



Dec 1, 2020

Chairman Thom Tillis
Senate Judiciary Subcommittee on Intellectual Property
113 Dirksen Senate Office Building
Washington, D.C. 20510

Re: DMCA Reform Bill - Questions from Senator Tillis for Stakeholders

Dear Chairman Tillis,

Thank you for the opportunity to respond to your questions on DMCA modernization.
My answers are below.

Sincerely,

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- 1. The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.**

While we support, conceptually, the need to create obligations tailored to accommodate differences of scale, it is difficult to design a status that does not produce undesirable secondary effects. Smaller platforms, for example, have expressed concern that the metrics embodied in the EU Copyright Directive (setting different obligations for platforms that are less than three years old, AND enjoy annual revenue below 10 million euros, AND have fewer than 5 million average unique monthly visitors¹) will lead small platforms to artificially depress their organic growth in order to avoid a sharp cliff of compliance obligations.

Some benchmarks (such as nonprofit status) are relatively non-controversial, but under-inclusive. However, more common metrics (such as revenue, staff size, and traffic) are vulnerable in a number of ways; large behemoths can game the system by moving revenue or outsourcing staff, while a small blog that goes viral can be inadvertently swept into megacorp-scaled compliance obligations if designed poorly. Put simply, we need more data; a rigorous study conducted by NTIA or a similar web-focused agency would allow lawmakers to understand how these metrics actually relate to the vague notion of “big versus small”, as well as how they scale--or don't. Moreover, to the extent the obligations are made to “scale,” any change should not just increase burden for large OSPs but lessen the burden for small ones, rather than using the status quo as a baseline.

¹ Article 17, Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, p 124, https://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf?redirect

On the rightsholder side, the need for scalable obligations is more limited. To the extent that such a need exists, it exists primarily in setting the standard of care for sending takedown notices; simply put, more sophisticated rightsholders should be held to a higher standard for bad or abusive notices. To that end, 512(f) should be tied to a standard that scales with the size and sophistication of the notice sender, such as a requirement to use “reasonable best efforts” to determine whether or not an infringement occurred before sending notices, or an otherwise scalable reasonableness standard which takes into account differences in sophistication among noticers.

- 2. OSPs eligible for the safe harbor under section 512 are divided into four categories (conduits, caching services, hosting services, and web location tools) that can be both under-inclusive and over-inclusive. First, what types of OSPs should be covered to account for technological advances and business practice changes that have occurred during the past twenty-two years? Second, how should the categories be revised to better cover the types of OSPs that need—rather than just appreciate—the safe harbor’s benefit? Among the possibilities would be to either increase the number of statutory categories to more explicitly cover specific types of service providers or to reduce the number of statutory categories, possibly to only one, and delegate authority to the Copyright Office to identify, by regulation, the covered types of service providers. If Congress were to take the latter approach, would this raise concerns about such authority being delegated to a non-presidentially-appointed Register?**

Conduits: ISPs and caching should not need a safe harbor, as they should not be subject to liability in the first place. As I discussed in my testimony (before both the Senate IP Subcommittee and House Judiciary Committee), “internet service providers” meant something very different in 1998 than it does in 2020. In 1998, “internet service providers” were software-layer services such as America Online and CompuServe, operating over the existing telephone network. Thus, in 1998, termination from an “internet service provider” meant that a customer had to uninstall American Online and subscribe to any of its numerous competitors. In short, when the DMCA was written, ISPs were edge services that operated in a competitive market and operated over a separately-owned, regulated common carrier. Congress did not suggest at any point that the operator of the infrastructural component (i.e. the legacy telephone network) could be held liable for copyright infringement.

The act of providing broadband access, as a legal and policy matter, does not (and should not) give rise to any form of secondary liability even requiring a shield. The law as it stands has no indication of how ISPs are supposed to obtain knowledge of repeat infringers; there’s no requirement to accept notices under the DMCA; and they do not host any material. On a policy level, ISPs do not (and should not) have a general duty to track their users’ activity--let alone to terminate a customer’s connection to the broader internet over unproven, private allegations of a civil offense.

As a statutory drafting matter, we propose striking 512(a) and inserting a new section 512A which contains the following:

(a) **Transitory Digital Network Communications.**—A service provider shall not be liable for **either primary or secondary** infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) the material is transmitted through the system or network without modification of its content.

Caching services: Similar to ISPs, caching services are a primarily infrastructural component that operate absent meaningful direction by users. Because of this, their activities lack a meaningful volitional component and thus do not and should not carry any secondary liability for which a shield is even necessary. Caching services should thus be removed entirely from the liability scheme alongside ISPs.

As a matter of statutory drafting, we propose striking 512(b)(2)(E).

Hosting Providers: An online service that stores material at the direction of users should in general not be liable for copyright infringements that may be committed by its users, if that material is not made publicly available. Storage providers do not--and, in many instances, cannot, and should not--monitor user activity for infringements. Such monitoring would not only raise privacy concerns, but would be limited to flagging that copyrighted works are being *stored*, without a determination whether or not those stored works are actually infringing. This reasoning applies equally to consumer-facing services such as Dropbox, iCloud, or Google Drive, as well as back-end cloud services like Amazon S3 or Backblaze B2.

To be clear, this does not mean that generally-applicable safe harbors should be written to exclude such services--rather, the existence of such safe harbors does not in and of itself imply liability. Storage services that are intended to make material available to the general public are more appropriately subject to standard liability principles.

Web location tools: Activities such as linking and providing brief excerpts do not infringe on any intellectual property right and should not give rise to secondary liability absent unusual facts. However, to the extent that a liability shield would provide explicit certainty, the overwhelming first amendment concerns posed by practices such as de-listing and backdating weigh toward providing location tools with an exceptionally strong safe harbor.

Rulemaking authority: The Copyright Office does not (nor should it, as a legislative branch agency) possess the kind of sweeping rulemaking capacity required to grant and deny categories of safe harbor protections. These determinations are within the ambit of Congress, and Congress alone. Moreover, we have significant concerns about the Constitutionality of the Copyright Office--an arm of the legislature--wielding affirmative rulemaking authority on such a grand scale. The Office's authority is soundest when developing and executing procedures necessary to fulfilling its mission (registration, recordation, and voluntary guidance) as an arm of the Library of Congress. If we are going to vest any institution with full, binding rulemaking authority, it must, for the purposes of Constitutional clarity, be a full organ of the executive branch.

- 3. Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?**

Notice-and-staydown is an idea so far removed from feasibility that even the Copyright Office, after years of study, declined to endorse it. After a lengthy discussion of the potential pitfalls of such a system, the Office explicitly warned Congress “to wait until the DSM Copyright Directive has been implemented in many of the EU member states in order to study the real-world impacts of such a requirement.”² The Copyright Office is, on this point, unequivocally right; the European Union provides a historically rare opportunity for lawmakers to study, in real time, the effects of such a system on the online ecosystem and its 447 million European users. Attempting to leapfrog this transition before it’s even returned initial results would be policy malpractice.

The limitations of notice-and-staydown are numerous and known, and we will not attempt to fully rehash them here. Chief among the drawbacks is that notice and staydown *unavoidably* relies on algorithmic and perceptual filtering, since simpler methods of filtering (e.g., based on cryptographic hash functions) are essentially useless. The shortcomings of algorithms in this space are extraordinarily well-documented, including in the Copyright Office’s own 512 report.³ Notably, they cannot account for fair use, a necessary “First Amendment accommodation” that prevents copyright law from unconstitutionally burdening speech.⁴ In order for a notice-and-staydown system to pass constitutional muster, it would have to allow for all kinds of legal speech that involve copyrighted work; that involve not-copyrighted work which could be mistaken, by an algorithm, for copyrighted work; may not involve copyrighted work at

² U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* at 193 (May 2020) [hereinafter USCO § 512 Report], <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

³ USCO § 512 Report at 189-192.

⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

all but is at risk of being taken down by bad actors weaponizing algorithmic filtering; involve *de minimis* use of copyrighted work.

In the meantime, any adjustments to the DMCA should focus on improving the notice/counter-notice system to make it more accessible and ergonomic for a greater number of players. We propose a comprehensive re-balancing of burdens to better hedge against abuse and swiftly resolve disputes. Our full proposal is attached as an appendix below.

- 4. Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?**

As noted above, a notice-and-staydown system has numerous structural problems that simply cannot be worked around. The soundest method is to start from a position of improving the functioning and accessibility of the current notice/counter-notice system.

Under current law, many services view counter-notices as a “best practice” rather than a legal obligation. The safe-harbor provided by 512(g) provides protection against liability for injuries resulting from content removed under the DMCA takedown process; however, these injuries typically take the form of small state law claims, and are, in too many cases, foreclosed entirely by overbroad removal rights contained within a given platform’s EULA. It is unsurprising that, in 22 years, this section has not been meaningfully litigated; the available claims are low-dollar, difficult to claim, and often contracted around.

If the goal is to remove platforms’ discretion to selectively remove or reinstate content, and to make this a truly neutral process, then the law must balance penalties for noncompliance with takedowns, and noncompliance with put-backs. To that end, noncompliance with counter-notice and put-back provisions must give rise to an independent cause of action, with damages equal to those listed in 504(c)(2).

Regarding standardization of forms and the legal sufficiency of incomplete notices, we propose a system utilizing a single “common app” style submission that streamlines the process for noticers and counter-noticers alike. Further details can be found in our full proposal, attached below.

5. **The injunctions available under section 512(j) have been narrowly interpreted by courts and thus little-used by copyright owners. Is it worthwhile for Congress to consider revising this provision to make injunctions more readily available for website-blocking in special circumstances (with an eye toward article 8(3) of the Information Society Directive)? Such injunctions could be issued by a special tribunal and appealed to federal district court, or, out of concern for user protections, the law could require that injunction orders come from the district court alone. If warranted, what would be the best way to enact limited website-blocking via such injunctions? Again, please provide suggested legislative text. If you do not think the law should be amended to expand the availability of injunctions, please be specific about any ways you think section 512(j) could be improved.**

SOPA/PIPA was roundly condemned by people from different political backgrounds for a reason, and accomplishing the same objective of site-blocking through injunctions against third parties is subject to the same critiques. Technologists have pointed out that interfering with the domain name system carries security and privacy risks. Civil libertarians have pointed out that putting in place the technical infrastructure for censorship risks it being expanded beyond its initial purpose or abused.

But it is also important to realize that site-blocking is not only ineffective, but misdirected. It is ineffective because it is trivially easy for sites dedicated to infringement to simply switch to alternate domains. It's misdirected because ISP- and DNS-level blocking fails to actually take sites *offline*. In general, instead of deputizing intermediaries for law enforcement purposes it would be better to improve existing processes, including through international cooperation, to ensure that sites dedicated to infringement are actually shut down. Broadly speaking, broadband access providers, DNS providers, caching, denial-of-service protection providers, and other technical intermediaries should not be a focus for policy changes designed to reduce infringement, let alone subjected to new and novel duties to monitor customer usage. Nor should the provision of general-purpose infrastructure services to the market create a risk of direct or secondary liability.

6. **It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress might consider improving dispute resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?**

A forum to adjudicate notices and counter-notices must be fair, fast, and cost-effective, and must not curtail participants' Constitutional right to a jury trial. The CASE Act falls short on many of these axes: it has a broad mandate, is designed to consider complex issues of law and fact, it is not designed for the kind of speed that would represent any improvement on the current statutory scheme, and its opt-out system forecloses a respondent's right to a jury trial.

We propose a version of the notice/counter-notice system which will create faster response times than the current statute, while still allowing parties to vindicate their rights in federal court, *and* prevent systemic bias against one class of parties by balancing short "uptime/downtime" windows for the disputed content. The full proposal is attached as an appendix to these comments.

- 7. More generally, the notice- and counter-notice sending process have many shortcomings. These could be improved by clarifying when automation is appropriate and that OSPs cannot erect requirements beyond those in section 512(c)(3); by authorizing the Copyright Office to develop standardized web forms for notices and counter-notices and to set regulations for the communications that OSPs must deliver to a user when their content is taken down or had access disabled (including offering information about the fair use doctrine as codified in section 107 and as illustrated in the Copyright Office’s Fair Use Index); and by increasing privacy protections for notice and counter-notice senders by masking certain personally identifiable information, including address and phone number. How could this best be done? Please provide specific provisions for accomplishing these goals.**

Automated removal is never “appropriate.” Automated removal is definitionally incapable of respecting those rights and limitations which we feel should be non-waivable, including those in 17 USC §§ 107, 108, 110 (see comment to Q 10 below).

Given the variety of business models across platforms (and the resulting diversity of bad-notice “threat models”), OSPs should be allowed the flexibility to ask for information above and beyond the statutory minimum in order to appropriately process take-down notices. This is not just needless “make-work”; video-based platforms, for example, may require time stamps to properly match works. Platforms such as Twitch employ technology which selectively removes infringing material (such as by muting a song) while leaving the remaining content intact and available. These minimally invasive technologies should be encouraged as a means of compliance, and their unique requirements accommodated under the law.

However, we acknowledge the substantial time investment faced by rightsholders attempting to send valid notices across multiple platforms. We propose a solution which streamlines the process while providing platforms flexibility to gather the data they need to ensure quality compliance. Specifically, Congress should establish a “DMCA Hub,” designed and maintained by NTIA or USPTO in consultation with the US Copyright Office. The hub will allow users to submit multiple notices in one visit by using a process similar to the “Common Application” used by many colleges and universities. Noticers will begin by selecting the websites to which they wish to issue notices. The first page will ask noticers for basic information, such as their name and contact information, the identity of the infringed-upon work, a legally-binding certification that they hold the rights necessary to issue a takedown, and the like. Noticers will then receive site-specific follow-up prompts to augment their notice, including site-specific URLs of the infringing content (mandatory), the specific timestamp of the

infringement (if relevant), and any other question that the site feels necessary to confidentially process the takedown.⁵ Upon completion, notices will then be sent to the relevant sites. While platforms may offer a separate, parallel method for sending and receiving takedown notices, DMCA Hub notices will be legally sufficient to trigger the statutory process.⁶ The Hub will retain and secure the sensitive private data of noticers and counter-noticers. We detail the system more fully in our attached appendix.

⁵ Platforms requesting additional information through this site may be limited to a reasonable but fixed number of supplemental questions (e.g., up to 5 each), so as to prevent an undue aggregate burden on rightsholders.

⁶ In the event that the notice is deficient (e.g. missing fields, typos), the recipient platform must be permitted, within a set timeframe, to request clarification before starting the statutory clock.

8. **At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?**

Ameliorating the “bad notice” problem requires action at three stages: education pre-notice; standardization of notices; and enforceable, meaningful penalties for bad notices.

Education is most easily accomplished by assuring that noticers are confronted with basic information about copyright and fair use *prior* to sending their notice. One advantage of using a DMCA Hub system is that it would allow for this content to be provided directly before filing a notice, or even on the same page, via links or embedded video.

Standardization is also crucial. A notice which does not meet the legal minimums must necessarily be understood as a nullity, and not legally sufficient to trigger platform obligations under the law. A recent study found that a common point of failure is that notices often lack information identifying the allegedly infringing work and/or allegedly infringing material.⁷ A centralized submission process would not only account for these known problems by checking for common omissions prior to submitting, but would also allow policymakers and stakeholders to gather data on which provisions or requirements are causing the greatest confusion among noticers.

Penalties for bad notices must also be sufficient to deter bad actors from abusing the system. This is an instance where increased size and sophistication among rightsholders should trigger extra obligations. Specifically, the 512(f) standard should be tightened to require noticers to use reasonable best efforts to determine whether or not an infringement occurred before sending notices, or otherwise impose a scalable reasonableness standard which takes into account differences in sophistication among noticers. Such a standard will impose higher

⁷ Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown in Everyday Practice* 93 (March 22, 2017) (UC Berkeley Pub. L. Res. Paper No. 2755628) [hereinafter Urban Report], <https://ssrn.com/abstract=2755628>.

obligations on larger or more powerful rightsholders than on individuals, while also taking into account a sender's history of engagement with the notice/counter-notice system.

We also support the suggestions by other commentators to strengthen penalties for copyright misuse, or create a copyright-oriented "anti-SLAPP" provision that creates heightened penalties for noticers who are attempting to remove non-infringing content concerning a matter of public interest.

As with many other provisions, we address this more thoroughly in our attached appendix. The presence of a robust arbitration mechanism should, if developed, allow for the creation of a publicly accessible paper trail for repeat bad actors. By making these records available, they can serve as evidence of a pattern of conduct in support of a § 512(f) action.

- 9. Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?**

We have no position on the question of STMs, except to urge Congress to recommit to the requirement in 512(i)(2)(B) that STMs must be available to all comers on “fair, reasonable and non-discriminatory” (FRAND) terms or at rates and under terms that are known in advance. We have recently seen high-profile examples of companies whose intellectual property was included as part of a standard in exchange for a FRAND commitment, but have chosen not to honor their pledge; unfortunately, some courts have been reluctant to hold these companies to their FRAND commitments. These dangers must be avoided.

It is worth reiterating that the Copyright Office’s affirmative rulemaking authority is, at best, uneasy in the Constitutional scheme. Its authority is soundest when developing and executing procedures necessary to fulfilling its mission *as an arm of the Library of Congress*. If we are going to vest any institution with full, binding rulemaking authority, it must, for the purposes of Constitutional clarity, be a full organ of the executive branch.

- 10. One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP’s monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?**

As our everyday communications become increasingly “fixed in a tangible medium of expression” and reach greater and greater global audiences, the clash between expression and copyright becomes more and more unavoidable. In this context, limitations and exceptions are central to the free expression of users. Congress must recognize that the fundamental rights enjoyed by users and civic institutions--namely, those codified at 17 USC §§ 107, 108, 110, and the counter-notice procedures in § 512--cannot be contracted away, under any circumstances, personally or by third parties.⁸ This is neither novel nor radical; Congress, recognizing the power dynamics within the music industry, ensured that termination rights “may be effected notwithstanding any agreement to the contrary.”⁹ Congress must similarly recognize these dynamics as they exist between platforms and users, and rightsholders and civic institutions (such as libraries) that find themselves increasingly at the mercy of rightsholder demands. Congress should thus include similar language in each relevant provision to ensure that these limitations and exceptions “may be effected notwithstanding any agreement to the contrary, including an agreement between service providers and rights holders, including agreements entered into by service providers purporting to bind that service’s users.”

However, the disenfranchisement of users, owners and institutions is not *merely* a product of contract law; it is also, increasingly, the result of over-expansive interpretations of copyright law as applied to software. The legal fiction that underpins software copyright--that the statutorily-required “physical copy” is the physical space on a hard disk occupied by the relevant

⁸ For it to be remotely functional in protecting users and small rightsholders, the entire notice-and-takedown/putback system should not be waivable.

⁹ 17 U.S.C. § 203(a)(5).

file--has led to a stunning domino effect of disappearing user and institutional rights. Under this fiction, any time a file is moved--even within a hard drive--is inherently violative of the reproduction right. Setting aside the basic absurdity of the premise, this fiction has necessitated a flurry of patchwork “fixes” to make the software copyright system even passingly sustainable in the face of reality. The most glaring issue--the idea that software can never be truly owned, but merely licensed within contractually dictated parameters, violation of which gives rise copyright infringement and massive attendant damages--has never been “patched.” Any “solution” that avoids addressing this root problem is tantamount to slapping a band-aid over a gaping wound.

The damage from this line of doctrine is not limited to online platforms; libraries, in particular, are under increasing pressure to sign away their statutory rights in order to obtain ebooks for their customers. The practice of inter-library loan has been decimated as a result of the restrictive contract terms that fundamental software copyright doctrine enables, and libraries are often left uncertain as to whether they can engage in obvious fair uses such as digitizing and lending books already in their collection. Any “solution” must not only preserve statutory rights of libraries in a digital environment, but prevent the weaponization of absurd copyright doctrine against legitimate uses.

Access to monetization programs and shut-out effects are crucial questions that must be more closely examined, especially in light of their impacts on smaller, independent, and platform-based creators. In structuring a regulatory review, Congress must bear in mind that these--as well as the necessary component questions about creator compensation, contractual terms, and competitive arrangements among content industries--are fundamentally *competition* questions; the fact that they affect industries that rely on copyright law is, in most cases, irrelevant to issues under inquiry. As such, any regulatory review must be helmed by a competition agency, such as the DOJ or FTC. Under current practice, the DOJ and FTC regularly use their own clearance processes to determine which of the two agencies is best suited to conduct a review. Given the variety of content industries, platforms, and competitive questions at play, we think this existing process of ad hoc determination is the best solution.

- 11. Section 1201 currently allows for temporary exemptions to be granted from the circumvention prohibition, but those exemptions do not extend to third-party assistance. This means that when the Librarian of Congress grants an exemption for circumvention of technological protection measures (TPMs) over software for a tractor to allow for repair, the tractor owner must perform the software repair themselves. The Copyright Office has recommended amending the statute to grant the Librarian authority to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user, and this may be the right way to address this problem. Do you agree with the Copyright Office? If so, how should this provision be drafted to avoid unintended consequences, and to what extent is the Unlocking Consumer Choice and Wireless Competition Act a helpful model? If not, please explain why you do not agree and provide specific recommendations as to how you think this problem should be addressed?**

Congress should, above all else, take up bills introduced by Senator Ron Wyden and Representative Zoe Lofgren to establish a “nexus” requirement between section 1201 and copyright infringement. Such a requirement would ensure that only circumvention undertaken for the purposes of infringement would trigger penalties under section 1201. If the motivating concern behind section 1201 is the possibility of infringement, then we must make infringement itself the trigger violation--not circumvention. In the absence of such a requirement, 1201 allows rightsholders to unilaterally felonize all lawful uses until users comply with onerous triennial exemption procedures.

Less ideal, though still feasible, is for Congress to pass a permanent statutory exception to 1201 that broadly covers any circumvention undertaken by or at the direction of the user for the purposes of diagnosis, repair, and maintenance. Still less ideal (but still an improvement over the status quo) would be inserting statutory language clarifying that all permitted circumventions can be performed by a third party at the direction of an intended user.¹⁰

¹⁰ Circumventions must be available at the direction of the *user*. Limiting the right to owners would exclude numerous categories of potential users--including vehicle lessees, long-term users of medical devices (which are typically owned by insurance companies and/or hospitals), and the like. For example, mothers who express breast milk often do so by using medical-grade breast pumps provided by the hospital, and paid for by insurance. These hospital-grade pumps, while available at retail, cost well over a thousand dollars, and are as such rarely purchased for individual use. For a repair exemption to be at all useful for these or any other number of medical device users, the exemption must center on users, not owners.

- 12. The Copyright Office has recommended revising some of the permanent exemptions so that they are better tailored to the types of uses sought today. In particular, the exemptions for security testing and encryption research should be revised to expand the types of activities permitted, ease the requirements to seek authorization from the owner of the relevant system or technology, and eliminate or clarify the multifactor tests for eligibility. What thoughts do you have about revising these existing permanent exemptions, and how would you recommend that be done?**

Simpler, more straightforward exemptions are more useful as a general rule. While we do not take a detailed stance on this question, we generally support eliminating multifactor tests, easing or eliminating requirements to seek authorization, and broadening the scope of activities permitted under the exemptions.

13. Congress should adopt new permanent exemptions for non-infringing activities that have repeatedly received exemptions in recent triennial rulemakings, or where there is a particularly broad-based need, including to enable blind or visually impaired persons to utilize assistive technologies and to allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls. What other temporary exemptions should be made permanent?

As we noted in our response to question 11, Congress' top priority should be adopting a nexus requirement that only imputes liability for circumvention when there is also underlying infringement.

In the alternative, we agree that any exemptions renewed two or more times should be granted permanent status. Classes of exemptions which have been granted and twice renewed (or had their second renewal recommended in the recent NPRM) include:

- Audiovisual Works—Criticism and Comment—Universities and K–12 Educational Institutions
- Audiovisual Works—Criticism and Comment—Massively Open Online Courses (“MOOCs”)
- Audiovisual Works—Criticism and Comment—Digital and Media Literacy Programs
- Audiovisual Works—Criticism and Comment—Multimedia E-Books
- Audiovisual Works—Criticism and Comment—Filmmaking
- Audiovisual Works—Criticism and Comment—Noncommercial Videos
- Literary Works—Accessibility
- Literary Works—Medical Device Data
- Computer Programs—Unlocking
- Computer Programs—Jailbreaking
- Computer Programs—Repair of Motorized Land Vehicles
- Computer Programs—Security Research
- Computer Programs—Video Game Preservation
- Computer Programs—3D Printing

However, we must take care not to replicate the problems of over-narrowness faced by the current temporary exemptions (and cited in question 11). For permanent exemptions to remain useful in the face of changing technology and implementation, they must be drawn broadly and in a technology-agnostic manner.

- 14. There are various ways that the triennial rulemaking process could be streamlined to be more efficient and so that section 1201 better accounts for user concerns. These include establishing presumptive renewal of exemptions adopted in the previous rulemaking cycle, shifting the burden to those who want to oppose an exemption from the previous rulemaking, and authorizing the Librarian, upon recommendation of the Register, to make permanent a temporary exemption that has been renewed twice without opposition and without modification. How ought section 1201 be revised to reflect the stakeholder desire for a less burdensome triennial rulemaking process and consumer interests, and what other means should be adopted to make the rulemaking process more efficient?**

The Copyright Office has made significant strides toward streamlining the triennial process in recent years. However, there are larger questions regarding the broader governance structure of 1201 and its reviewability under the Administrative Procedure Act that Congress must address before determining how to improve the current process.

The current situation--in which the Librarian of Congress signs off on rules “suggested” by the Copyright Office--is not sustainable in the long term. The Librarian, as a member of the legislative branch, is neither bound by the strictures of the Administrative Procedure Act, nor the Copyright Office’s voluntary adoption of the statute for the purposes of its rulemaking. Courts have gone so far as to hold that the 1201 process is beyond the reach of APA review.¹¹ The requirements of the Administrative Procedure Act, however, are not mere technicalities. They ensure that agencies issue reasoned decisions that take into account evidence in the record, and prevent arbitrary and predetermined decisions.

This is a fixable problem. Congress can vest final rulemaking authority in the register herself, and subject the entire process, cradle to grave, to APA standards. The more sustainable long-term solution, however, would be to move the process outside of the Copyright Office to an executive agency (such as NTIA¹²) with full rulemaking power.

¹¹ “Because it is the Librarian of Congress, who on behalf of the Library of Congress, consummates the triennial exemptions to the DMCA’s circumvention prohibition and is only obligated to consider the recommendation of the Register of Copyrights in that exemption process, the challenged “final” action at issue here is an action taken by the Librarian and Library of Congress. Accordingly, the statutory provision subjecting the actions of the Register of Copyrights to the APA, see 17 U.S.C. § 701(e), does not permit an APA claim against the Copyright Office or the Register of Copyrights for agency action taken pursuant to the DMCA’s triennial rulemaking process.” *Green v DOJ*, No. 16-1492, mem op. at 52 (D. D.C. Jun. 27, 2019) (internal quotations and citations removed).

¹² The original statutory language of 1201 assigned NTIA total responsibility for the triennial process. The process’ shift to the Copyright Office is unexplained in the final text, and no Constitutional justification for the Office’s supposed rulemaking authority was ever put forth.

However, within the current framework, there are two simple improvements that we suggest. First, standing exemptions should be renewed automatically, without the need for affirmative advocacy, unless substantial objections are filed.

Second, Congress should designate a fast track to make permanent any exemptions which have been successfully renewed two or more times. As noted above, the Constitutional position of the Librarian and Register together raises a number of questions, not least of which is whether they can Constitutionally promulgate permanent exemptions *sua sponte*. However, there are a number of possible ways to “fast track” exemptions to permanency status through other avenues, if necessary, while preserving the status quo of the Library’s relationship with the Office. The Librarian and Register can jointly recommend that Congress adopt twice-renewed exemptions by legislation. Alternatively, these exceptions could occupy a special class of “entrenched exemptions” within subsequent 1201 rounds, opposition to which carries a substantially higher burden of proof. However, neither of these are a substitute for administrative permanency which only a full executive agency can provide.

15. **Though it did not receive as much attention during my hearings as sections 512 and 1201, section 1202 is another important part of copyright law added to title 17 by the DMCA, and it too is in need of modernizing. For example, Congress could amend section 1202 to drop the double-intent standard and only require a copyright owner to prove that a defendant removed or altered rights management information (knowingly or not) with the knowledge that it would encourage infringement. And Congress could adopt the Copyright Office’s recommendation to enact a new section 1202A to provide the author of a copyrighted work—rather than just the copyright owner—with a right of action when someone removes or alters rights management information with the intent to conceal an author’s attribution information. Do you think that the proposed legislative text that appears on page 98 of Authors, Attribution, and Integrity: Examining Moral Rights in the United States is the best way to add a right for the copyright owner, or would you recommend different text? And what are your thoughts on revising section 1202’s double-intent standard?**

We have no response to this question.

Appendix: Our proposed Notice/Counter-Notice System

The DMCA Hub: a centralized clearinghouse for notices and counter-notices

Our proposed notice/counter-notice system funnels notice and enforcement through a DMCA “hub” which manages both the initial notice procedure and streamlines reference to future adjudication. Establishment, administration, and maintenance of this site could fall to any number of entities, ranging from a private/public partnership, to the USPTO, to the Commerce Department.¹³

Part One: Notice through the DMCA Hub

Notices may be submitted via centralized online hub. The hub will allow users to select which websites will receive the notice, and will use a format modeled after the “Common Application” used by many colleges and universities.

Users will begin by selecting the websites to which they wish to issue notices. The first page will ask noticers for basic information, such as their name and contact information, the identity of the infringed-upon work, a certification under penalty of perjury that they hold the rights necessary to issue a takedown, and the like. Noticers will then receive site-specific follow-up prompts to augment their notice, including site-specific URLs of the infringing content (mandatory), the specific timestamp of the infringement (if relevant), and any other question that the site reasonably needs to process the takedown.¹⁴ Once the noticer has submitted the form, the hub will then send notices to the selected sites. While platforms may offer a separate, parallel method for sending and receiving takedown notices, correctly-completed DMCA Hub notices will be legally sufficient to trigger the statutory process.¹⁵

¹³ Given the technological constraints faced by, and current demands placed on, the U.S. Copyright Office--as well as the substantial volume such a service would be expected to handle--we would recommend against placing it under the already-strained auspices of Copyright Office IT.

¹⁴ Platforms requesting additional information through this site may be limited to a reasonable but fixed number of supplemental questions, so as to prevent an undue burden on rightsholders.

¹⁵ In the event that the notice is deficient (e.g. missing fields, typos), the recipient platform may, within a set timeframe, request clarification from the noticer before starting the statutory clock.

Part Two: Platform Response

Upon receipt of a notice, the platform has a set time¹⁶ in which it must either request clarification, or **disable access** to the content. The platform *must* disable access to the disputed content in such a way that the content can be fully restored upon receipt of a counter-notice. If the content is being actively monetized through the platform, the revenue from the time of notice until the takedown must be held in escrow.¹⁷

The platform must, within 24 hours, notify the user who uploaded the content of its removal. This communication must contain the following information: (1) what content was alleged to infringe (including timestamps, where relevant), (2) the identity of the content allegedly infringed upon, (3) the identity of the individual or entity filing the claim, (4) information on how to file a counter-notice through the DMCA Hub, and, if relevant, (5) an alert that revenue from the work is being held in escrow.

Part Three: User counter-notice and reinstatement

Users may then file a counter-notice through the DMCA Hub. The counter-notice should contain, at a minimum:

1. The asserted grounds for reinstatement, including (but not limited to):
 - a. The use is licensed;
 - b. The use falls under specific exception (available as check boxes);
 - c. The original notice was deficient (claimant does not appear to be the rightsholder, etc.);
 - d. Any other objection or context as relevant.
2. A demand for reinstatement of the disabled content.
3. An acknowledgement that the dispute may be taken to arbitration.
4. An acknowledgement that, if arbitration occurs, the user's response in this form will provide the (non-exclusive) basis for that consideration.

The Hub then notifies the platform of receipt of a counter-notice; the platform must then reinstate content within a reasonable timeframe, and notify the Hub of this action.

¹⁶ This time can be statutorily scaled, taking into consideration a platform's size, resources, and relative use patterns.

¹⁷ YouTube, notably, has implemented an escrow system which may be useful as a model for broader adoption.

The Hub, in turn, automatically notifies the noticer of the content’s reinstatement. The noticer then has a reasonable timeframe in which to object to reinstatement, triggering arbitration.

Part 4: Arbitration

Arbitration is triggered whenever a rightsholder objects to reinstatement within a reasonable time. Ideally, in order to maintain the smoothest and quickest transition, this arbitration stage should be managed by a federal agency responsible for maintaining the DMCA Hub.

When a reinstatement claim is disputed, the case is assigned within 3 business days to an arbitrator. The arbitrator then has 3 days to make a decision based on the contents of the notice and counter-notice, and render a decision. This decision is then appealable within the agency to a formal adjudication, overseen by one adjudicator.¹⁸ In the event that a case is uniquely complex, or involves potentially novel fair use considerations, the first-stage arbitrator can elect, with the consent of the parties, to escalate the dispute to the subsequent stage without rendering a decision.

The second-stage adjudicator can do a full hearing, complete with limited findings of fact. Hearings by a second-stage adjudicator should be remote by default, not require legal counsel (though counsel should be available pro bono if parties desire), and can consider a much broader basis of inquiry. A second-stage adjudicator can consider extrinsic evidence, defenses not provided by the counter-noticer (fair use, etc) and past behavior of the participants (history of trolling). The content should remain available (and escrowed, if applicable) pending the adjudicator’s decision.¹⁹ Adjudicators’ decisions are appealable to federal court.

Records of decisions and parties should be **publicly available, in an API-enabled format**. This serves three purposes: first, to create a public record so that stakeholders and

¹⁸ Given the complexity of complying with Section 557 of the APA, we recommend strongly against making this a formal Administrative Law Judge position under the definition of the APA. Rather, it should be a novel statutory role, housed within an executive branch agency.

¹⁹ While there should be an “ideal” timetable for second-stage adjudications, we demur on whether that requires a statutory mandate, or simply agency guidelines with periodic internal review. It is worth noting that, regardless of timetable, it will still leave stakeholders with a speedier resolution than federal court.

policymakers can better understand how the statute is being utilized (and, if relevant, misused). Second, it allows for journalists, advocacy groups, and watchdog organizations to identify repeat offenders, including (but not limited to) “trolls” and bad faith uploaders. Third, in the case of bad actors, it allows victims to identify one another and creates a paper trail to enable collective 512(f) actions against bad-faith noticers.

Policy rationales for shifting to a Notice/Counter-Notice system

First, a notice/counter-notice proposal would represent a substantial improvement over the current 10-14 day windows for content reinstatement, and would allow both users and rightsholders greater control over timing. The timing of processes, from beginning to end, would approximate the following:

Step #	Action	Taken by...	Must happen within...	Once taken, content is...
1	Notice	Rightsholder	[Open-ended]	Automatically down
2	Counter-notice	Uploader	[Open-ended]	Automatically up
3	Arbitration demand	Rightsholder	[Open-ended]	Left up
4	Decision on the filings	“Pool” arbitrator	3 business days	[Decision controls]
5	Request for Adjudication	[Losing party]	7 business days	[Lower arbitration stands]
6	Formal adjudication	Formal adjudicator	[Open-ended, goal of ~1 week]	[Lower arbitration stands]
7	Appeal to federal court	[Losing party]	[Open-ended]	[Formal adjudication stands]

Second, a centralized location for notices and counter-notices, as well as even initial arbitration on the merits, would both deter bad-faith actors and create a publicly accessible paper

trail documenting abusive behaviors. Such a paper trail can be used as the basis for a collective action against bad actors under 512(f). Moreover, it would provide critical data for lawmakers and stakeholders alike to gauge the state of content protection online.