



## **LIBRARY COPYRIGHT ALLIANCE COMMENTS ON DMCA REFORM BILL**

The Library Copyright Alliance (“LCA”) welcomes this opportunity to provide its responses to Chairman Tillis’s questions regarding a possible Digital Millennium Copyright Act (“DMCA”) reform bill. LCA consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations collectively represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year. U.S. libraries spend over \$4 billion annually purchasing or licensing copyrighted works.

At the outset, LCA states that it agrees with the Chairman’s belief that “American copyright law needs to be modernized to be more responsive to current technologies, copyright markets, and business practices.” Further, it agrees that “Congress should reform copyright law’s framework...to protect users and consumers making lawful uses of copyrighted goods and software enabled products....” In this vein, LCA concurs that section 1201 is “ripe for reform.”

However, LCA strongly disagrees that the Copyright Act needs amendment “to better encourage the creation of copyrightable works....” As the hearings demonstrated, this is a golden age of content creation by large media companies, professional artists, and individual creators who wish to share their works with the public. For the first time in history, any creator can reach a global audience at little or no cost. This distribution without intermediation is enabled by section 512. Without the section 512 safe harbors, libraries and commercial entities could not permit individuals and small entities to access the Internet and upload their content without burdensome review. Accordingly, the proposed amendments to section 512 not only are not needed, they run contrary to the constitutional objective of the copyright system: promoting the progress of science and useful arts. If Congress enacted these amendments, far less content would be created and made available to the public.

Although the copyright law has enabled business models that benefit consumers greatly, such as Internet platforms that host user generated content, it has also facilitated business models that benefit rights holders at the expense of consumers. As implicitly acknowledged by questions 6, 8, and 10, section 512 is often abused by rights holders. This abuse is rooted in the incentive structure provided by the statutory damages set forth in 17 U.S.C. § 504(c). Indeed, the existing statutory damages framework encourages copyright trolls and has a chilling effect on many lawful uses, including by libraries. If Chairman Tillis seeks to protect users and consumers making lawful uses of copyrighted goods and software enabled products, the place to begin is reforming statutory damages.

## Statutory Damages

Starting with first principles, Congress should examine whether statutory damages for copyright infringement are truly necessary in the first place. Patent law, for example, does not provide statutory damages. To the extent there is a perceived need for punitive damages to disincentivize willful infringement, treble damages—as provided by patent law and antitrust law—are sufficient.

If Congress decides to retain statutory damages, it could adopt changes to reduce the incentives for abusive behavior. These include:

- Adopting a \$5,000 cap on statutory damages in actions for noncommercial infringements, as in Canada.
- Simplifying the remission of damages for non-profit institutions. 17 U.S.C. § 504(c)(2) allows for the remission of statutory damages to libraries, educational institutions, and public broadcasters when they reasonably believed that certain activities were fair uses. However, this limitation does not apply to museums. Moreover, the limitation for libraries and educational institutions applies only to infringements of the reproduction right, not the performance, display, distribution, or derivative work right. As a result, the limitation provides little benefit, particularly for Internet uses that involve the display of a work on a website. This change could be effectuated simply by deleting the phrase “which infringed by reproducing the work in copies or phonorecords” from the third sentence of section 504(c)(2).
- Ensuring the predictability of statutory damages in secondary liability cases. Currently, an Internet service provider or a consumer electronics manufacturer could be found liable for statutory damages for each work a third party infringes while using the service or product. This potential exposure to astronomical damages chills innovation and discourages capital investment in new products and services. Accordingly, Section 504(c)(2) should require the remission of statutory damages for secondary infringement, except in a case in which the copyright owner sustains the burden of proving, and the court finds, that the act or acts constituting such secondary infringement were done under circumstances in which no reasonable person could have believed such conduct to be lawful.
- Reducing the level of minimum damages. The existing statute contains a range of damages, but the minimum is too high. For example, a consumer is liable for a minimum of \$750 for infringement of one song that she could purchase on iTunes for just over \$1.00. Even if the court finds the infringement is innocent, the minimum is still \$200. The general statutory minimum should be reduced to \$250, and the minimum for innocent infringement should be reduced to \$100. This is still more than 100 times greater than the going rate for many common works, and in the unlikely event that it is insufficient, plaintiffs may always opt for actual damages.

- Guiding courts in awarding damages. The statute sets forth a broad range for damages but provides no guidance for courts on how they should exercise their discretion. The court is simply directed to make the award “as the court considers just.” When the case does not involve willful infringement, the court in calculating statutory damages should attempt to compensate the plaintiff, not punish the defendant.
- Requiring the timely election of statutory damages. Current practice permits plaintiffs to delay the election between actual and statutory damages until after the jury (or court) awards both actual and statutory damages. This allows the plaintiff to “game the system” and extract higher settlements by threatening draconian damages throughout the litigation. So as not to unfairly prejudice defendants, plaintiffs should make this election in a timely manner, before the trial or the filing of a motion for summary judgment.
- Requiring registration renewal for continued eligibility for statutory damages. Currently, statutory damages are available for any work registered prior to infringement, even if the work was registered decades ago and has little economic value. The threat of significant statutory damages contributes to the orphan works problem and discourages important preservation efforts. Statutory damages should be available only for works whose registration has been renewed through a renewal procedure to be established by the Copyright Office.

### **Preempting Abusive Contracts**

In addition to reducing the incentives for abuse by fixing a broken statutory damages framework, Congress should address a specific form of misuse frequently exercised by rights holders via licenses. Libraries, as well as individual and businesses, acquire digital content subject to license agreements. Indeed, many libraries currently expend the majority of their acquisitions budget on licenses for digital content. Often these licenses prohibit libraries from engaging in activities permitted by fair use or other copyright exceptions. Strong arguments can be made that licenses inconsistent with the fair use right are preempted either by the Constitution<sup>1</sup> or 17 U.S.C. § 301(a).<sup>2</sup> Notwithstanding these arguments, there is authority suggesting that contractual prohibitions on copying otherwise permitted by fair use may be enforceable.<sup>3</sup> Congressional intervention may be necessary to make clear that exceptions provided in the Copyright Act prevail over license terms inconsistent with those exceptions.

It should be noted that for nearly thirty years, the European Union has included contract preemption clauses in its directives. It has recognized that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by contract.

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<sup>1</sup> See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988).

<sup>2</sup> See *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994); 1 Nimmer on Copyright § 1.01[B][1][a][i].

<sup>3</sup> See *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), *cert. denied*, 539 U.S. 928 (2003); *Davidson & Assoc. v. Jung*, 422 F.3d 630 (8th Cir. 2005); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

- **Software Directive (1991).** Article 9(1) of the Software Directive provides that “[a]ny contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.” Article 5(2) permits back-up copying; Article 5(3) permits “black box” reverse engineering; and Article 6 permits decompilation for the purpose of achieving interoperability.
- **Database Directive (1996).** Article 15 provides that “[a]ny contractual provision contrary to Articles 6(1) and 8 shall be null and void.” Article 6(1) permits “acts necessary for the purpose of access to and normal uses of contents of database;” Article 8 permits a database user to extract and re-utilize insubstantial parts of a database.
- **Marrakesh Directive (2013).** Article 3 of the Marrakesh Directive provides that “Member States shall ensure that the exception provided for in paragraph 1 cannot be overridden by contract.” Paragraph 1 is the operative part of the Directive that permits authorized entities to make and distribute accessible format copies.
- **Digital Single Market Directive (2019).** Article 7(1) of the Digital Single Market (“DSM”) Directive provides that “Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.” Article 3 permits text and data mining by research organizations and cultural heritage institutions for scientific research; Article 5 permits the use of works in digital and cross-border teaching activities; and Article 6 permits preservation by cultural heritage institutions.

All EU Member States must implement these contract preemption provisions in their law. Moreover, some Member States have adopted more extensive contract preemption provisions than those required by EU directives. For example, in addition to the contract preemption provisions required by the EU directives, the United Kingdom (prior to Brexit) had declared unenforceable a term of a contract purporting to prevent the making of a copy which does not infringe copyright by virtue of exceptions in sections: 28B (personal use), 29 (research and private study), 30 (criticism, review, quotation, and news reporting), 31 (caricature and parody), 32 (illustration for education), 41(5) (supply of copies to other libraries), 42(7) (replacement copies), and 42A (single copy to user). The copyright laws of Germany, Ireland, Portugal, Montenegro, and Belgium likewise prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions.<sup>4</sup>

Beyond responding to the specific problem of abusive licensing practices, Congress should enact a general copyright misuse provision. Victims of copyright misuse should be entitled to actual and statutory damages.

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<sup>4</sup> See International Federation of Library Associations and Institutions, *Protecting Exceptions Against Contractual Override*, [https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract\\_override\\_article.pdf](https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf).

## **Fair Remuneration in Author Agreements**

While LCA believes that existing copyright law provides authors with ample incentive to create, the abundance of content has made it even easier for publishers and other content distributors to exploit individual creators. The competition between creators has exacerbated the already unequal bargaining position between publishers and creators. Significantly, the European Union has devoted attention to this issue. The EU DSM Directive contains an entire chapter entitled “Fair remuneration in exploitation contracts of authors and performers.” Article 18 sets forth a principle of appropriate and proportionate remuneration. Article 19 imposes transparency obligations on the publishers to whom authors have licensed their copyrights. Article 20 provides for a mechanism to adjust contracts to enable creators to “claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for an exploitation of their rights.” Article 21 requires an alternative dispute resolution procedure for the transparency obligations in Article 19 and contract adjustment under Article 20. Article 22 grants creators a right to revoke a license if the publisher fails to exploit the work. Article 23 provides that “any contract provision that prevents compliance with Articles 19, 20, and 21 shall be unenforceable.” If Chairman Tillis wants to amend the Copyright Act in a manner that will really benefit individual creators, these provisions should be considered. Protecting authors from exploitation by publishers is far more likely to benefit authors than amending section 512.

## **Facilitating Distance Education**

The Covid-19 pandemic has magnified the detrimental impact of the gaps in the exceptions for online education. Films are a critical component of instruction across disciplines, including film studies, history, social sciences, and area studies. Section 110(1) enables this use in the course of face-to-face teaching activities by permitting an instructor to screen an entire film in a classroom. However, the exception for distance education is not as broad. Enacted in 2002, the TEACH Act, 17 U.S.C. § 110(2), permits the instructor only to show “limited portions” of a film to an online class. Instructors, therefore, could not rely on the TEACH Act to show films to their classes when all instruction migrated online after the pandemic struck. Additionally, institutional streaming licenses were not available for many of these films. Every institution has been forced to adopt its own policy whether to allow its instructors to rely on fair use to stream these films to their online classes, or to require them to redesign their syllabus. The deficiencies of section 110(2) made an already bad situation worse for faculty, students, and administrators.

Even after the pandemic ends, the TEACH Act’s inadequacies will continue. Online education was becoming increasingly prevalent before the pandemic, and this trend will resume after the pandemic. Accordingly, section 110(1) should be amended to apply to all teaching activities of a nonprofit educational institution, regardless of whether they occur in person or online.

## Section 512

Turning to the questions asked by Chairman Tillis regarding section 512, LCA states as a general matter that section 512 does not require amendment, and the potential harm resulting from any changes far outweigh the possible benefits.

1. If additional burdens are imposed on online service providers (“OSPs”), such burdens should be placed only on commercial OSPs, and not OSPs operated on a nonprofit basis, such as libraries. Indeed, burdens currently imposed on libraries in their OSP capacity could even be lightened. For example, libraries should not be required to register their designated agent with the Copyright Office under section 512(c)(2). (Frankly, the requirement to register a designated agent with the Copyright Office should be eliminated across the board; it is a bureaucratic obstacle that traps less sophisticated OSPs without providing meaningful benefit for rights holders.)

2. There is no need to change the safe harbors; the four categories have stood the test of time. Reducing the number of safe harbors and delegating authority to the Copyright Office to identify by regulation the covered types of service providers is not a good idea. Technology evolves too quickly and the Copyright Office does not have the expertise to make this type of determination. Additionally, as noted in the question, delegation of this authority may raise separation of powers issues.

3. LCA strongly opposes establishment of a notice-and-staydown regime. The Copyright Office correctly recommended against it. Notice-and-staydown would require filtering, which inevitably would result in false positives and the chilling of free speech.

4. As noted above, LCA would strongly oppose a notice-and-staydown regime.

5. LCA strongly opposes site blocking. The Copyright Office correctly recommended against it. Site blocking likely would block lawful content and thus would prevent free speech.

6. LCA opposes the CASE Act and would oppose the creation of a new forum to deal with disputes relating to counter-notices. The solution to the problem of excessive or abusive takedown notices is to diminish the incentive for filing such notices, *i.e.*, reform statutory damages as discussed above.

7. LCA opposes changes to the notice- and counter-notice sending process.

8. The best way to discourage the over-sending of notices is to reduce the incentive provided by the current statutory damages framework. At the same time, statutory damages should be available against the senders of abusive notices. Abusive notices would include the sending of takedown notices to a search engine when the allegedly infringing site is not even listed in the search engine. Google, for example, has reported that the vast majority of the notices it receives are for sites not actually listed in its search results. It appears the providers of automated takedown notices incorrectly assume, without verification, that any infringing site is contained in the Google search database. This grossly distorts the number of takedown notices Google

receives. Because Google can only recover actual damages under section 512(f), it likely does not have sufficient incentive to pursue these automated service providers who flagrantly misuse the notice-and-takedown system.

9. Congress should not grant the Copyright Office regulatory authority with respect to standard technical measures (“STMs”). The Office does not have expertise in this area. Additionally, as LCA explained in the Copyright Office roundtables concerning STMs, section 512(i)(1)(B) was rendered largely unnecessary by section 1201, which prohibits the circumvention of technological protection measures.

10. LCA opposes granting a government agency regulatory authority over how an OSP structures its voluntary monetization programs. A more appropriate area for government intervention would be rights holders’ abusive copyright licensing practices and publishers’ exploitation of authors, described above.

### **Section 1201**

LCA welcomes the recognition that section 1201 is “ripe for reform.” However, the changes proposed just “tinker around the edges,” and do not address the core problem with section 1201: that it does not unambiguously require a nexus between circumvention and infringement liability to attach. To be sure, the Sixth Circuit and the Federal Circuit have required such a nexus, but the Eighth and Ninth Circuit have not. In the face of this circuit split, users have to assume that liability can attach even if the circumvention does not enable infringement. Accordingly, section 1201 should explicitly state that it is not a violation of section 1201 to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work.

Although the proposed changes to section 1201 do not go far enough, they would provide libraries and others some benefit.

11. The current exemption for repair does permit third-party assistance, but section 1201(a)(1) should be amended to eliminate any possible ambiguity on the Librarian’s authority to grant an exemption permitting third party assistance. Additionally, Congress should make clear that the tools necessary to exercise an exemption can be manufactured or distributed by any party without violating the “trafficking” provision in section 1201(a)(2).

12. LCA does not have the expertise to comment on the security testing and encryption research exceptions. The exception for nonprofit libraries, archives, and educational institutions, section 1201(d), has always been useless: it simply permits a library to circumvent a technological protection to gain access to a commercially exploited work solely to make a good faith determination whether to acquire the work. To our knowledge, there has never been an instance where a rights holder has not permitted a library access to a work the rights holder wanted to sell the library. And why would it? Providing the library with access to sample its wares is in the rights holder’s interest. The libraries did not ask for this exception during the drafting of the section 1201. Rather, it was “given” to them by the House IP Subcommittee so that the Subcommittee could claim that it had addressed libraries’ concerns. In fact, libraries sought an

exception that would permit them to circumvent technological protections for the purposes of preservation and similar lawful uses.

13. Other temporary exemptions that should be made permanent include those for the preservation of software by libraries and the use of DVDs and digital streams in documentary film, noncommercial videos, education, and nonfiction multimedia ebooks. However, these exemptions should be substantially broadened and simplified. Thus, libraries should be permitted to circumvent the technological protections on any type of work for the purpose of preservation.

14. The triennial rulemaking could be made less burdensome by eliminating the requirement that an exemption must apply only to users of “a particular class of works.” This phrase in section 1201(a)(1)(B) has led the Copyright Office to adopt extremely narrow exemptions, which in turn has imposed a heavy burden of seeking a new exemption on users who seeks to make a similar use of a different “class” of works. Thus, although the Librarian of Congress in 2018 granted an exemption for libraries to preserve software, which will be renewed, LCA currently is seeking a new exemption for the preservation of DVDs. Similarly, the Office has indicated that it will reject a petition for an exemption to enable access to all types of works by a person with any type of disability. Instead, LCA and disabilities rights organizations must submit evidence concerning each class of work and every type of disability. This, in a word, is absurd. It places an unnecessary burden on the Copyright Office as well as users.

15. LCA opposes any amendment to section 1202.

We would be happy to discuss our responses in greater detail.

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