

1 December 2020

Senator Thom Tillis  
Chairman, Senate Judiciary Subcommittee on Intellectual Property  
113 Dirksen Senate Office Building  
Washington, DC 20510

Re: Responses to Your DMCA Reform Questions

Dear Chairman Tillis:

This letter is sent on behalf of Professors Jessica Litman, Pamela Samuelson, Rebecca Tushnet, and Jennifer Urban to share our collaborative responses to a set of questions you recently posed about possible reforms of the safe harbor provisions of the Copyright Act of 1976 (as amended), which were enacted in 1998 as part of the Digital Millennium Copyright Act (DMCA). Professors Litman and Tushnet were, as you know, witnesses at the first of your subcommittee's hearings on the origins of the DMCA in February 2020. Professor Samuelson was a witness at the March 2020 hearing on what foreign jurisdictions are doing about online copyright infringements. Professor Urban is the lead author of *Notice and Takedown in Everyday Practice* (with Joe Karaganis and Brianna Schofield), which is a substantial empirical study of how online service providers (OSPs) and large copyright holders have implemented their responsibilities under the DMCA safe harbors. For the sake of brevity, we have condensed the questions.

Our responses are below:

1. Should the DMCA safe harbors be revised to take into account the relative size of copyright owners and OSPs?

No, Congress should not attempt to revise the safe harbors based on purported differences between “small” and “big” OSPs and copyright holders. We appreciate that this question recognizes the great diversity of actors within the § 512 system, as established in your DMCA reform hearings, the Copyright

Office's § 512 Study, and Professor Urban's research. In fact, this diversity counsels against attempting to revise the law in this way.

While the idea to differentiate among actors by size is at first appealing, Professor Urban's research showed that this would not accurately reflect the actual notice-and-takedown landscape. As Professor Urban found, the actors have sorted themselves based on volume of takedown notices. This may change over time, and does not necessarily correspond to "size." Specifically, OSPs have responded to the volume of takedown notices they receive by sorting themselves into "DMCA Classic" OSPs (which handle a relatively small volume of notices using human review), "DMCA Auto" OSPs (which have added automated systems to process higher volumes of notices quickly), and a relative few "DMCA Plus" OSPs (which have gone beyond what § 512 requires by implementing additional measures, such as filtering systems). See Jennifer M. Urban, Joe Karaganis, and Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 28–30 (v.2, Mar. 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628). Similarly, copyright holders that need to send larger volumes of notices use automated methods or engage third-party rights-enforcement organizations ("REOs") to support their enforcement efforts. *Id.* at 31–33.

Professor Urban and her co-authors tried but failed to develop a map of the "types" of OSPs likely to operate under the DMCA Classic, DMCA Auto, or DMCA Plus models. Perhaps surprisingly, the size of an OSP—whether it is measured in terms of revenue, traffic, hosted material, or other metrics they attempted—did not predict well how many notices the OSP receives and by extension, how much demand for takedown it experiences. Rather, some very big OSPs receive very few valid takedown notices, and OSPs tend to put in place DMCA Auto or Plus systems when and if notices increase enough to require it.

This multi-dimensional diversity should prompt caution. Precisely because the § 512 ecosystem is so complex and because it changes with each new technological or creative shift, it may not be possible to create additional categories of actors without unintended consequences. The DMCA Classic, Auto, and Plus categories have arisen in response to § 512's current requirements and incentive structure, and have been developed by those in the best position to do so: system actors themselves. There is a very high level of concern from some DMCA Classic OSPs—including large sites that don't get many valid notices, such as Wikipedia

and the Archive of Our Own<sup>1</sup>—that filtering or other DMCA Plus technologies would be too costly for them to implement. Attempts to impose requirements on some actors and not others—whether those differential requirements are based on “size,” other characteristics, or a combination of factors as attempted by the European Union with Article 17—are at high risk of creating a system that is both inflexible and a mismatch for ever-evolving technologies, creative activities, and business models. And as we explain further in response to Question 3, below, this then risks further entrenching dominant platforms and hindering the growth of firms that might otherwise provide meaningful competition to today’s dominant actors.

We do think educational materials for smaller copyright holders and targets of notices (as recently developed by the Copyright Office) could be helpful, but changes to the law in this regard are not advisable.

2. Should the categories of OSPs set forth in § 512(a)-(d) be revised?

We do not see a need to revise the categories of activities set forth in § 512(a)-(d). As the Copyright Office observed in its § 512 Study, Congress intended these categories to be broad in order to accommodate technological change. *See* § 512 Study at 2. It is our view that the courts have generally applied the categories appropriately, and that there is room within the categories to accommodate current technologies and future innovations that likely would be constrained if Congress were to revise the categories. As we note in our response to Question 8 below, however, we do think it would be worthwhile for Congress to revise § 512 to clarify that the notice-and-takedown regime applies to the safe harbors in § 512(c) and § 512(d), but not to the safe harbors in § 512(a) and § 512(b). And as we note in our response to Question 6 below, Congress should make technical revisions to § 512(g) to clarify § 512(d) search providers’ responsibilities.

3. Should Congress adopt a notice-and-staydown regime to ease the burden on copyright owners whose works are being infringed?

No, Congress should not adopt a notice-and-staydown regime so that OSPs would be obliged to ensure that infringing files could not be re-uploaded after having been taken down in response to a copyright owner notice. We agree with the Copyright Office’s conclusion in its § 512 Study that this would be a very

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<sup>1</sup> The “DMCA Classic” label for these particular sites comes not from the original study, which did not identify the OSPs specifically surveyed, but from public descriptions of how Wikipedia and the Archive of Our Own respond to DMCA notices, including in Professor Tushnet’s testimony.

substantial a departure from the DMCA safe harbor framework that has brought so much prosperity to the U.S. digital economy. *See* § 512 Study at 191. As we noted in our answer to your question 1, dominant platforms, such as YouTube and Facebook, have already developed or licensed automated content recognition (ACR) technologies that can accomplish staydown requests. But small, non-profit, and even medium-sized OSPs—including OSPs with a huge impact on public discourse even with a relatively small financial footprint—simply cannot afford to do this, and very few of them host sites on which large volumes of infringements take place. To adopt a general notice-and-staydown mandate would further entrench dominant platforms and hinder the growth of firms that might, in the absence of this mandate, provide meaningful competition to them.

A notice-and-staydown regime would, in effect, be a mandate that all OSPs that host user contents would have to install filtering technologies to avoid copyright liability. We think this mandate would prove to be even more controversial in the U.S. than in the EU. As the Copyright Office § 512 Study observes, the EU’s notice-and-staydown mandate has yet to be implemented in any member state legislation. *See* § 512 Study at 191. Moreover, the Court of Justice of the European Union (CJEU) on 10 November 2020 heard arguments in a case brought by the Republic of Poland to annul those parts of Article 17 that mandate upload filters as violative of user freedom of expression rights under the Charter of Fundamental Rights of the European Union. The Justices reportedly are taking this challenge very seriously. *See* Paul Keller, *CJEU Hearing in the Polish Challenge to Article 17: Not Even the Supporters of the Provision Agree on How It Should Work*, Kluwer Copyright Blog (Nov. 11, 2020), <http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>. It would be wise to wait and see whether the CJEU strikes this mandate down and whether and how the EU member states will actually implement and begin to enforce it.

4. Do OSPs have a duty to investigate infringement claims consistent with § 512(m) when given a representative list of infringing files instead of OSPs having no duty to investigate until rights holders have provided specific details as courts have required in § 512(c) cases?

We believe that the courts have generally done a good job articulating what is reasonably required of service providers under the conditions that they have faced in practice. Courts have wisely recognized that not all OSPs behaving in good faith are alike. The law appropriately requires “information reasonably

sufficient to permit the service provider to locate” the infringing material. 17 U.S.C. § 512(c)(3)(A)(iii). As services developed, it became clear that, for most services, specific location information was required to identify allegedly infringing material, especially if courts were to avoid creating a duty to search and filter an entire website (contrary to § 512(m)’s prohibition on monitoring mandates). Technologically speaking, in most cases, a duty to investigate to find other locations in which the accused material is posted would require content filtering.

To put it another way, in most circumstances, a representative list without complete location information doesn’t provide the OSP enough information to find allegedly infringing content beyond that which is specifically identified.<sup>2</sup> Even files with the same name may be very different. In addition, persistent problems with invalid notices—as documented extensively in our previous testimony—have made clear that services often need specific location information to protect against abuse and mistake. E.g., *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 664 (9th Cir. 2017) (discussing incomplete notices that the sender insisted were sufficient). Courts have generally recognized the need for certainty and feasibility in determining when notices were sufficient.

5. Should § 512(j) be amended to make injunctions more available to copyright owners as to content hosted by OSPs, as by site-blocking? Should such injunctions be issued by district courts or a special tribunal?

We believe that the paucity of case law interpreting § 512(j) concerning injunctive relief against OSPs for infringing content posted by their users is due to its being unnecessary because OSPs have strong incentives to take down infringing content after being notified about it, as the safe harbor would not protect them against charges of contributory infringement if they fail to take infringements down in a timely manner. If OSPs comply with their DMCA takedown responsibilities, there is no need for an injunction to issue.

We have serious doubts about whether courts in the US have the authority to issue no-fault site-blocking injunctions. Courts have in the past refused to grant injunctive relief against defendants who have been found not to have engaged in copyright infringement. See, e.g., *Bryant v. Gordon*, 503 F. Supp.2d 1062, 1066 (N.D. Ill. 2007). See also *Paramount Pictures Corp. v. Carol Publishing Group*, 25 F.

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<sup>2</sup> However, one court found that where an owner alleges that substantially all of the content on an individual website infringes its copyrights, the requirements of §512 have been met. *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2002).

Supp. 2d 372, 374, 376 (S.D.N.Y. 1998) (denying injunction against nonparty distributors of copies of infringing books); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06 [C][2][b] (Rev. Ed. 2019).

The structure and legislative history of § 512(j) do not support the grant of injunctive relief against an Internet Service Provider (ISP) that has not been held directly or indirectly liable for infringement. We agree with the judgment of an outside counsel to the motion picture industry who was quoted as concluding that “it appears substantially more likely than not that a court would require a copyright owner to establish the ISP’s liability for copyright infringement before the ISP can be ordered to site-block.” See Eriq Gardner, *MPAA Testing the Limits of Pirate Site Blocking in Movie Tube Lawsuit*, *Hollywood Reporter*, July 30, 2015, <https://www.hollywoodreporter.com/thr-esq/mpaa-testing-limits-pirate-site-812126>.

During a consultation with Dean Erwin Chemerinsky and Professor Andrew Bradt of Berkeley Law School, these constitutional and remedy law experts expressed serious doubts about whether Congress could authorize courts to issue no-fault site-blocking injunctions. Moreover, courts lack the inherent power in equity to issue injunctive relief against OSPs (or anyone else) if there is no viable cause of action against them. In support of these doubts, they cited *General Building Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 398-402 (1982) (injunctive relief held unavailable against an entity that had not violated the law).

The US has some experience with the seizure of websites and domains which has shown that at times, entirely legitimate content has been removed from the Internet without sufficient justification or explanation. See Timothy B. Lee, *ICE Admits Year-Long Seizure of Music Blog Was a Mistake*, *Ars Technica*, Dec. 8, 2011, <https://arstechnica.com/tech-policy/2011/12/ice-admits-months-long-seizure-of-music-blog-was-a-mistake/>; Ryan Singel, *Oops! Copyright Cops Return Seized RojaDirecta Domain Names – 19 Months Later*, *WIRED*, Aug. 29, 2012, <https://www.wired.com/2012/08/domain-names-returned/>. The Copyright Office § 512 Report (pp. 195-96) acknowledges that website blocking has sometimes resulted in inadvertent blockage of lawful contents. Because of the lack of empirical data about the impacts of site blocking on freedom of expression interests of users, the Office recommended against this approach.

It is also worth recognizing that the last time that Congress considered authorizing issuance of site-blocking injunctions through the Stop Online Piracy Act bill, protests against this legislation were so widespread that the legislation

failed. As with notice-and-staydown proposal, the Copyright Office § 512 Study concluded that any consideration of site-blocking was premature, and its potential impacts on speech in particular would need to be investigated. *See* § 512 Study at 196, 198.

6. What can be done to make the counter-notice provisions of § 512 more effective?

We agree that the counter-notice provisions currently are ineffective, as established by your hearings, the Copyright Office's § 512 Study, and Professor Urban's research. Counter-notices appear to be vanishingly rare, especially as compared to the number of inaccurate notices. The ten-to-fourteen-day waiting period is routinely criticized for jeopardizing expression and business competition, while also giving copyright holders an unreasonably short timeframe in which to file suit.

Congress should do the following three things to improve the counter-notice mechanism. It should not create a small claims court or other alternative dispute resolution system at this time.

First, Congress should revise § 512(g)(2) to allow OSPs to immediately replace material upon receipt of a valid counter-notice rather than waiting ten days. Given the very small number of counter-notices received by OSPs, and the high social cost of removing legitimate material, any costs related to this change would be outweighed by the benefits that flow from fixing the problem the current timeframe creates for legitimate expression and business competition. In cases where non-infringement is clear, the timely replacement of material in response to a counter-notice would have the effect of resolving the dispute. In less-clear-cut scenarios, it would have the effect of sending the parties to court—the appropriate venue for truly contested claims.

Congress could also consider expanding the time for copyright holders to file a lawsuit to a more reasonable timeframe—perhaps 30 or 60 days from the current 14—so long as it also allows OSPs to replace material upon receipt of a counter-notice. Should a copyright holder file suit during the expanded time frame, then any material replaced in response to a counter-notice would come back down upon the filing of the lawsuit until the dispute is resolved.

Second, Congress should implement a technical fix to clarify that search providers must accept and respond to counter-notices, and that they are

protected for replacing material in response to valid counter-notices. It is often assumed that search providers must accept counter-notices and are protected by the safe harbors if they “put back” material in response to valid counter-notices. This is debatably true, but it is not entirely clear. *See* Urban et al., *Notice and Takedown in Everyday Practice*, at 132–33. The result is a perception among some OSPs that removing material alleviates risk, but putting it back in response to a counter-notice creates risk. *See id.* at 45. Congress almost certainly did not intend this result. Accordingly, § 512(g) should be revised to clarify that §§ 512(g)(2)(B), 512(g)(2)(C), and 512(g)(4) apply to all providers.

Third, and perhaps most importantly, Congress should reduce the need for counter-notices in the first place by encouraging valid and accurate takedown notices and discouraging invalid and inaccurate takedown notices. We make several suggestions to improve notices below, in response to Question 8.

Congress should not create a small claims court or other alternative dispute resolution system at this time. Instead, it should focus on recalibrating incentives to encourage valid and accurate notices and counter notices, and providing more meaningful recovery mechanisms for those harmed by abusive senders. Creating a new dispute resolution venue without fixing these existing issues would risk simply expanding the problem.

7. Should the Copyright Office develop standardized webforms for § 512 notice and counter-notice procedures and regulate communications between OSPs and users when their uploaded files are taken down? How can user privacy be protected in these proceedings?

In 2014 and 2015, the Patent and Trademark Office (PTO), in conjunction with the National Telecommunications and Information Administration (NTIA), engaged in extensive factfinding attempting to develop principles for standard notice and counter-notice procedures. It heard extensive testimony from multiple stakeholders that a standardized webform would be a very bad idea, because different services are configured so differently. For example, the Usenet still exists, and notices identifying which Usenet messages contain infringing material need to be presented in specific ways in order to allow Usenet providers to respond to them. If Usenet providers were required to use Facebook procedures, many more notices would fail and both notice senders and recipients would experience increased costs. On the sender side, too, there are substantial differences that often justify the existence of multiple notice paths: trusted senders who are routinely seeking the takedown of entire movies, or links to



entire movies, regularly get special treatment from large providers, while an individual seeking to remove a single photo often needs to be walked through the process to ensure that the claim is a valid one. An interface that is configured to accept from one to ten links is ideal for some senders but awful for others who may prefer an automated system that accepts thousands at once, and it makes sense to program those separately.

As a result of the extensive testimony from stakeholders about the dangers of trying to standardize webforms, the PTO/NTIA instead developed a list of “good, bad, and situational” practices, which are available for reference. DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices, [https://www.ntia.doc.gov/files/ntia/publications/dmca\\_good\\_bad\\_and\\_situational\\_practices\\_document.pdf](https://www.ntia.doc.gov/files/ntia/publications/dmca_good_bad_and_situational_practices_document.pdf) (2015). We believe that, rather than directing the Copyright Office to create a one-size-fits-few webform, policymakers should increase awareness of these findings, and the Copyright Office should promote them as part of its educational endeavors.

8. How can Congress revise § 512 to discourage over-sending of takedown notices?

Congress should revise § 512 to make clear that the notice-and-takedown regime applies to the safe harbors in § 512(c) and § 512(d), but not to the safe harbors in §512(a) and § 512 (b). Conduit internet service providers cannot respond to § 512 takedown notices by blocking and removing allegedly infringing files because those files do not live on the service providers’ servers, but merely pass through them. For that reason, the §§ 512(a) and 512 (b) safe harbors should not be conditioned on responding to takedown notices. Indeed, we would support an amendment clarifying that the §512(i) prerequisite of having and enforcing a policy of terminating repeat infringers does not apply to the §512(a) safe harbor for conduit service providers.

The COVID-19 pandemic has highlighted that internet access is absolutely essential for many necessary life activities. While it makes good policy sense to encourage service providers to terminate repeat infringers’ subscriptions to services that allow consumers to post files for public consumption, terminating a household’s access to the internet when a member has been alleged to be a repeat infringer is disproportionately severe. That is particularly the case in view of recent court decisions holding that a “repeat infringer” is any subscriber who has been the subject of multiple takedown notices, regardless of whether they are

well-founded. See, e.g., *BMG Rights Management v Cox Communications*, 881 F.3d 293 (4th Cir 2018.)

In addition, Congress could require that valid notices not contain additional demands for payment, which was part of the problem in the *BMG* case. While copyright owners remain free to sue infringers, they should not use the takedown process to require telecom providers to transmit their demands for them, or to include other matter not relevant to the takedown. As a possible model, Canada's OSP liability rules forbid such demands.

Congress should take several additional steps to encourage valid and accurate takedown notices and discourage invalid and inaccurate takedown notices. A striking feature of the notice-and-takedown system is its failure to balance risk. Those who send counter-notices must declare under penalty of perjury that they have a "good faith belief that the material was removed or disabled as a result of mistake or misidentification." § 512(g)(3)(c). For those who send takedown notices, however, penalty of perjury applies only to the assertion that the sender is acting with authorization from the copyright holder; it does not apply to the substantive claims in the notice. See § 512(c)(3)(A). And while § 512(f) does allow recovery for misrepresentations in notices or counter notices, it applies only to senders who "knowingly materially misrepresent[]" that the material is infringing, or, in the case of counter-notices, non-infringing. This creates too high a bar for recovery to deter abusive notices.

Congress should rebalance the notice-and-takedown and counter-notice systems to encourage valid notices and counter-notices and discourage invalid ones. Congress should apply the penalty of perjury equally to senders of takedown notices and counter notices by adding it to all of the assertions required under §§ 512(c)(3)(A)(v) and 512(c)(3)(A)(vi). And Congress should give § 512(f) some teeth by revising it to include "reckless" as well as "knowing" misrepresentations. The Copyright Office was correct to invite Congress to consider the similar "reckless disregard" standard in its § 512 Study. § 512 Study at 150. Including "recklessness" would make it more feasible—though still challenging—to recover against senders of invalid notices, thus encouraging valid notices and discouraging invalid ones.

Finally, we think that Congress should discourage over-sending of takedown notices by incorporating a fine for bad faith takedown notices that does not require a federal court action to impose. Since the purpose of the fine would be

to deter bad faith takedown notices, the money could be payable to the injured subscriber, the injured service provider, or the federal government.

9. Should Congress provide the Copyright Office with regulatory authority to adopt standard technical measures (STMs) to protect copyrighted works that OSPs could accommodate?

No, the Copyright Office should not be given regulatory authority to adopt STMs as contemplated in § 512(i). The Office lacks the expertise to assess what technological approaches to STM development would be feasible and what processes to set in motion to oversee STM development from a conceptual stage through to full implementation. The task is made more daunting in today's much more complicated digital infrastructure than was contemplated in 1998.

We think that the main reason that so little progress has been made on STM development is that many copyright owners decided to go their own way in developing their own proprietary technical protection measures (TPMs) for their digital works. OSPs cannot be expected to know of or to accommodate a wide array of firm- or industry-specific TPMs for different types of works. There are, moreover, so many different types of OSPs today and so many types of devices that would have to accommodate STMs than were contemplated in 1998. The burdens this would place on small and startup businesses and creators could be impracticable.

There would also be a legacy system problem. One cannot go back to all works created and disseminated on today's digital networked environments and the legacy works disseminated in the last two decades to tag them with yet-to-be-developed STMs.

We would support the Copyright Office proceeding with its expressed willingness in the § 512 Study to host a future symposium on STMs at which major stakeholders could explore how to move forward with the process envisioned by § 512(i)(2) so that the STMs would be developed through a "broad consensus" in "an open, fair, voluntary, multi-industry standards process" and the STMs would be available to all comers "on reasonable and nondiscriminatory terms" and would not "impose substantial costs on service providers or substantial burdens on their systems or networks." *See* § 512 Study at 180 (quoting § 512(i)(2)).

10. Should there be some sort of regulatory review to protect third-party interests when copyright owners and OSPs have entered into private agreements on copyright-protection matters, so that independent copyright owners' and users' interests are fairly protected? What institution would be best suited to carrying out this task?

We have very little information about terms of the private deals between copyright owners and online services, so the first step should be seeking more information. We have heard concerns that the private agreements are unfair to creators as well as being unfair to consumers, but without more information, it is difficult to know whether the appropriate institution to review these deals would be the Copyright Office, the Federal Trade Commission, the Department of Justice, or some combination of agencies. Since the parties to these agreements will understandably be reluctant to reveal their terms to government agencies, we suggest that an initial important step would be for the Intellectual Property Subcommittee to hold investigative hearings to seek to learn more about the terms of these agreements.

11. Should § 1201 be amended to allow third-party assistance to enable users to exercise privileges granted during the triennial review of the anti-circumvention rules?

We would support such an amendment, which should also extend to any allowed conduct. Today's technological protections measures are sufficiently sophisticated that most people cannot circumvent them without expert assistance or a specially designed circumvention tool. We suggest that the statute be amended to provide that all exemptions, granted in the triennial rulemaking or otherwise, apply to both §§ 1201(a)(1)(A) and 1201(b). For some purposes, such as device repair, the model of the Unlocking Consumer Choice and Wireless Competition Act, which allows acts to be taken at the direction of the owner of a particular device, could work. For other purposes, such as uses by libraries or on behalf of the blind and print disabled, the relevant condition would likely have to be different, such as lawful possession of a relevant copy. Prohibitions on marketing a device in order to induce infringement, however, should still apply.

12. Should the statutory computer security and encryption research exceptions be revised?

The computer security and encryption research exceptions in §§ 1201 (g) and 1201(j) are woefully out of date after 22 years. Meanwhile, the importance of

robust computer security and encryption research has never been greater. Moreover, we do not know what the next set of challenges will be.

The simplest and best reform would be to narrow § 1201 so that prohibits only circumvention of technological protection measures that is either intended to facilitate or is likely to lead to widespread copyright infringement. With an infringement nexus requirement, there would be far less need to craft exemptions that can easily go out of date. Congress could also work with computing professionals to ensure that the statute specifically identifies security and encryption research as protected categories.

In addition, we believe that Congress should broaden the current § 1201(d) exemption for non-profit libraries, archives and education institutions to enable them to circumvent technological protection measures when it is necessary to do so for archival purposes. A broader exemption likewise would cut down on the speed with which exemptions go out of date.

13. Should Congress adopt new permanent exemptions for non-infringing activities that have repeatedly been granted exemptions during the triennial review process or where there is a broad-based need?

We would support granting permanent exemptions for non-infringing activities that have repeatedly been granted exemptions during the triennial review. In addition, we would urge Congress to enact new exemptions for non-infringing activities that the drafters of § 1201 never intended to prohibit. We would in particular urge Congress to enact a permanent exemption for circumvention reasonably necessary to repair a consumer product or to install replacement parts. Consumers should be entitled to repair their own vehicles and devices or seek the mechanic of their choice to do so for them. Such repairs pose little danger of the sort of copyright infringement that Congress sought to prevent when it enacted § 1201. The Register of Copyrights has no special expertise regarding technological protection measures that prevent the repair of vehicles or medical devices. The need to petition every three years in order to secure a new exemption is time-consuming and wasteful of the Copyright Office's resources as well as those of educators, librarians, representatives of the blind and print disabled, users of medical devices, users of vehicles, security researchers, consumer representatives, artists, and others affected by §1201.

14. How should § 1201 be revised so that the triennial review so that it is less burdensome?

If § 1201 is appropriately narrowed so that it prohibits only circumvention of technological protection measures that is either intended to facilitate or is likely to lead to widespread copyright infringement, the triennial review will also be narrower and more manageable. In addition, we agree with the Copyright Office's recommendation that previously granted exemptions should presumptively be renewed. The Office's recent streamlined renewal process is a step in the right direction, but still generates substantial uncertainty.

We also believe that the Copyright Office's interpretation of § 1201(a)(1)(B) that any exemption must be limited to a subclass of a single class of copyrightable works of authorship listed in 17 USC § 102(a) has unnecessarily required duplicative exemption petitions and duplicative comments, so that representatives of remix artists, ebook authors, K-12 educators, college professors, college students, documentary filmmakers, fictional filmmakers, and others all have to submit separate evidence and argument for the same fair uses, and sometimes get different exemptions. We would urge Congress to enact clarifying language correcting that misinterpretation.

15. Should § 1202 be revised to change the knowledge and intent requirements for liability for false, removed or altered copyright management information (CMI)?

We believe that § 1202 should not be amended. To establish liability under § 1202(a), copyright owners have to prove that the accused person knew she provided or distributed false CMI with the intent that this false information would "induce, enable, facilitate or conceal infringement." To establish liability under § 1202(b), copyright owners have to prove that the accused person intentionally removed or altered CMI having reason to know this would "induce, enable, facilitate or conceal an infringement." It would not be fair to impose § 1202 liability on someone who mistakenly or innocently removed or altered CMI without intending or having reason to know it could facilitate infringement.

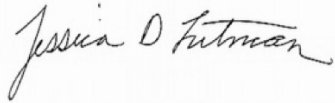
As with § 512(i), the expectations of major stakeholders in 1998 about the technological infrastructure that would develop over time and why CMI needed

new legislative and treaty protection have not been borne out. Drafters thought that every digital copy of protected works would be technically protected and would have CMI attached, which if removed or altered, would facilitate widespread infringement. We think that § 1202 was enacted in anticipation that it would only apply in the digital environment. The current CMI protection provision is being asserted in many instances well beyond the original expectation and intent, and has the potential to interfere with lawful and fair uses.

If Congress decides to enact a general attribution right for authors (except perhaps as to works for hire), it may want to consider amending § 1202 to give authors the right to sue for removed or altered CMI insofar as it conceals authorial identity. But until then, no change to § 1202 is warranted.

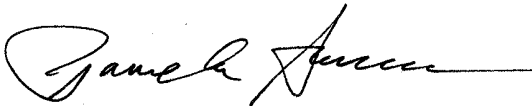
In closing, we hope this additional information will be useful to you, your fellow subcommittee members, and staffs as you consider possible changes should to the § 512 safe harbors Congress enacted in 1998 as part of the DMCA. We hope that this letter finds you and your staff in good health and good spirits in these trying times.

Sincerely,



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Jessica Litman  
John F. Nickoll Professor of Law and Professor of Information  
University of Michigan

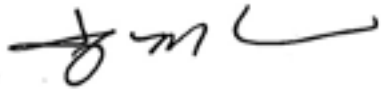


Pamela Samuelson  
Richard M. Sherman Distinguished Professor of Law  
Berkeley Law School



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Rebecca Tushnet  
Frank Stanton Professor of First Amendment Law  
Harvard Law School

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Jennifer M. Urban  
Clinical Professor of Law  
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