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December 1, 2020

The Honorable Thom Tillis
United States Senate
113 Dirksen Senate Office Building
Washington, DC 20510

Via email to brad_watts@tillis.senate.gov and brad_greenberg@tillis.senate.gov

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

Dear Senator Tillis:

Authors Alliance appreciates the opportunity to respond to your questions about reforming copyright law to better encourage the creation of copyrightable works and to protect those who make lawful uses of copyrighted works. Authors Alliance is a nonprofit organization with the mission to advance the interests of authors who want to serve the public good by sharing their creations broadly. We create resources to help authors understand and enjoy their rights and promote policies that make knowledge and culture available and discoverable.¹

As a threshold matter, the goal of copyright reform efforts should be to appropriately align the interests of individual creators with the interests of the public for whom they create. We are pleased to share our *Principles and Proposals for Copyright Reform*,² attached as Appendix A, which we believe could serve as a guide for these efforts.

With respect to Digital Millennium Copyright Act (“DMCA”) reform, Authors Alliance regularly engages with authors whose ability to create, use, and share works is affected by the DMCA. In the context of 17 U.S.C. § 512 (“section 512”), we provide information for authors whose works have been removed from online services in response to takedown notices, sharing options to ensure their non-infringing works remain available online.³ In the context of 17 U.S.C.

¹ For more information about Authors Alliance, see *About Us*, Authors Alliance, <http://www.authorsalliance.org/about> (last visited Nov. 30, 2020).

² *Principles and Proposals for Copyright Reform*, Authors Alliance, <https://www.authorsalliance.org/principles-and-proposals-for-copyright-reform/> (last visited Nov. 30, 2020).

³ *DMCA Takedown Notices: Know Your Rights*, Authors Alliance (June 22, 2017), <https://www.authorsalliance.org/2017/06/22/dmca-takedown-notices-know-your-rights/>.

§ 1201 (“section 1201”), we have supported exemptions to anti-circumvention provisions that facilitate text and data mining research,⁴ enable authors to create multimedia ebooks,⁵ and ensure authors’ works reach a broad readership.⁶ Our responses to your questions, attached, are informed by these experiences.

We hope our input is helpful as you consider legislative text for DMCA reform.

Respectfully Submitted,



Brianna Schofield
Executive Director, Authors Alliance



Rachel Brooke
Staff Attorney, Authors Alliance

⁴ *Authors Alliance Petitions for New Exemption to Section 1201 of the DMCA to Enable Text and Data Mining Research*, Authors Alliance (Sept. 8, 2020), <https://www.authorsalliance.org/2020/09/08/authors-alliance-petitions-for-new-exemption-to-section-1201-of-the-dmca-to-enable-text-and-data-mining-research/>.

⁵ *Authors Alliance Comments in Support of Modified Exemption to Section 1201 of the DMCA*, Authors Alliance (Dec. 19, 2017), <https://www.authorsalliance.org/2017/12/19/authors-alliance-comments-in-support-of-modified-exemption-to-section-1201-of-the-dmca/>.

⁶ *Authors Alliance Comment to U.S. Copyright Office Supports Print-Disabled Readers*, Authors Alliance (Nov. 9, 2016), <https://www.authorsalliance.org/2016/11/09/authors-alliance-comment-to-u-s-copyright-office-supports-print-disabled-readers/>.

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?

Authors Alliance strongly cautions against making changes to section 512 that would shift the notice-and-takedown system to a notice-and-staydown system. While Authors Alliance appreciates that section 512 places a burden on copyright owners to identify infringing material and request its removal, this burden is appropriately placed. Whether a particular use is infringing depends on context and facts that the relevant online service provider is unlikely to have. Even the use of an entire work may be non-infringing in some circumstances, such as when the use qualifies as a fair use,⁷ or when the user has a license or is the copyright owner.⁸ Authors and other creators who rely on online platforms to share non-infringing works with their audiences would be harmed if online service providers were required to remove subsequent uses of a copyrighted work following an initial notice. Such a requirement would harm authors relying on fair use, a license, or another lawful reason for sharing a work on the platform. Moreover, inaccurate takedown notices already have deleterious effects on authors sharing non-infringing works under the notice-and-takedown regime (see response to Question 8), and notice-and-staydown would amplify these harms.

We share your interest in reforming “copyright law’s framework to better encourage the creation of copyrightable works and to protect users and consumers making lawful uses” of copyrighted works. While we believe that notice-and-staydown would be antithetical to these goals, we offer instead the following suggestions for copyright reform that would better serve the interests of creators and other non-infringing users:

⁷ See, e.g., *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006).

⁸ See, e.g., David Hansen, *Section 512: University and Research Libraries as Rightsholders*, Authors Alliance (July 7, 2020), <https://www.authorsalliance.org/2020/07/07/section-512-university-and-research-libraries-as-rightsholders/>.

Provide additional incentives to record transfers of copyright ownership and to keep copyright owner contact information up to date

Authors Alliance encourages Congress to provide for better incentives for rightsholders to record transfers of copyright ownership. Ownership records can help authors increase the compensation for and dissemination of their own works.⁹ If an author transferred the copyright in her work, a record of the current owner—often a publisher—can help ensure that she receives any available royalties for downstream uses of her works. Even in the absence of potential royalties, many authors care about ensuring that their works remain widely available to be read and built upon by other creators. Many Authors Alliance members who have signed over rights to a third party worry that their works will fall into oblivion if the subsequent copyright owner cannot be found; ownership records can help others secure necessary permissions and, as a result, prevent authors' works from becoming orphans. Additionally, as content creators, authors may want to seek permission to use other authors' copyrighted materials in their works.¹⁰ Without publicly available information about a chain of title, it can be difficult for these authors to find a work's copyright owner.¹¹ In some cases, the inability to trace the copyright owner of a work can cause an author to decide not to use a particular work, or even to abandon a project altogether.¹² Because of the benefits of accurate copyright records for authors and the public, Congress should amend the Copyright Act to provide incentives to encourage the recordation of transfers of copyright ownership and incentives to encourage copyright owners to keep ownership information accurate and up to date.¹³

⁹ See Jane C. Ginsburg, “*With Untired Spirits and Formal Constancy*”: *Berne-Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1585 (2013).

¹⁰ In some situations, of course, authors can rely on fair use. 17 U.S.C. § 107. In other situations, authors may need to secure permission for the use.

¹¹ See *Why Does the Authors Alliance Care About Orphan Works*, Authors Alliance (July 2, 2014), <http://www.authorsalliance.org/2014/07/02/why-does-the-authors-alliance-care-about-orphan-works/>.

¹² See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006), available at <https://www.copyright.gov/orphan/orphan-report-full.pdf>. (“In the situation where the owner cannot be identified and located . . . the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use . . . Concerns have been raised that in such situation, a productive and beneficial use of the work is forestalled—not because the copyright owner has asserted his exclusive rights in the work, or because the user and the owner cannot agree on the terms of a license—but merely because the user cannot locate the owner.”).

¹³ *Authors Alliance Submits Comments in Support of Modernization Efforts at the U.S. Copyright Office*, Authors Alliance (July 17, 2017), <https://www.authorsalliance.org/2017/07/17/authors-alliance-submits-comments-in-support-of-modernization-efforts-at-the-u-s-copyright-office/>.

Exempt orphan works from copyright control or limit remedies when the re-user has a good faith belief that a work is an orphan

Millions of in-copyright works are now orphans, that is, works whose owners cannot reasonably be identified and located.¹⁴ Orphans benefit no one: not the authors whose works languish unread, not the authors who would like to build on works from the past, and not the public that would rather see such works digitized, archived, explored, and repurposed. Congress should amend the Copyright Act to exempt orphan works from copyright control or to limit remedies for reuses as long as the re-user has a good faith belief that the work is an orphan.

Simplify termination of transfer rules

Under current law, authors can reclaim their copyrights by terminating licenses or assignments after a period of time has passed.¹⁵ The termination of transfer provisions allow authors to reacquire their copyrights to regain control of a work and enjoy more of its financial success. Importantly, termination rights also enable authors to regain rights to works no longer being commercially exploited in order to make them widely available to new audiences. Despite these benefits to authors and the public, termination rules are complicated and formalistic, which likely contributes to underutilization of this important tool.¹⁶ Congress should simplify the termination provisions to be more accessible so that authors can more effectively reclaim rights in their works.

Expand statutory recognition of authors' non-economic rights

Authors Alliance supports amending the Copyright Act to expand statutory recognition of the attribution and integrity interests of authors. Many authors care deeply about having their names associated with the works they create and about their works being publicly available in the form in which their creators authorized dissemination. In fact, authorial incentives to create new works of authorship are often directly affected by the author's perception as to whether they will be given credit for their creations and whether their works will be exhibited in the form they authorized for dissemination.¹⁷

¹⁴ See REPORT ON ORPHAN WORKS at 15.

¹⁵ 17 U.S.C. § 203, § 304(c), and § 304(d).

¹⁶ See R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895, 898-99 (2016) (describing how hurdles imposed by the statute's complex formalities can potentially stymie attempts to exercise termination rights).

¹⁷ Jeanne C. Fromer, *Expressive Incentives in Intellectual Property Law*, 98 VA. L. REV. 1745, 1747 (2012) (arguing that moral rights offer non-pecuniary "expressive incentives" that "can bolster the utilitarian inducement" to create works).

In addition, the Copyright Act should recognize the authorial right to revive one's work if it is no longer available commercially and an authorial right to revise one's work over time.¹⁸ Authors often assign their copyrights to publishers or other distributors. While these assignments may have been mutually acceptable at the time the contract was signed, over time, two troubling situations can arise. First, authors can find themselves unable to reach readers with existing works that are no longer being disseminated by their publishers, typically because the works' commercial value has lapsed while the license or assignment remains in effect. Second, authors can find themselves unable to improve their own works in ways that would fall within the copyright owner's right to create derivative works. We therefore suggest that Congress give consideration to mechanisms that would help authors to revive and revise their works.

Reform statutory damages

The negative effects of the current statutory damages regime are well documented.¹⁹ Current law allows copyright owners to ask for monetary compensation for infringement unmoored from the harm the alleged infringement causes. The specter of such crippling liability can chill even non-infringing and socially beneficial acts of authorship, dissemination, archiving, and curation.²⁰ The chilling effect of statutory damages is made stronger by their unpredictability; as one treatise observes: "the truth is that statutory damages fluctuate wildly" and do not necessarily bear a "reasonable relationship" to a copyright owner's actual damages.²¹ Congress should reform statutory damage awards to ensure that authors, publishers, libraries, and others who act in good faith reliance on copyright's limits can make works available without fear.

Make it easier for authors to dedicate works to the public domain

The Copyright Act should be amended to include a mechanism for authors to dedicate their works directly to the public domain. Until 1989, authors could publish works without a copyright notice, and those works would then automatically enter the public domain, maximizing the potential for them to be accessed and reused. This is no longer the case. The lack of a clear,

¹⁸ For a complete discussion of these ideas, including how U.S. copyright law could accommodate authors' rights to revive and revise their works, see Molly Van Houweling, *Authors Versus Owners*, 54 HOUSTON L. REV. 371 (2016).

¹⁹ See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 500 (2009) ("The largely compensatory purpose of statutory damages in innocent and ordinary infringement cases has been undermined by overzealous plaintiffs and judges who have failed to grasp the tripartite structure of § 504(c)."); Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 309-25 (2009) (arguing that statutory damages are an ineffective deterrent of infringement).

²⁰ See, e.g., Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 434 (2007) (arguing that "uncertainty in the doctrine" makes fair use incapable of overcoming copyright liability's "chilling of creative expression").

²¹ 1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §14.04[E][1][a][ii].

reliable way to formally abandon copyright frustrates authors who wish to abandon their copyrights, and the practical effectiveness of abandonment is undermined by the lack of a broadly accessible record of abandoned works.²²

Condition the last 20 years of protection on registration

Many of our members think that copyright terms are far longer than is necessary to serve the goal of copyright to incentivize authors to create new works, but the Berne Convention constrains Congress' power to adopt copyright terms shorter than the life of the author plus 50 years.²³ In 1998, Congress extended existing copyright terms by another 20 years beyond that.²⁴ Congress should amend the Copyright Act to require copyright owners to register their copyrights to enjoy that last 20 years of protection. Those rightsholders who are continuing to make works available to the public will have ample incentive to register, and such a requirement would not violate U.S. treaty obligations. It is in creators' and society's interests that there be a way to reuse works created many decades ago that are no longer commercially viable and whose owners do not care enough about them to register for additional protection.

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?

Our experience with authors who have had content removed in response to a takedown notice is consistent with the observation that they are often hesitant to file counter-notices, even when

²² Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, WM & MARY L. REV. (forthcoming), available at <https://ssrn.com/abstract=3543654>.

²³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, S. Treaty Doc. No. 99-27.

²⁴ Sonny Bono Copyright Term Extension Act, Tit. I, Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 27, 1998), codified at 17 U.S.C. §§ 302-04.

they believe that a challenged use is fair or otherwise non-infringing.²⁵ We also agree that the current 10-14 day window for put back does not work well and is harmful to time-sensitive non-infringing expression online. Instead, Authors Alliance supports statutory reform which would allow for the immediate put back of targeted content in response to a valid counter-notice.

In principle, a well-designed copyright small claims court could provide an efficient and cost-effective forum to resolve disputes between notice and counter-notice senders. Unfortunately, the CASE Act as written invites abuse and poses a high likelihood of harm to authors as both claimants and respondents in the proposed tribunal. To address these issues, Congress could improve the CASE Act by making the following changes:

Limit statutory damages to cases where it is impossible or cost prohibitive to prove actual damages and develop principles to guide awards of statutory damages

There may be a role for a reasonable statutory damages framework in a small claims tribunal when damages from infringement are difficult or impossible to prove, especially if the Copyright Office develops principles to guide awards of statutory damages. However, while substantially lower than the statutory damages available in federal court, the CASE Act's statutory damages are still excessively high and are available in all cases.²⁶ In federal court, awards of statutory damages are frequently arbitrary and sometimes grossly excessive,²⁷ incentivizing unscrupulous plaintiffs to intimidate and extract settlements from individuals accused of infringement. Faced with the risk of a high statutory award, many defendants opt to settle, even when they have a valid defense. With lower barriers for claimants and a disproportionate statutory damages framework, the CASE Act could exacerbate these problems for authors accused of infringement who may feel pressured to settle rather than defend their lawful uses of copyrighted works.

Remove restrictions on the grounds for judicial review of the tribunal's decisions

Independent judicial review is essential to ensuring that any tribunal operates fairly and arrives at the correct result. The CASE Act, however, narrowly restricts the ability of either party to seek review of the tribunal's decisions in federal court. Under the CASE Act, parties can ask the tribunal to reconsider a determination, and, with an additional fee, parties can ask the Register of Copyrights to review the tribunal's refusal to reconsider on abuse of discretion grounds. Independent review by a court is available only on the grounds of "fraud, corruption,

²⁵ See Casey Fiesler & Corian Zacher, *The Missing Stakeholder of DMCA 512: Non-Infringing Users*, Authors Alliance (June 20, 2020), <https://www.authorsalliance.org/2020/06/30/the-missing-stakeholder-of-dmca-512-non-infringing-users/>.

²⁶ Under the CASE Act, claimants who timely registered their works can request up to \$15,000 per work infringed, with a total limit of \$30,000 per proceeding.

²⁷ See, e.g. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480-491 (2009).

misrepresentation, or other misconduct,” or if the tribunal exceeded its authority or failed to render a final decision. Default judgments are reviewable only on grounds of excusable neglect. By restricting the grounds for appeal, the CASE Act would leave erroneous tribunal decisions essentially unreviewable and unjustly wronged parties with nowhere to turn for relief.

Include additional safeguards to deter opportunistic claimants and preserve the utility of the small claims tribunal for independent authors and creators

The copyright holders who most need, and would most benefit from, a small claims process are the independent authors and creators who cannot afford to enforce their copyrights in federal court. Unfortunately, the CASE Act’s small claims tribunal is vulnerable to abuse by entities that acquire others’ copyright claims simply to profit from litigation, making it even easier for these entities to obtain quick default judgments and be awarded disproportionately high damages awards. Absent enough protections for accused infringers and reasonable limits on damages, the CASE Act could invite abusive litigation tactics by opportunistic, bad faith plaintiffs while cluttering up the docket and interfering with the ability of independent authors and creators to access the tribunal. As noted above, limiting statutory damages and providing principles to guide their award would help to mitigate this issue, as would requiring the Register of Copyrights to establish regulations limiting the permitted number of proceedings each year by the same claimant.²⁸

Require potential respondents to affirmatively opt-in to the small claims process

The CASE Act’s opt-out provision does not provide authors accused of infringement with enough protection. Under the CASE Act, if a respondent fails to opt-out of the small claims process within 60 days of receiving notice of the claim, the small claims tribunal can enter a default judgment in favor of the claimant and award her damages. While this opt-out procedure is intended to provide some protection for the accused, there is a strong likelihood that authors, educators, and independent creators without sophisticated legal knowledge or representation will not fully understand the implications and will ignore the notice. As a result, they could be held liable for substantial damages awards without a meaningful opportunity to defend their cases.

Narrow the jurisdiction of the small claims tribunal

Some areas of copyright law are too complicated, fact specific, and unsettled to be decided by a small claims process. The CASE Act tribunal’s accelerated process and limited discovery mean that it is only equipped to handle simple, straightforward infringement claims in settled areas of

²⁸ The current draft of the CASE Act permits but does not require the Register of Copyrights to establish regulations relating to the permitted number of proceedings each year by the same claimant.

law.²⁹ Despite this, the tribunal as set out in the CASE Act has expansive authority to hear all types of copyright infringement claims, including those that involve highly complex issues and uncertain areas of law.³⁰ These complicated cases belong in a federal court with the expertise and resources to more competently address the factual and legal issues involved. Leaving these cases with the small claims tribunal hurts those creators trying to enforce their copyrights and those trying to defend their rights to use copyrighted works, as the tribunal may be ill-equipped to adequately resolve the issues involved.

If these changes were adopted, we believe that a copyright small claims court could provide an effective forum for notice senders to enforce their copyrights and for counter-notice senders to vindicate their right to use others' copyrighted works in lawful ways.

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?

Authors Alliance strongly cautions against a notice-and-staydown system (see response to Question 3). That said, we urge Congress to prioritize reform efforts that encourage accurate notice sending, even within the current notice-and-takedown framework. This is important in light of our members' and other authors' experiences with takedown notices that target non-infringing content. For example, some authors' academic articles have been removed from online repositories in response to takedown notices from publishers, even though the authors retain the rights to share the version of their articles that they posted online. Similarly, other experts have shared how publishers sometimes fail to take into account pre-existing open access licenses when sending takedown notices targeting content that is held in institutional repositories.³¹ In addition, many creators who reasonably rely on fair use to incorporate copyrighted material into their works have had their creations removed in response to takedown

²⁹ See, e.g., Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 607 (2018); Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY TECH. L.J. 711, 730 (2018).

³⁰ While the CASE Act does include a provision providing that the tribunal shall dismiss a claim or counterclaim if the tribunal concludes that the determination of a relevant issue of law or fact exceeds either the number of proceedings the tribunal could reasonably administer or its subject matter competence, it does so without providing any guidance on the limitations of the tribunal's jurisdiction.

³¹ David Hansen, *Section 512: University and Research Libraries as Rightsholders*, Authors Alliance (July 7, 2020), <https://www.authorsalliance.org/2020/07/07/section-512-university-and-research-libraries-as-rightsholders/>.

notices or automated content filters.³² Inaccurate takedown notices are particularly concerning to our members and other creators who rely on online platforms to share non-infringing content with their audiences but are reluctant to file counter-notices when their works are improperly taken down due to the intimidating and burdensome nature of the process.

Congress should make several adjustments to section 512 to strengthen requirements for accuracy in notice sending. We support amending section 512(c)(3)(A)(vi) to require notice senders to declare under penalty of perjury that they have a good faith belief that the substantive claims in a takedown notice are accurate.³³ This change would mean that notice senders would be required to meet an equivalent standard to that of counter notice senders, who are required under section 512(g)(3)(c) to include in a counter notice a statement under penalty of perjury that they have a good faith belief that the targeted material was removed as a result of mistake or misidentification. Relatedly, Congress should codify *Lenz v. Universal Music Group*³⁴ to make it clear that a copyright owner cannot claim it has a good faith belief of infringement before sending a takedown notice and therefore may be liable for damages under section 512(f) if they fail to consider fair use before sending a takedown notice.

13. Congress should adopt new permanent exemptions for noninfringing 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?

Authors Alliance supports making permanent several exemptions which we have petitioned for and which the Copyright Office has granted in the past. In addition to making permanent the exemption for assistive technologies for people with visual impairments and print disabilities, we strongly support making the temporary exemption for film clips in multimedia e-books permanent as well as instituting a new, permanent exemption allowing text and data-mining in lawfully accessed literary and film works. The Copyright Office has found that exemptions should be made permanent where parties have repeatedly sought and been granted these

³² See Casey Fiesler & Corian Zacher, *The Missing Stakeholder of DMCA 512: Non-Infringing Users*, Authors Alliance (June 20, 2020), <https://www.authorsalliance.org/2020/06/30/the-missing-stakeholder-of-dmca-512-non-infringing-users/>.

³³ For more details about how this recommendation would improve notice accuracy, see JENNIFER M. URBAN ET AL., NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 128 (2016). Note: Schofield contributed to this report in her capacity as a Research & Policy Fellow with the Samuelson Law, Technology & Public Policy Clinic at the University of California, Berkeley School of Law, not in her capacity as the Executive Director of Authors Alliance.

³⁴ *Lenz v. Universal Music Group Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016) (holding that fair use is “authorized by law” and a copyright holder must consider the existence of fair use before sending a takedown notice under § 512(c)).

exemptions in the past.³⁵ Authors Alliance’s dedication to petitioning for these exemptions lends support to the proposition that they should be made permanent. More generally, Authors Alliance supports permanent exemptions which cover non-infringing activities that constitute fair use, and we believe that sensible streamlining of the process of requesting exemptions would conserve resources and better serve both our members and the public at large.

Permanent exemption for enabling persons who are blind or visually impaired to utilize assistive technologies

Authors Alliance strongly supports making the exemption for blind or visually impaired persons to utilize assistive technologies permanent. This exemption has been granted in each rulemaking cycle since 2003, evincing broad consensus about the need for an exemption facilitating access to copyrighted works for the underserved communities of people with visual impairments and print disabilities. Authors Alliance has petitioned for the renewal of this exemption in the past, voicing support for a permanent exemption that would mitigate the deleterious effects of the DMCA’s anti-circumvention provisions on access to copyrighted works by people who are blind, visually impaired, and print disabled. Our members seek the broadest possible audiences for their creative works. Existing markets and intermediaries that authors rely on to reach readers have left people who are blind, visually impaired, and print disabled underserved, running contrary to the wishes of both our community of authors and the needs of their potential audiences.

Permanent exemption for motion picture excerpts for use in nonfiction multimedia e-books

Authors Alliance strongly supports making permanent the temporary exemption for motion picture excerpts for use in nonfiction multimedia e-books, a now-temporary exemption which serves our members’ interests by facilitating non-infringing uses of film clips in multimedia materials to foster creative expression. Authors Alliance exists to serve the interests of authors who write to be read, and this exemption serves that interest by enabling new forms of comment and criticism in the information age. Authors Alliance submitted a comment in favor of adopting

³⁵ U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS ii (2017), *available at* <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

this exemption during the sixth triennial rulemaking,³⁶ advocated for its expansion in the seventh triennial rulemaking,³⁷ and petitioned for its renewal in 2020.³⁸

In our renewal petition, Authors Alliance highlighted the work of an author who is creating an e-book series relying on high-resolution video which cannot be made available without circumvention of technological protection measures.³⁹ We emphasized that this author and others who wish to incorporate film clips into e-books would be prevented from doing so if this exemption were not renewed. Authors Alliance believes that multimedia e-books are an important form of authorship and wants to see authors empowered to fully realize their promise. The freedom to author e-books that incorporate multimedia content, consistent with the core tenets of the First Amendment and academic freedom, remains significant and important, underscoring that this exemption should be adopted on a permanent basis.

Permanent exemption for text and data mining

Authors Alliance also supports adding a permanent exemption for text and data mining to section 1201, which would allow the circumvention of technical protection measures on lawfully accessed literary works distributed electronically and on lawfully accessed motion pictures for the purpose of deploying text and data mining techniques. Authors Alliance, along with other organizations, petitioned in September 2020 for instituting this exemption on a temporary basis as part of the Copyright Office's 8th Triennial Rulemaking.⁴⁰

Text and data mining enables researchers to gain new insights into language and culture, scientific inquiry, and civic participation. For example, text and data mining can be used to examine the evolution of language over time or to identify important but overlooked findings in scientific papers. While the possibilities of text and data mining are immense, researchers face

³⁶ See generally U.S. COPYRIGHT OFFICE, IN THE MATTER OF EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES, COMMENT OF AUTHORS ALL. ET AL., DKT. NO. 2014-07, available at <https://authorsalliance.org/wp-content/uploads/Documents/Comment%20of%20Authors%20Alliance%20et%20al.pdf>.

³⁷ *Authors Alliance Comments in Support of Modified Exemption to Section 1201 of the DMCA*, Authors Alliance (Dec. 19, 2017), <https://www.authorsalliance.org/2017/12/19/authors-alliance-comments-in-support-of-modified-exemption-to-section-1201-of-the-dmca/>.

³⁸ Authors Alliance et al., *Petition to Renew a Current Exemption Under 17 U.S.C. § 1201, 8th Triennial Rulemaking* (July 7, 2020), available at https://www.authorsalliance.org/wp-content/uploads/2020/07/20200722_MultimediaEBook_RenewalPetition.pdf.

³⁹ *Id.*

⁴⁰ See Authors Alliance et al., *Petition for New Exemption Under 17 U.S.C. § 1201, 8th Triennial Rulemaking* (Sept. 8, 2020), available at https://www.authorsalliance.org/wp-content/uploads/2020/09/20200908_1201_AuthsAll_AAUP_LCA.pdf.

substantial barriers in their ability to use the technique. They must either rely on collections of works created by others—which may be missing important, relevant works—or they must build their own collections, a prohibitively time-consuming process in which researchers manually scan printed books or capture video playback in real time.

Authors Alliance believes that researchers building their own collections of works should be able to circumvent technological protection measures to extract data directly from literary works distributed electronically and motion pictures. If this exemption is granted on a permanent basis, researchers will be empowered to build relevant collections and conduct this important research.

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?

Authors Alliance supports the proposed means of streamlining the triennial rulemaking process. Presumptive renewal would conserve resources, both for the Copyright Office and for those advocating for exemptions. Proponents of exemptions and renewals thereof are forced to undergo an expensive and time-consuming process, which effectively forecloses the participation of individual users and creators.⁴¹ Both presumptive renewal and a presumption of permanence for twice-renewed temporary exemptions would go some way to ameliorating this imbalance, though we believe this presumption should apply even where renewed exemptions have been modified, as modifications to exemptions are often minor and do not change the overall character of the exemption or its benefit to the public. A related and important step Congress could take to make the rulemaking process less burdensome is to ensure that any new exemptions, whether permanent or temporary, apply with equal force to the prohibitions on trafficking in section 1201 so that those affected by section 1201 can consult others for help regarding non-infringing activities.⁴² Yet making the rulemaking process more efficient in these and similar ways is only a

⁴¹ Mitch Stoltz, *New “Breaking Down Barriers to Innovation Act” Targets Many of DMCA Section 1201’s Problems*, EFF (Apr. 20, 2015), <https://www.eff.org/deeplinks/2015/04/new-breaking-down-barriers-innovation-act-targets-many-dmca-section-1201s-problems>.

⁴² See *Are Reforms to Section 1201 Needed and Warranted?: Hearing Before the Subcomm. on Intell. Prop. of S. Comm. on the Judiciary*, 116th Cong. (Sept. 16, 2020), available at <https://www.judiciary.senate.gov/imo/media/doc/Reid%20Testimony.pdf> (statement of Blake Reid, Clinical Professor, Colorado Law School).

partial remedy to the fundamental problem that section 1201 stifles speech, access, and onward creation—even where those activities are clearly non-infringing—and in doing so creates heavy burdens for authors.

To truly update section 1201 in a way that would benefit authors, Congress should, in addition to examining the rulemaking process with an eye towards conservation of resources, make clear in reforming legislation that there must be a nexus between the relevant use and copyright infringement for there to be a violation of section 1201 and a claim for copyright infringement. The Federal Circuit reached this conclusion in 2004, finding that a copyright holder alleging infringement must demonstrate a nexus between the use and actual infringement,⁴³ and Congress should amend section 1201 to codify this sensible position.

In the past, numerous exemption proponents have had to undergo the burdensome process of seeking permission from the Copyright Office to make noninfringing uses of copyrighted works. Authors Alliance has repeatedly petitioned for temporary exemptions and renewals which cover activities that are undoubtedly fair use. We have petitioned for an exemption that allows authors to incorporate film excerpts in nonfiction multimedia e-books over the course of three rulemaking cycles, using time and resources to advocate for a narrow exemption well within the bounds of fair use. Similarly, Authors Alliance is currently petitioning for an exemption that would allow circumventing technical protection measures on lawfully accessed literary works and motion pictures distributed electronically in order to deploy text and data mining techniques—another activity that falls within fair use—utilizing resources that could be deployed elsewhere to advocate for our members’ interests.

The Copyright Office’s 2017 study of section 1201 reflected some of our concerns, acknowledging a wealth of public feedback stating that section 1201 “does little to prevent digital piracy, while chilling a wide range of otherwise lawful activities.”⁴⁴ The report noted that multiple commenters had specifically suggested requiring a nexus between a particular use and infringement,⁴⁵ and while the Copyright Office did not recommend adopting this requirement as an exemption at that time, it did note Congress’s concern with considering the intersection of circumvention exemptions and fair use to ensure balanced and fair copyright policies.⁴⁶ Moreover, if Congress would like to help authors by adopting this reform to section 1201, it need look no further than a bill already introduced in the U.S. House of Representatives: The Unlocking Technology Act of 2015, introduced by Representative Zoe Lofgren, which would amend section 1201 so that it “shall not be a violation of this section to circumvent a

⁴³ See *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004).

⁴⁴ U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS ii (2017), available at <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

⁴⁵ *Id.* at 102

⁴⁶ *Id.* at 102-103.

technological measure in connection with a work protected under this title if the purpose of such circumvention is to engage in a use that is not an infringement of copyright under this title.”⁴⁷ Similar legislation has been introduced in the U.S. Senate,⁴⁸ which may also be instructive.

⁴⁷ Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/1587/text>.

⁴⁸ Breaking Down Barriers to Innovation Act of 2015, S. 990, 114th Cong (2015-2016), <https://www.congress.gov/bill/114th-congress/senate-bill/990/text>.