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

Via email to Intellectual_Property@tillis.senate.gov

RE: Digital Copyright Act of 2021 Discussion Draft

Dear Senator Tillis:

Authors Alliance appreciates the opportunity to respond to your discussion draft of the Digital Copyright Act of 2021 (“DCA”).¹ 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.²

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. 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. § 1201 (“section 1201”), we have supported exemptions to anti-circumvention provisions that facilitate

¹ Digital Copyright Act of 2021 Discussion Draft, *available at* <https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B>.

² For more information about Authors Alliance, see *About Us*, Authors All., <http://www.authorsalliance.org/about>.

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

text and data mining research,⁴ enable authors to create multimedia e-books,⁵ and ensure authors' works reach a broad readership.⁶ In general, we support copyright policies which make knowledge more available and accessible, including limitations on liability for orphan works⁷ and Copyright Office modernization.⁸

Our responses to selected provisions from the DCA draft text, attached, are informed by these experiences. We have focused our comments on the sections of the draft bill that will have the most impact on how our members create, use, and share copyrighted works. We hope our input is helpful as you consider revisions to the DCA to better align the proposal with the interests of the authors and the public for which they write.

Respectfully Submitted,



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⁴ *Authors Alliance Petitions for New Exemption to Section 1201 of the DMCA to Enable Text and Data Mining Research*, Authors All. (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 All. (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 All. (Nov. 9, 2016), <https://www.authorsalliance.org/2016/11/09/authors-alliance-comment-to-u-s-copyright-office-supports-print-disabled-readers/>.

⁷ Pamela Samuelson, *Thoughts on the Copyright Office Report and Orphan Works*, Authors All. (June 18, 2015), <https://www.authorsalliance.org/2015/06/18/thoughts-on-the-copyright-office-report-and-orphan-works/>.

⁸ *Authors Alliance Submits Comment to U.S. Copyright Office in Support of Registration Modernization*, Authors All. (Jan. 17, 2019), <https://www.authorsalliance.org/2019/01/17/authors-alliance-submits-comment-to-u-s-copyright-office-in-support-of-registration-modernization/>.

Section 2: Limitations on Liability Relating to Material Online

Replacing notice-and-takedown with notice-and-staydown

Authors Alliance opposes proposed changes to section 512 that would shift the notice-and-takedown system to a notice-and-staydown system, as section 2 of the DCA, 17 U.S.C. § 512(a)(2)(C), contemplates. 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 (“OSP”) 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,⁹ or when the user has a license or is the copyright owner.¹⁰ The notice-and-staydown procedure does not account for these fact-sensitive determinations, and the presumption in favor of removing subsequent uses magnifies the risk of improper takedowns.

Authors and other creators who rely on online platforms to share non-infringing works with their audiences would be harmed if OSPs 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. Even if an initial notice is accurate and targets infringing content, because infringement is a fact-sensitive determination, it cannot be assumed that any subsequent use of the same material is also infringing. Moreover, inaccurate takedown notices already have deleterious effects on authors sharing non-infringing works under the notice-and-takedown regime,¹¹ and notice-and-staydown would amplify these harms.

Authors Alliance is also concerned that by requiring OSPs to remove future uses of a work for which it received a takedown notice, the notice-and-staydown regime will effectively require large and well-resourced platforms to develop content filtering systems, while smaller or nascent platforms which cannot afford these costly systems will struggle to comply with staydown requirements.¹² In turn, the vibrant array of platforms for online speech that have been allowed to

⁹ See *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006).

¹⁰ See David Hansen, *Section 512: University and Research Libraries as Rightsholders*, Authors All. (July 7, 2020), <https://www.authorsalliance.org/2020/07/07/section-512-university-and-research-libraries-as-rightsholders/>.

¹¹ *Id.*

¹² See Jennifer M. Urban et al, *Notice and Takedown in Everyday Practice* (Mar. 22, 2017), UC Berkeley Public Law Research Paper No. 2755628, available at <https://ssrn.com/abstract=2755628>, at 121 (arguing that small and medium-sized OSPs simply do not have the resources to implement automated filtering systems and that a staydown requirement would create a competitive disadvantage for most OSPs).

grow and thrive under the notice-and-takedown system will likely suffer. Authors Alliance supports copyright policies that lead to widespread dissemination of knowledge, from a diversity of viewpoints and using a diversity of platforms. Policies that privilege the most well-resourced OSPs work against these values. This proposal could also have the detrimental effect of curtailing online speech generally,¹³ an outcome that hurts the interests of our members and the American public writ-large.

Reforms to “put back” and seeing content restored

The summary of the draft bill states that it makes reforms which would make it easier for content creators to see their content restored after being improperly removed in response to a "staydown" notice.¹⁴ Authors Alliance supports making it easier for creators who have had their content removed to see their content restored sooner than under the current system. Yet it is unclear from the draft language of 17 U.S.C. § 512(g)(2)(C) how this provision would enable content to be restored or “put back” sooner than under the current system, as this new provision would shift the window for OSPs to replace improperly removed content from 10 to 14 business days to 5 to 30 business days. Therefore, while a user might see her content restored faster under the new system, it might also take weeks longer than is allowed under the current system.

Additionally, the requirement that the user receive instructions standardized by regulation does not directly lead to the content being restored faster than under the current system, because the counter notice itself remains an onerous burden for authors and creators: this proposal does not go far enough towards making it easier to have content removed pursuant to a takedown notice restored.

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 embark on the daunting, time consuming process of sending counter-notices, even when they believe that a challenged use is fair or otherwise non-infringing. Authors Alliance supports statutory reform which would allow for the immediate put back of targeted content in response to a valid counter-notice. One of the most impactful ways that Congress could reduce the burden on authors who have their content improperly removed would be to amend section 512 to incentivize accurate notice sending and to make it more feasible for authors to recover for harms caused by inaccurate notices.¹⁵

¹³ See Karl Borgsmiller, *Youtube vs. the Music Industry: Are Online Service Providers Doing Enough to Prevent Piracy?*, 43 S. Ill. U. L.J. 647, 664 (2019) (detailing how notice-and-staydown could lead to less diverse online speech).

¹⁴ See Digital Copyright Act of 2021 Discussion Draft, *available at* <https://www.tillis.senate.gov/services/files/4B568218-1344-4453-A30D-33B6406EB7CB>.

¹⁵ See Jennifer M. Urban et al, *Notice and Takedown in Everyday Practice* at 128-129 (providing recommendations for statutory reform that would help prevent mistaken and abusive takedown notices).

Section 3: Limitation on Remedies in Cases Involving Orphan Works

Authors Alliance supports policy reforms that limit liability for good faith users who are unable to identify or locate the copyright owner of a work after a diligent search and decide to use the work in question, but we are concerned that the Orphan Works Act, 17 U.S.C. § 514, does not go far enough towards limiting liability for authors who make use of an orphan work after a diligent search for the rightsholder.

Millions of in-copyright works are orphans, that is, works whose owners cannot reasonably be identified and located. 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. Our members care about the dissemination of knowledge and, more specifically, seeing their own works disseminated broadly, and the threat of liability for the use of orphans is contrary to these priorities.

Section 3 of the DCA, while aimed at addressing the orphan works problem, does not go far enough in limiting liability for creators who use orphan works after a diligent but unsuccessful search for the copyright holder. Authors Alliance is concerned in particular about the requirement that users file a “notice of use” with the Copyright Office in order to take advantage of the limitation on liability. This procedural hurdle makes the limitation less accessible for individual authors and creators, who are less likely to be familiar with Copyright Office procedure than sophisticated commercial entities. While the notice of use requirement may not be unduly burdensome for large firms, for individual authors—particularly our members, whose motivation to write focuses on contributing to the commons of knowledge—this requirement may be entirely too difficult to comply with, placing the limitation on liability out of the reach for many authors. For this reason, for the new section 514 to provide the intended benefits to good faith users of orphan works, we recommend striking the notice of use requirement.

Section 4: Appointment of Register of Copyright; Copyright Office Relocation

Authors Alliance opposes the proposed changes to 17 U.S.C. § 701, which would reclassify the Copyright Office—a division of the Library of Congress and part of the legislative branch of the federal government for over 150 years—as an executive agency with a politically appointed register. This is contrary to our members’ interests for three distinct reasons. First, the relocation would politicize the Copyright Office, intended to be impartial and removed from partisanship. Second, the relocation would shift the focus of copyright policy towards commercial interests and away from creativity and individual authorship. Finally, relocation would disrupt the mutually beneficial relationship between the Library of Congress and the Copyright Office, which furthers our members’ interests in preservation of knowledge and broad dissemination of creative works.

Relocating the Copyright Office to the Department of Commerce would have the extraordinary effect of politicizing the Copyright Office, which is enabled to provide impartial policy advice to Congress since it is removed from political bipartisanship. While the provision is framed as one that would increase accountability for the Register, it inevitably politicizes the Office: under this provision, the appointment process for the Register would be changed to the procedure used to appoint Supreme Court nominees and Cabinet appointees. This could have the effect of leading the Copyright Office to be more partisan in its positions on substantive issues rather than serving as a “neutral arbiter.”¹⁶

Authors Alliance is concerned that housing the Copyright Office, a government entity tasked with “promot[ing] creativity and free expression by administering the nation’s copyright laws and providing impartial, expert advice on copyright law and policy for the benefit of all”¹⁷ within an agency that focuses on “promot[ing] job creation and economic growth”¹⁸ would have the unintended consequence of refocusing copyright policy around the commercial interests of commercial entities and away from the focus on individual authorship and promotion of creativity that copyright is intended to incentivize. Our members care about the wide dissemination of knowledge and culture, and refocusing copyright policy around commerce moves away from addressing the needs of individual creators.

Finally, the proposed reorganization would be to the detriment of both the Copyright Office and the Library of Congress. The Copyright Office has served as an important unit within the Library of Congress for more than a century, and one of the Office’s most critical functions is to obtain and make available deposit copies of works for the Library’s collections.¹⁹ The Library of Congress itself as an institution is greatly enriched by the resources the Copyright Office provides to the Library,²⁰ and the alignment of the missions of the Copyright Office and Library of Congress, focusing on preservation and enabling access to creative work, has fostered this symbiotic relationship.²¹

¹⁶ Jarrett Dieterle & Sasha Moss, *Moving Copyright Office Authorities to Executive Branch Could Improve Accountability*, Hill (Mar. 28, 2017), <https://thehill.com/blogs/pundits-blog/lawmaker-news/326246-moving-copyright-office-authorities-to-executive-branch?r=1>.

¹⁷ *About: Overview*, U.S. Copyright Off., <https://www.copyright.gov/about/>.

¹⁸ *About Commerce*, U.S. Dep’t Com., <https://www.commerce.gov/about>.

¹⁹ *Brief History of the Copyright Office*, U.S. Copyright Off., <https://copyright.gov/circs/circlea.html>.

²⁰ *Id.*

²¹ See Letter from Pamela Samuelson, President, Authors All., to Hon. Robert Goodlatte & Hon. John Conyers, H. Comm. on Judiciary, Jan. 31, 2017, available at <https://www.authorsalliance.org/2017/01/31/authors-alliance-submits-comments-regarding-the-u-s-copyright-office-to-the-house-judiciary-committee/>.

Section 5: Modernizing Circumvention Exemptions

Nexus requirement

First and foremost, the revisions and new provisions in the draft bill are only a 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. The Copyright Office has granted, over the course of its triennial rulemaking cycles, fourteen separate exemptions to section 1201 liability,²² recognizing that there are many non-infringing uses of copyrighted works that have been impeded by section 1201. To update section 1201 in a way that would truly benefit authors, Congress should make clear in reforming legislation that there must be a nexus between the relevant circumvention and likely infringement (or likely facilitation of 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,²³ 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 non-infringing uses of copyrighted works. Authors Alliance has repeatedly petitioned for temporary exemptions and renewals which cover activities that are undoubtedly fair use. For example, 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 squarely 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.”²⁴ The report noted that multiple commenters had suggested requiring a nexus between a particular use and infringement,²⁵ and while the Copyright Office did not specifically recommend adopting this

²² See 83 Fed. Reg. 54,028-031 (Oct. 26, 2018) (to be codified at 37 C.F.R. pt. 201).

²³ See *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004).

²⁴ 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>.

²⁵ *Id.* at 102.

requirement 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.²⁶

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, which would amend section 1201 so that it would “not be a violation of th[e] section to circumvent a 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.”²⁷ Similar legislation has been introduced in the U.S. Senate,²⁸ which may also be instructive.

Presumptive renewal and permanent exemptions

Authors Alliance supports the addition of 17 U.S.C. § 1201(a)(1)(F)(i), which provides that the Register of Copyrights shall renew an exception previously granted for the succeeding 3-year period without additional documentation unless a party opposing the renewal files a good faith statement in opposition. Authors Alliance also supports the addition of § 1201(a)(1)(G)(i), which grants the Register of Copyrights the authority to make permanent a temporary exception that has been adopted for a 3-year period and renewed without opposition. Both of these revisions will help to streamline the triennial rulemaking process. Proponents of exemptions are currently required to undergo an expensive and time-consuming process of formally petitioning for new exemptions and renewals of existing exemptions, which effectively forecloses the participation of individual users and creators and drains limited resources. Presumptive renewal and making a temporary exemption permanent after it has been adopted and renewed would conserve resources, both for the Copyright Office and for those advocating for exemptions, and would go some way to ameliorating the imbalance under the current system.

Third-party assistance

Authors Alliance appreciates the addition of language in §§ 1201(a)(1)(C) and 1201(a)(1)(D)(ii) requiring that the Librarian of Congress make a determination in a rulemaking proceeding as to whether third-party assistance at the direction of an intended user should be exempt and, if so, publish a determination that the prohibition shall not apply to such third-party assistance for the ensuing 3-year period. However, the permissive structure of the draft language does not go far enough to ensure that exemption beneficiaries will be able to conduct the non-infringing

²⁶ *Id.* at 102-103.

²⁷ Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/house-bill/1587/text>.

²⁸ Breaking Down Barriers to Innovation Act of 2015, S. 990, 114th Cong (2015-2016), *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/990/text>.

activities permitted under an exemption. Further, it invites additional inefficiencies by requiring an additional, seemingly separate determination as to whether third-party assistance is permitted for a given exemption. We urge Congress to strengthen these important provisions in the draft DCA by requiring that exemptions extend to cover third-party assistance at the direction of the intended user instead of leaving this to the discretion of the Librarian of Congress to be evaluated on a case-by-case basis for each exemption. This would help to ensure that those affected by section 1201 can consult others for help regarding non-infringing activities and that the inefficiencies of the already burdensome triennial rulemaking are not compounded.²⁹

Prohibition on trafficking

Similarly, we appreciate the language added in §§ 1201(a)(2)(D) and 1201(b)(1)(D) which makes clear that the Register of Copyrights *may* provide by regulation that the prohibition on trafficking does not apply when the relevant user is an intended beneficiary of an exemption. But this, too, should be strengthened such that the statutory language *requires* that exemptions granted during the triennial rulemaking also exempt activity barred by the trafficking bans rather than leaving this decision to the discretion of the Register. This change would help to ensure that the intended beneficiaries are actually able to utilize the exemption, regardless of their technical ability to do so.

Permanent exemption for assistive technologies

Authors Alliance generally supports the addition of § 1201(l), which provides a permanent exemption for activities that enable a blind or visually impaired individual to utilize assistive technologies. However, the language in the current provision does not go nearly far enough to meet the needs of authors and their readers. 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 with all types of disabilities underserved, running contrary to the wishes of our community of authors and the needs of their potential audiences. The proposed addition of § 1201(l) may help to mitigate some of the deleterious effects of the DMCA’s anti-circumvention provisions on access to copyrighted works by people who are blind or visually impaired, but it arbitrarily excludes people with a wide range of other disabilities. Likewise, the term “assistive technologies” is potentially too limiting, and should be changed to ensure that it covers all activities that make a copyrighted work accessible. At minimum, a permanent exemption should encompass the specific temporary accessibility-related exemptions already in existence.

²⁹ 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).

Section 12: Authority to Reduce Fees for Individual Authors and Small Businesses

We wholeheartedly support the addition of the proposed language to 17 U.S.C. § 708 to make it clear that the Copyright Office has the authority to implement tiered fees for individual authors and small businesses.

Authors and the public benefit from comprehensive and accurate Copyright Office records. Without a public record of ownership, authors can miss out on the chance to grant permission for uses they would welcome, and would-be users may abandon potential onward uses of the work. Yet, as the Copyright Office acknowledges, “when fees are set too high, potential users—including non-profit or non-commercial users—will be unable or unwilling to pay and simply will stop participating at all and the public record will suffer.”³⁰

The current fees for registration and recording documents with the Copyright Office can be a barrier for individual authors or other copyright owners whose works have low or unproven commercial value but are nonetheless culturally or historically valuable.³¹ For example, an individual author may want to exercise her termination right in an out-of-print book so that she can make it openly available online, but may be discouraged from doing so by the current fees for recordation. Such a result would be a loss for the public, which would have otherwise gained renewed access to the work.

Because of the benefits associated with registration and recordation and the deterrent effect when fees are too high, Authors Alliance believes that it is important that the Copyright Office have the flexibility to adopt a fee schedule that accommodates all authors, particularly individual authors. Making it clear in section 708 that the Copyright Office has the authority to implement tiered fees for individual authors and small businesses is a sensible step towards ensuring that the Copyright Office can take into account the interests of small creators when it sets its fee schedule.

³⁰ Copyright Office Fees, 83 Fed. Reg. 24,05 (May 24, 2018) (to be codified at 37 C.F.R. pt. 201).

³¹ Robert Brauneis, TRANSFORMING DOCUMENT RECORDATION AT THE U.S. COPYRIGHT OFFICE 54 (Dec. 2014), *available at* <https://www.copyright.gov/docs/recordation/recordation-report.pdf> (stating that “[h]igh recordation fees are likely deterring recordation, particularly of smaller-value transactions”).