

Nineteen Hundred and Twenty-two

# NYIPLA

The New York Intellectual Property Law Association®

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Re: Questionnaire from Senator Tillis Regarding DMCA Reform Bill

Dear Messrs. Watts and Greenberg:

Thank you on behalf of the New York Intellectual Property Law Association ("NYIPLA") for the opportunity to respond to the questions concerning the DMCA Reform Bill that your office circulated this month.

### NYIPLA Background

The NYIPLA is a professional association of attorneys whose interests and practices lie in the area of patent, trademark, copyright, trade secret, and other intellectual property law. The NYIPLA's members include a diverse array of attorneys specializing in copyright law, including in-house counsel for businesses that own, enforce, and challenge copyrights, as well as attorneys in private practice who advise a wide array of clients on copyright matters and procure copyright registrations through the U.S. Copyright Office. Many of the NYIPLA's member attorneys participate actively in copyright litigation, representing both owners and accused infringers. The NYIPLA, its members, and the clients of its members share an interest in having the standards governing the enforceability of copyrights be reasonably clear and predictable. Through its Copyright Committee, the NYIPLA has engaged in public discourse with respect to copyright law, including the filing of amicus briefs on copyright matters before the federal courts and responding to requests for information from the Copyright Office and Congress.

### Responses to Questions

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

Although customizing DMCA solutions based on the relative size or sophistication of the OSP or rightsholder has its appeal, we believe this approach is risky, in that it is likely to be arbitrary, imbalanced and administratively burdensome. It is difficult to imagine a system for sorting OSPs and content providers into appropriate buckets based on criteria that relate directly to the purposes of the DMCA, as opposed to imposing what may be arbitrary distinctions based on, by way of example, for OSPs, market share, capitalization, or number of users, or, for copyright owners, the number of copyrights under management. Also, a customized system may incentivize interested parties to manipulate the system in order to obtain more favorable treatment under the new regulatory scheme. This also begs the question of who will administer and enforce the boundaries of these categories, in particular as a number of these categories would need to be informed by information that is not currently, and perhaps is not intended to be, made public by all interested parties.

There also does not appear to be any policy justification for setting forth different standards for OSPs and copyright owners based on who the relevant actors are, and such distinctions would appear to be inconsistent with the policy goals of the Copyright Act, which favors uniformity and agnosticism with respect to the identity of the parties, and ostensibly focuses instead on the behavior of such actors. Thus, even assuming Congress can provide workable guidelines for categorizing OSPs and rightsholders, to what end are these categories being created? How will Congress address different requirements in a manner that is fair to all parties? It is easy to envision these tailored regulations applying unevenly to parties that fall within the same arbitrary bucket. For example, a small startup platform that experiences explosive user growth in a short period of time might be grouped with a larger, better resourced market player with the same number of users. A customized DMCA that imposes a higher burden on OSPs above a certain user threshold is likely to have a disparate impact on these two companies, without a strong policy justification. We would caution against replacing an imbalanced system with a system imbalanced in different ways, favoring differing interests.

We believe the DMCA's "one size fits all" approach is preferable to a customized system if it is made more efficient, effective and equitable for all interested parties. As discussed in more detail below, such improvements might include standardizing notice- and counter-notice forms, providing uniform guidance on access to OSP forms and DMCA designated agent information, protecting the privacy of rightsholders in the takedown process and reducing or eliminating monetary penalties associated with the counter-notice process.

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

The categories originally created by Congress when the DMCA was enacted into law in 1998 were well considered at the time, and judicial decisions over the past 22+ years have properly expanded those categories. As a general rule, however, we are concerned that establishing a regulatory system through the Copyright Office proactively to update and modify these categories may create more problems than they would solve. In contrast to the Copyright Office, the courts are better positioned to consider the unique factual nature and legal defenses available in each case and determine whether the conduct at issue is subject to a safe harbor defense, and that is because the issue of whether or not a safe

harbor defense applies is based not only on the aforementioned categories, but also on the specific facts concerning the conduct and knowledge of the defendant. Therefore, it is likely more efficient to look to the courts for guidance on these issues in the first instance. Although we do not see a present need for modifying the DMCA safe harbor provisions, at most we would urge Congress to leverage judicial precedent and codify into amendments to the DMCA those judicial expansions that Congress concludes are appropriate. Additionally, we are concerned that, as more safe harbor categories are created, the analysis of selecting which categories are appropriate could become more difficult, as more “grey areas” between the categories may appear.

**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?**

If Congress seeks to move forward with a notice-and-staydown system, any additional duties imposed on OSPs must be carefully limited in order to avoid exacerbating abuses that occur under the current notice-and-takedown system and to ensure that legitimate speech is protected. Staydown requirements should be limited to verbatim copies of the noticed content distributed in an identical output format. That is, for example, an OSP’s responsibility in response to a notice regarding an audio file should be to police only identical audio files, not video files that might have the audio as part of the soundtrack. Similarly, an OSP’s responsibility in response to a notice regarding a still image should be to remove only exact copies of that still image—not copies embedded in or remixed with other still images in, for example, a collage format or a copy otherwise transformed into a new work in some fashion.

An overly broad staydown requirement would place an excessive burden on OSPs to track other copies of the noticed material that in many instances would be so difficult to identify (without the assistance of the copyright owner) that the purpose of the DMCA to create a balance between the freedom to operate by OSPs and copyright enforcement by content creators would be disserved. Imagine, for example, an OSP hosting both an audio-only platform and an audio-visual platform. A copyright holder issues a notice to that OSP after discovering an infringing recording on OSP’s audio platform. Under a broad notice-and-staydown provision, the OSP could face liability if the recording is played in the background of a video on OSP’s audio-video platform, the latter of which may be difficult to identify without investigating one-by-one every single piece of content appearing on the OSP’s platform. This result would contradict the legislative intent of the DMCA.

If strict liability were to follow from a failure to identify and take down subsequent alleged, related acts of infringement following a single notice, notice-and-staydown could exacerbate what some OSPs already consider to be the chilling effect notice-and-takedown causes. From the perspective of these OSPs, notice-and-takedown is already subject to significant abuse and misuse. For instance, bad-faith (or otherwise misinformed) DMCA notices result in takedowns of content that may be protected by fair use. While *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015), suggests that copyright holders must *consider* fair use before issuing a takedown notice, that may be insufficient to safeguard a content creator’s rights in the face of a bad-faith takedown request. Shifting the burden to the OSP of determining whether fair use applies before deciding whether allegedly infringing content should stay down is a recipe for inconsistent application of the fair use doctrine, with which courts continue to struggle in interpreting its application.

The stakes of an inappropriate staydown are even higher when the allegedly infringing material is newsworthy or time-sensitive. For example, a politician in the run-up to an election might issue bad-faith notices to cause the removal of content criticizing the politician on the ground that it contains quotations from the politician. If the content is not put back before the election occurs, whatever value the content might otherwise have had is significantly lessened if not eliminated. Also, the public interest is disserved by the improper removal of protected speech.

Finally, imposing overly broad staydown requirements on OSPs increases the risk that those OSPs with the resources available may broaden their search algorithms for material that is required to come down as a result of a notice of infringement. Expanding these automated systems increases the risk that more protected speech will be chilled. To the extent these takedowns may be voluntary in nature in that the OSP is taking down material beyond the scope of the original notice, content creators whose content was taken down may have little or no recourse other than an opaque OSP internal review process overseen by OSP employees who may not have a thorough understanding of the copyright-related issues presented.

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

We initially note Section 512(m)'s lack of a duty to monitor is limited— monitoring can and should be required when it is “consistent with a standard technical measure complying with the provisions of subsection (i).” 17 U.S.C. § 512(m). Standard technical measures (“STMs”) should be set so that once a takedown notice is delivered OSPs will have a base set of standards and guidelines regarding their duty to investigate. These STMs should be more rigorous than under current standards and should account for advances in artificial intelligence and other technologies since the DMCA was passed in 1998.

The essential tension in setting these STMs is between balancing the interests of the copyright owners in ensuring that their takedown notice produces tangible and effective results, while ensuring that the algorithms and processes the OSPs utilize to find and take down the allegedly infringing content do not result in takedowns of protected, non-infringing speech. For example, if content is embedded into an online news article, use of that embedded content may be deemed to be a fair use in some cases, and not a fair use in others. *Compare, Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL) (E.D.N.Y. Nov. 2, 2020) (sports website's embedding of an Instagram post depicting tennis star Caroline Wozniacki in an article reporting on her retirement constituted fair use because the Instagram itself was the news story), *with Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018) (embedding a Twitter post did *not* constitute fair use because the content of the Twitter post was the news story, but the photograph itself was not). As demonstrated by these cases, the fair use question is not informed solely by the presence of the copied content on the defendant OSP's platform. Instead, the fair use analysis also requires a careful balancing of multiple factors concerning facts not directly related to the extent of copying alone, which does not lend itself to evaluation by algorithms. Indeed, fair use remains one of the more complex and factually sensitive areas of copyright jurisprudence. Thus, expanding “notice and takedown” to “notice and staydown” means that the consequences of failing properly to consider and apply fair use principles can be more severe, as more content is at risk for being improperly taken and kept down.

Where takedown algorithms used by OSPs can be helpful is for the process of identifying content that is identical or nearly identical to that identified in the takedown notice. For images, it is reasonable to expect that current technology could scan for copies of such images across an OSP's servers and web site. Likewise, text recognition would allow OSPs to find exact or near-exact copies of text (how close to exact to be set as part of STMs). As copyright owners are required to submit deposit copies as part of a copyright application, it would be reasonable to require them to provide the equivalent of the relevant deposit copy to the OSP as part of a takedown notice. Further, takedown notices and counter notices should identify whether the alleged infringer is using the allegedly infringing content in connection with news reporting, educational purposes or a narrowly defined list of other categories that historically receive broader fair use protection than other strictly commercial uses.

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

The NYIPLA has not thoroughly reviewed or considered the issues raised in this question, and therefore respectfully declines to answer it at this time. However, NYIPLA believes these are important and significant issues that deserve further consideration.

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

A voluntary small-claims process such as that proposed in the CASE Act, but which adjudicates *only* the question of whether a particular takedown was correct may be an appropriate reform. Ideally, the small-claims administrative judge would be sufficiently versed in copyright law to be able to determine, for example, if the allegedly infringing material constitutes a fair use. Appeals to the federal district court, as with other appeals from arbitral panels, should be limited to situations where the small claim judge either committed an error of law that is material and prejudicial, made determinations of fact that are clearly erroneous, or acted in a manner outside of the scope of their powers as a small claims judge. Assuming the process for adjudicating such claims can be managed by competent stakeholders without legal training, such a small claims system would provide much needed protection for stakeholders with "shallow pockets" who would otherwise be deterred from litigation in federal court due to costs and liability risk.

Reducing litigation costs through a small claims system, however, solves only half the problem. The other half of the problem is the risk of liability, accompanied by a large claim for damages, or recovery of attorneys' fees. If small claims judge is vested with the authority to award the same range of damages and remedies as a federal court, the stakes in the small claims process become potentially quite high, which may create the very deterrent effect the process was intended to avoid. If, on the other hand, small claims judgments have fewer damages remedies than in court, stakeholders with deeper pockets or lawyers retained on a contingency basis will likely opt for proceeding in court, where they can perhaps leverage those risks into a favorable and quick settlement.

Absent finding a fair and workable resolution to the deterrent effect of litigation liability risk, a rational stakeholder, recognizing that the outcome of their dispute cannot be predicted, may still choose to refrain from challenging a questionable takedown rather than risk potentially ruinous liability. This outcome is inefficient for all involved: because the copyright owner was not actually injured by the non-infringing fair use, it is actually no better off if the non-infringing content is removed. And both the content creator (whose speech has been chilled) and the OSP (whose service has less content as a result) come off worse. Any counter-notice reform that focuses solely on the dispute-resolution mechanism but does not revisit penalties for liability is likely to underperform with respect to the legislative intent of the DMCA.

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

All stakeholders in the DMCA notice and counter-notice process would benefit from uniformity. This starts with ensuring that all copyright owners have equal and sufficient access to each OSP's notice submission forms and systems. At present, this information is not always easily accessible on OSP websites. OSPs often require selection of numerous separate radio buttons to reach a DMCA takedown notice webform. Some of these practices appear to be the result of intentional obfuscation. Although highly sophisticated copyright owners (e.g., major stock image licensing agencies) may have the technological resources to easily navigate within each OSP's system, less sophisticated copyright owners (e.g., individual visual artists) without such resources are forced to navigate this web on their own. Accordingly, the lack of uniformity among OSPs' takedown systems with respect to transparency and access disadvantages some copyright owners depending on the extent of such copyright owners' level of operational sophistication and resources. Such an inconsistent result does not have a valid policy justification according to the legislative intent of the DMCA.

A reformed DMCA should create a standardized system that requires all OSP notice submission systems to meet certain minimal regulatory standards for accessibility and ease of use. The reformed law should mandate the location and prominence of each OSP's takedown notice webform, procedures and DMCA designated agent contact information.

There is also an opportunity for the Copyright Office to develop standard webforms for takedown notices, counter-notices and communications with all parties. Section 512(c)(3)(A) mandates certain basic requirements for an effective takedown notice,

namely:

- (i) complaining party's signature;
- (ii) identification of the copyrighted work;
- (iii) identification of the allegedly infringing material;
- (iv) complaining party's contact information;
- (v) statement of complaining party's good faith belief that the use is not authorized; and
- (vi) statement that the notice is accurate, and, under penalty of perjury, that the complaining party is authorized to act on behalf of the rightsholder.

17 U.S.C. § 512(c)(3)(A). OSPs often will not respond to or process takedown notices unless this required information is submitted via the OSP's unique webform. This puts an increased burden on copyright owners to tailor their notices for each platform and makes the notice and takedown system inefficient. The Copyright Office could alleviate this burden by providing standardized electronic forms for use across all platforms. In addition, the Copyright Office might prepare standard communications materials or set minimum requirements for the same between OSPs and users to ensure that users receive all the information they need to make informed decisions about submitting counter-notices, for instance, in the same way that state and federal courts provide pro se litigants with standard forms for pleadings and other court filings. This should include information about fair use.

Any reform also should consider reducing or eliminating the many advantages infringers can enjoy by virtue of the many ways in which they can mask their identity, including reverse proxy services and falsified usernames, email addresses and contact information. Infringers that are subject to takedown notices receive the name and certain contact information regarding the content owner, but the content owner receives no information concerning the alleged infringer. Reforms to the DMCA should consider ways in which OSPs can be more transparent in providing information about alleged infringers to content owners who send DMCA notices.

**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?**

Abuse of takedown notices has been identified by some stakeholders as being a significant problem that should be addressed through new legislation. In this regard, targeted statutory damages based on the number of bad faith notices sent seems to strike an appropriate balance in deterring mass use of take down notices, without unduly deterring infrequent users of the DMCA notice system. For example, the statutory damages could assess a penalty in the range of \$100 - \$500 per bad faith notice letter, with the higher end of the damages range being reserved for repeat infringers. The statutory damages provisions, however, should not penalize content owners for sending out good faith and reasonable take-down notices, even if the notices turn out to be inappropriate due to, for instance, a valid fair use defense.

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

The NYIPLA has not thoroughly reviewed or considered the issues raised in this question, and therefore respectfully declines to answer it at this time. However, NYIPLA believes these are important and significant issues that deserve further consideration.

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

We do not believe executive or legislative review of voluntary agreements between OSPs and copyright owners is the most effective use of federal resources. Rather, these voluntary agreements should remain subject to judicial review through the regular court process. The advantages of reliance on courts is that the suits will address concrete, real disputes for which the litigants have standing, rather than making decisions based on theoretical problems and contractual language. Also, fair use in particular is a matter best handled by the courts relying on precedent, rather than adding a new governmental, and potentially politically charged, voice in the process. To the extent a branch or division of the executive or legislative branches of government may wish to weigh in on voluntary agreements, there are pre-existing mechanisms, including ensuring that the departments receive notice on any complaints filed with respect to such voluntary agreements, and permitting the department either to intervene or appear as amicus where appropriate. As for the appropriate department or agency to receive such a notice, the Department of Justice and the Federal Trade Commission seem the most logical choices, considering the wide range of legal issues beyond copyright – including antitrust – that may be implicated.

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

The NYIPLA has not thoroughly reviewed or considered the issues raised in this question, and therefore respectfully declines to answer it at this time. However, NYIPLA believes these are important and significant issues that deserve further consideration.



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

As internet-connected devices—many of them manufactured outside the United States—become ubiquitous in our homes and workspaces, security testing of the computer programs that operate these devices is essential to Americans’ safety and privacy. Strong encryption is a key not just to the security of these devices but also to doing business securely on the internet. However, there is a constant push and pull between developers of strong encryption and law enforcement, which contends that strong encryption can also be used to hide evidence of crimes. Law enforcement therefore generally seeks back-door access to any encryption protocols—essentially, intentional weaknesses built into the encryption systems to which only law enforcement is supposed to have direct access. Encryption researchers warn that intentional law-enforcement back doors in encryption protocols are nearly inevitably subject to discovery by non-law-enforcement actors.

The Librarian has expanded the temporary regulation governing the exemption for security testing of computer programs. 37 C.F.R. § 201.40(b)(11)(i)–(ii). However, the potential for liability under the Computer Fraud and Abuse Act under both the regulation and the statute, 17 U.S.C. § 1201(j)(2), remains a significant hurdle for good-faith security researchers. The current temporary exemption allows good-faith security research without limitation as to devices, and so long as the environment in which it is carried out is “designed to avoid any harm to individuals or the public.” *Id.* Barring cogent public comments suggesting an ongoing and previously unrecognized threat from these activities, these exemptions, at a minimum, should be made permanent.

But the exemption allows research so long as it is authorized by the owner or operator of the computer in question and specifically requires that the research not violate any applicable law, expressly including the CFAA. This, in effect, removes “or operator” from the regulation, or at a minimum leaves security researchers in a gray area, because a good-faith security researcher acting on authorization from the operator of a computer system but without the owner’s consent could be liable under the CFAA for exceeding authorized access. The permanent exemption therefore should include a similar exemption to the CFAA for good-faith research into the security of computer programs, including the encryption protocols used to protect those programs.

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

In our experience, the triennial rulemaking process for temporary exemptions introduces unnecessary uncertainty into the law by throwing into doubt the lawful nature of various activities. This uncertainty can impede technological innovation and creativity.

We recommend a legislative solution that would make permanent all temporary exemptions that have been renewed for consecutive triennial rulemaking periods. These renewed exemptions have been multiple times through the Copyright Office’s extensive year-long rulemaking process, which gives all interested stakeholders ample opportunity to submit written comments and participate in public hearings. While there are competing policy interests at stake, these interests receive a full and fair hearing during the rulemaking process and are reflected in the exemptions that have been adopted.

In 2018, the Librarian of Congress renewed and expanded all ten temporary exemptions granted in the 2015 triennial rulemaking process and introduced four new exemptions. As the Acting Register noted in her October 2018 recommendation to the Librarian of Congress, there was no serious opposition to any temporary exemptions issued in 2015. This allowed the Register to recommend re-adoption of all of them at an early stage of rulemaking. Thus, the renewed temporary exemptions appear to have been widely accepted by tech companies, content creators and the Register. We believe it is appropriate to make these ten renewed exemptions permanent. The four new exemptions should be made permanent if they are renewed. Moving forward, all temporary exemptions should be presumed to be made permanent after they have been renewed once.

**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?**

Presumptive renewal of the exemptions adopted in a previous rule-making cycle should not be favored. Rather, after a *de novo* review of the original exemption for renewal, upon second renewal, the exemption should enjoy a presumption in favor of making the exemption permanent.

The first triennial renewal of an exemption should not rely on a presumption because the prior three years were the first period in which that exemption was in practice. Data about how effective the exemption was, or whether it was overly or underly inclusive, will be available for review and should be considered without a presumption placing its thumb on the scale. By the time of the second renewal, however, there should be sufficient data to determine whether the exemption should be made permanent. In those situations, a presumption in favor of making the exemption permanent seems appropriate. Such a presumption, however, should remain rebuttable, and can be overcome by either (1) a recommendation by the Register against making the exemption permanent; or (2) a conclusion that the original rulemaking or renewal was arbitrary and capricious.

In order to make the rulemaking process more efficient, we suggest considering converting the notice process to a purely electronic process, with specific exceptions based on a showing that the stakeholder specified acceptable reasons why they should be allowed to submit comments via traditional written means. Use of electronic means for participating in rule making can be encouraged by imposing a modest handling fee for non-electronic submissions. Also, the Copyright Office should consider adding instructional videos and/of FAQ files on the rule-making process to help make the process more transparent and easy to access.

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

Section 1202(b)(1) should be amended by deleting the word "intentionally" and thereby removing the "double-intent" standard from that statute. Section 1202(b)(1) already prohibits removing or altering copyright management information. The acts of removing and altering are non-passive acts which already imply intentionality. One does not "remove" or "alter" copyright management information through inaction or omission. To ensure that innocent actors are not unfairly punished, the statute's "second" intent provision – prohibiting removing or alteration of copyright management information when that actor knows or has reasonable grounds for knowing, that such conduct will "induce, enable, facilitate, or conceal an infringement of any right under this title." – should remain as drafted.

The proposed text for 1202A strikes an appropriate balance between competing interests and should be adopted. Extending rights to authors regarding improper attribution rights is consistent with copyright principles. Certainly, the author is the party most aggrieved when authorship of a work is falsely attributed to someone else, and therefore should have rights. Thus, authors aggrieved by a misattribution of authorship should have the full panoply of remedies available under 17 U.S.C. § 1203.

We would like to thank the Senate Judiciary Committee for seeking the input of the NYIPLA with respect to this important legislative initiative.

Sincerely,

A handwritten signature in black ink, appearing to read "Colman B. Ragan". The signature is fluid and cursive, with the first name "Colman" being more prominent and the last name "Ragan" following in a similar style.

Colman B. Ragan., NYIPLA President