



# Liability of Online Marketplaces – New Legislation and Current Practice

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# Impact of COVID-19 on e-commerce

- The COVID-19 pandemic has significantly accelerated digital transformations and, in particular, led to a major surge in e-commerce.
- According to the United Nations Conference on Trade and Development (UNCTAD) and eTrade report [COVID-19 and E-Commerce: A Global Review](#), there is a strong uptake of e-commerce across regions, with consumers in emerging economies making the greatest shift to online shopping.
- For example, China's online retail sales rose from 19.4% to 24.6% between August 2019 and August 2020.
- The trend towards e-commerce uptake seen in 2020 is likely to be sustained during recovery, the report says.

# Risks caused by the surge of e-commerce (continued)

- E-commerce platforms rely on third-party vendors, and their websites actively seek to enable trade between them and customers to increase overall website traffic. Such platforms have become major facilitators of illicit product trade due to minimal verification carried out on vendors. This issue has been raised long before the pandemic, and it has brought a series of court cases against e-commerce platforms resulting in different liability regimes depending on the activity undertaken or not undertaken by the platform in regards to a third party's illicit product.
- In all countries, the COVID-19 pandemic has reinforced the importance of addressing barriers to e-commerce to leverage the benefits that can be derived from it and cope with the potential downsides of digital transformation.

# Risks caused by the surge of e-commerce

- To address this issue, legislators in the E.U. and the U.S. have introduced different bills on these topics.

# NEW LEGISLATION

# U.S.A Shop SAFE Act (continued)

**The Shop Safe Act** is a bipartisan bill introduced in the House of Representatives on March 2, 2020.

- This bill establishes that an electronic commerce platform shall be liable for trademark infringement by a third-party seller of goods that implicate health and safety unless the platform takes certain actions.
- Specifically, the platform may be contributorily liable if the seller uses a counterfeit mark in connection with selling, offering, or advertising such goods on the platform.

# U.S.A Shop SAFE Act

- The platform may avoid such liability by taking certain actions, including
  1. Requiring the seller to be available for service of process in the United States
  2. Verifying the seller's identity and contact information
  3. Requiring the seller to agree to not use counterfeit marks with goods sold on the platform
  4. Implementing technical measures to prescreen listings on the platform and remove listings or goods being sold with a counterfeit mark
  5. Implementing policies to remove and ban repeat offenders

# U.S.A: Marketplaces INFORM Consumers Act

- The **Integrity, Notification, and Fairness in Online Retail Marketplaces Consumers Act (INFORM)** was introduced in the Senate on March 23, 2021.
- This bill requires online marketplaces to disclose to consumers basic information about high-volume third-party sellers, including the seller's name and address, email address, and telephone number. Violators would be subject to civil penalties.
- High-volume third-party sellers are defined in the Act as vendors who have made at least 200 sales totaling at least \$5,000 over a 1-year period.
- In addition, the proposed legislation requires online marketplaces to provide customers with a hotline to report spurious activity, i.e., the sale of counterfeit, stolen, or otherwise dangerous merchandise.



# E.U.: The Digital Services Act (DSA) (continued)

- The European Commission proposed two legislative initiatives: the **Digital Services Act (DSA)** and **Digital Markets Act (DMA)**
- Both bills were submitted to the European Parliament and the European Council on 15 December 2020. They encompass a single set of new rules applicable across the whole E.U. to create a safer and more open digital space.
- The rules specified in the DSA primarily concern online intermediaries and platforms, including online marketplaces and social networks, while the DMA primarily governs online gatekeeper platforms.

# E.U.: The Digital Services Act (DSA)

- The DSA introduces the following requirements for online platforms:
  1. Publishing the parameters of the algorithms used for content moderation (automated removal of illicit content) and targeted advertisement
  2. Establishing an “effective internal complaint-handling system, which enables the consumer complaints to be lodged electronically and free of charge”
  3. Additional requirements regarding content moderation and targeted advertisements for "very large" platforms (having more than 45 million users).
- If platforms fail to comply with the regulations stipulated by the DSA, they could be subject to fines of up to 10 percent of global revenue in the case of repeat offenders

# NEW CASE LAW

# U.S.A: *Bolger v. Amazon.com, LLC*

- Plaintiff Angela Bolger bought a replacement laptop computer battery on the online shopping website operated by defendant Amazon.com, LLC. Several months after it was shipped to Bolger from the Amazon warehouse, the battery exploded, causing severe burns to her as a result.
- The lower court granted Amazon's motion for summary judgment on the basis that Amazon did not manufacture or sell the battery.
- However, the California Court of Appeals reversed the decision. It stated, "whatever term we use to describe Amazon's role, be it retailer, distributor, or merely facilitator, it was pivotal in bringing the product here to the consumer." Amazon's appeal to the California Supreme Court was refused, creating a pathway for other state and federal decisions holding Amazon and other online marketplaces liable for defective products sold by third-party sellers on its platforms.

# U.S.A: *Stiner v. Amazon.com, Inc.*

- Eighteen-year-old Logan Stiner died after ingesting a fatal dose of caffeine powder that he obtained from his friend, K.K. His friend purchased the caffeine powder on Amazon. After K.K. gave some caffeine powder to Logan, he died of cardiac arrhythmia and seizures from acute caffeine toxicity.
- Dennis Steiner, the administrator of Logan's estate, brought this action against Amazon, alleging claims under the Ohio Products Liability Act (enacted in 1988) and the Ohio Pure Food and Drug Act.
- The Ohio Supreme Court ruled that under Ohio's Products Liability Act, Amazon could not be held liable because it did not meet the required definition of a "supplier" of the caffeine powder.

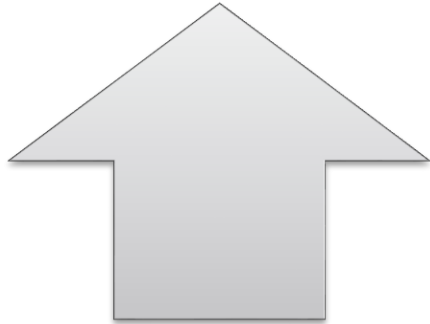
# **E.U.: *Coty Germany GmbH v. Amazon Services Europe Sàrl* (continued)**

- The claimant, Coty Germany GmbH (Coty), is a perfume distributor and licensee of the E.U. trademark DAVIDOFF.
- Coty filed a trademark infringement claim against Amazon (i.e. Amazon's affiliates in the E.U.) before The Landgericht requesting the defendants to be ordered to desist, in the course of trade, from stocking or dispatching 'Davidoff Hot Water' brand perfumes in Germany or from causing them to be stocked or dispatched, if those goods were not put on the Union market with Coty's consent.

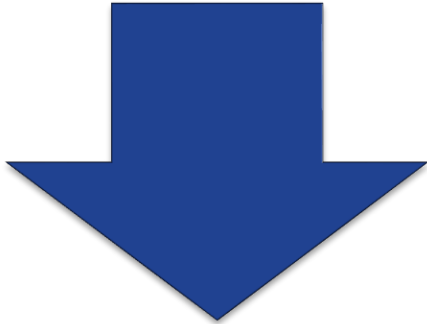
# E.U.: Coty Germany GmbH v. Amazon Services Europe Sàrl

- The action was dismissed at first instance and on appeal, but Coty appealed further on the point of law to the Federal Court. The Federal Court sought the CJEU's input regarding the proper interpretation of Article 9 EUTMR:
  - *'Does a person who, on behalf of a third party, stores goods which infringe trademark rights, without having knowledge of that infringement, stock those goods for the purpose of offering them or putting them on the market, if it is not that person himself but rather the third party alone which intends to offer the goods or put them on the market?'*
- The Court of Justice of the European Union (CJEU) held that Amazon was storing the goods without any interest to offer them or put them on the market (or to control these activities).

# E.U. vs. U.S.: Differences in perceiving the role of online marketplaces in E-commerce



***E.U.: Online marketplace is just an intermediary, and thus, it cannot be directly liable***



***U.S.: 'Whatever term we use to describe Amazon's role, be it retailer, distributor, or merely facilitator, it was pivotal in bringing the product here to the consumer' (Bolger v. Amazon.com, LLC 431, 438, Patricia Guerrero)***



(1) evaluates the frequency of cases of waste, fraud, or abuse perpetrated across multiple Federal science agencies by an awardee or group of awardees;

(2) evaluates the effectiveness of existing mechanisms to detect waste, fraud, and abuse perpetrated across multiple Federal science agencies by an awardee or group of awardees; and

(3) evaluates options for strengthening detection of waste, fraud, and abuse perpetrated across multiple Federal science agencies by an awardee or group of awardees, including by examining the benefits and drawbacks of—

(A) providing additional support to agency inspectors general with regard to coordinated oversight of Federal and technology grant making investments; and

(B) alternative mechanisms for strengthening prevention and detection of waste, fraud, and abuse across Federal science agencies perpetrated across multiple Federal science agencies by an awardee or group of awardees, such as the establishment of a special inspector general or other mechanisms as the Comptroller General sees fit.

**SA 2056.** Mr. PAUL submitted an amendment intended to be proposed to amendment SA 1502 proposed by Mr. SCHUMER to the bill S. 1260, to establish a new Directorate for Technology and Innovation in the National Science Foundation, to establish a regional technology hub program, to require a strategy and report on economic security, science, research, innovation, manufacturing, and job creation, to establish a critical supply chain resiliency program, and for other purposes; which was ordered to lie on the table; as follows:

Beginning on page 478, strike line 17, and all that follows through page 485, line 18, and insert the following:

**SEC. 2527. BASIC RESEARCH.**

(a) **NONDISCLOSURE OF MEMBERS OF GRANT REVIEW PANEL.**—Notwithstanding any other provision of law, each agency that awards a Federal research grant shall not disclose, either publicly or privately, to an applicant for such grant the identity of any member of the grant review panel for such applicant.

(b) **DOWNSTREAM REPORTING; IMPARTIALITY.**—

(1) **DOWNSTREAM REPORTING.**—Any person or institution awarded a grant from a Federal research agency shall—

(A) notify and seek authorization from the relevant agency for any funds derived from the grant made available through a subgrant or subsequent grant (including to an employee or subdivision of the grant recipient's organization); and

(B) ensure that each subgrant or subsequent grant award (including to an employee or subdivision of the grant recipient's organization) funded with funds derived from the Federal grant is within the scope of the Federal grant award.

(2) **IMPARTIALITY IN FUNDING SCIENTIFIC RESEARCH.**—Notwithstanding any other provision of law, each Federal agency, in awarding grants for scientific research, shall be impartial and shall not seek to advance any political position or fund a grant to reach a predetermined conclusion.

**SEC. 2528. GAO STUDY ON OVERSIGHT OF FEDERAL SCIENCE AND TECHNOLOGY GRANT MAKING AND INVESTMENTS.**

(a) **FINDINGS.**—Congress finds that—

(1) in instances such as the Troubled Asset Relief Program, the American Recovery and Reinvestment Act of 2009, Iraq, and Afghani-

stan, Congress has created special inspectors general and other oversight entities focused on particular program areas who have performed in outstanding ways;

(2) the oversight entities described in paragraph (1) have helped to strengthen oversight in cross-agency activities and where component inspectors general may have otherwise faced significant challenges;

(3) because of the cross-agency nature of Federal science and technology activities, Congress created the Office of Science and Technology Policy to coordinate and harmonize among science functions at agencies;

(4) the United States innovation ecosystem, which uses multiple science agencies to invest in research and development, can make it more difficult to identify and remove scientists who violate research integrity principles;

(5) the single agency jurisdiction of an agency inspector general can be a disadvantage with respect to their oversight roles, and opportunities to strengthen the system may exist;

(6) single agency jurisdiction of inspectors general may also make it difficult to harmonize principles and standards for oversight of waste, fraud, and abuse among agencies; and

(7) certain issues of fraud, waste, and abuse in Federal science and technology activities span multiple agencies and are more apparent through cross-agency oversight.

(b) **STUDY.**—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall conduct a study and submit to Congress a report that—

(1) evaluates the frequency of cases of waste, fraud, or abuse perpetrated across multiple Federal science agencies by an awardee or group of awardees;

(2) evaluates the effectiveness of existing mechanisms to detect waste, fraud, and abuse perpetrated across multiple Federal science agencies by an awardee or group of awardees; and

(3) evaluates options for strengthening detection of waste, fraud, and abuse perpetrated across multiple Federal science agencies by an awardee or group of awardees, including by examining the benefits and drawbacks of—

(A) providing additional support to agency inspectors general with regard to coordinated oversight of Federal and technology grant making investments; and

(B) alternative mechanisms for strengthening prevention and detection of waste, fraud, and abuse across Federal science agencies perpetrated across multiple Federal science agencies by an awardee or group of awardees, such as the establishment of a special inspector general or other mechanisms as the Comptroller General sees fit.

**SA 2057.** Mr. BARRASSO (for himself, Ms. MURKOWSKI, Ms. LUMMIS, Mr. LANKFORD, Mr. CRAMER, Mrs. HYDE-SMITH, and Mr. HOEVEN) submitted an amendment intended to be proposed by him to the bill S. 1260, to establish a new Directorate for Technology and Innovation in the National Science Foundation, to establish a regional technology hub program, to require a strategy and report on economic security, science, research, innovation, manufacturing, and job creation, to establish a critical supply chain resiliency program, and for other purposes; which was ordered to lie on the table; as follows:

At the end of title V, add the following:

**SEC. 522. GLOBAL COOPERATIVE FRAMEWORK TO END HUMAN RIGHTS ABUSES IN SOURCING CRITICAL MINERALS.**

(a) **IN GENERAL.**—The Secretary of State shall seek to convene a meeting of foreign leaders to establish a multilateral framework to end human rights abuses, including the exploitation of forced labor and child labor, related to the mining and sourcing of critical minerals.

(b) **CERTIFICATION SCHEME.**—The Secretary shall seek to ensure that the framework under subsection (a) includes a certification scheme, comprised of—

(1) minimum requirements for national legislation, institutions, and import and export controls related to the sourcing of critical minerals;

(2) measures to enforce transparency in the exchange of production, transportation, and end-use manufacturing data related to critical minerals, including through the use of blockchain technology, if feasible;

(3) prohibitions on the purchase or trade in critical minerals unless parties to the purchase or trade are certified under and in compliance with the framework; and

(4) measures to certify shipments as in compliance with the framework, including requiring the provision of supporting documentation.

(c) **IMPLEMENTATION REPORT.**—The Secretary shall lead the development of an annual global report on the implementation of the framework under subsection (a), including progress and recommendations to fully end human rights abuses, including the exploitation of forced labor and child labor, related to the extraction of critical minerals around the world.

(d) **REVIEW OF CONFLICT MINERALS LIST.**—The Secretary shall review the list of conflict minerals under section 1502(e)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203; 124 Stat. 228) to determine whether certain critical minerals, such as cobalt, should be included on the list.

(e) **CRITICAL MINERAL DEFINED.**—In this section, the term “critical mineral” has the meaning given the term in section 7002(a) of the Energy Act of 2020 (division Z of Public Law 116-260; 30 U.S.C. 1606(a)).

**SA 2058.** Mr. CASSIDY (for himself, Mr. DURBIN, Ms. HIRONO, Mr. COONS, Mr. WARNOCK, and Mr. GRASSLEY) submitted an amendment intended to be proposed to amendment SA 1502 proposed by Mr. SCHUMER to the bill S. 1260, to establish a new Directorate for Technology and Innovation in the National Science Foundation, to establish a regional technology hub program, to require a strategy and report on economic security, science, research, innovation, manufacturing, and job creation, to establish a critical supply chain resiliency program, and for other purposes; which was ordered to lie on the table; as follows:

At the appropriate place in division F, insert the following:

**SEC. \_\_\_\_ . COLLECTION, VERIFICATION, AND DISCLOSURE OF INFORMATION BY ONLINE MARKETPLACES TO INFORM CONSUMERS.**

(a) **COLLECTION AND VERIFICATION OF INFORMATION.**—

(1) **COLLECTION.**—

(A) **IN GENERAL.**—An online marketplace shall require any high-volume third party seller on such online marketplace's platform to provide, not later than 7 days after qualifying as a high-volume third party seller on the platform, the following information to the online marketplace:

(i) BANK ACCOUNT.—

(I) IN GENERAL.—A bank account number, or, if such seller does not have a bank account, the name of the payee for payments issued by the online marketplace to such seller.

(II) PROVISION OF INFORMATION.—The bank account or payee information required under subclause (I) may be provided by the seller in the following ways:

(aa) To the online marketplace.

(bb) To a payment processor or other third party contracted by the online marketplace to maintain such information, provided that the online marketplace ensures that it can obtain such information on demand from such payment processor or other third party.

(ii) CONTACT INFORMATION.—Contact information for such seller as follows:

(I) With respect to a high-volume third party seller that is an individual, the individual's name.

(II) With respect to a high-volume third party seller that is not an individual, one of the following forms of contact information:

(aa) A copy of a valid government-issued identification for an individual acting on behalf of such seller that includes the individual's name.

(bb) A copy of a valid government-issued record or tax document that includes the business name and physical address of such seller.

(iii) TAX ID.—A business tax identification number, or, if such seller does not have a business tax identification number, a taxpayer identification number.

(iv) WORKING EMAIL AND PHONE NUMBER.—A current working email address and phone number for such seller.

(B) NOTIFICATION OF CHANGE; ANNUAL CERTIFICATION.—

(i) IN GENERAL.—An online marketplace shall—

(I) periodically, but not less than annually, notify any high-volume third party seller on such online marketplace's platform of the requirement to keep any information collected under subparagraph (A) current; and

(II) require any high-volume third party seller on such online marketplace's platform to, not later than 7 days after receiving the notice under subclause (I), electronically certify that—

(aa) there have been no changes to such seller's information; or

(bb) such seller has provided any changes to such information to the online marketplace.

(ii) SUSPENSION.—In the event that a high-volume third party seller does not provide the information or certification required under this paragraph, the online marketplace shall, after providing the seller with written or electronic notice and an opportunity to provide such information or certification not later than 7 days after the issuance of such notice, suspend any future sales activity of such seller until such seller provides such information or certification.

(2) VERIFICATION.—

(A) IN GENERAL.—An online marketplace shall—

(i) verify the information collected under paragraph (1)(A) not later than 7 days after such collection; and

(ii) verify any change to such information not later than 7 days after being notified of such change by a high-volume third party seller under paragraph (1)(B).

(B) PRESUMPTION OF VERIFICATION.—In the case of a high-volume third party seller that provides a copy of a valid government-issued tax document, any information contained in such document shall be presumed to be verified as of the date of issuance of such document.

(3) DATA USE LIMITATION.—Data collected solely to comply with the requirements of this section may not be used for any other purpose.

(b) DISCLOSURE REQUIRED.—

(1) REQUIREMENT.—

(A) IN GENERAL.—An online marketplace shall—

(i) require any high-volume third party seller on such online marketplace's platform to provide the information described in subparagraph (B) to the online marketplace; and

(ii) disclose the information described in subparagraph (B) to consumers in a clear and conspicuous manner in the—

(I) order confirmation message or other document or communication made to a consumer after a purchase is finalized; and

(II) consumer's account transaction history.

(B) INFORMATION DESCRIBED.—The information described in this subparagraph is the following:

(i) Subject to paragraph (2), the identity of the high-volume third party seller, including—

(I) the full name of the seller;

(II) the physical address of the seller; and

(iii) contact information for the seller, including—

(aa) a current working phone number; and

(bb) a current working email address or other means of electronic messaging (which may be provided to such seller by the online marketplace).

(ii) Whether the high-volume third party seller used a different seller to supply the consumer product to the consumer upon purchase, and, upon the request of an authenticated purchaser, the information described in clause (i) relating to any such seller that supplied the consumer product to the purchaser, if such seller is different than the high-volume third party seller listed on the product listing prior to purchase.

(2) EXCEPTION.—

(A) IN GENERAL.—Subject to subparagraph (B), upon the request of a high-volume third party seller, an online marketplace may provide for partial disclosure of the identity information required under paragraph (1)(B)(i) in the following situations:

(i) If such seller certifies to the online marketplace that the seller does not have a business address and only has a residential street address, or has a combined business and residential address, the online marketplace may—

(I) disclose only the country and, if applicable, the State in which such seller resides; and

(II) inform consumers that there is no business address available for the seller and that consumer inquiries should be submitted to the seller by phone, email, or other means of electronic messaging provided to such seller by the online marketplace.

(ii) If such seller certifies to the online marketplace that the seller is a business that has a physical address for product returns, the online marketplace may disclose the seller's physical address for product returns.

(iii) If such seller certifies to the online marketplace that the seller does not have a phone number other than a personal phone number, the online marketplace shall inform consumers that there is no phone number available for the seller and that consumer inquiries should be submitted to the seller's email address or other means of electronic messaging provided to such seller by the online marketplace.

(B) LIMITATION ON EXCEPTION.—If an online marketplace becomes aware that a high-volume third party seller has made a false representation to the online marketplace in order to justify the provision of a partial dis-

closure under subparagraph (A) or that a high-volume third party seller who has requested and received a provision for a partial disclosure under subparagraph (A) has not provided responsive answers within a reasonable time frame to consumer inquiries submitted to the seller by phone, email, or other means of electronic messaging provided to such seller by the online marketplace, the online marketplace shall, after providing the seller with written or electronic notice and an opportunity to respond not later than 7 days after the issuance of such notice, suspend any future sales activity of such seller unless such seller consents to the disclosure of the identity information required under paragraph (1)(B)(i).

(3) REPORTING MECHANISM.—An online marketplace shall disclose to consumers in a clear and conspicuous manner on the product listing of any high-volume third party seller a reporting mechanism that allows for electronic and telephonic reporting of suspicious marketplace activity to the online marketplace.

(4) COMPLIANCE.—If a high-volume third party seller does not comply with the requirements to provide and disclose information under this subsection, the online marketplace shall, after providing the seller with written or electronic notice and an opportunity to provide or disclose such information not later than 7 days after the issuance of such notice, suspend any future sales activity of such seller until the seller complies with such requirements.

(c) ENFORCEMENT.—

(1) UNFAIR AND DECEPTIVE ACTS OR PRACTICES.—A violation of subsection (a) or (b) by an online marketplace shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(2) POWERS OF THE COMMISSION.—

(A) IN GENERAL.—The Commission shall enforce subsections (a) and (b) in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this section.

(B) PRIVILEGES AND IMMUNITIES.—Any person that violates subsection (a) or (b) shall be subject to the penalties, and entitled to the privileges and immunities, provided in the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(3) REGULATIONS.—The Commission may promulgate regulations under section 553 of title 5, United States Code, with respect to the collection, verification, or disclosure of information under this section, provided that such regulations are limited to what is necessary to collect, verify, and disclose such information.

(4) AUTHORITY PRESERVED.—Nothing in this section shall be construed to limit the authority of the Commission under any other provision of law.

(d) SEVERABILITY.—If any provision of this section, or the application thereof to any person or circumstance, is held invalid, the remainder of this section and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected by the invalidation.

(e) DEFINITIONS.—In this section:

(1) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(2) CONSUMER PRODUCT.—The term "consumer product" has the meaning given such term in section 101 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 note) and section 700.1 of title 16, Code of Federal Regulations.

## (3) HIGH-VOLUME THIRD PARTY SELLER.—

(A) IN GENERAL.—The term “high-volume third party seller” means a participant on an online marketplace’s platform who is a third party seller and who, in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete sales or transactions of new or unused consumer products and an aggregate total of \$7,000 or more in gross revenues.

(B) CLARIFICATION.—For purposes of calculating the number of discrete sales or transactions or the aggregate gross revenues under subparagraph (A), an online marketplace shall only be required to count sales or transactions made through the online marketplace and for which payment was processed by the online marketplace, either directly or through its payment processor.

(4) ONLINE MARKETPLACE.—The term “online marketplace” means any person or entity that operates a consumer-directed electronically based or accessed platform that—

(A) includes features that allow for, facilitate, or enable third party sellers to engage in the sale, purchase, payment, storage, shipping, or delivery of a consumer product in the United States;

(B) is used by one or more third party sellers for such purposes; and

(C) has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products.

(5) SELLER.—The term “seller” means a person who sells, offers to sell, or contracts to sell a consumer product through an online marketplace’s platform.

## (6) THIRD PARTY SELLER.—

(A) IN GENERAL.—The term “third party seller” means any seller, independent of an online marketplace, who sells, offers to sell, or contracts to sell a consumer product in the United States through such online marketplace’s platform.

(B) EXCLUSIONS.—The term “third party seller” does not include, with respect to an online marketplace—

(i) a seller who operates the online marketplace’s platform; or

(ii) a business entity that has—

(I) made available to the general public the entity’s name, business address, and working contact information;

(II) an ongoing contractual relationship with the online marketplace to provide the online marketplace with the manufacture, distribution, wholesaling, or fulfillment of shipments of consumer products; and

(III) provided to the online marketplace identifying information, as described in subsection (a), that has been verified in accordance with that subsection.

(7) VERIFY.—The term “verify” means to confirm information provided to an online marketplace pursuant to this section by the use of one or more methods that enable the online marketplace to reliably determine that any information and documents provided are valid, corresponding to the seller or an individual acting on the seller’s behalf, not misappropriated, and not falsified.

(f) RELATIONSHIP TO STATE LAWS.—No State or political subdivision of a State may establish or continue in effect any law, regulation, rule, requirement, or standard that conflicts with the requirements of this section.

(g) EFFECTIVE DATE.—This section shall take effect 180 days after the date of the enactment of this Act.

**SA 2059.** Mr. PADILLA (for himself, Mr. LUJÁN, Ms. CORTEZ MASTO, and Mr. CORNYN) submitted an amendment intended to be proposed to amendment SA 1502 proposed by Mr. SCHUMER to the bill S. 1260, to establish a new Di-

rectorate for Technology and Innovation in the National Science Foundation, to establish a regional technology hub program, to require a strategy and report on economic security, science, research, innovation, manufacturing, and job creation, to establish a critical supply chain resiliency program, and for other purposes; which was ordered to lie on the table; as follows:

At the end of division F, add the following:

**TITLE IV—DEVELOPMENT OF PROGRAM TO SUPPORT PARTNERSHIPS FOR HBCU/MSI/TCU-DESIGNATED INSTITUTIONS**

**SEC. 6401. FINDINGS.**

(a) FINDINGS.—Congress finds the following:

(1) Strengthening the United States research enterprise is critical to our Nation’s leadership in science and technology.

(2) Promoting diversity, equity, and inclusion in the federally funded research pipeline is essential to ensuring the development of scientific breakthroughs that benefit every person of the United States.

(3) Partnerships between institutions of higher education with the highest levels of research activity and historically Black colleges and universities, Tribal Colleges or Universities, or other minority-serving institutions that are committed to the recruitment, retention, and advancement of historically underrepresented populations benefit the United States at large.

(4) The STEM workforce drives forward the United States economy and our global competitiveness.

(5) Federal funding for initiatives that support the development of a diverse research workforce pipeline across institutions of higher education are in the best interest of the United States research enterprise.

(6) Congress believes that Federal science agencies should provide funding to foster collaboration between institutions of higher education to promote a more diverse, equitable, and inclusive research workforce and enterprise.

**SEC. 6402. PURPOSE.**

The purpose of this title is to provide funding to Federal science agencies for distribution to eligible partnerships that commit resources to collaboration and cooperation with historically Black colleges or universities, Tribal Colleges or Universities, Hispanic-serving institutions, or other minority-serving institutions, including—

(1) programs that help enroll alumni from historically Black colleges or universities, Tribal Colleges or Universities, or other minority-serving institutions in postgraduate programs leading to master or doctoral degrees in STEM disciplines at partner institutions of higher education with the highest levels of research activity;

(2) summer research internship support grants at partner institutions of higher education with the highest levels of research activity;

(3) research projects that include students at historically Black colleges and universities, Tribal Colleges and Universities, or other minority-serving institutions, and at institutions of higher education with the highest levels of research activity; and

(4) competitive grant awards to enhance and expand pathways to the professoriate for underrepresented students.

**SEC. 6403. DEFINITIONS.**

In this title:

(1) ASIAN AMERICAN AND NATIVE AMERICAN PACIFIC ISLANDER-SERVING INSTITUTION.—The term “Asian American and Native American Pacific Islander-serving institution” has the

meaning given the term in section 320(b) or 371(c)(2) of the Higher Education Act of 1965 (20 U.S.C. 1059g(b) and 1067q(c)(2)).

(2) ELIGIBLE PARTNERSHIP.—The term “eligible partnership” means a partnership that includes—

(A)(i) an institution with the highest levels of research activity; or

(ii) a National Laboratory; and

(B) not less than 1 historically Black college or university, Tribal College or University, or other minority-serving institution.

(3) FEDERAL SCIENCE AGENCY.—The term “Federal science agency” means any Federal agency with at least \$100,000,000 in basic and applied research obligations in fiscal year 2021.

(4) GRANTEE.—The term “grantee” means the legal entity to which a grant is awarded and that is accountable to the Federal Government for the use of the funds provided.

(5) INSTITUTION WITH THE HIGHEST LEVELS OF RESEARCH ACTIVITY.—The term “institution with the highest levels of research activity”, means an institution of higher education that is classified as an R1 University, or successor designation, by the Carnegie Classification of Institutions of Higher Education.

(6) HISPANIC-SERVING INSTITUTION.—The term “Hispanic-serving institution” means an institution of higher education as defined in section 502 of the Higher Education Act of 1965 (20 U.S.C. 1101a).

(7) HISTORICALLY BLACK COLLEGE OR UNIVERSITY.—The term “historically Black college and university” has the meaning given the term “part B institution” in section 322 of the Higher Education Act of 1965 (20 U.S.C. 1061).

(8) INSTITUTION OF HIGHER EDUCATION.—The term “institution of higher education” has the meaning given the term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

(9) MINORITY-SERVING INSTITUTION.—The term “minority-serving institution” means a historically Black college or university, predominantly Black institution, Hispanic-serving institution, Asian American and Native American Pacific Islander-Serving Institution, or Tribal College or University.

(10) NATIONAL LABORATORY.—The term “National Laboratory” has the meaning given the term in section 2 of the Energy Policy Act of 2005 (42 U.S.C. 15801).

(11) PREDOMINANTLY BLACK INSTITUTION.—The term “predominantly Black institution” means—

(A) a Predominantly Black Institution, as defined in section 318(b) of the Higher Education Act of 1965 (20 U.S.C. 1059e(b)); or

(B) a Predominantly Black institution, as defined in section 371(c)(9) of such Act (20 U.S.C. 1067q(c)(9)).

(12) STEM.—The term “STEM” means science, technology, engineering, and mathematics, including computer science and biological and agricultural sciences.

(13) TRIBAL COLLEGE OR UNIVERSITY.—The term “Tribal College or University” has the meaning given the term in section 316(b) of the Higher Education Act of 1965 (20 U.S.C. 1059c(b)).

**SEC. 6404. DEVELOPMENT OF PROGRAM TO SUPPORT PARTNERSHIPS FOR HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, TRIBAL COLLEGES OR UNIVERSITIES, OR OTHER MINORITY-SERVING INSTITUTIONS.**

(a) GRANT PROGRAM AUTHORIZED.—From amounts made available under section 6406, the head of each Federal science agency shall make awards to eligible partnerships in order to support the recruitment, retention, and advancement of underrepresented students in STEM fields, including students who are the first in their families to graduate



# **“DIGITAL COPYRIGHT ACT”**

(discussion draft issued by Sen. Thomas Roland Tillis, R-N.C.)

*A proposed re-write of DMCA Section 512 Safe Harbors for OSPs*

**Barry Werbin, Esq.**

**Herrick, Feinstein LLP**

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# DMCA – 17 USC § 512

## OSP SAFE HARBORS



Section 512 online service provider (OSP) safe harbor was enacted in 1998 as part of Digital Millennium Copyright Act (DMCA). Created a system intended at the time to foster the growth of what was then a burgeoning internet economy, by balancing rights of copyright owners and OSPs respecting infringement, including qualified limitations on OSP liability respecting transmission, publication and storage of content posted by third parties.

# DMCA – 17 USC § 512

## OSP SAFE HARBORS



- OSPs must register DMCA agents with Copyright Office for “take down” notices.
- Rights owners issuing takedown notices must specify the web page and specific infringing content.
- Counternotification process by end user who posted content.
- OSP must adopt and inform users of “repeat infringer” termination policies.
- OSP safe harbors cover transmission, caching and storage of content at the direction of a user:
  - For **storage of content at the direction of a user**: OSP either does not have actual knowledge of infringing activity or is “not aware of facts or circumstances from which infringing activity **is apparent**” (*i.e.*, no “red flag” knowledge or “willful blindness”).
  - OSPs **transmitting, routing, or providing connections (“transitory digital networks”)** are protected if the transmission was (i) initiated by a third party, (ii) carried out through automatic technical process w/o selection or modification of content by OSP, (iii) OSP does not select the recipients, and (iv) copy is not maintained on the system except for limited time to permit access by recipient. Similar qualifications apply to intermediate or temporary storage of content being transmitted. *NOTE no knowledge qualifiers.*

# DMCA 512 “RED FLAG” KNOWLEDGE



Courts have held that “red flag knowledge” arises only when an OSP is aware of facts that would have made it objectively obvious to a reasonable person that a specific piece of content was an infringement:

- *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (rejected argument that “actual” and “red flag” knowledge referred to “specific” and “generalized” knowledge respectively).
- *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013) (actual and red flag knowledge have subjective and objective standards, respectively, citing *Viacom*).
- *Capitol Records v. Vimeo, LLC*, 826 F.3d 78 (2nd Cir 6/16/16): “Red flag” knowledge did not exist where Vimeo’s employees viewed certain user-uploaded videos containing all or substantially all of recognizable copyrighted songs. This was insufficient to make infringement obvious to a reasonable person who wasn’t a music or copyright expert.
- *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 92–93 (2d Cir. 2016): MP3tunes did not qualify for safe harbor where it actively encouraged infringement, including urging users to upload/download specific copyrighted works and burn such works to DVDs.



# COPYRIGHT OFFICE 2020 REPORT ON SECTION 512



“The Copyright Office concludes that the operation of the section 512 safe harbor system today is unbalanced. In its examination of the balance established by Congress, the Office outlines five principles that guided its review, identifies its findings, and makes several recommendations for Congress to consider. The Report highlights areas where current implementation of section 512 is out of sync with Congress’ original intent, including: eligibility qualifications for the service provider safe harbors; repeat infringer policies; knowledge requirement standards; specificity within takedown notices; non-standard notice requirements; subpoenas; and injunctions. While the Office is not recommending any wholesale changes to section 512, the Report points out these and other areas where Congress may wish to consider legislation to rebuild the original balance between rightsholders and online service providers.”

- <https://www.copyright.gov/newsnet/2020/824.html>  
<https://www.copyright.gov/policy/section512/>



# PROPOSED DIGITAL COPYRIGHT ACT (“DCA”):

SEN. THOM. TILLIS (R-N.C.), CHAIRMAN SENATE JUDICIARY INTELLECTUAL PROPERTY SUBCOMMITTEE (RELEASED DEC. 22, 2020)



- Would rewrite DMCA 512 to limit OSP’s **safe harbor defense** and reduce notification obligations for copyright rights owners, including replacing existing notice-and-takedown process with “notice-and-staydown” process for complete and near complete works.
- Would adopt Copyright Office 2015 recommendations on **orphan works** to limit liability for good faith content users who, after diligent searches, cannot locate a copyright owner.
- Would **move Copyright Office to the Executive Branch** and make the Register of Copyright a presidential appointee requiring Senate approval.
- Would **modernize Section 1210 circumvention of technological measures exemptions** to (i) extend them to third parties who assist at the direction of an exempt group of end users (e.g., farmers who need their trucks repaired); and (ii) make permanent the exemptions for visually blind/impaired using assistive technologies; unlocking used mobile devices; and diagnosing and repairing computer programs.
- Require copyright owners to affix **copyright management information** (CMI) to digital copies with author attribution and give such authors private right of action.
- Adjudication of certain “small claims” by a **copyright small claims tribunal**.
- Require Copyright Office to **permit application corrections** where good faith errors occurred.
- Would allow for **group registration** of both published and unpublished works.

# PROPOSED DIGITAL COPYRIGHT ACT

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



OSPs would not be liable for infringement by reason of:

- Their **transmitting, routing, or providing connections** for material through a system/network controlled/operated by the provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, against infringement liability, if the provider:
  - has no actual knowledge that content is infringing;
  - is not aware of facts/circumstances from which infringing activity is likely (*i.e.*, “red flag” knowledge);
  - is not willfully blind with respect to the infringement, or does not induce the infringement;
- For OSPs who either (i) **provide storage** at the direction of a user of material that resides on a system/network controlled/operated by or for the provider, or (ii) provide **referring or linking users** to an online location containing infringing material or activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link: They must meet the above criteria, AND
  - not receive a financial benefit directly attributable to the infringing activity, in a case where the provider has the right and ability to control that activity.

# PROPOSED DIGITAL COPYRIGHT ACT:

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



OSPs receiving takedown notices must “act expeditiously” to:

- remove, or disable access to, the material that is claimed to be infringing or the subject of infringing activity; and
- notify the user, in accordance with standards established under rules to be issued by the Copyright Office, of:
  - the removal or disabling, as applicable;
  - the right of the user to file a counter-notification

*AND....*

# PROPOSED DIGITAL COPYRIGHT ACT:

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



- OSP must takes steps to ensure that, absent a sworn statement from the user that, subject to subsection (f) [false and bad faith removal notices], the user has a good faith belief that the use is licensed or authorized by law, including that the use is permitted under section 107 [fair use], the allegedly infringing materials ***stays down*** when:
  - a **complete or near complete copy** of a copyrighted work already identified in a notification of claimed infringement or list of unauthorized works..., or
  - **any portion** of a copyrighted work is **already identified** in a notification of claimed infringement or list of unauthorized works ..., if the service provider derives its commercial value predominantly from short-form media.

# PROPOSED DIGITAL COPYRIGHT ACT:

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



- OPS to follow “reasonableness best practices” to be established by the Register of Copyrights and updated every five years, that account for factors including the type and size of the service provider, and the scale of infringement that occurs on the platform.
- “Best practices” may include standards such as requiring a user who uploads, publicly performs, or displays content on a service to affirm that the user holds the copyright to that content, has permission to upload or publicly perform the content, or is otherwise authorized by law (including but not limited to fair use).
  - Web button
  - Terms of service

# PROPOSED DIGITAL COPYRIGHT ACT:

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



- Notifications of claimed infringement: written communication provided to the designated agent of the service provider that includes the following:
  - Physical/electronic signature of person authorized to act for copyright owner.
  - Identification of copyrighted work allegedly infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, *a non-exhaustive representative list* of those allegedly infringed works at that website.
  - Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
  - If the same copyrighted work is claimed to be infringed by multiple items of material or at multiple locations on a single website, the identification shall be sufficient for the purposes of clause (i) if the notification identifies not less than 1 such item of material and not less than 1 such location, rather than specific web addresses for each location.

# PROPOSED DIGITAL COPYRIGHT ACT:

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



- Notifications must also provide:
  - Information reasonably sufficient to permit the service provider to contact the complaining party [address, telephone number, mail address]
  - A statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
  - A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner.
- A notice that fails to substantially comply with the above requirements cannot be used to determine whether a service provider has actual knowledge or is aware of facts/circumstances from which infringing activity is apparent.
- However, if the notice fails to comply only with the physical/electronic signature requirement [*“partial compliance”*], the service provider only escapes liability if it: Promptly attempts to contact the person submitting the notification or takes other reasonable actions to assist in the receipt of a notification that substantially complies with the notice authorization provision.

# PROPOSED DIGITAL COPYRIGHT ACT:

## LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE



- “Takedown” notification penalties and restrictions:
  - Party who submits a takedown notification without a [subjective] good faith belief that the use that is the subject of the notification is unauthorized shall be subject to damages.
  - Party submitting the notification may not include information with respect to licensing or any demand of payment.
- Counter-notifications by posting users: As per existing DMCA.
- A notice sender to whom a counter-notification is provided may send the service provider a challenge claiming that the counter notification is facially invalid. Bad faith challenges are subject to claims for damages.
- Notice senders who repeatedly issue false notifications would be “blacklisted” by Register of Copyrights.



# COMMENTS BY INTEREST GROUPS:

## *ABA IP LAW SECTION*



### ***ABA IP Law Section:***

- OSPs should be required to act when an objectively reasonable person would be aware of or willfully blind to infringing material on their systems.
- Sophisticated OSPs should be required to monitor their systems and to remove infringing content without awaiting receipt of a takedown demand.
- OSPs should be required to remove reasonably identified material, including material identified through a representative list of works.
- Persons who make knowing, material misrepresentations through the notification system should be held monetarily liable.

# COMMENTS BY INTEREST GROUPS: ASSOCIATION OF AMERICAN PUBLISHERS



## **AAP:**

- “The DMCA has a tremendous impact on everyone who drives and benefits from the whirl of modern commerce—from copyright owners to online services providers to consumers and users of creative content.”
- “Regrettably, the once-innovative DMCA safe harbor system is now deeply damaged and no longer separates lawful copyright transactions from egregious online infringement. Rather, the safe harbors provide broad and unwarranted immunity to bad faith actors—some of whom monetize piracy—unfairly burdening copyright owners to locate and identify infringements and, worst of all, to engage in an interminable game of whack-a-mole that provides little, if any, relief from the pervasive violation of their rights.”

# DCA COMMENTS: RE:CREATE COALITION



## Re:Create Coalition (American Library Assoc., Open Technology Institute, EFF and others):

- “The DMCA, despite its critics, has aged well....Internet creativity is flourishing.... Consumers are enjoying the new forms of content available on these platforms and the growth of new creatives is not stopping anytime soon.... The [DCA] would have a chilling effect on the internet ecosystem. Had it passed just 10 years ago, this new creative industry would never have been created.”
- “The DCA makes the notice and takedown/staydown framework apply to all providers, including email, conduits and private clouds.... Notice and takedown, or when it qualifies, staydown does not make sense for ‘dumb’ conduits, private activities, email and messaging services between private individuals and non-public facing storage of data.”
- “The DCA turns any provider of any type of internet services into the police, judge and jury.... The DCA shifts the burden onto providers to monitor for and identify potentially infringing content. They are required to remove any content if it is ‘likely’ infringing - a big change from the DMCA’s test of ‘facts and circumstances from which infringing activity is apparent.’”
- “The notice requirements allowing for a ‘non-exhaustive representative list’ eliminate requirement of location-specific information in notices, adding to the broad duty to monitor.... [I]t will require the implementation of often flawed and expensive filtering systems. Current technology is not up to the task of dealing with the subjective nature of what is and is not infringing copyright.”
- “The DCA’s notice and staydown provisions will have a chilling impact on fair use, likely violating the First Amendment.”

# DCA COMMENTS: AMERICAN ASSOCIATION OF LAW LIBRARIES



## **AALL:**

- “The proposed changes in the DCA make amendments to the [DMCA] that would significantly impact the ability of law libraries to provide equitable access to copyrighted materials.”
- “AALL believes that section 512 is working well for law librarians, legal information professionals, and law library users. While we understand the legitimate concerns some rightsholders have about potential online infringement of their works, we are concerned that the notice-and-staydown system proposed in this section would discourage the legal sharing of scholarship and legal research.”
- “Under a notice-and-staydown system, automated content filtering systems employed by online service providers may inadvertently flag legally shared content as infringing. Because automated content filtering systems often struggle with recognizing fair use claims, legally uploaded content may be unnecessarily removed, and the users could be prevented from uploading the content in the future.”

# DCA: MANY OPEN ISSUES TO BE ADDRESSED



- How long would a “stay-down” last, considering potential future fair uses?
- OSP monitoring would require technological filtering that’s imperfect.
- Adequacy of counter-notification process.
- How to define a “likely” infringing content standard instead of the DMCA’s “apparent” standard.
- Economic impact on startup/small platforms that can’t afford costly filtering systems (*e.g.*, YouTube spent over \$100 million to build ContentID, which is still evolving).
- Will the DCA have a chilling effect on the First Amendment and fair use postings?
- Would requiring the Copyright Office to establish “reasonableness best practices” overburden the Office?

March 5, 2021

The Honorable Thom Tillis  
Ranking Member  
Subcommittee on Intellectual Property  
U.S. Senate Judiciary Committee  
113 Dirksen Senate Office Building  
Washington, DC 20510

**RE: *Digital Copyright Act of 2021* Discussion Draft**

Dear Senator Tillis:

The American Association of Law Libraries (AALL), a national organization representing 4,000 law librarians and legal information professionals, appreciates the opportunity to provide comments on the *Digital Copyright Act of 2021* (DCA). AALL agrees with your views that legislative changes are needed to improve copyright laws to encourage the creation of copyrightable works and to protect users who are making lawful uses of copyrighted materials.<sup>1</sup> We appreciate your efforts to address these issues.

The proposed changes in the DCA make amendments to the *Digital Millennium Copyright Act* (DMCA) that would significantly impact the ability of law libraries to provide equitable access to copyrighted materials. While AALL supports some of the changes in the DCA that promote access to legal information—including updates to section 1201—we are concerned that other changes may limit the abilities of law libraries to provide access to copyrighted works and preserve these works. We are providing more details on our views below.

**SECTION 2. LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE**

AALL believes that section 512 is working well for law librarians, legal information professionals, and law library users. While we understand the legitimate concerns some rightsholders have about potential online infringement of their works, we are concerned that the notice-and-staydown system proposed in this section would discourage the legal sharing of scholarship and legal research.

Under a notice-and-staydown system, automated content filtering systems employed by online service providers may inadvertently flag legally shared content as infringing. Because automated content filtering systems often struggle with recognizing fair use claims, legally uploaded content may be unnecessarily removed, and the users could be

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<sup>1</sup> Senator Thom Tillis, “Tillis Releases Landmark Discussion Draft to Reform the Digital Millennium Copyright Act,” Press release (December 22, 2020), <https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act>.



prevented from uploading the content in the future. Unless online service providers implement robust systems to address legal claims of fair use under a notice-and-takedown system, scholars, researchers, librarians, and others would be prevented from legally uploading important scholarship and legal research.

The potential impact on law libraries from takedown requests that do not consider fair use has become particularly apparent during the current COVID-19 pandemic. Law libraries are increasingly relying on fair use in remote learning environments for activities such as embedding videos into educational materials and sharing articles for course assignments.

AALL agrees with the U.S. Copyright Office (Copyright Office) in its report, *Section 512 of Title 17*, that a notice-and-staydown system requires additional study and public input before legislation is enacted.<sup>2</sup> We urge you to remove the notice-and-staydown requirement from the draft legislation.

### SECTION 3. LIMITATION ON REMEDIES IN CASES INVOLVING ORPHAN WORKS

Many academic law libraries and public law libraries have orphan works in their collections, including rare or out-of-print volumes, legal treatises, and other special collections. Digitizing these works will provide access to unique, historical materials that benefit the legal community, researchers, and the public. Digitizing these works would also provide access for people with disabilities for whom the original formats may not be accessible.

While AALL supported a similar legislative proposal to address orphan works when it was last considered by Congress more than a decade ago, we believe legislation that defines a “diligent search” and requires specific notice and attribution requirements is no longer needed for law libraries to digitize orphan works legally and successfully. The developments in several fair use cases, including *Authors Guild, Inc. v. HathiTrust*<sup>3</sup> and *Authors Guild, Inc. v. Google Inc.*<sup>4</sup> clarifies that law libraries may rely on fair use to digitize orphan works. The development of library best practices on orphan works has also provided law libraries with important guidance on how to apply both the fair use doctrine and other legal strategies to digitize special collections that may include orphan works.

AALL would welcome the opportunity to work with your office on alternative proposals to support the use of orphan works by law libraries, including options to address

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<sup>2</sup> U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* (May 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

<sup>3</sup> *Authors Guild v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2014).

<sup>4</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).





statutory damages that may protect rightsholders while encouraging digitization of orphan works under certain circumstances.

#### **SECTION 4. APPOINTMENT OF REGISTER OF COPYRIGHTS; COPYRIGHT OFFICE RELOCATION**

Law librarians and legal information professionals interact with the Copyright Office in many ways, including by registering their own works as creators; accessing copyright ownership records to support their organizations; and assisting attorneys, law professors, law students, and members of the public with researching copyright-related questions.

The current structure of the Copyright Office has advantages for the Copyright Office and the copyright system, the Library of Congress, and the public. The Copyright Office is funded through its own budget within the Library of Congress' budget, which provides flexibility for the Office to set priorities and use funds to support its mission to “promote creativity and free expression by administering the nation’s copyright laws and by providing impartial, expert advice on copyright law and policy for the benefit of all.”

The Copyright Office also saves money by coordinating its information technology (IT) needs with the Library of Congress and by using specialized office space within the Library of Congress. Several Congressional committees have recently recognized the substantial progress the Copyright Office and the Library of Congress have made to update the Copyright Office’s IT systems.<sup>5</sup> The Library of Congress also benefits from its close relationship with the Copyright Office. The Copyright Office shares information about certain works of authorship, known as copyright deposits, directly with the Library, which helps the Library expand its collections to benefit researchers and the public.

Several recent initiatives by the Copyright Office and the Library of Congress demonstrate the benefits of their current relationship to the copyright system and to the public. This includes the establishment of the new Copyright Public Modernization Committee, which is being convened by the Library of Congress to enhance communication between stakeholders in the copyright community and to allow public input on the technology-related aspects of the Copyright Office’s modernization initiatives.<sup>6</sup> AALL also appreciates the Copyright Offices efforts to solicit public input on its website and other IT initiatives. We are concerned that the proposed move of the

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<sup>5</sup> For example, see *Register of Copyrights Selection and Accountability Act: Opening Statement of Chairman Roy Blunt before the Rules & Administration Committee, U.S. Senate*, 115th Cong. (2018), <https://www.govinfo.gov/content/pkg/CHRG-115shrg35237/pdf/CHRG-115shrg35237.pdf>.

<sup>6</sup> Library of Congress, “Announcement of Copyright Public Modernization Committee,” *Federal Register* 86, no. 21 (February 3, 2021): 8044-8045, <https://www.govinfo.gov/content/pkg/FR-2021-02-03/pdf/2021-02194.pdf>.





Copyright Office out of the Library of Congress and into the U.S. Department of Commerce could interrupt the Copyright Office's efforts to engage the public in its modernization efforts, including to solicit feedback on efforts to provide greater access to current and historical copyright records.

AALL believes that the Copyright Office's location in the Library of Congress supports an efficient copyright system and benefits creators, rightsholders, libraries, and the public. We urge you to remove the proposal for moving the Copyright Office out of the Library of Congress from the draft legislation.

## SECTION 5. MODERNIZING CIRCUMVENTION EXEMPTIONS

AALL appreciates the steps the Copyright Office has taken to implement improvements to the section 1201 rulemaking process, including streamlining the procedures for renewals of previously adopted exemptions. We believe the updates to the rulemaking process in this section would help to ensure an appropriate balance between the interests of copyright owners and users and facilitate equitable access to copyrighted information.

AALL supports the proposal that any temporary exemption adopted in the Copyright Office's rulemaking proceeding under section 1201 of the DMCA receive a presumption in favor of renewal in the subsequent rulemaking proceeding. AALL also supports the proposed addition of the anti-trafficking provision to the triennial rulemaking process to enable the beneficiaries of temporary exemptions to make or obtain necessary circumvention tools. Finally, AALL supports the proposal to add other new permanent exemptions for non-infringing activities that enable blind, visually impaired, or print disabled people to utilize assistive technologies to gain access to law library resources such as e-books.

## CONCLUSION

Thank you for giving AALL the opportunity to share its views on the *Digital Copyright Act of 2021*. We hope our comments will assist you in your efforts to reform the DMCA while balancing access to legal information. We also hope that you will reach out if your office has questions on the submitted comments.

# AAP COMMENTS ON DMCA REFORM DISCUSSION DRAFT LEGISLATION FROM SENATOR THOM TILLIS - AAP

[Back To News](#)

December 22, 2020



Today Senator Thom Tillis (R-N.C.), Chairman of the Senate Judiciary Intellectual Property Subcommittee, [released](#) the Digital Copyright Act of 2021, his much anticipated discussion draft of legislation to modernize and reform the Digital Millennium Copyright Act (DMCA). Below is a comment from Maria A. Pallante, President and CEO of the Association of American Publishers (AAP), on the draft legislation:

“On behalf of the publishing industry, we thank Chairman Tillis for his purposeful efforts to evaluate and improve the DMCA framework by conducting a year-long series of hearings and releasing a discussion draft today aimed at possible legislative reforms. The DMCA has a tremendous impact on everyone who drives and benefits from the whirl of modern commerce—from copyright owners to online services providers to consumers and users of creative content.”

“Regrettably, the once-innovative DMCA safe harbor system is now deeply damaged and no longer separates lawful copyright transactions from egregious online infringement. Rather, the safe harbors provide broad and unwarranted immunity to bad faith actors—some of whom monetize piracy—unfairly burdening copyright owners to locate and identify infringements and, worst of all, to engage in an interminable game of whack-a-mole that provides little, if any, relief from the pervasive violation of their rights. This is not a small problem, it is a crisis, and it was thoroughly documented by the U.S. Copyright Office in a 250-page [report](#) on its comprehensive five-year study of the DMCA’s safe harbor framework, released in May of this year.”

“In releasing the discussion draft, Chairman Tillis has taken an important step forward in addressing a serious problem. We look forward to working together with Chairman Tillis and Members of the Senate and House Judiciary Committees as this

legislative dialogue progresses.”

A link to the draft legislation can be found [here](#).

# # #



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March 5, 2021

Hon. Thom Tillis  
United States Senate  
113 Dirksen Senate Office Building  
Washington, D.C. 20510  
via email to: [Brad\\_Watts@tillis.senate.gov](mailto:Brad_Watts@tillis.senate.gov)

Re: ABA-IPL Section Comments on Draft Digital Copyright Act of 2021

Dear Senator Tillis:

On behalf of the Section of Intellectual Property Law of the American Bar Association (“Section”), we are pleased to submit this letter in response to your draft of the Digital Copyright Act of 2021 (“DCA”). The views expressed herein are presented on behalf of the Section, but have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and accordingly should not be construed as representing the positions of the Association. Although the Section applauds your modernization efforts, it has not adopted policy on each of the issues addressed by the DCA. Thus, the Section addresses below the provisions on which it has policy.

**Limitations on Liability Relating to Material Online**

*Limitations of liability should not apply to OSPs when infringing materials are posted at the direction or request of OSPs.*

The Section supports, in principle, limiting monetary liability for online service providers (“OSP”) as a result of copyrighted material posted to the OSPs’ systems or networks by third parties, but it also supports conditioning such limitations on OSPs’ compliance with obligations that reasonably encourage and require them to remove or disable access to material that infringes upon copyrights. In doing so, the Section opposes extending such limitations on liability to OSPs when copyrighted materials are posted to the OSPs’ systems or networks by individuals or entities acting at the direction or request of the OSP.

*OSPs should be required to act when an objectively reasonable person would be aware of or willfully blind to infringing material on their systems.*

Under current law, one of the conditions of limiting their monetary liability as a result of copyrighted material posted to the OSPs' systems or networks by third parties is to remove or disable access to infringing material under reasonable circumstances and within an expeditious timeframe, which includes when OSPs have actual knowledge or are willfully blind that such material or an activity using such material on the OSPs' systems or networks is infringing. This makes sense to the Section. Current law also includes an objective reasonableness requirement. Yet, the Section would clarify the law to make clear that OSPs must act when an objectively reasonable person would be aware of or willfully blind to facts or circumstances indicating that third parties are posting infringing material to the OSPs' systems or networks.

*Sophisticated OSPs should be required to monitor their systems and to remove infringing content without awaiting receipt of a takedown demand.*

Moreover, the Section supports, in principle, requiring OSPs, depending on their nature, size, and scope, to monitor their systems and networks to identify and remove or disable access to infringing material. Many OSPs are incredibly sophisticated and are able to determine with minute detail what material is on their systems or networks. The DMCA was not intended as a windfall for OSPs and, thus, they should be required to take steps to stop or prevent infringement when they are aware of such generalized infringement. When an OSP has the resources and ability to monitor its own systems, it should be required to do so and to remove the infringing material that it finds under appropriate circumstances. The Section, however, has not made a determination as to what standards should be used to measure an OSP's ability to monitor its own systems in the context of the DMCA.

*OSP policies regarding repeat infringers should be published to OSP users and implemented as written.*

With regard to repeat infringers, the Section agrees with the current law that OSPs seeking to benefit from the DMCA's safe harbors should adopt and reasonably implement a repeat infringer policy that the OSPs will terminate repeat infringers, as well as take other action intended to curb or prevent copyright infringement based on the nature of the OSPs and the allegations of infringement. It further believes that such policies should be in writing, communicated to the OSPs' users, and implemented as written.<sup>1</sup> Although the current statute was written with the understanding that OSPs would adopt specific policies, recent cases have shown that, in some circumstances, OSPs merely pay lip service to that requirement. OSPs should be encouraged to include in the policy not just termination, but other actions the OSP will take to curb or prevent infringement, such as reducing the features or speed of, or access to, the OSPs' systems

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<sup>1</sup> Although implementation may not be perfect, those circumstances that require deviation should be articulated in the policy. The repeat infringer policies must also apply not only to adjudicated repeat infringers, but alleged repeat infringers.

or networks. The policy should be provided to the OSPs' users in order to encourage users to abide by the policy by putting them on notice and to permit copyright holders to confirm that the OSP has such a policy without suing the OSP and seeking the policy in discovery. Further, authorizing the Copyright Office to develop a model repeat infringer policy would allow the Office to implement these standards through rules creating standard technical measures for reducing infringement that OSPs will be required to adopt or accommodate. This will hold OSPs to a reasonable minimum benchmark.

*OSP policies regarding repeat infringers should be published to OSP users and implemented as written.*

The Section also supports, in principle, defining a repeat infringer as an individual who is repeatedly alleged to have infringed one or more copyright owners' rights, but not if such alleged infringements are subsequently adjudged by a court of competent jurisdiction not to have been infringements. Limiting repeat infringement policies to adjudicated repeat infringers would require litigation against every person who stores infringing material on an OSP's systems or network, which is not feasible.

*OSPs should be required to remove reasonably identified material, including material identified through a representative list of works.*

Turning to DMCA notices, the Section supports conditioning the DMCA safe harbors on OSPs removing or disabling access to material when such material is reasonably identified as infringing by the copyright owner, which would include providing either (a) the title of a specific work and information reasonably sufficient for the OSP to locate such material; or (b) a representative list of works that infringe the copyright owner's rights, such that the OSPs can reasonably identify infringing material on their systems or networks to be removed or disabled access (including both the representative sample and similarly situated materials). The Section also supports allowing the Copyright Office to determine through regulation whether there are other ways that a reasonable identification could be made. Given the existing comprehensive information required of copyright holders to make an identification of infringement, the Section opposes, in principle, OSPs adding additional requirements to copyright owners beyond such a Congressionally-legislated or Copyright Office-regulated list of information as a condition for removing or disabling access to material identified as infringing. The Section is comfortable with the list of information the DMCA currently requires copyright holders to provide to OSPs in takedown notices, without heightening standards through their own policies. As the DMCA currently provides that copyright holders may provide notice through a representative list of works, it does not make sense to permit copyright holders to provide a representative list but then to allow OSPs to restrict the material that they remove or to which they disable access to only those identified in the list.

*Those who make knowing, material misrepresentations through the notice-and-takedown system should be held monetarily liable.*

Likewise, with regard to counternotifications, the Section supports, in principle, (a) imposing liability on copyright owners, users, or service providers that make knowing and material misrepresentations as part of a process to remove or disable access to material posted online, on which limitations of monetary liability for OSPs is based; and (b) not requiring OSPs to take action in response to notices or counternotifications containing such knowing and material misrepresentations to qualify for limitations on monetary liability in such circumstances. The notice-and-takedown system created by the DMCA is subject to abuse when rights holders, users, or OSPs act in bad faith, such as (a) when a rights holder knows the challenged post is licensed; (b) when a user knows posting the content is infringing; or (c) when an OSP asserts that it has taken down content when it has not done so. These knowing, material misrepresentations reduce the effectiveness of the system, chilling speech from users who are making fair use in their posted content and burdening rights holders who must take further steps to assert their rights.

*Copyright owners' right to injunctive relief against OSPs should be evaluated under the standard test rather than limited by the DMCA.*

Finally, with regard to injunctive relief, the Section supports, in principle, the availability of reasonable injunctive relief to copyright owners against OSPs that permit copyrighted material to be posted on their systems or networks by third parties without regard to limitations on monetary relief provided to OSPs by the copyright laws. Instead of the current limitations in the DMCA that restrict the nature or scope of such injunctive relief, the Section supports determining whether injunctive relief is reasonable based on factors such as (a) whether the copyright holder has or will suffer irreparable injury; (b) whether remedies are available at law to adequately compensate the copyright holder for the injury; (c) whether an equitable remedy is warranted given the balance of the hardships between the copyright owner and the OSP; and (d) whether the public interest would be served or disserved by an injunction. These factors are applied by courts every day, and will allow a case-by-case determination of when relief is appropriate.

### **Orphan Works Act**

Although the Section has not had the opportunity to develop policy concerning the specific orphan works legislation in the DCA, it supports, in principle, legislation to limit the remedies available in copyright infringement suits against users of orphan works who (a) make a good faith, reasonably diligent effort to identify and locate the copyright owners of such works without success; and (b) file a notice of use with the U.S. Copyright Office prior to making such use. In determining what constitutes a reasonable search, the Section does not believe that users should have to search “dark archives” to the extent that term means “a collection of materials preserved for future use but with no current access,” but it would oppose, in principle, legislation that would exempt users of orphan works from searching databases that require a fee to access them.

### **Appointment of the Register of Copyrights; Copyright Office Relocation**

This Section strongly supports establishing the Copyright Office as an independent agency with its head appointed by the President with the advice and consent of the Senate. Although it opposes making the Copyright Office part of the Patent & Trademark Office, it has not developed policy as to whether the agency would fit within the Department of Commerce. We, however, do note that some of our members worry that, by placing the Copyright Office within an Executive Branch department, the Office will lose the autonomy in rulemaking and control over its own budget and IT support that the Section believes are essential to its modernization. In particular, the Office historically has been permitted to provide unfiltered advice to Congress, which the Section believes is an important part of the Office's role. Our members also note that, unlike patents and trademarks, copyrights are not considered "industrial property" and, thus, may protect works that are not commercial in nature.

### **Modernizing the Circumvention Exemptions (1201)**

Although the Section has not developed views on all of the DCA's provisions concerning the Copyright Act's anti-circumvention provisions, it supports, in principle, establishing a presumption in favor of renewing previously granted exemptions to the prohibition against circumventing technological protection measures that control access to copyrighted works, as well as making permanent exemptions that have been adopted twice without opposition, subject to a process to raise changed circumstances to the Copyright Office, which may then move such exemptions back to the ordinary process. By doing so, burdens on those seeking less controversial exemptions could be reduced, while simultaneously leaving open the possibility that, due to changed circumstances, the Copyright Office can continue to consider the exceptions on an individualized basis.

### **Deposit Copy Retention**

The Section supports, in principle, requiring the Library of Congress and/or Copyright Office to retain deposit copies where practicable, as well as to have those agencies contact copyright owners to return deposit copies prior to disposing of the copies. We see these provisions as important given that deposit copies' original purpose was to serve as evidence of what was registered by the Office.

### **Fee Funding Authority During Lapse In Appropriations**

The Section supports, in principle, permitting the Copyright Office to use registration fees to maintain operations during a lapse in appropriations. It is important that, even when the U.S. government shuts down, the Office is permitted to continue its critical functions.

### **Authority to Set Alternative Fee Structures**

The Section supports, in principle, allowing the Copyright Office to lower its fees for individuals and small entities when those fee reductions are off-set by cost savings



from other modernization efforts (e.g., charging for API access to the Office's records). This is because dynamic pricing can allow the Office to more equitably distribute the burden of such fees and believes that the measures in this section would be a step towards that principle. The Section believes, however, that the new fee structure should not overburden some applicants as it eases the burden on others. This can be accomplished as part of a modernization effort that will reduce costs and allow the Copyright Office to permit fee reductions where warranted.

### **Best Edition Definition**

The Section supports, in principle, requiring the Librarian of Congress to post a definition of what constitutes a "best edition" of various types of works on the Library of Congress' website.

### **Amendment of Application for Registration and Derivative Works**

Although the Section has not had an opportunity to develop policy with regard to the specific approach adopted by the DCA, the Section supports, in principle, application of the effective registration doctrine to computer programs and other works that are routinely revised as new versions, such as websites, blogs, and video games. It also supports, in principle, the Copyright Office's adoption of procedures that allow computer programs and other routinely revised works to update their registrations periodically, rather than filing for separate registrations when each new version is created. Works that are routinely revised require an alternative process to ensure that new versions, minor updates, and patches can be registered easily.

### **Copyright Office Public Advisory Board**

The Section supports the creation of the board as doing so is in line with the longstanding public advisory boards at the PTO, with which Section members have interacted and of which some have been members in the past. In particular, such a board would allow the Register to hear directly from those who know the practice of copyright law intimately, and the members could bring their diverse experience to bear on issues facing the Office.

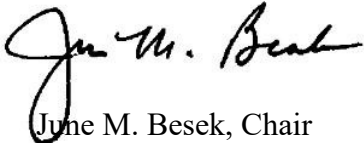
### **Copyright Office Studies**

Finally, the Section supports the Copyright Office studies called for by the DCA on (a) whether the United States should provide press publishers a copyright-style right; (b) the best edition requirement; (c) how to define the term "publication" in the modern age, and how the Copyright Office can instruct applicants on how to designate publication status; and (d) whether the Copyright Office should provide a registration option for deferring examination of a work while making the submission date the effective registration date. Such studies will provide Congress with better information to determine whether further legislation is worth pursuing, as well as provide information to all parts of the copyright system.

\* \* \*

If you have any comments or questions after reviewing these comments, we would be happy to respond and/or provide further comments.

Sincerely,

A handwritten signature in black ink, appearing to read "June M. Besek". The signature is fluid and cursive, with the first name "June" being more prominent.

June M. Besek, Chair  
ABA Section of Intellectual Property Law

LII > U.S. Code > Title 17. COPYRIGHTS

> Chapter 5. COPYRIGHT INFRINGEMENT AND REMEDIES

> **Section 512. Limitations on liability relating to material online**

## 17 U.S. Code § 512 - Limitations on liability relating to material online

U.S. Code      Notes

**(a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS.**—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

- (1)** the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2)** the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3)** the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4)** no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on

the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

**(5)** the material is transmitted through the system or network without modification of its content.

**(b) SYSTEM CACHING.—**

**(1) LIMITATION ON LIABILITY.—**A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

**(A)** the material is made available online by a person other than the service provider;

**(B)** the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

**(C)** the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

**(2) CONDITIONS.—**The conditions referred to in paragraph (1) are that—

**(A)** the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

**(B)** the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

**(C)** the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

**(i)** does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

**(ii)** is consistent with generally accepted industry standard communications protocols; and

**(iii)** does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

**(D)** if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

**(E)** if the person described in paragraph (1)(A) makes that

material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

**(C) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—**

**(1) IN GENERAL.—**A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

**(A)**

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

**(B)** does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

**(C)** upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

**(2) DESIGNATED AGENT.**—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

**(A)** the name, address, phone number, and electronic mail address of the agent.

**(B)** other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

**(3) ELEMENTS OF NOTIFICATION.**—

**(A)** To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

**(i)** A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

**(ii)** Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

**(iii)** Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

**(iv)** Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

**(v)** A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

**(vi)** A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

**(B)**

**(i)** Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

**(ii)** In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).



**(d) INFORMATION LOCATION TOOLS.**—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

**(1)**

**(A)** does not have actual knowledge that the material or activity is infringing;

**(B)** in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

**(C)** upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

**(2)** does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

**(3)** upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

**(e) LIMITATION ON LIABILITY OF NONPROFIT EDUCATIONAL INSTITUTIONS.**—

**(1)** When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student

shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

**(A)** such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

**(B)** the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

**(C)** the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

**(2)** For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

**(f) MISREPRESENTATIONS.**—Any person who knowingly materially misrepresents under this section—

**(1)** that material or activity is infringing, or

**(2)** that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to

disable access to it.

**(g) REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY.—**

**(1) NO LIABILITY FOR TAKING DOWN GENERALLY.—**

Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

**(2) EXCEPTION.—**Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

**(A)** takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

**(B)** upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

**(C)** replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

**(3) CONTENTS OF COUNTER NOTIFICATION.—**To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent

that includes substantially the following:

**(A)** A physical or electronic signature of the subscriber.

**(B)** Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

**(C)** A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

**(D)** The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

**(4) LIMITATION ON OTHER LIABILITY.—**

A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

**(h) SUBPOENA TO IDENTIFY INFRINGER.—**

**(1) REQUEST.—**

A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

**(2) CONTENTS OF REQUEST.—**The request may be made by filing with the clerk—

**(A)** a copy of a notification described in subsection (c)(3)(A);

**(B)** a proposed subpoena; and

**(C)** a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

**(3) CONTENTS OF SUBPOENA.—**

The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

**(4) BASIS FOR GRANTING SUBPOENA.—**

If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

**(5) ACTIONS OF SERVICE PROVIDER RECEIVING SUBPOENA.—**

Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

**(6) RULES APPLICABLE TO SUBPOENA.—**

Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

**(i) CONDITIONS FOR ELIGIBILITY.—**

**(1) ACCOMMODATION OF TECHNOLOGY.—**The limitations on liability established by this section shall apply to a service provider only if

the service provider—

**(A)** has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

**(B)** accommodates and does not interfere with standard technical measures.

**(2) DEFINITION.**—As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and—

**(A)** have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

**(B)** are available to any person on reasonable and nondiscriminatory terms; and

**(C)** do not impose substantial costs on service providers or substantial burdens on their systems or networks.

**(j) INJUNCTIONS.**—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

**(1) SCOPE OF RELIEF.**—

**(A)** With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

**(i)** An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

**(ii)** An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing

activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

**(iii)** Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

**(B)** If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

**(i)** An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

**(ii)** An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

**(2) CONSIDERATIONS.**—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

**(A)** whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

**(B)** the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

**(C)** whether implementation of such an injunction would be technically feasible and effective, and would not interfere with

access to noninfringing material at other online locations; and

**(D)** whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

**(3) NOTICE AND EX PARTE ORDERS.—**

Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

**(k) DEFINITIONS.—**

**(1) SERVICE PROVIDER.—**

**(A)** As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

**(B)** As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

**(2) MONETARY RELIEF.—**

As used in this section, the term “monetary relief” means damages, costs, attorneys' fees, and any other form of monetary payment.

**(l) OTHER DEFENSES NOT AFFECTED.—**

The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.



**(m) PROTECTION OF PRIVACY.**—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

**(n) CONSTRUCTION.**—

Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

(Added Pub. L. 105-304, title II, § 202(a), Oct. 28, 1998, 112 Stat. 2877; amended Pub. L. 106-44, § 1(d), Aug. 5, 1999, 113 Stat. 222; Pub. L. 111-295, § 3(a), Dec. 9, 2010, 124 Stat. 3180.)

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March 5, 2021

Senator Tom Tillis  
113 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Tillis:

Thank you for the opportunity to provide feedback on your proposed Digital Copyright Act. Unfortunately, the draft as proposed creates a system for digital copyright that is clearly unconstitutional and just unworkable for internet creators, users and service providers. Rather than make some tweaks to the DMCA to improve a generally well-functioning system that has allowed creativity, expression, and innovation to thrive on the internet, it completely destroys the core framework of the DMCA and replaces it with a system that will chill online creativity, take choices away from consumers and harm the internet ecosystem. Thus, we are not providing a red line in response and instead share some feedback on the concepts within the draft and our perspective on a better way forward.

The DMCA, despite its critics, has aged well thanks to the expert drafting of Senators Hatch and Leahy. Internet creativity is flourishing. Approximately 5 billion views of videos occur on YouTube every day. In 2019 Etsy sales were approximately \$5 billion, and in the first half of 2020 sales increased 71 percent. This February, almost 3 billion hours were spent watching Twitch streamers, more than double the amount from February 2019. In 2019, Patreon made \$500 million in payouts to creators. Instagram influencers made \$2.3 billion in 2020. The Archive of Our Own (AO3) has over 5 million creative works in its repository and won a Hugo Award in 2020 for its contributions to literature. The online influencer market is estimated to have been almost \$10 billion in 2020. Internet streaming was a \$161.37 billion market in 2020. Our own study of just three years ago is a drop in the bucket of what has happened since.

The numbers are staggering. Consumers are enjoying the new forms of content available on these platforms and the growth of new creatives is not stopping anytime soon. By authoring the DMCA, Senators Leahy and Hatch unlocked this creative revolution, one that Congress should be proud of creating, and one that is exactly why we have copyright law - to promote the progress of the useful arts.

The Digital Copyright Act would have a chilling effect on the internet ecosystem. Had it passed just 10 years ago, this new creative industry would never have been created. It deter the proliferation of not just the new creative economy -- additional innovative technologies, like cloud services, would not exist. No investor would have taken a chance on the platforms and services consumers use every day on their phone, their desktop, at work and for fun. A nonprofit-run service like AO3 or Wikipedia would never be able to get off the ground due to the staggeringly high costs of complying with DCA. We would have lost billions of dollars in

economic value, and also would have missed out on an unquantifiably large amount of creative works that would never have seen the light of day.

Because the framework of the DCA as currently written is so problematic, we cannot provide specific constructive feedback on the contents of the DCA. While our reasons for this are numerous, we wanted to highlight the fundamental problems with the DCA and its repeal of the DMCA, in order to encourage a focus on multi-stakeholder collaboration to address specific concerns in the ecosystem. There are many problems that are more specific and nuanced, but at this time commentary on them would be premature.

### **1. The DCA makes the notice and takedown/staydown framework apply to all providers, including email, conduits and private clouds**

The DCA eliminates the distinction between different types of providers. In doing so, it forces all sorts of providers, including internet access providers, email services, cloud services and more to be subject to the notice and takedown/staydown system, in a complete departure from one of the key decisions made by the DMCA's drafters. Notice and takedown, or when it qualifies, staydown does not make sense for "dumb" conduits, private activities, email and messaging services between private individuals and non-public facing storage of data.

An example illustrates just how intrusive and wrong the DCA's enactment would be. Bob takes a video with his iPhone of his kids dancing to a Taylor Swift song. Bob emails that video to his parents and also texts it to his wife. Given the personal use and the *Lenz* case, it is safe to say this is not infringing copyright. However, based on the current draft of the DCA this would trigger a series of actions to occur.

If Bob's email provider, internet access provider, his wife's email provider, wife's internet access provider, his parents' internet access provider and/or his parents' email provider received a notice on Taylor Swift's song at any time prior, this would trigger the DCA's staydown requirements without the sending of a new notice.

In combination with the DCA's duty to monitor, all of these services would have to inspect what is being sent. If they implemented a filtering technology in order to comply, it is safe to say that every level of this "transaction" would face challenges. What's more, Bob's email provider and internet access provider may have to prevent him from sending it unless they have a way to inspect the specific contents, know that the recipient is authorized under copyright law, and be willing to take on the risk of being sued.

iCloud -- or any other cloud service -- would face a similar challenge and potentially delete the video. In the unlikely event that the video made it through Bob's services, his parent's internet access and email providers would likely prevent the email from reaching their inbox with the file attached, and his wife's internet access provider would do the same for the text message. Bob could still have the video on his iPhone's harddrive, but he could only share it with people by

playing it on his phone with them present in the room. This issue alone is enough to require a return to the drawing board.

## **2. The DCA turns any provider of any type of internet services into the police, judge and jury**

One of the issues with the DMCA as written is it allows allegations of copyright infringement, not *actual* infringement. This allows content to be taken down permanently unless there is either a counter-notice or the intermediary feels so confident it is not infringing that they keep the content up and take on the liability burden. Less than 1% of [notices](#) sent receive a counter-notice, permanently removing content from the internet. However, a far lower share of that content is actually infringing copyright.

The DCA shifts the burden onto providers to monitor for and identify potentially infringing content. They are required to remove any content if it is “likely” infringing - a big change from the DMCA’s test of “facts and circumstances from which infringing activity is apparent.” The “Likely” standard is extremely subjective and in reality it will force any intermediary to be overly-cautious and institute a lesser standard to avoid liability for tens of billions in damages. This “likely” standard will actually create a much lower “maybe” standard to avoid massive legal risk and uncertainty. Additionally, without rights holders providing notices for each alleged infringement, it is extremely challenging for a provider to make this determination for the particular use. As a result, under the DCA massive amounts of non-infringing content will never get to be shared using the internet in any way.

Furthermore, it is not necessary to change the red flag knowledge standard. Those complaining about judicial interpretation of the red flag knowledge standard under the DMCA point to two cases as the most problematic: [Perfect 10](#) and [Viacom](#). However, they always omit a key fact: some of the content in those cases was not infringing, thus the infringement was not apparent nor should it have been. Given the unique facts of those cases, the courts reached the right decision, yet the testimony of witnesses and submissions to the IP Subcommittee throughout 2020 conveniently leave this key fact out. It’s time to ignore false flags from the content industry and leave the red flag knowledge standard as it is: working as it was intended.

The bill also guts the current “no duty to monitor” requirement by permitting “reasonable monitoring.” Combined with the red flag knowledge change and the move to staydown for certain content, this actually creates a “duty to monitor” requirement in practice. The notice requirements allowing for a “*non-exhaustive* representative list” eliminate requirement of location-specific information in notices, adding to the broad duty to monitor.

Reasonable monitoring can still leave internet providers open to red flag knowledge problems, as well as liability on staydown eligible content, without even getting at the problem of locating content that has been noticed. In the end, this will create a copyright surveillance state at every layer of the internet, one that fundamentally violates the privacy of many Americans. Imagine if

the phone company was required to inspect every phone call. That is what the DCA does for internet communications.

In order to implement the new-found surveillance state, it will require the implementation of often flawed and expensive filtering systems. Current technology is not up to the task of dealing with the subjective nature of what is and is not infringing copyright - this has been borne out by even the most sophisticated filtering tools on the market today. Additionally, even if non-infringing content gets past one filtering system, there are multiple company systems it will have to go through. So, while content might be on a platform, a potential consumer could be blocked from accessing that content by their ISP, a cloud service for that platform or see it removed from search results. That is of course on top of the platform's filter.

This is a serious problem for small businesses. One potentially infringing photo on a website for a small local business would likely cause their website to be taken off line (or at least the page with the infringing content) as well as their business being removed from search results. The idea that a webpage could be taken offline without any due process until the photo is removed is a serious problem; the punishment simply does not meet the crime. This would apply to any type of operation, including charities, schools, libraries, local government, small businesses, political campaigns, official congressional pages, and so much more.

Additionally, the notice and staydown provisions provide an impossible catch-22 for any business, organization or individual subject to its requirements. By requiring the blocking of any re-upload of complete and near complete copies (and shorter portions if the provider derives its commercial value predominantly from short-form media) platforms will be doomed to fail in their good faith attempts to comply. There will be infringing activity that still occurs and makes it through even with the best, most conservative filters imaginable. Because of that, if a platform, cloud provider, e-commerce company or other third-party service providers want to allow the use of any copyrighted content on their platforms, they will inherently have accidental slip ups at a cost of up to \$150,000 each.

### **3. The DCA does not contemplate the unique issues around physical goods**

By creating a one size fits all approach, the legislation does not capture all of the ways the DMCA applies online. Additionally, it reads to only combat illicit uses of intellectual property online and does not consider e-commerce and other uses of platforms. If considering changes to the DMCA, it's prudent to consider every usage of the internet. The internet is more than simply an entertainment machine, it's an economic engine -- an important point that the original drafters of the legislation understood.

Using Bob from earlier, imagine he goes onto Etsy to buy a t-shirt that is a parody of his favorite TV show. Bob assumes the shirt is not copyright infringing. However, the large TV studio disagrees and believes it is not a fair use. Under current law, if Bob wants to purchase the t-shirt he can and the dispute will be between the t-shirt seller and the TV studio.

Under the DCA, this dynamic completely changes. The studio has many shots at preventing the t-shirt from being sold. They can send a notice under the DCA to Etsy, to search engines that link to the Etsy content, to Bob's internet access provider and others. While Etsy is much more likely to understand copyright and support their artist, the others who have no relationship with the seller have no incentive to allow the transaction

The DCA places a burden on all of the internet services involved to monitor for all uses and attempts to use the image on the t-shirt that is copyrighted. However, unlike a digital file, there are no metadata or underlying technological identifiers on a physical good. How are filters supposed to accurately find the use of the copyright work, let alone understand the nuance between the original image and the parody of it?

Additionally, this sets up a liability trap for all these internet services. They now have legal risk depending on if the parody is a fair use or not. Rather than go after the Etsy small business, it will make sense to go after the deeper pockets of the internet services for up to \$150,000 in damages. The internet services will also have to consider the costs of a potentially expensive litigation that is likely a fair use parody. This is a bonanza for IP lawyers. It will certainly be easier to go after the big internet business than the actual artist who created the fair use parody.

This is not just a problem from notice and staydown -- the *de facto* duty to monitor requirements of the DCA create the same dilemma. And while Bob and Etsy are just one example, there are many creators selling their physical creations on services like Society6, Redbubble, Shapeways, and countless others. How are these platforms going to comply with the DCA when it comes to the requirements on them? This will be to the financial detriment of all the creators that are using those platforms while preventing them from benefiting from their creativity.

#### **4. The DCA fails to address the harms of false notices and makes it even harder to send a counter-notice**

The draft legislation forces anyone sending a counter-notice into the CASE Act's "Copyright Claims Board" (CCB) jurisdiction. Re:Create believes that the CCB opt-out process as codified by the CASE Act does not comply with the Seventh Amendment right to a trial by jury. That will ultimately be up to the courts to decide. However, the current draft legislation forces counter-notice senders to consent to jurisdiction of the CCB. In doing so, the only way they can voluntarily opt-out of the CCB is not to exercise their right to counter-notice. That is an absurd proposition that takes away any argument around voluntary consent to CCB jurisdiction, further proving that it is unconstitutional. It will also massively discourage the sending of counter-notices, something that is already a big problem.

Second, the DCA requires a counter-notice sender to explain why the notice was abusive/mistaken and to explain why their use is licensed and fair. This creates a lot of extra work to counter-notice, and also requires the counter-notice sender to prematurely make their legal arguments known to the notice sender without placing the equivalent conditions on filing a

notice. This is not just unfair to the recipients of notices, but will also only further discourage counter-notices.

Third, it allows the notice sender to “challenge” a counter-notice, but gives no details on how or by whom that challenge is to be adjudicated. A lot more details are needed on this before its impact on counter-notices can be judged, but it is likely to have the impact of curtailing the sending of counter-notices. Studies show that about a third of all notices are bad, and yet less than one percent of notices are countered, creating a wide gap. We should be doing everything in our power to encourage the sending of counter-notices in these cases.

#### **5. The DCA’s notice and staydown provisions will have a chilling impact on fair use, likely violating the First Amendment**

The notice and staydown provisions in the DCA create a system where sending a single notice suffices as a notice on *all* uses of that work, past, present and future. While that is a convenient option for notice senders, it leaves internet services with two options: do their own copyright analysis of the use and hope they get it right, or just take down all future uses, even if they are lawful. This shifts how lawful uses are exercised - it would require sending a counter-notice to have lawful uses on the internet, especially fair uses.

The current counter-notice system is already flawed, as many have testified about in the Copyright Office 512 roundtables and before the IP Subcommittee in 2020. However, when added to the forced consent to CCB jurisdiction to counter-notice, this could have the effect of taking almost all fair use cases out of the courts and placing them instead in a venue with no substantive right to appeal, just in order to exercise fair use rights. This sets up a trap for Americans - choose to sacrifice their 7th Amendment rights to a trial by jury or their First Amendment rights to free speech.

#### **6. The “reasonable best practices” developed by the Copyright Office and NTIA would create a government-mandated prior restraint on free speech**

This provision has serious First Amendment problems, as it would allow the federal government to create regulations forcing speech holders to meet certain conditions to be allowed to “speak”. Under copyright law, you exercise your speech rights and are then subject to the consequences of doing so. However, by mandating best practices, this would fundamentally change that dynamic to the government policing what is said before it is said. This is the government creating a prior restraint on speech before it is permitted. That violates the First Amendment.

#### **7. The DCA empowers the flawed CCB on misrepresentation claims**

As Re:Create has argued for the last couple years, the CCB created in the CASE Act will likely become an opt-out factory, especially for copyright sophisticated companies and individuals that know the process and procedure. This is because these people will know that court is too

burdensome and costly to actually file an action (which is ironically why the CCB was created in the first place).

Thus, the CCB is a terrible venue to deal with misrepresentation and fraudulent notice claims. Most notice senders will just opt-out of a CCB action, leaving afflicted parties with a false solution.

#### **8. The DCA could result in Americans losing internet access because of mere allegations of infringement**

Throughout this process, many commenters have raised the serious concerns of termination of internet access as a potential remedy, including the Copyright Office itself in its [follow up letter](#) to your office on their 512 Study. The arguments are many and need not be repeated yet again. Allegations of copyright infringement, even if borne out to be true, cannot lead to the complete economic, social, societal and educational disenfranchisement of all members of a household that occurs with termination of access, especially given the lack of competition in broadband marketplaces for so many Americans and the weeks it would take to get reconnected if another provider was available in a market.

#### **Conclusion**

There are many, many other challenges with the DCA that are not discussed here because they are specific issues rather than structural flaws. They include but are not limited to:

- 1) codifying the flawed subjective good faith standard of the *Lenz* decision;
- 2) moving the Copyright Office out of the Library of Congress and empowering it with significant new regulatory authorities around UX design, technological mandates, privacy and other issues that go far beyond its expertise or mission;
- 3) creating a five-year Copyright Office review outside the legislative process;
- 4) making incremental changes to Section 1201 that don't get at the ultimate problem that needs to be solved: the lack of a nexus to infringement requirement.

As you know, Re:Create always engages with you and your staff in good faith with a goal towards resolution. I am very thankful that I was invited as a witness to one of the hearings leading to the draft, and all the hard work of the team over the last year. Over the last five years, Re:Create and its members have engaged in good faith with real solutions to improving the Music Modernization Act, Felony Streaming, and the CASE Act.

In the end, for both the Music Modernization Act and Felony Streaming, Congress addressed our concerns in a way that worked for rights holders despite their attacks, and legislation was passed in the spirit of compromise. For CASE Act, we tried to negotiate in good faith around real solutions for a workable solution to deal with smaller claims. While ultimately that did not occur, all of these efforts have been made with an eye towards finding common ground and compromise to move forward.



Re:Create and our members have approached the attempts to refine the DMCA and the great work of the legislation's drafters and their vision with an eye towards action. We want to continue to do so. However, as drafted the DCA repeals the DMCA and replaces it with a structurally unworkable solution that cannot be fixed.

While we appreciate the efforts of staff and Senator Tillis to create a comprehensive proposal to "reform" the DMCA, unfortunately, this draft is far from a workable starting point. However, we understand the concerns of the Office and will continue to work in good faith to ensure internet users, consumers, and creators are adequately represented.

Re:Create is hopeful that you will take this opportunity, listen to our concerns and produce a new framework that can be the basis for getting to a compromise.

Sincerely,

Joshua Lamel  
Executive Director  
Re:Create

Cc: Senator Patrick Leahy  
Senator Dick Durbin  
Senator Charles Grassley

1 Title: To amend title 17, United States Code, to update copyright law to address contemporary  
2 business practices and technologies and to support the growth of digital technologies without  
3 undermining incentives for creators, and for other purposes.  
4  
5

6 Be it enacted by the Senate and House of Representatives of the United States of America in  
7 Congress assembled,

## 8 SECTION 1. SHORT TITLE.

9 This Act may be cited as the “Digital Copyright Act of 2021”.

## 10 SEC. 2. LIMITATIONS ON LIABILITY RELATING TO 11 MATERIAL ONLINE.

12 Section 512 of title 17, United States Code, is amended—

13 (1) by striking subsections (a) through (d) and inserting the following:

14 “(a) Transitory Digital Network Communications.—

15 “(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or, except  
16 as provided in subsection (j), for injunctive or other equitable relief, for infringement of  
17 copyright by reason of:

18 “(A) the provider’s transmitting, routing, or providing connections for, material  
19 through a system or network controlled or operated by or for the service provider, or by  
20 reason of the intermediate and transient storage of that material in the course of such  
21 transmitting, routing, or providing connections, if —

22 “(i) the transmission of the material was initiated by or at the direction of a  
23 person other than the service provider;

24 “(ii) the transmission, routing, provision of connections, or storage is carried  
25 out through an automatic technical process without selection of the material by  
26 the service provider;

27 “(iii) the service provider does not select the recipients of the material except as  
28 an automatic response to the request of another person;

29 “(iv) no copy of the material made by the service provider in the course of such  
30 intermediate or transient storage is maintained on the system or network in a  
31 manner ordinarily accessible to anyone other than anticipated recipients, and no  
32 such copy is maintained on the system or network in a manner ordinarily  
33 accessible to such anticipated recipients for a longer period than is reasonably  
34 necessary for the transmission, routing, or provision of connections; and

35 “(v) the material is transmitted through the system or network without  
36 modification of its content.

37 “(B) the intermediate and temporary storage of material on a system or network  
38 controlled or operated by or for the service provider in a case in which—

1 “(i) the material is made available online by a person other than the service  
2 provider;

3 “(ii) the material is transmitted from the person described in subparagraph (i)  
4 through the system or network to a person other than the person described in  
5 subparagraph (i) at the direction of that other person; and

6 “(iii) the storage is carried out through an automatic technical process for the  
7 purpose of making the material available to users of the system or network who,  
8 after the material is transmitted as described in subparagraph (ii), request access  
9 to the material from the person described in subparagraph (iii).

10 “(C) storage at the direction of a user of material that resides on a system or network  
11 controlled or operated by or for the service provider[, or activities related to such  
12 storage].

13 “(D) provider referring or linking users to an online location containing infringing  
14 material or infringing activity, by using information location tools, including a directory,  
15 index, reference, pointer, or hypertext link.

16 “(2) A service provider, as described in subsection (1) of this paragraph, will be eligible  
17 for the limitation on liability if the service provider—

18 “(A) does not have actual knowledge that the material or an activity so using the  
19 material is infringing;

20 “(B) in the absence of actual knowledge described in subparagraph (A)—

21 “(i) is not aware of facts or circumstances from which infringing activity is  
22 likely;

23 “(ii) is not willfully blind with respect to the infringement, or does not induce  
24 the infringement; and

25 “(iii) for service providers eligible under subparagraphs (C) or (D), does not  
26 receive a financial benefit directly attributable to the infringing activity, if the  
27 service provider has the right and ability to control that activity;

28 “(C) upon receiving a notification under subsection (b)—

29 “(i) acts expeditiously to—

30 “(I) remove, or disable access to, the material that is claimed to be  
31 infringing or the subject of infringing activity; and

32 “(II) notify the user in accordance with standards established under rules  
33 issued by the Copyright Office under subsection (g) of—

34 “(aa) the removal or disabling, as applicable; and

35 “(bb) the right of the user to file a counter notification under  
36 subsection (g); and

37 “(ii) takes certain steps to ensure that, absent a sworn statement from the user  
38 (without regard to whether the user is the copyright owner) that, subject to  
39 subsection (f), the user has a [subjective] good faith belief that the use is licensed

or otherwise authorized by law, including that the use is permitted under section 107, the allegedly infringing materials stays down when:

“(aa) a complete or near complete copy of a copyrighted work already identified in a notification of claimed infringement or list of unauthorized works as provided in [XX], or

“(bb) any portion of a copyrighted work already identified in a notification of claimed infringement or list of unauthorized works as provided in [XX], if the service provider derives its commercial value predominantly from short-form media; and

“(D) if, for service providers eligible under subparagraph (B), the service providers meets these conditions:

“(i)—(iv) [incorporates the current language of subsection (b)(2)]

“(E) follow reasonableness best practices established by the Register of Copyrights, which the Register, in consultation with the NTIA, shall update once every 5 years [beginning one year after date of enactment of this statute], that account for factors including the type and size of the service provider and the scale of infringement that occurs the service. Such best practices may include standards such as requiring a user that uploads or publicly performs or displays content on or across the service to affirm that the user holds the copyright to that content, has permission to upload or publicly perform that content, or is otherwise authorized by law.

“(b) Notification.—

“(1) IN GENERAL.—To be effective under this subsection, a notification of claimed infringement submitted to a service provider, whether submitted by an individual or automated process, shall be a written communication provided to the designated agent of the service provider, as described in subsection (c), that includes substantially the following:

“(A) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

“(B) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a non-exhaustive representative list of those allegedly infringed works at that website.

“(C)(i) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

“(ii) If the same copyrighted work is claimed to be infringed by multiple items of material or at multiple locations on a single website, the identification shall be sufficient for the purposes of clause (i) if the notification identifies not less than 1 such item of material and not less than 1 such location, rather than specific web addresses for each location.

“(D) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, or electronic mail address at

which the complaining party may be contacted.

“(E) A statement that the complaining party has a [subjective] good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

“(F) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

“(2) SUBSTANTIAL COMPLIANCE.—

“(A) IN GENERAL.—Subject to subparagraph (B), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of paragraph (1) shall not be considered under subsection (a) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

“(B) PARTIAL COMPLIANCE.—In a case in which a notification under paragraph (1) that is provided to a service provider’s designated agent fails to comply substantially with all of the requirements of paragraph (1) but substantially complies with subparagraphs (B), (C), and (D) of that paragraph, subparagraph (A) of this paragraph applies only if the service provider promptly attempts to contact the person submitting the notification or takes other reasonable actions to assist in the receipt of a notification that substantially complies with all the provisions of subparagraph (A).

“(C) PENALTY.—

“(i) IN GENERAL.—A person that submits a notification under this paragraph without a [subjective] good faith belief that the use that is the subject of the notification is unauthorized shall be subject to damages under subsection (f).

“(ii) RULE OF CONSTRUCTION.—Nothing in clause (i) may be construed to subject a person that submits a notification containing a mistake to a penalty under subsection (f) if the notification is sent in good faith and is at least minimally compliant with the requirements under subparagraph (A).

“(3) WEB FORMS.—

“(A) IN GENERAL.—Each service provider with a public-facing website shall, based on criteria established under rules issued by the Register of Copyrights under subparagraph (B), make available—

“(i) a web form for submitting to the service provider a notice under paragraph (1);

“(ii) a physical and electronic mail address for the submission of either a physical or electronic notice sent under paragraph (1); and

“(iii) a process by which, as a supplement to the materials made available under clauses (i) and (ii), a service provider may enter into a voluntary agreement with a copyright owner for an alternative noticing process under this subsection.

“(B) RULES.—

1 “(i) IN GENERAL.—Not later than [X] after the date of enactment of the Digital  
2 Copyright Act of 2021, the Register of Copyrights shall issue rules that, taking  
3 into consideration the different types of service providers, establishes the format  
4 for a form described in subparagraph (A).

5 “(ii) UPDATES.—The Register of Copyrights shall update the rules issued under  
6 subparagraph (B) once every 5 years.

7 “(4) PROHIBITIONS.—With respect to a notification submitted under this subsection—

8 “(A) the person submitting the notification may not include in the notification  
9 information with respect to licensing or any demand of payment; and

10 “(B) if the notification contains any item prohibited under subparagraph (A)—

11 “(i) the notification shall be considered to be void and without effect under  
12 subsection (a); and

13 “(ii) the person submitting the notification shall be subject to damages under  
14 subsection (f).

15 “(5) PERSONALLY IDENTIFIABLE INFORMATION.—Not later than [X] after the date of  
16 enactment of the Digital Copyright Act of 2021, the Register of Copyrights shall issue rules  
17 that provide which personally identifiable information [such as physical address] shall be  
18 protected by a service provider under a fiduciary duty and redacted or withheld when a  
19 service provider shares any information from a notification under this subsection.

20 “(c) Designated Agent.—

21 “(1) IN GENERAL.—The limitations on liability established under subsection (a) apply to a  
22 service provider only if the service provider has designated an agent to receive notifications  
23 submitted under subsection (b), by making available through its service, including on its  
24 website in a conspicuous location that is accessible to the public, and by providing to the  
25 Copyright Office, substantially the following information:

26 “(A) The name, address, phone number, and electronic mail address of the agent.

27 “(B) Other contact information which the Register of Copyrights may deem  
28 appropriate.

29 “(2) DIRECTORY.—The Register of Copyrights shall maintain a current directory of  
30 agents available to the public for inspection, including through the internet, and may require  
31 payment of a fee by service providers to cover the costs of maintaining the directory.

32 “(d) A service provider that does not satisfy the requirements of this section shall not enjoy the  
33 limitation on liability or, where noncompliance is under subsection (g), or damages under  
34 subsection (f).

35 “(f) Remedies.—

36 “(1) MISREPRESENTATIONS AND BAD FAITH.—Any person who knowingly materially  
37 represents under this section that material or activity is infringing, or that material or  
38 activity was removed or disabled by mistake or misidentification, or otherwise acts in bad  
39 faith, shall be liable for any damages, including costs and attorneys’ fees, incurred by the  
40 alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a

1 service provider, who is injured by such misrepresentation, as the result of the service  
2 provider relying upon such misrepresentation in removing or disabling access to the  
3 material or activity claimed to be infringing, or in replacing the removed material or ceasing  
4 to disable access to it.

5 “(2) REPEATEDLY SENDING FALSE NOTIFICATIONS.—If a person repeatedly and falsely  
6 submits notifications under subsection (b) or counter notifications under subsection (g)(3)—

7 “(A) that person shall be placed on a list maintained by the Register of Copyrights,  
8 which the Register shall establish through rules that the Register shall update once  
9 every 5 years; and

10 “(B) a service provider that receives a notification or counter notification sent by a  
11 person that is on the list described in subparagraph (A) may elect not to respond to the  
12 notification or counter notification without facing any adverse consequence under this  
13 section.

14 “(3) RESPONDING TO A COUNTER NOTICE.—If a service provider disables access to, or  
15 removes, material or activity under subsection (a) without satisfying the requirements under  
16 subsection (g), the person against which the service provider takes that action may bring a  
17 civil action against the service provider, for monetary damages, including attorneys’ fees  
18 and costs, or injunctive relief, in an appropriate district court of the United States or under  
19 paragraph (4).

20 “(4) COPYRIGHT CLAIMS BOARD.—

21 “(A) MISREPRESENTATION OR BAD FAITH.—Any claim for misrepresentation or bad  
22 faith under this subsection may be brought, upon voluntary agreement of both parties,  
23 before the [Copyright Claims Board] on an expedited basis pursuant to rules issued by  
24 the Register of Copyrights, which the Register shall update once every 5 years.

25 (3) in subsection (g)—

26 (A) in paragraph (1), by inserting “if the service provider retains the allegedly  
27 infringing content for 30 days and replaces the removed material or ceases disabling  
28 access to it in accordance with the requirements of this subsection” after “determined  
29 to be infringing”;

30 (B) in paragraph (2)—

31 (i) in the matter preceding subparagraph (A), by striking “subsection (c)(1)(C)”  
32 and inserting “subsection (b)”;

33 (ii) in subparagraph (A), by inserting “and provides, as established by the  
34 Register of Copyright, by rule, counter notice forms to the subscriber, which shall  
35 include information regarding the fair use doctrine” after “to the material”;

36 (iii) in subparagraph (B)—

37 (I) by striking “subsection (c)(1)(C)” and inserting “subsection (b)”;

38 (II) by striking “in 10 business days” and inserting “in 5 business days,  
39 unless the designated agent of the service provider first receives notice from  
40 the person that submitted the notification under subsection (b) that the

alleged infringement exceeds the statutory maximum 1501 of this title  
[[copyright small claims]] and that such person is, in good faith, considering  
filing an action seeking a court order to restrain the subscriber from engaging  
in infringing activity”;

(iv) in subparagraph (C)—

(I) by striking “10” and inserting “5”;

(II) by striking “14” and inserting “30”; and

(III) by striking “subsection (c)(1)(C)” and inserting “subsection (b)”;

(C) in paragraph (3)—

(i) in the matter preceding subparagraph (A), by inserting “, or submitted by  
means of a web form (the format for which shall be established by the Register of  
Copyrights, by rule),” after “designated agent”;

(ii) in subparagraph (C), by inserting “because the material is licensed to the  
user or otherwise authorized by law” after “mistake”;

(iii) in subparagraph (D)—

(I) by inserting “the Copyright Claims Board,” after “jurisdiction of”; and

(II) by inserting “if damages exceed \$30,000 under subsection (e) of  
section 1504” after “is located”; and

(iv) by adding at the end the following:

“(E) An explanation of the alleged mistake contained in the original notification and  
a description of any license under which the subscriber is operating or a description of  
any [subjective good faith] claim that the subscriber could make under section 107  
with respect to the material.”;

(D) in paragraph (4), by striking “subsection (c)(1)(C)” and inserting “subsection  
(b)”;

(E) by adding at the end the following:

“(5) PERSONALLY IDENTIFIABLE INFORMATION.— Not later than [X] after the date of  
enactment of the Digital Copyright Act of 2021, the Register of Copyrights shall issue rules  
that provide which personally identifiable information [such as physical address] shall be  
protected by a service provider under a fiduciary duty and redacted or withheld when a  
service provider shares any information from a counter notification under this subsection

“(6) CHALLENGES TO COUNTER NOTICE.—

“(A) IN GENERAL.—A notice sender to which a counter notification is provided  
under this subsection may send the service provider a challenge claiming that the  
counter notification is facially invalid.

“(B) SUBJECT TO DAMAGES.—A challenge brought under subparagraph (A) that is  
not brought in good faith shall be subject to the damages under [subsection (f)].”;

(4) in subsection (h), by striking all references to “notification described in subsection



1 (c)(3)(A)” and replacing with the following:

2 “a notice containing substantially the same information as a notification submitted  
3 under subsection (b);”;

4 (5) in subsection (i)—

5 (A) in paragraph (1)—

6 (i) in subparagraph (A), by striking “repeat infringers” and inserting “persons  
7 that, on multiple occasions, were the subject of notifications under subsection (b)  
8 that were not successfully challenged”; and

9 (ii) in subparagraph (B), by striking “accommodates and does not interfere  
10 with” and inserting “adopts (or, where utilized by copyright owners, does not  
11 interfere with)”;

12 (B) by redesignating paragraph (2) as paragraph (3);

13 (C) by inserting after paragraph (1) the following:

14 “(2) RULEMAKINGS.—

15 “(A) IN GENERAL.—Not later than [X] after the date of enactment of this Act, the  
16 Register of Copyrights shall—

17 “(i) in consultation with the NTIA, develop and maintain a model policy with  
18 respect to persons described in paragraph (1)(A) that shall determine minimum  
19 requirements for service providers; and

20 “(ii) in consultation with the National Institute of Standards and Technology,  
21 identify and adopt standard technical measures and clarify that, when adopted,  
22 shall be made available to copyright owners and service providers on fair,  
23 reasonable, and non-discriminatory terms.

24 “(B) UPDATES.—The Register of Copyrights shall update the material developed  
25 and established under subparagraph (A) once every 5 years.”; and

26 (D) in paragraph (3), as so redesignated—

27 (i) inserting “or service providers to manage copyrighted works on the service”  
28 after “or protect copyrighted works”;

29 (ii) in subparagraph (B)—

30 (I) by inserting “, or can be made available,” after “are available”; and

31 (II) by striking “and” at the end;

32 (iii) in subparagraph (C)—

33 (I) by inserting “and disproportionate” after “substantial”; and

34 (II) by striking the period at the end and inserting “; and”; and

35 (iv) by adding at the end the following:

36 “(D) vary across types and sizes of service providers.”;

(6) in subsection (m)(1), by inserting “or if that monitoring would be reasonable in consideration of the rules issued under subsection (a)(2)” after “subsection (i)”; and

(7) by adding at the end the following:

“(o) Review.—The Attorney General, in consultation with the Register of Copyrights, may review a voluntary agreement for addressing copyright infringement online that raises antitrust concerns or constrains uses that are otherwise authorized under this title.”.

### SEC. 3. LIMITATION ON REMEDIES IN CASES INVOLVING ORPHAN WORKS.

(a) Amendment.—Chapter 5 of title 17, United States Code, is amended by adding at the end the following:

#### “514. Limitation on remedies in cases involving orphan works

“(a) Definitions.—In this section:

“(1) NOTICE OF CLAIM OF INFRINGEMENT.—The term ‘notice of claim of infringement’ means, with respect to a claim of copyright infringement, a written notice sent from the owner of the infringed copyright, or a person acting on the owner’s behalf, to the infringer, or a person acting on the infringer’s behalf, that includes at a minimum—

“(A) the name of the owner of the infringed copyright;

“(B) the title of the infringed work, any alternative titles of the infringed work known to the owner of the infringed copyright, or if the work has no title, a description in detail sufficient to identify that work;

“(C) an address and telephone number at which the owner of the infringed copyright or a person acting on behalf of the owner may be contacted; and

“(D) information reasonably sufficient to permit the infringer to locate the infringer’s material in which the infringed work resides.

“(2) OWNER OF THE INFRINGED COPYRIGHT.—The ‘owner of the infringed copyright’ is the owner of any particular exclusive right under section 106 that is applicable to the infringement, or any person or entity with the authority to grant or license such right.

“(3) REASONABLE COMPENSATION.—The term ‘reasonable compensation’ means, with respect to a claim of infringement, the amount on which a willing buyer and willing seller in the positions of the infringer and the owner of the infringed copyright would have agreed with respect to the infringing use of the work immediately before the infringement began.

“(b) Conditions for Eligibility.—

“(1) CONDITIONS.—

“(A) IN GENERAL.—Notwithstanding sections 502 through 506, and subject to subparagraph (B), in an action brought under this title for infringement of copyright in a work, the remedies for infringement shall be limited in accordance with subsection (c) if the infringer—

“(i) proves by a preponderance of the evidence that before the infringement

began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement—

“(I) performed and documented a qualifying search, in good faith, to locate and identify the owner of the infringed copyright; and

“(II) was unable to locate and identify an owner of the infringed copyright;

“(ii) prior to using the work, filed with the Register of Copyrights a Notice of Use under paragraph (3);

“(iii) provided attribution, in a manner that is reasonable under the circumstances, to the legal owner of the infringed copyright, if such legal owner was known with a reasonable degree of certainty, based on information obtained in performing the qualifying search;

“(iv) included with the public distribution, display, or performance of the infringing work a symbol or other notice of the use of the infringing work, the form and manner of which shall be prescribed by the Register of Copyrights;

“(v) asserts in the initial pleading to the civil action eligibility for such limitations; and

“(vi) at the time of making the initial discovery disclosures required under rule 26 of the Federal Rules of Civil Procedure, states with particularity the basis for eligibility for the limitations, including a detailed description and documentation of the search undertaken in accordance with paragraph (2)(A) and produces documentation of the search.

“(B) EXCEPTION.—Subparagraph (A) shall not apply if, after receiving notice of the claim for infringement and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer—

“(i) fails to negotiate reasonable compensation in good faith with the owner of the infringed copyright; or

“(ii) fails to render payment of reasonable compensation in a reasonably timely manner after reaching an agreement with the owner of the infringed copyright or under an order described in subsection (c)(1)(A).

“(2) REQUIREMENTS FOR SEARCHES.—

“(A) REQUIREMENTS FOR QUALIFYING SEARCHES.—

“(i) IN GENERAL.—A search qualifies under paragraph (1)(A)(i)(I) if the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement, undertakes a diligent effort that is reasonable under the circumstances to locate the owner of the infringed copyright prior to, and at a time reasonably proximate to, the infringement.

“(ii) DILIGENT EFFORT.—For purposes of clause (i), a diligent effort—

“(I) requires, at a minimum—

“(aa) a search of the records of the Copyright Office that are available to the public through the Internet and relevant to identifying and

1 locating copyright owners, provided there is sufficient identifying  
2 information on which to construct a search;

3 “(bb) a search of reasonably available sources of copyright  
4 authorship and ownership information and, where appropriate, licensor  
5 information;

6 “(cc) use of appropriate technology tools, printed publications, and  
7 where reasonable, internal or external expert assistance; and

8 “(dd) use of appropriate databases, including databases that are  
9 available to the public through the Internet; and

10 “(II) includes any actions that are reasonable and appropriate under the  
11 facts relevant to the search, including actions based on facts known at the  
12 start of the search and facts uncovered during the search, and including a  
13 review, as appropriate, of Copyright Office records not available to the  
14 public through the Internet that are reasonably likely to be useful in  
15 identifying and locating the copyright owner.

16 “(iii) CONSIDERATION OF RECOMMENDED PRACTICES.—A qualifying search  
17 under this subsection shall ordinarily be based on the applicable statement of  
18 Recommended Practices made available by the Copyright Office.

19 “(iv) LACK OF IDENTIFYING OF INFORMATION.—Each of the following  
20 circumstances shall not be considered to be sufficient to meet the conditions under  
21 paragraph (1)(A)(i)(I):

22 “(I) A particular copy or phonorecord lacks identifying information  
23 pertaining to the owner of the infringed copyright.

24 “(II) An owner of the infringed copyright fails to respond to any inquiry or  
25 other communication about the work.

26 “(v) USE OF RESOURCES FOR CHARGE.—A qualifying search under paragraph  
27 (1)(A)(i)(I) may require use of resources for which a charge or subscription is  
28 imposed to the extent reasonable under the circumstances.

29 “(vi) EFFECT OF FOREIGN SEARCHES.—If a search is found to be qualifying  
30 under the laws of a foreign jurisdiction, and this search is relied upon in part by a  
31 U.S. infringer, a court may take this fact into account when determining whether  
32 the United States search is qualifying, provided the foreign jurisdiction accepts  
33 qualifying United States searches in a reciprocal manner.

34 “(B) INFORMATION TO GUIDE SEARCHES; RECOMMENDED PRACTICES.—

35 “(i) STATEMENTS OF RECOMMENDED PRACTICES.—

36 “(I) IN GENERAL.—The Register of Copyrights shall maintain and make  
37 available to the public and, from time to time, update not less than 1  
38 statement of Recommended Practices for each category, or, in the discretion  
39 of the Register, subcategory of work under section 102(a), for conducting  
40 and documenting a search under this subsection.

1 “(II) CONTENTS.— A statement under subclause (I) shall ordinarily  
2 include reference to materials, resources, databases, and technology tools  
3 that are relevant to a search.

4 “(III) ADDITIONAL STATEMENTS.—The Register of Copyrights may  
5 maintain and make available more than 1 statement of Recommended  
6 Practices for each category or subcategory, as appropriate.

7 “(ii) CONSIDERATION OF RELEVANT MATERIALS.—In maintaining and making  
8 available and, from time to time, updating the Recommended Practices under  
9 clause (i), the Register of Copyrights—

10 “(I) shall, in the discretion of the Register, consider materials, resources,  
11 databases, technology tools, and practices that are reasonable and relevant to  
12 the qualifying search; and

13 “(II) may consider any comments submitted to the Copyright Office by  
14 any interested entities.

15 “(3) NOTICE OF USE ARCHIVE.—

16 “(A) IN GENERAL.—The Register of Copyrights shall create and maintain an archive  
17 to retain the Notices of Use filed under paragraph (1)(A)(ii).

18 “(B) CONTENTS.—Each Notice of Use filed under paragraph (1)(A)(ii) shall  
19 include—

20 “(i) the type of work being used, as described in section 102(a);

21 “(ii) a description of the work;

22 “(iii) a summary of the search conducted under paragraph (1)(A)(i)(I);

23 “(iv) the owner, author, recognized title, and other available identifying  
24 element of the work to the extent the infringer knows such information with a  
25 reasonable degree of certainty;

26 “(v) the source of the work, including the library or archive in which the work  
27 was found, the publication in which the work originally appeared, the website  
28 from which the work was taken, (including the url and the date the site was  
29 accessed);

30 “(vi) a certification that the infringer performed a qualifying search in good  
31 faith under this subsection to locate the owner of the infringed copyright; and

32 “(vii) the name of the infringer and how the work will be used.

33 “(C) AVAILABILITY.—A Notice of Use filed under paragraph (1)(A)(ii) and retained  
34 under the control of the Copyright Office shall be made available to individuals or the  
35 public only under the conditions specified by regulations of the Copyright Office.

36 “(4) PENALTY FOR FAILURE TO COMPLY.—If an infringer fails to comply with any  
37 requirement under this subsection, the infringer shall not be eligible for a limitation on  
38 remedies under this section.

39 “(c) Limitations on Remedies.—The limitations on remedies in an action for infringement of a

copyright to which this section applies are the following:

“(1) MONETARY RELIEF.—

“(A) IN GENERAL.—Subject to subparagraph (B), a court may not award monetary relief (including actual damages, statutory damages, costs, and attorney’s fees), except that the court may require the infringer to pay reasonable compensation to the owner of the exclusive right under the infringed copyright for the use of the infringed work.

“(B) LIMITATIONS.—An order requiring the infringer to pay reasonable compensation for the use of the infringed work may not be made under subparagraph (A) if—

“(i) the infringer is a nonprofit educational institution, museum, library, archives, or a public broadcasting entity (as such term is defined in section 118(f)), or any of such entities’ employees acting within the scope of their employment; and

“(ii) the infringer proves by a preponderance of the evidence that—

“(I) the infringement was performed without any purpose of direct or indirect commercial advantage;

“(II) the infringement was primarily educational, religious, or charitable in nature; and

“(III) after receiving a notice of claim of infringement, and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer promptly ceased the infringement.

“(C) EFFECT OF REGISTRATION ON REASONABLE COMPENSATION.— If a work is registered, the court may, in determining reasonable compensation under this paragraph, take into account the value, if any, added to the work by reason of such registration.

“(2) INJUNCTIVE RELIEF.—

“(A) IN GENERAL.—Except as provided in subparagraph (B)—

“(i) the court may impose injunctive relief to prevent or restrain any infringement alleged in the civil action; and

“(ii) in the case of an infringer that has met the requirements of subsection (b), the relief described in clause (i) shall, to the extent practicable and subject to applicable law, account for any harm that the relief would cause the infringer due to its reliance on subsection (b).

“(B) EXCEPTION.—

“(i) IN GENERAL.—In the case of an infringer, which is not a case described in clause (ii), that has prepared or commenced preparation of a new work of authorship that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression, any injunctive relief ordered by the court may not restrain the infringer’s continued preparation or use of that new work, if—

1 “(I) the infringer pays reasonable compensation in a reasonably timely  
2 manner after the amount of such compensation has been agreed upon with  
3 the owner of the infringed copyright or determined by the court; and

4 “(II) the court requires that the infringer provide attribution, in a manner  
5 that is reasonable under the circumstances, to the legal owner of the  
6 infringed copyright, if requested by such owner.

7 “(ii) CERTAIN CASES DESCRIBED.—For purposes of paragraph (1), a case  
8 described in this subparagraph is a case in which the owner of the infringed  
9 work—

10 “(I) is also an author of the work;

11 “(II) requests the injunctive relief described in subparagraph (A); and

12 “(III) alleges, and the court so finds, that the infringer’s continued and  
13 intentional preparation or use of the new work would be prejudicial to the  
14 owner’s honor or reputation, and this harm is not otherwise compensable.

15 “(C) LIMITATIONS.—The limitations on injunctive relief under subparagraphs (A)  
16 and (B) may not be available to an infringer, or a representative of the infringer acting  
17 in an official capacity, if the infringer asserts that neither the infringer nor any  
18 representative of the infringer acting in an official capacity is subject to suit in the  
19 courts of the United States for an award of damages for the infringement, unless the  
20 court finds that the infringer—

21 “(i) has complied with the requirements of subsection (b); and

22 “(ii) pays reasonable compensation to the owner of the exclusive right under  
23 the infringed copyright in a reasonably timely manner after the amount of  
24 reasonable compensation has been agreed upon with the owner or determined by  
25 the court.

26 “(D) RULE OF CONSTRUCTION.—Nothing in subparagraph (C) shall be construed to  
27 authorize or require, and no action taken under such subparagraph shall be deemed to  
28 constitute, either an award of damages by the court against the infringer or an  
29 authorization to sue a State.

30 “(E) RIGHTS AND PRIVILEGES NOT WAIVED.—No action taken by an infringer under  
31 subparagraph (C) shall be considered to waive any right or privilege that, as a matter of  
32 law, protects the infringer from being subject to suit in the courts of the United States  
33 for an award of damages.

34 “(d) Preservation of Other Rights, Limitations, and Defenses.—

35 “(1) IN GENERAL.—This section shall not affect any right, or any limitation or defense to  
36 copyright infringement, including fair use, under this title.

37 “(2) EFFECT ON OTHER PROVISIONS.—In the case of another provision of this title that  
38 provides for a statutory license that would permit the use contemplated by the infringer,  
39 such other provision shall apply.

40 “(e) Copyright for Derivative Works and Compilations.—Notwithstanding section 103(a), an

infringer that qualifies for the limitation on remedies afforded by this section shall not be denied copyright protection in a compilation or derivative work on the basis that such compilation or derivative work employs preexisting material that has been used unlawfully under this section.

“(f) Exclusion for Fixations in or on Useful Articles.—The limitations on remedies under this section shall not be available to an infringer for infringements resulting from fixation of a pictorial, graphic, or sculptural work in or on a useful article that is offered for sale or other commercial distribution to the public.”.

(b) Table of Sections Amendment.—The table of sections for chapter 5 of title 17, United States Code, is amended by inserting after the item relating to section 513 the following:

“514. Limitation on remedies in cases involving orphan works.”.

(c) Effective Date.—The amendments made by this section shall take effect on [January 1, 20\_\_].

## SEC. 4. APPOINTMENT OF REGISTER OF COPYRIGHTS; COPYRIGHT OFFICE RELOCATION.

(a) In General.—Section 701 of title 17, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

“(a) Establishment of Copyright Office.—

“(1) IN GENERAL.—The Copyright Office is established as an agency within the Department of Commerce.

“(2) REGISTER OF COPYRIGHTS.—The Copyright Office shall be headed by the Register of Copyrights, who—

“(A) shall be appointed by the President, by and with the advice and consent of the Senate, for a 5-year term; and

“(B) shall be responsible for all administrative functions and duties under this title, except as otherwise specified.

“(3) SUBORDINATE OFFICERS AND EMPLOYEES.—Each subordinate officer or employee of the Copyright Office shall be appointed by, and act under the general direction and supervision of, the Register of Copyrights.”; and

(2) by striking subsection (d) and inserting the following:

“(d) Relation to Deposit Requirements.—Nothing in paragraph (a) of this section shall be construed to affect—

“(1) the deposit requirements under section 407 or 408;

(b) Conforming Amendments.—[conforming amendments throughout title 17, including section 701, will need to be added.]

(c) Effective Date; Effect on Personnel.—

[(1) EFFECTIVE DATE.—The amendments made by this section shall take effect beginning with the first appointment of an individual to serve as the Register of Copyrights on or after



the date of enactment of this Act.

(2) EFFECT ON PERSONNEL.—No individual who was employed by the Copyright Office on the day before the date of enactment of this Act shall be separated or reduced in grade or compensation because of the amendments made by this section.

## SEC. 5. MODERNIZING CIRCUMVENTION EXEMPTIONS.

(a) In General.—Section 1201 of title 17, United States Code, is amended—

(1) in subsection (a)(1)—

(A) in subparagraph (B)—

(i) by striking “shall not apply to persons” and inserting the following: “shall not apply to—

“(i) persons”; and

(ii) by striking the period at the end and inserting the following: “; or

“(ii) third-party assistance at the direction of an intended user, subject to subparagraph (C).”;

(B) in subparagraph (C), in the matter preceding clause (i)—

(i) by striking “shall make the determination in a rulemaking proceeding for purposes of subparagraph (B)” and inserting “shall make a determination in a rulemaking proceeding for purposes of subparagraph (B)(i)”;

(ii) by striking “works.” and inserting the following: “works, and shall make a determination in a rulemaking proceeding for purposes of subparagraph (B)(ii) of whether third-party assistance at the direction of an intended user should be exempt from the prohibition contained in subparagraph (A)”;

(iii) [by striking “In conducting such rulemaking” and inserting “In conducting the rulemaking for purposes of subparagraph (B)(i)”;

(C) in subparagraph (D)—

(i) by inserting “(i)” after “(D)”;

(ii) in clause (i), as so designated, by inserting “for purposes of subparagraph (B)(i)” after “subparagraph (C)”;

(iii) by adding at the end the following:

“(ii) If the Register of Copyrights determines, pursuant to the rulemaking conducted under subparagraph (C) for purposes of subparagraph (B)(ii), that third-party assistance at the direction of an intended user should be exempt from the prohibition contained in subparagraph (A), the Register shall publish that determination and that prohibition shall not apply to such third-party assistance for the ensuing 3-year period.”;

(D) in subparagraph (E), by striking “exception” and inserting “exceptions”; and

(E) by adding at the end the following:

“(F) Notwithstanding subparagraph (B), (C), or (D)—

1 “(i) the Register of Copyrights shall renew an exception described in clause (i) for  
2 the succeeding 3-year period without additional documentation unless a party opposing  
3 renewal files a good faith statement in opposition.

4 “(G)(i) Notwithstanding subparagraph (B), (C), or (D), the Register of Copyrights may  
5 make permanent a temporary exception that has been—

6 “(I) adopted under subparagraph (C) for a 3-year period; and

7 “(II) renewed for the successive 3-year period under subparagraph (F) without  
8 opposition.

9 “(iii) If the Register of Copyrights receives a good faith statement in opposition to a  
10 temporary exception described in clause (i), the Register shall provide notice to the public  
11 that the exception has reentered the rulemaking proceeding described in subsection (a)(1);

12 (2) in subsection (a)(2)—

13 (A) inserting

14 “(D) The Register of Copyrights may provide by regulation that this paragraph shall  
15 not apply to the manufacture, importation, offering to the public, provision, or other  
16 trafficking of a technology, product, service, device, component, or part thereof to the  
17 intended user of an exemption under subsection (1).

18 (3) in subsection (b)—

19 (A) by redesignating paragraph (2) as paragraph (3); and

20 (B) by inserting in paragraph (1) the following:

21 “(D) The Register of Copyrights may provide by regulation that paragraph (1) shall not  
22 apply to the manufacture, importation, offering to the public, provision, or other trafficking  
23 of a technology, product, service, device, component, or part thereof to the intended user of  
24 an exemption under subsection (1)”;

25 (3) in subsection (g)—

26 (A) in paragraph (2)—

27 (i) in subparagraph (B), by adding “and” at the end;

28 (ii) by striking subparagraph (C); and

29 (iii) by redesignating subparagraph (D) as subparagraph (C);

30 (B) in paragraph (3)—

31 (i) by striking subparagraph (A) and inserting the following:

32 “(A) whether the information derived from the encryption research was  
33 disseminated, to the copyright owner, a research body, or the public, in a manner that  
34 does not facilitate infringement and can improve encryption tools; and”;

35 (ii) in subparagraph (B), by striking “; and” and inserting a period; and

36 (iii) by striking subparagraph (C);

37 (4) in subsection (j)—

1 (A) by striking “Security Testing” and replacing with “Good-Faith Security  
2 Research”

3 (B) by striking paragraphs (1), (2), and (3) and inserting the following:

4 “(1) DEFINITION.—For purposes of this section, the term ‘good-faith security research’  
5 means accessing a computer program for purposes of good-faith testing, investigation, or  
6 correction of a security flaw or vulnerability, if—

7 “(A) the activity is carried out in an environment designed to avoid harm to  
8 individuals and the public; and

9 “(B) the information derived from the activity—

10 “(i) is used primarily to promote the security or safety of—

11 “(I) the class of devices or machines on which the computer program  
12 operates; or

13 “(II) the individuals or entities that use the devices or machines described  
14 in subclause (I); and

15 “(ii) is not used or maintained in a manner that facilitates copyright  
16 infringement.

17 “(2) PERMISSIBLE ACTS OF GOOD-FAITH SECURITY RESEARCH—Notwithstanding the  
18 provisions of subsection (a)(1)(A), it is not a violation of that subsection if the  
19 circumvention of a computer program—

20 “(A) is undertaken on—

21 “(i) a lawfully acquired device or machine on which the computer program  
22 operates; or

23 “(ii) a computer, computer system, or computer network on which the  
24 computer program operates with the authorization of the owner or operator of the  
25 computer, computer system, or computer network;

26 “(B) is undertaken solely for the purpose of good-faith security research; and

27 “(C) does not violate any applicable law, including section 1030 of title 18.

28 “(3) FACTORS IN DETERMINING EXEMPTION.—In determining whether a person qualifies  
29 for the exemption under paragraph (2), the factors to be considered shall include—

30 “(A) whether the person used the information derived from the security testing  
31 primarily to promote the security or safety of—

32 “(i) the class of devices or machines on which the computer program operates;  
33 or

34 “(ii) those individuals or entities that use the devices or machines described in  
35 clause (i); and

36 “(B) whether the person used the information derived from the security testing for  
37 the purpose of facilitating copyright infringement.”; and

38 (B) in paragraph (4)—

(i) by striking “subsection (2)” and inserting “paragraph (2) of this subsection”;  
and

(ii) by striking “section (a)(2)” and inserting “subsection (a)(2)”;

(iii) by striking “security testing” and inserting “good-faith security research”;  
and

(5) by adding at the end the following:

“(l) Assistive Technologies Exemption.—Notwithstanding the provisions of subsections (a) and (b), it is not a violation of this section for a person to circumvent a technological protection measure or to provide assistance or a tool at the direction of the user for an activity that enables a blind or visually impaired individual to utilize assistive technologies, to the extent that the activity does not constitute infringement under this title.

“(m) Unlocking Mobile Devices.— Notwithstanding the provisions of subsections (a) and (b), it is not a violation of this section for a person to circumvent a technological protection measure or to provide assistance or a tool at the direction of the user for an activity that unlocks a mobile device, to the extent that the activity does not constitute infringement under this title.

“(n) Technical Assistance for Computer Programs Exemption.— Notwithstanding the provisions of subsections (a) and (b), it is not a violation of this section for a person to circumvent a technological protection measure or to provide assistance or a tool at the direction of the user for an activity that allows the diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls, to the extent that the activity does not constitute infringement under this title.”.

(b) Applicability.—The amendments to section 1201(a)(1) of title 17, United States Code, made by subsection (a)(1) shall apply with respect to the first rulemaking under subparagraph (C) of such section 1201(a)(1) that begins on or after the date of enactment of this Act.

## SEC. 6. PROMOTING ATTRIBUTION THROUGH COPYRIGHT MANAGEMENT INFORMATION.

(a) Integrity of Copyright Management Information.—Section 1202 of title 17, United States Code, is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and adjusting the margins accordingly;

(B) by striking “No person” and inserting the following:

“(1) IN GENERAL.—No person”; and

(C) by adding at the end the following:

“(2) MENS REA REQUIREMENT.—For purposes of paragraph (1), the requirement that an action be taken with intent to induce, enable, facilitate, or conceal infringement—

“(A) shall be satisfied by knowledge that the action is being taken and doing so would encourage or facilitate infringement; and

“(B) does not require any pattern of conduct or modus operandi.”;  
(2) in subsection (b)—

(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively, and adjusting the margins accordingly;

(B) by striking “No person” and inserting the following:  
“(1) IN GENERAL.—No person”;

(C) by moving the undesignated matter following subparagraph (C), as so redesignated, 2 ems to the right; and

(D) by adding at the end the following:

“(2) MENS REA REQUIREMENT.—For purposes of paragraph (1), the requirement that an action be taken with knowledge, or reasonable grounds to know, that the action will induce, enable, facilitate, or conceal infringement—

“(A) shall be satisfied by knowledge that the action is being taken and doing so would encourage or facilitate infringement; and

“(B) does not require any pattern of conduct or modus operandi.”; and  
(3) in subsection (c)—

(A) by redesignating paragraphs (1) through (8) as subparagraphs (A) through (H), respectively, and adjusting the margins accordingly;

(B) by striking “As used in this section” and inserting the following:  
“(1) IN GENERAL.—As used in this section”; and

(C) by adding at the end the following:  
“(2) RULE OF CONSTRUCTION.—For purposes of paragraph (1), the term ‘including in digital form’ shall not be construed to exclude information conveyed in forms other than digital.”.

(b) Requirement for Non-authors to Affix Copyright Management Information.—

(1) IN GENERAL.—Chapter 12 of title 17, United States Code, is amended by inserting after section 1202 the following:

## “1202A. Requirement for non-authors to affix copyright management information

“(a) Definition.—In this section, the term ‘copyright management information’ has the meaning given the term in section 1202.

“(b) Requirement to Affix Information.—The copyright owner of a work who is not the author of the work shall affix copyright management information to any digital copy of the work reproduced or distributed by the copyright owner.

“(c) Right of Action for Authors.—If a person removes copyright information from, or alters copyright management information conveyed in connection with, a digital or analog copy of a

copyrighted work with the intent to conceal the attribution information of the author of the work, the author may bring a civil action against the person in an appropriation district court of the United States, and may pursue remedies under section 1203 of this title”.

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 12 of title 17, United States Code, is amended by inserting after the item relating to section 1202 the following:

“1202A. Requirement for non-authors to affix copyright management information.”.

## SEC. 7. COPYRIGHT ALTERNATIVES IN SMALL-CLAIMS ENFORCEMENT ACT.

(a) Copyright Small Claims.—

(1) IN GENERAL.—Title 17, United States Code, is amended by adding at the end the following:

### “CHAPTER 15—COPYRIGHT SMALL CLAIMS

“1501. Definitions.

“1502. Copyright Claims Board.

“1503. Authority and duties of the Copyright Claims Board.

“1504. Nature of proceedings.

“1505. Registration requirement.

“1506. Conduct of proceedings.

“1507. Effect of proceeding.

“1508. Review and confirmation by district court.

“1509. Relationship to other district court actions.

“1510. Implementation by Copyright Office.

“1511. Funding.

#### “1501. Definitions

“In this chapter—

“(1) the term ‘claimant’ means the real party in interest that commences a proceeding before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), noninfringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3);

“(2) the term ‘counterclaimant’ means a respondent in a proceeding before the Copyright Claims Board that—

“(A) asserts a permissible counterclaim under section 1504(c)(4) against the claimant in the proceeding; and

“(B) is the real party in interest with respect to the counterclaim described in subparagraph (A);

“(3) the term ‘party’—

“(A) means a party; and

“(B) includes the attorney of a party, as applicable; and

“(4) the term ‘respondent’ means any person against whom a proceeding is brought before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), noninfringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3).

## “1502. Copyright Claims Board

“(a) In General.—There is established in the Copyright Office the Copyright Claims Board, which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in this chapter.

“(b) Officers and Staff.—

“(1) COPYRIGHT CLAIMS OFFICERS.—The Register of Copyrights shall recommend 6 full-time Copyright Claims Officers to serve on the Copyright Claims Board in accordance with paragraph (3)(A). The Officers shall be appointed by the [Secretary of Commerce] to such positions after consultation with the Register of Copyrights.

“(2) COPYRIGHT CLAIMS ATTORNEYS.—The Register of Copyrights shall hire not fewer than 6 full-time Copyright Claims Attorneys to assist in the administration of the Copyright Claims Board.

“(3) QUALIFICATIONS.—

“(A) COPYRIGHT CLAIMS OFFICERS.—

“(i) IN GENERAL.—Each Copyright Claims Officer shall be an attorney who has not fewer than 7 years of legal experience.

“(ii) EXPERIENCE.—Four of the Copyright Claims Officers shall—

“(I) have substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims; and

“(II) between those 4 Officers, have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works.

“(iii) ALTERNATIVE DISPUTE RESOLUTION.—The Copyright Claims Officer not described in clause (ii) shall have substantial familiarity with copyright law and experience in the field of alternative dispute resolution, including the resolution of litigation matters through that method of resolution.

“(B) COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be an attorney who has not fewer than 3 years of substantial experience in copyright law.

“(4) COMPENSATION.—

1 “(A) COPYRIGHT CLAIMS OFFICERS.—

2 “(i) DEFINITION.—In this subparagraph, the term ‘senior level employee of the  
3 Federal Government’ means an employee, other than an employee in the Senior  
4 Executive Service, the position of whom is classified above GS–15 of the General  
5 Schedule.

6 “(ii) PAY RANGE.—Each Copyright Claims Officer shall be compensated at a  
7 rate of pay that is not less than the minimum, and not more than the maximum,  
8 rate of pay payable for senior level employees of the Federal Government,  
9 including locality pay, as applicable.

10 “(B) COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be  
11 compensated at a rate of pay that is not more than the maximum rate of pay payable for  
12 level 10 of GS–15 of the General Schedule, including locality pay, as applicable.

13 “(5) TERMS.—

14 “(A) IN GENERAL.—Subject to subparagraph (B), a Copyright Claims Officer shall  
15 serve for a renewable term of 6 years.

16 “(B) INITIAL TERMS.—The terms for the first Copyright Claims Officers appointed  
17 under this chapter shall be as follows:

18 “(i) The first two such Copyright Claims Officer appointed shall be appointed  
19 for a term of 4 years.

20 “(ii) The second pair of Copyright Claims Officer appointed shall be appointed  
21 for a term of 5 years.

22 “(iii) The third pair of Copyright Claims Officer appointed shall be appointed  
23 for a term of 6 years.

24 “(6) VACANCIES AND INCAPACITY.—

25 “(A) VACANCY.—

26 “(i) IN GENERAL.—If a vacancy occurs in the position of a Copyright Claims  
27 Officer, the [Secretary of Commerce] shall, upon the recommendation of, and in  
28 consultation with, the Register of Copyrights, act expeditiously to appoint a  
29 Copyright Claims Officer for that position.

30 “(ii) VACANCY BEFORE EXPIRATION.—An individual appointed to fill a vacancy  
31 occurring before the expiration of the term for which the predecessor of the  
32 individual was appointed shall be appointed to serve a 6-year term.

33 “(B) INCAPACITY.—If a Copyright Claims Officer is temporarily unable to perform  
34 the duties of the Officer, the [Secretary of Commerce] shall, upon recommendation of,  
35 and in consultation with, the Register of Copyrights, act expeditiously to appoint an  
36 interim Copyright Claims Officer to perform such duties during the period of such  
37 incapacity.

38 “(7) SANCTION OR REMOVAL.—Subject to section 1503(b), the [Secretary of Commerce]  
39 may sanction or remove a Copyright Claims Officer.

40 “(8) ADMINISTRATIVE SUPPORT.—The Register of Copyrights shall provide the Copyright



1 Claims Officers and Copyright Claims Attorneys with necessary administrative support,  
2 including technological facilities, to carry out the duties of the Officers and Attorneys under  
3 this chapter.

4 “(9) LOCATION OF COPYRIGHT CLAIMS BOARD.—The offices and facilities of the  
5 Copyright Claims Officers and Copyright Claims Attorneys shall be located at the  
6 Copyright Office.

## 7 “1503. Authority and duties of the Copyright Claims Board

8 “(a) Functions.—

9 “(1) COPYRIGHT CLAIMS OFFICERS.—Subject to the provisions of this chapter and  
10 applicable regulations, the functions of the Copyright Claims Officers shall be as follows:

11 “(A) To render determinations on the civil copyright claims, counterclaims, and  
12 defenses that may be brought before the Officers under this chapter.

13 “(B) To ensure that claims, counterclaims, and defenses are properly asserted and  
14 otherwise appropriate for resolution by the Copyright Claims Board.

15 “(C) To manage the proceedings before the Officers and render rulings pertaining to  
16 the consideration of claims, counterclaims, and defenses, including with respect to  
17 scheduling, discovery, evidentiary, and other matters.

18 “(D) To request, from participants and nonparticipants in a proceeding, the  
19 production of information and documents relevant to the resolution of a claim,  
20 counterclaim, or defense.

21 “(E) To conduct hearings and conferences.

22 “(F) To facilitate the settlement by the parties of claims and counterclaims.

23 “(G) To—

24 “(i) award monetary relief; and

25 “(ii) include in the determinations of the Officers a requirement that certain  
26 activities under section 1504(e)(2) cease or be mitigated, if the party to undertake  
27 the applicable measure has so agreed.

28 “(H) To provide information to the public concerning the procedures and  
29 requirements of the Copyright Claims Board.

30 “(I) To maintain records of the proceedings before the Officers, certify official  
31 records of such proceedings as needed, and, as provided in section 1506(t), make the  
32 records in such proceedings available to the public.

33 “(J) To carry out such other duties as are set forth in this chapter.

34 “(K) When not engaged in performing the duties of the Officers set forth in this  
35 chapter, to perform such other duties as may be assigned by the Register of Copyrights.

36 “(2) COPYRIGHT CLAIMS ATTORNEYS.—Subject to the provisions of this chapter and  
37 applicable regulations, the functions of the Copyright Claims Attorneys shall be as follows:

38 “(A) To provide assistance to the Copyright Claims Officers in the administration of

the duties of those Officers under this chapter.

“(B) To provide assistance to members of the public with respect to the procedures and requirements of the Copyright Claims Board.

“(C) To provide information to potential claimants contemplating bringing a permissible action before the Copyright Claims Board about obtaining a subpoena under section 512(h) for the sole purpose of identifying a potential respondent in such an action.

“(D) When not engaged in performing the duties of the Attorneys set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

“(b) Independence in Determinations.—

“(1) IN GENERAL.—The Copyright Claims Board shall render the determinations of the Board in individual proceedings independently on the basis of the records in the proceedings before it and in accordance with the provisions of this title, judicial precedent, and applicable regulations of the Register of Copyrights.

“(2) CONSULTATION.—The Copyright Claims Officers and Copyright Claims Attorneys—

“(A) may consult with the Register of Copyrights on general issues of law; and

“(B) subject to section 1506(x), may not consult with the Register of Copyrights with respect to—

“(i) the facts of any particular matter pending before the Officers and the Attorneys; or

“(ii) the application of law to the facts described in clause (i).

“(3) PERFORMANCE APPRAISALS.—Notwithstanding any other provision of law or any regulation or policy of the [Department of Commerce] or Register of Copyrights, any performance appraisal of a Copyright Claims Officer or Copyright Claims Attorney may not consider the substantive result of any individual determination reached by the Copyright Claims Board as a basis for appraisal except to the extent that the result may relate to any actual or alleged violation of an ethical standard of conduct.

“(c) Direction by Register.—Subject to subsection (b), the Copyright Claims Officers and Copyright Claims Attorneys shall, in the administration of their duties, be under the general direction of the Register of Copyrights.

“(d) Inconsistent Duties Barred.—A Copyright Claims Officer or Copyright Claims Attorney may not undertake any duty that conflicts with the duties of the Officer or Attorney in connection with the Copyright Claims Board.

“(e) Recusal.—A Copyright Claims Officer or Copyright Claims Attorney shall recuse himself or herself from participation in any proceeding with respect to which the Copyright Claims Officer or Copyright Claims Attorney, as the case may be, has reason to believe that he or she has a conflict of interest.

“(f) Ex Parte Communications.—Except as may otherwise be permitted by applicable law, any party to a proceeding before the Copyright Claims Board shall refrain from ex parte

communications with the Copyright Claims Officers and the Register of Copyrights concerning the substance of any active or pending proceeding before the Copyright Claims Board.

“(g) Judicial Review.—Actions of the Copyright Claims Officers and Register of Copyrights under this chapter in connection with the rendering of any determination are subject to judicial review as provided under section 1508(c) and not under chapter 7 of title 5.

## “1504. Nature of proceedings

“(a) Voluntary Participation.—Participation in a Copyright Claims Board proceeding shall be on a voluntary basis in accordance with this chapter, and the right of any party to instead pursue a claim, counterclaim, or defense in a district court of the United States or any other court, and to seek a jury trial, shall be preserved.

“(b) Statute of Limitations.—

“(1) IN GENERAL.—A proceeding may not be maintained before the Copyright Claims Board unless the proceeding is commenced, in accordance with section 1506(e), before the Copyright Claims Board not later than 3 years after the claim accrued.

“(2) TOLLING.—Subject to section 1507(a), a proceeding commenced before the Copyright Claims Board shall toll the time permitted under section 507(b) for the commencement of an action on the same claim in a district court of the United States during the period in which the proceeding is pending.

“(c) Permissible Claims, Counterclaims, and Defenses.—The Copyright Claims Board may render determinations with respect to the following claims, counterclaims, and defenses, subject to such further limitations and requirements, including with respect to particular classes of works, as may be set forth in regulations established by the Register of Copyrights:

“(1) A claim for infringement of an exclusive right in a copyrighted work provided under section 106 by the legal or beneficial owner of the exclusive right at the time of the infringement for which the claimant seeks damages, if any, within the limitations set forth in subsection (e)(1).

“(2) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under section 106, consistent with section 2201 of title 28.

“(3) A claim under section 512(f) for misrepresentation in connection with a notification of claimed infringement or a counter notification seeking to replace removed or disabled material, except that any remedies relating to such a claim in a proceeding before the Copyright Claims Board shall be limited to those available under this chapter.

“(4) A counterclaim that is asserted solely against the claimant in a proceeding—

“(A) pursuant to which the counterclaimant seeks damages, if any, within the limitations set forth in subsection (e)(1); and

“(B) that—

“(i) arises under section 106 or section 512(f) and out of the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), a claim of noninfringement brought under paragraph (2), or a claim of misrepresentation brought under paragraph (3); or

“(ii) arises under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), if the agreement could affect the relief awarded to the claimant.

“(5) A legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under this subsection.

“(6) A single claim or multiple claims permitted under paragraph (1), (2), or (3) by 1 or more claimants against 1 or more respondents, but only if all claims asserted in any 1 proceeding arise out of the same allegedly infringing activity or continuous course of infringing activities and do not, in the aggregate, result in the recovery of such claim or claims for damages that exceed the limitations under subsection (e)(1).

“(d) Excluded Claims.—The following claims and counterclaims are not subject to determination by the Copyright Claims Board:

“(1) A claim or counterclaim that is not a permissible claim or counterclaim under subsection (c).

“(2) A claim or counterclaim that has been finally adjudicated by a court of competent jurisdiction or that is pending before a court of competent jurisdiction, unless that court has granted a stay to permit that claim or counterclaim to proceed before the Copyright Claims Board.

“(3) A claim or counterclaim by or against a Federal or State governmental entity.

“(4) A claim or counterclaim asserted against a person or entity residing outside of the United States, except in a case in which the person or entity initiated the proceeding before the Copyright Claims Board and is subject to counterclaims under this chapter.

“(e) Permissible Remedies.—

“(1) MONETARY RECOVERY.—

“(A) ACTUAL DAMAGES, PROFITS, AND STATUTORY DAMAGES FOR INFRINGEMENT.—With respect to a claim or counterclaim for infringement of copyright, and subject to the limitation on total monetary recovery under subparagraph (D), the Copyright Claims Board may award either of the following:

“(i) Actual damages and profits determined in accordance with section 504(b), with that award taking into consideration, in appropriate cases, whether the infringing party has agreed to cease or mitigate the infringing activity under paragraph (2).

“(ii) Statutory damages, which shall be determined in accordance with section 504(c), subject to the following conditions:

“(I) With respect to works timely registered under section 412, so that the works are eligible for an award of statutory damages in accordance with that section, the statutory damages may not exceed \$15,000 for each work infringed.

“(II) With respect to works not timely registered under section 412, but eligible for an award of statutory damages under this section, statutory

1 damages may not exceed \$7,500 per work infringed, or a total of \$15,000 in  
2 any 1 proceeding.

3 “(III) The Copyright Claims Board may not make any finding that, or  
4 consider whether, the infringement was committed willfully in making an  
5 award of statutory damages.

6 “(IV) The Copyright Claims Board may consider, as an additional factor  
7 in awarding statutory damages, whether the infringer has agreed to cease or  
8 mitigate the infringing activity under paragraph (2).

9 “(B) ELECTION OF DAMAGES.—With respect to a claim or counterclaim of  
10 infringement, at any time before final determination is rendered, the claimant or  
11 counterclaimant shall, in accordance with the schedule established by the Copyright  
12 Claims Board under section 1506(k), elect—

13 “(i) to pursue actual damages and profits or statutory damages under  
14 subparagraph (A); or

15 “(ii) not to pursue damages.

16 “(C) DAMAGES FOR OTHER CLAIMS.—Damages for claims and counterclaims other  
17 than infringement claims, such as those brought under section 512(f), shall be subject  
18 to the limitation under subparagraph (D).

19 “(D) LIMITATION ON TOTAL MONETARY RECOVERY.—Notwithstanding any other  
20 provision of law, a party that pursues any 1 or more claims or counterclaims in any  
21 single proceeding before the Copyright Claims Board may not seek or recover in that  
22 proceeding a total monetary recovery that exceeds the sum of \$30,000, exclusive of  
23 any attorneys’ fees and costs that may be awarded under section 1506(y)(2).

24 “(2) AGREEMENT TO CEASE CERTAIN ACTIVITY.—In a determination of the Copyright  
25 Claims Board, the Board shall include a requirement to cease conduct if, in the proceeding  
26 relating to the determination—

27 “(A) a party agrees—

28 “(i) to cease activity that is found to be infringing, including removing or  
29 disabling access to, or destroying, infringing materials; or

30 “(ii) to cease sending a takedown notice or counter notice under section 512 to  
31 the other party regarding the conduct at issue before the Board if that notice or  
32 counter notice was found to be a knowing material misrepresentation under  
33 section 512(f); and

34 “(B) the agreement described in subparagraph (A) is reflected in the record for the  
35 proceeding.

36 “(3) ATTORNEYS’ FEES AND COSTS.—Notwithstanding any other provision of law, except  
37 in the case of bad faith conduct as provided in section 1506(y)(2), the parties to proceedings  
38 before the Copyright Claims Board shall bear their own attorneys’ fees and costs.

39 “(f) Joint and Several Liability.—Parties to a proceeding before the Copyright Claims Board  
40 may be found jointly and severally liable if all such parties and relevant claims or counterclaims

1 arise from the same activity or activities.

2 “(g) Permissible Number of Cases.—The Register of Copyrights may establish regulations  
3 relating to the permitted number of proceedings each year by the same claimant under this  
4 chapter, in the interests of justice and the administration of the Copyright Claims Board.

## 5 “1505. Registration requirement

6 “(a) Application or Certificate.—A claim or counterclaim alleging infringement of an  
7 exclusive right in a copyrighted work may not be asserted before the Copyright Claims Board  
8 unless—

9 “(1) the legal or beneficial owner of the copyright has first delivered a completed  
10 application, a deposit, and the required fee for registration of the copyright to the Copyright  
11 Office; and

12 “(2) a registration certificate has either been issued or has not been refused.

13 “(b) Certificate of Registration.—Notwithstanding any other provision of law, a claimant or  
14 counterclaimant in a proceeding before the Copyright Claims Board shall be eligible to recover  
15 actual damages and profits or statutory damages under this chapter for infringement of a work if  
16 the requirements of subsection (a) have been met, except that—

17 “(1) the Copyright Claims Board may not render a determination in the proceeding  
18 until—

19 “(A) a registration certificate with respect to the work has been issued by the  
20 Copyright Office, submitted to the Copyright Claims Board, and made available to the  
21 other parties to the proceeding; and

22 “(B) the other parties to the proceeding have been provided an opportunity to  
23 address the registration certificate;

24 “(2) if the proceeding may not proceed further because a registration certificate for the  
25 work is pending, the proceeding shall be held in abeyance pending submission of the  
26 certificate to the Copyright Claims Board, except that, if the proceeding is held in abeyance  
27 for more than 1 year, the Copyright Claims Board may, upon providing written notice to the  
28 parties to the proceeding, and 30 days to the parties to respond to the notice, dismiss the  
29 proceeding without prejudice; and

30 “(3) if the Copyright Claims Board receives notice that registration with respect to the  
31 work has been refused, the proceeding shall be dismissed without prejudice.

32 “(c) Presumption.—In a case in which a registration certificate shows that registration with  
33 respect to a work was issued not later than 5 years after the date of the first publication of the  
34 work, the presumption under section 410(c) shall apply in a proceeding before the Copyright  
35 Claims Board, in addition to relevant principles of law under this title.

36 “(d) Regulations.—In order to ensure that actions before the Copyright Claims Board proceed  
37 in a timely manner, the Register of Copyrights shall establish regulations allowing the Copyright  
38 Office to make a decision, on an expedited basis, to issue or deny copyright registration for an  
39 unregistered work that is at issue before the Board.

1 “1506. Conduct of proceedings

2 “(a) In General.—

3 “(1) APPLICABLE LAW.—Proceedings of the Copyright Claims Board shall be conducted  
4 in accordance with this chapter and regulations established by the Register of Copyrights  
5 under this chapter, in addition to relevant principles of law under this title.

6 “(2) CONFLICTING PRECEDENT.—If it appears that there may be conflicting judicial  
7 precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright  
8 Claims Board shall follow the law of the Federal jurisdiction in which the action could have  
9 been brought if filed in a district court of the United States, or, if the action could have been  
10 brought in more than 1 such jurisdiction, the jurisdiction that the Copyright Claims Board  
11 determines has the most significant ties to the parties and conduct at issue.

12 “(b) Record.—The Copyright Claims Board shall maintain records documenting the  
13 proceedings before the Board.

14 “(c) Centralized Process.—Proceedings before the Copyright Claims Board shall—

15 “(1) be conducted at the offices of the Copyright Claims Board without the requirement  
16 of in-person appearances by parties or others; and

17 “(2) take place by means of written submissions, hearings, and conferences carried out  
18 through internet-based applications and other telecommunications facilities, except that, in  
19 cases in which physical or other nontestimonial evidence material to a proceeding cannot be  
20 furnished to the Copyright Claims Board through available telecommunications facilities,  
21 the Copyright Claims Board may make alternative arrangements for the submission of such  
22 evidence that do not prejudice any other party to the proceeding.

23 “(d) Representation.—A party to a proceeding before the Copyright Claims Board may be, but  
24 is not required to be, represented by—

25 “(1) an attorney; or

26 “(2) a law student who is qualified under applicable law governing representation by law  
27 students of parties in legal proceedings and who provides such representation on a pro bono  
28 basis.

29 “(e) Commencement of Proceeding.—In order to commence a proceeding under this chapter, a  
30 claimant shall, subject to such additional requirements as may be prescribed in regulations  
31 established by the Register of Copyrights, file a claim with the Copyright Claims Board, that—

32 “(1) includes a statement of material facts in support of the claim;

33 “(2) is certified under subsection (y)(1); and

34 “(3) is accompanied by a filing fee in such amount as may be prescribed in regulations  
35 established by the Register of Copyrights.

36 “(f) Review of Claims and Counterclaims.—

37 “(1) CLAIMS.—Upon the filing of a claim under subsection (e), the claim shall be  
38 reviewed by a Copyright Claims Attorney to ensure that the claim complies with this  
39 chapter and applicable regulations, subject to the following:

1 “(A) If the claim is found to comply, the claimant shall be notified regarding that  
2 compliance and instructed to proceed with service of the claim under subsection (g).

3 “(B) If the claim is found not to comply, the claimant shall be notified that the claim  
4 is deficient and be permitted to file an amended claim not later than 30 days after the  
5 date on which the claimant receives the notice, without the requirement of an  
6 additional filing fee. If the claimant files a compliant claim within that 30-day period,  
7 the claimant shall be so notified and be instructed to proceed with service of the claim.  
8 If the claim is refiled within that 30-day period and still fails to comply, the claimant  
9 shall again be notified that the claim is deficient and shall be provided a second  
10 opportunity to amend the claim not later than 30 days after the date of that second  
11 notice, without the requirement of an additional filing fee. If the claim is refiled again  
12 within that second 30-day period and is compliant, the claimant shall be so notified and  
13 shall be instructed to proceed with service of the claim, but if the claim still fails to  
14 comply, upon confirmation of such noncompliance by a Copyright Claims Officer, the  
15 proceeding shall be dismissed without prejudice. The Copyright Claims Board shall  
16 also dismiss without prejudice any proceeding in which a compliant claim is not filed  
17 within the applicable 30-day period.

18 “(C)(i) Subject to clause (ii), for purposes of this paragraph, a claim against an  
19 online service provider for infringement by reason of the storage of or referral or  
20 linking to infringing material that may be subject to the limitations on liability set forth  
21 in subsection (b), (c), or (d) of section 512 shall be considered noncompliant unless the  
22 claimant affirms in the statement required under subsection (e)(1) of this section that  
23 the claimant has previously notified the service provider of the claimed infringement in  
24 accordance with subsection (b)(2)(E), (c)(3), or (d)(3) of section 512, as applicable,  
25 and the service provider failed to remove or disable access to the material  
26 expeditiously upon the provision of such notice.

27 “(ii) If a claim is found to be noncompliant under clause (i), the Copyright Claims  
28 Board shall provide the claimant with information concerning the service of such a  
29 notice under the applicable provision of section 512.

30 “(2) COUNTERCLAIMS.—Upon the filing and service of a counterclaim, the counterclaim  
31 shall be reviewed by a Copyright Claims Attorney to ensure that the counterclaim complies  
32 with the provisions of this chapter and applicable regulations. If the counterclaim is found  
33 not to comply, the counterclaimant and the other parties to the proceeding shall be notified  
34 that the counterclaim is deficient, and the counterclaimant shall be permitted to file and  
35 serve an amended counterclaim not later than 30 days after the date of such notice. If the  
36 counterclaimant files and serves a compliant counterclaim within that 30-day period, the  
37 counterclaimant and such other parties shall be so notified. If the counterclaim is refiled and  
38 served within that 30-day period but still fails to comply, the counterclaimant and such  
39 other parties shall again be notified that the counterclaim is deficient, and the  
40 counterclaimant shall be provided a second opportunity to amend the counterclaim not later  
41 than 30 days after the date of the second notice. If the counterclaim is refiled and served  
42 again within that second 30-day period and is compliant, the counterclaimant and such other  
43 parties shall be so notified, but if the counterclaim still fails to comply, upon confirmation  
44 of such noncompliance by a Copyright Claims Officer, the counterclaim, but not the  
45 proceeding, shall be dismissed without prejudice.



1 “(3) DISMISSAL OF UNSUITABILITY.—The Copyright Claims Board shall dismiss a claim  
2 or counterclaim without prejudice if, upon reviewing the claim or counterclaim, or at any  
3 other time in the proceeding, the Copyright Claims Board concludes that the claim or  
4 counterclaim is unsuitable for determination by the Copyright Claims Board, including on  
5 account of any of the following:

6 “(A) The failure to join a necessary party.

7 “(B) The lack of an essential witness, evidence, or expert testimony.

8 “(C) The determination of a relevant issue of law or fact that could exceed either the  
9 number of proceedings the Copyright Claims Board could reasonably administer or the  
10 subject matter competence of the Copyright Claims Board.

11 “(g) Service of Notice and Claims.—In order to proceed with a claim against a respondent, a  
12 claimant shall, not later than 90 days after receiving notification under subsection (f) to proceed  
13 with service, file with the Copyright Claims Board proof of service on the respondent. In order to  
14 effectuate service on a respondent, the claimant shall cause notice of the proceeding and a copy  
15 of the claim to be served on the respondent, either by personal service or pursuant to a waiver of  
16 personal service, as prescribed in regulations established by the Register of Copyrights. Such  
17 regulations shall include the following requirements:

18 “(1) The notice of the proceeding shall adhere to a prescribed form and shall set forth the  
19 nature of the Copyright Claims Board and proceeding, the right of the respondent to opt out,  
20 and the consequences of opting out and not opting out, including a prominent statement  
21 that, by not opting out within 60 days after receiving the notice, the respondent—

22 “(A) loses the opportunity to have the dispute decided by a court created under  
23 article III of the Constitution of the United States; and

24 “(B) waives the right to a jury trial regarding the dispute.

25 “(2) The copy of the claim served on the respondent shall be the same as the claim that  
26 was filed with the Copyright Claims Board.

27 “(3) Personal service of a notice and claim may be effected by an individual who is not a  
28 party to the proceeding and is older than 18 years of age.

29 “(4) An individual, other than a minor or incompetent individual, may be served by—

30 “(A) complying with State law for serving a summons in an action brought in courts  
31 of general jurisdiction in the State where service is made;

32 “(B) delivering a copy of the notice and claim to the individual personally;

33 “(C) leaving a copy of the notice and claim at the individual’s dwelling or usual  
34 place of abode with someone of suitable age and discretion who resides there; or

35 “(D) delivering a copy of the notice and claim to an agent designated by the  
36 respondent to receive service of process or, if not so designated, an agent authorized by  
37 appointment or by law to receive service of process.

38 “(5)(A) A corporation, partnership, or unincorporated association that is subject to suit in  
39 courts of general jurisdiction under a common name shall be served by delivering a copy of  
40 the notice and claim to its service agent. If such service agent has not been designated,

1 service shall be accomplished—

2 “(i) by complying with State law for serving a summons in an action brought in  
3 courts of general jurisdiction in the State where service is made; or

4 “(ii) by delivering a copy of the notice and claim to an officer, a managing or  
5 general agent, or any other agent authorized by appointment or by law to receive  
6 service of process in an action brought in courts of general jurisdiction in the State  
7 where service is made and, if the agent is one authorized by statute and the statute so  
8 requires, by also mailing a copy of the notice and claim to the respondent.

9 “(B) A corporation, partnership, or unincorporated association that is subject to suit in  
10 courts of general jurisdiction under a common name may elect to designate a service agent  
11 to receive notice of a claim against it before the Copyright Claims Board by complying with  
12 requirements that the Register of Copyrights shall establish by regulation. The Register of  
13 Copyrights shall maintain a current directory of service agents that is available to the public  
14 for inspection, including through the internet, and may require such corporations,  
15 partnerships, and unincorporated associations designating such service agents to pay a fee to  
16 cover the costs of maintaining the directory.

17 “(6) In order to request a waiver of personal service, the claimant may notify a  
18 respondent, by first class mail or by other reasonable means, that a proceeding has been  
19 commenced, such notice to be made in accordance with regulations established by the  
20 Register of Copyrights, subject to the following:

21 “(A) Any such request shall be in writing, shall be addressed to the respondent, and  
22 shall be accompanied by a prescribed notice of the proceeding, a copy of the claim as  
23 filed with the Copyright Claims Board, a prescribed form for waiver of personal  
24 service, and a prepaid or other means of returning the form without cost.

25 “(B) The request shall state the date on which the request is sent, and shall provide  
26 the respondent a period of 30 days, beginning on the date on which the request is sent,  
27 to return the waiver form signed by the respondent. The signed waiver form shall, for  
28 purposes of this subsection, constitute acceptance and proof of service as of the date on  
29 which the waiver is signed.

30 “(7)(A) A respondent’s waiver of personal service shall not constitute a waiver of the  
31 respondent’s right to opt out of the proceeding.

32 “(B) A respondent who timely waives personal service under paragraph (6) and does not  
33 opt out of the proceeding shall be permitted a period of 30 days, in addition to the period  
34 otherwise permitted under the applicable procedures of the Copyright Claims Board, to  
35 submit a substantive response to the claim, including any defenses and counterclaims.

36 “(8) A minor or an incompetent individual may only be served by complying with State  
37 law for serving a summons or like process on such an individual in an action brought in the  
38 courts of general jurisdiction of the State where service is made.

39 “(9) Service of a claim and waiver of personal service may only be effected within the  
40 United States.

41 “(h) Notification by Copyright Claims Board.—The Register of Copyrights shall establish  
42 regulations providing for a written notification to be sent by, or on behalf of, the Copyright

1 Claims Board to notify the respondent of a pending proceeding against the respondent, as set  
2 forth in those regulations, which shall—

3 “(1) include information concerning the respondent’s right to opt out of the proceeding,  
4 the consequences of opting out and not opting out, and a prominent statement that, by not  
5 opting out within 60 days after the date of service under subsection (g), the respondent loses  
6 the opportunity to have the dispute decided by a court created under article III of the  
7 Constitution of the United States and waives the right to a jury trial regarding the dispute;  
8 and

9 “(2) be in addition to, and separate and apart from, the notice requirements under  
10 subsection (g).

11 “(i) Opt-Out Procedure.—Upon being properly served with a notice and claim, a respondent  
12 who chooses to opt out of the proceeding shall have a period of 60 days, beginning on the date of  
13 service, in which to provide written notice of such choice to the Copyright Claims Board, in  
14 accordance with regulations established by the Register of Copyrights. If proof of service has  
15 been filed by the claimant and the respondent does not submit an opt-out notice to the Copyright  
16 Claims Board within that 60-day period, the proceeding shall be deemed an active proceeding  
17 and the respondent shall be bound by the determination in the proceeding to the extent provided  
18 under section 1507(a). If the respondent opts out of the proceeding during that 60-day period, the  
19 proceeding shall be dismissed without prejudice, except that, in exceptional circumstances and  
20 upon written notice to the claimant, the Copyright Claims Board may extend that 60-day period  
21 in the interests of justice.

22 “(j) Service of Other Documents.—Documents submitted or relied upon in a proceeding, other  
23 than the notice and claim, shall be served in accordance with regulations established by the  
24 Register of Copyrights.

25 “(k) Scheduling.—Upon confirmation that a proceeding has become an active proceeding, the  
26 Copyright Claims Board shall issue a schedule for the future conduct of the proceeding. A  
27 schedule issued by the Copyright Claims Board may be amended by the Copyright Claims Board  
28 in the interests of justice.

29 “(l) Conferences.—One or more Copyright Claims Officers may hold a conference to address  
30 case management or discovery issues in a proceeding, which shall be noted upon the record of  
31 the proceeding and may be recorded or transcribed.

32 “(m) Party Submissions.—A proceeding of the Copyright Claims Board may not include any  
33 formal motion practice, except that, subject to applicable regulations and procedures of the  
34 Copyright Claims Board—

35 “(1) the parties to the proceeding may make requests to the Copyright Claims Board to  
36 address case management and discovery matters, and submit responses thereto; and

37 “(2) the Copyright Claims Board may request or permit parties to make submissions  
38 addressing relevant questions of fact or law, or other matters, including matters raised sua  
39 sponte by the Copyright Claims Officers, and offer responses thereto.

40 “(n) Discovery.—Discovery in a proceeding shall be limited to the production of relevant  
41 information and documents, written interrogatories, and written requests for admission, as  
42 provided in regulations established by the Register of Copyrights, except that—

1 “(1) upon the request of a party, and for good cause shown, the Copyright Claims Board  
2 may approve additional relevant discovery, on a limited basis, in particular matters, and  
3 may request specific information and documents from participants in the proceeding and  
4 voluntary submissions from nonparticipants, consistent with the interests of justice;

5 “(2) upon the request of a party, and for good cause shown, the Copyright Claims Board  
6 may issue a protective order to limit the disclosure of documents or testimony that contain  
7 confidential information; and

8 “(3) after providing notice and an opportunity to respond, and upon good cause shown,  
9 the Copyright Claims Board may apply an adverse inference with respect to disputed facts  
10 against a party who has failed to timely provide discovery materials in response to a proper  
11 request for materials that could be relevant to such facts.

12 “(o) Evidence.—The Copyright Claims Board may consider the following types of evidence in  
13 a proceeding, and such evidence may be admitted without application of formal rules of  
14 evidence:

15 “(1) Documentary and other nontestimonial evidence that is relevant to the claims,  
16 counterclaims, or defenses in the proceeding.

17 “(2) Testimonial evidence, submitted under penalty of perjury in written form or in  
18 accordance with subsection (p), limited to statements of the parties and nonexpert witnesses,  
19 that is relevant to the claims, counterclaims, and defenses in a proceeding, except that, in  
20 exceptional cases, expert witness testimony or other types of testimony may be permitted by  
21 the Copyright Claims Board for good cause shown.

22 “(p) Hearings.—The Copyright Claims Board may conduct a hearing to receive oral  
23 presentations on issues of fact or law from parties and witnesses to a proceeding, including oral  
24 testimony, subject to the following:

25 “(1) Any such hearing shall be attended by not fewer than 2 of the Copyright Claims  
26 Officers.

27 “(2) The hearing shall be noted upon the record of the proceeding and, subject to  
28 paragraph (3), may be recorded or transcribed as deemed necessary by the Copyright  
29 Claims Board.

30 “(3) A recording or transcript of the hearing shall be made available to any Copyright  
31 Claims Officer who is not in attendance.

32 “(q) Voluntary Dismissal.—

33 “(1) BY CLAIMANT.—Upon the written request of a claimant that is received before a  
34 respondent files a response to the claim in a proceeding, the Copyright Claims Board shall  
35 dismiss the proceeding, or a claim or respondent, as requested, without prejudice.

36 “(2) BY COUNTERCLAIMANT.—Upon written request of a counterclaimant that is received  
37 before a claimant files a response to the counterclaim, the Copyright Claims Board shall  
38 dismiss the counterclaim, such dismissal to be without prejudice.

39 “(3) CLASS ACTIONS.—Any party in an active proceeding before the Copyright Claims  
40 Board who receives notice of a pending or putative class action, arising out of the same  
41 transaction or occurrence, in which that party is a class member may request in writing

1 dismissal of the proceeding before the Board. Upon notice to all claimants and  
2 counterclaimants, the Copyright Claims Board shall dismiss the proceeding without  
3 prejudice.

4 “(r) Settlement.—

5 “(1) IN GENERAL.—At any time in an active proceeding, some or all of the parties may—

6 “(A) jointly request a conference with a Copyright Claims Officer for the purpose of  
7 facilitating settlement discussions; or

8 “(B) submit to the Copyright Claims Board an agreement providing for settlement  
9 and dismissal of some or all of the claims and counterclaims in the proceeding.

10 “(2) ADDITIONAL REQUEST.—A submission under paragraph (1)(B) may include a request  
11 that the Copyright Claims Board adopt some or all of the terms of the parties’ settlement in  
12 a final determination in the proceeding.

13 “(s) Factual Findings.—Subject to subsection (n)(3), the Copyright Claims Board shall make  
14 factual findings based upon a preponderance of the evidence.

15 “(t) Determinations.—

16 “(1) NATURE AND CONTENTS.—A determination rendered by the Copyright Claims Board  
17 in a proceeding shall—

18 “(A) be reached by a majority of the Copyright Claims Board;

19 “(B) be in writing, and include an explanation of the factual and legal basis of the  
20 determination;

21 “(C) set forth any terms by which a respondent or counterclaim respondent has  
22 agreed to cease infringing activity under section 1504(e)(2);

23 “(D) to the extent requested under subsection (r)(2), set forth the terms of any  
24 settlement agreed to under subsection (r)(1); and

25 “(E) include a clear statement of all damages and other relief awarded, including  
26 under subparagraphs (C) and (D).

27 “(2) DISSENT.—A Copyright Claims Officer who dissents from a decision contained in a  
28 determination under paragraph (1) may append a statement setting forth the grounds for that  
29 dissent.

30 “(3) PUBLICATION.—Each final determination of the Copyright Claims Board shall be  
31 made available on a publicly accessible website. The Register shall establish regulations  
32 with respect to the publication of other records and information relating to such  
33 determinations, including the redaction of records to protect confidential information that is  
34 the subject of a protective order under subsection (n)(2).

35 “(4) FREEDOM OF INFORMATION ACT.—All information relating to proceedings of the  
36 Copyright Claims Board under this chapter is exempt from disclosure to the public under  
37 section 552(b)(3) of title 5, except for determinations, records, and information published  
38 under paragraph (3).

39 “(u) Respondent’s Default.—If a proceeding has been deemed an active proceeding but the

1 respondent has failed to appear or has ceased participating in the proceeding, as demonstrated by  
2 the respondent's failure, without justifiable cause, to meet 1 or more deadlines or requirements  
3 set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the  
4 Copyright Claims Board may enter a default determination, including the dismissal of any  
5 counterclaim asserted by the respondent, as follows and in accordance with such other  
6 requirements as the Register of Copyrights may establish by regulation:

7       “(1) The Copyright Claims Board shall require the claimant to submit relevant evidence  
8 and other information in support of the claimant's claim and any asserted damages and,  
9 upon review of such evidence and any other requested submissions from the claimant, shall  
10 determine whether the materials so submitted are sufficient to support a finding in favor of  
11 the claimant under applicable law and, if so, the appropriate relief and damages, if any, to  
12 be awarded.

13       “(2) If the Copyright Claims Board makes an affirmative determination under paragraph  
14 (1), the Copyright Claims Board shall prepare a proposed default determination, and shall  
15 provide written notice to the respondent at all addresses, including email addresses,  
16 reflected in the records of the proceeding before the Copyright Claims Board, of the  
17 pendency of a default determination by the Copyright Claims Board and of the legal  
18 significance of such determination. Such notice shall be accompanied by the proposed  
19 default determination and shall provide that the respondent has a period of 30 days,  
20 beginning on the date of the notice, to submit any evidence or other information in  
21 opposition to the proposed default determination.

22       “(3) If the respondent responds to the notice provided under paragraph (2) within the 30-  
23 day period provided in such paragraph, the Copyright Claims Board shall consider the  
24 respondent's submissions and, after allowing the other parties to address such submissions,  
25 maintain, or amend its proposed determination as appropriate, and the resulting  
26 determination shall not be a default determination.

27       “(4) If the respondent fails to respond to the notice provided under paragraph (2), the  
28 Copyright Claims Board shall proceed to issue the default determination as a final  
29 determination. Thereafter, the respondent may only challenge such determination to the  
30 extent permitted under section 1508(c), except that, before any additional proceedings are  
31 initiated under section 1508, the Copyright Claims Board may, in the interests of justice,  
32 vacate the default determination.

33       “(v) Claimant's Failure To Proceed.—

34       “(1) FAILURE TO COMPLETE SERVICE.—If a claimant fails to complete service on a  
35 respondent within the 90-day period required under subsection (g), the Copyright Claims  
36 Board shall dismiss that respondent from the proceeding without prejudice. If a claimant  
37 fails to complete service on all respondents within that 90-day period, the Copyright Claims  
38 Board shall dismiss the proceeding without prejudice.

39       “(2) FAILURE TO PROSECUTE.—If a claimant fails to proceed in an active proceeding, as  
40 demonstrated by the claimant's failure, without justifiable cause, to meet 1 or more  
41 deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board  
42 under subsection (k), the Copyright Claims Board may, upon providing written notice to the  
43 claimant and a period of 30 days, beginning on the date of the notice, to respond to the

notice, and after considering any such response, issue a determination dismissing the claimant's claims, which shall include an award of attorneys' fees and costs, if appropriate, under subsection (y)(2). Thereafter, the claimant may only challenge such determination to the extent permitted under section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the determination of dismissal.

“(w) Request for Reconsideration.—A party may, not later than 30 days after the date on which the Copyright Claims Board issues a final determination in a proceeding under this chapter, submit a written request for reconsideration of, or an amendment to, such determination if the party identifies a clear error of law or fact material to the outcome, or a technical mistake. After providing the other parties an opportunity to address such request, the Copyright Claims Board shall either deny the request or issue an amended final determination.

“(x) Review by Register.—If the Copyright Claims Board denies a party a request for reconsideration of a final determination under subsection (w), that party may, not later than 30 days after the date of such denial, request review of the final determination by the Register of Copyrights in accordance with regulations established by the Register. Such request shall be accompanied by a reasonable filing fee, as provided in such regulations. The review by the Register shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination. After providing the other parties an opportunity to address the request, the Register shall either deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination. Such amended final determination shall not be subject to further consideration or review, other than under section 1508(c).

“(y) Conduct of Parties and Attorneys.—

“(1) CERTIFICATION.—The Register of Copyrights shall establish regulations requiring certification of the accuracy and truthfulness of statements made by participants in proceedings before the Copyright Claims Board.

“(2) BAD FAITH CONDUCT.—Notwithstanding any other provision of law, in any proceeding in which a determination is rendered and it is established that a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, then, unless inconsistent with the interests of justice, the Copyright Claims Board shall in such determination award reasonable attorneys' fees and costs to any adversely affected party of in an amount of not more than \$5,000, except that—

“(A) if an adversely affected party appeared pro se in the proceeding, the award to that party shall be for costs only, in an amount of not more than \$2,500; and

“(B) in extraordinary circumstances, such as where a party has demonstrated a pattern or practice of bad faith conduct as described in this paragraph, the Copyright Claims Board may, in the interests of justice, award costs in excess of the limitations under this paragraph.

“(3) ADDITIONAL PENALTY.—If the Board finds that on more than 1 occasion within a 12-month period a party pursued a claim, counterclaim, or defense before the Copyright Claims Board for a harassing or other improper purpose, or without a reasonable basis in law or

fact, that party shall be barred from initiating a claim before the Copyright Claims Board under this chapter for a period of 12 months beginning on the date on which the Board makes such a finding. Any proceeding commenced by that party that is still pending before the Board when such a finding is made shall be dismissed without prejudice, except that if a proceeding has been deemed active under subsection (i), the proceeding shall be dismissed under this paragraph only if the respondent provides written consent thereto.

“(z) Regulations for Smaller Claims.—The Register of Copyrights shall establish regulations to provide for the consideration and determination, by not less than 1 Copyright Claims Officer, of any claim under this chapter in which total damages sought do not exceed \$5,000 (exclusive of attorneys’ fees and costs). A determination issued under this subsection shall have the same effect as a determination issued by the entire Copyright Claims Board.

## “1507. Effect of proceeding

“(a) Determination.—Subject to the reconsideration and review processes provided under subsections (w) and (x) of section 1506 and section 1508(c), the issuance of a final determination by the Copyright Claims Board in a proceeding, including a default determination or determination based on a failure to prosecute, shall, solely with respect to the parties to such determination, preclude relitigation before any court or tribunal, or before the Copyright Claims Board, of the claims and counterclaims asserted and finally determined by the Board, and may be relied upon for such purpose in a future action or proceeding arising from the same specific activity or activities, subject to the following:

“(1) A determination of the Copyright Claims Board shall not preclude litigation or relitigation as between the same or different parties before any court or tribunal, or the Copyright Claims Board, of the same or similar issues of fact or law in connection with claims or counterclaims not asserted or not finally determined by the Copyright Claims Board.

“(2) A determination of ownership of a copyrighted work for purposes of resolving a matter before the Copyright Claims Board may not be relied upon, and shall not have any preclusive effect, in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.

“(3) Except to the extent permitted under this subsection and section 1508, any determination of the Copyright Claims Board may not be cited or relied upon as legal precedent in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.

“(b) Class Actions Not Affected.—

“(1) IN GENERAL.—A proceeding before the Copyright Claims Board shall not have any effect on a class action proceeding in a district court of the United States, and section 1509(a) shall not apply to a class action proceeding in a district court of the United States.

“(2) NOTICE OF CLASS ACTION.—Any party to an active proceeding before the Copyright Claims Board who receives notice of a pending class action, arising out of the same transaction or occurrence as the proceeding before the Copyright Claims Board, in which the party is a class member shall either—

“(A) opt out of the class action, in accordance with regulations established by the



1 Register of Copyrights; or

2 “(B) seek dismissal under section 1506(q)(3) of the proceeding before the Copyright  
3 Claims Board.

4 “(c) Other Materials in Proceeding.—Except as permitted under this section and section 1508,  
5 a submission or statement of a party or witness made in connection with a proceeding before the  
6 Copyright Claims Board, including a proceeding that is dismissed, may not be cited or relied  
7 upon in, or serve as the basis of, any action or proceeding concerning rights or limitations on  
8 rights under this title before any court or tribunal, including the Copyright Claims Board.

9 “(d) Applicability of Section 512(g).—A claim or counterclaim before the Copyright Claims  
10 Board that is brought under subsection (c)(1) or (c)(4) of section 1504, or brought under  
11 subsection (c)(6) of section 1504 and that relates to a claim under subsection (c)(1) or (c)(4) of  
12 such section, qualifies as an action seeking an order to restrain a subscriber from engaging in  
13 infringing activity under section 512(g)(2)(C) if—

14 “(1) notice of the commencement of the Copyright Claims Board proceeding is provided  
15 by the claimant to the service provider’s designated agent before the service provider  
16 replaces the material following receipt of a counter notification under section 512(g); and

17 “(2) the claim brought alleges infringement of the material identified in the notification of  
18 claimed infringement under section 512(c)(1)(C).

19 “(e) Failure To Assert Counterclaim.—The failure or inability to assert a counterclaim in a  
20 proceeding before the Copyright Claims Board shall not preclude the assertion of that  
21 counterclaim in a subsequent court action or proceeding before the Copyright Claims Board.

22 “(f) Opt-Out or Dismissal of Party.—If a party has timely opted out of a proceeding under  
23 section 1506(i) or is dismissed from a proceeding before the Copyright Claims Board issues a  
24 final determination in the proceeding, the determination shall not be binding upon and shall have  
25 no preclusive effect with respect to that party.

## 26 “1508. Review and confirmation by district court

27 “(a) In General.—In any proceeding in which a party has failed to pay damages, or has failed  
28 otherwise to comply with the relief, awarded in a final determination of the Copyright Claims  
29 Board, including a default determination or a determination based on a failure to prosecute, the  
30 aggrieved party may, not later than 1 year after the date on which the final determination is  
31 issued, any reconsideration by the Copyright Claims Board or review by the Register of  
32 Copyrights is resolved, or an amended final determination is issued, whichever occurs last, apply  
33 to the United States District Court for the District of Columbia or any other appropriate district  
34 court of the United States for an order confirming the relief awarded in the final determination  
35 and reducing such award to judgment. The court shall grant such order and direct entry of  
36 judgment unless the determination is or has been vacated, modified, or corrected under  
37 subsection (c). If the United States District Court for the District of Columbia or other district  
38 court of the United States, as the case may be, issues an order confirming the relief awarded by  
39 the Copyright Claims Board, the court shall impose on the party who failed to pay damages or  
40 otherwise comply with the relief, the reasonable expenses required to secure such order,  
41 including attorneys’ fees, that were incurred by the aggrieved party.

42 “(b) Filing Procedures.—

1 “(1) APPLICATION TO CONFIRM DETERMINATION.—Notice of the application under  
2 subsection (a) for confirmation of a determination of the Copyright Claims Board and entry  
3 of judgment shall be provided to all parties to the proceeding before the Copyright Claims  
4 Board that resulted in the determination, in accordance with the procedures applicable to  
5 service of a motion in the district court of the United States where the application is made.

6 “(2) CONTENTS OF APPLICATION.—The application under subsection (a) shall include the  
7 following:

8 “(A) A certified copy of the final or amended final determination of the Copyright  
9 Claims Board, as reflected in the records of the Copyright Claims Board, following  
10 any process of reconsideration or review by the Register of Copyrights, to be  
11 confirmed and rendered to judgment.

12 “(B) A declaration by the applicant, under penalty of perjury—

13 “(i) that the copy is a true and correct copy of such determination;

14 “(ii) stating the date the determination was issued;

15 “(iii) stating the basis for the challenge under subsection (c)(1); and

16 “(iv) stating whether the applicant is aware of any other proceedings before the  
17 court concerning the same determination of the Copyright Claims Board.

18 “(c) Challenges to the Determination.—

19 “(1) BASES FOR CHALLENGE.—Not later than 90 days after the date on which the  
20 Copyright Claims Board issues a final or amended final determination in a proceeding, or  
21 not later than 90 days after the date on which the Register of Copyrights completes any  
22 process of reconsideration or review of the determination, whichever occurs later, a party  
23 may seek a court order vacating, modifying, or correcting the determination of the  
24 Copyright Claims Board in the following cases:

25 “(A) If the determination was issued as a result of fraud, corruption,  
26 misrepresentation, or other misconduct.

27 “(B) If the Copyright Claims Board exceeded its authority or failed to render a final  
28 determination concerning the subject matter at issue.

29 “(C) In the case of a default determination or determination based on a failure to  
30 prosecute, if it is established that the default or failure was due to excusable neglect.

31 “(2) PROCEDURE TO CHALLENGE.—

32 “(A) NOTICE OF APPLICATION.—Notice of the application to challenge a  
33 determination of the Copyright Claims Board shall be provided to all parties to the  
34 proceeding before the Copyright Claims Board, in accordance with the procedures  
35 applicable to service of a motion in the court where the application is made.

36 “(B) STAYING OF PROCEEDINGS.—For purposes of an application under this  
37 subsection, any judge who is authorized to issue an order to stay the proceedings in  
38 another action brought in the same court may issue an order, to be served with the  
39 notice of application, staying proceedings to enforce the award while the challenge is  
40 pending.

## “1509. Relationship to other district court actions

“(a) Stay of District Court Proceedings.—Subject to section 1507(b), a district court of the United States shall issue a stay of proceedings or such other relief as the court determines appropriate with respect to any claim brought before the court that is already the subject of a pending or active proceeding before the Copyright Claims Board.

“(b) Alternative Dispute Resolution Process.—A proceeding before the Copyright Claims Board under this chapter shall qualify as an alternative dispute resolution process under section 651 of title 28 for purposes of referral of eligible cases by district courts of the United States upon the consent of the parties.

## “1510. Implementation by Copyright Office

“(a) Regulations.—

“(1) IMPLEMENTATION GENERALLY.—The Register of Copyrights shall establish regulations to carry out this chapter. Such regulations shall include the fees prescribed under subsections (e) and (x) of section 1506. The authority to issue such fees shall not limit the authority of the Register of Copyrights to establish fees for services under section 708. All fees received by the Copyright Office in connection with the activities under this chapter shall be deposited by the Register of Copyrights and credited to the appropriations for necessary expenses of the Office in accordance with section 708(d). In establishing regulations under this subsection, the Register of Copyrights shall provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings instituted under this chapter, including by implementing mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party.

“(2) LIMITS ON MONETARY RELIEF.—

“(A) IN GENERAL.—Subject to subparagraph (B), the Register of Copyrights may, in order to further the goals of the Copyright Claims Board, conduct a rulemaking to adjust the limits on monetary recovery or attorneys’ fees and costs that may be awarded under this chapter.

“(B) EFFECTIVE DATE OF ADJUSTMENT.—Any rule under subparagraph (A) that makes an adjustment shall take effect at the end of the 120-day period beginning on the date on which the Register of Copyrights submits the rule to Congress and only if Congress does not, during that 120-day period, enact a law that provides in substance that Congress does not approve the rule.

“(b) Necessary Facilities.—Subject to applicable law, the Register of Copyrights may retain outside vendors to establish internet-based, teleconferencing, and other facilities required to operate the Copyright Claims Board.

“(c) Fees.—Any filing fees, including the fee to commence a proceeding under section 1506(e), shall be prescribed in regulations established by the Register of Copyrights. The sum total of such filing fees shall be in an amount of not less than \$100, may not exceed the cost of filing an action in a district court of the United States, and shall be fixed in amounts that further the goals of the Copyright Claims Board.

## “1511. Funding

“There are authorized to be appropriated such sums as may be necessary to pay the costs incurred by the Copyright Office under this chapter that are not covered by fees collected for services rendered under this chapter, including the costs of establishing and maintaining the Copyright Claims Board and its facilities.”.

(2) CLERICAL AMENDMENT.—The table of chapters for title 17, United States Code, is amended by adding at the end the following:

“15. Copyright Small Claims  
1501”.

(b) Implementation.—Not later than 1 year after the date of enactment of this Act, the Copyright Claims Board established under section 1502 of title 17, United States Code, as added by subsection (a) of this section, shall begin operations.

(c) Study.—Not later than 3 years after the date on which the Copyright Claims Board issues the first determination of the Copyright Claims Board under chapter 15 of title 17, United States Code, as added by subsection (a) of this section, the Register of Copyrights shall conduct, and report to Congress on, a study that addresses the following:

(1) The use and efficacy of the Copyright Claims Board in resolving copyright claims, including the number of proceedings the Copyright Claims Board could reasonably administer.

(2) Whether adjustments to the authority of the Copyright Claims Board are necessary or advisable, including with respect to—

(A) eligible claims, such as claims under section 1202 of title 17, United States Code; and

(B) works and applicable damages limitations.

(3) Whether greater allowance should be made to permit awards of attorneys’ fees and costs to prevailing parties, including potential limitations on such awards.

(4) Potential mechanisms to assist copyright owners with small claims in ascertaining the identity and location of unknown online infringers.

(5) Whether the Copyright Claims Board should be expanded to offer mediation or other nonbinding alternative dispute resolution services to interested parties.

(6) Such other matters as the Register of Copyrights believes may be pertinent concerning the Copyright Claims Board.

(d) Severability.—If any provision of this section, an amendment made by this section, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this section and the amendments made by this section, and the application of the provision or the amendment to any other person or circumstance, shall not be affected.

## SEC. 8. STUDY ON ANCILLARY COPYRIGHT FOR PRESS

## PUBLISHERS.

The Register of Copyrights shall study the costs, benefits, and viability of adding ancillary copyright for press publishers to Federal law. The Register shall, not later than 12 months after the date of the enactment of this Act, submit to the Congress a report on the evaluation, including any legislative recommendations the Register may have.

## SEC. 9. GOOD FAITH ERROR IN APPLICATION FOR REGISTRATION.

(a) Effect on Application.—Section 409 of title 17, United States Code, is amended—

(1) by striking “The application” and inserting the following:

“(a) In General.—The application”;

(2) by striking “If an application” and inserting the following:

“(b) Application for Renewed and Extended Term.—If an application”; and

(3) by adding at the end the following:

“(c) Good Faith Error in Application for Registration.—If an application for copyright registration under this section contains a good faith error, but would otherwise be registrable, the Register of Copyrights—

“(1) may not refuse registration based on the error; and

“(2) shall allow the applicant to amend the application to correct the error at any time, including after the registration of the work, without payment of any additional fee, unless correction of the error requires that the original application be split into multiple separate applications, in which case the applicant shall elect to which application the initial fee shall be applied.”.

(b) Effect on Enforcement of Copyright.—Section 411 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) by striking “(b)(1)” and all that follows through the end of paragraph (2) and inserting the following:

“(b)(1) A certificate of registration that contains inaccurate information shall not be deemed to satisfy the requirements of this section and section 412, for the purposes of a civil action for

infringement, if the alleged infringer proves that—

“(A) the alleged infringer reasonably relied on the inaccurate information in engaging in the act alleged to constitute infringement; and

“(B) the act described in subparagraph (A) would not have constituted infringement had the correct information been included in the application.”; and

(B) by redesignating paragraph (3) as paragraph (2); and

(2) by adding at the end the following:

“(d) Effect of Inaccurate Information on Validity of Registration.—The inclusion of inaccurate information in an application for registration shall not affect the validity of any registration unless subsection (b)(1) or section 413 is satisfied.”.

(c) Effective Date of New Registration.—Section 410(d) of title 17, United States Code, is amended—

(1) by striking “The Effective date” and inserting “(1) Except as provided in paragraph (2), the effective date”; and

(2) by adding at the end, the following:

“(2) If an application or certificate of registration contains a good faith error and a new application or an application for supplementary registration is required due to the nature of the error, the effective date of the new registration shall be the same as the effective date of the initial registration.”.

(d) Fraud Against Copyright Office.—

(1) IN GENERAL.—Chapter 4 of title 17, United States Code, is amended by adding at the end the following:

## “SEC. 413. FRAUD AGAINST COPYRIGHT OFFICE.

“If an application for copyright registration includes inaccurate information, a certificate of registration shall not be deemed to satisfy the requirements of sections 411 and 412 if the inaccurate information was included on the application for copyright registration in bad faith or with an intent to defraud the Register of Copyrights.”.

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 4 of title 17, United States Code, is amended by adding at the end the following:

“413. Fraud against Copyright Office.”.

## SEC. 10. DEPOSIT COPY RETENTION.

Section 704(d) of title 17, United States Code, is amended, in the second sentence—

(1) by inserting “, provided that the Copyright Office, based on regulations that the Register may promulgate, attempts to notify the depositer of the copy or the copyright owner of record of the pending destruction or other disposition not later than 90 days before the date on which the Register and the Librarian plan to destroy or otherwise dispose of the deposits” after “or other disposition”; and

(2) by inserting “and published works deposited electronically” after “in the case of unpublished works”.

## SEC. 11. FEE FUNDING AUTHORITY DURING LAPSE IN APPROPRIATIONS.

(a) In General.—Section 708 of title 17, United States Code, is amended by adding at the end the following:

“(e) Funding Flexibility.—In the event of a lapse in annual appropriations, fees received under this title, and amounts deducted from filing fees and royalty payments under this title, shall be available for obligation to support operations at the rate of offsetting collections provided in the applicable appropriations act for the preceding fiscal year.”.

(b) Effective Date.—The amendment made by subsection (a) shall apply with respect to fiscal year 2021 and each fiscal year thereafter.

## SEC. 12. AUTHORITY TO SET ALTERNATIVE FEE STRUCTURES FOR REGISTRATION AND OTHER COPYRIGHT OFFICE SERVICES.

Section 708 of title 17, United States Code, as amended by section 6 of this Act, is amended by adding at the end the following:

“(f) Subscription Fees.—The Register of Copyrights may allow the payment of the fees required under subsection (a) on an annual basis, or with another frequency to be determined by the Register, through a subscription rather than on a per-service basis.

“(g) Small Entities.—

“(1) AUTHORITY TO REDUCE FEES.—To encourage registration and use of Copyright Office services by individual authors and small businesses, the Register of Copyrights may reduce the fees that a small entity is required to pay under subsection (a).

1 “(2) SMALL ENTITY DEFINED.—The Register of Copyrights shall by regulation define the  
2 term ‘small entity’ for purposes of this subsection.”.

3 **SEC. 13. CONVERSION OF APPLICATION FOR**  
4 **REGISTRATION TO APPLICATION TO AMEND;**  
5 **PENDING REGISTRATION APPLICATIONS.**

6 (a) In General.—Section 409 of title 17, United States Code, as amended by section 4 of this  
7 Act, is amended by adding at the end the following:

8 “(d) Conversion of Application for Registration to Application to Amend.—If the Copyright  
9 Office receives an application for copyright registration claiming ownership or co-ownership of a  
10 copyright or any exclusive right in a work for which the Copyright Office previously received a  
11 separate application and for which the Copyright Office has granted or has not yet refused  
12 registration, the Register of Copyrights—

13 “(1) shall, upon written consent of the initial applicant, allow the subsequent applicant to  
14 convert the application for registration to an application to amend the existing registration  
15 or initially pending application, as the case may be; and

16 “(2) may not charge the subsequent applicant a fee for converting the application.”.

17 (b) Pending Registration Application Search Function.—Section 705 of title 17, United States  
18 Code, is amended—

19 (1) in subsection (a), by inserting “pending applications for registration,” before  
20 “registrations,”; and

21 (2) in subsection (c), by inserting “pending applications for registration,” before  
22 “registrations,”.

23 (c) Constructive Notice of Registration of Works.—Title 17, United States Code, is  
24 amended—

25 (1) in section 205(c), by striking paragraph (2) and inserting the following;

26 “(2)(A) the copyright in the work has been registered; or

27 “(B) the deposit, application, and fee required for registration have been delivered to the  
28 Copyright Office and registration has not been refused.”;

29 (2) in section 411(c)—

30 (B) in paragraph (2), by striking “makes registration for the work” and inserting  
31 “delivers the deposit, application, and fee required for registration to the Copyright



Office”; and

(3) in section 412(2), by striking “such registration is made” and inserting “the effective date of the registration is”.

(d) Registrations Upon Counter Notification.—Section 411 of title 17, United States Code, as amended by section 4, is amended by adding at the end the following:

“(e) Counter Notification.—

“(1) IN GENERAL.—The owner of a copyright or of any exclusive right in a work that is the subject of a counter notification provided under section 512(g) shall be deemed to have satisfied the requirements under subsection (a) of this section and may institute a civil action for infringement of the copyright if—

“(A) the owner—

“(i) delivers the deposit, application, and fee required for registration to the Copyright Office in proper form; and

“(ii) requests and pays any applicable fees for expedited handling for the application in accordance with practices or regulations of the Copyright Office authorizing expedited processing of applications; and

“(B) the Copyright Office does not issue a certificate of registration within 48 hours of receiving a proper—

“(i) application described in subparagraph (A)(i); and

“(ii) request for expedited handling described in subparagraph (A)(ii).

“(2) LIMITATION ON FINAL JUDGMENT.—No final judgment may be entered in a civil action for infringement under paragraph (1) until the Register of Copyrights registers or refuses to register the work that is the basis for the civil action.”.

## SEC. 14. DEPOSIT REQUIREMENT.

(a) Study on Digital Deposits.—

(1) STUDY.—The Register of Copyrights shall conduct a study, in consultation with the Librarian of Congress, on the acceptance of copies or phonorecords for deposit by means of electronic transmission under sections 407 and 408 of title 17, United States Code.

(2) REPORT TO CONGRESS.—The Register of Copyrights, in consultation with the Librarian of Congress, shall submit to Congress a final report that describes the results of the study conducted under paragraph (1) and any recommendations resulting from the

study.

(b) Study on Best Edition.—

(1) STUDY.—The Register of Copyrights shall conduct a study, in consultation with the Librarian of Congress, on best edition as it relates to the deposit of copies or phonorecords for the use or disposition of the Library of Congress under section 407 of title 17, United States Code, and the registration of copyright claims under section 408 of title 17, United States Code.

(2) REPORT TO CONGRESS.—The Register of Copyrights, in consultation with the Librarian of Congress, shall submit to Congress a final report that describes the results of the study conducted under paragraph (1) and any recommendations resulting from the study.

## SEC. 15. BEST EDITION DEFINITION.

The fifth undesignated paragraph in section 101 of title 17, United States Code, is amended by inserting after “purposes” the following: “and publishes that standard to its website”.

## SEC. 16. STUDY ON PUBLICATION.

(a) In General.—The Register of Copyrights shall conduct a study on the definition of the term “publication” and how the Copyright Office can better educate applicants on how to correctly designate publication status in an application for copyright registration.

(b) Date and Nation of First Publication.—In conducting the study under subsection (a), the Register of Copyrights shall examine whether the requirement under section 409(8) of title 17, United States Code, should be eliminated or made voluntary for some or all copyright applications.

## SEC. 17. STUDY ON DEFERRED EXAMINATION.

The Register of Copyrights, in consultation with the Librarian of Congress, shall conduct a study on the feasibility and benefits of adding an option for registering a work in which the registrant can obtain an effective date of registration upon submission of an application and deposit while choosing to defer the examination of the submitted work until the registrant subsequently requests the examination. Such study shall take particular account of the needs of the Library to maintain and grow its collection.

## SEC. 18. AMENDMENT OF APPLICATION FOR REGISTRATION; DERIVATIVE WORKS.

(a) Amendment of Application for Registration.—Section 409 of title 17, United States Code,

as amended by section 8 of this Act, is amended by adding at the end the following:

“(e) Amendment of Application After Filing.—The owner of a copyright or of any exclusive right in a work who submits an application for registration of the copyright under this section may subsequently amend the application.”.

(b) Derivative Works.—Section 409 of title 17, United States Code, as amended by subsection (a), is amended—

(1) in subsection (a)(9), as so designated by section 4 of this Act, by inserting “subject to subsection (f),” after “(9)”; and

(2) by adding at the end the following:

“(f) Computer Programs That Are Derivative Works.—

“(1) SIMPLIFIED APPLICATION PROCESS.—The Register of Copyrights shall establish a simplified process for the application for copyright registration of a computer program that is a derivative work of a previously registered computer program.

“(2) DATE OF REGISTRATION.—A derivative work described in paragraph (1) shall be deemed registered as of the date on which the deposit, application, and fee required for registration have been delivered to the Copyright Office, subject to the registration requirements under this title.

“(g) Regulations.—The Register of Copyrights shall issue regulations to establish procedures—

“(1) for the deposit and registration of serial digital, online, mobile application, and other electronic-based publications, including newspapers and magazines; and

“(2) that shall provide a reasonable means for copyright owners to file applications with respect to the publications described in paragraph (1).”.

## SEC. 19. COPYRIGHT OFFICE PUBLIC ADVISORY BOARD.

(a) In General.—Chapter 7 of title 17, United States Code, is amended by adding at the end the following:

### “11. Copyright Office Public Advisory Board

“(a) Establishment.—The Register of Copyrights shall establish a Copyright Office Public Advisory Board (referred to in this section as the ‘Public Advisory Board’) to advise the Register on the operation and modernization of the information technology of the Copyright Office.

“(b) Members.—

“(1) IN GENERAL.—The Public Advisory Board shall be composed of 12 members appointed by Register of Copyrights in accordance with paragraph (2) who—

“(A) are citizens of the United States;

“(B) have substantial background or experience in copyright and copyright registration practice; and

“(C) represent a diverse group of users of the services of the Copyright Office.

“(2) APPOINTMENT.—

“(A) APPOINTMENT.—Each year, the Register of Copyrights shall appoint 4 members to the Public Advisory Board for a 3-year term that begins on January 1 of that year.

“(B) VACANCIES.—

“(i) FILLING VACANCIES.—The Register of Copyrights shall fill a vacancy on the Public Advisory Board not later than 90 days after the vacancy occurs.

“(ii) LENGTH OF SERVICE.—A new member who is appointed to fill a vacancy on the Public Advisory Board shall serve for the remainder of the predecessor’s term.

“(C) AUTHORITY OF THE REGISTER.—A member appointed to the Public Advisory Board shall serve at the pleasure of the Register of Copyrights.

“(c) Chair.—

“(1) IN GENERAL.—The Register of Copyrights shall designate a Chair and Vice-Chair of the Public Advisory Board, from among the members of the Public Advisory Board, to serve for a 3-year term.

“(2) VACANCY.—If the Chair resigns before the completion of his or her term, or is otherwise removed or unable to exercise the functions of the Chair, the Vice-Chair shall exercise the functions of the Chair.

“(d) Duties.—

“(1) IN GENERAL.—The Public Advisory Board shall advise the Register of Copyrights on the management of copyright information technology operations and information technology modernization, including the needs of the users of the online services and website of the Copyright Office.

1 “(2) PRE-RELEASE EVALUATION.—The Register of Copyrights, as applicable, shall  
2 provide the Public Advisory Board with the opportunity to provide input regarding user-  
3 facing systems and content, with sufficient time to provide reasonable feedback, before the  
4 systems and content are released to the public.

5 “(e) Copyright Law and Policy.—The Public Advisory Board may not advise the Copyright  
6 Office on matters of substantive copyright law or policy.

7 “(f) Meetings.—The Public Advisory Board—

8 “(1) shall meet not less frequently than twice a year, at the call of the Chair; and

9 “(2) at each meeting, shall consider an agenda set by the Chair.

10 “(g) Applicability of Certain Ethics Laws.—A member of the Public Advisory Board  
11 appointed under subsection (b)(2) shall be treated as a special Government employee within the  
12 meaning of section 202(a) of title 18, United States Code.

13 “(h) Inapplicability of Federal Advisory Committee Act.—The Federal Advisory Committee  
14 Act (5 U.S.C. App.) shall not apply to the Public Advisory Board.

15 “(i) Open Meetings.—The meetings of the Public Advisory board shall be open to the public,  
16 except that the Public Advisory Board may by majority vote meet in executive session when  
17 considering privileged or confidential information.”.

18 (b) Technical and Conforming Amendment.—The table of sections for chapter 7 of title 17,  
19 United States Code, is amended by adding at the end the following:

20 “11. Copyright Office Public Advisory Board.”.

## 21 SEC. 20. GROUP REGISTRATION OF PUBLISHED AND 22 UNPUBLISHED WORKS.

23 (a) In General.—Section 408(c) of title 17, United States Code, as amended by section 8 of  
24 this Act, is amended by adding at the end the following:

25 “(4) OPTIONAL DELIVERY OF EXAMINATION MATERIALS.—In carrying out paragraph (1),  
26 the Register of Copyrights—

27 “(A) shall establish regulations specifically permitting a single registration for a  
28 group of works by the same individual author, all first published as contributions to  
29 periodicals, including newspapers and online publications, whether or not updated on a  
30 set schedule, within a twelve-month period, on the basis of a single delivery of a  
31 registration deposit, application, and fee, if—

1 “(i) the deposit consists of one copy of each entire issue of each periodical, or  
2 of each entire section in the case of a newspaper or online publication, in which  
3 each contribution was first published; and

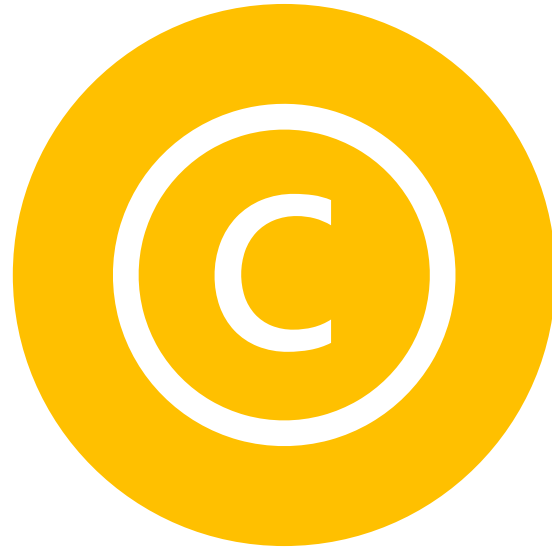
4 “(ii) the application identifies each work separately, including each periodical  
5 containing it and its date of first publication;

6 “(B) may, for works not addressed in subparagraph (A), establish regulations  
7 specifically permitting a single registration for a group of works by the same individual  
8 author, all first published within a twelve-month period, on the basis of a single  
9 delivery of a registration deposit, application, and fee if the application identifies each  
10 work separately; and

11 “(C) in cases in which the Register has provided for group registration, shall allow  
12 published and unpublished works to be registered together in one group registration.”.

13 (b) Effective Date.—The amendment made by subsection (a) shall take effect on the date on  
14 which the Register of Copyrights certifies to Congress that the information technology system of  
15 the Copyright Office is able to support group registration of published and unpublished works, as  
16 described in section 408(b)(4)(C) of title 17, United States Code, as added by subsection (a).

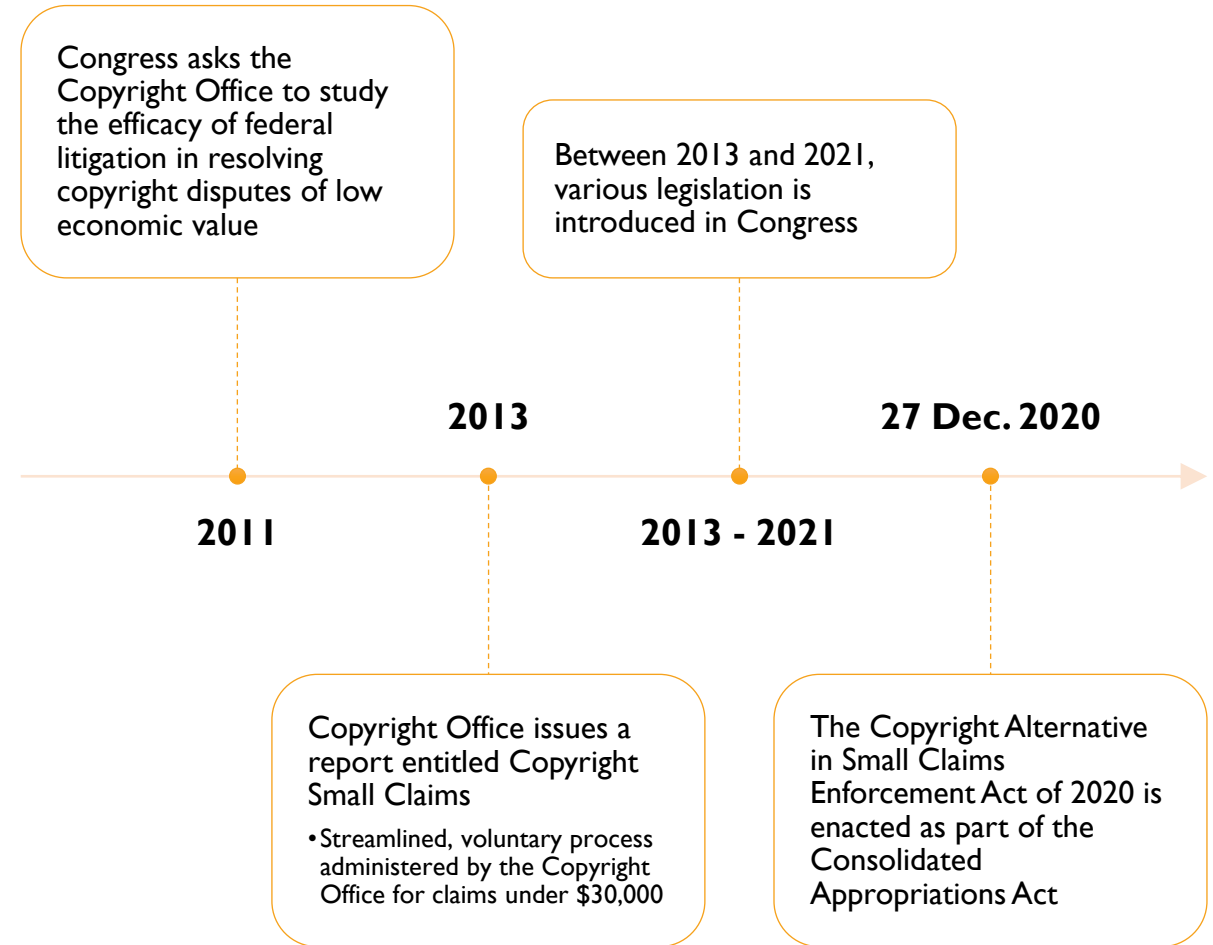
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## **COPYRIGHT ALTERNATIVE IN SMALL CLAIMS ENFORCEMENT ACT**

*An Introduction to the Forthcoming Administrative Tribunal for Copyright Claims*

# THE HISTORY





**WHAT TYPES OF  
CLAIMS CAN THE CCB  
HEAR?**

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Copyright infringement

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Declarations of  
non-infringement

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Notice and takedown disputes  
under §512(f) of the DMCA

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Counterclaims against  
Claimant

**JUST HOW SMALL  
ARE THESE  
“SMALL CLAIMS”?**

- The maximum that a party may seek and recover in a single claim in the CCB is \$30,000 (exclusive of attorneys’ fees/costs).
- The Act also provides for the Copyright Office to establish regulations for “smaller claims” proceedings for claims for no more than \$5,000.

**TELL ME MORE  
ABOUT THE  
POSSIBLE RELIEF**

- Two types of remedies are possible in CCB proceedings:
  - Damages
    - Actual damages and profits (capped at \$30,000); or
    - Statutory damages for infringement
      - For works timely registered: up to \$15,000/work or \$30,000/proceeding
      - Otherwise: up to \$7,500/work or \$15,000/proceeding
  - Requirements to cease activity\*

## ARE ATTORNEYS' FEES AVAILABLE?

- The parties are to bear their own attorneys' fees and costs ***unless*** there is evidence of bad faith conduct.
- Even then, fees/costs will be capped at \$5,000 absent extraordinary circumstances.
- Repeated bad faith conduct can get a party banned from bringing claims for a year.

**DOES A  
CLAIMANT'S  
WORK NEED TO  
BE REGISTERED?**

- Yes and no.
- A claimant may file based on a pending application, but a decision will not be rendered until the registration issues.
- The Act contemplates the Copyright Office establishing regulations that allow for expedited processing of applications for works that are at issue before the CCB.

## ARE CCB PROCEEDINGS MANDATORY?

- Participation in a CCB proceeding is ***voluntary*** and would-be respondents will have the opportunity to ***opt out***. If a putative respondent opts out, the claimant may pursue its claim in court.

## HOW CAN CCB DETERMINATIONS BE APPEALED?

- A party can request reconsideration in the event of **clear error** of law or fact material to the outcome, or a technical mistake. If that request is denied, it may request a review of the final determination by the Register of Copyrights.
- The Register's review will be limited to whether the CCB **abused its discretion** in denying reconsideration.
- If the Register does not provide the requested relief, the party may bring a challenge to a district court: (i) if the determination was the result of fraud, corruption, misrepresentation, or other misconduct; (ii) if the CCB exceeded its authority or failed to render a final determination; or (iii) if the determination was based on a default or failure to prosecute due to excusable neglect.
- After exhausting the foregoing challenges (or after the window to do so expires), the decision of the CCB will become final and the parties will be precluded from re-litigating the same claims before any court, tribunal or the CCB again.
- However, the same parties **will be** allowed to litigate similar issues of fact or law in court or any tribunal even if they were connected to the claims raised in the CCB proceeding, as long as they were not actually raised.

ARE  
DETERMINATIONS  
PRECEDENTIAL?

CAN MATERIALS BE  
USED IN  
SUBSEQUENT CASES?

- No and no.
- Determinations by the CCB should **not** be cited or relied upon as legal precedent or any other action or proceeding before any court, tribunal or even the CCB (except to enforce the determination).
- A determination of ownership of a copyrighted work in a CCB case may **not** be relied upon or have preclusive effect in any other action or proceeding before the CCB, court or other tribunal.
- Submissions or statements made in connection with CCB proceedings may **not** be cited, relied upon, or form the basis of any future actions or proceedings in court, tribunals or the CCB.



## WHERE WILL CCB PROCEEDINGS TAKE PLACE?

- Proceedings before the CCB will not require in-person appearances.
- Rather, they will be conducted via written submissions and remote hearings and conferences.

## WHO WILL MAKE UP THE CCB?

- The CCB will be comprised of three full-time Copyright Claims Officers who are recommended by the Register of Copyrights and appointed by the Librarian of Congress for staggered renewable six-year terms.
- The Act also creates Copyright Claim Attorneys to assist in the administration of the CCB.

## IS THERE A TIME LIMIT FOR BRINGING A CLAIM?

- A proceeding before the CCB must be commenced within three years of the claim's accrual.
- Initiating a proceeding before the CCB will toll the statute of limitations for commencing an action on the same claim in district court while the claim is pending.

## WHAT LAW APPLIES?

- The CCB will follow the law of the federal jurisdiction in which the action would have been brought if filed in a district court of the US.
- If there's more than one possibility, then the CCB shall determine which jurisdiction has greatest connections to parties/activities.

## WHAT ELSE SHOULD I KNOW?

- Lawyers are optional.
- The CCB will be operational within one year (possibility of 180-day extension).
- Process will be studied by Register of Copyrights within three years of first decision.

## OPEN QUESTIONS

- How will discovery work?
  - Limited to document requests, interrogatories and requests for admission (except on request)
- Cost/payment schedule
  - Total not less than \$100, not more than \$400
- The specific mechanism(s) for opting out
- Will opt outs be public?
- Will there be a registry for designated agents for service for corporations?