



LIBRARY COPYRIGHT ALLIANCE COMMENTS ON “DIGITAL COPYRIGHT ACT OF 2021” DISCUSSION DRAFT

The Library Copyright Alliance (“LCA”) welcomes this opportunity to provide its comments on the December 18, 2020 discussion draft of the “Digital Copyright Act of 2021.” LCA consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations collectively represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year. U.S. libraries spend over \$4 billion annually purchasing or licensing copyrighted works.

At the outset, LCA states that it disagrees with the basic premise of the draft articulated in the press release announcing the release of the draft. Contrary to the press release, the Digital Millennium Copyright Act (“DMCA”) *does not* “show the strain of a statute that has not adapted well to the technological advancements and changing business practices that have occurred since” 1998. Likewise, copyright law today is *not* “ill-suited for the needs of most copyright owners and individual users.” Further, the copyright framework *does not* need to “better encourage the creation of copyrightable works.” Based on this disagreement with the draft’s premise, LCA strongly opposes section 2 of the draft, which would amend the DMCA’s safe harbors for online service providers.

At the same time, LCA completely agrees with the press release’s assertion that copyright modernization is necessary to “protect users and consumers who are making lawful uses of copyrighted good and software-enabled products.” Thus, LCA supports the spirit of the draft’s amendments to section 1201 of the DMCA in section 5 of the draft, but they do not go nearly far enough.

Below, LCA provides more detailed comments on these and other sections of the draft. Additionally, LCA enumerates reforms to the Copyright Act that should be in the draft, but aren’t.

Section 2—Safe Harbors

Section 2 of the draft represents a radical and dangerous rewriting of the DMCA’s safe harbors for online service providers, including libraries. LCA believes this section should be stricken in its entirety.

Section 2 makes two major structural changes to section 512. First, it would collapse the four separate categories of online services (mere conduit, caching, hosting, and linking) into one. Second, it would impose increased obligations on all service providers, including taking steps to ensure that “allegedly infringing materials stays [sic] down.” This would require libraries providing Internet access to employ filters to prevent users from uploading allegedly infringing

content in order to remain within the safe harbor. Such filters would severely limit the freedom of expression of library users. Filters cannot make fair use determinations. Moreover, we are not aware of any filters that would enable libraries to meet this obligation across all categories of works. Assuming such technologies could be developed and adopted through the overhauled standard technical measures provisions, libraries likely would have difficulty affording them.

Additionally, section 2's sweeping revisions would introduce enormous uncertainty into library operations. Libraries would have to follow "reasonableness best practices" updated by the Copyright Office every five years. Thus, libraries would have to revise their procedures every five years in order to accommodate the updated best practices.

Even if Congress decides to adopt more limited amendments, they would be destabilizing. For example, changing the red flag knowledge standard from "awareness of facts and circumstances from which infringing activity is apparent" to "awareness of facts and circumstances from which infringing is likely"—as the draft proposes—would lead to years of costly litigation as courts develop tests for this new standard.

Given the billion-dollar judgment recently assessed against Cox Communications due to its failure to comply with the DMCA's requirements, there simply is no merit to the assertion that section 512 is "ill-suited to the needs of most copyright owners" and "has not adapted well to the technological advancements and changing business practices that have occurred since" 1998. Likewise, there is no merit to the assertion that the Copyright Act needs amendment "to better encourage the creation of copyrightable works...." As the Senate IP subcommittee hearings last year demonstrated, we live in a golden age of content creation by large media companies, professional artists, and individual creators who wish to share their works with the public. For the first time in history, any creator can reach a global audience at little or no cost. This distribution without intermediation is enabled by section 512. Without the section 512 safe harbors, libraries and commercial entities could not permit individuals and small entities to access the Internet and upload their content without burdensome review. Accordingly, the proposed amendments to section 512 not only are not needed, they run contrary to the constitutional objective of the copyright system: promoting the progress of science and useful arts. If Congress enacted these amendments, far less content would be created and made available to the public.

Furthermore, there is no reason to believe that amending section 512 as proposed by the draft would actually reduce online infringement. Most of the websites hosting infringing content are overseas, beyond the jurisdiction of the U.S. Copyright Act. Thus, were Congress to enact section 2 as drafted, U.S. consumers interested in infringing content would still find it. And assuming *arguendo* that the draft's "repeal and replace" of section 512 would lead to an appreciable decrease in infringement, it is completely speculative to conclude that the income of individual creators would increase. While rights holder groups often cite the decreasing average income of individual creators, they fail to note that many factors contribute to this decrease, most notably the increased competition from other creators as digital technology has lowered the barriers to entry. This competition enables publishers and other distributors to pay the individual creators less for their works.

In short, section 2 would not help individual creators but would destroy the open Internet. There is no reason for Congress to pursue it.

Section 512 is not perfect. It is subject to abuse by rights holders and people who falsely claim to be rights holders. The draft attempts to improve the notice-and-putback process, but these changes do not address the underlying problem of abuse. This abuse is rooted in the incentive structure provided by the statutory damages set forth in 17 U.S.C. § 504(c). Indeed, the existing statutory damages framework encourages copyright trolls and has a chilling effect on many lawful uses, including by libraries. If Congress seeks to protect users and consumers making lawful uses of copyrighted goods and software enabled products, the place to begin is reforming statutory damages. LCA proposes such reforms in the final section of these comments.

Section 3—Orphan Works

LCA supported orphan works legislation when it was first proposed by the Copyright Office in 2006. However, the proposed bill became more complex and convoluted during the course of the legislative process, leading LCA to conclude that it would have little utility to libraries. Since then, LCA has not supported orphan works legislation, in large measure because fair use jurisprudence now makes clear that libraries may rely on 17 U.S.C. § 107 to digitize the orphan works in their collections. Section 3 of the draft includes the last iteration of the orphan work bill in the House in 2008, which LCA rejected as unworkable.

Although libraries no longer need orphan works legislation to engage confidently in the mass digitization of their special collections, LCA understands that other communities may not feel as comfortable relying on fair use and may find merit in an approach based on limiting remedies if the user performed a reasonably diligent search for the copyright owner prior to the use. Accordingly, Congress should consider a one sentence amendment to 17 U.S.C. § 504(c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use. Because courts would simply have the discretion to reduce statutory damages, but would not be required to do so, there would be no need to define precisely what constituted a reasonably diligent search. That determination would be left to the court. At the end of 17 U.S.C. § 504(c)(2), the following sentence should be added:

In a case of infringement, the court shall have the discretion to reduce or remit statutory damages if, before the infringement began, the infringer performed a reasonably diligent search to identify and locate the owner of the infringed copyright, but was unable to identify and locate the owner of the infringed copyright.

Section 4—Appointment of the Register and Copyright Office Relocation

In 2018, before the Senate Committee on Rules and Administration, LCA testified that making the Register of Copyrights a Presidentially-appointed, Senate confirmed position would politicize the role in an office whose mission is primarily administrative: registering copyrights. LCA continues to oppose changing the nature of the Register's appointment on this basis. The main justification for moving the Copyright Office into the Executive Branch would be to enhance its ability to promulgate the regulations called for by section 2's amendments to section

512 of the DMCA. If section 2 were deleted, as we suggest, there would be no reason to remove the Copyright Office from the Library of Congress.

Section 5—Circumvention of Technological Protection Measures

LCA welcomes the draft’s recognition that section 1201 is “ripe for reform.” However, the changes proposed just “tinker around the edges,” and do not address the core problem with section 1201: that it does not unambiguously require a nexus between circumvention and infringement liability to attach. To be sure, the Sixth Circuit and the Federal Circuit have required such a nexus, but the Eighth and Ninth Circuits have not. In the face of this circuit split, users have to assume that liability can attach even if the circumvention does not enable infringement. Accordingly, section 1201 should explicitly state that it is not a violation of section 1201 to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work. We suggest that the following language be added at the end of 17 U.S.C. § 1201(c)(1):

It is not a violation of this section to circumvent a technological protection measure in connection with access to, or use of, a work if such circumvention does not result in an infringement of the copyright in the work.

The language was introduced by Representatives Boucher and Doolittle as H.R. 5544, 107th Cong. (2002). Similar language appeared in H.R. 5522, 107th Cong. (2002) (introduced by Representative Lofgren); H.R. 107, 108th Cong. (2003) (introduced by Representatives Boucher, Doolittle, Kennedy, and Bachus); and H.R. 1201, 109th Cong. (2005) (introduced by Representative Boucher).

The triennial rulemaking could be made less burdensome by eliminating the requirement that an exemption must apply only to users of “a particular class of works.” This phrase in section 1201(a)(1)(B) has led the Librarian of Congress to adopt extremely narrow exemptions, which in turn has imposed a heavy burden of seeking a new exemption on users who need to make a similar use of a different “class” of works. Thus, although the Librarian in 2018 granted an exemption for libraries to preserve software, which will be renewed, LCA currently is seeking a new exemption for the preservation of motion pictures on DVDs. Similarly, the Office has indicated that it will reject a petition for an exemption to enable access to all types of works by a person with any type of disability. Instead, LCA and disabilities rights organizations must submit evidence concerning each class of work and every type of disability. This, in a word, is absurd. It places an unnecessary burden on the Copyright Office as well as users. Accordingly, Section 1201(a)(1)(B) should be amended to read as follows:

The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a category of works under Section 102(a), if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of their ability to make noninfringing uses of that particular category of works under this title as determined under subparagraph (C).

With respect to the language of section 5, LCA supports the amendments concerning third party assistance, as well as the application of the exemptions to §§ 1201(a)(2) and 1201(b). LCA also supports the proposed new exceptions, although the new exception for people with disabilities should be broader:

Notwithstanding the provisions of subsections (a) and (b), it is not a violation of this section to:

**(1) circumvent a technological protection measure; or
(2) develop and employ technological means to circumvent a technological measure,
for the purpose of making a copyrighted work accessible to a person or people with disabilities.**

LCA supports the other amendments concerning people with disabilities proposed by Professor Blake Reid.

A new permanent exception should be created to enable preservation by libraries, archives, and museums:

Notwithstanding the provisions of subsections (a) and (b), it is not a violation of this section to:

**(1) circumvent a technological protection measure; or
(2) develop and employ technological means to circumvent a technological measure,
for the purpose of making a preservation copy of a work in the collection of a library, archives, or museum.**

Preservation of our cultural heritage is one of the core missions of libraries, archives, and museums. There is no financial incentive for rights holders to preserve works of little economic value. Allowing cultural heritage institutions to carry out this essential function will not have an adverse impact on rights holders.¹

Further, a new permanent exception should be created to enable educational uses:

¹ The existing exception for nonprofit libraries, archives, and educational institutions, 17 U.S.C. § 1201(d), has always been useless: it simply permits a library to circumvent a technological protection to gain access to a commercially exploited work solely to make a good faith determination whether to acquire the work. To our knowledge, there has never been an instance where a rights holder has not permitted a library access to a work the rights holder wanted to sell the library. And why would it? Providing the library with access to sample its works is in the rights holder's interest. The libraries did not ask for this exception during the drafting of the section 1201. Rather, it was "given" to them by the House IP Subcommittee so that the Subcommittee could claim that it had addressed libraries' concerns. In fact, libraries sought an exception that would permit them to circumvent technological protections for the purposes of preservation and similar lawful uses.

Notwithstanding the provisions of subsections (a) and (b), it is not a violation of this section to:

- (1) circumvent a technological protection measure; or**
 - (2) develop and employ technological means to circumvent a technological measure,**
- for the purpose of facilitating educational uses of a work in the lawful possession of an educational institution.**

Section 6--Copyright Management Information

LCA does not see a need for section 6. The new section 1202A seems particularly burdensome, and may raise First Amendment concerns as compelled speech.

Section 7—CASE Act

Presumably Section 7 was rendered unnecessary by the adoption of the CASE Act as part of the Omnibus spending bill.

Section 8—Study of Snippet Tax

LCA strongly opposes a study on adding ancillary copyright for press publishers. To the extent that fair use is a built-in accommodation to the First Amendment, and quotations are quintessential fair uses, a snippet tax would be unconstitutional. Moreover, a new book by Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyrighted Works*, argues that “snippet taxes” and similar efforts to prevent quotation without payment to quoted authors violates the quotation right in Article 10(1) of the Berne Convention.

Aplin and Bently engage in a detailed analysis of the implications of Article 10(1)’s mandatory nature. They ask whether “the mandatory rule under Berne carries with it an ancillary obligation for the holder of such a related right to permit quotation.” Aplin & Bentley at 53. They answer that

in any situation where a quotation of an underlying work cannot be effected without involving the related or other right, the Member State is obliged to ensure that the related right does not restrict or inhibit the ability to exercise the quotation right. The freedom granted by Article 10(1) Berne is preemptive.

Id. at 53–54.

Aplin and Bently then turn to the specific case of the press publication right provided by Article 15 of the EU Directive on Copyright in the Digital Single Market: must EU Member States recognize the Berne 10(1) quotation right as an exception to the press publication right? They answer in the affirmative; Member States must “allow for the exercise of the mandatory freedom to quote works under the Berne Convention.” *Id.* at 54–55. Aplin and Bently elaborate that

in any situation where a person proposes to quote from a published authorial work such as a newspaper article, cartoon or photograph, the press publishers' right may not be invoked to restrict or prevent such lawful quotation. Were it to do so, there would be a breach of Article 10(1) Berne.

Id. at 55.

There is no reason to study this controversial and unconstitutional concept.

Section 9—Errors in Registration Applications

LCA opposes subsection (a)–(c), which would incentivize rights holders to be more careless when registering their works. Due to the ongoing efforts to modernize the Copyright Office, the registration system soon will be more user-friendly. It is the rights holder's responsibility to comply with the registration requirements in order to receive the benefits of registration: statutory damages and attorney's fees. LCA supports subsection (d), which creates a disincentive for rights holders to commit fraud on the Copyright Office.

Section 10—Deposit Copy Retention

Currently, LCA has no position on section 10.

Section 11—Fee Funding Authority

LCA supports providing the Copyright Office with additional flexibility in its funding.

Section 12—Authority to Set Alternative Fee Structure

LCA supports providing the Copyright Office with the authority to set alternative fee structures for registration and other Copyright Office services.

Section 13—Conversion of Applications

Currently, LCA has no position on section 13.

Section 14—Studies on Deposit Requirement

LCA supports the studies proposed in section 14.

Section 15—Best Edition Definition

The section is unnecessary. The definition of “best edition” is set forth in the Compendium of U.S. Copyright Office Practices, which is available on the Copyright Office website.

Section 16—Study on Publication

LCA supports the study on the definition of “publication.”

Section 17—Study on Deferred Examination

Currently, LCA has no position on the study proposed in section 17.

Section 18—Amendment of Application for Registration

Currently, LCA has no position on section 18.

Section 19—Copyright Office Public Advisory Board

While LCA supports the establishment of a board to advise the Register on the operation and modernization of information technology at the Copyright Office, LCA sees no need for the board to be mandated by statute. Indeed, the Register is currently assembling such a board without a statutory mandate to do so.

Section 20—Group Registration

Currently, LCA has no position on section 20.

OTHER NECESSARY REFORMS

Preempting Abusive Contracts

Congress should address a specific form of misuse frequently exercised by rights holders via licenses. Libraries, as well as individual and businesses, acquire digital content subject to license agreements. Indeed, many libraries currently expend the majority of their acquisitions budget on licenses for digital content. Often these licenses prohibit libraries from engaging in activities permitted by fair use or other copyright exceptions. Strong arguments can be made that licenses inconsistent with the fair use right are preempted either by the Constitution² or 17 U.S.C. § 301(a).³ Notwithstanding these arguments, there is authority suggesting that contractual prohibitions on copying otherwise permitted by fair use may be enforceable.⁴ Congressional intervention is necessary to make clear that exceptions provided in the Copyright Act prevail over license terms inconsistent with those exceptions.

It should be noted that for nearly thirty years, the European Union (“EU”) has included contract preemption clauses in its directives. The EU has recognized that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by contract.

² See *Vault Corp. v. Quaid Software Ltd*, 847 F.2d 255 (5th Cir. 1988).

³ See *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994); 1 *Nimmer on Copyright* § 1.01[B][1][a][i].

⁴ See *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), cert. denied, 539 U.S. 928 (2003); *Davidson & Assoc. v. Jung*, 422 F.3d 630 (8th Cir. 2005); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

- **Software Directive (1991).** Article 9(1) of the Software Directive provides that “[a]ny contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.” Article 5(2) permits back-up copying; Article 5(3) permits “black box” reverse engineering; and Article 6 permits decompilation for the purpose of achieving interoperability.
- **Database Directive (1996).** Article 15 provides that “[a]ny contractual provision contrary to Articles 6(1) and 8 shall be null and void.” Article 6(1) permits “acts necessary for the purpose of access to and normal uses of contents of database;” Article 8 permits a database user to extract and re-utilize insubstantial parts of a database.
- **Marrakesh Directive (2013).** Article 3 of the Marrakesh Directive provides that “Member States shall ensure that the exception provided for in paragraph 1 cannot be overridden by contract.” Paragraph 1 is the operative part of the Directive that permits authorized entities to make and distribute accessible format copies.
- **Copyright in the Digital Single Market Directive (2019).** Article 7(1) of the Copyright in the Digital Single Market (“CDSM”) Directive provides that “Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.” Article 3 permits text and data mining by research organizations and cultural heritage institutions for scientific research; Article 5 permits the use of works in digital and cross-border teaching activities; and Article 6 permits preservation by cultural heritage institutions.

All EU Member States must implement these contract preemption provisions in their law. Moreover, some Member States have adopted more extensive contract preemption provisions than those required by EU directives. The copyright laws of Germany, Ireland, Portugal, Montenegro, and Belgium prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions.⁵ In addition to the contract preemption provisions required by the EU directives prior to Brexit, the United Kingdom had declared unenforceable a term of a contract purporting to prevent the making of a copy which does not infringe copyright by virtue of exceptions in sections: 28B (personal use), 29 (research and private study), 30 (criticism, review, quotation, and news reporting), 31 (caricature and parody), 32 (illustration for education), 41(5) (supply of copies to other libraries), 42(7) (replacement copies), and 42A (single copy to user).

Singapore’s draft copyright law, which likely will be enacted later this year, includes a thoughtful and balanced contract preemption provision which provides a model for Congress to consider:

⁵ See International Federation of Library Associations and Institutions, *Protecting Exceptions Against Contractual Override*, https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf.

Permitted uses may be restricted or excluded by reasonable contract term

179.—(1) Subject to this section and section 180, a rights owner may, by contract with a person, exclude or restrict the application of a permitted use to that person.

(2) A term in a contract between the rights owner and another person (called in this section the counterparty) is valid for the purposes of subsection (1) only if —

- (a) the contract is individually negotiated; and**
- (b) the term is fair and reasonable, having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.**

(3) For the purposes of subsection (2)(b), relevant factors in deciding whether a term of a contract is fair and reasonable include —

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the counterparty's requirements could have been met;**
- (b) whether the counterparty received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;**
- (c) whether the counterparty knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and**
- (d) whether at the time of the contract it was reasonable to expect that the contract is workable without the term.**

(4) Where a term of a contract between a rights owner and a person excludes or restricts the application of a permitted use to that person, the benefit of that term passes to subsequent rights owners.

(5) This section applies to any contract, whether made before, on or after the date of commencement of this section.

Permitted uses that may not be excluded or restricted

180.—(1) Any contract term is void to the extent that it purports, directly or indirectly, to exclude or restrict any permitted use under any provision in —

- (a) Division 6 (public collections);**
- (b) Division 7 (computer programs);**
- (c) Division 8 (computational data analysis); or**
- (d) Division 17 (judicial proceedings and legal advice).**

(2) Without limiting subsection (1), a contract term is void to the extent that it purports, directly or indirectly, to prevent or restrict the doing of any of the following acts in circumstances that constitute a permitted use under the provision mentioned in subsection (1):

- (a) the communication, making or supply of a copy or reproduction of a work or protected performance;**

(b) the performance of any work or recording of a protected performance.

Evasion through choice of law clause to be void

181.—(1) A term of a contract that purports to apply the law of a country other than Singapore is void if —

- (a) the term has been imposed wholly or mainly for the purpose of evading the operation of any permitted use; or**
- (b) in the making of the contract one of the parties dealt as consumer, and he or she was then a Singapore resident, and the essential steps for the making of the contract were taken in Singapore, whether by him or her or by others on his or her behalf.**

(2) For the purposes of subsection (1)(b), the interpretation of section 27(2)(b) of the Unfair Contract Terms Act 1977 must be considered.

(3) This section applies to any contract, whether made before, on or after the date of commencement of this section.

Beyond responding to the specific problem of abusive licensing practices, Congress should enact a general copyright misuse provision. Victims of copyright misuse should be entitled to actual and statutory damages.

Facilitating Distance Education

The Covid-19 pandemic has magnified the detrimental impact of the gaps in the exceptions for online education. Films are a critical component of instruction across disciplines, including film studies, history, social sciences, and area studies. Section 110(1) enables this use in the course of face-to-face teaching activities by permitting an instructor to screen an entire film in a classroom. However, the exception for distance education is not as broad. Enacted in 2002, the TEACH Act, 17 U.S.C. § 110(2), permits the instructor only to show “limited portions” of a film to an online class. Instructors, therefore, could not rely on the TEACH Act to show films to their classes when all instruction migrated online after the pandemic struck. Additionally, institutional streaming licenses were not available for many of these films. Every institution has been forced to adopt its own policy whether to allow its instructors to rely on fair use to stream these films to their online classes, or to require them to redesign their syllabus. The deficiencies of section 110(2) made an already bad situation worse for faculty, students, and administrators.

Even after the pandemic ends, the TEACH Act’s inadequacies will continue. Online education was becoming increasingly prevalent before the pandemic, and this trend will resume after the pandemic. Accordingly, section 110(1) should be amended to apply to all teaching activities of a nonprofit educational institution, regardless of whether they occur in person or online.

Statutory Damages

Congress should examine whether statutory damages for copyright infringement are truly necessary in the first place. Patent law, for example, does not provide statutory damages. To the extent there is a perceived need for punitive damages to disincentivize willful infringement, treble damages—as provided by patent law and antitrust law—are sufficient.

If Congress decides to retain statutory damages, it could adopt changes to reduce the incentives for abusive behavior. These include:

- Adopting a \$5,000 cap on statutory damages in actions for noncommercial infringements, as in Canada.
- Simplifying the remission of damages for non-profit institutions. 17 U.S.C. § 504(c)(2) allows for the remission of statutory damages to libraries, educational institutions, and public broadcasters when they reasonably believed that certain activities were fair uses. However, this limitation does not apply to museums. Moreover, the limitation for libraries and educational institutions applies only to infringements of the reproduction right, not the performance, display, distribution, or derivative work right. As a result, the limitation provides little benefit, particularly for Internet uses that involve the display of a work on a website. This change could be effectuated simply by deleting the phrase “which infringed by reproducing the work in copies or phonorecords” from the third sentence of section 504(c)(2).
- Ensuring the predictability of statutory damages in secondary liability cases. Currently, an Internet service provider or a consumer electronics manufacturer could be found liable for statutory damages for each work a third party infringes while using the service or product. This potential exposure to astronomical damages chills innovation and discourages capital investment in new products and services. (This is what happened in the Cox Communications case referenced above.) Accordingly, Section 504(c)(2) should require the remission of statutory damages for secondary infringement, except in a case in which the copyright owner sustains the burden of proving, and the court finds, that the act or acts constituting such secondary infringement were done under circumstances in which no reasonable person could have believed such conduct to be lawful.
- Reducing the level of minimum damages. The existing statute contains a range of damages, but the minimum is too high. For example, a consumer is liable for a minimum of \$750 for infringement of one song that she could purchase on iTunes for \$1.29. Even if the court finds the infringement is innocent, the minimum is still \$200. The general statutory minimum should be reduced to \$250, and the minimum for innocent infringement should be reduced to \$100. This is still more than 100 times greater than the going rate for many common works, and in the unlikely event that it is insufficient, plaintiffs may always opt for actual damages.
- Guiding courts in awarding damages. The statute sets forth a broad range for damages but provides no guidance for courts on how they should exercise their discretion. The court is simply directed to make the award “as the court considers just.” When the case does not involve willful infringement, the court in calculating statutory damages should attempt to compensate the plaintiff, not punish the defendant.

- Requiring the timely election of statutory damages. Current practice permits plaintiffs to delay the election between actual and statutory damages until after the jury (or court) awards both actual and statutory damages. This allows the plaintiff to “game the system” and extract higher settlements by threatening draconian damages throughout the litigation. So as not to unfairly prejudice defendants, plaintiffs should make this election in a timely manner, before the trial or the filing of a motion for summary judgment.
- Requiring registration renewal for continued eligibility for statutory damages. Currently, statutory damages are available for any work registered prior to infringement, even if the work was registered decades ago and has little economic value. The threat of significant statutory damages contributes to the orphan works problem and discourages important preservation efforts. Statutory damages should be available only for works whose registration has been renewed through a renewal procedure to be established by the Copyright Office.

Fair Remuneration in Author Agreements

While LCA believes that existing copyright law provides authors with ample incentive to create, the abundance of content has made it even easier for publishers and other content distributors to exploit individual creators. The competition between creators has exacerbated the already unequal bargaining position between publishers and creators. Significantly, the European Union has devoted attention to this issue. The CDSM Directive contains an entire chapter entitled “Fair remuneration in exploitation contracts of authors and performers.” Article 18 sets forth a principle of appropriate and proportionate remuneration. Article 19 imposes transparency obligations on the publishers to whom authors have licensed their copyrights. Article 20 provides for a mechanism to adjust contracts to enable creators to “claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for an exploitation of their rights.” Article 21 requires an alternative dispute resolution procedure for the transparency obligations in Article 19 and contract adjustment under Article 20. Article 22 grants creators a right to revoke a license if the publisher fails to exploit the work. Article 23 provides that “any contract provision that prevents compliance with Articles 19, 20, and 21 shall be unenforceable.” If Ranking Member Tillis wants to amend the Copyright Act in a manner that will really benefit individual creators, these provisions should be considered. Protecting authors from exploitation by publishers is far more likely to benefit authors than amending section 512.

We would be happy to discuss our responses in greater detail.

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