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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.