# LIBRARY COPYRIGHT ALLIANCE COMMENTS ON DMCA REFORM BILL

The Library Copyright Alliance ("LCA") welcomes this opportunity to provide its responses to Chairman Tillis's questions regarding a possible Digital Millennium Copyright Act ("DMCA") reform bill.

**Statutory Damages**

Starting with first principles, 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)

- 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.

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- **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

**Section 512**

Turning to the questions asked by Chairman Tillis regarding section 512, LCA states as a general matter that section 512 does not require amendment, and the potential harm resulting from any changes far outweigh the possible benefits.

1. If additional burdens are imposed on online service providers ("OSPs"), such burdens should be placed only on commercial OSPs, and not OSPs operated on a nonprofit basis, such as libraries. Indeed, burdens currently imposed on libraries in their OSP capacity could even be lightened. For example, libraries should not be required to register their designated agent with the Copyright Office under section 512(c)(2). (Frankly, the requirement to register a designated agent with the Copyright Office should be eliminated across the board; it is a bureaucratic obstacle that traps less sophisticated OSPs without providing meaningful benefit for rights holders.)

2. There is no need to change the safe harbors; the four categories have stood the test of time. Reducing the number of safe harbors and delegating authority to the Copyright Office to identify by regulation the covered types of service providers is not a good idea. Technology evolves too quickly and the Copyright Office does not have the expertise to make this type of determination.

receives. Because Google can only recover actual damages under section 512(f), it likely does not have sufficient incentive to pursue these automated service providers who flagrantly misuse the notice-and-takedown system.

9. Congress should not grant the Copyright Office regulatory authority with respect to standard technical measures ("STMs"). The Office does not have expertise in this area. Additionally, as LCA explained in the Copyright Office roundtables concerning STMs, section 512(i)(1)(B) was rendered largely unnecessary by section 1201, which prohibits the circumvention of technological protection measures.

10. LCA opposes granting a government agency regulatory authority over how an OSP structures its voluntary monetization programs. A more appropriate area for government intervention would be rights holders' abusive copyright licensing practices and publishers' exploitation of authors, described above.

**Section 1201**

exception that would permit them to circumvent technological protections for the purposes of