



Supporting a Pro-Innovation, Pro-Creator, Pro-Consumer Copyright Agenda

Congratulations on your election to the 117th Congress. As representatives of a cross-section of creators, advocates, thinkers and consumers, we look forward to working with you in the upcoming months as you tackle many of the issues we face as a nation.

Re:Create was founded in 2015 to educate policymakers on the positive impact the internet has had on creativity and innovation over the last 25 years. Collectively, the members of Re:Create operate over 100,000 libraries visited by the public more than 1.5 billion times per year; fight censorship by repressive regimes globally; provide platforms that enable music and video content to reach a global audience; create new and inspiring works of art, literature and video enjoyed by wide audiences; invest in new startups and entrepreneurs; and generate billions of dollars in revenue for the motion picture, recording, publishing and other content industries. While our individual organizations maintain diverse views of specific issues, we are united in our overarching respect for copyright and concern for its future.

Our members are the American Association of Law Libraries, American Library Association, Association of Research Libraries, Center for Democracy and Technology, Computer & Communications Industry Association, Consumer Technology Association, Electronic Frontier Foundation, Engine, Harry Potter Alliance, Innovation Defense Foundation, Medical Library Association, New America's Open Technology Institute, Niskanen Center, Organization for Transformative Works, Public Knowledge, R Street Institute, and SPARC.

There has been no better time for creativity in history. Thanks to technological innovation, today there are more artists and authors creating more works on more platforms than ever before.

The internet is the largest of these platforms, enabling billions to be earned by creators. These online platforms and the creators that use them rely on the exclusive rights granted by copyright law, but also on the law's flexibility such as fair use and the Digital Millennium Copyright Act's (DMCA) safe harbors. It is this balanced approach that makes possible the online platforms that generate revenue streams for creators, small businesses, entrepreneurs, application developers, startups and large content producers. Consumers have more choice and the public has greater access to information. New and wonderful creative works are being seen

globally every second. The internet has lowered barriers for everyone. It is important to note that technological advancement bridges the gap between traditional media and online platforms. In today's changing marketplace, online services and traditional media are forming a positive symbiotic relationship that highlights the notion that creators build on pre-existing works. Copyright provisions such as fair use benefit *all* content creators regardless of the platform.

Copyright law and its impact on speech, content creation and dissemination have a large influence on all of us. Attempts to increase the protections provided by U.S. copyright law may serve an important purpose, but in doing so we must remain mindful that a heavy-handed approach will only stifle free speech, creativity and the economy writ large. The U.S. government should seek the appropriate balance in copyright law to unlock the full potential of all people's innovative and creative spirit. We would like to share with you important aspects of copyright policy that best fulfill our shared goals of innovation and creativity.

The DMCA's balance is largely working. Ever since the DMCA passed in 1998, the entertainment industries have been trying to get rid of its balancing provisions. One of the main provisions is the Section 512 notice and takedown regime for handling allegations of infringement online. The DMCA creates a notice and takedown procedure that both rightsholders and internet platforms need to comply with. As long as they comply with the procedure, then the poster of the content (rather than the platform or host) is liable for copyright infringement.

Some platforms have gone beyond the requirements of notice and takedown, implementing their own systems that allow copyright holders the option to request infringing content is taken down or to make money off of the content. This system largely works well for traditional rightsholders, but can hurt the new generation of digital creators who sometimes have their content de-monetized or blocked for noninfringing uses, such as fair use.

We recommend that the DMCA's notice and takedown regime largely be left alone, although there is a need to strengthen the penalties for abusive and fraudulent notices, and to make it easier to file counter-notices on non-infringing content.

The other major part of the DMCA is Section 1201, which deals with the use of digital rights management (DRM) software and the rules around it. Section 1201 was focused on DVDs and CDs, but applies widely today because of the proliferation of copyrighted software into almost all devices in our society, including cars, smartphones, and beyond. Under Section 1201, to break DRM software and alter a device is considered to be an infringement of copyright, even if the reason for breaking into the DRM is for non-infringing uses like repair and cybersecurity

research. This can prevent farmers from repairing a tractor or hospitals from repairing a respirator.

We believe that Section 1201 should be amended to include a nexus requirement that the reason for breaking DRM is for an infringing use of the underlying copyrighted material. It was never intended to prevent device repair, cybersecurity research or to prevent making products more accessible for those who need them. We urge Congress to take up legislation previously introduced by Senator Wyden and Representative Lofgren to create this nexus requirement as a solution.

Fair use is an essential part of our copyright system. Fair use, which has its origins in the courts and was enshrined into the U.S. Code as Section 107 of the Copyright Act, plays an essential role in our copyright system. It is the yin to copyright enforcement's yang, coexisting with each other, incentivizing creativity and innovation. The Supreme Court has found that copyright is a government-granted monopoly on speech, and it is the fair use doctrine that ensures this monopoly does not violate the First Amendment.

The fair use doctrine creates a flexible test to determine if uses of copyrighted works are permissible without the prior authorization of the copyright holder. Examples of fair uses in our society include criticism, parody, commentary, news reporting, search results, making products accessible to the disability community, clips in documentary films and scholarship. The courts have a well-developed understanding of fair use, and generally do a good job of interpreting what is and what is not a fair use.

Our recommendations around fair use are to ensure it is serving its purpose and allow it to flourish. As the U.S. embarks on exporting our copyright policy through trade agreements, we need to make sure that balancing provisions like fair use and Section 512 are also included, as otherwise we are exporting the yin without the yang.

We are all creators in today's society, and copyright law should encourage this creativity. The Constitution grants to Congress the power to make copyright laws in order to "promote the progress of science and useful arts." Copyright law, by its very nature, needs to focus on how to best allow this progress to occur. Restrictive rules that strengthen gatekeepers to the creative world and prevent new and different types of creativity go against this Constitutional purpose.

In today's world, we are all creators who have copyrights. The photographs we take and share from our phones, the blog posts we write, the videos we make all have copyright automatically. Amateur creators are everywhere. There is also a new class of professional creators making amazing YouTube and TikTok videos, sharing breathtaking content on Instagram, selling jewelry

and artisanal products on Etsy, and creating Substacks to get paid for their writing. The gatekeepers have seen their gates crashed, and want to try to use copyright law to put the gates back up. They want stricter rules around copyright enforcement to increase their profits at the expense of creativity as a whole. This is not copyright's purpose, and efforts to do this should be stopped.

This is another reason why we support the balancing provisions of Section 512 of the DMCA and fair use. Copyright should empower creativity, not block it.

A small claims copyright court is a good idea; the CASE Act is unconstitutional, unworkable and needs to be fixed. Last year, Congress passed the CASE Act to create a small claims tribunal for copyright infringement by sneaking it into the COVID relief/spending package at the end of the year, despite serious Constitutional concerns being raised. The legislation could bankrupt families just for sharing a meme on Twitter. While it will take 18 months to implement, unscrupulous law firms are already trying to build CASE Act contingency fee practices to harass everyday Americans. We urge Congress to reconsider the current law and adjust it to prevent entrapping your constituents in \$30,000 quasi-lawsuits. The easiest fix would be to make participating in a CASE Act tribunal an opt-in process and to remove the right to seek statutorily directed damages as opposed to actual damages. Right now, the legislation only gives a short time period to opt-out of a CASE Act tribunal. Additionally, no matter what the actual harm is, it could put someone on the hook for \$15,000 in damages for a single infringement and \$30,000 for two.

It's time to modernize our laws to allow schools and libraries to succeed in a digital environment. Much of our copyright law surrounding schools and libraries was written at a time when instruction was in person and libraries owned everything they lent. This has changed drastically in the digital age and been particularly exacerbated by the COVID pandemic. Moving from purchased copies of physical books to licensed copies of digital versions has taken ownership away from schools and libraries, costing taxpayers as much as 100 times the money of the physical copy. It is pretty simple - schools and libraries should be able to lend to students and patrons in order to fulfill their purpose in society. Schools and libraries should be granted the opportunity to access digital copies without onerous restrictions and make them available to students and patrons in an accessible manner. Congressional intervention may be necessary to clarify that exceptions provided in the Copyright Act prevail over licenses for lawfully acquired material.

Internet access is a fundamental part of our everyday lives and must be protected. Under current copyright law, internet access providers are encouraged to work with copyright holders on creating procedures that eventually lead to kicking someone off the internet based on

allegations of copyright infringement. Internet access is a necessity in today's society - being cut off from the internet could mean losing a job or not being able to participate in school fully. Just because one household member has had multiple allegations of copyright infringement against them, the whole household should not lose internet access. Copyright law should be amended to ensure that no one loses access to the internet based on allegations of copyright infringement.

A vibrant public domain is a core component of creativity and knowledge. The public domain is the reservoir that nourishes creativity. It is thanks to the public domain that the works of Mozart are free to play, *Alice in Wonderland* can be adapted into a movie and today's libraries can digitize and preserve their rare books collections. On January 1, 2019 we were glad to see that Congress did not intervene, and allowed works to enter the public domain for the first time in 20 years. This January, the *Great Gatsby* entered the public domain, leading to a ton of creativity based on F. Scott Fitzgerald's original masterpiece. Understanding that a cultural commons is vital to future creativity, we support a vibrant public domain and copyright term should not be extended.

We thank you for your time and attention to all of these matters and look forward to working with you over the next two years to promote equitable copyright policy for every sector of society. We encourage you to take due care as you approach that work to ensure that the current explosion of creative and innovative energy unleashed by technology continues to drive every aspect of American society and industry forward.