

## **CONFIDENTIAL AND PRIVILEGED**

### The Digital Copyright Act of 2021-Discussion Draft

#### **Section 1: Short Title**

The short title of the bill is the Digital Copyright Act of 2021.

#### **Section 2: Limitations on Liability Relating to Material Online (512)**

This section lowers the knowledge requirement for OSPs to take advantage of safe harbors and requires monitoring for infringement where that would be reasonable.

This section replaces the notice-and-takedown system in existing law with a notice-and-staydown system for complete and near complete works. This section also requires OSPs to make users click a button when they upload material that affirms that they hold the copyright, have permission, or are otherwise authorized by law, including but not limited to fair use.

This section requires the Copyright Office, in consultation with NTIA, to establish best practices that OSPs must take to combat online piracy in order to be eligible for the liability safe harbors. Such best practices must account for differences in OSP size and service, and the scale of infringement on the service.

This section changes the requirements for sending notices of infringement and counter-notices by lowering the specificity with which copyright owners must identify the location of infringing material and, when multiple works are on the same service, broadens the applicability of a representative list of infringing works. This section allows copyright owners to identify infringement and submit notices through standardized takedown web forms.

This section imposes penalties on notice and counter-notice senders for sending bad-faith notices or notices that do not account for exceptions in federal copyright law like fair use. These heightened penalties can be pursued in a copyright small claims tribunal, such as the one envisioned by the CASE Act.

This section increases protections for content users by creating mechanisms that ensure a user who has their content removed pursuant to a takedown notice will receive instructions, standardized by regulation, from the OSP about their right to file a counter-notice and what information must be included in such counter-notice. Users who files a valid counter-notice will see their content restored (or “put back”) sooner than under the current system.

This section authorizes the Copyright Office, in consultation with NTIA, to develop and maintain a model repeat infringer policy to serve as the minimum baseline standard for OSPs. It also authorizes the Copyright Office, in consultation with the National Institute of Standards and Technology, to establish by rulemaking standard technical measures (STMs) for reducing infringement that OSPs must either adopt or accommodate and states that when adopted STMs must be made available on reasonable and non-discriminatory terms.

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This section authorizes the Department of Justice, in consultation with the Copyright Office, to review voluntary agreements if they raise antitrust concerns or constrain uses that are otherwise authorized by copyright law.

### **Section 3: Orphan Works Act**

This section adopts legislative text recommended by the Copyright Office in its 2015 report on orphan works. It provides a limitation on liability for good faith users who, following a diligent search, are unable to locate the copyright owner and decide to still use the work.

### **Section 4: Appointment of the Register of Copyrights; Copyright Office Relocation**

This section establishes the Copyright Office as an executive branch agency within the Department of Commerce. This section also makes the Register of Copyrights a presidential appointee, subject to the advice and consent of the Senate, for a five-year term.

### **Section 5: Modernizing the Circumvention Exemptions (1201)**

This section authorizes the Copyright Office to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user—meaning that, for example, a farmer who has an exemption to circumvent the TPM for his tractor’s engine software does not need to know how to circumvent the TPM himself.

This section mandates that any temporary exemption adopted in the previous rulemaking enjoys a presumption in favor of renewal and will be renewed without additional documentation unless someone opposing its renewal files an opposition. This section also authorizes the Copyright Office to make permanent a temporary exemption that has been granted twice without opposition.

This section adds section 1201(b)—the anti-trafficking provision—to the triennial rulemaking process for temporary exemptions. Currently, the temporary exemptions apply only to the prohibition against circumvention (section 1201(a))—meaning that an individual looking to make a permissible circumvention must develop the tool for doing so themselves. But this section allows the Copyright Office to adopt exemptions for trafficking of circumvention tools when the tool would be used to facilitate an exempted circumvention.

This section modernizes the existing permanent exemptions for encryption research and good faith security testing, and it adds new permanent exemptions for noninfringing activities that: (1) enable blind or visually impaired persons to utilize assistive technologies; (2) unlock used mobile devices; and (3) allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls.

### **Section 6: Promoting Attribution through Copyright Management Information (1202)**

This section adds a new section 1202A to require a copyright owner who is not the author to affix copyright management information (CMI) to digital copies and to provide the author of the

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copyrighted work with a right of action when someone removes or alters CMI on digital or analog copies with the intent to conceal an author's attribution information.

### **Section 7: Copyright Alternative in Small-Claims Enforcement Act**

This section allows for certain disputes to be adjudicated by a copyright small claims tribunal for easier, quicker, and cheaper resolution.

### **Section 8: Study on Ancillary Copyright for Press Publishers**

This section directs the U.S. Copyright Office to study the costs, benefits, and viability of adding ancillary copyright for press publishers to U.S. law.

### **Section 9: Good Faith Error in Application for Registration**

This section amends the statute so the Register of Copyrights may not refuse to register a work whose application contains only a good faith error, and to increase penalties for fraud against the Copyright Office.

### **Section 10: Deposit Copy Retention**

This section requires that the Copyright Office retain one deposit copy where there is more than one deposit copy for future litigation purposes.

### **Section 11: Fee Funding Authority During Lapse In Appropriations**

This section gives the Copyright Office authority to use fees collected to continue operations during a shutdown. The Copyright Office currently does not have such authority, even though registration applications still must be submitted.

### **Section 12: Authority to Set Alternative Fee Structures**

This section makes it clear that the Copyright Office has the authority to implement tiered fees.

### **Section 13: Conversion of Application for Registration to Application to Amend and Pending Registration Application**

This section indicates that when a registrant files an application for registration but another individual has also filed a registration the second application shall be converted to an application to amend the existing registration with consent of original registrant.

### **Section 14: Deposit Requirement**

This section states that the default deposit copy for registration will be a digital copy subject to rulemaking by the Register to set standards for situations where digital deposit copies are

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impractical or would cause hardship. Registrants will have the option to deposit a copy that is sufficient for registration needs or a best edition copy at the time of registration. If the registrant does not provide a best edition copy at the time of registration the Library shall have a right to request a best edition copy to add to its collection.

### **Section 15: Best Edition Definition**

This section amends the definition of “best edition” in section 101 by adding “and publishes the standard to its website” after “purposes.”

### **Section 16: Study on Publication**

This section directs the Register of Copyrights to 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.

### **Section 17: Study on Deferred Examination**

This section directs the Register of Copyrights, in consultation with the Librarian of Congress, to study 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.

### **Section 18: Amendment of Application for Registration and Derivative Works**

This section makes it clear that a derivative work of a registered computer program can be registered by amending the registration application in a timely way given internet connectivity. Derivative works should not require an entirely new registration where the owner has the ability to expedite registration. This section requires the Register to implement a simplified process to amend a registration for derivative works of computer programs

### **Section 19: Copyright Office Public Advisory Board**

This section establishes an advisory board at the Copyright Office. The statute requires the Register, and the Chief Information Officer or the Librarian, or her designee, and copyright community stakeholders to be appointed to this board by the Librarian of Congress. The advisory board will have 12 members with staggered terms. This advisory board will advise on operations of the Copyright Office and not policy.

### **Section 20: Group Registration of Works**

This section allows for the group registration of both published and unpublished works.