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Senator Thom Tillis
113 Dirksen Senate Office Building
Washington, DC 20510

Re: DMCA Reform Bill: Questions from Senator Tillis for Stakeholders

Senator Tillis:

You have indicated that you believe that there are aspects of title 17 that could be revised to better tailor copyright law for the digital age. I write today to urge you to codify existing judicial precedent that the mere act of digitizing a physical work does not create a new copyright interest in that digitization. Bringing further clarity to this issue would remove ambiguities around the copyright status of works that were made before the advent of digital technology.

I also take this opportunity to support existing efforts to improve the 1201 process. As a participant in numerous 1201 exemption cycles, I believe that the process can best be improved by strengthening the connection between section 1201 and copyright interests.

Clarifying the Copyright Status of Digitizations of Existing Physical Objects

The act of digitizing physical artifacts is an important, but often overlooked, part of bringing a complete record of our collective history into the digital age. Galleries, libraries, archives, museums, and individuals work every day to create digital versions of objects that originally existed in physical form. This digitization can take the form of creatively reimagining or reinterpreting the artifact. However, much more often, it involves using technology to create a detailed and accurate digital copy of the physical object. Many of these digitized artifacts are not protected by copyright, either because their copyright protection has expired or they were never protected by a copyright in the first place.

Digitization can involve photographing primarily two dimensional objects, such as prints, drawings, and photographs. It can also involve scanning three dimensional objects, such as sculptures, skeletons, and even entire ships.[1] Sometimes the process of digitization can remind us that objects we think of as two dimensional are really three dimensional, such as when 3D scans of a painting can help us explore the topography of its brushstrokes.

[1] For more information about the 3D digitization process at cultural institutions, see https://glam3d.org/.

While digitization can require a great deal of skill, it is fundamentally not a creative act. The purpose of digitization is to create as accurate a copy of the artifact being digitized as possible. Injecting the type of creative interpretation that would trigger copyright protection into the digitization process would undermine its purpose.

Widely-cited judicial precedent has established that the mere act of digitization does not create a new copyright interest in the digitization. *Bridgeman Art Library* recognized that while the process of creating "slavish copies" of works of art such as paintings by photographing them "required both skill and effort," it lacked the "spark of originality" required to obtain copyright protection.[2] In fact, in denying independent copyright protection for the digitized versions of the works, the court rightly recognized that the "point of the exercise was to reproduce the underlying works with absolute fidelity."[3]

This rationale was extended to the process of 3D digitization in *Meshwerks*.[4] Then Judge Gorsuch rejected a claim that digitizing Toyota vehicles created a new copyright interest in the digitizations on similar grounds as *Bridgman*: that the digitized "models owe their designs and origins to Toyota and deliberately do not include anything original of their own."[5] The "slavish copying" of physical vehicles into digital models by way of 3D scanning did not involve the type of creativity required to obtain copyright protection on the scans themselves.

The European Union has also recognized the alarming possibility of digitization effectively removing works from the public domain. Article 14 of the recently ratified Copyright Directive explicitly recognizes that reproductions of works of visual art do not qualify for new copyright protection.[6]

Notwithstanding these precedents, there are numerous examples of institutions applying copyright licenses to digitizations of public domain works.[7] While these licenses may not be legally valid, they create ambiguity for would-be users of these public domain works. This dynamic can work to create the impression that the digital age effectively shrinks the public domain.

Any tailoring of copyright law for the digital age should explicitly recognize that the mere act of digitizing an artifact does not create a new copyright interest in that digitization. Such statutory

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[2] *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F.Supp.2d 191, 197 (S.D.N.Y. 1999).
[3] *Id*.
[4] *Meshwerks, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).
[5] *Id*. at 1260.
[6] Directive (EU) 2019/790 of the European Parliament and of the Council 17 April 2019 on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC OJ L130/92, Art. 14.
[7] For example, the Harvard Museum of the Ancient and Near East has a copyright-based license on its 3D scan of an Egyptian cat figurine believed to have been created during the Ptolemaic Period, c. 304-30 BC. Harvard Museum of the Ancient Near East, *Cat Figurine*, https://sketchfab.com/3d-models/cat-figurine-67d4a2c571264064aa209e9f0008fbd1.

language would formalize longstanding precedent, advance the purpose of copyright law, discourage baseless restrictions on our shared cultural heritage, and help assure collective access to the public domain.

Improving the 1201 Process

I have been involved in every 1201 exemption preceding since 2010. I have also been the primary proponent of the unlocking 3D printing exemption since it was first proposed in 2015.

In light of those experiences and the questions you pose, I believe that the best way to improve the 1201 process is to adopt the legislation proposed by Senator Ron Wyden and Representative Zoe Lofgren that requires a nexus between section 1201 and copyright infringement. The behavior at the core of the 3D printing exemption - an exemption which was granted in the 2015 cycle, renewed in the 2018 cycle, and has not been opposed in the current cycle - is not related to concerns about copyright infringement of software connected to the operation of 3D printers. Instead, as evidenced by the nature of the objections raised in both the 2015 and 2018 cycles, 3D printer manufacturers were primarily interested in 1201 protections to advance concerns far from the scope of copyright law, such as their ability to tie 3D printing materials to individual 3D printers.

Linking 1201 to copyright infringement would eliminate this type of copyright gamesmanship. It would bring much needed clarity to the 1201 process and allow the debate about its future to be grounded in copyright concerns.

Thank you for your consideration of these matters. I look forward to an opportunity to discuss them further at your convenience.

Sincerely,

/s/
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