



**“How Does the DMCA Contemplate Limitations and  
Exceptions Like Fair Use?”**

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**Subcommittee on Intellectual Property**

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## I. Introduction

Mr. Chairman, Ranking Member, and members of the Committee, on behalf of the Software and Information Industry Association (SIIA) and its members, thank you for this opportunity to testify before you today about the Digital Millennium Copyright Act's contemplation of fair use and other limitations and exceptions.

SIIA is the principal U.S. trade association for the software and digital content industries. With over 800 member companies, SIIA is the largest association of software and content publishers in the country. Our members range from start-up firms to some of the largest and most recognizable corporations in the world, and it consists of journal and business to business publishers, as well as software providers, educational technology companies, and platforms. As part of our mandate, SIIA also helps enforce our members' rights through antipiracy efforts.

SIIA's collective membership sits at the crossroads of the countervailing interests in many of the ongoing intellectual property debates in recent years. Our members are keenly focused on issues surrounding intellectual property protection and the effect of IP laws on the pace-setting companies in our digital age. That was true when we appeared before you to discuss the patent system, and it remains equally true when discussing copyright.

As a backdrop to this entire discussion, it's important to remember two key points about the context in which the DMCA was enacted. The first involves the incentives that undergird the Copyright Act, and which flow from Article I's authorizing grant: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Thus, "[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."<sup>1</sup>

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<sup>1</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954). See also, e.g., *The Federalist*, 43. ("The public good fully coincides in both cases with the claims of individuals."); *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) ("copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by

In 1998, the effect of advances in digital technology on the dissemination of SIIA member works has both provided a tremendous opportunity and a tremendous risk: opportunity, in that they have the ability to reach a whole mass of users that they could not reach before, and risk in that through the use of the technology their works may be subject to large-scale misappropriation and made available without permission or payment. This Committee feared that without adjusting the ecosystem in which these works would live, the promise of the Internet as an online market for copyrighted works would never be reached.<sup>2</sup> At the same time, however, the Committee feared that without a certain degree of legal clarity—and insulation from copyright liability—online service providers would not make the necessary investments in infrastructure that would permit the widespread dissemination of copyrighted works.<sup>3</sup>

The DMCA advanced these goals through two principal means. The first involves section 1201, which prohibits the circumvention of devices that control access to a copyrighted work, or trafficking in such devices, subject to a specific list of detailed exceptions such as encryption research, security testing, reverse engineering, and law enforcement.<sup>4</sup> The second involves section 512, which the Committee enacted to give online service providers a safe harbor from copyright liability if, once informed, they expeditiously remove access to infringing material and comply with the statute's other requirements.<sup>5</sup> It also contains a put-back procedure: if the

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resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of science.”), *aff'd*, 60 F.3d 913 (CA2 1994) (emphasis in original) (cited in *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003)); *Harper & Row v. The Nation*, 471 U.S. 539, 558 (1985).

<sup>2</sup> See S. Rep. 105-190, at 8-9 (noting the Committee's intent that the DMCA would form “the legal platform for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius. It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.”).

<sup>3</sup> *Id.*

<sup>4</sup> See 17 U.S.C. §§ 1201 (g) (encryption research); 1201(j) (security testing); 1201(f) (reverse engineering) Section 1202 prohibits the alteration or removal of copyright management information.

<sup>5</sup> 17 U.S.C. § 512. See also S. Rep. 105-190, at 19-20.

user files a counter-notice, the service provider must restore access to the material within 10 to 14 days unless it receives notice that the copyright owner has sought a court order seeking to restrain alleged infringement.<sup>6</sup>

With the understanding that this Committee has already held a hearing on section 512, we write to make three basic points, and will focus our remarks on section 1201 and the counter-notification procedure of section 512.

First, although our individual members differ in terms of degree of enthusiasm for each of these provisions, they have by and large been a success. For our members, experience has demonstrated the soundness of the animating principles that motivated the DMCA's passage. The copyright industries have grown in the intervening years, and online content has grown considerably. Although piracy remains a problem, it is also true that paid services have flourished: from database subscriptions to cloud software to online streaming. And many of our members have both sets of interests: in some circumstances, they are content providers and in others act as service providers. Our members do not believe either that "the internet will die" if minor changes are made to section 512, or that "we won't be able to sell content" if its provisions are not enhanced.

Second, neither of these provisions affects the scope of fair use or copyright liability.<sup>7</sup> Each, however, contains safety valves to prevent overbroad assertions of rights, appropriate to their respective purposes and design. In the case of section 1201, that comes in the form of exemptions and a rulemaking procedure. In the case of section 512, it comes through the procedure in section 512(g). Per the Committee's request, we have limited our comments to that provision.

And finally, this background leads us to what we believe should be the criteria for legislative examination. First, the case for wholesale revision of either statute has not been made, and we are agnostic of the need for revision at this time.

## **II. The World Has Changed Since 1998, But the Premises of Sections 1201 and 512 Remain Valid**

Life under the DMCA has been kind to the software and information industries. In 2018, the International

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<sup>6</sup> See 17 U.S.C. § 512(g)(2), (g)(3).

<sup>7</sup> 17 U.S.C. § 107.

Intellectual Property alliance reported that the core copyright industries—those that primarily create, produce, distribute or exhibit copyrighted works contributed over \$1.3 trillion to U.S. GDP, and grew at a rate much faster than that of the pre-COVID economy generally.<sup>8</sup> Fixed investment into intellectual property products is decidedly on a steepening upward slope.<sup>9</sup> In 2015 alone, R&D investments in the software and internet industry grew faster than any other industry: “[s]oftware & Internet [R&D spending] grew at over 27%, far greater than the growth of all other industries from 2014 to 2015.”<sup>10</sup> And that spending is increasing as a percentage of R&D generally, from 15% of total R&D spending in 2010 to 24% in 2020.<sup>11</sup> Companies that reported faster revenue growth than their competitors allocated more R&D investment to software.<sup>12</sup> That same positive trajectory is on the startup side as well: since 2014, venture capital funding for startup software and internet companies is up by 88% compared to the three years prior.<sup>13</sup> And in 2016, venture capital raised \$41.6 billion for startups, the highest amount in 10 years.<sup>14</sup> Cloud software providers have flourished, and different services compete for customers in education, finance, software, and entertainment.

For SIIA’s members, the world has evolved considerably since 1998. Consider, for example, educational technology, which at that time revolved around the textbook, which takes an enormous amount of work to create. All told, the publishing cycle—from the author’s conception of an idea for a new

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<sup>8</sup> Siwek, Copyright Industries in the U.S. Economy, at 3 [https://iipa.org/files/uploads/2018/12/2018\\_Executive\\_Summary10567723.1.pdf](https://iipa.org/files/uploads/2018/12/2018_Executive_Summary10567723.1.pdf)

<sup>9</sup> Federal Reserve Economic Data, <https://fred.stlouisfed.org/series/Y006RC1Q027SBEA#0>

<sup>10</sup> [PwC, 2015 Global Innovation 1000: Innovation’s New World Order at 14, October 2015.](#)

<sup>11</sup> [\(PWC, 2016 Global Innovation 1000, October 2016\).](#)

<sup>12</sup> [PWC, 2016 Global Innovation 1000, October 2016.](#)

<sup>13</sup> PwC / CBInsights MoneyTree™ data explore, available at <http://www.pwc.com/moneytree> (showing that U.S. VC funding for internet and software companies totaled \$55.13B for Q2 2011-Q2 2014; funding for Q3 2014-Q3 2017 totaled \$104.22B).

<sup>14</sup> [\(2017 NVCA Yearbook\)](#). See also Patent Progress, Innovation is Alive and Well, <https://www.patentprogress.org/2018/02/08/innovation-alive-well-rd/>.

textbook to the time that the text reaches bookshelves—generally takes two to four years.<sup>15</sup> During this time, a textbook author must complete a wide range of tasks. There is, of course, the actual writing of the text, requiring both extensive knowledge and research. Authors of textbooks must be able to transform expert knowledge and field-specific jargon into accessible and understandable formats. Further, many authors also will have a role in, for example: compiling appendices, references, and bibliographies; producing figures and tables; obtaining necessary permissions for the use of photographs, artwork, quotations, and other illustrative materials; providing feedback as to the book’s design; and proofing the text at various stages.<sup>16</sup> As an academic field develops, that textbook will require revision and updating. As just one example, the TAA found that the effort to update one textbook from the sixth to seventh edition required over 8,000 hours of work by the authors and contributors—and over ten person-years altogether (when accounting for development, editing, artistic production, and other necessary tasks).<sup>17</sup>

In 1998, an educational content producer would be generally focused on one thing: protecting the IP in its textbook. Today, that investment has been supplemented by investments in back end servers, artificial intelligence that adapts learning to the ability of a particular student, and the creation of entire learning platforms on which this content can be analyzed, discussed, taught, tested, and commented on. This transformation has occurred with our software members who once licensed CD ROMS but now host entire creative suites in the cloud.

As a result, a given educational technology provider will have a diversity of interests. On the one hand, it must protect the course content that is central to its business. On the other, it acts as a service provider that hosts a variety of content: most of which is non-infringing, but some of which may be infringing.

COVID has accelerated this transition. Our educational technology members have expanded the use of their materials

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<sup>15</sup> Mary Ellen Lpionka, *Writing and Developing Your College Textbook* 43 (2d ed. 2008).

<sup>16</sup> See generally *id.* at 29-42 (explaining the publication process); William Germano, *Getting It Published: A Guide For Scholars and Anyone Else Serious About Serious Books* 139-54 (2d ed. 2008) (advising authors on the process of obtaining necessary permissions to use others’ work in a textbook).

<sup>17</sup> Text and Academic Authors Association, *TAA Debunks the Top 7 Myths Regarding Textbook Costs*, available at <https://blog.taaonline.net/2011/07/taa-debunks-the-top-7-myths-regarding-textbook-costs/>.

to schools who suddenly and desperately needed both educational materials and the technology needed to distribute them at scale. And that change is not limited to educational technology: we have many business-to-business publications that also put on conferences and other live events. Those conferences are now entirely virtual, and they charge for both live and to recorded versions: all of which are entirely at the mercy of copyright and related rights. To foster engagement with their customers, others effectively provide platforms for issues to be discussed. Another member requires registration in order for users to gain access to their profiles. That key permits access to all subscribed content with a single password, which in this involves massive databases of news, legal, and academic material.

Section 1201 allows our educational technology—and in fact all of our content members—to offer digital materials secure in the knowledge that tools designed to crack access controls cannot lawfully be made available. At the same time, section 512 provides a degree of legal certainty that allows them to maintain responsible interactive communities.

### **III. Congress Designed Sections 512 and 1201 to be Agnostic on Fair Use**

#### **A. Anticircumvention: Section 1201**

Neither the anticircumvention provisions of section 1201 nor section 512 has any meaningful effect on fair use. Section 1201(a) of the DMCA makes it unlawful to circumvent a technological protection measure that effectively controls access to a copyrighted work. There is, however, a triennial rulemaking through which the Library of Congress can exempt a class of works if the proponent can show that their ability to make noninfringing uses has been adversely affected during the prior three-year period.<sup>18</sup> Section 1201(a)(2) makes it unlawful to manufacture or traffic in a device that only a limited commercially significant purpose or use other than circumventing an access control measure. The statute is explicit that it does not affect fair use or any other rights, remedies or defenses to copyright infringement, and courts have repeatedly confirmed that the presence or absence of fair use is not relevant to a determination of liability under section 1201.<sup>19</sup> Criminal penalties are available for willful

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<sup>18</sup> 17 U.S.C. § 1201(a)(1)(A).

<sup>19</sup> 17 U.S.C. § 1201(c)(1); see also *Disney Enterprises, Inc. v. VidAngel, Inc.*, 371 F. Supp. 3d 708, 715 (C.D. Cal. 2019) (rejecting

violations for purposes of private financial gain or commercial advantage.<sup>20</sup> The statute also contains several defenses for activities engaged during the course of good-faith encryption research, law enforcement and other government uses, reverse engineering for purposes of interoperability, and security testing, to name a few.<sup>21</sup> Importantly, the DMCA is technologically neutral: it does not require the use of any specific access control measure, nor did it require people to design systems to recognize them.<sup>22</sup>

While the language of the statute can be technical (if not soporific) its purpose can be explained in colloquial terms. An action under 1201 is not—and should not be confused with—an action for copyright infringement. Sections 1201(a)(1) and (2) makes it unlawful to pick the lock that protects a copyrighted work, or to make and sell lockpicks specifically designed for that purpose. The enumerated defenses in section 1201 protect activities that Congress recognized as valuable and which would not affect the ordinary exploitation of a work. Most importantly, these provisions prevented piracy tools from being widely available and was in our view successful at keeping honest people honest by making piracy more difficult for the average person. Thus, while a variety of cracking tools for software and other media might exist on the internet, Congress did not intend that such tools be available in big box stores.

What’s more, the DMCA’s anticircumvention provisions have served as a basis for American global leadership in intellectual property. Its assumptions appear in multiple

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fair use defense based on 1201(c)), reconsideration denied, No. CV1604109ABPLAX, 2020 WL 2738233 (C.D. Cal. Mar. 31, 2020); *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010), *as amended on denial of reh'g* (Feb. 17, 2011), *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (noting that section 1201(c)(1) “simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred.”).

<sup>20</sup> 17 U.S.C. § 1204.

<sup>21</sup> *Id.* §§ 1201 (e)-(h), (j).

<sup>22</sup> *Id.* § 1201(c)(3). Section 1201(k) did specifically regulate certain analog technologies (VHS video records) if they did not conform to certain copy control technologies.



trade agreements—not just the recently ratified USMCA,<sup>23</sup> but in several others.<sup>24</sup> The successful export of section 1201’s premises has led to a healthier environment for the distribution of copyrighted works.

Finally, to the extent that the statute posed particular challenges to the use of certain classes of works, the rulemaking process provided by section 1201(a)(1)(A) has and should continue to provide a ready outlet. In the Copyright Office’s streamlined procedure, petitions that have been granted in the past will be re-granted.<sup>25</sup> And the Office in its last report renewed every one that had been granted in the prior rulemaking,<sup>26</sup> as well as fourteen others.<sup>27</sup>

### **B. Section 512**

This Subcommittee has already held multiple discussions of section 512, and SIIA will confine its remarks to the counter-notification provision in section 512(g). As the Committee is well aware, the ordinary takedown procedure begins when the copyright owner has a good faith belief that posted material infringes a copyright and files a notice in compliance with, for example section 512(c)(3) (the hosting provision). Upon receipt of the notice, the service provider is supposed to both alert the user and disable access to the material.<sup>28</sup> If the provider does that, section 512 precludes

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<sup>23</sup> [United States Mexico Canada Agreement](#), art. 20.66 (2020) (visited 23 July 2020).

<sup>24</sup> See also, e.g., [US-Singapore Free Trade Agreement](#), art. 16(7); (2003); [U.S. – Korea Free Trade Agreement](#), art. 18.4(6) (2012); [U.S. – Australia Free Trade Agreement](#), art. 17.4(7) (2004).

<sup>25</sup> Once it has proven the need for an exemption, the petitioner only needs to file a short paragraph declaring that “if the exemption is not renewed, users would be unable to make noninfringing uses of the copyrighted works, and are likely to rely upon the exemption in the next three-year period; and there has been no material change in the facts, law, or other circumstances set forth in the prior rulemaking record.” [U.S. Copyright Office, Streamlined Petitions for Renewal Exemptions](#), at 3 (2020)

<sup>26</sup> U.S. Copyright Office, Exemption to Prohibition on Circumvention for Copyright Protection Systems or Access Control Technologies, Final Rule, 83 Fed Reg. 54010, 54012 (Oct. 26, 2018).

<sup>27</sup> See *id.* at 54031.

<sup>28</sup> See 17 U.S.C. § 512(c).

monetary relief against it and, as a practical matter, injunctive relief.<sup>29</sup>

Section 512(g), however, permits the user to file a counter-notice to have access to the material re-enabled if he or she believes that the notice is a mistake. That notice, in addition to identifying the material taken down, must contain the user's signature, a statement under penalty of perjury that the user has a good faith belief that the material was removed as a result of mistake or misidentification, and the subscriber's real name and address, and consent to personal jurisdiction in the district in which the address is located.<sup>30</sup>

That notification is given teeth by the relationship between section 512(g)(1) and section 512(g)(2). Section 512(g)(1) creates a general rule that the service provider is never liable to anyone for good-faith actions in removing allegedly infringing material, whether the use is ultimately infringing or not.<sup>31</sup> Section 512(g)(2), in turn, creates an exception to that rule if the prescribed counter-notice procedures are not followed: the service provider *can* be liable unless, when it receives a counter notice, the service provider gives the copyright owner a copy, and re-establishes access to the allegedly infringing material within ten to fourteen days of receipt of the counter-notice.<sup>32</sup> Unless the copyright owner files a lawsuit, the service provider's obligations are finished and it has no copyright exposure.<sup>33</sup>

Like the rest of section 512, there is no mention of fair use in the counter-notification provision, and like the rest of section 512, it is designed to maintain the service provider's neutrality in bona fide disputes.

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<sup>29</sup> Cf. *id.* § 512(i) (defining narrow terms for injunction and eliminating availability of ex parte orders except for preservation of evidence or other orders that have no effect on network operation).

<sup>30</sup> See *id.* § 512(g)(3)(A)-(D).

<sup>31</sup> 17 U.S.C. § 512(g)(1) (no general liability for takedowns).

<sup>32</sup> *Id.* § 512(g)(2)(B), (C). See also generally *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333 (D. Mass. 2013) (describing counter-notice procedure).

<sup>33</sup> See *id.* § 512(g)(4).

### **C. SIIA Urges the Committee to Proceed Deliberately**

One could argue that although these provisions do not expressly mention fair use, they indirectly affect its scope. And that is, to some degree, a reasonable point. But the widespread presence of mashups, user generated content, and commentary involving almost any kind of media suggests that fair use is alive and well. At best, any amendments to sections 512 and 1201 should be done along the margins, and their creation should follow a couple of key premises.

First, amendments to either of these provisions should be targeted at a specific identified problem, documented by a detailed and focused legislative record. For example, the Copyright Office's recent report on section 512 noted that counter-notices are almost never contested, as copyright owners will not bring a suit within ten days of a counter-notice, and many of them are filed in error.<sup>34</sup> Some of our members believe that a better solution to address bad actors on the margins could include stepped-up penalties for abusive counter-notices, such as the loss of filing a DMCA notice (for content owners) or counter-notices (for alleged infringers) for a specified period of time. For SIIA as a whole, however, it is critical that any suggested changes not interfere with the operations of responsible platform providers.

Second, to the extent that the Committee may entertain amendments to section 1201, we urge that it proceed carefully. The exemptions in sections 1201(d)-(j) apply both to acts of circumvention proscribed by section (a)(1), and trafficking under section (a)(2). Thus, the addition of future exemptions will result in capital formation around the exempted activity. Our collective instinct is, accordingly, that such exemptions should be narrowly tailored to a specific factual situation that does not create a widespread risk of infringement in the event that circumvention tools to implement that exemption were widespread.<sup>35</sup>

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<sup>34</sup> See U.S. Copyright Office, [Section 512 of Title 17: A Report of the Register of Copyrights](#), at 41 & n.190 (2020)

<sup>35</sup> Cf. The Unlocking Consumer Choice and Wireless Competition Act § 2(c), Pub. L. No. 113-144 (2014) (repealing refusal by Librarian of Congress to allow cell phone unlocking so that consumers can switch between carriers).

Third, as written, section 1201 is intended to overlap with the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.<sup>36</sup> In 1998 and for some time thereafter, the statute was considered to provide some protection coterminous with terms of service: a person who “exceeds authorized access” could be civilly (and criminally) liable.<sup>37</sup> That is to say, at the time of passage, copyright owners could take some comfort that even if someone doing encryption research or security testing legally got into a particular system, section 1030 would create a legal disincentive to exceed authorized access. The Supreme Court is now considering the question whether a person who is authorized to access information on a computer for certain purposes violates the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.<sup>38</sup> Thus, the assumptions that existed when these provisions

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<sup>36</sup> Cf. 17 U.S.C. §§ 1201(g)(2)(D) (conditioning encryption research exemption on whether the defendant committed “a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.”); 1201(j)(2) (conditioning applicability of security testing exemption similarly).

<sup>37</sup> Compare, e.g., *United States v. Morris*, 928 F.2d 504, 510 (2d Cir. 1991) (whether transmission of worm using computer that defendant had lawful access to exceeded that lawful access); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 450 (E.D. Va. 1998) (harvesting of emails in violation of terms of service violates section 1030) with *United States v. Valle*, 807 F.3d 508, 526–28 (2d Cir. 2015) (holding that while there is support for both a narrow and broad reading of “exceeds authorized access,” the rule of lenity requires the court to adopt a narrower interpretation in the defendant’s favor). See also *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012) (concluding that “an employee ‘exceeds authorized access’ when he has approval to access a computer, but uses his access to obtain or alter information that falls outside the bounds of his approved access”), and *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010) (“Access to a computer and data that can be obtained from that access may be exceeded if the purposes for which access has been given are exceeded.”), and *United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2010) (holding that an employee who violates employer use restrictions “exceeds authorized access”), and *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420–21 (7th Cir. 2006) (holding that while the “difference between access ‘without authorization’ and ‘exceeding authorized access’ is paper thin,” an employee who breached a duty of loyalty terminated the agency relationship and exceeded authorized access in using company laptop).

<sup>38</sup> *Van Buren v. United States*, 940 F.3d 1192 (11th Cir. 2019), cert. granted, 2020 WL 1906566 (Apr 20, 2020) (Case No. 19-783).

were enacted may be different, and we ought to consider the effect of the Court's decision on any potential 1201 revisions.

**D. Conclusion**

Finally, it is not our intention to suggest that this Committee has proceeded in anything but a deliberate fashion. We commend the Chairman for his thorough solicitation of views from all sides. There is an old saying that the life of the law is not logic, but experience. On the whole, the software and information industry's experience with the DMCA has been a positive one.

Thank you again for the opportunity to testify and your consideration of our views. We look forward to working with you as this process continues.

Respectfully submitted,

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