ASSOCIATION OF RESEARCH LIBRARIES

November 8, 2011

Chairman Lamar Smith
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member John Conyers
House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, D.C. 20515

Re: Stop Online Piracy Act, H.R. 3261

Dear Chairman Smith and Ranking Member Conyers:

I write on behalf the Library Copyright Alliance (LCA), consisting of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 139,000 libraries in the United States employing over 350,000 librarians and other personnel. I write to express our serious concerns with the Stop Online Piracy Act (SOPA). While we agree with many of the criticisms raised by others with respect to Title I, this letter will focus on problems section 201 could cause for libraries and their users.

Two provisions of section 201—the definition of willfulness in section 201(c) and the expansion of criminal penalties to public performances in section 201(a)—are troubling. While each provision is problematic in its own right, the two together could threaten important library and educational activities.

I. Definition of Willfulness

Section 201(c) contains a rule of construction concerning the term "willful" that could substantially expand the range of activity considered criminal copyright infringement.

The Copyright Act recognizes three different levels of intent for infringement: innocent infringement, ordinary infringement, and willful infringement. The Copyright Act defines an innocent infringer as an infringer that "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright…." 17 U.S.C. § 504(c)(2). Willful infringement is not defined in the statute, but has been understood by courts to mean a "voluntary, intentional violation of a known legal duty." Regular infringement falls between these two extremes, *e.g.*, when a person believed that his action were noninfringing but this belief was unreasonable. Different statutory damages

attach to these different levels of intent. The range of statutory damages for ordinary infringement is $750 to $30,000 per work infringed. 17 U.S.C. § 504(c)(1). In cases of willful infringement, the court can increase the statutory damages to $150,000; in cases of innocent infringement, the court can reduce the statutory damages to $200.[1]

Additionally, willful infringement is subject to criminal sanctions. This is where section 201(c) of SOPA comes into play. Section 201(c) provides that a person "acting with a good faith reasonable basis in law to believe that that the person's conduct is lawful shall not be considered to have acted willfully" for criminal copyright purposes. This rule of construction creates a negative implication that a person is a willful infringer if the person did not have a good faith reasonable basis in law for believing that his conduct was lawful. Thus, if a court finds that the person's belief was unreasonable, the court might consider him a willful infringer, even if the person in good faith believed his actions were legal. Under current law, however, this level of intent constitutes ordinary infringement, not willful infringement. In other words, the rule of construction could have the effect of collapsing the three levels of intent into two: willful infringement and innocent infringement. The willful infringement level would swallow the ordinary infringement level, thereby significantly broadening the range of activities subject to criminal sanctions.

II. Criminal Sanctions for Public Performances

Section 201 extends criminal sanctions for public performances such as streaming, but does so in a manner far broader than similar legislation in the Senate, S. 978.

Under current law, infringing public performances are subject to lower criminal penalties than infringing reproductions or distributions. A willful infringer of the public performance right can only be subject to misdemeanor (as opposed to felony) sanctions, and only if the infringement was for purposes of commercial advantage or private financial gain. *See* 18 U.S.C. § 2319(b)(3). S. 978 would allow felony penalties for a public performance for commercial advantage or private financial gain. However, S. 978 would leave the status quo of no criminal penalties for public performances without purpose of commercial advantage or private financial gain.

Section 201 of SOPA makes the same amendment as S. 978 for commercial performances. But, SOPA also imposes criminal penalties for public performances by means of digital networks with a retail value of more than $1,000. *See* proposed section 506(a)(1)(B). Felony penalties would be available if the retail value is more than $2,500. *See* section 201(b)(2). Thus, section 201 of SOPA for the first time authorizes both misdemeanor and felony penalties for non-commercial public performances.

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[1] When the infringer is a nonprofit educational institution, library, archives, or public broadcasting entity, the court can remit statutory damages altogether.

III. Impact of Amendments on Libraries

There are three pending copyright infringement lawsuits against universities and their libraries relating to their use of digital technology.[2] One of these cases, *AIME v. UCLA*, concerns the streaming of films to students as part of their course assignments. These lawsuits reflect a growing tension between rights holders and libraries, and some rights holders' increasingly belligerent enforcement mentality. Moreover, legislation such as SOPA and the PRO-IP Act passed in the 110th Congress, and the activities of the Intellectual Property Enforcement Coordinator (a position created by the PRO-IP Act), encourage federal prosecutors to enforce copyrights law more aggressively.

In this environment, the criminal prosecution of a library for copyright infringement is no longer beyond the realm of possibility. For this reason, we strongly oppose the amendments described above, which would increase the exposure of libraries to prosecution. The broadening of the definition of willful infringement could result in a criminal prosecution if an Assistant U.S. Attorney believes that a library's assertion of fair use or one of the Copyright Act's other privileges is unreasonable. This risk is compounded with streaming, which SOPA would subject to felony penalties even if conducted without purpose of commercial advantage or private financial gain.

To be sure, section 201(c) states that a person is not acting willfully if he is "engaged in conduct forming the basis of a bona fide commercial dispute over the scope [or] existence of a contract or license governing such conduct…." But this would provide little comfort to libraries in disputes relating to streaming because of the second clause of the sentence: "where such person has a reasonable basis in law to believe that such conduct is noninfringing." So long as the prosecutor believes that the library's interpretation of the license is not reasonable, the existence of the license will not protect the library from the claim that it acted willfully.

Accordingly, the rule of construction in section 201(c) should be amended to eliminate any possible negative implication that broadens the scope of willfulness. Additionally, section 201(a) and (b) should be amended so that they do not apply to streaming and other public performances for non-commercial purposes.
We would be happy to answer any questions you may have. We look forward to working with you and your staff as the legislation moves forward.

Respectfully,

Brandon Butler
ARL Director of Public Policy Initiatives, on behalf of LCA

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[2] *Cambridge University Press v. Patton* (three publishers sued Georgia State University concerning its electronic reserve system); *Association for Information Media and Eqipment v. Regents of the University of California* (film distributor sued UCLA concerning its streaming of films to students); and *Authors Guild v. HathiTrust* (authors associations sued a consortium of libraries concerning the assembly and use of a digital repository of books).