**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY**
**SUBCOMMITTEE ON COURTS, INTELLECTUAL**
**PROPERTY AND THE INTERNET**

**HEARING ON COPYRIGHT REMEDIES**

**STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE**

The Library Copyright Alliance (LCA) consists 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 100,000 libraries in the United States employing over 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than 2 billion times each year. This statement proposes amendments to the provision of Title 17 relating to statutory damages to make them less onerous on libraries.

As LCA indicated in the context of the hearing on preservation and reuse, the courts have self-corrected one of the serious problems relating to copyright remedies: the granting of an automatic injunction on the finding of infringement. Following the Supreme Court's decision in *eBay v. MercExchange*, 547 U.S. 388 (2006), courts in copyright cases now consider the four factors traditionally employed to determine whether to enjoin conduct, including whether the injury was irreparable and whether money damages were inadequate to compensate for that injury.[1] Nonetheless, another controversial feature of the copyright remedies system, statutory damages, remains.

[1] *See, e.g, Salinger v. Colting*, 607 F.3d 68 (2nd Cir. 2010).

With potential liability of $150,000 per work infringed, the threat of enormous damages exacerbates other flaws of the copyright system, such as long copyright terms and orphan works. Legal scholars have identified numerous problems with the statutory damages framework that necessitate comprehensive reform.[2] The risk of high statutory damages has been shown to deter investment in new technologies.[3] Further, the possibility of windfall profits from statutory damages incentivizes "copyright trolls."[4] Rather than address all the issues relating to statutory damages, this statement focuses on the inadequacy of the existing limitation on statutory damages against libraries and archives.

When Congress enacted the statutory damages framework in 17 U.S.C. §504(c)(2), it recognized "the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part," where the threat of statutory damages could deter lawful activities that involve the use of

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[2] *See, e.g*., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

[3] See Michael Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 944 (2012); Matthew Le Merle et al., Booz Allen & Co., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), *available at* http://www.booz.com/media/file/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

[4] *See Brownmark Films v. Comedy Partners,* 682 F.3d 687 (7th Cir. 2012). While the Copyright Act provides potentially onerous statutory damages for infringement that might far exceed actual damages, it does not provide remedies for knowing misrepresentations of claims of infringement (except in the section 512 context). This imbalance in current law and the chilling effects it creates require redress. To initiate and inform that process, the subcommittee should hold a hearing on copyright trolls, misrepresentation, and other forms of copyright misuse as part of its ongoing copyright review.

copyrighted works.[5] Accordingly, Congress required a court to remit statutory damages when a library, archives, educational institution, or public broadcasting entity believed and had reasonable grounds for believing that its use of a copyrighted work was a fair use. The plaintiff bears the burden of proving that such entities did not act in good faith.[6]

However, this safe harbor applies to libraries, archives, and educational institutions only with respect to their infringement of the reproduction right.[7] This means that the safe harbor does *not* apply to a library's infringement of the performance, display, distribution, or derivative work rights. As a result, the safe harbor provides little benefit, particularly for Internet uses that involve the performance or display of a work on a website.

The safe harbor needs to be updated to reflect the digital era. It should apply whenever the entity had a reasonable belief that *any* type of use of *any* type of work was non-infringing. It also should be expanded to include museums. For these entities to perform their critical public service missions in the 21st Century, the safe harbor must be amended to apply to innocent infringement by these entities of all exclusive rights with respect to all kinds of works.

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[5] H.R. Rep. No. 1476, 94th Cong. 2d Sess. 163 (1976).
[6] *Id*.
[7] The limitation applies even more narrowly to public broadcasters; they are shielded only with respect to performances of published nondramatic literary works or reproductions of a transmission program embodying a performance of such a work.