Stanford | Cyber Policy Center
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April 14, 2020

Dear Senator Tillis:

Thank you for the opportunity to respond to these further questions. My answers are below. I hope that you and your staff are well in these difficult days.

Regards,
Daphne Keller

1. Copyright is a big part of the US economy – some estimates say almost 7% of GDP – and copyright owners lose 10s of billions of dollars each year due to piracy. Are countries doing enough to protect U.S. copyright owners from online piracy?

I cannot claim expertise in the economic calculations, or speak to non-intermediary considerations such as failure to enforce laws against direct infringement on non-U.S. websites or services. In the intermediary liability context, as discussed by Professor Hughes and myself in testimony, the exact impact of other countries' laws can be hard to assess. This is in part because so many major Internet platforms are U.S.-based, and have applied the U.S. Digital Millennium Copyright Act (DMCA) as a global standard. As a result, while Chile, Argentina, and other countries may wish to set different standards for takedown – and create a greater role for judges to protect against wrongful removals under their national laws – much of that choice is effectively taken out of their hands. This global imposition of U.S. standards is a major source of frustration for many non-U.S. observers, and is often invoked as a rebuttal when Americans complain about global censorship under foreign laws -- for example, Austria seeking to have Facebook globally enforce its defamation law, or France demanding that Google comply globally with its Right to Be Forgotten laws.[1]

[1] See Daphne Keller, *Platform Policy Bingo*, Card 93916, http://cyberlaw.stanford.edu/bingo (2019) (listing "Platforms already enforce the DMCA globally, so Americans shouldn't complain when other countries want their laws enforced that way" as a bingo square).

2. Many countries have systems different from a U.S.-style notice-and-takedown regime – with different burdens and liabilities for service providers. How have these other systems affected the internet and online services in those countries?

I am aware of a few studies that have attempted to quantify the economic impact of different national intermediary liability laws. One is a 2015 report from Oxera (commissioned by Google) that compared economic indicators from Chile, India, Germany and Thailand, finding a strong correlation between legal certainty in intermediary liability regimes and economic success for startups.[2] Such country comparisons are difficult, however, because it is hard to isolate effects of intermediary liability laws from other important variables. These include market size/Internet coverage, availability of local/in-language digital content, scale of online credit card usage, tax laws for investors and companies, legal protections for investors, availability of skilled labor, and overall economic stability and legal certainty. As an anecdotal example, while Argentine intermediary liability law should in theory make the country friendly to startups, one would-be founder told me that his investors refused to fund his company unless he moved to a country that more effectively limited corruption.

Another way to measure the impact of intermediary liability laws is to look at a single country before and after significant changes in the law. A Copia Institute study did so in 2019, comparing investment before and after significant legal changes in several countries.[3] In India, for example, it found 1,642 startup investments totaling $15.4 billion in the three year period before a seminal Supreme Court ruling protecting intermediaries, and 3,938 investments totaling $46.9 billion in the three years after.[4] In Russia, the legal and economic changes moved in the opposite direction: startup funding declined substantially, correlated with the enactment of restrictive intermediary liability laws.[5] As the report correctly notes, however, other factors likely influence investment and complicate the effort to track these laws' impact.[6]

3. How could site-blocking be administered to best protect users? What have we learned from other countries that use site-blocking, such as Australia and the United Kingdom, about ways that a site-blocking mechanism can be designed to protect users?

"Site-blocking" could refer to a number of measures, and the exact consequences for Internet users may vary with the technical implementation.[7] As a general matter, advocates for Internet user' rights have been highly skeptical of site-blocking proposals and efforts. The ACLU characterized ICE's domain

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[2] Oxera, *How are Internet start-ups affected by liability for user content?* (2015), https://www.oxera.com/publications/how-are-internet-start-ups-affected-by-liability-for-user-content/.
[3] Michael Masnick, *Don't Shoot the Message Board* (2019), https://copia.is/wp-content/uploads/2019/06/DSTMB-Copia.pdf.
[4] P. 12
[5] P. 15-17
[6] P. 4.
[7] See generally Daphne Keller, *A Glossary of Internet Content Blocking Tools* (2018), http://cyberlaw.stanford.edu/blog/2018/01/glossary-internet-content-blocking-tools.

seizures, for example, as "threaten[ing] due process and First Amendment rights."[8] One key issue is that while authorities may intend only to require blockage of unlawful material, intermediaries' easiest, cheapest, and most risk-avoidant technical implementations may nonetheless lead to substantial over-blocking. In one U.S. case, a court struck down as unconstitutional a law which was intended to reach only highly unlawful material, but which led to ISPs "blocking of more than one and a half million innocent web sites."[9]

International human rights sources have been particularly critical of site blocking. The UN Human Rights Committee, for example, has noted that "permissible restrictions" on access to Internet content "generally should be content-specific," while "generic bans on the operation of certain sites and systems are not compatible" with free expression protections under the ICCPR.[10] Other human rights materials indicate more openness to site-blocking in extreme cases. A 2011 Joint Declaration, for example, said that "mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse."[11] Another Joint Declaration expressed serious reservations about site-blocking provisions in the then-pending SOPA/PIPA legislation.[12]

Nonetheless, some jurisdictions have proceeded with site-blocking or app-blocking orders, including Russia's 2016 block against LinkedIn;[13] Turkey's blocks of YouTube, Facebook, Twitter, and other sites;[14] Brazil's block of WhatsApp;[15] and Colombia's block of Uber.[16] Some of these blockages were later determined by courts to violate national constitutions or international human rights instruments.[17]

European courts, too, have issued site blocking orders, including in intellectual property cases. The lead case, the CJEU's *Telekabel Wien* ruling, effectively placed responsibility for protecting users' rights on a private ISP.[18] The court stated that, when executing a site-blocking injunction, the company "must ensure compliance with the fundamental right of internet users to freedom of information" and block

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[8] Agatha M. Cole, *ICE Domain Name Seizures Threaten Due Process and First Amendment Rights (*2012), https://www.aclu.org/blog/national-security/privacy-and-surveillance/ice-domain-name-seizures-threaten-due-process-and.

[9] *CDT v. Pappert,* 337 F. Supp. 2d 606, 611 (E.D. Penn. 2004).

[10] See CCPR/C/GC/34 para. 43 (2011), http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

[11] *Joint Declaration on Freedom of Expression and the Internet* (1 June 2011) (Frank LaRue [UN], Dunja Mijatović [OSCE], Catalina Botero Marino [OAS], Faith Pansy Tlakula [ACHPR]) at 3.a, https://www.osce.org/fom/78309.

[12] *Joint Declaration* (20 January 2012) (Catalina Botero [OAS] and Frank LaRue [UN]), http://www.oas.org/en/iachr/expression/showarticle.asp?artID=888&lID=1.

[13] *LinkedIn blocked by Russian authorities*, BBC: Technology, (Nov. 17, 2016), http://www.bbc.com/news/technology-38014501.

[14] Cara McGoogan, *Turkey blocks access to Facebook, Twitter and WhatsApp following Ambassador's Assassination*, The Telegraph, (Dec. 20, 2016) http://www.telegraph.co.uk/technology/2016/12/20/turkey-blocks-access-facebook-twitter-whatsapp-following-ambassadors/.

[15] *WhatsApp officially un-banned in Brazil after third block in eight months*, The Guardian (July 19 2016) https://www.theguardian.com/world/2016/jul/19/whatsapp-ban-brazil-facebook.

[16] *Para bloquear a Uber se tendría que bloquear también a Google,* El Espectador, (Mar 24, 2017) http://www.elespectador.com/economia/tribunal-de-cundinamarca-admitio-demanda-contra-uber-interpuesta-por-mintransporte-articulo-684526.

[17] The Guardian, supra note 15; *Ahmet Yildirim v. Turkey*, Application No. 3111/10, (Dec. 18, 2012), ECtHR, http://hudoc.echr.coe.int/fre?i=001-115705.

[18] C-314/12, *UPC Telekabel Wien*, (2014) (CJEU).

the specified sites "without thereby affecting internet users who are using the provider's services in order to lawfully access information."[19] It further held that national law must "provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known."[20] It did not, however, examine how users were to learn about the "implementing measures" or any resulting over-blocks. One approach, discussed in the UK's seminal *Cartier* case, involved attempts at transparency for users who sought to access the blocked websites. The lower court in that case required that the page displayed to such users should (1) state that the site had been blocked by court order, (2) identify the party or parties which obtained the order, and (3) advise users of their right to oppose the block in court.[21] The UK court additionally required a "sunset clause," provisionally set at two years, for the order's duration.[22] I have not closely followed more recent site-blocking jurisprudence, which may elaborate further on potential procedural safeguards. Whatever attempted safeguards may pass muster under European or international standards for protection of free expression, however, there will likely remain serious questions under the U.S.'s stringent constitutional standards.

4. How would US-based online service providers respond to court-ordered site-blocking? What if we had a lower standard for smaller ISPs?

It is hard to speculate about the likely responses, since they would presumably vary greatly depending on the kind of service provider (DNS providers, search engines, email hosts, social media, mobile carriers, etc.), the kind of content at issue, the procedural protections including burden of proof on claimants seeking injunctions, the degree of prescriptive technical specificity in the order, and more. Presumably at least some online service providers would seek to legally challenge such orders, including on Constitutional grounds. I do not imagine that courts' analysis of challenges of this sort would vary significantly depending on the size of ISPs, but I have not explored this question in depth in my own research.

5. In your experience, what tools have other countries used to tailor their copyright laws so that smaller ISPs (and authors) maybe have lesser obligations?

The question whether laws might impose greater burdens on large incumbent platforms, while preserving stronger protections for their smaller competitors, is an important one. The vast majority of entities that depend on immunities under the DMCA and similar laws look nothing like YouTube or Facebook. They are small, have very limited access to expert legal advice, and in many cases have little real issue with piracy or infringement on their services. Drafting laws based on major platforms' experiences and capabilities, and then applying those same laws to ordinary smaller platforms, can create major unintended consequences.

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[19] *Id.*, para 56-57.
[20] *Id.*, para. 57.
[21] *Cartier International AG v. BSB,* EWHC 3354 (2016) at Paras. 262-265; aff'd by WLR(D) 389 (2016).
[22] *Id.*

That said, unintended consequences can also arise from attempts to define intermediary liability rules based on a service's size (as defined by number of users, revenue, or other metrics). Unusual services such as Wikipedia, which is large by many measures but thinly staffed and resourced, could too easily fall afoul of such rules. Size-based legal obligations could also create perverse incentives for growing platforms – including adding to their reasons to seek acquisition by large and well-equipped incumbents, rather than continuing as potential competitors.

To my knowledge, non-U.S. law to date provides only very crude models for size-based differentiations of this sort. Germany's NetzDG, for example, exempts platforms with fewer than two million registered users in Germany from most obligations.[23] Article 17 of the EU Copyright Directive limits some obligations for platforms in their first three years of operation if they fall below a certain number of users or certain annual economic turnover rate.[24] As a partial correction for the clumsiness of this standard, Article 17 additionally carves out specific known services, including not-for-profit online encyclopedias like Wikipedia. But it leaves no mechanism for protecting unforeseen innovators – short of requiring them to litigate and gamble on prevailing under the Directive's "proportionality" standard. As U.S. startup organizations and investors have pointed out, the cost of litigating under unclear standards can be prohibitive for small companies – and such uncertainty can deter investment in competitors to today's incumbent platforms in the first place.[25]

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[23] Act to Improve Enforcement of the Law in Social Networks (2017) (English translation), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2.
[24] Art. 17.6.
[25] Evan Engstrom, *Primer: Value of Section 230*, ENGINE (2019) (citing U.S. litigation costs of $15,000-80,000 even for platforms that prevail at the early Motion to Dismiss stage); Booz & Co., The Impact of U.S. Copyright Regulations on Early Stage Investment: A Quantitative Study, http://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

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Dear Senator Coons:

Thank you for the opportunity to respond to these further questions. My answers are below. I hope that you and your staff are well in these difficult days.

Regards,
Daphne Keller

1. **Several foreign jurisdictions rely on no-fault injunctive relief to compel online providers to block access to websites hosting infringing content, subject to valid process. Could the United States implement a similar framework while providing adequate due process protections and without impinging on free speech rights? Why or why not?**

This question contemplates two potential changes to U.S. law. The first would involve requiring intermediaries to block entire websites if they host infringing material. I believe that arriving at a legal mechanism to do so while providing adequate protection for due process and free speech rights would be very challenging. As I discuss at greater length in my response to Senator Tillis's related question about foreign jurisdictions that permit site-blocking orders, there are serious questions whether the user protection mechanisms adopted in case law from the UK and elsewhere would meet the U.S.'s stringent constitutional standards.

The second potential change raised in this question would be the adoption of no-fault injunctive relief. Conceptually, it is not necessarily a problem for laws to define one standard for an entity to be "liable" and a different standard for an entity to be subject to an injunction. Standards like this exist in the *Norwich Pharmacal* lines of cases in some Commonwealth countries, and in some European laws.[1] They can in principle be useful to separate situations in which a defendant should appropriately face damages, and situations in which only the costs of complying with an injunction (and the threat of

[1] *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133.

contempt for non-compliance) should be at issue. Important economic and legal scholarship on point has come from the European scholar Martin Husovec.[2]

U.S. law could, in principle, arrive at a legal cause of action supporting injunctive relief without fault either by (1) making injunctive relief available against entities not currently liable for copyright infringement, or (2) reducing the exposure of some currently-liable entities, so that they can be enjoined but not held liable for damages. The first possibility would, like any new legal restriction, be a legitimate exercise of legislative or judicial power only if it respected due process and other constitutional rights of affected entities and individuals. In the intermediary liability context, this would include not only potential defendant intermediaries but current and future speakers affected by the intermediaries' compliance with such an injunction. As my other testimony has suggested, I am skeptical that models from the EU and other non-U.S. jurisdictions would adequately protect these rights under U.S. constitutional standards.

2. Critics contend that the EU Copyright Directive will require filtering algorithms that cannot distinguish between infringing material and content that is lawful based on fair-use. Do you agree with those concerns, and do you think they could be mitigated?

I agree that the EU Copyright Directive (or "DSM Directive") will require automated content management technologies, which in most cases can be expected to mean content-recognition algorithms or filters. As filters' developers have repeatedly acknowledged, these technologies cannot discern context or differentiate between fair and infringing uses of the same work.[3]

The most commonly proposed mechanisms to mitigate filters' inevitable errors are (1) "human review" of filters' output by platform employees and (2) counternotice for Internet users who are victims of improper removals, perhaps backed by an opportunity for the user to assert his or her rights in court. Evidence strongly suggests that both of these mechanisms are inadequate. As I wrote in my earlier testimony, relying on human review

> puts all of the responsibility for applying real judgment about users' online speech onto platform employees. This has real costs for innovation: it is unclear which smaller platforms can even afford the additional hiring to take on this task. And it has real costs for speech and user rights. Decisions about whether to follow filters' recommendations will presumably be made by the same employees who, understandably but routinely, take down the wrong thing in existing notice and takedown systems. They will still have incentives to err on the side of removal. The difference is that these workers will now be the first and only source of human judgment assessing a firehose of machine-generated matches. For a filter assessing the half-million posts users make on Facebook each minute, with a hypothetical (and remarkably

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[2] *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge Intellectual Property and Information Law, pp. 73-142) (2017). Cambridge: Cambridge University Press.

[3] My written testimony at pages 7 and 12-13 briefly discusses this point, I address it at greater length and discuss available filtering technologies in a recent White Paper. *Dolphins in the Net: Internet Content Filters and the Advocate General's Glawischnig-Piesczek v. Facebook Ireland Opinion*, Stanford Center for Internet and Society White Paper (2019), https://cyberlaw.stanford.edu/files/Dolphins-in-the-Net-AG-Analysis.pdf.

> low) error rate of 0.1%, that firehose would include 720,000 misjudgments each day. Some experts have predicted that human review will provide little more than a "rubber stamp" for machines' decisions. While appeals by users could in theory offset the harm to lawful speech from a "take down first, ask questions later" approach, experience with existing counternotice systems gives little reason for optimism.[4]

I am unaware of laws or scholarship suggesting significant additional mitigations for the over-removal likely to be caused by filters.

3. Critics also warn that the EU Copyright Directive will lead to blocking legal content and chilling free speech. What is your perspective? Would you support a less aggressive provision requiring service providers to ensure that once infringing content has been removed pursuant to a notice-and-takedown procedure, the same user cannot repost the same content on any platform controlled by that provider?

It is highly probable that the EU Copyright Directive's filtering provisions will lead to blocking legal content. A less aggressive filtering provision that limited filtering to duplicates subsequently uploaded by the same user would in principle mitigate this problem, but would create others. In particular, it would impose on platforms of all sizes a requirement to build and implement new and potentially very costly technologies – without providing a clear and significant upside in increased deterrence of infringement, beyond that already created by the DMCA's existing account-termination mechanisms. Expanding such filtering obligations beyond the initial service to all other services controlled by the same company would increase this expense. It would also complicate legal analysis of the subsequent removals, for example in the case of a user whose initial upload was to a publicly accessible service, but who subsequently uploaded the same material for lawful backup storage on a different service. This difference in the legal status of copies stored on different services counsels great caution in responding to proposals to expand obligations across multiple platforms controlled by the same provider.

[4] Keller Testimony at 13.

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Dear Senator Blumenthal:

Thank you for the opportunity to respond to these further questions. My answers are below. I hope that you and your staff are well in these difficult days.

Regards,
Daphne Keller

1. **Are there countries that have done a particularly good job at balancing the rights of content creators against copyright infringement with consumer rights and the growth of online platforms?**

The United States has done a particularly good job. The DMCA is not perfect, but has achieved a remarkable balance of intermediary liability law's three goals: preventing harm, protecting speech, and encouraging innovation. The legal certainty it provided for both rightsholders and platforms made possible the development of music and video distribution technologies that today are widely used by consumers and provide a major source of revenue for rightsholders. Without the litigation cease-fire created by the DMCA, technologies like YouTube's ContentID and the resulting revenue sharing arrangements between that platform and rightsholders would not have been feasible.

For consumers, the DMCA's detailed notice and takedown provisions have functioned as a sort of private system of civil procedure – certainly not yielding perfect results, but increasing the odds that outcomes will be fair. Like civil procedure rules, they create inevitable burdens – for rightsholders, platforms, and law-abiding Internet users alike. The DMCA's rules fall short in some cases, of course. Counternotice, a key protection for users' rights, appears to be underused, as I described in my testimony. Penalties for bad-faith takedown notices have not achieved their intended deterrent effect, likely owing to judicial interpretations of Section 512(f). But these provisions are better than most of their international analogs. The shortcomings of EU procedural rules, in particular, are widely acknowledged by European legal and policy experts. One valuable source on this, and a good review of

friction points in notice and takedown systems generally, is the Commission Staff Report from a 2012 EU consultation with stakeholders throughout the notice-and-takedown ecosystem.[1]

I think this question is intended to elicit useful ideas from other countries, so I will expand on one I mentioned in my live testimony – though I think it is complicated and would not necessarily represent a useful way forward for the U.S. That idea is to require special treatment of parody, criticism, and other potential fair-use material. Roughly speaking, one option is the Argentine model, which would require judicial review before a platform faces any liability or legal compulsion to remove such material.[2] Another more modest approach might be to adjust the DMCA's procedural rules to differentiate harder legal judgment calls from the easier ones of straightforward piracy cases. For example, notifiers could be required to flag hard-call cases in their notices and penalized for failure to do so, and platforms could be discouraged from "fast-tracking" those removals. Or platforms could be more strongly incentivized to offer counternotice in such cases. Of course, any attempt to differentiate "hard" from "easy" removal decisions would create difficult and heavily litigated questions about the line between those two categories. Recent experience with analogous rules differentiating "obvious" from "non-obvious" defamation in Austria suggests that such lines can be very difficult to draw.[3]

On another note, U.S. copyright and First Amendment law have also played critical roles in allowing researchers and the public to critically assess platforms' notice and takedown operations. The best information we have about notifier and platform behavior, and consequences for users, comes from Harvard's Lumen Database. This unique repository of takedown notices, including U.S. DMCA notices and global notices on other legal grounds, has provided the basis for the most important independent empirical research in the field.[4] This research, and the public transparency that makes it possible, are increasingly important given mounting public concern about platform power as de facto "gatekeepers" of online speech and participation.

2. **Are there examples of successful statutes or technological tools that curb digital piracy?**

As my previous response suggests, I believe the DMCA is an example of a statute that successfully balances the goal of curbing digital piracy with the law's countervailing speech and innovation goals. Other countries have enacted laws that may more effectively deter piracy, but at serious cost to those other values. Korea's implementation of EU and US Fair Trade Agreements, for example, has been interpreted to require "on-demand takedown not as a requirement for qualifying for the safe harbor but

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[1] *COMMISSION STAFF WORKING DOCUMENT Online services, including e-commerce, in the Single Market* (2012), https://op.europa.eu/en/publication-detail/-/publication/2d17d3dd-4f00-4e3c-b75c-98c03b135047/language-en.
[2] *M. Belen Rodriguez c/Google y Otro s/ daños y perjuicios*, Civil R.522.XLIX (2014) (Argentina).
[3] Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (2019) (calling a politician a "treacherous oaf" and member of a fascist party was obviously defamatory under Austrian law).
[4] See, e.g., Jennifer Urban, et al., *Notice and Takedown in Everyday Practice* (2016); other studies listed in Daphne Keller and Paddy Leerssen, *Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation,* forthcoming in Nathaniel Persily and Joshua Tucker, eds, Social Media and Democracy, Cambridge U.P., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504930; Brief of Amici Curiae Chilling Effects Clearinghouse, *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011), 2010 WL 5813411 (listing research and scholarship that depends on Lumen database [formerly known as Chilling Effects]), https://www.eff.org/document/amicus-brief-chilling-effects.

as an unconditional requirement," meaning platforms must honor even dubious takedown notices.[5] As my previous written testimony indicated, I believe the EU's major new law on point, Article 17 of the DSM Directive, also prioritizes piracy prevention at the cost of seriously disserving Internet users' rights to lawfully seek and impart information online.

3. **How were those statutes perceived domestically among different public groups when they were first introduced?**

I am unaware of public response to the Korean law referenced in my above answer. The Argentine, Indian, Canadian, and Chilean laws I have mentioned in earlier testimony were celebrated by some civil society groups, but I am not aware of broader stakeholder or societal reception. I believe that Brazil's Marco Civil da Internet, which includes both content takedown rules and other user rights-oriented legal provisions, was widely reported on in the country at the time as a major legislative achievement. The EU Copyright Directive, as mentioned in my earlier testimony and that of Ms. Julia Reda, prompted significant public outcry including street protests, and is being challenged before the EU's highest court as a violation of Internet users' rights to freedom of expression and information.

4. **The clear takeaway from the first hearing in this series of hearings on copyright law was that world has changed since the DMCA was enacted. This second hearing made it clear that other countries are also wrestling with the changing landscape. I am interested in what we can do within the current U.S. law.**

    a. **Is there anything that can be done at the industry level within the current DMCA regime?**

The world has certainly changed since the DMCA was enacted. In the copyright space, many of those changes – including the development of highly profitable digital distribution models for licensed content – are hard to imagine coming about in the absence of the DMCA. Given the considerable evolution of both technology and revenue-sharing systems under the DMCA to date, we should not assume the current situation is static. The most interesting future developments will likely continue to arise from unanticipated technologies and business models.

In my opinion, the biggest threats to positive evolution in this space could come from inadequate competition – both among rightsholders and platform owners. If smaller platforms cannot afford to challenge today's incumbents, we will miss out on technologies and business models that offer improved services for both rightsholders and Internet users. Intermediary liability is not the primary source of law to address competition or antitrust concerns, of course. But it can be an important contributing factor, particularly when legal obligations or exposure become costly enough to deter market entry or impair long-term economic viability for new companies. This includes legal obligations outside the U.S., as any company that hopes to compete with platforms like YouTube or Spotify must have viable plans for international expansion.

[5] Stanford Center for Internet and Society, Overview of Copyright Act, last amended by Act No. 12137 (Korea), https://wilmap.law.stanford.edu/entries/copyright-act-last-amended-act-no-12137.

5. **It is my understanding that community guidelines drafted and enforced by online service providers are starting to play a bigger role in this space. They can determine what kinds of content is and is not appropriate, and how content will be removed. Since these are private guidelines, these decisions are not reviewable by a court. I see both advantages and disadvantages to this practice, since there are serious concerns about the potential of private decisions replacing democratic lawmaking and judicial systems with private ordering.**

    a. **How do you see the role of community guidelines today?**

I, too, see both advantages and disadvantages from the increasing reliance on private Terms of Service as sources of online governance. This has been a major focus of my scholarship in recent years. I will try to give a greatly compressed response here.

Major platforms' use of Terms of Service to prohibit "lawful-but-awful" user content is, I believe, unavoidable and in many ways positive. This in part reflects commercial reality: users, advertisers, the press, civil society, and political critics overwhelmingly have called for *more* platform content removal, not less, for many years. In the U.S., pressure for Terms-of-Service-based content removals also reflects the vast gap between First Amendment speech protections and widely held social norms or values. The Constitution protects a broad swath of speech that most people believe platforms *should* take down, as a matter of both personal preference and morality. As a particularly horrific illustration, the video of the Christchurch massacre is in many cases legal to share online, yet prompted near universal calls for elimination from social media platforms. Calls for removal of such content effectively must invoke and rely on platforms' private power under Terms of Service.

The downside of relying on platform Terms of Service to control online speech, of course, is that it places tremendous power over public discourse in private hands. Platforms themselves can abuse this power, as critics from all across the political spectrum claim they already do. Without better transparency, we have no way of knowing which of the numerous anecdotal accounts of discriminatory enforcement reflect real patterns. As I discuss in my article *Who Do You Sue? State and Platform Hybrid Power over Online Speech*, platforms can also become vectors by which any entity with sufficient leverage can influence the speech rules applied to the platform's users.[6] In the DMCA context, for example, an important commercial partner might exert influence – as Universal Music Group did in contractually binding YouTube to remove fair use videos.[7] In the geopolitical context, pressure may come from governments demanding global enforcement of their speech laws. Examples of disclosed state influence include the recent French[8] and Austrian[9] global takedown cases before the CJEU, as well as the EU Hate Speech Code of Conduct, which binds Facebook, YouTube, Twitter, and

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[6] Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech* (2019), Hoover Institute, https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf.

[7] Michael Weinberg, Universal Music Group and YouTube Agree to Forget About Fair Use (June 27, 2014), Public Knowledge, https://www.publicknowledge.org/blog/universal-music-group-and-youtube-agree-to-forget-about-fair-use/.

[8] Case C-507/17, *Google v. Commission nationale de l'informatique et des libertés (CNIL)* (2019) (holding that France can in some cases order global enforcement of its Right to Be Forgotten laws).

[9] Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (2019) (holding that Austria may order Facebook to globally remove speech deemed defamatory under Austrian law).

Microsoft to globally enforce European legal standards using their Terms of Service.[10] More ambiguous examples suggestive of state influence include Apple's removal of the Taiwanese flag emoji for users in Hong Kong.[11]

We are only beginning to wrangle with the consequences of private companies becoming de facto substitutes for institutions ranging from the public square to the post office to the currency system. Constraints on private power in this situation seem entirely appropriate. But when those same constraints effectively function as state-based restrictions on speech and other activities of Internet users, important Constitutional questions will arise. We must navigate those questions with great care.

b. **In an ideal world, what role should they play?**

We are far from identifying any ideal role for private power generally, or Terms of Service in particular, in limiting Internet users' online speech and activities. Some key principles can, however, be identified. First, not all platforms are the same. Many concerns we have about Facebook or Google are not relevant for a small blog, a real estate listings site, a coffee shop wifi service, or a DNS provider. The platforms whose Terms of Service matter the most are the few that have the greatest market share and most prominent role in our daily lives. As I discuss in *Who Do You Sue*, telecommunications law provides a major source of history, literature, case law, and models when thinking about potential legal constraints on major platforms' own discretionary content rules. Approaches like must-carry, the fairness doctrine, or unbundling, while potentially very problematic, warrant much more exploration and analysis as potential models for contemporary platform regulation.[12]

Second, for major platforms' TOS enforcement, transparency and fairness are key. The widely endorsed Santa Clara Principles call for "numbers, notice, and appeal."[13] In other words, platforms should publish transparency reports enumerating takedown practices, notify users when their content has been removed, and allow those users to appeal. I would add to this that allowing independent researchers to review the actual content that has been removed – as opposed to reviewing aggregate data released by platforms – is the only way to truly assess the accuracy of platform takedown decisions, or to detect potential patterns of bias or disparate impact.

Third, courts and the public should be alert to "state action laundering." Private TOS enforcement should not become the means by which governments achieve goals – including suppression of lawful speech – that exceed governments' own powers under the Constitution.

These three principles will not be enough to define an ideal role for private platform power over online speech. But they provide important starting points as we work toward better understanding and wiser regulation.

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[10] European Commission, Code of Conduct on Countering Illegal Hate Speech Online (May 2016), http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.
[11] Mark Gurman, *Apple Pulls Taiwanese Flag Emoji From iPhones in Hong Kong* (Oct. 8 2019), Bloomberg, https://www.bloomberg.com/news/articles/2019-10-08/apple-pulls-taiwanese-flag-emoji-from-iphones-in-hong-kong.
[12] See discussion in *Platform Content Regulation: Some Models and Their Problems* (2019), http://cyberlaw.stanford.edu/blog/2019/05/platform-content-regulation-%E2%80%93-some-models-and-their-problems.
[13] Santa Clara Principles, https://www.santaclaraprinciples.org/.