

First DMCA Hearing Questions

1. How did the advent of the internet impact copyright infringement in the 1990s? What did online copyright infringement look like in the 1990s when the DMCA was enacted? And how does the infringement of the dial-up internet era compare to infringements taking place today?

At the time the DMCA was being drafted, online copyright infringement was already recognized as a serious problem that required different responses from those used to combat piracy in “hard-copy” formats such as books, compact discs, and videocassettes. But online infringement looked much different then than it does today. Most of the online infringement cases which had been decided at that time involved bulletin board systems, in which individual files were posted by individual users and then downloaded one at a time to the computers of users. The framework constructed in section 512 for dealing with online infringement reflects this model that, from today’s perspective, appears slow in pace, narrow in bandwidth, and involving individual or at most a few files at a time. As I noted in my testimony, two major aspects of the transformation online copyright infringement over the past 22 years involve the volume of infringements, and the velocity and ease with which infringing materials proliferate worldwide. Pervasive features of today’s environment such as peer-to-peer services and social media literally did not exist in 1998. Not surprisingly, the model developed 22 years ago has proven largely unsuccessful in dealing with online infringement as it exists today.

2. What was the historical context for the enactment of the DMCA? What were the key issues, legal decisions, agreements, and other activities it sought to address?

Title I of the DMCA was enacted in order to bring U.S. law into compliance with the then-new international copyright norms reflected in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The most innovative aspect of this effort was the adoption of chapter 12 of Title 17 (section 1201 *et seq.*), providing legal protections for the integrity of technological protection measures (TPMs) that copyright owners could use to control access to and exploitation of their copyright works. The impetus for enactment of Title II (now codified in section 512 of Title 17) was the concern by service providers regarding their potential liability for copyright infringements carried out by their users or customers, using their networks or services. Since copyright (and other intellectual property) claims were excluded from the blanket immunity that online service providers had obtained from Congress in 1996 in the Communications Decency Act (codified as section 230 of the Telecommunications Act), service providers perceived a gap, which they were not prepared to let the courts fill in by applying long-standing doctrines of vicarious and contributory copyright infringement.

3. When it passed the DMCA Congress envisioned copyright owners and ISPs/platforms working together and reaching voluntary agreements on issues such as standard technical

measures. Yet, twenty years later, very few—if any—effective voluntary agreements have been reached and there are no approved standard technical measures under 512(i). Why is that? Is it because ISPs/platforms are comfortable with the current system and have little incentive to meet copyright owners halfway?

The answer appears to be yes. While Congress provided for recognition of standard technical measures, it failed to provide adequate incentives for all affected parties to work together to develop and implement them. The liberal approach that some courts have taken toward evaluating compliance with the statutory requirements for achieving safe harbor status has further weakened any incentives service providers might have had to choose to invest time and resources in cooperative efforts – they can in effect reap the benefits of safe harbor status (virtually full immunity from infringement liability) without doing so. This is particularly unfortunate because some of the technological tools that have been developed, such as Audible Magic and the Content ID system, could make a significant contribution to dealing with the massive and pervasive online infringement encountered today --- if strong incentives were put in place for service providers to deploy them in a context of cooperation with rights holders. .

4. The DMCA, and more specifically Section 512's safe harbor provisions, were drafted in a way to allow pioneering internet platforms and services to innovate and grow without the constant threat of liability for the third-party content uploaded to their websites or using their services. Twenty-plus years later, internet platforms that grew up under these safe harbors have become some of the most powerful and wealthy entities in the world, and they have created business models based on their ability to monetize the content of others while turning a blind eye to infringement. Given this change of circumstances, do you think these companies ought to play a more proactive role in combating online infringement and assume more accountability for the misappropriation facilitated by their services?

Yes. There is no doubt that these companies have both the resources and the technical capabilities to do much more than they are now doing, both to prevent the proliferation of infringing material in the online environment, and to detect and deal with it when it occurs. There is also no doubt that requiring them to take on an appropriate measure of responsibility for infringements carried out over their networks and employing their services would be a manageable cost of doing business for many of these companies. It would put them on a more level playing field with other business sectors in our economy that already shoulder this responsibility.

5. What are some of the practical challenges posed by the digital age that were unforeseen when the DMCA was enacted?

See my response to question 1 above, regarding the volume and velocity of online infringement today. Additionally, Congress may not have foreseen the extent to which copyright-protected computer software would become a pervasive feature

of a wide range of consumer and industrial products, thus potentially bringing TPMs used to control access to this software within the scope of section 1201. Finally, Congress did not foresee that online platforms would incorporate pervasive monitoring of the activities of their users as an integral element of their business models. If it had foreseen this, perhaps it would not have absolved all service providers of any responsibility to monitor customer misbehavior in order to qualify for safe harbor status.

6. In order to better understand the various parties who participated in the DMCA legislative process, can you give us a sense of who the government and non-government participants were? Did individual creators or small businesses have a voice in the proceedings?

While a full list of participants can be found in the hearing records and other legislative history documents of the DMCA, the main participants on the side of copyright owners were the trade associations and companies of the Creative Incentive Coalition (CIC), which I served as counsel. The industry participants on the other side were described in the hearing testimony of Jonathan Band and Robert Schwartz. With regard to the negotiations that resulted in section 512, the major telecom companies (the so-called “Baby Bells”) took a leading role. Many of the large online service providers most impacted by section 512 today did not even exist in 1998, and most of the companies that were venturing into the online service provider space then no longer exist today. On the right holder side, individuals and small businesses were represented through some of the CIC participating organizations, but organizations like the Copyright Alliance today speak more explicitly for the interests of such right holders.

7. My understanding is that when the DMCA was enacted, the online platforms proposed a system in which they would simply have to take down infringing files in response to notices from rightsholders. Why was that system rejected by Congress?

While this was a starting point for negotiations, it was rejected as inadequate, and additional requirements for a safe harbor were adopted, including responding to infringements of which providers have “red flag” knowledge, implementation of repeat infringer policies, and others. Ironically, because of the liberal approach taken by some courts to interpreting these requirements, the system as it currently operates is uncomfortably close to the model first proposed: service providers who respond to takedown notices enjoy effective immunity from liability, even when individual takedowns do little to address the infringement problem, even when they turn a blind eye to obvious infringements of which they have not been formally notified, and even when their business model encourages and facilitates infringement.

8. In order for service providers to avail themselves of safe harbor protection, the DMCA established a duty to remove infringing content even without the input from copyright owners when they have actual or red flag knowledge of infringement. Do you believe that

service providers have held up their end of the bargain and investigated infringing activity when they have red flag knowledge? Has case law supported the intent of congress in incentivizing service providers to be proactive when red flag knowledge exists?

Too often, the answers to both questions are no. As referenced in the answer to the previous question, some courts have virtually read the “red flag” obligation out of the statute. Please see Professor Aistars’ testimony for the case citations. The balance that Congress intended to strike has not been achieved. Safe harbor status, which Congress intended be limited to neutral entities that simply provided services without any intent to promote copyright infringement, has been accorded to entities whose business models depend to a considerable extent on the facilitation of copyright infringement by their users.

The recurrent statements in section 512 absolving all service providers of any duty to monitor their systems for indications of widespread copyright infringement was a major contributor to this outcome. This blanket absolution failed to distinguish adequately between innocent parties whose platforms might be abused by users to carry out massive infringement, and providers who simply turned a blind eye to strong evidence of such activities. Those in the latter category, especially those services where widespread infringing activity had repeatedly occurred and been brought to their attention, should have been obligated to take commercially reasonable steps to prevent recurrences. The strong “no monitoring” mandate of section 512 eliminated any incentive for such providers to do so. This stress on absolving providers of any duty to monitor was attributable to the view that such monitoring would not be feasible or practicable, and/or could be carried out only at such expense that it would render the underlying services commercially unviable. That perspective, while not unreasonable to take in 1998, certainly seems short-sighted today, when the powerful capability of some of these services to monitor in minute detail the activities of their customers, subscribers, and even unwitting third-party Internet users, forms an integral part of their business models. Indeed, today it is precisely that monitoring capability that is widely recognized as a serious threat to the public interest.

9. In seeking provisions in the DMCA that would minimize their exposure to liability, ISPs likened themselves to common carriers in the telecom industry who enjoyed broad immunities from responsibility for the actions of their customers because they served as a mere conduit or utility. Do you believe that this comparison between ISPs and telecom providers was appropriate 22 years ago? What about now?

At the time of enactment of the DMCA, telecom companies and other service providers in effect sought the benefits of common carrier status, in terms of immunity from liability for activities carried out over their networks or using their

services, while rejecting the concomitant submission to government regulation that ordinarily accompanies such status. To a certain extent, the interpretation of section 512 by the courts, along with other developments in telecommunications law, have enabled service providers to have their cake and eat it too: to minimize their legal responsibilities, while continuing to escape any meaningful regulation in the public interest, even in the face of clear evidence of market dominance by some of them. There seems to be a growing consensus that both sides of this equation are ripe for re-examination.

10. Trademark law does not contain safe harbor provisions, and yet internal notice and takedown mechanism have been implemented among platforms that often deal with infringing and counterfeit materials. Shouldn't platforms be just as willing to take voluntary action to monitor and combat copyright infringement?

While I am not intimately knowledgeable about this topic, I believe it would be worthwhile for the subcommittee to study the mechanisms adopted by major online platforms to deal with counterfeiting and trademark infringement. Although, as I understand it, trademark owners do have concerns about the effectiveness of some of these systems, under at least some of them the platform operators take proactive steps to detect and deal with infringers, including steps to try to exclude them from re-entry onto the system, and some enable trusted trademark owners to carry out "takedowns" of counterfeit products themselves. Experience under some of these systems may have produced lessons that could be applied to the copyright infringement sphere. Since trademark, like copyright, was carved out of the blanket immunity that service providers obtained from Congress in section 230 of the Telecommunications Act, the trademark experience could be viewed as a natural experiment of what happens when the "gap" in liability protection is filled, not by detailed and prescriptive legislation like section 512, but by market developments, cooperative efforts, and litigation under common law indirect liability principles.

11. Projects such as the Google Transparency Report have tracked the extreme volume—75 million in February 2019 alone—of DMCA-related take down notices received. Are these astonishing numbers evidence of a system working efficiently and effectively?

Efficiently, perhaps; effectively, no. The goal of the notice-and -takedown system that Congress enacted was not to process a huge number of notices efficiently. The goal was to provide an efficient mechanism to rid online platforms and services of infringing materials brought to their attention. On this effectiveness metric, the system is not working, because any materials "taken down" are often immediately re-posted in multiple versions, triggering more ineffective "notices and takedowns" and nothing more. In addition, as Professor Aistars has noted in her testimony before the subcommittee, a system designed to process, in an automated fashion, huge volumes of takedown notices, has become as a practical matter unavailable to independent creators and small businesses.

12. Do you believe ISPs are doing enough to educate users on copyright infringement and the related harms? If not, what more could be done?

While this is not an area with which I am particularly knowledgeable, I am not aware of any effective educational campaigns carried out by service providers. The subcommittee may wish to look into educational campaigns that have been carried out by government agencies, sometimes in cooperation with service providers and rights owners, in other countries, such as Korea, Taiwan, and the United Kingdom, as there may be lessons here that could be applied in the U.S. context.

13. Congress recognized at the time of the DMCA's enactment that the only thing that remains constant is change and that the enactment of the DMCA was only the beginning of an ongoing evaluation by Congress on the relationship between technological change and U.S. copyright law. Given how drastically technology, the internet, and our online existence has changed and evolved over the past twenty-five years, what changes or solutions would you suggest to deal with the changed circumstances?

While, as noted in my written testimony, I am not in a position to offer specific suggestions for changes to the statute, I would offer the following general observation. Title I of the DMCA has weathered the rapid changes of the past 22 years better than Title II. The former (codified in sections 1201 et seq. of Title 17) created prohibitions that are phrased in a general and technology-neutral manner. In my view, these have been far more successful in carrying out Congress's intent than the extremely detailed and prescriptive provisions of Title II (codified in 17 USC 512), which reflect a specific technological environment that is by now quite outdated. In approaching this review, the subcommittee should consider whether there are ways to replace section 512 with a more general and technology-neutral provision that specifies the standard of care that a responsible service provider ought to achieve in the course of detecting and dealing with infringing activities that are carried out using its services or platforms, including the use of the best commercially reasonable technological tools, and that provides strong incentives for providers and right holders to work together to manage this problem. Such an approach could prove to be more "future-proofed" than what Congress enacted in 1998.

Additionally, as noted in my response to question 5 above, Congress' rejection of any requirement for any service provider seeking liability limitations to monitor its services for indicators of widespread copyright infringement was, in retrospect, a mistake. It opened the door to court decisions that undermined the balance that Congress sought to strike, and frustrated its intent to treat innocent service providers, whose platforms were abused to carry out such infringement, differently from those players who either turned a blind eye toward, or at worst encouraged and facilitated, such infringement. It should be reconsidered.

14. The Copyright Office is on the verge of releasing its much anticipated 512 report. What do you think are the most important issues the report should address and what would you like to see the report propose concerning these issues?

As I have had no involvement in the Copyright Office study, I would simply point to my testimony and the responses to the Questions for the Record for the identification of issues and proposals.

**Mr. Steve Metalitz –
The Digital Millennium Copyright Act at 22:
What is it, why was it enacted, and where are we now?
Questions for the Record
Submitted February 18, 2020**

QUESTIONS FROM SENATOR COONS

1. What aspects of the DMCA were the most difficult to negotiate and why? Does anything surprise you about how those provisions have been interpreted and applied over the past 22 years? Do you have any advice for those considering future DMCA reforms?

Both section 1201 et seq. (the centerpiece of Title I of the DMCA) and section 512 (Title II) involved protracted negotiations. However, in the former, the basic thrust of the prohibitions created by the statute remained fundamentally unchanged; negotiations focused on the statutory exceptions, and on the process for administrative recognition of exceptions in the future. In section 512, by contrast, the negotiations concerned the core questions such as how the liability limitations of the safe harbor would be defined, the criteria for the recognition of safe harbor status, and to which functions that status would apply. The result was an extremely prescriptive and detailed statute that, in my view, has not withstood the test of time as well as Title I.

The liberal approach taken by some courts to interpreting the safe harbor requirements of section 512 has been surprising and disappointing. As a result of some of these decisions (many of them cataloged by Prof. Aistars in her testimony), service providers who respond to takedown notices enjoy effective immunity from liability, even when individual takedowns do little to address the infringement problem; even when providers turn a blind eye to obvious infringements of which they have not been formally notified; and even when their business model encourages and facilitates infringement. These decisions undermined the balance that Congress sought to strike, and frustrated its intent to confine safe harbor status to innocent service providers, whose platforms were abused to carry out such infringement.

With regard to advice, as noted in my written testimony, I recommend that your reviews of section 1201 and section 512 be clearly separated and distinguished. The provisions are conceptually distinct, aimed at completely different goals, and should each be evaluated, among other factors, based on how well they have met those goals. Furthermore, in my view, Title I of the DMCA has weathered the rapid changes of the past 22 years better than Title II. The former (codified in sections 1201 et seq. of Title 17) created prohibitions that are phrased in a general and technology-neutral manner. In my view, these have been far more successful in carrying out Congress's intent than the extremely detailed and prescriptive provisions of Title II (codified in 17 USC 512), which reflect a specific technological environment that is by now quite outdated. Perhaps in approaching this review, the subcommittee should consider whether there are ways to replace section 512 with a more general and technology-neutral provision that specifies the standard of care that a responsible service provider ought to achieve in the course of detecting and dealing with infringing activities that are carried out using its services or platforms. Such an approach could prove to be more "future-proofed" than what Congress enacted in 1998.

2. The Senate Judiciary Committee's 1998 report on the DMCA stated that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in the digital age," and the Committee "strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals." We are told that no meaningful cooperative effort took place. During the drafting of Section 512 of the DMCA, how did you envision cooperation between online providers and rights holders? Has this cooperation worked in practice as you envisioned it should?

The Committee's "strong urg[ing]" was, unfortunately, not sufficiently re-inforced in the terms of the legislation itself. While Congress provided for recognition of standard technical measures, it failed to provide adequate incentives for all affected parties to work together to develop and implement them. The liberal approach that some courts have taken toward evaluating compliance with the statutory requirements for achieving safe harbor status has further weakened any incentives service providers might have had to choose to invest time and resources in cooperative efforts – they can in effect reap all the benefits of safe harbor status (virtually full immunity from infringement liability) without doing so. This is particularly unfortunate because some of the technological tools that have been developed, such as Audible Magic and the Content ID system, could make a significant contribution to dealing with the massive and pervasive online infringement encountered today --- if strong incentives were put in place for service providers to deploy them in an context of cooperation with rights holders.

3. The internet and digital content distribution mechanisms have changed drastically in the past 22 years. What technological and practical challenges exist today that you did not foresee during the drafting of the DMCA?

At the time the DMCA was being drafted, online copyright infringement was already recognized as a serious problem; but it looked much different then than it does today. Most of the online infringement cases which had been decided at that time involved bulletin board systems, in which individual files were posted by individual users and then downloaded one at a time to the computers of users. The framework constructed in section 512 for dealing with online infringement reflects this model that, from today's perspective, appears slow in pace, narrow in bandwidth, and involving individual or at most a few files at a time. As I noted in my testimony, two major aspects of the transformation online copyright infringement over the past 22 years involve the volume of infringements and the velocity and ease with which infringing materials proliferate worldwide. Pervasive features of today's environment such as peer-to-peer services and social media literally did not exist in 1998. Not surprisingly, the model developed 22 years ago has proven largely unsuccessful in dealing with online infringement as it exists today.

With regard to section 1201, while I believe that it has largely withstood the test of time and has achieved its stated goal of encouraging the development of a robust online marketplace in creative works, Congress may not have foreseen the extent to which copyright-protected computer software would become a pervasive feature of a wide range of consumer and industrial products, thus potentially bringing TPMs used to control access to this software within the scope of section 1201.

4. Judge Damich testified that Senator Hatch rejected notice-and-takedown as the sole copyright responsibility on the part of service providers. What additional service provider responsibilities were contemplated while drafting the DMCA? Do the “red flag” provisions impose such responsibilities, and do you believe they have served that purpose in practice?

While notice and takedown standing alone was a starting point for negotiations, it was rejected as inadequate, and additional requirements for a safe harbor were adopted, including responding to infringements of which providers have “red flag” knowledge, implementation of repeat infringer policies, and others. Ironically, because of the liberal approach taken by some courts to interpreting these requirements, especially the “red flag” test, the system as it currently operates is uncomfortably close to the model first proposed: service providers who respond to takedown notices enjoy effective immunity from liability, even when individual takedowns do little to address the infringement problem, even when they turn a blind eye to obvious infringements of which they have not been formally notified, and even when their business model encourages and facilitates infringement.

5. Professors Litman and Tushnet raise concerns regarding Section 1201’s anti-circumvention provisions for their lack of copyright infringement nexus. Why was Section 1201 drafted more broadly to encompass circumvention of technical protection measures for other purposes, along with statutory exceptions and a triennial rulemaking process?

Section 1201 has a copyright nexus, in that it applies only to circumvention of technological protection measures (TPMs) used to control access to, or the exercise of exclusive rights over, a work that is protected by copyright. During the legislative process that produced section 1201, several proposals were made to require proof of copyright infringement as an additional element of the violation, but all these were rejected. If the prohibition on circumvention of technological protection measures could only be enforced in the context of a specific copyright infringement, it would be largely redundant, and would not provide the additional layer of protection that the WIPO Internet treaties mandated.

The drafters also understood that control over access to copyright works was essential if copyright owners were to have the ability to create a licensed market for their works in the digital networked environment, and that actions (such as circumvention of access control TPMs) that enabled unauthorized access could destroy that ability, whether or not those actions constituted copyright infringement. Indeed, it was readily foreseeable that some of

these actions to divest copyright owners of their control might not directly involve copyright infringement actionable under U.S. law. For instance, hacking through access controls could enable individual consumers to receive copies of works which they had not paid for, and it was questionable whether the mere act of receiving or possessing a copy would necessarily involve the exercise of an exclusive right. In such a scenario, for instance, infringing reproduction of a work enabled by circumvention of access controls might take place outside the U.S. and thus might not be actionable under U.S. copyright law.

Subsequent technological and market developments, such as the trend toward streaming rather than downloading as the major means for exploiting copyrighted works in the digital networked environment, further validate the distinction Congress made between circumvention and infringement. The limited bandwidth available to users in 1998 made streaming of audio-visual material completely impracticable. Today, streaming is the predominant means of delivering such content to users; and the commercial value of today's streaming service lies in access to the stream. As the 9th Circuit Court of Appeals has noted, the statute's "two specific examples of unlawful circumvention under § 1201(a) — descrambling a scrambled work and decrypting an encrypted work — are acts that do not necessarily infringe or facilitate infringement of a copyright. Descrambling or decrypting only enables someone to *watch or listen to a work without authorization, which is not necessarily an infringement* of a copyright owner's traditional exclusive rights under § 106." MDY Industries, LLC v. Blizzard Entertainment, Inc., 629 F. 3d 928, 945 (9th Cir. 2010) (emphasis added). The success of section 1201 in fostering a robust digital marketplace in creative works underscores the wisdom of Congress' decision not to tie the TPMs prohibition to proof of copyright infringement.

As your question notes, the legislation also incorporated safeguards to protect against applications of the TPMs prohibition that would be counterproductive or that would impinge excessively on other important interests, including on uses of copyright works that might not be authorized by the copyright owner but that nevertheless could be non-infringing. Besides the general savings clauses appearing in section 1201[c], Congress adopted a series of specific exceptions to some or all of the circumvention prohibitions, to limit how the prohibitions would be applied in specific situations in which important non-infringing uses of copyright works were likely to take place. Finally, in section 1201(a)(1)(B)-(D), Congress established a rulemaking proceeding in which the scope of the prohibition on the act of circumvention of access controls could be adjusted and reviewed every three years, in order to correct unanticipated impingements on non-infringing uses of copyright works that were protected by access controls. The seven triennial rulemaking cycles have produced dozens of administrative exceptions, which have served to further calibrate the scope of the prohibition in circumstances in which copyright infringement is not also involved.

**Questions for the Steve Metalitz
From Senator Mazie Hirono**

1. With the outsize role the Internet plays in all of our daily lives today, it is hard to look back and appreciate where we were 22 years ago when the DMCA was passed.

- a. **What types of online platforms did Congress have in mind when it passed the DMCA?**

At the time the DMCA was being drafted, online copyright infringement was already recognized as a serious problem; but that problem looked much different than it does today. Most of the online infringement cases which had been decided at that time involved bulletin board systems, in which individual files were posted by individual users and then downloaded one at a time to the computers of users. The framework constructed in section 512 for dealing with online infringement reflects this model. In particular, features that we would consider fundamental to today's online environment, such as per-to-peer services and social media, were virtually non-existent in 1998.

- b. **What was the scale of online copyright privacy at the time the DMCA was passed in comparison to the scale of the problem today?**

(I assume the reference to "copyright privacy" is meant to be "copyright piracy.") I don't have ready access to statistical information responsive to this question. Obviously, the problem is orders of magnitude greater now than it was then. I did note in my written testimony some qualitative differences. Two major aspects of the transformation of online copyright infringement over the past 22 years involve the volume of infringements and the velocity and ease with which infringing materials proliferate worldwide.

2. The Conference Report accompanying the DMCA states that Title II, which relates to online infringement liability, was meant to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."

- a. **What was the expectation when the law was passed regarding how online service providers and copyright owners would cooperate to deal with online infringement?**

Candidly, I believe the "expectation" was more a hope that there would be inter-industry cooperation, not only in the operation of notice-and-takedown systems, but also in the formulation and implementation of effective repeat infringer policies, and in the development of standard technical measures to detect and deal with online infringement. During the course of negotiations over what became section 512, both sides learned much more about the others' perspectives. This could have laid the groundwork for ongoing cooperation, but in retrospect there were insufficient incentives for it to occur, especially once court decisions began to interpret section 512 in ways that upset the balance the legislation tried to strike.

- b. **I've heard from many in the creative community that this idea of cooperation has broken down. That the DMCA has placed the entire burden on copyright owners to**

police infringement online. Do you agree that too much of the weight to police infringement falls on copyright owners? If you do, where did the DMCA fail?

I do agree with this analysis. It is difficult to pinpoint a single locus of failure, and certainly adverse court decisions that awarded safe harbor status very liberally despite minimal if any compliance with the statutory pre-conditions played a major role. However, looking simply at the statute itself, the recurrent statements absolving all service providers of any duty to monitor their systems for indications of widespread copyright infringement was a major deficiency. This blanket absolution failed to distinguish adequately between innocent parties whose platforms might be abused by users to carry out massive infringement, and providers who simply turned a blind eye to strong evidence of such activities. Those in the latter category, especially those services where widespread infringing activity had repeatedly occurred and been brought to their attention, should have been obligated to take commercially reasonable steps to prevent recurrences. The strong “no monitoring” mandate of section 512 eliminated any incentive for such providers to do so. This stress on absolving providers of any duty to monitor was attributable to the view that such monitoring would not be feasible or practicable, and/or could be carried out only at such expense that it would render the underlying services commercially unviable. That perspective, while not unreasonable to take in 1998, certainly seems short-sighted today, when the powerful capability of some of these services to monitor in minute detail the activities of their customers, subscribers, and even unwitting third-party Internet users, forms an integral part of their business models. Indeed, today it is precisely that monitoring capability that is widely recognized as a serious threat to the public interest.

3. The subcommittee will be focusing on the DMCA for most of this year with the expectation that reform legislation will be introduced late in the year.

a. As we embark on this process, what lessons learned can you share from your experience drafting and negotiating the original DMCA?

First, as noted in my written testimony, I recommend that your reviews of section 1201 and section 512 be clearly separated and distinguished. The provisions are conceptually distinct, aimed at completely different goals, and should each be evaluated, among other factors, based on how well they have met those goals.

Second, in my view, Title I has weathered the rapid changes of the past 22 years better than Title II. The former (codified in sections 1201 et seq. of Title 17) created prohibitions that are phrased in a general and technology-neutral manner. In my view, these have been far more successful in carrying out Congress’s intent than the extremely detailed and prescriptive provisions of Title II (codified in 17 USC 512), which reflect a specific technological environment that is by now quite outdated. Perhaps in approaching this review, the subcommittee should consider whether there are ways to replace section 512 with a more general and technology-neutral provision that specifies the standard of care that a responsible service provider ought to achieve in the course of detecting and dealing with infringing activities that are carried out using its services or platforms, including the use of the best commercially reasonable technological tools, and that provides strong incentives for providers and right holders to work together to

monitor and manage this problem. Such an approach could prove to be more “future-proofed” than what Congress enacted in 1998.

b. If you could go back and change one thing about the DMCA, what would it be and why?

As noted in response to a previous question, Congress’ rejection of any requirement for any service provider seeking liability limitations to monitor its services for indicators of widespread copyright infringement was, in retrospect, a mistake. It opened the door to court decisions that undermined the balance that Congress sought to strike, and frustrated its intent to treat innocent service providers, whose platforms were abused to carry out such infringement, differently from those players who either turned a blind eye toward, or at worst encouraged and facilitated, such infringement.