

Before the
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate

Hearing on

*The Digital Millennium Copyright Act at 22:
What is it, why was it enacted, and where are we now?*

Written Testimony of

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Thank you for this invitation to share my perspectives on the Digital Millennium Copyright Act (DMCA). In this testimony, I hope to provide some of the relevant historical context surrounding enactment of the DMCA in 1998, as well as to indicate in general terms some of the challenges facing the subcommittee as it conducts its planned review of the legislation throughout this year.

While I offer this testimony in my personal capacity only, my perspective is informed by my experience as counsel to the Creative Incentive Coalition, the umbrella group of copyright industry organizations that was deeply engaged on this legislation throughout the period during which the DMCA was drafted, negotiated and enacted. More broadly, I draw on a quarter century of experience representing copyright industry coalitions on policy and legislative matters, and on my years as chief counsel and staff director of the predecessor to this subcommittee (the Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks) during the 1980's. Finally, as I have not represented any client with regard to DMCA matters for several years, and indeed have largely retired from law practice, I will refrain at this time from commenting on current developments in practice under the DMCA, and from offering specific suggestions for changes to it.

The Historical Context of the DMCA

To fully understand the context within which the DMCA was enacted in 1998, one must refer back to two events that occurred two years earlier, in 1996. One was the adoption, by the World Intellectual Property Organization (WIPO), of two new treaties – the WIPO Copyright Treaty, or WCT, and the WIPO Performances and Phonograms Treaty, or WPPT. The other event (which actually occurred first) was the enactment of the Communications Decency Act, and in particular of the provision now codified at 47 USC 230.

The WCT and WPPT – often collectively referred to as the WIPO digital treaties – were an ambitious and forward-looking effort to update global copyright law standards to address

the challenges posed by the digital networked environment --- including but not limited to the Internet. By the mid-1990's, this environment was already beginning to reshape how creative works protected by copyright were being created, distributed, performed, consumed, and infringed, and the national and global markets in which these activities were taking place. The United States government played a leading role in the protracted process of bringing the WCT and WPPT into existence, and was eager to set an example by making any necessary changes to our national copyright law in order to meet these updated global standards. This was the primary motivation for drafting what became Title I of the DMCA, which consists of provisions necessary to bring U.S. law into compliance with the WIPO treaties.

The most important such provision was to provide explicit legal protection for the integrity of technical measures that copyright owners might choose to employ to control access to their works and to manage the exercise of exclusive rights in those works. Prior to the adoption of the WIPO digital treaties, a lot of study, analysis and drafting had already been done on this topic, under the leadership of the U.S. Patent and Trademark Office (PTO), as reflected in a green paper and a white paper issued by the PTO. This work formed the basis for provisions that were ultimately codified in chapter 12 of Title 17 of the U.S. Code --- and colloquially labeled by reference to the first statutory section in that chapter, section 1201. This was a key element of H.R. 2281, the legislation that ultimately became the DMCA. However, during Congressional consideration of this proposed legislation, another issue arose. To understand its role in enactment of the DMCA, we have to return to 1996 once again.

The Communications Decency Act (CDA), adopted in 1996, was Congress's first attempt to set ground rules for activities in the digital networked environment that was coming to be known as the Internet. A key provision of that legislation -- section 230 -- sought to encourage the development of Internet-based services by bestowing on the providers of these services a sweeping immunity from liability for speech undertaken by users of those services -- for example, by users who might post to online bulletin boards or other platforms statements that were defamatory or fraudulent. By blocking any claim that would hold the service provider responsible for such legally actionable speech, CDA's drafters sought to shelter the fledgling Internet sector of the economy from the specter of potentially huge damage claims for

activities that the providers themselves had not undertaken, even though they might have been aware of them, and regardless of whether it would have been technologically feasible for the providers to prevent or curtail them.

As originally drafted, section 230 would have applied to copyright infringement claims as well. This prospect set off alarm bells in the copyright community. Over the years, federal courts had developed well-established doctrines of contributory and vicarious infringement, which spelled out the circumstances in which entities that enabled or benefited from acts of copyright infringement could be held responsible for those acts, even though they had not committed copyright infringement directly. By 1996, courts were beginning to apply these well-established doctrines to the online environment. If the section 230 immunity were to be applied to copyright claims as well as to other torts, then vicarious and contributory infringement liability would essentially have been abolished online. Copyright owners, already aware of and increasingly concerned about the impacts of online infringement of their works, feared that they would be deprived of any meaningful remedy for such conduct. Accordingly, the copyright industries insisted on carving out intellectual property claims from the sweeping immunity established by section 230.

The providers of online networks and services reluctantly accepted the intellectual property carve-out in order to obtain the section 230 immunity. (That immunity, of course, has proven to be exceptionally broad and powerful; while it has been hailed in some quarters as the Magna Carta of the Internet economy, it has also been the subject of increased scrutiny recently, focused on whether it has contributed to a widening range of social problems.) However, the providers remained concerned that section 230, as enacted, did not protect them against copyright infringement claims, which would instead continue to be adjudicated under the judge-made vicarious and contributory infringement doctrines. The providers perceived these doctrines as too unclear and unpredictable in their application online. If they could not make themselves altogether immune from responsibility for copyright infringements committed by their users, they at least sought to minimize their exposure, and achieve greater certainty in advance about what steps if any they needed to take to reduce that exposure. No doubt one factor in this calculus was the historical experience of the largest and most politically

powerful providers --- the major telecom carriers --- which were used to operating in a common carrier environment, in which they not only enjoyed broad immunities from responsibility for the actions of their customers, but in which their activities were frequently subject to detailed regulation by the Federal Communications Commission and/or state regulatory bodies. The unavoidable uncertainties of case-by-case adjudication by the courts, even on the basis of well-established indirect liability doctrines, no doubt loomed much larger in their concerns than they did in the viewpoint of experienced copyright-dependent companies, which were much more used to them.

In any case, the enthusiasm of copyright owners for legislation bringing U.S. copyright law into compliance with the standards of the WIPO digital treaties inevitably made that bill a target for the online service providers -- led by the giant telecom companies -- who sought to achieve at least some of what they had been denied by the IP carveout to section 230. Although the limitation of online copyright liability was in no way required by the WIPO treaties, it rapidly became clear that it was a political necessity for achieving the goal of WIPO treaties compliance. The result, following protracted negotiations, was Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act, now codified in section 512 of Title 17. That legislation spells out, in excruciating detail, the circumstances under which a wide range of service providers may achieve near-total immunity from liability for infringing acts undertaken by their customers, subscribers, or users. Those circumstances involve a complex interplay among those injured by copyright infringement, the service providers and network operators, and to a limited extent, the direct infringers themselves.

Applying the Context to this Review

How should this subcommittee incorporate this history into its review of the DMCA? In my view, the historical context fully justifies the subcommittee's decision to review both Title I and Title II of the 1998 legislation, and for those reviews to be clearly separated. The provisions on technological protection measures (section 1201) are conceptually distinct from the provisions on online liability limitation (section 512). They aimed at completely different goals and should each be evaluated, among other factors, based on how well they have met those

goals. In my view, it is quite likely that the outcome of those evaluations will be very different for the two different provisions in question.

Section 1201, I believe, should be regarded largely as a success story. Attempts by Congress, or by legislators in general, to anticipate technological developments and to shape legislation in light of that anticipation are rightly viewed with considerable skepticism. In a fast-changing environment, Congress often arrives on the scene too late to legislate effectively, but it can also arrive too early. In the case of Title I of the DMCA, Congress may well have arrived right on time.

Back in 1998, Congress anticipated that, if it provided new legal tools to safeguard the integrity of technological protection measures (TPMs) that manage access to and use of copyright works, copyright owners would be encouraged to develop, refine and deploy such tools; and it further anticipated that the result of such deployment would be greater access by more consumers to a wider range of such works. To a great extent, from the vantage point of 2020, we can say that that is exactly what has happened. Thanks to access controls and other TPMs, copyright owners have the confidence to make their works available in the online marketplace to audiences great and small; to do so is no longer synonymous with surrendering all control over the works and abandoning any hope of recouping the massive investments required to produce them. The chief beneficiary, of course, is the American public, which enjoys great access to more works in more formats through more media at a wider range of price points than ever before in human history. Section 1201 is critical to this success, not least because whenever businesses have cropped up whose model is based on hacking through these protections and undermining the controls they provide, the statute has provided an enforcement tool for combating these illicit enterprises and putting them out of business. The subcommittee's review of section 1201 should keep the success of this provision foremost in mind, though undoubtedly there could be improvements.

The verdict on section 512, on the other hand, has to be much more mixed. While section 512 reflects provisions that copyright owners in 1998 neither needed nor wanted, it was the product of tough negotiation, and it sought to achieve a balance. Unlike section 230 of the

CDA, fostering the development of robust online businesses was not its sole goal; section 512 also sought make the online environment a safer venue for works of authorship by providing incentives for copyright owners and service providers to work together to detect and deal with online infringement. While we can point to some examples where this type of cooperation has been achieved, on the whole, it seems that section 512 has fallen short of this goal. The continued pervasive presence of infringing activity in the Internet environment, and the persistence of service provider business models built upon tolerating, enabling, and even profiting from infringing activity, would constitute evidence of this failure.

Even if it were desirable, it would not be possible to retrace our steps back to 1998 and take the other fork in the road: to allow concepts of vicarious and contributory copyright liability that had developed in the off-line environment to be evolved and adapted, on a case-by-case basis, by federal courts applying these concepts to particular factual situations. But it is also essential that Congress eschew the approach it embraced in 1996, in the CDA, but that it wisely declined to apply to intellectual property matters at that time. The subcommittee should give serious attention to concerns that the “safe harbor” provided by section 512 has evolved in ways that today give it an uncomfortably close resemblance to blanket immunity. In particular, the subcommittee should examine whether, in large part because of the interpretations some courts have given to key section 512 concepts, service providers today, by taking relatively minimal steps that are far from commensurate with the scale of the online infringement problem, can not only insulate themselves from infringement liability, but can even continue to base their business models on using infringing content to attract users. At a time when the significant societal costs of the blanket immunity Congress granted to the nascent online industry in section 230 have become increasingly apparent, the subcommittee’s review should focus on finding the best way to get the online technology sector, which increasingly has come to dominate our economy, to implement sound business practices that reflect a willingness to shoulder its fair share of responsibility for destructive behaviors that its services enable and facilitate. Those behaviors include, but are by no means limited to, widespread theft of the intellectual property of others.

Volume, Velocity, and Voluntary Arrangements

As the subcommittee considers whether, and if so, how best, to recalibrate the balance struck in 1998 and embodied in section 512, let me briefly mention three phenomena that characterize the development of online infringement over the past two decades but that the current law does not adequately address. These are the volume of infringement; the velocity of infringing activity; and the importance of voluntary arrangements, including licensing and technological collaboration.

Section 512 in general, and the notice-and-takedown system in particular, implicitly assume a model in which the volume of infringing activity is sufficiently low that human decision making can feasibly be applied on virtually a case-by case basis to decisions about whether to file a notice of infringement, how such notices are to be processed, and what action should be taken in response to them. If that model was ever a realistic approach, the huge volume of online infringement soon outstripped it. It was not long before the entire notice-and-takedown process became fully automated on both sides: robots talking to robots to decide the fate of particular disputed postings or links, which themselves had been generated through automated processes. While there are some provisions in section 512 that appear to recognize that infringing activity may occur at high volumes, such as the reference to including a representative sample of infringing materials in a valid takedown notice, it may be worth assessing more systematically which parts of the statute have been outstripped by the huge volumes of material, both infringing and non-infringing, that characterize the online environment today, and to consider how best to remedy these shortcomings.

There are also within section 512 some implicit assumptions about what we would now consider to be the low velocity of online infringements. Few issues provoked as much intense negotiation during the drafting of the statute as the question of how fast a service provider must act in response to a valid notice of infringement in order for its takedown action to bring it within the statutory safe harbor, and whether if the law specified a particular time frame, that would be treated more as a floor or a ceiling. Ultimately this led to the decision to require an

“expeditious” takedown, a compromise which prevented either a floor or ceiling from being erected but (if I may persist in the metaphor) which also removed the walls from the structure and threatened to collapse it altogether. The drafters may not have sufficiently foreseen an environment in which, once an infringer makes a work accessible in a single online location, that work becomes almost instantaneously accessible to millions of users around the globe. In that circumstance, any takedown that is slower than instantaneous may be completely ineffective. Similarly, even if an initial takedown is effective, if an instantaneous reposting occurs almost automatically, and if that reposting requires an entirely new notice and takedown procedure to be initiated, the velocity of the activity can render the entire system pointless. Indeed, to a great extent, the drafters of section 512 seem to have perceived a relatively static online universe, in which an infringing copy of a work posted somewhere is propagated across a network mainly as individual users download the work in its entirety and then make it available to others under the same conditions. Whatever its accuracy in 1998, this perception is obviously outmoded and unrealistically limited in an era of peer-to-peer services, or even of streaming rather than downloading as the primary mode of consuming copyrighted material from online sources. The former technology was completely unknown at the time the DMCA was enacted; and while online infringement through unauthorized public performance via streaming is clearly covered by the statute, it was generally considered a corner case, of interest primarily to the music performing rights societies. In reviewing section 512, the subcommittee should consider what changes are needed to respond to this vast acceleration in the velocity of online infringement, as well as the ease with which Internet users with even limited tech savvy can carry it out.

Finally, in this as in so many other areas of the marketplace for copyright works, while the statute provides the default rules, relationships among the main players are in fact frequently (and in general optimally) regulated by licensing and other private, voluntary agreements. The subcommittee would do well to look into areas in which copyright owners, service providers, and other interested parties have sought to enter into voluntary arrangements to manage the problem of online infringement more efficiently and effectively; which such arrangements have worked and which have not; and whether the DMCA (or other

relevant laws) have provided sufficient incentives for, and avoided creating roadblocks to, developing and implementing such arrangements. In this regard, it could inquire why the concept of “standard technical measures,” a form of voluntary arrangement which the statute specifically recognizes and encourages, has proven to be a dead letter in practice, and whether with appropriate modifications, this concept could be revived as a means of promoting cooperative efforts to prevent, detect and/or deal with online infringement.

Thank you for this opportunity to share my views with the subcommittee.