Mr. Matt Schruers
Copyright Law in Foreign Jurisdictions:
How Are Other Countries Handling Digital Piracy?
Hearing before the Senate Committee on the Judiciary
Subcommittee on Intellectual Property
March 10, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

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?**

As my testimony discussed, the U.S. approach to balancing the interests of content creators, rightsholders, consumers and users, and online services is the prevailing international model for good reason. Thanks to Congress's leadership in passing the DMCA, U.S. content creators and online platforms have been able to thrive and become global industry leaders, to the benefit of consumers.[1] This regulatory environment has enabled U.S. platforms to develop cutting-edge methods for combating infringement, build a robust market for legitimate content, and maintain a commitment to protecting lawful speech, while stamping out bad actors online. Other U.S. trading partners have adopted similar policies as well, enabling U.S. digital exports. While my testimony details challenges in the U.S. approach, including abuse of the DMCA's extraordinary remedies via overbroad takedown requests, it has performed well and has provided a model for other nation's laws.

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

In addition to the success of U.S. law discussed above, industry has developed tools and partnerships to reduce incentives for infringement. Without question, the technological tools that most successfully curb piracy are those that provide lawful alternatives via licensing, and

[1] *See, e.g.*, Moozicore, *2019 RIAA U.S. Music Industry Revenue Report* (Feb. 27, 2020), https://medium.com/@moozicore/2019-riaa-u-s-music-industry-revenue-report-e386b66ca1c2 (citing *Year-End 2019 RIAA Music Revenues Report*) ("Revenues from recorded music in the United States grew 13% in 2019 from $9.8 billion to $11.1 billion at estimated retail value. This is the fourth year in a row of double digit growth, reflecting continued increases primarily from paid subscription services, which reached more than 60 million subscriptions in the United States."); Motion Picture Ass'n of Am., *2018 THEME Report*, https://www.motionpictures.org/wp-content/uploads/2019/03/MPAA-THEME-Report-2018.pdf ("The combined home and theatrical entertainment market was $96.8B . . . up 25% from 5 years ago"); Michael Masnick & Leigh Beadon, *The Sky Is Rising* (Copia Inst. & CCIA, Apr. 2019), https://skyisrising.com/TheSkyIsRising2019.pdf ("All of the actual data showed tremendous, and often unprecedented, growth in both earnings and creative output").

voluntary industry information-sharing initiatives also help reduce piracy. It is difficult to cite any one technology as a metric for success since "DMCA-Plus" systems tend to be service-specific and third-party content protection tools tend to be specific to particular classes of works (such as sound recordings) and are therefore not well-suited to general application. Because each service and rightsholder operates differently, the DMCA's flexibility has been crucial to the creation of effective technological tools and practices. While legislation similar to the DMCA is in place in multiple jurisdictions, it is not the prevailing structure in many of the high-piracy jurisdictions in the world, and encouraging more U.S. trading partners to adopt the DMCA would improve the global copyright enforcement environment.

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

From the moment it was signed, Title II of the U.S. DMCA has served as a landmark Congressional achievement: a historic compromise successfully balancing the interests of rightsholders, service providers, and users. In contrast, the recently enacted EU Directive on Copyright and Related Rights in the Digital Single Market (hereinafter "DSM Directive"), in particular Article 13, later renumbered as Article 17, was controversial among many stakeholders[2] — including rightsholders[3] — throughout the process. Article 17 remains controversial after it was enacted by a narrow margin.

4. **The clear takeaway from the first hearing in this series of hearings on copyright law was that the 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?**

[2] *See, e.g.*, Don't Wreck The Net, https://dontwreckthe.net/#support (signed by more than a dozen startups); YouTube, #SaveYourInternet, https://www.youtube.com/saveyourinternet/ (featuring videos from independent artists and creators); Cory Doctorow, *History is made: petition opposing the EU's #Article13 internet censorship plan draws more signatures than any petition in human history*, Boing Boing (Mar. 5, 2019), https://boingboing.net/2019/03/05/no-filternets-nein.html (discussing petition of nearly 5 million users).

[3] *See, e.g.*, Letter, Creative Sectors Call for a Suspension of Negotiations on Article 13 (Jan. 15, 2019), *available at* https://www.politico.eu/wp-content/uploads/2019/01/Creative-Sector-Calls-for-a-Suspension-of-Negotiations-on-Article-13.pdf (signed by the Motion Picture Association and 13 other local stakeholders in the entertainment industries); Letter, European Creatives and Rightsholders Caution that New Draft of Article 13 Requires Urgent Changes in Key Areas (Jan. 17, 2019), *available at* https://assets.documentcloud.org/documents/5688826/17-Jan-2019-European-Creatives-and-Rightsholders.pdf (signed by 12 other local stakeholders in the entertainment industries, including recording and publishing).

Yes. As discussed in my testimony, the DMCA makes possible private sector cooperation that exceeds the DMCA's baseline. This provision of additional tools and services for content protection and monetization is sometimes referred to as "DMCA-Plus" because these systems exceed the requirements that businesses must meet to qualify for statutory protection under the DMCA.

DMCA-Plus systems are both resource- and information-intensive. Where digital services are able to commit resources to DMCA-Plus systems, rightsholder industries can provide accurate and reliable rights management information to facilitate the functioning of these systems.

5. **The European Union and the United Kingdom share many of our democratic values, and it would be useful to understand how tech companies have responded to the different laws in those jurisdictions.**

   a. **Is there a difference in how the technology has developed in response to the law in the U.S. as opposed to in the E.U. and the U.K.? What accounts for those differences?**

As stated above, the DMCA has allowed both the U.S. creative and technology industries to be world leaders. Empirical research has demonstrated that venture capital investors are encouraged by provisions in U.S. copyright law that limit liability for third-party content,[4] and U.S. copyright jurisprudence has encouraged greater investment in cloud computing technology in the U.S. than in the EU.[5] In contrast, less hospitable European jurisprudence has produced a less robust technology sector. European jurisdictions tend to regard free expression as a right to balance against other policy objectives, and are thus more willing to tolerate overblocking of content. Together, these factors have created a very different EU environment.

[4] Matthew Le Merle et al., *The Impact of Internet Regulation on Early Stage Investment* (Fifth Era 2014), http://www.fifthera.com/s/Fifth-Era-report-lr.pdf.

[5] *Compare* Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/lerner_fall2011_copyright_policy_vc_investments.pdf *with* Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), http://cdn.ccianet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf.

Mr. Matt Schruers
Copyright Law in Foreign Jurisdictions:
How Are Other Countries Handling Digital Piracy?
Hearing before the Senate Committee on the Judiciary
Subcommittee on Intellectual Property
March 10, 2020

QUESTIONS FROM SENATOR COONS

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?**

Section 512(j) represented an attempt by Congress to offer a remedy in this vein that provided adequate process and protection for all parties. Section 512(j) authorizes certain injunctive relief involving entities covered by 512(a), (b), (c), and (d). No-fault injunctive relief (i.e., site-blocking) is inherently in tension with the existing due process protections that are required under U.S. law, which Section 512(j) attempts to accommodate.[6] Federal courts have traditionally declined to enter remedies against innocent parties, as Federal Rule of Civil Procedure 65 requires "active concert or participation" to bind a non-party.[7] The precedential consequences of granting plaintiffs relief against innocent defendants with no meaningful connection to the party engaged in misconduct may be far-reaching.

While no-fault injunctive relief or site-blocking may reduce traffic to the domains blocked, this is not equivalent to meaningfully reducing piracy, and site-blocking also leads to overblocking of legitimate content and speech. As described in my written testimony, attempts at achieving this outcome in the United States via domain name seizures nearly a decade ago were abandoned after considerably burdening innocent third-party free expression. Jurisdictions that regard free expression as a right that must be balanced against other policy objectives, including Europe and the United Kingdom, may have a greater willingness to tolerate this overblocking. There are more effective, scalable ways to fight piracy, including by increased implementation of DMCA-like systems worldwide.

[6] By requiring courts to consider hardship on parties and to avoid restricting access to non-infringing materials, and by giving enjoined parties notice and opportunity to be heard, Section 512(j) takes into account both due process and free expression considerations. *See* 17 U.S.C. § 512(j)(2)-(3).

[7] Fed. R. Civ. P. 65(d)(2)(C). *See also Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

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?**

CCIA shares these concerns. Moreover, it is not possible for EU policymakers to mitigate these risks by attempting to enumerate all lawful and infringing categories of content in the implementation process. Rather, EU policymakers should implement the recent Directive to allow companies the flexibility to invest in human and algorithmic review mechanisms according to their resources. Content moderation is inherently challenging. The legitimacy of the use of a work may vary depending on the context, context which moderators both human and automated frequently lack. Content moderation by automation, and even human review, cannot determine with certainty what is fair use or public domain, nor is information publicly available to determine what works have been licensed for what uses. Only rightsholders possess the information of what licensees have the rights to do what, where, and when. That is why it is critical to maintain the current notice-and-takedown system, with a strong counter-notice process.

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?**

CCIA agrees that EU member state implementation of the DSM Directive is likely to lead to overblocking. The Directive's attempt to tailor obligations differently to different-sized services was designed to protect EU domestic industries, and is inconsistent with the stated legislative goals of combating online piracy. Moreover, this disincentivizes services from growing. U.S. technology exporters now face significant commercial uncertainty as a result of the Directive.

Notwithstanding many shared values between the United States and European Union, it is well-documented that much of the momentum behind the recent Directive arose from anti-American sentiment.[8] Policymakers therefore gave insufficient weight to concerns about

[8] *See* Axel Voss, *Protecting Europe's Creative Sector Against the Threat of Technology*, The Parliament Magazine (Feb. 5, 2019), https://www.theparliamentmagazine.eu/articles/opinion/protecting-europe%E2%80%99screative -sector-against-threat-technology (criticizing U.S. businesses specifically). This is also clear from statements made by MEPs following Parliament's adoption. *See, e.g.*, Pervenche Beres, June 20, 2018

overblocking that were raised at the time. In light of the well-documented takedown misuse (discussed in my testimony) that has resulted under the DMCA, Article 17's mandate is likely to result in considerable suppression of lawful content, including time-sensitive political speech, on U.S. services operating in Europe. CCIA does not support this controversial departure from U.S. law, to a so-called "notice-and-staydown" obligation, for similar reasons.

With respect to the proposed "less aggressive" provision, it is unclear whether all service providers could operationalize such a provision consistent with U.S. and EU privacy law. Assuming this were possible, it would appear to be inconsistent with Section 512(m)(1)'s provision that the DMCA does not impose an obligation upon services to continuously monitor their users. This proposal also may discount the fact that while one use of a work may be infringing, subsequent uses may be lawful.

("Bravo aux membres de #JURI qui ne sont pas tombés dans le piège tendu par les #GAFA et ont voté en faveur de la culture et de la création #art13"), https://twitter.com/PervencheBeres/status/1009365360234123264; Statement of Virgine Roziere, June 20, 2018 ("Directive #droitdauteur : après plusieurs mois de débats houleux marqués par un lobbying intense des #GAFAM, la commission #JURI du #PE s'est enfin prononcée en faveur d'une réforme qui soutient les #artistes européens et la #création ! Une avancée pour mettre fin au #Valuegap !"), https://twitter.com/VRoziere/status/1009383585885892609. One European Commission statement made expressly clear that the DSM Directive was targeted at "the big California companies" before it was deleted. *See archived version at* http://web.archive.org/web/20190215114522/https://medium.com/@EuropeanCommission/the-copyright-directive-how-the-mob-was-told- to-save-the-dragon-and-slay-the-knight-b35876008f16.

Mr. Matt Schruers
Copyright Law in Foreign Jurisdictions:
How Are Other Countries Handling Digital Piracy?
Hearing before the Senate Committee on the Judiciary
Subcommittee on Intellectual Property
March 10, 2020

QUESTIONS FROM SENATOR TILLIS

1. **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? Which do you think could improve our system for curbing online piracy?**

Lack of harmony in enforcement systems around the world limits U.S. services' export opportunities. While larger firms may be able to manage inconsistent regulatory models in different countries, this asymmetry forces smaller firms to pick and choose which markets they can do business in.

Empirical research has demonstrated that other governments' alternative enforcement systems have not been as successful in reducing piracy.[9] Instead, as discussed in my testimony, providing lawful alternatives helped reduce infringement in those countries.[10] The U.S. system is the best approach of which CCIA is aware, thanks to Congress' prescience enacting the DMCA. The balance inherent in the DMCA has contributed to the U.S. being a leader in innovation. It is critical to maintain this flexibility to allow new voluntary initiatives to develop, as well as to provide access to diverse sources of legitimate digital content.

2. **You talked about section 512(j) in the context of site-blocking. Why in your opinion has this provision been rarely utilized? What amendments to section 512(j) would be needed to make it equivalent to the "no-fault injunctions" that the Motion Picture Association talked about in countries like the UK?**

It is unclear why rightsholders underutilize Section 512(j). Rightsholder constituencies focused on digital enforcement are best equipped to explain why they decline to use the protections offered by this subsection. CCIA does not support amending Section 512(j) to

[9] Michael Ho, Joyce Hung, & Michael Masnick, *The Carrot or the Stick? Innovation vs. Anti-Piracy Enforcement* (Copia Inst., Oct. 2015), https://copia.is/library/the-carrot-or-the-stick/.

[10] *See, e.g.*, Will Page, *Adventures in the Netherlands*, Spotify (July 17, 2013), http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands; Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, The Telegraph (July 18, 2013), http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html.

resemble UK law. In addition to reopening the DMCA, such a proposal appears to contemplate fundamental changes to due process protections, including those embodied in Federal Rule of Civil Procedure 65. Accordingly, proponents of the UK model are best equipped to articulate why and how U.S. law should be changed to resemble the British approach.

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

CCIA is aware that some jurisdictions have adopted notice-forwarding models, including Canada, whose system is described in authorities cited in section III.A, note 14, of my testimony. Because this approach will scale with the number of users, it may provide a more proportionate burden on smaller service providers.

The DSM Directive contains certain exceptions for smaller businesses and startups.[11] Article 17(6) attempts to mitigate some of this burden for smaller ISPs that have been in business "for less than three years and which have an annual turnover below" 10 million euros. These ISPs are exempted from some (but not all) of the Directive's sweeping "best efforts" mandate. However, once these platforms average over five million unique visitors a month, they must also demonstrate best efforts to prevent future uploads of protected content. Implementation of the Directive and its requirements of "best efforts" is likely to disproportionately disadvantage smaller businesses and rightsholders in the marketplace.[12]

Despite this attempt to minimize the burden on smaller services, there is still a serious risk that the system imposed by Article 17 will stifle the development of new platforms. Numerous EU-based online companies complained to the Parliament that small and medium-

[11] Press Release, European Parliament, European Parliament approves new copyright rules for the internet (Mar. 26, 2019), https://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet ("The text also specifies that uploading works to online encyclopedias in a non-commercial way, such as Wikipedia, or open source software platforms, such as GitHub, will automatically be excluded from the scope of this directive. Start-up platforms will be subject to lighter obligations than more established ones."); Press Release, European Parliament, Questions and Answers on issues about the digital copyright directive (Mar. 27, 2019), https://www.europarl.europa.eu/news/en/press-room/20190111IPR23225/questions-and-answers-on-issues-about-the-digital-copyright-directive ("This would exclude wikipedia, GitHub, dating sites, Ebay and numerous other types of platforms for example.").

[12] Compliance with the Directive is likely to distort online markets toward those services capable of shouldering extreme regulatory burdens and those with significant negotiating power and becoming a barrier to entry that harms small companies' ability to scale up in Europe. Victoria de Posson, *What should be considered as "best efforts" to prevent the availability of copyright-protected material?*, Disruptive Competition Project (Feb. 10, 2020), http://www.project-disco.org/european-union/021020-best-efforts-to-prevent-the-availability-of-copyright-protected-material/.

sized enterprises, unlike larger platforms, could not afford to develop or deploy automated content recognition technologies that would be required by the Directive.

Regardless of whether the DSM Directive successfully carved out small EU businesses, this attempt to protect domestic industries from regulations aimed at U.S. exporters is inconsistent with the legislative goals of combating online piracy, and disincentivizes growth.

4. **One big issue that notice-and-takedown seems poorly suited for dealing with is piracy of live sports and other live events. Court-ordered site-blocking may also be too slow for real relief with live events. What is the solution to this issue?**

As stated in CCIA's testimony, providing lawful, affordable, convenient alternatives to piracy can mitigate incentives to infringe.[13] With respect to enforcement, CCIA is aware of rightsholders obtaining prompt injunctive relief against the infringement of live sporting events online.[14] Notice-and-takedown (and DMCA-Plus implementations like YouTube's Content ID and Facebook's Rights Manager) is utilized for live event content, and while mistakes can be made in the takedown process,[15] these more granular solutions are better suited for this context than court-ordered site-blocking. In response to concerns raised in relation to live events, some services have provided additional DMCA-Plus tools for live events and given priority to takedown requests involving live events.

The DMCA's balance of obligations and protections for rightsholders, services, and users has enabled businesses to constantly calibrate their responses to thwart new piracy techniques without the negative impact on speech. The flexibility in the DMCA that allows for companies to innovate and collaborate is essential, as bad actors are constantly adapting to take advantage of both rightsholders and new technology.

---

[13] *See, e.g.*, Will Page, *Adventures in the Netherlands*, Spotify (July 17, 2013), http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands; Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, The Telegraph (July 18, 2013), http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html.

[14] *See, e.g.*, The Irish Times, C*ourt orders block on illegal streaming of English football matches* (July 15, 2019), https://www.irishtimes.com/news/crime-and-law/courts/high-court/court-orders-block-on-illegal-streaming-of-english-football-matches-1.3957365 (noting streaming would be "targeted in real time" under an injunctive relief order; the IP "addresses of the streaming hosts [could] be updated at least twice during match time so that blocking [could] be enabled"; and it would "be possible to respond 'within minutes' to the illegal streaming").

[15] Matthew Keys, *CBS News prevents Bernie Sanders from streaming own speech*, The Desk (Mar. 3, 2020), https://thedesk.matthewkeys.net/2020/03/cbs-news-showtime-twitter-facebook-bernie-sanders-bloomberg/; Mike Masnick, *Bogus Automated Copyright Claims By CBS Blocked Super Tuesday Speeches By Bernie Sanders, Mike Bloomberg, and Joe Biden*, Techdirt (Mar. 4, 2020), https://www.techdirt.com/articles/20200303/21140544029/bogus-automated-copyright-claims-cbs-blocked-super-tuesday-speeches-bernie-sanders-mike-bloomberg-joe-biden.shtml.