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?**

The DMCA was negotiated starting in the mid-1990s. As Representative Howard Coble observed when introducing the DMCA in the House, the DMCA "essentially codifie[d] the result" in what was considered, at the time, "the leading and most thoughtful judicial decision to date; *Religious Technology Center v. Netcom On-line Communications Services, Inc.*"[1] In the years that followed, other courts continued to look to the facts of *Netcom* to adjudicate DMCA cases.[2]

This 1995 decision, while well-reasoned, addressed technology that was already practically obsolete at the time. In that case, Dennis Erlich, a critic of the Church of Scientology, had posted messages containing copyrighted Church writings to a discussion forum service known as Usenet. In this system, messages were distributed by a set of discrete steps, rather than the seamless and instantaneous communication that today's users enjoy. The problem was a particular user, posting particular files.

The *Netcom* framework, and the DMCA, were designed to address 20th Century online infringement. In this paradigm of online infringement, ordinary court processes were almost, but not quite, quick enough to effectively block the spread of an infringing file. Copyright owners needed a little more time than the several days it would take to go to court to stop the spread beyond a point where it could be easily contained. The DMCA stepped into this perceived breach with the Section 512 notice and takedown system. As Professor Bruce Boyden observed, it was intended as a quick, "but temporary, substitute for going into court and getting a temporary restraining order."[3]

The DMCA is thus built for an era and a problem long gone. First, the DMCA's file-based containment strategy is hopelessly outdated. Copyright owners are not worried about a particular user uploading a particular infringing *file*. The problem is the non-stop, widespread copying and uploading of creative works by many users. Finding and removing a particular file is usually worthless, as it is likely that many other copies of that work – whether embodied in that file or a different one -- are being posted simultaneously. On many of today's most notorious websites, finding a particular file would be like looking for a needle in a haystack of infringing files.

[1] 144 Cong. Rec. E160 (Daily Ed. Feb. 12, 1998) (Remarks of Rep. Coble introducing the On-Line Copyright Liability Limitation Act); see also H. Rept. 105-551, 11 (1998).
[2] See, e.g., CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004).
[3] Bruce Boyden, The Failure of the DMCA Notice and Takedown System (CPIP 2013), https://cpip.gmu.edu/2013/12/05/the-failure-of-the-dmca-notice-and-takedown-system-2/

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?**

   Other witnesses at the hearing who were present at the creation of the DMCA provided excellent context, particularly Steve Metallitz. As I observe in my answer to question 1, *Religious Technology Center v. Netcom On-line Communications Services, Inc.* was key to the development of the DMCA.

   The type of online infringement that the DMCA and *Netcom* addressed was very much a product of the technology available at the time. When a particular user posted a particular file, it spread slowly (at least it did in the early to mid-90s). The DMCA sought to address and contain such specific acts of infringement rather than the problem of massive, persistent infringement that exists today.

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?**

   Yes, it does appear that online services are comfortable with the status quo and have little incentive to negotiate. Cases such as *Capitol Records v. Vimeo* have made it safe to build services where consumers can reliably find infringing material and the service providers are "safe" so long as they mind the letter of their obligations under the DMCA.

   At the least, Congress should encourage parties to work together as envisioned by 512(i) to establish Standard Technical Measures. Technology such as Audible Magic and Content ID have long existed but are not treated as standards.

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, I agree, and I discussed this problem in my testimony and written statement. Anyone who builds a business profiting from directly distributing the work of others ought to have a responsibility to protect it. In particular, the largest, wealthiest, and most technologically capable companies could lead the way in pioneering solutions and creating standards. If

they had done so, we might today have off-the-shelf solutions for smaller actors to manage and prevent infringement as envisioned in 512(i).

In the 1990s, Congress sought to protect the promise of the Internet. That promise has been realized, and online services are no longer infant industries. Offline businesses have duties to others that still do not impose on online industries. There is no longer a rationale to treat them as exceptions.

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

The digital age poses practical challenges of a degree and kind that were unforeseen -- or at least hard to comprehend when the DMCA was enacted. By the mid to late 1990s, even well-informed laypeople expected bandwidth to get cheaper and faster, gadgets to become easier to use and more widely available, and more content to be put online. However, until the experience was lived, it was hard to really comprehend, or legislate for, the world in which we live. Today's speed and ubiquity of internet connections and digital content would have astounded most people if they were shown it all at once.

Surely nobody anticipated the existence of *billions* of infringing files identified by *billions* of DMCA takedown notices, with certainly countless more files unidentified. If stakeholders had an inkling of what was to come, the DMCA debate would have looked a lot different. Few if any would have been sanguine about the prospect of wasting massive amounts of resources on an unproductive game of notice and takedown whack-a-mole.

Beyond that, the challenges have proved to be of a different kind. The social and ideological interest that many individuals have in uploading infringing content is an unanticipated challenge. While one would have expected that people would download free content, few if any would have expected so many ordinary individuals would go to such trouble to supply it. File "sharing" and social media have shown us that at least some individuals seem to enjoy the status or notoriety that come from "likes," "re-tweets," or the simple knowledge that they posted a file. It is also a boon to business models that depend on user supplied content, such as YouTube. People foresaw commercial pirate sites, as well as forums sites where traded infringing files, and legitimate sites where people occasionally uploaded infringing files. They hardly anticipated large businesses such as YouTube built in part on individuals' desire to supply other people's copyrighted content on a massive scale.

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?

The Senate Report on the DMCA documents who participated.[4] The representatives of larger companies, institutions, and trade associations dominated the discussion. Individual creators and small businesses often do not have time or the resources to participate, and at the time, there was not yet an organization such as the Copyright Alliance to speak for them.

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?

It is my understanding that the DMCA as enacted was supposed to provide a safe harbor for good faith actors, but otherwise leave in place traditional principles of liability for infringement. I believe that Congress did not want to create a system that placed all the burdens on copyright owners to identify infringement and excused service providers from every duty except to respond to specific notices of infringement regarding specific files. Congress rightly recognized that such a system would be unbalanced, unfair, and would represent an extraordinary departure from traditional principles of tort liability.

Unfortunately, that is the system we essentially now have because the courts have gutted red flag liability.

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?

As discussed in my statement and testimony, the courts have undermined Congress's intent by interpreting red flag knowledge in a way that defies both the common understanding of knowledge and the legal understanding applied in other contexts.

Under *Capitol Records v Vimeo*, employees can work with the content on their website in detail, viewing it, interacting with it, and generally being aware of what is there, but can avoid exposing their employer to liability so long as they remain willfully blind to its copyright status. So far as they know, that video or song could be excused fair use or licensed – even if unlikely, they cannot be sure. As the Second Circuit said, the "ordinary reasonable person . . . is not an expert in music or the law of copyright."

The problem with such a standard is that it defines "knowledge" differently from its common meaning or legal meaning in other contexts. The ordinary consumer knows quite

[4] *https://www.congress.gov/105/crpt/srpt190/CRPT-105srpt190.pdf*

well that it can go to such sites as an alternative to paying for it. In other legal contexts, we do not excuse companies and individuals from liability because they are not experts in such bodies of law as antitrust or employment discrimination, nor do we allow them to turn a blind eye to bad behavior in their own workplace.

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?**

   The analogy was imperfect 22 years ago. Today, it likely needs to be revisited as they provide services far more comprehensive than acting as "pipes" or "wires," providing content themselves, applications, serving advertising, and other activities in which telecom providers never engaged.

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?**

    Yes. Such systems show that the law, business processes, and technology could have developed in sensible ways to combat copyright infringement, absent the DMCA. Today, businesses should be held to a standard to use commercially reasonable efforts to combat infringement, particularly if they profit from it or base their business on supplying others' content. Trademark enforcement points to the possibilities,

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?**

    The system is broken, particularly for small businesses and individuals, many of whom have given up. It is an unproductive use of resources. In my written statement, I described instances where individual creators and small businesses have described the futility of trying to cope with the volume of infringement. Some have given up not only on enforcement, but also on investing in their creativity.

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?**

    ISPs are in a good position to educate users, given their continuous connection to users. During the course of these hearings, at the very least it would be useful to explore ways to

encourage greater voluntary efforts and more cooperation between ISPs and copyright owners to educate users.

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?**

I suggest two things:

First, Congress could amend the Section 512 safe harbors to require the implementation of a "notice and *stay-down*" system. Once a service provider receives a takedown notice for a given work, it should be held to a higher standard than only needing to react to notice of a particular file. It should monitor for re-posted copies of the same work (not the identical file, but the work) and take down copies pro-actively. All parties would benefit, at least in terms of obtaining legitimate savings and revenue, as there would be fewer notices to send and deal with, and less infringing material. such a system.

Second, the DMCA's red flag provisions need to be revised to achieve their original intent. At the very least, businesses should not be allowed to institute an official or de facto policy of willful blindness, where employees have a perverse incentive to avoid learning too much, and thus to do anything to police a site's contents. Under cases such as *Vimeo,* a service provider can build a business model that depends on openly and notoriously hosting infringing content, so long as that content is posted by users. The service provider simply must respond expeditiously to take down files for which it receives a specific DMCA takedown notice—but only those specific files. Under this model, its employees need only avoid actively further screening for or policing infringement in order to avoid specific knowledge of infringement (or reducing the presence of attractive infringing content on its site). They can maintain a "hear, speak, and see no evil" policy when it comes to infringement, but can tolerate the evil of infringement.

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?**

It would be useful for the Report to address the unfortunate evolution in case law regarding "red flag" knowledge.

Professor Mark F. Schultz –
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. **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." Has this cooperation worked in practice as Congress envisioned it should in connection with both Section 512 and 1201 of the DMCA? Why or why not?**

   The experience regarding the two different statutory sections has been quite different. That fact is unsurprising, given that they were two very different laws, motivated by different concerns and structured quite differently.

   Regarding Section 1201, there has been effective interindustry cooperation, which has resulted in solutions such as copy protection for DVDs and BluRay discs. One reason for this cooperation is that the law prohibits circumvention of technological protection measures, but also sets up the triennial rulemaking process, which creates an opportunity to seek exceptions. This statutory scheme creates incentives for parties to cooperate by creating an enforceable obligation to comply along with a "safety valve" to address instances where that obligation is counterproductive. Concerned parties have reason to talk and to cooperate.

   There are also sound business reasons for interindustry cooperation under Section 1201. The creative industries do not want to use TPMs to completely lock people out of their works, any more than a retail store would want to lock its doors to permanently bar the public. The creative industries and consumer electronics manufacturers need each other. People will only buy entertainment devices if there is creative content to enjoy on them, and they will only buy creative content if there are devices on which to enjoy that content.

   By contrast Section 512, particularly as it has been interpreted by the courts, has failed to create legal incentives to cooperate and has undermined cooperative business models. While Section 1201 encourages parties to talk, communication under Section 512 centers mostly on DMCA takedown notices, with each one addressing a discrete set of obligations for the content owner to identify a specific file and a service provider to take down that specific file.

   The takedown notice scheme addresses individual files, rather than the heart of the problem, which is unrelenting re-posting of and infringement of creative works. The lack of effective enforcement of the red flag standard enables service providers to purposely build "catch me if

you can" business models that rely on the delays and impracticability inherent in the file-by-file notice and takedown process to make infringing material available to consumers on a persistent and constant basis. Individual files come and go, but the infringing material is always there to find.

So long as the law, as interpreted by the courts, allows for such a business model, there is no reason for service providers to cooperate. It would be bad business to do so. Or if they do cooperate, it is on their terms, offering creators the choice of accepting miniscule licensing fees or continuing to play the futile notice and takedown game.

2. The internet and digital content distribution mechanisms have changed drastically in the past 22 years. What technological and practical challenges exist today that may require revising the DMCA, and what revisions would you suggest?

The world was rapidly changing even as the DMCA was enacted. It was never really up to the task of controlling online infringement. Today, it is even less effective and relevant to current conditions. Consider the contrasts between the internet and online infringement circa 1998 and the internet and online infringement today[1]:

1998, the year the DMCA passed	**Online Infringement Today**
Fewer than 3 million pages.	Over 6.4 billion pages[2]
Most users on home dialup, and a single song took 10 minutes or more to download.	Users connect from multiple super-fast mobile, home wi fi, and public networks, and a song takes seconds to download.
Online infringement likely started with a particular user, uploading a particular file.	Online infringement occurs constantly as many users and systems upload many different copies of the same work.
Online copyright infringement often spread through the relatively slow, methodical copying of a particular file from one computer to another.	Files spread quickly and simultaneously from many users and sources.
If copyright owners caught and contained an outbreak quickly enough, they could stop the spread of the file and save it from "escaping" into the broader world.	Infringement is a chronic problem that can be suppressed, reduced, and managed, but never fully contained.

[1] This table and other portions of this testimony owe a debt to the ideas and content in an earlier paper that I co-authored, A. Abbott, et al., *Creativity and Innovation Unchained: Why Copyright Law Must be Updated for the Digital Age by Simplifying It*, Regulatory Transparency Project of the Federalist Soc'y (Oct. 27, 2017). https://regproject.org/paper/creativity-innovation-unchained-copyright-law-must-updated-digital-age-simplifying/.

[2] https://www.worldwidewebsize.com

Service providers were likely to be more or less indifferent intermediaries that did not derive any great value from infringement.	Many popular and lucrative legal services are built to host user-posted content and benefit greatly from the presence of attractive infringing material.
Infringement notices in the hundreds, at most.	Infringement notices in the billions.

The DMCA is based on an outdated assumption that online infringement is a problem that can be controlled file-by-file, notice-by-notice. The speed and scale with which things happen makes this approach almost pointless.

For these reasons, I suggest two things:

First, Congress could amend the Section 512 safe harbors to require the implementation of a "notice and *stay-down*" system. Once a service provider receives a takedown notice for a given work, it should be held to a higher standard than only needing to react to notice of a particular file. It should monitor for re-posted copies of the same work (not the identical file, but the work) and take down copies pro-actively. All parties would benefit, at least in terms of obtaining legitimate savings and revenue, as there would be fewer notices to send and deal with, and less infringing material. such a system.

Second, the DMCA's red flag provisions need to be revised to achieve their original intent. At the very least, businesses should not be allowed to institute an official or de facto policy of willful blindness, where employees have a perverse incentive to avoid learning too much, and thus to do anything to police a site's contents. Under cases such as *Vimeo*, a service provider can build a business model that depends on openly and notoriously hosting infringing content, so long as that content is posted by users. The service provider simply must respond expeditiously to take down files for which it receives a specific DMCA takedown notice—but only those specific files. Under this model, its employees need only avoid actively further screening for or policing infringement in order to avoid specific knowledge of infringement (or reducing the presence of attractive infringing content on its site). They can maintain a "hear, speak, and see no evil" policy when it comes to infringement, but can tolerate the evil of infringement.

3. Professors Litman and Tushnet raise concerns regarding Section 1201's anti-circumvention provisions for their lack of copyright infringement nexus. Do you agree with those concerns?

This criticism conflates providing security that prevents the opportunity for infringement with the standard for infringement itself. Metaphorically, it would be like barring a retailer from locking its doors at night, or the law condoning the sale of lockpicks, unless the retailer first can show that it seeks to prevent theft rather than locking its doors to a health inspector or a competitor who wants to check prices.

Exceptional behavior, such as attempting to use Section 1201 to prevent the use of third-party toner cartridges, should not undermine the commonsense rule of Section 1201. The courts, the triennial rulemaking process, and Congress have addressed such anomalous cases effectively.

4. **Professors Litman and Tushnet suggest that a duty to monitor all user-posted content would stifle online providers. Would you support a middle ground that would require service providers to ensure that once infringing content has been removed pursuant to Section 512's notice-and-takedown procedure, the same user cannot repost the same content on any platform controlled by that provider?**

   I do not believe that anybody is suggesting "a duty to monitor all user-posted content." Rather, I suggest that a duty to screen for particular infringing content, using commercially reasonable means, should arise once a service provider is aware that a copyright owner objects to the posting of a particular work.

   Screening for content need not be stifling, particularly if such a duty is conditioned on commercial reasonableness. It could be done using tools such as Content ID and Audible Magic that already exist and are readily available. Such tools likely would be even more available and competitive if a market existed because a duty existed.

   The argument made at the hearing that screening technology is impracticable because it was developed at some initial expense and is not necessarily fully reliable is not convincing. The applications and services on which online services rely such as web development, site hosting, and e-commerce applications were once developed from scratch at great expense and were less than fully reliable. Today, they exist as cheap, reliable, off-the-shelf applications available to all. Similarly, screening technology already exists and is deployed in many contexts. It is far past its early, expensive stage in development, and we can expect it to follow the same trajectory as other applications. And the law need not require services to do more than is commercially reasonable at any given time.

   Focusing on individual users posting the same files would not be a middle ground – it would not really shift the problem a single inch. Since the advent of file-sharing over twenty years ago through Napster, the problem of online infringement has not been created by particular files or particular users. Rather, it is a problem of creative works being copied by many users who post many files at a massive and persistent scale. Chasing individual users and individual files cannot stem the tide of infringement. It would be a mid-1990s solution to a 21st Century problem.

5. **In exchange for the safe harbor protections of Section 512, the DMCA established an online service provider duty to remove infringing content even without the input from copyright owners when faced with actual or red flag knowledge of infringement. Has the case law supported the intent of Congress in incentivizing service providers to be proactive when red flag knowledge exists? Your testimony and Professor Aistars's testimony suggest that it has not, while the testimony of Professors Litman and Tushnet paints a very different picture. How do you reconcile these conflicting narratives?**

   Section 512 was indeed a compromise that was supposed to work for both sides. The fact that it is so clearly not working for copyright owners indicates that balance needs to be restored.

Cases such as *Capitol Records v. Vimeo* have destroyed any balance by destroying any incentive for service providers to correct open and notorious infringement on their sites.

Under *Vimeo*, employees can work with the content on their website in detail, viewing it, interacting with it, and generally being aware of what is there, but can avoid exposing their employer to liability so long as they remain willfully blind to its copyright status. So far as they know, that video or song could be excused fair use or licensed – even if unlikely, they cannot be sure. As the Second Circuit said, the "ordinary reasonable person . . . is not an expert in music or the law of copyright."

The problem with such a standard is that it defines "knowledge" differently from its common meaning or legal meaning in other contexts. The ordinary consumer knows quite well that it can go to such sites as an alternative to paying for it. In other legal contexts, we do not excuse companies and individuals from liability because they are not experts in such bodies of law as antitrust or employment discrimination, nor do we allow them to turn a blind eye to bad behavior in their own workplace.

6. Professor Aistars testified that students in her clinic who went through the process of addressing online infringement on behalf of copyright owners found the process "confusing and frustrating." How can the notice-and-takedown process be improved, particularly for small creators? Would you recommend standardizing the process across service providers? If so, who should be responsible for establishing and enforcing those standards?

Such a process would greatly help. While I will defer to Professor Aistars' experience and recommendations, I note that this process is very burdensome for individual creators.

Several years ago, the Trichordist blog detailed burdens on an indie record label.[3] "Just about a year after hiring two part time people, to do nothing else but issue DMCA takedown notices we've crossed the 50,000 notice milestone. The division of labor requires one person just to monitor YouTube, and another handles all DMCA compliant sites such as CyberLockers, Torrent Search Engines, etc. . . . Most of the take downs are for the same title, at the same site, the same day. Day after day during the initial release period of the album (generally the first 60-90 days) it is a constant game of whack-a-mole."

This small record label employed two full-time employees just to send the same notices to the same sites about the same content over and over again. This was hardly a good use of resources, and more recent reports say this kind of investment is less common, not because infringement has fallen off, but because many small players have given up either trying to enforce their rights or investing in commercial creativity entirely.

[3] https://thetrichordist.com/2012/07/18/the-dmca-is-broken/

For example, indie, LGBTQ filmmaker Ellen Seidler turned into an anti-piracy crusader after her film "And Then Came Lola" was widely pirated. When asked of her interest in funding another film, she said "Well, there's no way financially I could do it, nor would I want to."[4]

Six years ago, Grammy-winning jazz artist Maria Schneider testified in a hearing before the House. She expressed her frustration with the amount of time she spends sending DMCA notices, rather than making music: "The majority of my time is now spent simply trying to protect my work online, and only a small fraction of my time is now available for the creation of music. So instead of the Copyright Act providing an incentive to create, it provides a disincentive."[5]

[4] https://musictechpolicy.com/2012/01/02/the-mtp-interview-indie-film-maker-ellen-seidler-on-how-us-companies-profit-from-piracy-on-rogue-websites/
[5] https://vimeo.com/89327769

Questions for the Professor Mark F. Schultz
From Senator Mazie K. Hirono

1. The members of the first panel testified regarding the goals the DMCA was supposed to achieve.

   a. In your view, is the DMCA currently working to achieve these goals?

   b. In light of changes in technology since 1998, are the goals expressed by our first panel still valid or should the DMCA be reevaluated completely?

   In answer to both questions, while Section 1201 still functions well, section 512 is based on outdated premises and the times have long since passed it by. The DMCA was negotiated starting in the mid-1990s. As Representative Howard Coble observed when introducing the DMCA in the House, Section 512 "essentially codifie[d] the result" in what was considered, at the time, "the leading and most thoughtful judicial decision to date; *Religious Technology Center v. Netcom On-line Communications Services, Inc.*"[1] In the years that followed, other courts continued to look to the facts of *Netcom* to adjudicate DMCA cases.[2]

   This 1995 decision, while well-reasoned, addressed technology that was already practically obsolete at the time. In that case, Dennis Erlich, a critic of the Church of Scientology, had posted messages containing copyrighted Church writings to a discussion forum service known as Usenet. In this system, messages were distributed by a set of discrete steps, rather than the seamless and instantaneous communication that today's users enjoy. The problem was a particular user, posting particular files.

   The *Netcom* framework, and the DMCA, were designed to address 20th Century online infringement. In this paradigm of online infringement, ordinary court processes were almost, but not quite, quick enough to effectively block the spread of an infringing file. Copyright owners needed a little more time than the several days it would take to go to court to stop the spread beyond a point where it could be easily contained. The DMCA stepped into this perceived breach with the Section 512 notice and takedown system. As Professor Bruce Boyden observed, it was intended as a quick, "but temporary, substitute for going into court and getting a temporary restraining order."[3]

   The DMCA is thus built for an era and a problem long gone. First, the DMCA's file-based containment strategy is hopelessly outdated. Copyright owners are not worried about a particular user uploading a particular infringing *file*. The problem is the non-stop, widespread copying and uploading of creative works by many users. Finding and removing a particular file is usually worthless, as it is likely that many other copies of that work –

[1] 144 Cong. Rec. E160 (Daily Ed. Feb. 12, 1998) (Remarks of Rep. Coble introducing the On-Line Copyright Liability Limitation Act); see also H. Rept. 105-551, 11 (1998).
[2] See, e.g., CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004).
[3] Bruce Boyden, The Failure of the DMCA Notice and Takedown System (CPIP 2013), https://cpip.gmu.edu/2013/12/05/the-failure-of-the-dmca-notice-and-takedown-system-2/

whether embodied in that file or a different one -- are being posted simultaneously. On many of today's most notorious websites, finding a particular file would be like looking for a needle in a haystack of infringing files.

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."

   Is this "cooperation" between service providers and copyright owners currently working? If not, what caused the DMCA to fail in this regard?

Section 512, particularly as it has been interpreted by the courts, has failed to create legal incentives to cooperate and has undermined cooperative business models. Section 512 centers mostly on DMCA takedown notices, with each one addressing a discrete set of obligations for the content owner to identify a specific file and a service provider to take down that specific file.

The takedown notice scheme addresses individual files, rather than the heart of the problem, which is unrelenting re-posting of and infringement of creative works. The lack of effective enforcement of the red flag standard enables service providers to purposely build "catch me if you can" business models that rely on the delays and impracticability inherent in the file-by-file notice and takedown process to make infringing material available to consumers on a persistent and constant basis. Individual files come and go, but the infringing material is always there to find.

So long as the law, as interpreted by the courts, allows for such a business model, there is no reason for service providers to cooperate. It would be bad business to do so. Or if they do cooperate, it is on their terms, offering creators the choice of accepting miniscule licensing fees or continuing to play the futile notice and takedown game.

3. Section 512 of the DMCA seems to have created a one-size-fits-all world where copyright owners have to police their content online by searching for pirated copies and notifying online service providers of their existence—no matter the size or sophistication of the online service provider. While a system like that may have made sense in 1998, I wonder if it is still appropriate today when certain online service providers are among the biggest, most profitable companies in the world.

    a. **Should all online service providers be treated equally with regard to policing copyrighted content or would it be better to apply a sliding scale based on a provider's size and sophistication?**
    b. **How can Congress make sure that big players like Google, Facebook, and others are taking appropriate steps to proactively search for and remove copyrighted content without overburdening small companies?**

In answer to both questions:

Every online service provider should have the same fundamental duties to respect the property rights of others. In particular, they should not be able to build businesses that purposefully make infringing content available to consumers while maintaining willful blindness to infringement. Under cases such as *Capitol Records v. Vimeo,* a service provider can build a business model that depends on openly and notoriously hosting infringing content, so long as that content is posted by users. Under this model, its employees need only avoid actively further screening for or policing infringement in order to avoid specific knowledge of infringement (or reducing the presence of attractive infringing content on its site). They can maintain a "hear, speak, and see no evil" policy when it comes to infringement, but can tolerate the evil of infringement.

Even a small business operating in this manner can do great damage. Twenty years ago, Napster undermined the music industry. It was initially small and unprofitable and never really thrived as a business. But it facilitated a vast amount of infringement, eventually being shut down by the courts.

I suggest two solutions:

First, Congress could amend the Section 512 safe harbors to require the implementation of a "notice and *stay-down*" system. Once a service provider receives a takedown notice for a given work, it should be held to a higher standard than only needing to react to notice of a particular file. It should monitor for re-posted copies of the same work (not the identical file, but the work) and take down copies pro-actively. All parties would benefit, at least in terms of obtaining legitimate savings and revenue, as there would be fewer notices to send and deal with, and less infringing material. such a system.

Second, the DMCA's red flag provisions need to be revised to achieve their original intent. At the very least, businesses should not be allowed to institute an official or de facto policy of willful blindness, where employees have a perverse incentive to avoid learning too much, and thus to do anything to police a site's contents. Under cases such as *Vimeo,* a service provider can build a business model that depends on openly and notoriously hosting infringing content, so long as that content is posted by users. The service provider simply must respond expeditiously to take down

files for which it receives a specific DMCA takedown notice—but only those specific files. Under this model, its employees need only avoid actively further screening for or policing infringement in order to avoid specific knowledge of infringement (or reducing the presence of attractive infringing content on its site). They can maintain a "hear, speak, and see no evil" policy when it comes to infringement, but can tolerate the evil of infringement.

However, when it comes to greater affirmative duties to filter and screen content, such as under a notice and staydown regime, it may make sense to take account of a business's size and its for-profit status. Congress has experience with doing so under a variety of statutory schemes, and this might be an equitable solution. Alternatively, a standard of commercial reasonableness may account for the size and capabilities of businesses.

Finally, I was intrigued to hear during the hearing that Professor Tushnet's non-profit, the Organization for Transformative works, addresses about one DMCA complaint a month for its website Archive of Our Own ("AOO") https://archiveofourown.org. That website hosts millions of works of fanfiction, which are unauthorized[4] amateur works based on other people's copyright works, for example, movies such as the Avengers or books such as Harry Potter. The stories sometimes depict controversial content some creators might find objectionable, such as intimate relationships between the heroes and villains of such stories. Given these facts, if asked to guess how many DMCA notices AOO received, I would have expected a larger number.

While the experience of one unique, carefully-managed non-profit website may not be representative, it likely says something about how creators and the copyright industries choose to use the DMCA. Their interest is in not stifling free expression or the creativity of fans. Rather, they seek to prevent others from profiting from their creative works by building platforms tolerate encourage infringement on a massive scale.

Surely, small businesses and amateur sites acting in good faith can be accommodated without leaving creators with no effective solution against large, profitable companies that exploit the DMCA to avoid responsibility for profiting from infringement.

[4] These works are tolerated in many instances, but not officially sanctioned, at least not on an individual basis.