

**Statement of
Senior Judge Edward J. Damich
Before the Subcommittee on the Judiciary
Of the United States Senate
On the Enactment of the Digital Millennium Copyright Act
February 11, 2020**

Mr. Chairman, I am honored to appear before you and the other members of this distinguished Subcommittee to begin the process of the reevaluation of the Digital Millennium Copyright Act (DMCA) by sharing my recollection of how the bill became law and of what lay behind some of the decisions that were taken regarding the most important provisions of the Act. At the time of its enactment I was Chief Intellectual Property Counsel of the Senate Judiciary Committee. It became law in 1998—over 20 years ago—when I was a callow youth of 50—so I beg the indulgence of the Subcommittee members if my memory should falter a little.

I became Chief IP Counsel in August 1995, hired by Senator Orrin Hatch (R-UT), who was Chairman of the Judiciary Committee. I was ably assisted by Troy Dow and Steve Tepp, both of whom have gone on to distinguished careers in the intellectual property field.

Before I arrived, Senator Hatch had taken the unusual step of putting intellectual property issues on the full committee level. As I came to understand, he did this for two reasons: (1) the significance of intellectual property to the U.S. economy and (2), in the field of copyright, to address the challenges posed by digital technology in general and, specifically, by the internet.

At the time, the Clinton Administration had become similarly motivated. Under the leadership of Bruce Lehman, the Patent and Trademark Office (PTO), had drafted a legislative proposal, called the White Paper, which laid out its view of what was then called the “National Information Infrastructure” (NII). Although he did not agree with everything in the White Paper, Senator Hatch felt that the issues identified and the concepts embodied in it deserved to be debated seriously. Therefore, he introduced the NII Copyright Protection Act on September 28, 1995, with Senator Patrick Leahy, the then Ranking Member of the Committee. The next day, Congressman Carlos Moorhead introduced identical legislation in the House of Representatives, with Congresswoman Pat Schroeder.

A series of hearings was held by both houses of Congress, but it soon became clear that the major obstacle to enactment was the issue of copyright infringement on the internet, in particular, the liability of internet service providers for copyright infringement by their users. Despite the efforts of the House subcommittee charged with handling intellectual property issues and the PTO to negotiate a solution that would be acceptable to the stakeholders and that would preserve the interests of the public, no agreement was achieved; therefore, the NII bill stalled.

Activity then shifted to the international front. The World Intellectual Property Organization (WIPO) began to look into updating the Berne Convention, the premiere international copyright treaty, in light of digital technology and the internet. Its work bore fruit in December 1996, when WIPO adopted the Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT). I was privileged to be an observer on the U.S. delegation for a preparatory conference and for the diplomatic conference in which the treaties were adopted. As an observer, I did not engage in any of the actual negotiations, as this was a prerogative of the Executive Branch, but I noted that representatives of the

ISPs were quite active in the hallways, circulating among groups of WIPO member countries, presumably watching out for their interests. Of importance to the evolution of the DMCA, three provisions of the new treaties come to mind: (1) the recognition that the right of reproduction applies equally in the digital environment, (2) a new right of communication to the public that covers, in particular, on-demand, interactive communication through the internet, and (3) the obligation of member states to enact legislation to address the problem of circumvention of technical protection measures that copyright owners used to protect their works from piracy; that is, members states were expected to enact anticircumvention laws. The treaties did not deal with service provider liability.

The President submitted the WIPO treaties to the U.S. Senate on July 29, 1997 for ratification. This submission provoked a flurry of legislative activity as lawmakers focused on conforming U.S. law to the demands of the treaties. Service provider liability, however, was still a stumbling block to implementation of the treaties.

In the Senate, the Judiciary Committee held a hearing on service provider liability on September 4, 1997. At this hearing, parties on all sides were urged by Chairman Hatch and the Ranking Member, Senator Leahy, to resolve the remaining issues prior to the end of the year. Frustrated by the inability of the copyright owners and the service providers to come to an agreement, in January 1998, Senator Hatch initiated a series of comprehensive negotiations to resolve the problem on service provider liability. These negotiations centered around a draft proposal put forth by Senator Hatch, which built upon the efforts over the previous two years. These negotiations continued under his supervision for three months, from January to April, 1998.

As I assisted Senator Hatch with these negotiations, I was privy to his thoughts and a witness to his tactics. Senator Hatch's beginning premise was the protection of property, including copyrighted works. I have already mentioned that he appreciated the importance of intellectual property, including copyrighted works, to the national economy. He was motivated primarily to ensure that copyrighted works were protected in the burgeoning internet environment. But at the same time, Senator Hatch was concerned that the internet continue to expand and develop. He did not want to hamstring service providers with impossible burdens.

The opening positions of the parties, as I recall, represented opposite ends of the spectrum. The copyright owners honed in on the right of reproduction, and, because the internet runs on making copies, they argued that every copy made on the internet required permission and, possibly, payment. The service providers argued at first that they should be treated like telephone companies; they were just engaged in electronic transmission and were oblivious to what was being transmitted. Later, they relented somewhat and agreed to accept the concept of notice-and-takedown whereby a service provider would take down infringing material residing on its system after notice from the copyright owner. In addition, the copyright owners presented a series of futuristic scenarios of digital infringement possibilities, some of which were not even feasible at the time of the negotiations.

In order to bring the parties closer together, Senator Hatch proposed that discussions center around internet functions that were in actual practice, leaving futuristic scenarios to another time. Regarding the right of reproduction, he did not doubt that every copy made was a possible infringement, but he focused in on (1) email, (2) caching, and (3) internet storage and linking. Regarding the position of the service providers, he rejected notice-and-takedown as the sole copyright responsibility on the part of the service providers.

It is important to appreciate that the legal framework at the time was trending in the direction of secondary liability for copyright infringement on the part of service providers, that is, liability for the infringing acts of its users under certain conditions. (*See, Religious Technology Center v. Netcom*, 907 F.Supp. 1361 (N.D. Cal. 1995.)) Efforts had been made to clarify the law of secondary liability by legislation—I believe that Senator Hatch’s colleagues in the House tried this—but they had failed. Therefore, Senator Hatch opted instead to craft a solution within the framework of existing law by carving out liability limitations for service providers.

In addition to the legal framework, Senator Hatch wanted to create a cultural framework of cooperation between the service providers and copyright owners. I remember that the service providers quickly moved away from the telephone company analogy to an appreciation of the copyright owners legitimate fears of massive infringement. (This is why the service providers agreed to notice-and-takedown.) The service providers seemed willing to accept a degree of responsibility for the infringements of their users as long as the smooth functioning of the internet was not affected. The limited liability regime was grounded on the expectation that service providers would be “responsible” regarding the protection of copyright rights. This expectation was partially embodied in section 512(i) of the DMCA, which basically requires service providers to terminate service to repeat copyright infringers and not to interfere with technical protection measures that copyright owners might use to protect their works from piracy.

Copyright owners too moved away from their literal insistence on controlling all copying on the internet. The result was agreement on limited liability for “transitory communication,” for example, email, and for system caching when necessary for the smooth functioning of the internet.

Notice-and-takedown was the most difficult piece to put in place. As I said, early on the service providers were open to a notice-and-takedown regime, that is, the taking down of infringing material residing on a system upon notice from the copyright owner, but the copyright owners felt that this was inadequate. They at first pushed to the margin—monitoring—but later accepted a lesser role for service providers in cooperating to reduce copyright infringement on the internet. Defining this role between monitoring and waiting for notice was the most difficult task in the whole negotiation process.

There was little disagreement about losing limited liability because of a service provider’s *actual* knowledge of infringing activity. But how to characterize the step beyond? I recall a spectrum from “obvious” infringement to activity that was “suggestive” of copyright infringement. In the end—after considerable pressure from Senator Hatch to compromise—the parties accepted “apparent.” Thus, current section 512(c)(1)(A)(ii) requires that [a service provider] “is not aware of facts or circumstances from which infringing activity is apparent.” It should be kept in mind that at this time the ability of a service provider to monitor the activity of its users for copyright infringement was limited practically to visual inspection. The intent of Senator Hatch in prompting and accepting the “apparent” compromise was his understanding that service providers would be responsible for infringing activity that they inadvertently came across in the routine operating activities of their systems. Since that time, technology has progressed such that ferreting out infringing activity can be done electronically. Indeed, service providers such as YouTube in cooperation with some copyright owners have deployed this kind of technology. In addition to the knowledge requirement for limited liability—lack of actual knowledge, lack of knowledge of apparent infringing activity—Senator Hatch drew further on the law of secondary liability to require that a service provider “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” 512(c)(1)(B).

Rounding out section 512 was a provision aimed at controlling linking to infringing activity. The section on “Information Location Tools” adopted the criteria for limited liability that were in place for information residing on a system: actual knowledge, awareness, and financial benefit.

After the liability of service providers for the infringing activity of their users had resulted in an agreement, the next big piece of the implementation of the treaties puzzle was anticircumvention. Section 1201 prohibits the circumventing of technical protection measures used by copyright owners to prevent infringement and to control access, and it also prohibits trafficking in circumvention technology. As I recall, the main issues were: (1) the control of access as well as copyright protection and (2) exceptions from the prohibition for various advantageous activities, including, for example, libraries and archives, educational institutions, encryption research, law enforcement, etc. In the case of anticircumvention, legislators in the House and the Senate were involved. In the end, Congress found persuasive the argument of the copyright owners that not to have control over access would open the door to massive, largely undetectable, infringement. At the same time, exceptions were adopted, and—most importantly—a safety valve was created in the periodic reassessment by the “Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce” of possible adverse effects on access to copyrighted works because of the prohibition of circumvention. (The involvement of the Librarian of Congress—when the work is really done by the Copyright Office—results from the peculiar position of the Copyright Office within the Library of Congress and from the fact that the Librarian is a presidential appointee while the Register is not. Senator Hatch attempted to address this curiosity of history in separate legislation, but without success.)

Service provider liability having been determined and with anticircumvention provisions in place, the Digital Millennium Copyright Act was enacted on October 28, 1998, after the usual back and forth between the two Houses of Congress, including, of course, a Conference Committee. Congressman Howard Coble, chair of the House subcommittee dealing with intellectual property, and his staff played a crucial role in crafting the DMCA and in ensuring its passage.

This statement on the background to the enactment of the DMCA has concentrated on the roles of the copyright owners and the service providers, but these groups were by no means the only ones with input into the process and with a place at the table. Educational institutions were perhaps the most influential in the process after the copyright owners and service providers. A look at the long list of exceptions to anticircumvention gives a good indication of the diversity of interests that was considered by the legislators. During the working out of the provisions of the DMCA, Chairman Hatch and the intellectual property staff received technical advice from various sources, including Lee Hollaar, Professor of Computer Science, University of Utah, in his capacity as Committee Fellow. And the role of Chief Committee Counsel, Manus Cooney, was crucial in assisting Senator Hatch in navigating through the always shifting legislative and political sands.

In concluding, I want to emphasize that, in reviewing the compromises achieved, Senator Hatch always had an eye to the public good. In the end, the purpose of the DMCA was to provide to the American people low-cost, easy electronic access to the works that they desire by protecting copyright and at the same time promoting the flourishing of the internet, while making specific provisions for certain groups who would otherwise be adversely affected by the Act. I would also like to point out that the monumental process of enacting the DMCA could not have borne fruit without bipartisan cooperation.

I am profoundly grateful that Senator Hatch gave me a key role in the drafting and passage of the DMCA, and I am honored, Mr. Chairman, that you have asked me to contribute to the Subcommittee's reevaluation of this very significant piece of legislation. I am happy that the DMCA has withstood the test of time, but there have been so many developments since 1998 that a second look is indeed warranted. Thank you.