

Robert S. Schwartz Responses First DMCA Hearing Questions

As Chairman Tillis noted, I appeared solely in my own capacity as a participant in events, even though I referred to some client experiences. Similarly, these responses are attributable to me alone. And since these are questions intended for a continued round of live questioning had circumstances permitted, I am answering in that vein, mostly without citation (but likely with better grammar).

From Chairman Tillis

- 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 broadband internet adds a second, geometric multiplier to the consequence of secondary liability, even though in such copyright cases liability may not at all be clear – they offer the most difficult “grey area” decisions that result in frustrated juries and “splits” among the Courts of Appeal. The result is to threaten or chill online innovation for entities large and small. The harm from this is difficult to measure because we never see the innovations that failed to emerge. This is a reason why the Section 512 harbor remains important, and why statutory damage provisions need to be reformed.

The advantage afforded to copyright plaintiffs by Section 504’s statutory damages provision was first multiplied by the mass number of devices bought by the consuming public in the 1970s thru 1990s, and then multiplied again by the markets, and purported infringement opportunities, created in the on-line era. Even in 1981, Sony literally “bet the company” on its decision to appeal to the Supreme Court, to keep on the market a device that the Court ultimately decided was lawfully sold. The threatened levy of \$150,000 per work infringed, where so many new and older works are reaching markets that now include most consumers, quickly runs into the billions.

With respect to “red flag knowledge” under the DMCA, some of the witnesses, particularly on the second panel, urged what amounts to a “knew or should have known” standard. Similarly, in copyright contributory infringement cases, as an *amicus* I have encountered arguments by content owners that *knowledge* should suffice for liability for “willful” secondary infringement. I’ve argued strenuously against any such standard. It is at odds with the Supreme Court’s teaching not only in *Betamax*, but also in an important footnote on this subject in the 2005 *Grokster* decision. Moreover, any such vague standard, particularly in cases going to a jury, raises the *in terrorem* effect of statutory damages even higher.

For these reasons, the HRRC and successor organizations have argued for statutory damage reform as the internet grew, particularly for secondary liability. My own view is that such reform should be a priority in any new copyright or DMCA legislation.

I suggest this for copyright *and* DMCA legislation because, increasingly, and in cases involving a Section 512 defense – or even, as in recent litigation, conduct *related to* a potential 512 defense – the case is likely to also go to a jury on claims of secondary copyright liability. Moreover, the conduct scrutinized with respect to section 512 has been going to the jury under vague instructions, when the jury considers the *copyright* claims, even where the 512 defense is no longer in the case. This all heightens the distortive effect of statutory damages, and the vague “willfulness” standard, beyond anything envisioned prior to the growth of the internet.

Another destructive argument in damages claims is when courts assume that anyone who purportedly infringes on a work would have bought it instead. First, this ignores the fact that copyright incentives exist in part to spur additional creativity by others, through productive and fair uses. Second, it assumes that everyone who gains access to a work on-line is a potential purchaser. Third, it ignores the fact, well documented by surveys, that access often promotes, rather than replaces, purchase.

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?

I’ve addressed this context as comprehensively as I can in my written statement.

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?

While some copyright plaintiffs have attempted to claim that metadata is such a “standard technical measure,” courts have correctly rejected such claims because (1) passive markings are not *effective* and per section 1201(c)(3) cannot be made so via a mandated response mechanism; and (2) per statute, any such measure must be developed *after* enactment. (The Register and major content owners agree that, as stated in the question, there is not yet any such measure.)

My own view, based on the “successful” and unsuccessful negotiation experiences of the HRRC, is that nobody actually *wants* any such measure. All are aware that passive coding, without any accompanying legislative mandate, cannot be effective, and all are aware of the history of attempted mandates on devices or conduct. (And if necessarily enforced by legislative mandate,

the measure would no longer be “voluntary.”) Nor have encryption-based solutions fit the 512(i) model – they seem better to fit a licensing model, with relief available pursuant to contract, patent, or, in a few cases, Section 1201 litigation. (See also my answer to Question 7, with respect to voluntarily agreed means of coding to facilitate communication between rights-holders and OSPs.) Moreover, many proposed technologies have fallen short technologically (suffering from false positives *and* false negatives), economically (too expensive to be practical), and legally (inability to account for licensed, fair, and Public Domain uses). Thus, they have proven more useful for forensic detection by content owners than for protection.

I would note here that a member of the next panel – Ms. Aistars I think – had the timing wrong in suggesting that the enactment of Section 1201 enabled ensuing voluntary agreements. As I recounted in my testimony, it was quite the opposite. It was the experience with voluntary agreements, and their lack of any independent preclusive effect, that fueled the turn toward encryption and Section 1201.

- 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?**

This question is based on several assumptions, some of which I cannot confirm and others of which I am highly skeptical.

First, internet platforms do not monetize content solely or perhaps even primarily for their own benefit. Monetization is a practice offered to rights-holders as an alternative to takedown. It is the rights-holder who chooses the “monetization” option.

Second, the notion that platforms, in not pre-filtering content according to their own standards and information, are “turning a blind eye to infringement” ignores the existence of licensed and fair uses, as well as Public Domain content and false assertions of infringement based on similarity. Case law, starting with the Supreme Court’s *Betamax* decision, has emphasized the importance of all of these uses in considering whether secondary infringement, or infringing intent, are present. It is also clear, in the context of Section 512, that fair use is a right on which it is the rights-holder’s burden to extinguish any potential assertion.

The core question here is where the initial responsibility for identifying and then claiming infringement lies. In my view, due to the prevalence of fair and non-infringing uses, and the fact-intensive nature of such determinations, the responsibility and burden must remain with the rights-holder. In offering the alternative of monetization, platforms are offering the sort of voluntary means of dispute avoidance that were sought in the context of Question 3.

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

In the question round I cited one – the DMCA claims made to prevent embedded software from being manipulated, for purposes of repair, by owners of devices such as farm tractors and autos that were in need of repair or update.

Another which I must admit we foresaw but did not fully appreciate was User-Generated Content – that the internet would move *so* far from a top-down model. I believe that if the consequences of this shift had been fully appreciated there would have been more institutional and public interest concern over and opposition to the Sonny Bono Copyright Term Extension Act, also of 1998. The removal and postponement for 20 years of literary, audiovisual, and musical content from one of our most culturally profound and productive periods was, to be blunt, an act of *legislative vandalism*. In the hands of users, this content, for which the owners had long since been rewarded, would have been available for creating new and derivative works without obligation – just as Shakespeare and so many other great writers and musicians have drawn upon cultural legacy.

As a part-time musician (who has since returned to performing professionally) I was strongly opposed to this provision at the time, as were others in the academic and creative communities, but the core interest in the future free and creative vitality of the internet and its platforms was not widely recognized.

Today there is a far greater understanding of the Public Domain and the economic, as well as cultural, consequences of robbing it. Given today's institutional focus, this Congress did not attempt to prevent content from the years 1923 and 1924 from finally entering the Public Domain. And I am proud to be playing a small part in allowing creators to exploit what is finally being released – having worked with the Music Library Association and several universities to produce a free *Public Domain Song Anthology*, which I hope will be released around the time these answers are submitted.

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 DFC included representatives of libraries, universities, technology trade associations, and the HRRC. As I noted, the HRRC included what is now Consumer Technology Association (CTA), member companies, and consumer groups. The majority of CTA members are in fact small businesses, many of whom got their start exhibiting at CES[®]. As I also indicated, HRRC did not have a direct window into final discussions.

Mr. Band also emphasized that the effect of the Sonny Bono Copyright Term Extension Act cannot be ignored. The main voice in predicting what a tragedy it would be was Prof. Dennis S. Karjala of Arizona State University, whose facts and eloquence were heard but not adequately supported by anyone with an economic stake. While the Act was pending I asked a music composer and arranger, an expert on the era that was about to be withdrawn from the Public Domain, if he would testify about the bill. He answered regretfully, *“I would never work again.”* So no, I don’t believe that the important cultural interests of such creators were heard or accommodated.

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?

I have no personal knowledge as to how this mistake was avoided but am glad that it was. For the reasons stated above in response to Question 4, these determinations are neither as simple nor as just as they are painted by advocates. In an April 1, 2016 filing with the Copyright Office, CTA had this to say about the “staydown” idea (fn. omitted):

“While automated processes have facilitated discretion, they have not made it feasible to automate rights-holder discretion through some “notice and staydown” technique. Intermediaries have labeled such prospects a “seductive but false impression.” No reliable way has been found to do this without impinging on the obligations of content creators, the judgments of users, and the processes of intermediaries. For example, where multiple users with different rights status may be posting a link, comment, or portion of a work, the service provider would need to impose constraints without the necessary advance, accurate information about the rights-holder or the authorization status of the user

“CTA believes that only through further voluntary cooperation toward providing useful information from content owner to Internet intermediary can the “whack-a-mole” problem be cut down to size. One potential tool is for smaller services and content owners to embrace standard forms and coding practices, as pioneered in agreements between larger services and content owners, to make it faster and more efficient to supply targeted and effective takedown notices.”

I did provide an example to a “roundtable” held at the Copyright Office. I’ve been listening to and playing jazz since grade school. Jazz players’ main education is listening to performances – not only jazz, but also classical and folk “roots.” It is almost impossible for a jazz improviser to avoid intentionally or unintentionally “quoting” from familiar or favorite songs or performances. Due to term extension, any composition or performance after 1924 – which is most recorded performances – is likely to be still in copyright. So I could record and publish an entire “set” of my original compositions and Public Domain music, and still trigger filters if even *one* of the rights-holders objects to the length or similarity of a passage that I might reference.

- 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?**

Please see my answer to Question 1.

- 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?**

I can’t address the circumstance of 22 years ago. As to now, my *personal* view is that the mergers leading to the formation of very large ISPs have, for better or worse, put them in situations of both power and vulnerability similar to that faced by common carriers.

- 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?**

I’m familiar only with Google’s voluntary practices so I’ll make an exception and cite to their Nov. 2018 *How Google Fights Piracy*:

https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf

- 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?

It's generally believed that larger entities such as Google are those best equipped to take both required and voluntary measures on automated or curated bases. The number alone does not reveal how many of the notices were valid or justified (see my answer to Question 7).

Bad faith or inaccurate notices remain a significant problem, particularly for smaller OSPs. As Jennifer M. Urban, Joe Karaganis, and Brianna L. Schofield observed at 116 in their updated and comprehensive 2017 study,

“Unfortunately, interviews with OSPs made it clear that the absence of effective liability for bad requests means that there is no pressure on senders to adopt such measures. Senders, accordingly, vary widely in their behavior and degree of concern for improper takedown. In the worst cases, DMCA Auto and DMCA Plus systems that facilitate bulk notice sending and streamline removal may facilitate bad-faith, abusive practices.”

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628

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?

Please see answer to Question 9.

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?

Please see answer to Question 1. There I argued in favor of (1) statutory damage reform and (2) legislation to ensure that users (including repairers) of devices with embedded software are not considered to be engaged in “trafficking” when *obtaining* circumvention tools that grant them access to a device's software for a non-infringing purpose such as vehicle or equipment repair.

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?

I participated in a Copyright Office Roundtable held in aid of the report's preparation. I believe the most important advice received was that they *not* follow the EU DSM Article 17 path toward effectively requiring advance filtering of content. This should be expressed in the Report.

From Senator Coons

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

The expansion of language to weaken the intent standard toward a nullity, to break the tie to copyright infringement, to remove any definition of “effective” from 1201(b), and to omit any requirement of purpose or effect to infringe copyright were the most challenging and frustrating for those of us concerned about future abuse of Section 1201.

- The (A) (B) (C) metrics of 1201(a)(2) and 1201(b)(1), at the stage of my direct involvement in drafting, were joined by “*and*” rather than, as in the final version, “*or*” – I believe as a result of lobbying by the RIAA and other content interests. In the absence of legislative history providing guidance to courts, this would have effectively eviscerated any defense based on even the most compelling non-infringing purpose or effect.
- I recall that at some stage of the process (likely before the WIPO Diplomatic Conference) I took a leading role in discussions with other private sector elements, and with Senate Judiciary staff, in developing the definition of effective “technological measure” that ultimately appeared in section 1201(a)(3)(B). However, this consensus definition was omitted from section 1201(b). The recourse for supporters of this consensus definition was again clarifying legislative history, in this Committee through the efforts of Senators Ashcroft, Leahy, and Hatch, and in the House, in the Commerce Committee Report.
- Many have commented on the breaking of the nexus to copyright infringement and the absence of a meaningful fair use defense. I believe that the careful analysis by the Court of Appeals for the Federal Circuit in the *Chamberlain* case, finding such a nexus nevertheless based on logic and legislative history, is sound and persuasive and ought to be the generally accepted view.

As to future reforms, as I testified, nobody expected that the DMCA would prevent farmers and local repair personnel from downloading a tractor's functional embedded software so that a new part could be installed, and then re-loading the tractor's own software to activate that part. That repair would be lawful under either patent or copyright law generally. Yet the Copyright Office considers it “trafficking” to obtain a tool to enable any such manipulation of the *tractor's own software*.

Members of Congress continue to express astonishment that this is the case. Those involved in the DMCA have said they had no such intention. As I suggested in my testimony, I and many others would be pleased to work with staff on a bill similar to the *Unlocking Act*, which has allowed owners of cell phones to move from one system to another without anyone who provides tools or assistance being accused of “trafficking.”

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

Please see answer to Question 1.

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

As I testified, HRRC representatives did not have a “seat at the table” when these final decisions were made. I was, however, present when the head of the RIAA, in congressional testimony, urged that the “and” in the (A) (B) (C) metrics of 1201(a)(2) and 1201(b)(1) be changed to an “or.” It was my understanding at the time that interests with which HRRC was allied, including several in the Digital Future Coalition, ultimately and reluctantly accepted the triennial rulemaking process as a poor substitute for a clear nexus to a purpose and effect of infringing copyright. They understood that without enactment of section 1201 there would have been no section 512.

From Senator Hirono

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

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

From my perspective then, Congress seemed to be concerned about platforms set up as unauthorized marketplaces for expressive literary, audiovisual, and musical content. Hence with Section 1201 Congress took a transactional approach, and probably did not want to be explicit about infringing because both intent and infringing use may be difficult to prove. Similarly, with Section 512 Congress focused on Notice and Takedown because it recognized that users would play an increasing role in adding creativity, so some mechanism, *at the initiative of the rights-holder*, would be necessary to identify conduct that was exploitive rather than creative.

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

I have no recollection of privacy discussions, perhaps because my focus was Section 1201 rather than Section 512.

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

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

I wasn't directly involved in the Title II negotiations. In Title I, the idea behind “effective” measures in Section 1201 was to rely on “self-protecting” measures such as encryption and authentication. The next step of cooperation would thus be through *licensing*, rather than through mandated response to passive coding, or any attempts at voluntary agreements in such respect.

b. I've heard from many in the creative community that this idea of cooperation has broken down. That the DMCA has placed the entire burden on copyright owners to police infringement online. Do you agree that too much of the weight to police infringement falls on copyright owners? If you do, where did the DMCA fail?

My client CTA has advised the Copyright Office that the responsibility to identify and claim infringement must remain with the rights-holder, in part because courts have held that determinations of fair use must be made prior to any assertion of infringement. In this context, CTA has pointed out that automated tools are becoming available to rights-holders as well as to OSPs. While not a complete solution for either, they can be of assistance in making such determinations in the first instance. While no automated system can ever determine fair use definitively, modern systems do allow a copyright owner to separate entire, unchanged copies from those that are excerpted or modified, which would go a long way to protecting likely fair uses. Again in this context, CTA has further suggested that one potential tool is for smaller services and content owners to embrace standard forms and coding practices, as pioneered in agreements between larger services and content owners, to make it faster and more efficient to supply targeted and effective takedown notices.

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

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

I would advise to beware of mandates that seemingly invite flexible response but in reality, due to unfounded or optimistic assumptions, require responses that are counter-productive and / or not practical for start-ups and smaller entities. I fear that this is the path of the EU with DSM Article 17.

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

- I would have limited it to the protection from infringing copies of literary, audiovisual, and musical works.
- I would have scaled back the applicable statutory damages provision to remove the catastrophic risk of litigating the “grey area” copyright cases that are bound to arise.
- Along with many Members of Congress involved in passing the DMCA, I have been surprised at its imposition on users who need to repair or update devices, such as modern farm tractors, in which mechanical parts have been replaced by functional embedded software. Hence I would pass, for devices relying on embedded functional software, legislation similar to the “*Unlocking Act*,” which freed cell phones from being tied to an originating carrier.