

14 April 2020

Senator Thom Tillis
Chairman, Senate Judiciary Subcommittee on Intellectual Property
113 Dirksen Senate Office Building
Washington, DC 20510

Re: Responses to Your Follow-up Questions From the March 10 Hearing

Dear Chairman Tillis:

Thank you again for the opportunity to testify at the Intellectual Property Subcommittee hearing on March 10 on how other jurisdictions are handling online piracy. I appreciate the opportunity to address your follow-up questions. My responses are interspersed below:

1. Copyright is a big part of the US economy – some estimates say almost 7% of GDP – and copyright owners lose 10s of billions of dollars each year due to piracy. Are countries doing enough to protect U.S. copyright owners from online piracy?

The United States Trade Representative (USTR) publishes annual reports about online piracy based in countries outside the US. One recent such report can be accessed on the USTR website at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/ustr-releases-annual-special-301>. USTR establishes watch lists for countries that it believes are inadequately protecting US intellectual property rights and takes action to urge those nations to improve their laws and/or enforcement activities. If countries do not improve, the US can levy trade sanctions against them. In addition, any country that inadequately protects US intellectual property rights can be challenged, if a member of the World Trade Organization, for violating the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

The good news, though, is that despite the prevalence of online piracy, copyright industries have been doing very well in recent years, as I pointed out in my written testimony (p. 6).

2. 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?

The World Intermediary Liability Map website provides extensive information about copyright rules on intermediary liability in various countries around the world. See <http://wilmap.law.stanford.edu/topics/copyright-0>. As my written testimony explained (pp. 2-4), the US notice-and-takedown regime for Internet service Provider (ISP) hosting sites has become an international standard. The US has actively encouraged other countries to adopt comparable rules, including through free-trade agreements. As Ms. Keller's written testimony for the March 10 hearing observed, the DMCA notice-and-takedown rules are more demanding for ISPs than the copyright regimes in place in some countries, such as the notice-and-notice regime of Canada and the no-takedown-without-judicial-process rules in Chile. I do not have information upon which to judge whether online piracy is more or less prevalent in countries with these alternative rules.

3. How could site-blocking be administered to best protect users? What have we learned from other countries that use site-blocking, such as Australia and the United Kingdom, about ways that a site-blocking mechanism can be designed to protect users?

As a general matter, the most effective way to protect users' legitimate interests when enforcing intellectual property rights is to take action against the infringing contents or pages where they are located rather than blocking entire websites or domains. The US's own experience with the seizure of websites and domains has shown that at times, entirely legitimate content has been removed from the Internet without sufficient justification or explanation. See Timothy B. Lee, *ICE Admits Year-Long Seizure of Music Blog Was a Mistake*, *Ars Technica*, Dec. 8, 2011, <https://arstechnica.com/tech-policy/2011/12/ice-admits-months-long-seizure-of-music-blog-was-a-mistake/>.

While there are a number of studies expressing conflicting views of the efficacy of site blocking, I am not aware of any empirical study that has focused squarely on free expression or other legitimate user interests. Australia's site-blocking regime does require courts to consider impacts on users when deciding whether to grant an injunction. However, it is unclear the extent to which courts account for those interests in practice. What we do know is that intermediaries have much less incentive to protect users' legitimate interests than users themselves. Accordingly, any site-blocking regime should include ample notice to users and an opportunity to intervene and defend a use as fair.

When copyright owners notify designated agents of information locating tools, such as search engines, about the location of particular infringing materials on the Internet in which they have rights, the search engine can break a link to those materials. This has the effect of blocking its users from getting access to those infringing materials when conducting searches with that tool. User interests can be protected by tailoring any link-

breakage so that it is only effective against those infringing materials, not to whole sites on which non-infringing contents may be found.

If an ISP has acted in concert with an infringer or induced or otherwise indirectly contributed to infringement under US law, I believe a court could issue an injunction tailored to the pages where the infringing materials are located. User interests would be adequately protected by limiting the injunction to the part of the site where specific infringing materials can be found.

I have serious doubts about whether courts in the US have the authority to issue no-fault site-blocking injunctions either under 17 U.S.C. § 512(j) or under their inherent equitable powers. Courts have in the past refused to grant injunctive relief against defendants who have been found not to have engaged in copyright infringement. See, e.g., *Bryant v. Gordon*, 503 F. Supp.2d 1060, 1066 (N.D. Ill. 2007). See also *Paramount Pictures Corp. v. Carol Publishing Group*, 25 F. Supp. 2d 372, 374, 376 (S.D.N.Y. 1998) (refusing to issue an injunction against nonparty distributors of copies of infringing books); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06 [C][2][b] (Rev. Ed. 2019). Moreover, the structure and legislative history of § 512(j) do not support the grant of injunctive relief against an ISP who has not been held directly or indirectly liable for infringement. I agree with the judgment of an outside counsel to the motion picture industry who concluded that “it appears substantially more likely than not that a court would require a copyright owner to establish the ISP’s liability for copyright infringement before the ISP can be ordered to site-block.” See Eriq Gardner, *MPAA Testing the Limits of Pirate Site Blocking in Movie Tube Lawsuit*, *Hollywood Reporter*, July 30, 2015, <https://www.hollywoodreporter.com/thr-esq/mpaa-testing-limits-pirate-site-812126>.

Two Berkeley Law School colleagues, whom I consulted about whether Congress could authorize courts to issue no-fault site-blocking injunctions, expressed serious doubts about whether courts have the inherent power in equity to issue injunctive relief against ISPs (or anyone else) if there is no viable cause of action against them. In support of these doubts, they referred me to *General Building Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 398-402 (1982) (injunctive relief not available against an entity that had not violated the law).

Computer scientists have raised a different concern about site-blocking, namely, that it would undermine DNSSEC efforts to make the domain name system and the Internet more secure more secure. See, e.g., Mike Masnick, *Paul Vixie Explains, In Great Detail, Why You Don’t Want ‘Policy Analysts’ Determining DNS Rules*, *TechDirt*, Jan. 12, 2012, <https://www.techdirt.com/articles/20120112/01491417381/paul-vixie-explains-great-detail-why-you-dont-want-policy-analysts-determining-dns-rules.shtml>. It is also worth considering this: the last time that Congress considered authorizing issuance of site-blocking injunctions through the Stop Online Piracy Act bill, protests against this legislation were so widespread that the legislation failed. If you are looking for a consensus

approach to DMCA reform, Senator Tillis, I would not recommend trying to authorize site-blocking injunctions.

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

Except for the EU's recently adopted Digital Single Market (DSM) Directive, I am unaware of any country that has tailored its copyright law to distinguish among ISPs (or authors) based on their size or regulatory obligations.

No member state of the EU has yet transposed the DSM Directive into its national laws. It is possible that some EU member state(s) may choose to define "online content sharing service providers" to provide small and medium-sized ISPs greater certainty about whether they will be subject to Article 17's licensing and preventive measures rules than Article 17 itself provides. The DSM Directive is, after all, not "the law" in any member state of the EU; it is only a framework within which EU member states are obliged to enact legislation within the next two years.

5. Last year the EU adopted the Copyright Directive to address the "value gap" between how online services profit from use of copyrighted works and how copyright owners are compensated for exploitation of their works. What would be the benefits and costs of a similar legal framework in the United States?

My written testimony explained why it would not be in the overall best interest of US information technology industries or the American public for the US to adopt an Article 17-like regime for ISPs. Article 17 is deeply flawed, internally inconsistent in key respects, troublingly ambiguous about firms to which it applies, and under CJEU precedents, quite likely in violation of the European Charter of Fundamental Rights (pp. 8-14).

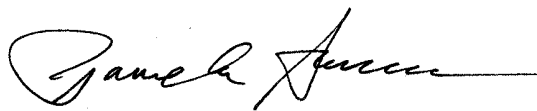
Major copyright industry firms in the motion picture and recording industries seem to believe they would benefit if the US adopted Article 17-like rules. However, it is not clear that other copyright owners or industries would benefit from Article 17-like rules in the US. The "value gap" argument for Article 17 posits that there are discrepancies in music licensing among different streaming services, not that there is a value gap as to all copyrighted works. See Annemarie Bridy, *The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform*, Vand. J. Ent. & Tech. L. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3412249 (discussing the value gap rationale for Article 17). Before Congress fundamentally restructures our successful intermediary liability framework to address licensing issues for a single industry sector, it would be best to get full and transparent information about how revenue generated by online content is divided among platforms, publishers, labels, and artists.

My written testimony pointed out another problem with Article 17, which is that automated content recognition technologies have generally been designed to detect user-uploads of commercially popular music and films (p. 17). However, Article 17 applies to all works of authorship, including many for which no tools exist to detect unauthorized user uploads. My written testimony also noted that the US does not have the collecting society infrastructure (except for music) to enable licensing on a mass scale akin to that well-established in the EU (p. 18).

It will be costly for Google, Facebook, and other mega-platforms to comply with Article 17-like mandates in the US as well as the EU. However, even if those platforms can absorb such costs while maintaining their roles as hosts of user-generated content, the costs of developing or licensing automated content recognition technologies would be cost-prohibitive for small and medium-sized platforms. Such a requirement would, moreover, be overkill as most of them experience relatively little infringement. Nor do small and medium-sized platforms have the resources to negotiate for licenses with every rights holder whose works appear on the Internet. Article 17-like rules would be harmful to these firms and to many millions of creators who rely on these platforms to disseminate their works, as well as to the hundreds of millions of Americans who are users of these platforms. US-based Internet companies, including ISPs, are important contributors to US GDP whose interests must be balanced with copyright industry interests when Congress considers reforms to § 512.

In closing, let me say that I hope this additional information will be useful to you, your fellow subcommittee members, and staffs as you consider what if any changes should be made to the safe harbors Congress enacted in 1998 as part of the DMCA. I hope that this letter finds you and your staff in good health and good spirits in these trying times.

Sincerely,



Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School



14 April 2020

Senator Chris Coons
Ranking Member, Senate Judiciary Subcommittee on Intellectual Property
218 Russell Senate Office Building
Washington DC 20510

Re: Answers to Follow-up Questions from March 10 Hearing

Dear Ranking Member Coons:

Thank you for the opportunity to respond to questions you have posed to me following the March 10 hearing on how foreign jurisdictions are handling online piracy. My answers are interspersed below:

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?

I have serious doubts about whether courts in the US have the authority to issue no-fault site-blocking injunctions either under 17 U.S.C. § 512(j) or under their inherent equitable powers. Courts have in the past refused to grant injunctive relief against defendants who have been found not to have engaged in copyright infringement. See, e.g., *Bryant v. Gordon*, 503 F. Supp.2d 1060, 1066 (N.D. Ill. 2007). See also *Paramount Pictures Corp. v. Carol Publishing Group*, 25 F. Supp. 2d 372, 374, 376 (S.D.N.Y. 1998) (refusing to issue an injunction against nonparty distributors of copies of infringing books); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06 [C][2][b] (Rev. Ed. 2019).

Moreover, the structure and legislative history of § 512(j) do not support the grant of injunctive relief against an ISP who has not been held directly or indirectly liable for infringement. I agree with the judgment of an outside counsel to the motion picture industry who concluded that “it appears substantially more likely than not that a court would require a copyright owner to establish the ISP’s liability for copyright infringement before the ISP can be ordered to site-block.” See Eriq Gardner, *MPAA Testing the Limits of*

Pirate Site Blocking in Movie Tube Lawsuit, Hollywood Reporter, July 30, 2015, <https://www.hollywoodreporter.com/thr-esq/mpaa-testing-limits-pirate-site-812126>.

Two Berkeley Law School colleagues, whom I consulted about whether Congress could authorize courts to issue no-fault site-blocking injunctions, expressed serious doubts about whether courts have the inherent power in equity to issue injunctive relief against ISPs (or anyone else) if there is no viable cause of action against them. In support of these doubts, they referred me to *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 398-402 (1982) (injunctive relief not available against an entity that had not violated the law).

For these reasons, I respectfully disagree with statements by those witnesses at the March 10 hearing whose testimony endorsed no-fault site-blocking injunctions.

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?

I agree with those concerns. My written testimony noted that leading providers of automated content recognition technologies have acknowledged that their tools cannot take context into account (p. 12). An understanding of context is essential if one is to determine whether a use is fair or not. Scholars have documented several types of errors of automated content recognition technologies, including their inability to detect fair uses. See, e.g., Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 Notre Dame L. Rev. 499, 543-54 (2017) (giving numerous examples of automated content recognition technology errors).

My oral testimony highlighted the failure of Content ID to detect fair uses in respect of a video of an New York University Law School educational program. The video featured two musicologists at an NYU Law School symposium explaining how they analyze similarities and differences in musical compositions to determine whether one song infringes copyright in another. Both musicologists had testified as expert witnesses in the well-known "Blurred Lines" infringement case, *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). During their symposium presentations, each played clips of the songs at issue so that the audience could hear the music and better understand their theories about the infringement issue. The Engelberg Center of NYU Law School posted this video to an NYU video channel on YouTube. Content ID detected the clips and blocked the video for containing infringing contents. NYU professors contested the blockage (not just as to one clip, but as to several), explaining why the clips were fair use. However, Universal Music Group, one of the copyright owners, did not accept their fair use claim, so the video blockage remained in place. It took personal contacts between NYU professors and people at YouTube to

overturn the blockage. A fuller version of this story can be found at <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown>.

To the best of my knowledge, fair use-friendly technologies are unlikely to be developed in the near future.

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?

My views about the potential for harmful effects on freedom of speech and of expression that would result from adoption of a rule akin to Article 17 of the EU's Digital Single Market (DSM) Directive have been shaped by the numerous statements and analyses published by leading European academics and the United Nations Special Rapporteur for Freedom of Expression. See Article 13 Research: Studies, Opinions and Sources of Data, CREATE (UK Copyright and Creative Economy Centre: Univ. of Glasgow), <https://www.create.ac.uk/policy-responses/eu-copyright-reform/article-13-research/> (listing critiques of Article 13 (now 17)); David Kaye (Special Rapporteur), Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 7–8, U.N. Doc. OL OTH 41/2018 (June 13, 2018), <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-OTH-41-2018.pdf> (detailing specific concerns and concluding that “I am very seriously concerned that the proposed Directive would establish a regime of active monitoring and prior censorship of user-generated content that is inconsistent with Article 19(3) of the ICCPR.”).

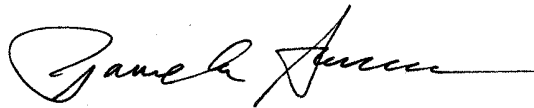
I think it unwise to impose a stay-down obligation for particular infringing files as a general obligation on all ISPs that host user contents because small and medium-sized firms generally experience very few infringement claims and process them by human review, as reported in my written testimony (pp. 21-22). For these ISPs, the extra expense of developing or licensing such a specific stay-down tool may be prohibitive. Consider the effect of such a rule on the Organization for Transformative Works about which Professor Tushnet testified at this Subcommittee's hearing on February 11, 2020.

To achieve stay-down for any particular file would, I believe, still require developing a technology that could scan all digital files on the ISP's site in order to detect a file that had been re-uploaded after being taken down. For sites that experience very little infringement, a stay-down requirement would be overkill. Moreover, a user's remix that might have been infringing the first time it was uploaded to an ISP's site because it took too much of the copyright owner's work (e.g., 2 minutes of a song) might not be on a re-upload if the user re-edited the remix to reduce the amount taken (e.g., 10 seconds). As I noted in my written

testimony (p. 12), automated content recognition technologies cannot assess context necessary to make a determination about whether a use is fair or not.

In closing, let me say that I hope this additional information will be useful to you, your fellow subcommittee members, and staffs as you consider what if any changes should be made to the safe harbors Congress enacted in 1998 as part of the Digital Millennium Copyright Act. I hope this letter finds you and your staff in good health.

Sincerely,

A handwritten signature in black ink, appearing to read "Pamela Samuelson". The signature is fluid and cursive, with a long horizontal line extending to the right.

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School



14 April 2020

Senator Richard Blumenthal
Member, Senate Judiciary Subcommittee on Intellectual Property
706 Hart Senate Office Building
Washington DC 20510

Re: Responses to Your Questions

Dear Senator Blumenthal:

Thank you for the opportunity to respond to the questions you have posed as a follow-up to the March 10 hearing on how foreign jurisdictions are handling online piracy. My answers are interspersed below:

- 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?**

I believe that the US has done the best job of any country in balancing the rights of content creators and the rights of consumers through the adoption of the Digital Millennium Copyright Act (DMCA) safe harbors. As my written testimony indicated (p. 6), copyright industries are flourishing, even though online piracy still is prevalent. Major US-based websites that host extremely large amounts of user-uploaded content have responded to piracy concerns by developing or licensing filtering technologies to thwart infringing uploads (p. 22).

Repealing or making significant changes to the DMCA safe harbors will do nothing to stop the operations of off-shore pirate websites, peer-to-peer file-sharing, and other significant sources of online infringements. Significant changes to these rules could, however, have profoundly negative consequences for small and medium-sized Internet Service Providers (ISPs) and for millions of user-creators who depend on access to these sites to share their creations with others. As my written testimony pointed out (pp. 19-20), US Internet-based companies are significant contributors to US GDP. The US has a strong interest in their continued prosperity. After all, the ISPs whose software undergirds their platforms as well as user-creators, who rely on these ISPs (such as fan fiction video producers who rely on the Organization for Transformative Works website about which Professor Tushnet

testified at this Subcommittee's February 11 hearing), are copyright owners too. They have a stake in this debate just as do motion picture industry representatives such as Mr. McCoy and individual film producers such as Mr. Yunger.

The fact that many other countries have adopted DMCA-like safe harbors shows that these countries believe that these safe harbors represent well-balanced compromises worthy of being emulated.

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

I am aware of the existence of automated content recognition tools such as Content ID and Audible Magic that detect user uploads of files for which copyright owners have provided relevant information identifying their works. These tools do thwart some digital piracy, although they tend to over-block lawful uses because they are unable to understand context, which is essential to determining whether a use is fair and otherwise privileged, as explained in my written testimony (p. 12).

Copyright laws in the US and elsewhere allow rights holders to sue those who have directly or indirectly infringed their copyrights. The WIPO Copyright Treaty of 1996 established international consensus about copyright rules in the digital era. The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which is binding on all members of the World Trade Organization, provides a dispute resolution process by which the US can challenge other countries if they fail to provide adequate legal protections to US copyrighted works.

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

To the best of my knowledge, jurisdictions that have adopted DMCA-like safe harbor rules for ISPs (other than the EU) have been satisfied with them, both when introduced and currently.

The EU's Digital Single Market (DSM) Directive is the only jurisdiction to have adopted significantly more restrictive rules than the notice-and-takedown regime that the US adopted in 1998 and the EU in 2000. As my written testimony pointed out (p. 7), Article 17 of the DSM Directive was extremely controversial and strongly opposed by many stakeholders. Only after numerous limits were placed on the scope of Article 17, including several that make this part of the DSM Directive internally inconsistent (p. 8-14), was there enough support for the Directive to be adopted.

As Ms. Keller's written testimony for the March 10 hearing observed (p. 5), the DMCA notice-and-takedown rules are more demanding of ISPs than the copyright regimes in place in some other countries, such as the notice-and-notice regime of Canada and the no-takedown-without-judicial-process rules in Chile.

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

The biggest change between 1998 and 2020 is the scale and scope of Internet usage. The best way to reduce online piracy is to make legitimate digital services available to the public, as Spotify and other online music services have done.

5. Our latest international trade agreement, the new NAFTA trade agreement, incorporates the DMCA's § 512 safe harbors and § 1201 anti-circumvention provisions. This decision has been criticized, and I question whether intermediary protections like § 512 should be locked into trade agreements in a manner that blocks Congress from updating the law in this area as we see fit.

a. **How have copyright laws and intermediary protections been treated in international trade negotiations in the past?**

b. **Under what circumstances is it appropriate to incorporate provisions like intellectual property rules and intermediary protections into trade agreements?**

c. **How do our international trading partners view the inclusion of intermediary protections that mirror our laws?**

Every Administration since 1998, both Republican and Democratic, has decided that DMCA-like notice-and-takedown rules for ISPs are in the overall best interest of US industries. Other countries have agreed to adopt these rules, perhaps in the hope that their Internet-based economies would be fostered thereby. In part because of US policy decisions to export these rules to other countries, US-based Internet companies have thrived in the global marketplace. As my written testimony observed (pp. 19-20), US-based Internet companies are huge contributors to GDP in the US and are leaders in the global market.

For decades, the US has strongly supported using trade agreements as a means of inducing other countries to adopt intellectual property rules that the US favors. With the adoption of the TRIPs Agreement in 1994, the linkage between trade and intellectual property rules was firmly established as an international norm for all members of the World Trade

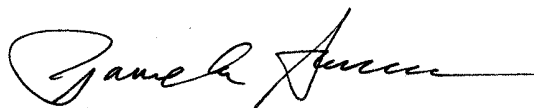
Organization. While there are certainly critics of this linkage, most commentators would say that the US has overall benefited from TRIPs as well as from the free trade agreements the US has negotiated with numerous other countries.

6. It is my understanding that community guidelines drafted and enforced by online service providers are starting to play a bigger role in this space. They can determine what kinds of content is and is not appropriate, and how content will be removed. Since these are private guidelines, these decisions are not reviewable by a court. I see both advantages and disadvantages to this practice, since there are serious concerns about the potential of private decisions replacing democratic lawmaking and judicial systems with private ordering.
 - a. **How do you see the role of community guidelines today?**
 - b. **In an ideal world, what role should they play?**

As long as they are publicly available, community guidelines adopted by online service providers can be effective in articulating and enforcing norms and thereby shaping behavior of Internet users. Such guidelines can be reviewed by governmental agencies. Such reviews can lead to refinement of the guidelines in response to concerns that they are either too loose or too restrictive. The Federal Trade Commission, for instance, has held numerous hearings about online privacy and cybersecurity concerns and taken action against online service providers for violating their own policies or industry standards. When guidelines alone have proven to be insufficient, as with the protection of the information privacy interests of children, Congress has been able to step in and provide legislation to address such problems.

In closing, let me say that I hope this additional information will be useful to you, your fellow subcommittee members, and staffs as you consider what if any changes should be made to the safe harbors Congress enacted in 1998 as part of the DMCA. I hope this letter finds you and your staff in good health.

Sincerely,



Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School

