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?

Answer: Senator Orrin G. Hatch, Chairman of the Judiciary Committee, first introduced a bill concerning copyright infringement and digital technology (including the internet) in 1995. By that time, use of the internet was burgeoning, and copyright owners were faced with voluminous, uncontrollable digital copying of copyrighted works and their widespread dissemination via the internet. This copying and dissemination occurred during the dial-up internet era and has been exacerbated by the advent of WiFi. In other words, ease of access to copyrighted works has increased tremendously.

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?

Answer: The Copyright Act did not speak expressly about copyright protection on the internet nor was it geared toward digital infringement in general. In the United States, it was widely held that making a digital copy was the same as making an analog copy, but this was not a national or international agreed-upon principle. There was only one significant court case that had tackled the question of the liability of internet service providers for indirect infringement when their users engaged in online copyright infringement, *Religious Technology Center v. Netcom,* 907 F.Supp. 1361 (N.D. Cal. 1995). Another key issue was circumvention of technological protection measures that copyright owners used to protect their works against infringing uses.

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?

Answer: Section 512(i) was intended to codify the requirement that, in order to have the benefit of limited liability, service providers had to be responsible regarding copyright infringement on their systems. They had to have and enforce an effective policy for termination of repeat infringers. They also had to accommodate technical protection measures on their systems. This means that service providers could not configure their systems in such a way that copyright owners' anticircumvention technology would be defeated. I am not aware that this is a major problem between service providers and copyright owners. Instead, the copyright owners believe that the safe harbors of limited liability are too easy to use, reducing the incentive of service providers to cooperate with copyright owners to protect their works. This issue goes beyond 512(i). Nevertheless, there have been agreements reached between major copyright owners and major internet platforms—YouTube and the MPA, for example.

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?

Answer: One of the goals of the DMCA was not to stifle the growth of the internet by saddling service providers with impossible anti-infringement responsibilities; hence, there is no requirement for monitoring. It is a reasonably tenable position that case law has interpreted the DMCA to loosen the level of responsibility of service providers for online copyright infringement.

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

Answer: One example is the advent of YouTube, which became active on February 14, 2005. This platform opened up the whole question of user-generated content. Another example is the explosion of file-sharing websites.

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?

Answer: The chief stakeholders were the major copyright owners—movies, music, computer software programs, literary works—and the internet service providers. Most of the negotiation sessions involved these parties. There were also, however, sidebar negotiations with other interested parties, for example, libraries, archives and educational institutions. Individual creators in the film industry gave input through their organizations, for example, actors, screenwriters, and directors. I do not specifically recall small business organizations as being represented. This was probably because there were no particular organizations of small business service providers or copyright owners. But small copyright business owners would have benefited from the same copyright protections negotiated by the major copyright owners, as would small service providers from protections negotiated by the major service providers. At all times, Chairman Hatch was concerned with the major public interest issues: the easy availability of copyrighted works on line for a reasonable fee and the stimulation of the growth of the internet.

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?

Answer: That is my recollection—that the service providers early on accepted the concept of notice-and-takedown and only notice-and-takedown. That was not the position of Chairman Hatch and was not the path taken by Congess.

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?

Answer: I do not have an informed opinion regarding whether "service providers have held up their end of the bargain and investigated infringing activity when they have red flag knowledge." The major copyright owners believe not. In looking at the cases that have interpreted the DMCA "red flag" provision, I believe that Congress had a broader view of the service providers' responsibility than the courts. In general, the courts have tended to confine the "red flag" to knowledge of specific infringing material. In contrast, the DMCA Senate Report states: "but it would not qualify for the safe harbor if it had turned a blind eye to 'red flags' of obvious infringement" (p.48). The Report continues: "The common sense of this 'red flag' test is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. *If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a 'red flag.'* A provider proceeding in the face of such a red flag must do so without the benefit of a safe harbor" (id. (emphasis added)). The courts' interpretations have provided a disincentive to service providers to engage in a cooperative effort with copyright owners to reduce internet infringement. The exception is the Second Circuit, which recognized the duty not to have "willful blindness." *Viacom v. YouTube*, 676 F.3d 19, at 35 (2d Cir. 2012).

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?

Answer: The most basic difference between traditional telecommunications and the internet is the degree to which these technologies rely on copying. While even traditional telecommunications involve some digital copying of data, the internet cannot *exist* without the copying of data. Sometimes this data when assembled for an end-user is a copyrighted work. Furthermore, traditional telecommunications did not and does not involve hosting of websites. Thus, traditional telecommunications did not raise issues of copyright infringement.

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?

Answer: There is no legislation directly addressing the issue of service provider liability for trademark infringement. Instead, the common law of contributory infringement and vicarious liability applies. This law also applied to copyright infringement when the DMCA was being considered. Neither the copyright owners nor the service providers were content to allow the law to develop incrementally. Copyright owners wanted copyright law to apply as fully in the digital world as it does in the analog world. In reaction, the service providers pointed out threats to the development of the internet if copyright law would apply rigorously to online services.

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?

Answer: Rather, it is evidence of the massive amount of copyright infringements on the internet, which surely exceeds this number. Imagine the amount of time and the expense that copyright owners require to protect their property rights.

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?

Answer: Service providers are trying to educate their users about copyright rights, but education alone is not enough to change behavior.

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?

Answer: (1) The "red flag" provision needs to be rewritten to undo the failure of most courts to understand what Congress intended. (2) The anticircumvention provisions need to be focused on copyright infringement, not on print cartridges, garage door openers, etc. (3) The requirements to be a "responsible" service provider need to include incentives to cooperate with copyright owners to reduce piracy. (4) The definition of "service provider" needs to be clarified, perhaps distinguishing those that simply provide internet access from those that provide additional services. (5) The definition of "person" needs to be modified to include the federal government and the jurisdiction of courts over the Act needs to include all federal courts.

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?

Answer: See answer above except for (2).

The Honorable Edward J. Damich –
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. 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?

Answer: The most difficult aspect to negotiate was service provider liability. I believe that the "red flag" provision has been interpreted too narrowly by some courts. This has resulted in a disincentive for service providers to cooperate with copyright owners in suppressing online piracy. My advice would be to reset the midpoint between monitoring on the on the one hand and actual knowledge on the other. Regarding anticircumvention, I would focus its prohibitions more on protecting copyright and not on print cartridges, garage door openers, etc.

2. 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." We are told that no meaningful cooperative effort took place. When drafting Section 512 of the DMCA, how did you envision cooperation between online providers and rights holders? Has this cooperation worked in practice as you envisioned it should?

Answer: Technology has greatly improved the ability to detect copyright infringement on line. There have been cooperative efforts between major copyright owners and big service providers. I believe that an agreement was worked out between the MPA and YouTube, for example. But the cooperation has not been as robust or as widespread as I had hoped.

3. 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?

Answer: When the DMCA was drafted service providers were simply that—providers of internet service to websites for hosting and to users for access. Now, there are many online platforms such as YouTube, Facebook, Instagram, etc. These were not foreseen even at the time of enactment of the DMCA.

4. You testified that Senator Hatch rejected notice-and-takedown as the sole copyright responsibility on the part of service providers. What motivated that decision, and what

additional service provider responsibilities were contemplated while drafting the DMCA? Did you intend the "red flag" provisions to impose such responsibilities, and do you believe they have served that purpose in practice?

Answer: Senator Hatch had to goals in mind: (1) to protect copyright in the then new digital environment and (2) to encourage the development of the internet. He saw the internet as a marketplace where consumers would have available an array of copyrighted works—movies, video games, computer programs—to buy and access instantly. Notice-and-takedown alone would not adequately protect copyright works, and inadequate protection would make copyright owners less willing to market their works on line. The copyright owners initially argued that every copy made in the running of the internet was copyright infringement, and indeed this is a tenable position based on the Copyright Act. On the one hand, Senator Hatch persuaded the copyright owners to modify this position so as not to impede ordinary internet functions such as email and caching. On the other hand, he persuaded the service providers to go beyond notice-and-takedown. The sticking point was the "red flag" provision--where to draw the line between monitoring, on the one hand, and actual knowledge, on the other. In practice, the "red flag" provision has been reduced almost to the "actual knowledge" standard. This has upset the balance that Senator Hatch envisioned. For example, I do not believe that he would have foreseen that service providers could ignore websites bearing all the characteristics of piratical sites just because the service providers did not have specific knowledge of infringing works on the website.

5. 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?

Answer: In my recollection, we never contemplated that Section 1201's anticircumvention provisions would apply outside the context of copyright infringement. I was quite surprised when I saw that it was invoked for print cartridges and garage door openers. The very fact that the DMCA assigns to the *Copyright* Office the promulgation of exceptions is proof that a nexus to copyright infringement was presumed.

Questions for the Honorable Edward J. Damich
From Senator Mazie K. 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?**

The internet was in its infancy. At the time, we perceived that service providers had three functions: (1) email, (2) hosting websites, and (3) providing access to the internet to individual users. YouTube came on line in 2005, the DMCA was passed in 1998.

    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?**

We thought it was massive at the time, now its scale defies description.

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?**

First, in order to be eligible for limited liability, a service provider was expected to be responsible. A responsible service provider would be concerned about copyright infringement on its network and would address it in good faith. This implies cooperation with copyright owners. Second, looking at the "red flag" provision, a responsible service provider would not turn a blind eye to apparent infringing activity. This does not mean that it would spontaneously act only when it came upon knowledge of a specific infringement.

    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?**

The way that the "red flag" provision has been interpreted by the courts has resulted in a disincentive to cooperation with copyright owners on the part of service providers. The "red flag" provision uses the phrase "infringing activity." I would think that it is apparent that a website called "Pirate's Cove"is engaging in copyright infringing activity. Some courts, however, have required actual knowledge of a specific copyright infringement for the "red flag" provision to apply. In contrast, on another issue, the Second Circuit rightly grasped the purpose of the "red flag" provision to apply when there was "willful blindness" on the part of a service provider. Viacom v. YouTube, 676 F.3d 19 (2012).

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?

The process of enactment of the DMCA began with a draft bill by the Clinton Administration, which was introduced for discussion purposes by Chairman Hatch and Ranking Member Leahy. In other words, the first step was a legislative framework. The introduction of the draft bill shifted the issues from the theoretical to the practical and focused discussion. However, as it emerged, the draft bill had not adequately addressed the concerns of the service providers. This defect also stalled a House bill. Senator Hatch was willing to take the service providers' arguments seriously and was willing to address them. He perceived that the public interest was reflected on both sides. Therefore, I believe that a draft bill is a good starting point, but it is important that at least the major stakeholders' concerns be taken into consideration at this initial stage.

But, although the major stakeholders, because of their importance to the U.S. economy, would play the leading role, other interested parties should be heard and even sought after if the result would truly be legislation in the public interest. In the negotiations that led up to the service provider limited liability provisions, the service providers and the major copyright owners were the majority at the table. But there were also meetings and negotiations involving other interested parties, such as educational institutions, libraries and archives. The legitimate requirements of these other interested parties either became the subject of negotiations with the major players or they were insisted upon by the legislators.

It is also important to emphasize that the DMCA was a bipartisan effort. The role of the Chairman and the Ranking Member was crucial. In my experience with the negotiations, personal meetings with Senator Hatch were necessary to remedy impasses.

Finally, when compromise is reached and bill language is largely agreed upon, it is important to pull back, look at the bill as whole, and verify that the bill is still in the public interest.

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

I would change three things. First, I would reword the "red flag" provision so that its original purpose would be grasped by the courts. Second, I would enhance the responsibilities of the service providers to qualify for limited liability. Third, I would amend the anticircumvention provisions to focus them on copyright protection, not print cartridges and garage door openers.