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By email

The Honorable Lindsay Graham
Chairman, Senate Judiciary Committee
Washington, D.C.

Dear Senator Graham:

Thank you for the opportunity to answer additional questions from members of the Senate Judiciary Committee's Subcommittee on Intellectual Property following the hearing held on March 10, 2020 on "Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy?"

Attached please find my answers to the very thoughtful questions posed by Subcommittee chairman Tillis, Subcommittee ranking member Coons, and Senator Blumenthal.

I have tried to provide as thorough and complete answers as time and my other obligations will permit. If there are any outstanding questions from my testimony and these answers I would be very happy to work with members of the Subcommittee and staff on these topics.

Cordially,

/s/ Justin Hughes

Justin Hughes

Attachment:

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I. QUESTIONS FROM CHAIRMAN TILLIS

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?

ANSWER

In terms of statutory law, most of our major trading partners have appropriate laws – in fact, as discussed below in answering other questions from the sub-committee, some jurisdictions have better statutory tools than the United States for the protection of copyrighted content in the networked, digital environment. Nonetheless, there are some countries that need to improve their statutory and administrative law frameworks to address online piracy. For example, I believe that a number of Latin American jurisdictions (Argentina, Chile, Ecuador, Colombia) lack adequate notice and take-down systems while some of the same countries still do not have adequate protection of digital locks that safeguard copyrighted works.

In terms of actual enforcement, the Office of the U.S. Trade Representative (USTR) does a good job in providing an annual overview on global intellectual property enforcement in its annual Special 301 Report.¹ As you know, the Special 301 Report has a list of “Priority Watch” countries that are considered to be doing the worst job in protecting intellectual property and a “Watch” list of countries that need significant improvement in their enforcement environments. A review of USTR’s 2019 Special 301 Report shows an emphasis with many “Priority Watch” countries on counterfeiting of physical goods, including online sales. In this respect, the dynamics of copyright enforcement can be quite different from the dynamics of the fight against counterfeit goods or the problem of patent infringement.

Consider China and India. Both have significant problems with online copyright infringement; both also have significant problems with counterfeit goods. But in each country the dynamics of online copyright enforcement are radically different from the dynamics of the fight against counterfeit goods. India’s film industry is one of the crown jewels of both the Indian economy and Indian culture – Bollywood’s leverage in demanding improved copyright enforcement is real; in contrast, India’s generic pharmaceutical industry does not have the same direct interest in fighting counterfeiting of patented pharmaceuticals. In China, the number of cinema screens has grown from 4,723 in 2009 to 66,028 screens in 2019.² Those cinemas are privately-owned – built by entrepreneurs answering the Beijing government’s call for better entertainment facilities for China’s growing middle class. That is a powerful group of local stakeholders who will continue to press China to maintain and improve online copyright enforcement. Is enough being done to enforce copyright online in those two countries? No, but improving copyright enforcement will depend on working with influential local stakeholders.

I think it is also important to acknowledge that when we ask whether countries are doing “enough” to protect U.S. copyright owners, we need to ask relative to each jurisdiction’s overall law enforcement capacities and its mix of socio-economic problems. On objective criteria, no doubt

¹ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2019 SPECIAL 301 REPORT, April 2019, available at https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf.

² Lai Lin Thomala, *Number of cinema screens in China from 2009 to 2019*, STATISTICA, 11 November 2019, available at <https://www.statista.com/statistics/279111/number-of-cinema-screens-in-china/>.

Venezuela and Ukraine each deserve a place on USTR's Priority Watch list, but "unauthorized camcording and widespread use of unlicensed software" – identified as a problem in each jurisdiction³ – are minor issues in the midst of the general collapse of the Venezuelan economy⁴ and the Ukraine's struggle against Russian territorial aggression. Even in less extreme circumstances, what we ask of other countries in terms of copyright enforcement should reflect what we ask of them in other areas of law enforcement as well as the resources we contribute to capacity-building in other countries.

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?

ANSWER

I doubt if there is much comparative data to answer your question directly. And there are several reasons why.

First, the most interesting natural experiment would have been a jurisdiction that imposed *strict* liability on ISPs for copyright infringement enabled by the ISP service (transmission, hosting) *without* a knowledge requirement. But I do not know of any such jurisdiction. Almost universally, if not universally, ISPs have been shielded from responsibility for copyright infringement caused by users as long as the ISP does not know about the infringement. The details of notice and takedown systems vary from jurisdiction to jurisdiction,⁵ but any legal system that imposes liability on the ISP once it has knowledge of the infringement devolves toward a notice-and-takedown system (because informationally-complete, properly-delivered notices are the surest way to establish that an ISP has actual knowledge).

Second, differences in regulation of the internet in different jurisdictions will probably overwhelm any effect that differences in copyright laws might make. For example, the DMCA creates safe harbors for ISPs who comply but does not *establish* liability for failing outside the safe harbors. In contrast, Chinese copyright law affirmatively makes an ISP *liable* when it fails to comply

³ 2019 SPECIAL 301 REPORT at 67 (Venezuela); *Id.* at 61 (Ukraine).

⁴ Mary Beth Sheridan, *How bad is Venezuela's economy? Even the criminals are struggling to get by*, WASH. POST, 8 March 2019, available at https://www.washingtonpost.com/world/how-bad-is-venezuelas-economy-even-the-criminals-are-struggling-to-get-by/2019/03/07/1ccb653e-3c75-11e9-b10b-f05a22e75865_story.html; Andrea Castillo, *Blankets, canned tuna, and faith in God – how fleeing Venezuelans survive*, LOS ANGELES TIMES, 16 January 2020, available at <https://www.latimes.com/projects/venezuela-migration-crisis/>.

⁵ As of 2013, one summary reported notice-and-takedown systems in Australia, China, France, Italy, Germany, Japan, New Zealand, Singapore, South Africa, South Korea, Taiwan and the United Kingdom. *Enforcing Online Copyright Protections Abroad: Understanding Foreign Takedown Notice Requirements*, THE IP EXPORTER, 25 March 2013, available at <https://theipexporter.com/2013/03/25/enforcing-online-copyright-protections-abroad-understanding-foreign-takedown-notice-requirements/>. India also has a notice-and-takedown system, but access to alleged infringing materials is only disabled for 21 days absent a court order. See GOVERNMENT OF INDIA COPYRIGHT OFFICE, THE COPYRIGHT RULES, 2013, Rule 75, available at http://www.copyright.gov.in/Copyright_Rules_2013/index.html; *Copyright Infringement and Remedies in India*, Lex Research Hub, available at <https://lexresearchhub.com/copyright-infringement-and-remedies-in-india/>.

with their safe harbor requirements.⁶ But the other differences between regulation of the internet in China and in the United States surely overwhelm any effect this copyright law difference has on the internet and online services in the two countries.

But there may be some helpful “orthogonal” data in the form of how, before the 2019 Digital Single Market Directive,⁷ the European Union *had already* imposed greater responsibilities on ISPs than ISPs have in the United States – with little or no adverse effect on the internet or online services for EU citizens. We can see this in two ways.

One way is that the European Union’s ISP safe harbors – and potential liability for falling outside the safe harbors – has never been limited to copyright law. The EU safe harbors were legislated in the 2000 “E-Commerce” Directive⁸ and apply to other “information torts” caused by internet users, including trademark infringement, defamation, invasion of privacy, etc.⁹ This is a very different regime from the *complete shield* Section 230 of the Communications Decency Act gives ISPs in the United States *from any claims other than intellectual property claims*. By the lights of what technology companies and their trade associations will tell you, the European system *must be* more onerous on ISPs, i.e. it exposes ISPs operating in Europe to a far wider range of potential liability unless they expeditiously disable access to a much wider range of materials.

Second, because the EU safe harbors for ISPs cover a wider range of torts, the EU had *already* been scaling back its safe harbors before Article 17 of the Digital Single Market Directive. In its 2011 *L’Oréal v. eBay* decision¹⁰ the Court of Justice of the European Union held that while an online market platform (like eBay) would be entitled to the E-Commerce Directive’s Article 14 safe harbor when it limits its activities to “providing an intermediary service, neutrally, by a merely technical and automatic processing of [third-party] data.”¹¹ The Court was clear that when the platform steps beyond that – and loses its “neutral position between the customer [and] seller” – the

⁶ Rules of Supreme People’s Court of China on Several Issues Concerning the Application of Law in Adjudication of Civil Disputes Related to Infringement of Right of Communication over Information Networks, Approved at No. 1561 Meeting of the Supreme People’s Court Adjudication Commission held on November 26, 2012. Fashi (2012) No. 20. Rule 7 affirmatively imposes contributory liability when ISPs “clearly know or should have known that their network users are infringing the right of communication and the [ISPs] have not taken any necessary measures such as deleting, shielding, disconnecting, . . .” while Rule 4 imposes joint liability under certain circumstances.

⁷ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directive 96/9/EC and 2001/29/EC. [hereinafter Digital Single Market Directive or DSM Directive].

⁸ Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 8 June 2000.

⁹ *Sotiris Papasavvas v. O Fileleftheros Dimosia Etairia Ltd*, Court of Justice of the European Union, Case C-291/13, 11 September 2014 (“limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31 are capable of applying in the context of proceedings . . . relating to civil liability for defamation, where the conditions referred to in those articles are satisfied”).

¹⁰ *L’Oréal SA, et al. v. eBay International AG*, Court of Justice of the European Union (Grand Chamber), Case C-324/09, 12 July 2011.

¹¹ The court agreed with the UK Government that an online marketplace could still enjoy the safe harbor where it “stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers” *Id.* at ¶ 115.

safe harbor is lost. The Court described those additional activities in terms that could easily apply to large social media platforms like Facebook and YouTube.¹²

So, given that 2011 development in EU law, we might ask *what effect has greater responsibility for online platforms in Europe outside copyright had on those platforms, the internet, and online services?* Well, despite the increased liability of the 2011 *L’Oreal* decision, it appears that in Europe as of 2019 “online marketplaces are here to stay” and there “are many . . . interesting platforms for retailers looking to sell their products to local customers.”¹³ Meanwhile, internet penetration rates in Europe and North America are largely the same¹⁴ and everyone agrees that Europeans pay substantially less for internet access than American citizens do.¹⁵ Again, there are other factors that contribute to Americans paying *more* for a *slower* internet, but we should be doubtful of any simple formula that increased burdens on ISPs will diminish the quality of the internet and online services.¹⁶

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?

ANSWER

In terms of “best protect[ing] users” we have to be clear about what the legitimate interests of internet users are. Internet users do have a legitimate – and increasingly critical – interest in reliable internet conductivity and access to websites for news, work, distance learning, shopping,

¹² *Id.* at ¶ 116 (“Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31”).

¹³ *Popular online marketplaces in Europe*, ECOMMERCE NEWS – EUROPE, available at <https://ecommercenews.eu/popular-online-marketplaces-in-europe/>

¹⁴ Internet penetration in northern and western European countries is better than in North America, while penetration in southern European countries is slightly worse. J. Clement, *Internet penetration rate worldwide 2020, by region*, STATISTICA, Feb 3, 2020 (“Northern Europe is a clear global leader, as the region’s online penetration rate stood at 95 percent.”), available at <https://www.statista.com/statistics/269329/penetration-rate-of-the-internet-by-region/>.

¹⁵ Niall McCarthy, *The Most And Least Expensive Countries For Broadband*, FORBES, 22 November 2017, available at <https://www.forbes.com/sites/niallmccarthy/2017/11/22/the-most-and-least-expensive-countries-for-broadband-infographic/#7cb7ffe323ef>; Hannha Yi, *This is how Internet speed and price in the U.S. compares to the rest of the world*, PBS NEWS HOUR, 26 April 2015, available at <https://www.pbs.org/newshour/world/internet-u-s-compare-globally-hint-slower-expensive>.

¹⁶ I also think that while ISPs have flourished behind the shield of Section 230, that provision has not worked completely as Congress intended, at least not in terms of how much ISPs police their own content. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (Congress enacted the CDA “to promote the free exchange of information and ideas of the internet and to encourage monitoring for offensive or obscene material”). See also Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014) (outlining different commentators’ proposals to amend §230 to limit the immunity granted to online intermediaries); DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE 2* (2014).

communicating with friends and family, professional development, libraries and research, worship, and entertainment. But meeting those needs does not require access to unauthorized works that have been taken from the creators and copyright owners. Internet users do not have a legitimate interest in accessing copyright piracy – particularly for entertainment purposes – any more than internet users have a legitimate interest in entertaining themselves with revenge porn, objectionable deep fakes, or stolen private data from American citizens.

Site-blocking has been effectively used in a number of democratic societies with no apparent meaningful loss of freedom of expression; that includes both continental European jurisdictions and common law countries (Australia, India, Singapore, the UK) that share even more of the United States’ legal and civic traditions. A brief review of these decisions does point to ways that a site-blocking mechanism can be designed to protect users.

In the European Union, the ability for copyright owners to obtain “no fault” injunctions against ISPs to block pirate websites was established in Article 8(3) of the 2001 Information Society Directive which provides:

Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.¹⁷

In establishing this provision, the European Parliament was very clear that often “intermediaries are best placed to bring such infringing activities to an end” and “right holders should have the possibility of applying for an injunction against an intermediary who carries a third party’s infringement of a protected work or other subject-matter in a network.”¹⁸

The 2004 Directive on the Enforcement of Intellectual Property Rights confirms that Article 8(3) injunctions are intended to issue without finding the ISP culpable for infringement.¹⁹ Article 11 of the enforcement directive provides that courts in EU countries “may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement” and then adds “Member States shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right.”²⁰ Article 9(a) of that directive also provides for interlocutory injunctions and recognizes that equivalent interlocutory injunctions against ISPs are permitted under the 2001 Information Society Directive.²¹

Based on these laws, I believe that national courts have issued website-blocking injunctions against ISPs in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Spain, Sweden, and the United Kingdom.

¹⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8, 2001 O.J. (L 167).

¹⁸ *Id.* at Recital 59.

¹⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, (OJ L 157, 30.4.2004), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29>

²⁰ *Id.* at Article 11.

²¹ *Id.* at Article 9. Article 9 also clarifies that interlocutory injunctions may be sought before lawsuits are commenced. Article 9(5) provides “Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority.”

In the United Kingdom, Article 8(3) of the Information Society Directive is implemented by Section 97A of the Copyright, Designs and Patents Act, 1988 which authorizes the High Court (Chancery) to grant an injunction against an ISP “where that service provider has actual knowledge of another person using their service to infringe copyright.”²² Section 97A is not expressly limited to orders for ISPs to block access to pirate sites, but in a series of courts decisions it has been used that way. The law was first used to obtain a website-blocking injunction in the 2011 *Twentieth Century Fox, et al. and British Telecommunications PLC* case;²³ since then multiple decisions from the English courts have granted website-blocking injunctions against ISPs, including in *Dramatico Entertainment et al. v. British Sky Broadcasting Limited*²⁴ in which the copyright owners named the ISPs as the technical defendants and did *not* bring proceedings against the operators of The Pirate Bay for copyright infringement; the court held an initial hearing on whether the Pirate Bay was infringing plaintiffs’ copyrighted works in which the ISPs “understandably” (according to the court) declined to participate.²⁵ The court determined that there was no need to join The Pirate Bay because EU Article 8(3) and Section 97A “confer jurisdiction on the Court to grant injunctions against intermediaries whose services are used by a third party to infringe copyright.”²⁶ *Dramatico Entertainment* and other English decisions have expressly found that the websites to be blocked are sites intended for and dedicated to copyright infringement.²⁷

In Australia the ability of courts to grant site-blocking orders was clarified by the addition of Section 115A to the Copyright Act through the *Copyright Amendment (Online Infringement) Act 2015* (Cth) (“the Amendment Act”), effective 27 June 2015. The amendment was expressly intended to permit injunctions “to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright” and to permit copyright owners to seek such orders “without having to first establish the [ISP’s] liability for copyright infringement or authorisation of copyright infringement.”²⁸ As the amendment’s legislative history makes clear, “[t]his judicial process would be more efficient and avoid implicating [ISPs] unnecessarily”;²⁹ it was

²² <http://www.legislation.gov.uk/ukpga/1988/48/section/97A>.

²³ *Twentieth Century Fox, et al. and British Telecommunications PLC*, [2011] EWHC 2714 (Ch) (26 October 2011).

²⁴ *Dramatico Entertainment Limited et al. v. British Sky Broadcasting Limited, et al* [2012] EWHC 268 (Ch) (20 February 2012)[finding Pirate Bay and Pirate Bay users infringe copyright]; *Dramatico Entertainment Limited et al. v. British Sky Broadcasting Limited, et al* [2012] EWHC 1152 (Ch) (2 May 2012)[issuing 97A injunction for ISPs to block Pirate Bay].

²⁵ *Id.* at ¶¶ 6-7.

²⁶ *Id.* at ¶ 10. A French court more recently agreed with this conclusion. *Federation Nationale Des Distributeurs De Films and Others v S.A. Orange and Others*, Paris District Court, 25 May 2018 (no prior action is required against site operators, hosting providers or even registrars before seeking site blocking or delisting).

²⁷ *Id.* at ¶ 78 (“Infringement is not merely an inevitable consequence of the provision of torrent files by TPB. It is the operators of TPB’s objective and intention. . . . According to a statement published on its site, it was founded by a ‘Swedish anti copyright organisation’ . . . [i]n the first instance judgment in the Swedish criminal proceedings, [one of the Pirate Bay founders] was recorded as stating that “the purpose of the site was pirate copying.”).

²⁸ Copyright Amendment (Online Infringement) Bill 2015, Revised Explanatory Memorandum at 2, available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf. In Australia, transmission ISPs are called “carriage service providers,” so where brackets above say “[ISPs],” the Memorandum says “CSPs”.

²⁹ *Id.*

“intended to create a no-fault remedy against [ISPs] where they are in a position to address copyright infringement.”³⁰

In the first application of Australia’s 2015 law, the Australian court ordered ISPs to block access to a website “SolarMovie” that offered – without authorization – “15,644 motion pictures and 1,768 television series (138,503 episodes)”³¹ as well as The Pirate Bay, TorrentHound, and Torrentz. With the exception of some inactive websites, the court was satisfied that each of these “online locations” had as “its primary purpose the facilitation of copyright infringement”³² and ordered a group of Australian ISPs to “take reasonable steps to disable access” to the online locations, including through “IP Address blocking or re-routing,” “URL blocking,” and “any alternative technical means for disabling access . . . as agreed in writing between the applicants and a respondent.”³³ The copyright owners and ISPs were jointly ordered to establish a webpage for redirected Internet users to inform those users that “access to the website has been disabled because this Court has determined that it infringes or facilitates the infringement of copyright.”³⁴ Subsequently, Australian courts have used section 115A to order ISPs to block scores of websites,³⁵ including an injunction to block illegal internet-based TV subscription services available through three *apps* installed on an Android operating system device for televisions, instead of via websites.³⁶

India and Singapore are other common law jurisdiction that have embraced judicious use of site blocking as an effective means of copyright enforcement that need not jeopardize free speech.

Protecting internet users and ISPs

The first and most important way that a site-blocking mechanism can be designed to protect internet users is by ensuring that it is only applied to sites that are what we would commonly identify as “pirate sites,” “rogue sites,” or – in the terminology of the Singapore Copyright Act, “flagrantly infringing online locations” (FIOL).³⁷ This is can be done through statutory law or by a common law court persuasively establishing criteria for identifying these online locations.

For example, section 115A of the Australia’s Copyright Act provides that the Federal Court of Australia may issue an injunction to a transmission ISP (called a “carriage service provider” in Australian law) to “take reasonable steps to disable access” to an online location outside Australia where:

“(b) the online location infringes, or facilitates an infringement of, the

³⁰ *Id.* at 3. The Memorandum makes clear that the provision is not only “no-fault,” but it “is designed to avoid the kind of factual inquiries into matters of the kind undertaken in a proceeding” to establish the secondary liability of the ISP.

³¹ *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503, Judgment at 21. This court’s judgement also applied to the Order granted in a parallel case, *Foxtel Management Pty v. TPG Internet*, et al.

³² *Id.* at 22, 29-31

³³ *Id.* at 33.

³⁴ *Id.* at 33-34.

³⁵ *Roadshow Films Pty Ltd v Telstra Corporation Limited* [2017] FCA 965; *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041.

³⁶ *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582. See also Andrew Colley, *Ruling puts Australian courts on the front line of global online TV piracy war*, FINANCIAL REVIEW, 28 May 2018, available at <https://www.afr.com/technology/ruling-puts-aussie-courts-on-the-front-line-of-global-online-tv-piracy-war-20180527-h10lxm>.

³⁷ Article 193DDA(1)(b), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).

copyright; and

- “(c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).”

Australian law also directs the court to consider various factors in the decision to issue an injunction which should also ensure that injunctive relief is granted against and only against genuine pirate sites:

- (a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement,;
- (b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
- (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;³⁸

The Singapore Copyright Act has a similar list of factors for the court to consider in determining whether “an online location has been or is being used to flagrantly commit or facilitate infringement of copyright.”³⁹ They are the following:

- (a) whether the primary purpose of the online location is to commit or facilitate copyright infringement;
- (b) whether the online location makes available or contains directories, indexes or categories of the means to commit or facilitate copyright infringement;
- (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- (e) whether the online location contains guides or instructions to circumvent measures, or any order of any court, that disables access to the online location on the ground of or related to copyright infringement;
- (f) the volume of traffic at or frequency of access to the online location.⁴⁰

Factors like this could certainly be included in a clarification or recasting of §512(j). But in the absence of such statutory factors, in the common law tradition American courts would identify similar criteria on their own. For example, in its 2019 *Utv Software Communication Ltd. ... vs 1337X*

³⁸ Section 115A(5) of the Australia Copyright Act [Part V, Division 2]

³⁹ Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).

⁴⁰ *Id.*

decision,⁴¹ the Delhi High Court focused on websites “which primarily or predominantly share infringing content,” held that site-blocking injunctions should be granted blocking ‘rogue websites’ that are ‘overwhelmingly infringing,’ and used many of the Australian and Singaporean criteria in its determination of which sites should be blocked under Indian copyright law.⁴²

The second way to protect consumers and ISPs in an effective site-blocking regime is choice of technology. Any federal courts handling a case requesting website blocking will consider which among different available blocking technologies are preferable, balancing effectiveness, burden on ISPs, and minimization of adverse side-effects on consumers. For example, in the English case *Twentieth Century Fox, et al. and British Telecommunications PLC*, Judge Arnold concluded that the injunction should be worded as “IP address re-routing” not “blocking” because he concluded that “IP address blocking could lead to ‘overblocking’ of sites or pages that ought not to be blocked.”⁴³ In the United Kingdom, a blocking technology called “Cleanfeed” initially developed for child pornography (as used for that in Canada and the UK) is now being used for copyright enforcement.⁴⁴ I honestly do not know enough about that technology, but it might warrant further study by subcommittee staff.

Finally, there should be consideration of the continued availability of any non-infringing materials and avenues for non-infringing speech. When a site consists *overwhelmingly* of copyright infringement, but still hosts some non-infringing material – *and that material is not included merely as ruse* – a decision to block that site can protect the legitimate interest of internet users by asking whether (a) the non-infringing material is or will be otherwise readily available to internet users and/or (b) whether the “speakers” using this particular site for legitimate purposes [independent musicians, for example] have ample other avenues to make their works available to the public [as musicians do through Bandcamp, YouTube, MySpace,⁴⁵ personal websites, etc.]

Making site block injunctions effective

In the UK, Singapore, and India, courts have fashioned a “dynamic injunction” remedy to address the problem of blocked websites creating “mirror/alphanumeric/redirect” websites after an injunction orders expressly to get around a court-ordered block. Following the Singapore Supreme Court’s *Disney v, M1* decision, a plaintiff can file an additional affidavit stating to the court why a new website falls within the purview of an existing blocking order; the affidavit is forwarded to an

⁴¹ [CS(COMM) 724/2017 & I.As. 12269/2017, 12271/2017, 6985/2018, 8949/2018 AND 16781/2018], Decision of 10 April 2019 at ¶93.

⁴² The court adopted criteria “(a)” to “(d)” of the Australian law verbatim as well as criteria “(e)” and “(f)” of the Singaporean law, albeit in a different order, and added the following considerations:

“c. Whether the detail of the registrant is masked and no personal or traceable detail is available either of the Registrant or of the user.

“d. Whether there is silence or inaction by such website after receipt of take down notices pertaining to copyright infringement.

Id. at ¶ 60.

⁴³ *Twentieth Century Fox, et al. and British Telecommunications PLC*, [2011] EWHC 2714 (Ch) (26 October 2011) at ¶ 6.

⁴⁴ For an explanation of the technology and its use, see <https://enacademic.com/dic.nsf/enwiki/3853130>.

⁴⁵ Yes, MySpace is still a viable social media platform and used by many musicians! See Elise Moreau, *Is MySpace Dead?*, LIFEWIRE, Updated 20 January 2020 (MySpace has) available at <https://www.lifewire.com/is-myspace-dead-3486012>.

ISP, which can either extend the blocking order or dispute the merits of such an extension. In the Delhi High Court case discussed above, the court found that a similar mechanism was possible under Indian law and delegated receipt of such extension requests to the joint-registrar of the court, an administrative office dealing mostly with purely procedural matter coming before the court.⁴⁶ In the UK, in the words of Judge Arnold:

“it is common ground that the order should permit the Studios to notify additional IP addresses and/or URLs to BT in future in order for those to be subject to the same blocking measures as www.newzbin.com”⁴⁷

This was to be done without further court order and could cover “any other IP address or URL whose sole or predominant purpose is to enable or facilitate access to the Newzbin[2] website.”⁴⁸ At least one German court has also issued a blocking order that can be considered dynamic.⁴⁹ Of course, a basic characteristic of this approach – in order to ensure that legitimate internet user interests are not encumbered – is that, in the words of the Singapore Supreme Court, “the dynamic injunction merely blocks new means of accessing the same infringing websites, rather than blocking new infringing websites that have not been included in the main injunction.”⁵⁰

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?

ANSWER

I do not know of any jurisdictions that have adopted distinct laws for smaller ISPs – with the obvious exception that the new Digital Single Market Directive exempts any new, small content-sharing platform of the obligations of Article 17 until the content-sharing platform has reached a

⁴⁶ See, e.g. Divij Joshi, *Breaking: Delhi High Court Issues India's First 'Dynamic' Website Blocking Injunction for Copyright Infringement*, SpicyIP, 12 April 2019 (describing the decision as “a significant contribution to this jurisprudence in India” and “important for its detailed consideration of the issues involved in issuing website blocking injunctions”), available at <https://spicyip.com/2019/04/breaking-delhi-high-court-issues-indias-first-dynamic-website-blocking-injunction-for-copyright-infringement.html>; Nigel Cory, *India and Website Blocking: Courts Allow Dynamic Injunctions to Fight Digital Piracy*, 29 May 2019 (calling decision “an important development for India’s digital economy”), available at <https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital> ; Case summary, Global Freedom of Speech at Columbia University (Delhi court “rightfully balanced the competing rights of freedom of speech and expression and that of copyright owners in the context of online privacy”), available at <https://globalfreedomofexpression.columbia.edu/cases/utv-software-communications-ltd-v-1337x-to/>.

⁴⁷ Twentieth Century Fox, et al. and British Telecommunications PLC, [2011] EWHC 2714 (Ch) (26 October 2011) at ¶ 10.

⁴⁸ *Id.*

⁴⁹ In *Constantin Film Verleih GmbH v. Vodafone Kabel Deutschland GmbH*, 29 U 732/18 (June 2018), the court expressly provided that the blocking injunction would also apply to additional domain names, IP address, and URLs (addresses, URLs) stating that the site blocking measures “do not relate to the domain ‘Kinnox.to’ but to the overall service ‘Kinnox.to’ which is offered under that company name, irrespective of the respective domain.” The decision was affirmed by the Court of Appeal of Munich (14 June 2018).

⁵⁰ *Disney Enterprise v. MI Ltd.*, (2018) SGHC 206 at ¶ 38.

certain age or size.⁵¹ The United States’ notice-and-takedown system is by far the most robust and active in the world and, as Professor Tushnet described in her testimony, the §512 provisions still work well for small §512(c) web hosts while being successfully adapted by industry to the automated systems that send tens of millions of §512(d) takedown notices to Google Search and Bing.

It is common for legal systems to employ, expressly or implicitly, some “principal of proportionality” in the application of intellectual property law. This is express in European Union law, but is also a standard element of common law adjudication. For example, in its 2018 *Ventura Content v. Motherless* decision⁵² the Ninth Circuit applied the §512(i) requirement to a relatively small pornography hosting site. Subsection 512(i) requires an ISP to have “adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account.”⁵³ The appellate court clearly applied the “reasonably implemented” and “in appropriate circumstances” requirements more leniently to this small ISP, both accepting that the website operator “uses his judgment, not a mechanical test, to terminate infringers based on the volume, history, severity, and intentions behind a user’s infringing content uploads”⁵⁴ and concluding that “the lack of a detailed written policy is not by itself fatal to safe harbor eligibility.”⁵⁵ I am sure there are many other cases where flexible standards are applied more leniently to smaller entities.

In contrast to enforcement obligations – which may be applied flexibly or subject to “proportionality,” it is common to have statutory provisions and administrative systems to try to help authors who are individual creative professionals. These are usually provisions that safeguard authors’ rights, especially in transactions. Congress and the European Parliament have both promulgated such provisions.⁵⁶ On the other hand, there are relatively few mechanisms to make it easier for individual authors to enforce their rights. In the United Kingdom, a small claims track was created in the Intellectual Property Enterprise Court in 2012 (IPEC-SCT). It appears to be having some success, especially for freelance photographers.⁵⁷ One group of commentators has concluded that “the SCT serves the needs of especially small plaintiffs suing to enforce rights in their own creations against defendants engaged in easy-to-prove infringing acts that would not have been

⁵¹ DSM Directive, Article 17(6).

⁵² 885 F.3rd 597 (9th Cir 2018)

⁵³ 17 U.S.C. §512(i)(1)(A).

⁵⁴ 885 F.3rd at 617.

⁵⁵ 885 F.3rd at 616.

⁵⁶ The DSM Directive itself has such provisions. Article 18(1) provides that “Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration” while Article 20 is a “contract adjustment mechanism” – commonly called a “best seller” provision – that allow authors to “claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights” when the work is unexpectedly successful. For a discussion of author-protective mechanisms in U.S. law, see Justin Hughes and Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV 513 (2017).

⁵⁷ Sheona Mary Lockhart Burrow, *Access to justice in the small claims track of the Intellectual Property Enterprise Court (IPEC): an empirical enquiry into use by creative SMEs*. PhD thesis, University of Glasgow (2018), available at <http://theses.gla.ac.uk/9019/>.

worth pursuing before the SCT's creation.”⁵⁸ In this respect, I want to express my appreciation for the work of the members of this subcommittee on the “CASE” Act, S.1273, that was reported out of this committee last September. S. 1273 is, as Chairman Graham said in the committee’s report, a serious effort to “addresses the enforcement challenges faced by small copyright owners with low value claims.”⁵⁹

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?

ANSWER

There are two distinct kinds of provisions in the EU Digital Single Market Directive intended to address the “value gap” you describe. The first kind are provisions to strengthen the negotiating position of creative professionals in relation to the traditional content industry players. These companies make tremendous financial investments in the creation of copyrighted works, but they are also a form of “intermediary” between creative professionals and consumers. The second kind of provision in the DSM Directive addresses the relationship between copyright owner (whether creative professionals or traditional content industry companies) and internet platforms.

In the first category, DSM Article 18(1) provides that “Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration” while Article 20 is a “contract adjustment mechanism” – commonly called a “best seller” provision – that allow authors – when their work is unexpectedly successful – to “claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights.” Article 20 is intended to address a scenario where an unknown and inexperienced Walter Mosely or J.K. Rawlings accepted a low-ball contract for a #1 bestseller. These provisions would apply to both online and meatspace exploitation of copyrighted works. Americans would tend to disfavor governmental intervention in private ordering through contract, but both these provisions are mild medicine compared to the termination of transfer power that Congress has vested in authors under 17 U.S.C. §§ 203, 304(c), and 304(d).

The second type of provision in the DSM Directive addressing the “value gap” is the much-discussed Article 17 (and to a lesser degree, Article 15 also addresses the “value gap” between traditional newspapers and non-journalistic news aggregators).

Article 17 of the Digital Single Market Directive requires a small set of ISPs – what are called “online content-sharing service providers” – to either obtain licenses for the copyrighted material

⁵⁸ Christian Helmers, Yassine Lefouili, Brian J. Love, and Luke McDonagh, *Who Needs a Copyright Small Claims Court? Evidence from the U.K.'s IP Enterprise Court*, BERKELEY TECH. L. J. (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104940.

⁵⁹ Senate Report 116-105, accompanying S. 1273 (12 September 2019) at 15, available at <https://www.congress.gov/congressional-report/116th-congress/senate-report/105>.

that platform users upload⁶⁰ and, where no license was obtained, makes these online content-sharing platforms “liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have . . . made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.”⁶¹ This has been reasonably understood to mean that when a copyright owner declines to license and provides the content-sharing platform with “necessary information” for filtering, the platform will have a legal duty to filter. In short, for *a very small number of internet platforms*, Article 17 imposes a “license-or-filter” requirement.⁶²

The general thinking is that the background model for this idea is YouTube’s “ContentID” system which is used to flag user uploads that infringe copyrighted materials and allow the copyright owner to decide what to do – either to block the upload or to allow the upload to be made available to users with a percentage of the ad revenue going to the copyright owner (instead of the uploader).⁶³ For all that has been written about Content ID, we have surprisingly little statistical data on its operation. We do know that YouTube makes Content ID available to *big* content industry players, but does not make it readily available to individual creators and small or medium-sized enterprises. Generally speaking, individual authors and artists have a very hard time being eligible to participate in Content ID. For example, one commentator reports, “according to some musicians, access to Content ID is linked to participation in YouTube’s music streaming services.”⁶⁴ And because Content ID is not *legally required* – or has not been held to be legally required (more on that below) – even when YouTube will provide the system to a set of copyright owners, YouTube has all the leverage in the negotiations and can drive down the price paid (that is, the advertising revenue that is shared with the copyright owners) because YouTube can say, essentially, ‘Content ID at the price we will pay you for your content or no deal and you can send us DMCA takedown notices for all the infringing uploads. As the former President of the Recording Industry Association of America described YouTube’s position in these negotiations “[t]hat’s like saying, ‘That’s a real nice song you got there. Be a shame if anything happened to it.’”⁶⁵

⁶⁰ Digital Single Market Directive, Article 17(1) (“An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter”).

⁶¹ *Id.* at Article 17(4)(b).

⁶² As I describe below in an answer to a question from Senator Coons, Article 17 has multiple safeguards to narrow its application to a small group of large platforms. *Id.* at Article 17(5) (Compliance with this framework is subject to a “principle of proportionality” that is to take into account the size and nature of the content-sharing platform); *Id.* at Article 17(6) (Article 17 obligations do not apply to new platforms in the first three years of their operation as long as the platform has an annual turnover under 10 million Euros).

⁶³ For an excellent explanatory discussion of Content ID, see Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 540-542 (2018).

⁶⁴ *Id.* at 542, citing Ben Popper, YouTube Will Block Videos from Artists Who Don’t Sign Up for Its Paid Streaming Service, VERGE (June 17, 2014), <https://www.theverge.com/2014/6/17/5817408/youtube-reportedly-block-videos-indie-artists/>.

⁶⁵ Justin Hughes, *Europe is right. Social media titans should pay up to use creative content*, LOS ANGELES TIMES, 19 April 2019 (quoting RIAA president Cary Sherman)

If the United States adopted a narrowly-tailored law paralleling Article 17 of the DSM Directive, it would have no impact on the vast majority of websites; it would also have no impact on traditional web-hosting services like GoDaddy, Amazon Web Services, Google Cloud, SquareSpace, bluehost, Dreamhost, etc.⁶⁶ It would also have no impact on internet giants like Amazon, Netflix, and Spotify. It would have no impact on streaming services like Hulu, CBS All Access, and Disney+ that have become even more important to Americans in the COVID-19 home entertainment environment. The principal impact of an Article 17-like law is on social-media hosting platforms that include significant sharing of content. The usual suspects/examples are Facebook, Instagram, Pinterest, Twitter, YouTube.

What would happen if YouTube offered Content ID to everyone because it was legally mandated to do so? First and foremost, individual creators and small and medium size enterprises – like independent film producers – would benefit. We can *guess* that, like large content companies, most of them would chose to monetize unauthorized uploads on content-sharing platforms rather than disable that material. Second, copyright owners and authors represented by large corporations and trade associations who *already* negotiate with YouTube for Content ID protection would benefit to the degree that YouTube loses its leverage over those copyright owners; as a consequence, the price YouTube pays copyright owners for its streams should rise from its abysmally low levels. (In other words, YouTube might start paying what normal music streaming services pay). Both those outcomes would have a direct effect on the “value gap.” Because the extremely low rates that YouTube currently pays serve as a “floor,” framing the behavior of other streaming service providers in their negotiations with copyright holders, increased payments from YouTube might induce further increased payments to artists across streaming platforms. That is the optimistic scenario in terms of the “value gap” and it is not unreasonable.

At the same, YouTube users – both uploaders and consumers of YouTube streams – could benefit from greater transparency in how the Content ID system filters and easier, improved availability of mechanisms to contest whatever false positives the filtering system generates. To be honest, this is also a reason that some large, well-organized copyright owners might prefer for Content ID to remain a purely private arrangement between them and Google.⁶⁷ If an Article 17-like law was in place in the United States, YouTube users would not have to worry about *additional* filtering – Content ID has been operational for years – but there might be new or augmented filtering systems on other content-sharing platforms. Many ISPs already use copyright detection systems provided by Audible Magic and I expect that Article 17 of the DSM Directive will trigger a round of new products and refinements in infringement detection systems. Since the inception of the internet, there has been a technological back and forth between vehicles for infringement and methods of enforcement⁶⁸ – that will continue however Congress might choose to strengthen enforcement of copyright in the digital, networked environment.

⁶⁶ For a list of the largest traditional web hosting services, see <https://www.hostingadvice.com/how-to/largest-web-hosting-companies/>.

⁶⁷ And that connects to Senator Blumenthal’s question about “community guidelines” created and enforced privately by online platforms; there is already a vast literature studying the good and bad of private ordering over what seem very much like public, if virtual, spaces. See footnote 129.

⁶⁸ See, e.g. Daniel (Yue) Zhang, Qi Li, Herman Tong, Jose Badilla, Yang Zhang, Dong Wang, Crowdsourcing-based Copyright Infringement Detection in Live Video Stream, 2018 IEEE/ACM International Conference on Advances in Social Networks Analysis and Mining (ASONAM), available at <http://dyzhang.net/proj-images/ccid.pdf>.

II. QUESTIONS FROM SENATOR COONS

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?

ANSWER

I believe that the United States could adopt a similar framework. In fact, a case can be made that that is what Congress intended in 1998 with 17 U.S.C. §512(j). However, it may be that the ambiguity of section §512(j), coupled with the scope of Rule 65(d) of the Federal Rules of Civil Procedure has prevented its use for non-fault injunctive relief. Congress could easily clarify §512(j) to make certain that copyright owners could seek no-fault injunctions by which ISPs would block access to pirate websites; I believe such relief is within the provenance of Article III courts.

Section 512(j) describes different types of injunctions that courts may issue against §512(b)-(d) ISPs versus §512(a) ISPs. In relevant part, §512(j) currently provides as follows:

(1)(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

...

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

The section then provides several equitable considerations that a court should take into account when deciding whether to grant an injunction, including – as discussed in my answer to Senator Tillis’ third question – that an injunction “would not interfere with access to noninfringing material at other online locations.”

As far as I can tell, the DMCA’s legislative history has little or no discussion of Congress’ intent with §512(j); there is no express commentary that it was intended to provide “no fault” injunctive relief in which the ISP is *not* a defendant in the suit brought by the copyright owner(s). Nonetheless, §512(j)(3) supports this view by providing as follows:

(3) Notice and *ex parte* orders.—

Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider’s communications network.

The express requirement of “notice to the service provider” and “an opportunity for the service provider to appear” strongly suggests that the ISP would not already be a defendant in the action in question.

At the same time, without an express provision by Congress as to the “no fault” injunctive relief intended, a federal court would probably look to Federal Rule of Civil Procedure 65(d) for guidance. FRCP 65(d)(2) provides that an injunction or restraining order

“binds only the following who receive actual notice of it by personal service or otherwise:

“(A) the parties;

“(B) the parties’ officers, agents, servants, employees, and attorneys; and

“(C) other persons who are in active concert or participation with anyone described in . . . (A) or (B)”

This leads to the question whether an ISP that provides the information conduit between a pirate site and consumers would be considered “*in active concert or participation with*” that pirate site. Determining whether a non-party is in participation with a direct infringer sufficient to fall within the ambit of FRCP 65(d)(2)(C) is generally a fact-sensitive question⁶⁹ and there are few cases dealing with fact patterns that match an ISP/pirate site relationship. Accepted understandings of “in active concert or participation” is that the concept extends to both parties aiding and abetting the wrongdoing and parties in “privity” with the wrongdoer. But is not clear that either of these can reach transmission ISPs. The one appellate court decision to consider whether FRCP 65(d)(2)(C) could reach a hosting ISP concluded that 65(d)(2)(C) did not, at least not on an “aiding and abetting” reasoning; the court concluded that the fact that the ISP “is technologically capable of removing the postings does not render its failure to do so aiding and abetting.”⁷⁰ That decision expressly did not consider the privity reasoning,⁷¹ but I assume that privity arguments would not work in relation to a foreign website and a transmission ISP. On the other hand, there are cases holding that banks are subject to injunctions – or contempt orders for violation of injunctions – to prevent them from carrying on ministerial banking activities for wrongdoers;⁷² that might have some parallelism to the services provided by ISPs.

It is important to remember that FRCP 65(d) does not establish the true contours of the power of federal courts to issue injunctive relief. In the words of one appellate court, “[t]hat the rules of civil procedure do not completely describe and limit the power of district courts seems to us long

⁶⁹ Merial LTD. v. Cipla Ltd., 681 F.3d 1282, 1293, 1304-05, 82 Fed. R. Serv. 3d 959 (Fed. Cir. 2012) (whether party aided and abetted is a fact question reviewed for clear error).

⁷⁰ Blockowicz v. Williams, 630 F.3d 563, 568 (7th Cir. 2010). Oddly, although there was a Terms of Service between the party liable for defamation and the hosting ISP, the court did not consider the “privity” branch of 65(d)(2)(C). The Blockowicz decision can also be criticized for its strange reasoning that “here . . . Xcentric’s only act, entering into a contract with the defendants, occurred long before the injunction was issued. Since the injunction was issued, Xcentric has simply done nothing, and it has certainly not actively assisted the defendants in violating the injunction.” *Id.* at 569. The court concluded “Rule 65(d)(2)(C) is not broad enough to bind Xcentric and Magedson to the terms of this injunction in light of their inactivity.” *Id.* But the continued provision of hosting services is doing something – providing an on-going service sufficiently valuable that the liable party pays for the continued service.

⁷¹ Plaintiffs “d[id] not assert a privity-related argument,” so the only issue on appeal was the aiding and abetting argument. *Id.* at 567.

⁷² Pittman v. Aswan Restaurant Group, LLC, 2012 WL 505920 (S.D. Cal, 2012); Reliance Ins. Co. v. Mast Const. Co. 84 F.3d 372 (10th Cir. 1996).

established.”⁷³ Under Article III of the Constitution, all federal courts are courts “in Equity” and, as discussed above, other common law jurisdictions have determined that common law equity permits no-fault injunctions against third parties to stop wrong-doing when those parties are otherwise subject to the court’s jurisdiction. As Lord Reid opined in the UK House of Lords’ famous *Norwich Pharmacal* decision, “if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged.”⁷⁴ So – while I am not an expert on civil procedure – I do not believe there is anything that would not constrain Congress from amending §512(j) to clarify its intent that federal courts should award “no fault” injunctions ordering ISPs to “block access, to a specific, identified, online location outside the United States.”⁷⁵

Of course, ensuring adequate due process protection to ISPs means ensuring that they can be heard in court before any such injunctions are granted – something that has been consistently done in other common law jurisdictions I discussed above my answer to Chairman Tillis’ third question (the UK, Australia, India, and Singapore).

As discussed in more detail in my answer to Chairman Tillis’ third question, I believe that the various measures taken by these same courts to ensure that injunctions are narrowly targeted at “pirate sites,” “rogue sites,” or – in the terminology of the Singapore Copyright Act – “flagrantly infringing online locations” (FIOL)⁷⁶ can be used by American courts to ensure that internet users’ First Amendment rights are not unduly burdened. In any revision of 17 U.S.C. §512(j) to clarify the possibility of “no-fault” third party injunctions I would recommend the inclusion of statutory factors to identify “pirate sites” as has been done in the Australian and Singaporean copyright laws. To further protect users’ First Amendment rights, I would recommend that Congress direct courts to undertake a review of the most suitable technologies for website-blocking as Justice Arnold has in the UK decisions over which he has presided.⁷⁷

⁷³ *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11 (1st Cir. 1985), cert. denied, 475 U.S. 1018 (1986). See also *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1989) (same); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

⁷⁴ *Norwich Pharmacal Co. & Others v Customs and Excise Commissioners* [1974] AC 133 (Lord Reid). The issue was an injunction against an innocent third party compelling the disclosure of the identity of the wrong-doer. The decision has been widely cited around the world in court decisions requiring ISPs to disclose the identity of users accused of IP infringement.

⁷⁵ 17 U.S.C. §512(j)(1)(B)(ii).

⁷⁶ Article 193DDA(1)(b), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).

⁷⁷ *Twentieth Century Fox, et al. and British Telecommunications PLC*, [2011] EWHC 2714 (Ch) (26 October 2011) at ¶ 6 (adjusting the wording of the injunction to safeguard against “‘overblocking’ of sites or pages that ought not to be blocked”).

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?

ANSWER

I am certainly familiar with such claims; indeed, during the European Parliament’s debate about the DSM Directive,⁷⁸ one of the witnesses from our March hearing tweeted “If we allow automatic enforcement of #copyright, say goodbye not just to memes, but also to the public domain.” But we already have significant “*automatic enforcement of copyright*” and the public domain is as or more robust than it has ever been.

While safeguarding freedom of expression should always be a significant part of the copyright enforcement equation, for the past twenty years claims about speech being “chilled” by copyright enforcement have been non-stop, blown out of proportions, and pretty consistently *wrong*. For example, in 1998 and the years that immediately followed, there were repeated commentaries by legal academics that the §1201 provisions of the DMCA would “chill” free speech and innovation – and, apropos of your question, that the protection of technological measures provided by the §1201 provisions (a form of automated enforcement) would be the end of fair use in copyright law. Over twenty years later, fair use is far more robust than it was when codified in 1976 or when the DMCA was passed in 1998. While some very reasonable people have staked out the position that algorithms cannot do fair use,⁷⁹ others are guardedly optimistic. I believe the downside to appropriately deployed filtering algorithms is small and can be made smaller.

As I described in answering Chairman Tillis’ fifth question, Article 17 of the Digital Single Market Directive requires a small set of ISPs – what are called “online content-sharing service providers” – to either obtain licenses for the copyrighted material that platform users upload⁸⁰ and, where no license was obtained, makes these online content-sharing platforms “liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have . . . made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information.”⁸¹ This has been reasonably understood to mean that when a copyright owner declines to license and provides the content-sharing platform with “necessary information” for filtering, the platform will have a legal duty to filter.

So, I agree that for *a very small number of internet platforms*, Article 17 imposes a “license-or-filter” requirement. Compliance with this framework is further subject to a “principle of

⁷⁸ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directive 96/9/EC and 2001/29/EC. [hereinafter Digital Single Market Directive or DSM Directive].

⁷⁹ Dan Burk, *Algorithmic Fair Use*, 86 U. CHICAGO L. REV. 863 (2019); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J. L. & TECH. 41, 56 (2001).

⁸⁰ Digital Single Market Directive, Article 17(1) (“An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter”).

⁸¹ *Id.* at Article 17(4)(b).

proportionality” that is to take into account the size and nature of the content-sharing platform and the cost of “suitable and effective means” to carry out the Article 17 obligations.⁸² In addition, the obligations do not apply to new platforms in the first three years of their operation as long as the platform has an annual turnover under 10 million Euros.⁸³

If the United States had an Article 17-like law, there would be the question of how filtering systems would adequately account for uses that appear to be prima facie infringements, but are in fact valid fair uses. While European Union jurisdictions do not have statutory fair use as the United States and a few other jurisdictions do, the EU Parliament was conscious of the parallel problem in relation to some of their copyright exceptions. As a “directive” the new EU law must be transposed into national law in each of the EU member states and Article 17 obliges member states to ensure that users are able to rely copyright exceptions or limitations for “quotation, criticism, review . . . caricature, parody, or pastiche” when uploading to the content-sharing platform.⁸⁴ We do not yet know the varied approaches EU member states will take to safeguard these fair use-like exceptions.

We all know that YouTube is already using Content ID, a sophisticated filtering system to address unauthorized uploading of copyrighted materials not authorized by the copyright owner. Using digital files provided by copyright owners, Content ID compares new files as they are uploaded to the copyright owner files, flagging any matches. When a match is detected, the copyright owner is allowed to block the upload *or* to monetize streams of the upload by receiving a portion of the ad revenue (instead of that revenue going to the uploader). Everyone agrees that *most* copyright owners choose monetization for *most* uploaded matches.⁸⁵

The amount of filtering done by Content ID is mind-boggling, but the number of matches is unknown. Even more unknown is the number of *alleged* “false positives” – things that ContentID flags as matching copyrighted content but that the uploader claims is not infringing – either because it does not actually match a protected work or because it is a fair use of a matched work. Even more unknown is the number of actual false positives. While there is plenty of anecdotal complaints among uploaders that Content ID unfairly flagged their fair use, we have to measure those reports against a system processing 30,000 hours of audiovisual content *daily*. We simply do not know how much, if any, fair use is being stymied relative to the expression being made available. (And because most Content ID-participating copyright owners chose monetization, with many false positives what is being stymied is the uploaders’ ability to make money from YouTube ad revenue, not the speech or self-expression per se.) As one commentator summarizes what we know about algorithmic filtering and fair use, “[t] is very difficult to systematically measure the impact on fair use . . . the overall consequences of algorithmic enforcement for fair use are difficult to measure.”⁸⁶

But your question was whether there are means to mitigate any negative impact on fair use from algorithmic filters and we do know various ways to ensure that an automated filtering system creates less *fewer* false positives that are actually fair use. For example, a system that allows 29 seconds of a sound recording to be used before flagging a match will be better for fair use than a system that only allows 14 seconds before flagging a match,⁸⁷ a system that allows less use of newly-released works and

⁸² *Id.* at Article 17(5).

⁸³ *Id.* at Article 17(6).

⁸⁴ *Id.* at Article 17(7).

⁸⁵ For a good summary of this, see Kristelia García, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. (forthcoming 2020) at 19-23 [manuscript on file with author], available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553453.

⁸⁶ Niva Elkin-Koren, *Fair Use By Design*, 64 UCLA L. REV. 1082 (2017).

⁸⁷ *Id.* at 1096.

more and longer uses of *older* works will also be more sensitive to fair use concerns;⁸⁸ a system that offers expeditious appeal to human reviewers will also mitigate the impact of temporary false positives; a system that recognized uploads from known educational institutions or known sources of commentary, criticism, and parody for different algorithmic handling could also reduce false positives.⁸⁹ In short, there are many ways to mitigate any negative impact on fair use from the deployment of filtering technology on content-sharing platforms.

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?

Critics also warn that the EU Copyright Directive will lead to blocking legal content and chilling free speech. What is your perspective?

ANSWER

While safeguarding freedom of expression should always be a significant part of the copyright enforcement equation, for the past twenty years claims about speech being “chilled” by copyright enforcement have been non-stop, blown out of proportions, and consistently unproven (if we cannot say absolutely *wrong*). My perspective? I’m tired of hearing how every proposal to enforce copyright, fight sex trafficking, or stop revenge porn and deep fakes is going to “break the internet.”

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?

ANSWER

While improved, but less aggressive enforcement measures could help, I definitely would NOT support this idea. This idea seems unworkable and incompatible with basic ideas of copyright enforcement. Let me explain why.

First, identification of the “same user” is not easy. For free platforms, a disqualified user can simply re-register with a different name and email. For platforms that charge a membership, there is still the problem that the same account can be used – or claim to be used – by different persons. In the peer-to-peer case law, content owners have had to repeatedly deal with these “someone else

⁸⁸ Joseph P. Liu, Copyright and Time: A Proposal, 101 MICH. L. REV. 409 (2002); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003). Some folks will immediately reply that commentary and criticism is often most salient with newly-released works – and that is true. My point is that with an enduring, older cultural work, there will likely be both *more* transformative uses and *less* negative market impact.

⁸⁹ Elkin-Koren at 1096; Justin Hughes, *The Sub Rosa Rules of Copyright Fair Use*, 34 HARV. J. L. & TECH. (forthcoming, 2020).

used my computer” claims.⁹⁰ Identification of the “same user” with the same IP address simply does not work – many IP addresses are “dynamic,” even ones that are not easy to change, and it’s likely that more than one person will be using one IP address. Cookies used to identify the same person can only identify the same computer – and they are easily erased. In comparison to this, it is much easier to identify the *same content* – as systems like Content ID and Audible Magic do.

Second, even if platforms *could* identify the same user reliably, how would the ISPs convince the content owners that this is actually being done reasonably and consistently? Whereas, it is easy for the content owners to see if the same copyrighted material is blocked from re-appearing on a platform, the content owners cannot easily verify if the ISPs are disabling matching uploads from “same users” only. Given the level of distrust between the content owners and some of the ISPs, this makes the idea unworkable.

But most importantly, this suggestion is incompatible with basic ideas of copyright enforcement. If the enforcement filter is only “*the same user cannot repost the same content*” that means that the platform will know it is dealing with (a) the same user and (b) the same content. So, if the platform *already knows* it is the same infringing content – “(b)” – the proposal might produce this: a platform *can knowingly allow the infringing platform to remain as long as it comes from another user*. That’s contrary to the basic idea – accepted globally since the late 1990s – that once the platform knows it is infringing content, the platform needs to disable access to the infringing material.

⁹⁰ See, e.g. *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487, 495 (1st Cir. 2011) (“Before the trial, Tenenbaum also attempted to shift responsibility for his conduct to other individuals by claiming they could have used his computer in order to illegally download and distribute the copyrighted works”); *Warner Bros. Records Inc. v. Walker*, 704 F. Supp. 2d 460, 466 (W.D. Pa. 2010) (“Despite Defendant’s admission that he used Ares to download copyrighted recordings, he contends in his Brief in Opposition that ‘it is possible one of the many third parties with access to [Defendant’s] computer downloaded the Recordings’”).

III. QUESTIONS FROM SENATOR BLUMENTHAL

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?

ANSWER

“Balance” is a popular concept in policy circles, but we need to be careful about what we think the legitimate interests on both sides are. Enforcement of the rights of content creators, consumer rights, and the growth of online platforms should go *hand in hand* – unless one believes that consumers have a right to infringe or that online platforms should be infringement-based business models. We would not say enforcing speed limits or NHTSA safety standards has to be “balanced” against citizens’ right to travel; we expect people to travel lawfully.

A good example that there is no real trade-off among *legitimate* interests is South Korea. In the past twenty years, South Korea has achieved extraordinary internet penetration and participation,⁹¹ built and maintained a strong tech sector, and had an explosion of popular culture.⁹² During that period, there is no question it has also taken up serious and sustained online copyright enforcement.⁹³ And no one questions the fact that South Korea has become a more robust democratic society in the past twenty years.

I think the Nordic countries and the Baltic states also count as examples for better-than-average internet penetration and technological base, better-than-average copyright enforcement, and better-than-average civic participation and democratic engagement.

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

ANSWER

I believe that each kind of copyright enforcement law deployed in developed countries since the late 1990s has helped curb digital piracy; those include (1) protection of technological measures (digital locks), (2) notice and take-down systems, (3) injunctions ordering ISPs to block pirate websites, and (4) statutory “three strike” systems against internet users who are repeat infringers. To

⁹¹ *Internet usage in South Korea - Statistics & Facts*, STATISTICA, 16 January 2020 (“South Korea is one of the best-connected countries in the world. In 2018, the internet penetration rate was at around 96 percent while the internet usage rate was at 91.6 percent”), available at <https://www.statista.com/topics/2230/internet-usage-in-south-korea/>.

⁹² Amy X. Wang, *How K-Pop Conquered the West*, ROLLING STONE, 21 August 2018, available at <https://www.rollingstone.com/music/music-features/bts-kpop-albums-bands-global-takeover-707139/>; Steph Cha, *Korean culture wave rises high on ‘Parasite’ and BTS*, L.A. TIMES, 22 February 2020, available at <https://www.latimes.com/entertainment-arts/story/2020-02-22/parasite-bts-korean-pop-culture-wave-trump>; Max Fisher, *Gangnam Style, Dissected: The Subversive Message Within South Korea's Music Video Sensation*, THE ATLANTIC, 23 August 2012, available to <https://www.theatlantic.com/international/archive/2012/08/gangnam-style-dissected-the-subversive-message-within-south-koreas-music-video-sensation/261462/>.

⁹³ For example, from 1998 to 2004 the International Intellectual Property Association (IIPA) recommended to USTR that South Korea be placed on the Special 301 “Priority Watch List” or “Watch List.” From 2005 to 2008, IIPA recommended “Watch List” status for South Korea. Since 2009, IIPA has dropped South Korea from its recommendations altogether. <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>

these we can now add (5) major social media platforms being required to license content and/or filter unauthorized content – Article 17 of the EU’s Digital Single Market Directive. We will have to see how successful Article 17 is, success perhaps best measured by increased payments from those social media platforms to copyright owners, especially smaller creative professionals.

Of these five, only the first is mandated by a multilateral treaty – and only the first and second of these have been used effectively in the United States. In the 1998 DMCA, we arguably botched our own effort at #3 – no fault injunctions ordering ISPs to block pirate websites – and that is something the subcommittee could meaningfully address. We may yet see the evolution in the United States of a meaningful #4 – multi-strike systems against repeat infringers – through court decisions that give teeth to the DMCA’s § 512(i) requirement that each ISPs have “a policy that provides for the termination in appropriate circumstances” of repeat infringers.⁹⁴ Whatever the courts do, Congress could usefully clarify and strengthen that provision. Congress should definitely monitor the new Article 17 as it is implemented in EU member states and major social media platforms respond to its requirements.

I do not believe any single one of these can be the dominant approach to copyright enforcement in the digital, networked environment. What the Delhi High Court said last year in regards to website blocking can be applied to each of these enforcement tools: each enforcement mechanism “is no silver bullet’ in the fight against digital piracy, but it should at least be one of the lead bullets”⁹⁵

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

ANSWER

To the best of my knowledge, there has been very little empirical evidence on popular attitudes toward copyright and its enforcement. This is true both in the United States and abroad. To give the short answer to your question, there is probably *no* meaningful empirical data on how copyright enforcement statutes were received by broad segments of the population when or shortly after the laws were introduced.

Of course, there are distinct, activist “public groups” who will work hard to raise awareness within their constituencies; these groups will have *reliable* perceptions of copyright enforcement. Groups representing writers, artists, and other creative professionals will be ardently supportive of copyright enforcement laws, while technologically-oriented “user” communities will be strenuously opposed. A copyright enforcement statute will get praise from the Authors Guild, the labor unions in the audiovisual industry, and organizations like the Creative Future Coalition.⁹⁶ The same statute will

⁹⁴ *BMG Rights Management v. Cox Communications*, 881 F.3d 293 (4th Cir. 2018); *Sony Music Entertainment v. Cox Communications* [Case 1:18-cv-00950-LO-JFA, E.D. Virginia] (December 19, 2019) (Denial of § 512 safe harbor because of failure to have § 512(i) is basis for \$1billion award against ISP).

⁹⁵ *Utv Software Communication Ltd. ... vs 1337X*, Delhi High Court [CS(COMM) 724/2017 & I.As. 12269/2017, 12271/2017, 6985/2018, 8949/2018 AND 16781/2018], Decision of 10 April 2019 at ¶93.

⁹⁶ <https://creativefuture.org/who-we-are/coalition/>

be roundly and colorfully criticized by the Electronic Frontier Foundation, Ars Technica, and Techdirt.⁹⁷

American copyright experts have a habit of saying things that *may* suggest they know more about popular perceptions than they do. In 2011, Jessica Litman – who testified before you recently – said she had “been struck by the deterioration in popular support for copyright law over the past twenty years.”⁹⁸ Almost a decade earlier, Professor Jane Ginsburg also felt that copyright had “got[ten] a bad name for itself.”⁹⁹ In between the two, then Register of Copyright Marybeth Peters seemed to feel that consumers already by 2004 “view[ed] copyright in a negative light.”¹⁰⁰ Other comments like these from academics and experts are common.¹⁰¹

But the data-gathering that supports such statements generally goes no further than the university coffee house. Such remarks also have a hall of mirrors quality – one professor says something and then, through regrettable feedback loops of academia, it gets repeated over and over until it takes on the patina of reality.¹⁰²

As far as I know, the little polling that has been done on intellectual property has not focused on copyright enforcement on the internet; as one group of commentators noted in 2015, “it is striking that almost nothing is known about popular perceptions and attitudes concerning intellectual property law.”¹⁰³ I personally would be surprised if more than 3-5% of any developed economy population – surveyed in a scientifically constructed poll – would understand existing notice and takedown, ISP safe harbor, or technological protection measure provisions enough to opine on those laws. A 2013 survey of over 26,000 EU citizens found that 73% believed they have a good understanding of intellectual property, but – in fact – only a much smaller percentage (13%) had command of the answers to seven pretty simple questions about IP law in Europe.¹⁰⁴

More importantly – and contrary to what many IP experts will tell you – the general population seems supportive of copyright law, if uninformed about its details. Credible surveys in 2003 and

⁹⁷ See, e.g. Jeremy Malcom, *Users Betrayed as Australia Adopts a Copyright Censorship Regime*, ELECTRONIC FRONTIER FOUNDATION, 23 June 2015 (likening Australia’s provision on site-blocking to Singapore’s ban on chewing gum and anti-LGBTQ laws in Russia), available at <https://www.eff.org/deeplinks/2015/06/users-betrayed-australia-adopts-copyright-censorship-regime>.

⁹⁸ Jessica Litman, *Reader’s Copyright*, 58 J. COPYRIGHT SOCIETY OF THE USA 325, 353 (2011).

⁹⁹ Jane Ginsburg, *How Copyright Got a Bad Name For Itself*, 26 COLUM. J.L. & ARTS 61, 65 (2002).

¹⁰⁰ Marybeth Peters, *Copyright Enters the Public Domain*, 51 J. COPYRIGHT SOC’Y U.S.A. 701 (2004).

¹⁰¹ See, e.g. Jon Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1282 (2003) (describing factors contributing to “a normative culture where theft of intellectual property is no longer regarded as an illegal, unethical, or antisocial act”).

¹⁰² For an example of how this happens in legal academia, see Justin Hughes, *Copyright and Incomplete Historiographies – of Piracy, Propertization, and Thomas Jefferson*, 79 SO. CAL. L. REV. 993, 1001-1003 (2006)

¹⁰³ Gregory N. Mandel, Anne A. Fast, & Kristina R. Olson, *Intellectual Property Law’s Plagiarism Fallacy*, 2015 B.Y.U. L. REV. 915, 925 (2015).

¹⁰⁴ OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET (OHIM), EUROPEAN CITIZENS AND INTELLECTUAL PROPERTY: PERCEPTIONS, AWARENESS AND BEHAVIOUR 35 (2013) (73% of Europeans feel that they either have a “very good” or “rather good” understanding of the term intellectual property.”). Whether they actually have a good understanding is a different issue. *Id.* (“Objective levels of knowledge of intellectual property are however significantly lower than the declared ones: tested with seven questions, 13% of Europeans demonstrate a good objective knowledge of intellectual property and its different components, whereas 51% demonstrate only moderate knowledge and 37% poor knowledge.”)

2011 showed a majority of Americans supporting the present copyright term¹⁰⁵ and penalties for downloading copyrighted music and movies,¹⁰⁶ respectively. Adding credibility, the second of these surveys was funded, at least in part, by a large internet platform that probably hoped for the opposite outcome.¹⁰⁷ In survey work, Gregory Mandel and colleagues found that lay persons identify moral and ethical justifications – more than incentives – as the grounding for copyright and prohibitions on copying other people’s work.¹⁰⁸ Although in direct questioning, “respondents on average thought that both copyright and patent law should stay about the same,” and “thought that it is important for people to comply with the law,”¹⁰⁹ Mandel et al used a series of six vignettes to find what they believe is evidence that “public preferences for what intellectual property should be are for weaker protection than what the law actually provides.” But the researchers also acknowledged “popular preferences for intellectual property rights appear to be highly context dependent.”¹¹⁰

In the absence of good empirical evidence, one indicator of deep-seated public sentiment supporting the enforcement of copyright is jury behavior. Juries are lay people who have been educated about copyright and then hear the strongest possible arguments on copyright enforcement – both favoring and opposing. And juries seem to have *no* problem exculpating some defendants on fair use and awarding very high statutory damages for copyright infringement against other defendants, both individuals and companies.¹¹¹

¹⁰⁵ <http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Inte...e-different-views-of-copyright-issues-from-musicians-and-artists.aspx> (surveying 2,013 American adults between Nov. 18 and Dec. 14, 2003).

¹⁰⁶ The American Assembly, *Copyright infringement and Enforcement in the US, A Research Note* (November 2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/11/AA-Research-Note-Infringement-and-Enforcement-November-2011.pdf>.

¹⁰⁷ The research was funded by Google and the final 2011 report may have been intended to demonstrate that Americans opposed, as Google did, the Stop Online Piracy Act (SOPA) then before Congress. Nonetheless, the raw survey numbers are pretty straightforward.

¹⁰⁸ Mandel, Fast, & Olson at 929-932. Another take away from Mandel’s surveys is that lay people – very few of whom (30%) identify incentives as the justification for IP law – really do not know much about American copyright law.

¹⁰⁹ *Id.* at 957.

¹¹⁰ *Id.* at 942.

¹¹¹ In *Sony BMG v. Joel Tenenbaum*, a five day jury trial in July 2009 against a graduate student and dedicated P2P user, the jury found Tenenbaum had infringed each of Sony’s thirty copyrighted sound recordings and returned a verdict of \$22,500 in statutory damages per infringement, yielding a total award of \$675,000. In *Capitol Records, Inc. v. Thomas-Rasset*, a 2007 jury of citizens ordered Jammie Thomas – a single mom – to pay \$222,000 for her downloading; when that decision was overturned and Ms. Thomas went to court again, the next jury (2009) ordered her to pay \$1.92 million – for downloading just 24 tracks. 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008). In *BMG Rights Management v. Cox Communications*, 881 F.3d 293 (4th Cir. 2018) the jury awarded \$25 million against Cox in contributory liability for downloading by Cox subscribers and in *Sony Music Entertainment v. Cox Communications* [Case 1:18-cv-00950-LO-JFA, E.D. Virginia] on December 19, 2019, a just awarded \$1 billion in damages for contributory liability against the same defendant. Of course, juries do not exist in most countries, but we can add one data point from Sweden: in 2010, a trial court in Sweden handed down prison sentences and \$4.75 million (32 million Swedish crowns) damages award against the four men who founded the *PirateBay* website. The trial court decision – the \$4.75 million award – was granted by a judge AND three lay persons sitting with the judge.

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?

ANSWER

I doubt that I know enough “inside baseball” to give you a valid answer. Unfortunately, in the years since the DMCA if there has been any amelioration of distrust between the content owners and the ISPs, it has come mainly from mergers and acquisitions which have aligned business interests. The story of the Copyright Alert System (2011-2017) is instructive on how difficult voluntary industry initiatives can be. But following the severe drubbing Cox Communications has taken with both judges and juries for its failure to meet the DMCA’s § 512(i) requirement that each ISPs have “a policy that provides for the termination” of repeat infringers,¹¹² perhaps there is an opening for all sides to sit down and hammer out best practices for both the substance and execution of a repeat infringer policy. It *might* also be possible for content owners and ISPs to accept a “test case”¹¹³ on whether §512(j) can be used to obtain a “no fault” injunction against an ISP to block foreign piracy sites – that appears to be what happened in the litigation on the same issue in the UK.

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?

ANSWER

The development of international legal norms in copyright law was almost completely separate from trade law until the late 1980s. Following a series of bilateral copyright treaties emerged in the mid-19th century, the multilateral Berne Convention for the Protection of Literary and Artistic Works was negotiated in 1886.¹¹⁴ Through many subsequent revisions, the Berne Convention was modernized through the 1970s. During this period, it is fair to say that copyright was almost

¹¹² *BMG Rights Management v. Cox Communications*, 881 F.3d 293 (4th Cir. 2018); *Sony Music Entertainment v. Cox Communications* [Case 1:18-cv-00950-LO-JFA, E.D. Virginia] (December 19, 2019) (Denial of § 512 safe harbor because of failure to have § 512(i) is basis for \$1billion award against ISP).

¹¹³ Subject to the case or controversy requirement of Article III of the Constitution. See, e.g. James E. Pfander and Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

¹¹⁴ Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. No. 99-27 (1986), 1161 U.N.T.S. 30.

completely separate from trade agreements – I say “almost” because some bilateral friendship, commerce, and navigation (FCN) treaties did address reciprocal protection of intellectual property in the partner countries.¹¹⁵

Although an American delegation had participated in the 1886 drafting of the Berne Convention, the United States remained distant from the “Berne Union” until we joined the Convention in 1988. While Berne remains the central pillar of the international copyright system, the United States accession to “Berne” coincided with the first integration of copyright legal norms into trade agreements: the “TRIPS” Agreement,¹¹⁶ which is part of the suite of agreements establishing the World Trade Organization (WTO) system. Contemporaneous with the WTO negotiations, the 1992 NAFTA also had an extensive chapter on intellectual property (but obviously there was no mention of the internet).

After the 1998 passage of the DMCA, the European Union, China, and Japan adopted similar safe harbor frameworks without any formal agreements with the United States to do so.¹¹⁷ But after the 1998 establishment of the §512 safe harbor framework, United States quickly sought to embed that framework in free trade agreements. Perhaps 2001 was the inflection point: the 2001 United States – Singapore Free Trade Agreement may have been the first occasion when the United States proposed and obtained recognition of internet intermediary “safe harbors” in a free trade agreement,¹¹⁸ while the 2001 United States – Jordan FTA did not. So, by the standards of bilateral and plurilateral trade agreements, the inclusion of internet intermediary “safe harbors” is remains a relatively new innovation.

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

ANSWER

While I believe that it is appropriate to have some general legal norms on intellectual property and intermediary liability in trade agreements, I think it has never been appropriate to have the level of detail that the United States sought [and obtained] in intellectual property provisions in many of its free trade agreements (FTAs). This is true of FTA provisions paralleling 17 USC §1201 [the

¹¹⁵ For example, the 1903 FCN between China and the United States did have provisions for some reciprocal recognition of copyright: the treaty granted Chinese authors copyright protection in the US, while only requiring China to provide vague protection to American materials “especially prepared for the use and education of the Chinese people.” WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 36-38 (1995).

¹¹⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, vol. 31, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

¹¹⁷ A parallelism of convergence in legal norms arguably caused by shared market or ‘environmental’ conditions. Justin Hughes, *The Internet and the Persistence of Law*, 44 BOSTON COLLEGE L. REV. 359 (2003)

¹¹⁸ United States – Singapore Free Trade Agreement, Chapter 16 [Intellectual Property Rights], Article 16:9(3) [Enforcement of Intellectual Property Rights], available at https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf. As the committee knows, similar provisions followed in subsequent FTAs. See, e.g. United States – Chile Free Trade Agreement, entered into force 1 January 2004, article 17.11(23) [Enforcement of Intellectual Property Rights], available at <https://tcc.export.gov/static/17.ipr.pdf>

protection of digital locks] as well as FTA provisions paralleling 17 USC § 501 [the intermediary safe harbors].

The result is that FTAs – which are congressional-executive agreements (not treaties) – serve as an impediment to Congress’ ability to respond to developments in technology, business models, and evolving patterns of consumer activity. Let me give one example and some explanation.

As consumers increasingly adapted smartphones (iPhone, 2007; iPhone4, 2010; Samsung Galaxy S I9000, 2010; iPhone5, 2013; Samsung Galaxy S6, 2015) some telecommunications carriers sold these devices as “locked” to their own networks, making it harder for a consumer to switch carriers. Unauthorized “unlocking” of a phone would mean circumventing technological measures protected by 17 USC §1201. Although §1201 was never intended to lock purchasers of a physical product into a particular service system or network (whether a telecom provider or a repair contract on equipment), circumventing technological measures to unlock a telecommunications device is **not** one of the statutory exceptions Congress built into §1201. And USTR had exported that list of exceptions into many of our FTAs. For example, we effectively baked our *precise* list of §1201 exceptions into Article 17.4(7)(e) of the United States-Australia Free Trade Agreement,¹¹⁹ Article 16.7(4)(e) of the United States-Colombia Trade Promotion Agreement,¹²⁰ and Article 18.4 (7)(d) of the United States-Korea Free Trade Agreement (KORUS).¹²¹ Section 1201(a) does provide a safety valve mechanism through which the Copyright Office, in consultation with the Commerce Department, establishes additional, *temporary* (3 year) exceptions to §1201, allowing certain technological measures to be circumvented for certain defined purposes. And that safety valve mechanism was also included in the FTAs I mentioned.¹²²

When the Copyright Office’s §1201(a) triennial process failed to produce an acceptable exception for unlocking smartphones in the mid-2010s, the logical thing to do would have been for Congress to add another statutory exception to the list of statutory exceptions in §1201 (d)-(j). But doing so would have put the United States in violation of the FTAs.¹²³ To avoid this – and maintain *technical* compliance with the FTAs – Congress ultimately passed and President Obama signed legislation

¹¹⁹ United States-Australia Free Trade Agreement, Chapter 17 [Intellectual Property Rights], Article 17.4 [COPYRIGHT](7)(e), available at <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>.

¹²⁰ United States-Colombia Trade Promotion Agreement, Chapter 16 [Intellectual Property Rights], Article 16.7 [Obligations Common to Copyright and Related Rights](4)(e), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>

¹²¹ United States – Korea Free Trade Agreement (KORUS), Chapter Eighteen [Intellectual Property Rights], Article 18.4 [Copyright and Related Rights](7)(d), available at https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf

¹²² Article 17.4 [COPYRIGHT](7) (e)(viii) (“non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.”). See also Article 16.7(f) of United States-Colombia Trade Promotion Agreement, *supra* (same language); Article 18.4 (7)(d)(viii) of KORUS, *supra* (same language).

¹²³ For a very detailed, play-by-play history of this legislation, see JONATHAN BAND, INTERFACES ON TRIAL 3:0: ORACLE AMERICA V. GOOGLE AND BEYOND (January 2019) 103-114 available at <https://docs.google.com/a/policybandwidth.com/viewer?a=v&pid=sites&srcid=cG9saWN5YmFuZHRoLmNvbXxwb2xpY3liYW5kd2lkdGh8Z3g6NDhjMTIxODliMDA2NjUzNQ>. As Band notes, “the legislation enacted by Congress is only a temporary measure whose short term nature was forced by free trade agreements supported (in the case of KORUS) . . . by the Obama Administration.” *Id.* at 114. Of course, that is true of FTAs supported by the Clinton and Bush administrations following passage of the DMCA.

amending the Copyright Office regulations that establish *temporary* circumvention exceptions;¹²⁴ as I understand it, the Congressional amendment effectively creates – by legislation – a *permanent, temporary administrative* exception. Thus, a lawyer with a good sense of humor can say the United States still complies with our FTA commitments. Obviously, it would have made a lot more sense to just amend §1201 (d)(j).¹²⁵

The level of detail in these provisions and the degree to which our trading partners are asked to mimic American copyright law in FTAs is the result of two things. First, industry lobbyists press the executive branch – completely understandably – to get these outcomes. But, second, this is only possible because Congress has increasingly ceded control of trade policy to the executive branch. As recently noted by Professors Timothy Meyer and Ganesh Sitaraman in a survey of legislative-executive interaction on trade, “in the post-World War II era, . . . Congress failed to reassert itself as the President negotiated increasingly broad trade agreements.”¹²⁶ Not just increasingly broad agreements, but also increasingly *detailed* agreements.

FTAs became increasingly detailed and regulation-like from about 2000 forward partly because of a mistaken belief following the end of the Cold War that international trade and international relations would just become a technocratic, *post* “end of history” (to use a phrase popular for a time) exercise in harmonizing legal systems. While it is always appropriate for the United States to advocate that our trading partners adopt legal regimes both compatible with our own and that provides balanced, effective protection of intellectual property, the extreme detail of many FTA provisions was not appropriate.

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

ANSWER

When it comes to developed economy trading partners, it is reasonable to assume that each of them has *almost* the same constellation of interest groups as the United States does – copyright owners, content and author advocacy groups, telecommunications providers, universities and well-organized voices for education, technology companies, and civil society NGOs.¹²⁷ The variety of stakeholders in other countries mean one can’t talk about how “Australia” or “Colombia” or

¹²⁴ Unlocking Consumer Choice and Wireless Competition Act, Public Law 113-144–August 1, 2014; Abigail Bessler, *Obama signs bill “unlocking” cell phones*, CBS NEWS, 1 August 2014. Available at <https://www.cbsnews.com/news/obama-signs-bill-unlocking-cellphones/>.

¹²⁵ The USMCA appears to improve on the inflexibility of prior FTAs by allowing additional legislative exceptions to §1201 in USMCA, Chapter 20 [Intellectual Property Rights], Article 20.66 (4)(h) at 20-37 (“in addition, a Party may provide additional exceptions or limitations for non-infringing uses of a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is demonstrated by substantial evidence in a legislative, regulatory, or administrative proceeding in accordance with the Party’s law”), available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf>. I have not studied the USMCA obligations on ISP safe harbors at Article 20.88 [Legal Remedies and Safe Harbors] at 20:58-60 to know whether the lesson of unduly narrow FTA provisions has also been learned in relation to ISP obligations and liabilities.

¹²⁶ Timothy Meyer and Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 599 (2019)

¹²⁷ I say “almost” because no other economy has search engine companies or dominant social media platforms – outside China, those companies are almost all American.

“Singapore” or “Israel” views the inclusion in FTAs of intermediary “safe harbors” mirroring §512. For example, in Australia, Australian telecom companies are presumably very happy about that inclusion of intermediary “safe harbors” in the AUSFTA; Australian authors and audiovisual producers probably less so.

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?

ANSWER

First, we should be clear that, *with or without guidelines*, most decisions by online service providers to disable access to materials are not reviewable by a court: the obligatory Terms of Use to gain access to the provider’s services will invariably allow the service provider to make these decisions. *As far as I know*, there are no decisions saying that a Facebook user or a YouTube uploader has some due process rights in relation to the free services provided by Facebook or YouTube; there are no decisions saying that dominant social media platforms are essential facilities under antitrust law or, in general, public forum for purposes of the First Amendment.¹²⁸ To the degree that these ubiquitous platforms seem like public fora, it is a little bit like the period in late 20th century American life when community and commercial activity moved from the public spaces of streets and sidewalks to the private-owned spaces of commercial shopping malls.

Well-publicized community guidelines and dispute resolution processes from social media platforms are a fairly recent development. For example, it was only in November 2018 that Facebook CEO Mark Zuckerberg announced that his company would create an independent oversight body. I think these efforts are generally well-intended and – because they will never please everyone – I imagine that these efforts are and will be subject to more criticism than they deserve. At the same time, I see guidelines and dispute resolution processes being put in place by these large social media platforms as being, in part, efforts to stave off government regulation – not unlike the way the motion picture industry self-regulated with the movie rating system.¹²⁹ Fortunately, there is a great deal of thoughtful scholarly and policymaker attention being turned in this direction.¹³⁰

¹²⁸ In *Knight First Amendment Institute v. Trump*, Case 1:17-cv-05205-NRB, S.D.N.Y., 23 May 2018, the court did hold “that portions of the @realDonaldTrump account – the ‘interactive space’ where Twitter users may directly engage with the content of the President’s tweets – are properly analyzed under the ‘public forum’ doctrines set forth by the Supreme Court, that such space is a designated public forum” but did not reach the same conclusion as to Twitter in general.

¹²⁹ See generally JON LEWIS, *AUTHOR OF HOLLYWOOD V. HARD CORE: HOW THE STRUGGLE OVER CENSORSHIP CREATED THE MODERN FILM INDUSTRY* (2000).

¹³⁰ See, e.g., Kate Klonick, *Creating Global Governance for Online Speech: The Development of Facebook’s Oversight Board*, 129 *YALE L. J.* (forthcoming 2020); JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019); DAVID KAYE, *SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET* (2019); Kate Klonick, *The New Governors:*

Absent more direct regulation by Congress, I can only expect that community guidelines for social media platforms will continue to develop and evolve; indeed, Congress has signaled to the large ISPs that they need to take a more proactive role in policing and preventing the harms that come from information passing through the network.¹³¹ More “community guidelines” is part of their response.

b. In an ideal world, what role should they play?

ANSWER

I agree with you that there are both advantages and disadvantages to the “private ordering” provided by community guidelines adopted by social media platforms. When it comes to social media and content-sharing platforms, I honestly do not have a well-formulated view on the best mix of public regulation and private ordering in order to protect personal information of users, combat copyright and trademark infringement, stop revenge porn and deep fakes, and otherwise handle the multitude of harms people can inflict on each other in the digital, networked environment.

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The People, Rules, and Processes Governing Online Speech 131 HARV. L. REV. 1598 (2018); Evelyn Douek, *Facebook’s “Oversight Board:” Move Fast with Stable Infrastructure and Humility*, 21 N.C.J. L. & TECH. 1 (2019); SIVA VAIDHYANATHAN, *ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY* (2018).

¹³¹ For an example from the debates about privacy, see *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the U.S. S. Comm. on the Judiciary and the U.S. Senate Comm. on Commerce, Sci., and Transp.*, 115th Cong. (2018) (statement of Senator John Thune) (“We want to hear more, without delay, about what Facebook and other companies plan to do to take greater responsibility for what happens on their platforms.”) (statement of Senator Bill Nelson) (“if Facebook and other online companies will not or cannot fix these privacy invasions, then we will”)