

**Copyright Law in Foreign Jurisdictions**  
**Hearing before the Senate Committee on the Judiciary**  
**Subcommittee on Intellectual Property**  
**March 10, 2020**

**Responses of Mr. Stan McCoy to Written Questions**

**Questions from Senator Tillis**

**1. 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? Which do you think could improve our system for curbing online piracy?**

Response:

Many countries throughout the world now recognize that notice-and-takedown alone cannot solve the problem of online piracy. The lesson of our experience at the Motion Picture Association (“MPA”) is that notice-and-takedown must be complimented by voluntary proactive measures and other legal tools, such as no-fault injunctive relief. As described in my testimony, the experiences of numerous jurisdictions that have implemented site blocking to date demonstrate clearly that the remedy, is highly effective and has posed no obstacle to innovation, nor has it adversely affected the internet and online services in those countries. Quite the contrary in fact: By curbing piracy, this remedy enhances the opportunity for legitimate services to flourish.

Another difference among the various international legal regimes is the extent to which the law imposes secondary liability on service providers. In the U.S., as described in the first hearing by Professors Aistars and Schultz and in numerous scholarly articles,<sup>1</sup> courts have eroded some of the key provisions in the DMCA that were designed to impose secondary liability and give services an incentive to self-police. Some international variants are unfortunately even weaker than the U.S. model, notably Canada’s “notice-and-notice” regime.<sup>2</sup> Likewise, as noted in my testimony, a persistent problem in many jurisdictions is the absence of an underpinning of secondary liability, seen for example in Mexico,<sup>3</sup> Ukraine,<sup>4</sup> and Vietnam<sup>5</sup> among others. The weaknesses in these regimes have adversely affected the business climate for the growth of legitimate services. That is why my testimony called on Congress to demand that U.S. trade

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<sup>1</sup> See, e.g., Matthew Barblan and Kevin Madigan, *Three Years Later, DMCA Still Just as Broken*, Center for the Protection of Intellectual Property (June 30, 2016) available at <http://cpip.gmu.edu/2016/06/30/three-years-later-dmca-still-just-as-broken/>.

<sup>2</sup> The International Intellectual Property Alliance (IIPA) says of the Canadian regime: “There is no evidence that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so: it was intended merely as an educational tool aimed at end-users, but there is no evidence that it is contributing to mitigation of infringing activity of consumers.” *IIPA Written Submission in Response to USTR’s Request for Comments and Notice of a Public Hearing Regarding the 2020 Special 301 Review* at 135 (Feb. 6, 2020) available at <https://iipa.org/files/uploads/2020/02/2020SPEC301REPORT.pdf>.

<sup>3</sup> Id. at 54.

<sup>4</sup> Id at 97.

<sup>5</sup> Id. at 112.

agreements include secondary liability for those entities that contribute to another's infringing activity.

In the European Union, by contrast, the law surrounding online liability provides for a simple calculus: "passive" platforms can be exempt from liability, "active" platforms cannot.<sup>6</sup> This works well and remains the rule for many types of services. The recent attempt to legislate stay-down obligations in the European Union for certain types of user-upload services was laudable in its initial goals, but its embodiment in Article 17 became disappointingly muddled in the legislative process. In our view, Article 17 in the end failed to offer an adequate improvement on the preexisting, and still-developing, EU law<sup>7</sup> surrounding online liability.

**2. You referred to injunctions under section 512(j) as a "hypothetical remedy." What has been the problem with section 512(j) in practice? What amendments to section 512(j) would be needed to make it equivalent to the "no-fault injunctions" you said many countries, including the United Kingdom, are doing?**

Response:

We believe section 512(j)(1)(B) of the DMCA provides a basis for courts to order U.S. ISPs to block access to foreign infringing sites. However, this provision suffers from some drafting ambiguity – including its location within the overall safe harbor regime – and has likely not been used due to concern by rightsholders that the provision might be interpreted as requiring a finding of liability on the part of the ISP.

While some have noted that 512(j) could be amended to explicitly provide "no-fault" injunctions, given the difficulty of successful legislative change, we are investigating other legal bases for injunctive relief related to internet intermediaries that facilitate or support piracy. We are also pursuing voluntary initiatives to address online piracy with various internet intermediaries (e.g., domain name registries and registrars, payment processors, reverse proxy services, and advertising networks).

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<sup>6</sup> Directive 2000/31/EC, Articles 12-14. See *L'Oréal v. eBay Int'l AG*, Case C-324/09 (2001) ("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.")

<sup>7</sup> Four CJEU referrals concerning platform liability are currently pending: *Joined cases Petersong's v. YouTube & Elsevier v. Uploaded* (C-682/18, C-683/18), *BREIN v. NSE Usenet* (C-442/19); *Puls4 TV v. YT* (C- 500/19). My testimony noted (fn. 18) that a decision was expected this Summer, but this timetable is likely to slip due to recent events.

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

Response:

European and other copyright laws reflect a principle of proportionality in the enforcement of copyright, such that no party should be required to take, or subjected to, measures that are disproportionate to its role. For example, in the context of no-fault injunctive relief, it is significant that ISPs who are subject to site blocking orders have flexibility in deciding the technological means to implement those orders provided they are effective. We believe U.S. law similarly recognizes the principle of proportionality or reasonableness. We are not aware of any proposal requiring all internet services of any size to deploy the same content recognition technology on their platforms. That being said, all businesses, large and small, online and offline, must respect the legitimate rights of others, including those protected by copyright law. Accordingly, they must utilize some effective method to ensure their platform responds appropriately to the presence of unauthorized content.

**4. One big issue that notice-and-takedown seems poorly suited for dealing with is piracy of live sports and other live events. Court-ordered site-blocking may also be too slow for real relief with live events. What is the solution to this issue?**

Response:

We agree that it is essential to the rule of law that we do not allow piracy of live broadcasts to evade legal remedies. The challenge of adapting no-fault injunctive relief to address that issue is getting considerable attention internationally, in large part because of the high value and rampant piracy of sports broadcasts. Several jurisdictions are moving toward innovative approaches where courts set framework conditions to allow the triggering of temporary site blocks timed to coincide with short-duration live events. We have seen this happen judicially in the United Kingdom in 2017,<sup>8</sup> and subsequently Ireland,<sup>9</sup> Spain,<sup>10</sup> and Denmark<sup>11</sup>. Legislation is under consideration right now in both France and Italy to set up similar systems. We are watching these developments closely with a view to ensuring rapid and effective remedies for all types of infringement. In addition, closing the “streaming loophole” so that illegal streaming at a commercial level can be prosecuted as a felony in the same way that other forms of reproduction and distribution are, would help in protecting live events.

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<sup>8</sup> High Court London, *FAPL v BT & Ors*, 13 March 2017.

<sup>9</sup> High Court Ireland, *FAPL v. Eircom & ors.*, 15 July 2019

<sup>10</sup> Commercial Court Madrid, *Telefonica Audiovisual Digital v Telefonica De Espana & Ors*, 11 February 2020.

<sup>11</sup> District Court Frederiksberg, *RA & La Liga v Telenor*, 15 April 2019.

## 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?**

Response:

Yes, many jurisdictions around the world that share a strong commitment to human rights, including freedom of speech, have implemented site blocking with due process safeguards appropriate to their legal systems. Examples include the United Kingdom, Australia, and most member states of the European Union, among others.

We believe section 512(j)(1)(B) of the DMCA provides a basis for courts to order U.S. ISPs to block access to foreign infringing sites. However, this provision suffers from some drafting ambiguity – including its location within the overall safe harbor regime – and has likely not been used due to concern by rightsholders that the provision might be interpreted as requiring a finding of liability on the part of the ISP.

While some have noted that 512(j) could be amended to explicitly provide “no-fault” injunctions, given the difficulty of successful legislative change, we are investigating other legal bases for injunctive relief related to internet intermediaries that facilitate or support piracy. We are also pursuing voluntary initiatives to address online piracy with various internet intermediaries (e.g., domain name registries and registrars, payment processors, reverse proxy services, and advertising networks).

- 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?**

Response:

The concern of certain critics about undue impingement on the possibility of relying on exceptions has been overstated. Filtering technology is capable of applying customized rules that dramatically reduce the likelihood of screening out works for which a fair use exception might apply. For example, the rules might be set to detect only files containing a substantial portion of the copyrighted work; or ignore files where the audio and video files do not match, suggesting the inclusion of commentary. Copyright owners who rely on content recognition technologies have nothing to gain by tarnishing the filtering process that is overwhelmingly error-free on the rightsholder side by overfiltering and opening themselves up to anecdotes about supposedly erroneous takedowns. As explained by the Association Littéraire et Artistique Internationale, one of the premier international organizations supporting artists rights, it is in the interest of rightsholders to support the proper functioning of the filtering process. They will therefore refrain from filtering in cases where the work would be subject to a fair use

exception.<sup>12</sup> It is also important to recall that exceptions to copyright are not rights as such; they are *defenses* to copyright infringement claims. This means that an exception can only be raised *after* someone else asserts that there is copyright infringement in the first place. Consequently, redress mechanisms are the most appropriate way to determine whether an exception is a legitimate defense to such a claim. Redress mechanisms are also better adapted to dealing with qualitative evaluation.

**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?**

Response:

The MPA and its members are in the business of creating content. We support and benefit from freedom of speech but do not agree that the EU Copyright Directive will lead to blocking legal content and chilling free speech. This criticism was part of a well-funded disinformation campaign against the Directive that sought, among other things, to equate the new measures for online copyright protection in Article 17 with censorship. Of course, IP enforcement is not censorship.

As for the proposal that services merely block the reposting of identical content from a particular user, that suggestion would do very little to improve the overall piracy problem. Typically, the identical file is uploaded by multiple users on a site, which is why content reappears immediately after it has been taken down. Blocking just those provided by a single user would be almost entirely ineffective. Moreover, it's unnecessary. We have the ability to determine when files are identical – there is no reason to restrict a staydown regime to only those files from a particular user. All identical files from all users should be subject to a staydown order.

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<sup>12</sup> See Association Littéraire et Artistique Internationale (ALAI), Draft Opinion on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, para. 6, available at [https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019\\_790-en.pdf](https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019_790-en.pdf).

## 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?**

Response:

Yes. We believe the more than 30 countries that have adopted no-fault injunctive relief have taken a significant step toward achieving that balance. A case in point is the United Kingdom, where site blocking orders against more than 176 infringing sites have proven effective without adverse consequences in terms of overblocking, network security, freedom of speech, and innovation. Another is Australia which boasts home-grown creative industries which have supported site blocking legislation (s115A) leading to blocking or delisting (from search results) of 357 sites, similarly without adverse consequences and now done without opposition by any major ISP or search engine in Australia. Australia's actions have resulted in reductions in online piracy and migration of habitual pirates to legitimate services.<sup>13</sup> In a seminal April 2019 decision, India's Delhi High Court determined that "rogue" piracy websites are eligible for permanent site blocking and does not interfere with open Internet principles; this decision has led to the blocking of more than 106 piracy sites without hindering the launch of legal online platforms.

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

Response:

More than 30 countries have adopted no fault injunctive relief by statute or other instrument, or by judicial decision. MPA is able to provide copies and translations of the various relevant instruments upon request. By way of illustration, we would for instance point to Article 8.3 of the EU Copyright Directive and its corresponding recital 59 (the provisions upon which all EU member state website blocking cases are based):

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders 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. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

Article 8.3

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<sup>13</sup> <https://www.mpa-apac.org/research-docs/measuring-the-effect-of-piracy-website-blocking-in-australia-on-consumer-behavior-december-2018/>.

3. Member States shall ensure that rightholders 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.

This legal remedy, described at length in my testimony, is highly effective and has posed no obstacle to innovation, nor has it adversely affected the internet and online services in those countries. Quite the contrary in fact: By curbing piracy, this remedy enhances the opportunity for legitimate services to flourish.

The main technologies used by ISPs to implement this remedy are:

- URL blocking: A URL is something like [www.motionpictures.org](http://www.motionpictures.org). A browser sends that to the ISP, and the ISP is technically capable of blocking this URL – either the whole website or specific pages on it.
- DNS blocking: DNS is the conversion of the URL into an IP address, which is a string of numbers. The company that does this DNS conversion – usually the ISP – can block it for infringing websites.
- IP blocking: The technology also exists for ISPs to block the IP address itself. This technique, known as IP blocking, is less vulnerable to circumvention than DNS blocking.

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

Response:

We have repeatedly seen site blocking introduced and adopted in major jurisdictions with relatively little controversy. A recent case in point is Australia, which has seen more than twenty cases and applications since the *Solarmovie* case<sup>14</sup> in December 2016, involving more than 1,300 domains. When Australia’s law was reviewed in 2018, legislators had a chance to consider whether it was causing any particular problems. Instead, they found the remedy was working as intended, and even chose to expand it further.

**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?**

Response:

Yes. Existing U.S. law not only permits, but indeed encourages, domestic stakeholders to do much more on a cooperative basis. In this age of unprecedented risk of online harm, it is more important than ever for online intermediaries to partner with the creative community to stem the flow of traffic to piracy sites and services. All online

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<sup>14</sup> Federal Court Australia, *Roadshow Films v. Telstra*, 15 December 2016.

intermediaries should be encouraged to employ voluntary measures to curb piracy, whether through technical measures like YouTube's ContentID or cooperative relationships like the MPA has entered into with payment processors, domain name registries and registrars, hosting services, and reverse proxy services. We also strongly support an effort to convene a consensus of copyright owners and service providers to develop "standard technical measures" to identify copyrighted works as envisioned by the DMCA.

5. **The European Union and the United Kingdom share many of our democratic values, and it would be useful to understand how tech companies have responded to the different laws in those jurisdictions.**
  - a. **Is there a difference in how the technology has developed in response to the law in the U.S. as opposed to in the E.U. and the U.K.? What accounts for those differences?**

Certainly many internet platforms in the U.S. lack strong policies and technology solutions to piracy. This is due in part to the federal courts paring back the protections afforded by the DMCA to rightsholders and also because the law might be interpreted to require a finding of fault before injunctive relief can be ordered against the platform. This was explained in detail by Professors Aistars and Schultz during the first hearing. While in the U.K. and E.U., the comparable law clearly permits injunctive relief to be ordered against third parties without a finding of fault. In general, we have seen no adverse impact and considerable positive impact on technological development in countries that have adopted no-fault injunctive relief (as noted in my response to your Question 2 above). In the EU and UK, parties that have been subject to no-fault injunctive relief (mainly but not exclusively ISPs) have developed and implemented effective technologies (as noted with respect to ISPs in my response to your Question 2 above).