

U.S. Senate
Committee on the Judiciary
Subcommittee on Intellectual Property

Hearing
[“Approaches of Foreign Jurisdictions to Copyright Law and Internet Piracy”]
Testimony of
Stanford K. McCoy
President and Managing Director,
Motion Picture Association EMEA
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Chairman Tillis, Ranking Member Coons and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss global approaches to internet piracy.

Introduction

For nearly a century, MPA¹ has studied the negative impact of piracy on businesses and consumers and has advocated for effective copyright protection around the world. During that time, the United States has often led the international community in providing a robust legal framework that enables legitimate businesses to thrive. As piracy has migrated to the online environment and become a global challenge, the United States has also learned from the experiences of its partners in other parts of the world. We therefore applaud this Committee’s continuing interest in evaluating international models and experience.

The United States, Europe and many of our other partners around the world share a similar challenge when it comes to online copyright enforcement: The old notice-and-takedown systems, conceived between 1996 and 2001, have failed to provide real, durable protection against online infringement. Lacking stay-down obligations, high-volume reactive notice-sending has been insufficiently effective, even in the short term.² Foreign jurisdictions have, unsurprisingly, concluded that a reactive notice sending approach by itself offers insufficient sustainability, scalability, and cost effectiveness.

Tackling the larger problem requires more proactive approaches, but intermediaries -- including ISPs, hosting providers, domain name providers, and search engines -- are too often reluctant to address illegal activity happening through their services without outside pressure from governments, or the threat of litigation and liability. They are often more concerned with preserving their own legal immunity than combatting illegality that harms others. Meanwhile, despite a growing antipiracy investment on the part of our industry, the

¹ The MPA is a not-for-profit association founded in 1922 to address issues of concern to the motion picture industry. The MPA’s member companies are: Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc. The MPA’s members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

² <http://cpip.gmu.edu/2016/06/30/three-years-later-dmca-still-just-as-broken/>

perpetrators themselves remain extremely difficult to identify, with identification now further hindered by the loss of access to WHOIS data.³

We see action by intermediaries to develop the online environment as a safe and lawful space as part of a wider agenda of creating a greater sense of responsibility from companies that are the gatekeepers to so many of citizens' day-to-day activities. In the early years of their development, the technology giants that now dominate online search, social media and user-upload video platforms didn't seem to think they had a role to play in ensuring that the pre-existing framework of rules and behavioral norms could be preserved. Their creed was one of 'permissionless innovation' – better to ask for forgiveness after the fact than to seek consent in advance – and their motto was 'move fast and break things'.

Our central contention is that that attitude is no longer acceptable, that it ill-serves the civic, consumer and wider industrial interest; and ultimately, that exercising a greater sense of responsibility for what end users do online – even if the platform is not legally liable for the actions of a (oftentimes anonymous) third party – is essential. It is in this context that we bring our analysis of two legislative developments of particular relevance to the Committee.

- The first comes from our experience in the more than 30 countries that for many years have provided for the possibility of no-fault injunctive relief (of which site blocking is the most prominent example) applied to intermediaries whose services are exploited by pirates. Each of these countries has successfully invoked this provision in their law to enjoin an illegal online site without negative repercussions to the internet. Indeed, while much may be problematic with the world of the internet today, the ability to enforce the rule of law is not part of the problem; it is part of the solution.
- The second is the 2019 EU Directive, which sets out a new approach to protecting copyrighted works on certain types of online services, but has not yet been implemented in any EU member state.

No-Fault Injunctive Relief Including Site Blocking

I want to begin with the most successful approach to online piracy currently available, which was pioneered by our international partners: no-fault injunctive relief. This remedy allows a rights holder to seek a legal order, subject to due process, from an online intermediary that is capable of preventing its service from being used for unlawful purposes. The remedy does not interfere with the legitimate business of online intermediaries, and they can select which enforcement measures to implement provided they are effective and proportionate.

Here we speak from experience: The MPA or our colleagues in the global audiovisual sector have used this remedy in dozens of countries as a means to grow and sustain healthy markets for exports of audiovisual services and protect content created locally. We continue to do so, with multiple cases typically pending at any given time in jurisdictions around the

³ The Internet Corporation for Assigned Names and Numbers (ICANN) requires registrars and registries of internet domain names to collect, share and process certain data from people and companies which register domain names (who they are, how they can be contacted, etc.). Until the entry into force of a new EU privacy rules in May 2018, this information was publicly accessible through a system called WHOIS, and was used for a variety of purposes, including by law enforcement agencies, private sector organizations and consumers.

world. The MPA’s experience confirms that no-fault injunctive relief helps to curtail illegal conduct and creates space for the cultivation of legitimate commerce. Importantly, it does so in a manner consistent with the rule of law, with the safeguards of due process.

When we describe this form of relief as “no-fault,” we mean that, legally and factually, these remedies turn on the infringing conduct of the pirate site at issue; they do not entail any finding of fault on the part of the intermediaries. No-fault injunctive remedies have been applied against a wide range of intermediaries, after first giving the intermediary notice of the infringing conduct taking place through its platform, all without entailing any inquiry into whether the intermediary may or may not have behaved in a manner that would incur primary or secondary liability. That question simply is not relevant to this form of relief, which turns on the simple finding that “such intermediaries are best placed to bring such infringing activities to an end.”⁴

One form of no-fault relief is site blocking, which is an order to an ISP to disable access to a given pirate site. Many countries currently offer such a no-fault injunctive remedy to address infringing conduct by pirate sites, including Australia, most member states of the European Union, India and the United Kingdom, to name a just a few. Globally 34 countries apply website blocking. One of the most recent additions to this list is Canada, where the Federal Court in November granted an intermediary injunction, sought by several broadcasters, in a case involving a notorious illegal streaming TV service.

Some of the deepest and most relevant experience with this remedy comes from the UK, where, since the *Newzbin 2* case⁵ in 2011, there have been some 23 court cases leading to civil injunctions against 176 infringing sites spread across more than 2,000 domains. These site blocking orders have been enacted without any ill effects to the larger internet ecosystem. In particular:

- Sites not intended to be encompassed by the block have been successfully excluded (measures to prevent “overblocking” are applied on an automated and continuous basis).
- Security has not been undermined by an exodus to alternative domain name system (DNS) servers.
- Freedom of speech remains strong. Courts in the UK have had no trouble understanding the difference between an injunctive remedy against illegal conduct of third parties on the one hand and the preservation of freedom of speech on the other.
- And innovation continues, with the UK still boasting the third largest digital technology sector in the world, according to its government.⁶

⁴ 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, recital 59.

⁵ High Court London, *MPA studios (20th Century Fox, NBCU, WB, Sony, Disney, Paramount) v. BT*, 28 July 2011.

⁶ <https://www.great.gov.uk/international/content/about-uk/industries/technology/>

Much the same can be said for Australia, which has seen more than twenty cases and applications since the *Solarmovie* case⁷ in December 2016, involving more than 1,300 domains. When the law was reviewed in 2018, Australia's 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.

Exactly how effective is site blocking in practice?

- Our internal data shows us that **site blocking is very effective at cutting traffic to pirate domains** – meaning that an order applicable to the main access providers in a given country reduces traffic to a targeted domain by 70% on average and can be as high as 80-90% in some countries. That domain-specific impact is very clear and sustained over time. It becomes even more durable if the remedy specifies the underlying site, rather than just one or a few of the many domain names the site may use at any given time (this is the case in the UK, for example).
- We also find that **consistent use of site blocking increases the overall health of the online ecosystem, including by decreasing overall piracy traffic and increasing traffic to legitimate content sources**. By that we mean that when rights holders are able to obtain orders against significant numbers of pirate sites, sites responsible for a large proportion of piracy traffic, we also see notable reductions in the overall volume of pirate traffic. The traffic to blocked sites significantly decreases and the overall piracy traffic decreases as well, as shown by research in the UK, Portugal and Australia⁸. Studies in the

⁷ Federal Court Australia, *Roadshow Films v. Telstra*, 15 December 2016.

⁸ Research consistently confirmed these findings in countries where important blocks have been implemented.

Australia:

- Incopro: *Site Blocking Efficacy Australia (May 2017)*, available at <https://www.incoproip.com/wp-content/uploads/2020/02/Site-blocking-efficacy-study-Australia.pdf>;
- Incopro: *Site Blocking Efficacy – Key Findings Australia (February 2018)*, available at <https://www.incoproip.com/wp-content/uploads/2020/02/Australian-site-blocking-efficacy-key-findings-Feb2018.pdf>.

UK:

- Carnegie Mellon University: *The Effect of Piracy Website Blocking On Consumer Behaviour (August 2019)*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063
- Carnegie Mellon University: *The Effect of Piracy Website Blocking On Consumer Behaviour (May 2015)*, available at <https://techpolicyinstitute.org/wp-content/uploads/2015/06/the-effect-of-piracy-website-b-2007716.pdf>
- Carnegie Mellon University: *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior (April 2016)*, available at <https://techpolicyinstitute.org/wp-content/uploads/2016/04/UK-Blocking-2-0-2016-04-06-mds.pdf>
- Incopro: *Site blocking efficacy study: United Kingdom (May 2015)*, available at <https://www.incoproip.com/wp-content/uploads/2020/02/Site-blocking-efficacy-study-United-Kingdom.pdf>

Portugal:

- Incopro: *Site Blocking Efficacy in Portugal (October 2016)*, available at <https://fevip.pt/site/wp-content/uploads/2016/10/IncoproReport.pdf>
- Incopro: *Site Blocking Efficacy in Portugal (September 2015-October 2016) (May 2017)*, available at <https://www.incoproip.com/wp-content/uploads/2020/02/Site-Blocking-and-Piracy-Landscape-in-Portugal-May-2017.pdf>

UK⁹ and Australia¹⁰ have shown that this can lead to statistically significant and meaningful increases in legal online consumption. In that respect, the injunctive remedy in the European Union, the UK, Australia, and elsewhere has been decidedly more effective than the endless cycle of DMCA notice-sending. In various countries the administrative or judicial authorities have recognized that a blocked website can easily switch to another domain, and therefore granted blocking orders that are specific to the underlying site rather than a particular domain. Notably, in the UK, Ireland, Spain, and Denmark¹¹ blocking orders cover alternative online locations (alternative domains, mirror sites, proxies) that allow access to the infringing site. Similarly, in Italy¹², among other jurisdictions, the authorities provide rapid procedures to update blocking orders. Many ISPs elsewhere in the world have even grown to recognize the benefits of no-fault injunctive relief (some being content licensees themselves), in some instances voluntarily agreeing to be subject to past orders, or even seeking the orders themselves.¹³

- We find that the remedy can be particularly effective when it allows quick coverage of mirror sites and proxies. We also note the importance of adapting the remedy to meet the need to protect live events, such as sports or concerts.¹⁴

So yes, site blocking is effective. And that is why much of the rest of the world has embraced this approach.¹⁵

It should be noted that the DMCA includes a provision for injunctive relief against intermediaries, including orders requiring reasonable steps to block access infringements occurring at specific, online locations outside the United States. In more than twenty years,

⁹ In the UK, research has found that application of injunctive relief caused former users of affected sites to decrease piracy and to increase their usage of legal subscription sites. It also caused an increase in new subscriptions. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063

¹⁰ In Australia, reductions in piracy traffic have been accompanied by increases in traffic to legal services by former users of illegal sites. <https://www.mpa-apac.org/wp-content/uploads/2020/02/Australia-Site-Blocking-Summary-January-2020.pdf>

¹¹ See for example: **UK** Twentieth Century Fox Film Corp & Ors v British Telecommunications plc [2011] EWHC 1981 (Ch) and [2011] EWHC 2714 (Ch)) **Ireland**: High Court Dublin, 20th Century Fox and Ors. v. Eircom and Ors., 3 April 2017; High Court Dublin, 20th Century Fox and Ors. v. Eircom and Ors., 15 January 2018, **Spain**: [Commercial Court Madrid, Telefonica v ISPs ,11 February 2020](#); [Commercial Court Barcelona, Columbia v Telefonica, 7 March 2019](#), **Denmark**: Frederiksberg District Court, RA v TDC, 5 December 2017 (Popcorn Time); District Court Frederiksberg, RA v Telenor, 8 February 2017.

¹² Administrative Siteblocking regulation: Regulation on the protection on copyright on electronic communication networks and implementation procedures in accordance with legislative decree 70 of 9 April 2003.

¹³ Commercial Court Madrid, Telefonica v ISPs, 11 February 2020 : the blocking action was filed by Telefonica Audiovisual Digital, S.L.U., Telefonica's audiovisual production branch, against most of the ISPs that operate in the Spanish market, including Telefonica.

¹⁴ See, for example, *FAPL v BT* [2017] EWHC 480 (Ch); *Union Des Associations Européennes De Football v British Telecommunications plc* [2017] EWHC 3414 (Ch); *Matchroom Boxing Ltd v British Telecommunications Plc* [2018] EWHC 2443 (Ch); *The Football Association Premier League ltd. v Eircom ltd. t/a Eir & ors* [2019] IEHC 615

¹⁵ Even the U.S. has employed a limited domain-name seizure remedy run by the government called Operation in Our Sites which has proven to be effective in combatting piracy and counterfeiting sites. This remedy was inherently limited to sites with certain domain names over which U.S. or coordinated foreign authorities could exert jurisdiction, but it was an effective site-specific remedy.

however, these provisions of the DMCA have never been deployed, presumably because of uncertainty about whether it is necessary to find fault against the service provider before an injunction could issue, unlike the clear no-fault injunctive remedies available in other countries.¹⁶

The EU Copyright Directive

The most recent way that an overseas partner has responded to the failure of notice-sending was the adoption by the European Union of Article 17 of the 2019 EU Copyright Directive.

Like the United States, EU legislators grew concerned that internet intermediaries were often profiting from piracy at great cost to creators, and without taking sufficient proactive steps to effectively address the issue through appropriate licensing or preventative measures. This led to a discussion of what came to be called “the value gap,” and an attempt to close that gap by proposing a more balanced legal framework between intermediaries and the creative sector. The initial goals of this part of the Directive were laudable, inasmuch as it sought to address the licensing and enforcement-related needs of a wide range of creators through cutting-edge technology. Unfortunately, the EU legislative process resulted in a weakening of the initial proposal and a reduction in legal certainty. The resulting legislation could still contribute to the achievement of its initial goals, but much now depends on how EU member states will implement it in their national laws by June 2021, and on how the courts will interpret those provisions.

Most of the public discussion around the new EU Directive has focused on Article 17. In other respects, while this new Directive is significant in the European context, there is candidly not much in it that is especially relevant for future U.S. legislation.¹⁷ As to Article 17, this part of the legislation aims to address one dimension of the failure of the notice-and-takedown model: infringement of copyright-protected content by “online content-sharing service providers” – a term of art that includes user-upload services like YouTube. The legislation requires these services to either obtain licenses from rightsholders (while confirming the freedom of rightsholders and OCSSPs to decide not to enter into a licensing agreement) or, where they do not obtain licenses, to use state-of-the art technology to prevent availability of infringing content.

While laudable in its initial goals, Article 17 became disappointingly muddled in the legislative process. This was in part due to a well-funded disinformation campaign. That campaign sought, among other things, to equate the new measures for online copyright protection in Article 17 with censorship. Make no mistake: IP enforcement is not censorship. Similar claims have been discredited by courts in Europe and the U.S. alike. The MPA and its

¹⁶ 17 U.S.C. 512(j) (“The following rules shall apply in a case of any application for an injunction under section 502 *against* a service provider that is not subject to monetary remedies under this section”) (emphasis supplied).

¹⁷ Most of the non-Article 17 provisions are devoted to clarifying distinctly European issues: its provisions on harmonization of exceptions and limitations, establishment of publishers’ rights, and intervention in relations between producers and talent all grow out of a distinctly European legal and business context that has no direct U.S. analog. Some of these provisions are nonetheless concerning. For example, we worry that the provisions regulating contractual relations between producers and talent could, if poorly implemented, create commercial obstacles to the production and financing of film and television in some EU countries. In the U.S. system, such issues are dealt with contractually, including through collective bargaining, and should remain so.

members support and benefit from freedom of speech. Conflating that freedom of *speech* with illegal *conduct*, such as copyright infringement, only weakens it. User-upload services and other intermediaries must do their part and use cutting-edge technologies to prevent the use of their services to facilitate piracy. We and our members are working with many online intermediaries to do just that.

In our view, Article 17 in the end failed to offer an adequate improvement on the preexisting, and still-developing, EU law¹⁸ surrounding online liability. That law provides for a simple calculus: passive platforms can be exempt from liability, active platforms cannot. This works well, and remains the rule for many types of services. The new Directive has now added a layer of complexity for “online content-sharing service providers.” In our view, many of the core activities of those providers should have simply placed them in the category of “active” platforms under the relevant EU case law.¹⁹

The Directive is now subject to national implementation, which may vary from country to country. It should be implemented in a way that encourages user-upload platforms to be proactive and implement best-in-class content recognition technologies, while also preserving the commercial freedom of rights holders in the audiovisual sector to simply opt not to license user-upload platforms, if they so choose. Whether it will be implemented in that way is something we will be monitoring over the next two years. So, the bottom line on the new EU Directive is that, despite all the attention it has garnered, so far it offers no lessons for U.S. legislators.

Other Remedies

That brings me to a final topic that is also fundamentally international: What more can be done to make it easier for rights holders and authorities around the world to find and take action against the perpetrators of online infringement, as the FBI did when it took action against the P2P pirate site Megaupload?

Of course, at the MPA we do go after the perpetrators ourselves, working cooperatively with law enforcement around the globe and engaging in self-help via civil courts. Our action against the massive pirate cyberlocker Openload, included on the “notorious market” list by the Office of the U.S. Trade Representative, was one recent example.²⁰

¹⁸ 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). First decision is expected this Summer.

¹⁹ Clarified by the Court of Justice in 2011 in case C-324/09 (*L’Oréal/eBay*): “*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.*” See previous footnote, similar questions are currently pending in four cases. First decision is expected this Summer in relation to joined cases *YouTube & Uploaded* (C-682/18 and C-683/18).

²⁰ <https://www.alliance4creativity.com/news/ace-action-prompts-pirate-giants-openload-and-streamango-to-cess-all-operations/>

We know that no one approach and no one jurisdiction can solve the problem, so we commit significant resources to taking action ourselves. Our international coalition, the Alliance for Creativity and Entertainment (ACE),²¹ was successful in taking down a large file-sharing site operating in Romania, France and Germany. ACE was recently able to strike another serious blow against a large majority of the most important pirate sites in Russia by taking legal action against the back-office servers they relied on in the Netherlands. ACE was similarly able to shut down the biggest pirate service in Spain by working with authorities in Uruguay.

Despite our efforts and those of law enforcement, today's piracy remains an extremely pervasive and lucrative form of cross-border organized crime. At least two major issues stand in the way of our ambition to pursue many more direct actions against many more perpetrators.

First, even for law enforcement authorities, it is extraordinarily difficult and time-consuming to identify the actual operators of pirate services, who are often located in distant countries and hiding behind proxy services like Cloudflare, and fake identities.

In theory, the operators of online businesses have legal obligations to identify themselves. In practice, however, operators of illegal businesses rarely do so. In theory, many jurisdictions require providers of hosting or other critical business services to reveal on request the identity of business customers running illegal commercial enterprises. In practice, however, many service providers simply do not know the identity of their business customers.

Unfortunately the difficulty of identifying operators of pirate services increased markedly in May of 2018, when the Internet Corporation for Assigned Names and Numbers (ICANN), the entity that adopts and enforces the rules that govern the registration and use of domain names, in a sweeping misapplication of EU privacy law, removed most data elements from the publicly available WHOIS without effectively ensuring access to this data to entities with a legitimate purpose including law enforcement, child protection, and the protection of private rights like trademark and copyright. We have all lost a valuable tool that can and should be restored through a more balanced and reasonable ICANN policy.

A second challenge that prevents us from taking more direct actions against infringers is simply the weakness and inconsistency of the rule of law in many jurisdictions. To promote stable and predictable rule of law in our sector, it is also critical that the U.S. insist on strong copyright enforcement and liability provisions in the law of its trading partners. The U.S. Government must continue to champion the rule of law and the need for adequate and effective protection of copyright around the world, as Congress has long demanded.

²¹ The worldwide members of ACE are Amazon, AMC Networks, BBC Worldwide, Bell Canada and Bell Media, Canal+ Group, CBS Corporation, Channel 5, Charter Communications, Comcast, Constantin Film, Discovery, Foxtel, Fox Corporation, Grupo Globo, HBO, Hulu, Lionsgate, Metro-Goldwyn-Mayer (MGM), Millennium Media, NBC Universal, Netflix, Paramount Pictures, SF Studios, Sky, Sony Pictures Entertainment, Star India, Studio Babelsberg, STX Entertainment, Telefe, Telemundo, Televisa, Univision Communications Inc., Viacom Inc., Village Roadshow, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. ACE draws upon the global content protection resources of the Motion Picture Association in concert with the internal content protection expertise of ACE members.

To that end, Congress should demand strong copyright laws that include secondary liability for those entities that contribute to another's infringing activity. Secondary liability is a well-established part of U.S. law, and is critical for enforcement efforts on the internet. For most internet service providers, safe harbors from liability are not needed at all without the threat of some form of liability.

Relatedly, Congress should work with the Administration to prevent the export of Section 230 of the Communications Decency Act or any other provisions of U.S. law that confer immunity from illegal behavior online. Blanket immunity inevitably encourages illegal conduct, erodes the stability and predictability of the rule of law and makes it harder for legitimate businesses to thrive. This is not a feature of the U.S. system that should proliferate elsewhere.

Our agreements should also include obligations to fully implement the WIPO Internet treaties; enshrine the concept that limitations and exceptions to copyright are confined to those consistent with the longstanding "3-step test"; reflect a term of protection similar to U.S. law and global consensus; and provide for comprehensive obligations regarding copyright enforcement with meaningful criminal penalties and civil remedies, including criminal liability for aiding and abetting, criminal remedies for illegal camcording, and remedies addressing pay-TV piracy and signal theft.

In conclusion, I want to be especially clear on one point: The Motion Picture Association is not coming before this Committee today to call for U.S. legislation introducing new civil remedies. Rather, I have come here to speak to the challenge of online copyright enforcement and to provide information on effective remedies deployed in other countries. But it is incumbent upon Congress to evaluate whether the laws we have are effective in achieving the ends Congress intends, and to learn what it can from the experience of our global partners. I hope that the perspective I share today of an industry that has seen the strengths and weaknesses of various international frameworks is helpful to you as you undertake your own examination.

As to what should happen here in the United States, we recall that 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.