

**Copyright Law in Foreign Jurisdictions:
How Are Other Countries Handling Digital Piracy?
Hearing before the Senate Committee on the Judiciary
Subcommittee on Intellectual Property
March 10, 2020**

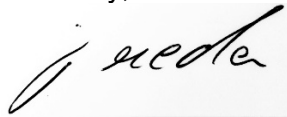
Berlin, March 26, 2020

Dear Chairman Tillis,

It was an honor to be invited to testify before the Senate Committee on the Judiciary Subcommittee on Intellectual Property and to be able to share my experience as a European lawmaker. I am a firm believer in the importance of international exchange between legislators. I appreciate your interest in my response to your written question, which I address below.

I wish you and your family all the best and good health in these trying times.

Sincerely,

A handwritten signature in black ink that reads "j. reda". The signature is written in a cursive, lowercase style.

Julia Reda

Question for Ms. Julia Reda

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?

Answer by Ms. Julia Reda

I will limit my response to a comparison of the current EU and US notice-and-takedown frameworks, my area of expertise. EU countries still have time until June 2021 to implement the new liability rules introduced by Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (DSM Directive) into their national copyright laws. Because no single country has adopted the new provision to date, we have no idea how, or even if, the alternative to notice and takedown will work. The current notice-and-takedown regime in the European Union is therefore still governed by Articles 12 to 15 of Directive 2000/31/EC on electronic commerce (E-Commerce Directive), as well as the copyright enforcement provisions of Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED). Those rules are quite similar to those of the US DMCA.

Both legal regimes provide for liability exemptions for comparable categories of internet service providers. Under both the US and the EU frameworks, service providers cannot be obliged to generally monitor user activities as a precondition for benefitting from the liability safe harbor. This ban on general monitoring obligations is an essential safeguard for users' privacy as well as proportionality of service providers' obligations. As regards hosting providers, the safe harbor is contingent on removing infringing material once the provider becomes aware of it.

The main difference between the US and EU notice-and-takedown regimes is procedural: Whereas the US DMCA contains relatively detailed provisions on the notice-and-takedown procedure, the EU E-Commerce Directive merely states that hosting providers are not liable for content of which they have no actual knowledge, and that they must expeditiously remove illegal content once they gain such knowledge. The exact procedure by which a hosting provider is considered to have gained actual knowledge is left to national law or judicial interpretation, no formal notice-and-takedown procedure is laid out in EU law. In particular, EU law is missing statutory safeguards against wrongful or fraudulent takedown notices that are included in the DMCA, such as penalties for knowing misrepresentation of the facts in copyright notices or a counter-notice procedure.

This lack of a formal notice-and-takedown procedure could be considered a shortcoming of the EU legal framework. The detailed notice-and-takedown provisions of the US DMCA have contributed to making it a de facto global copyright enforcement standard. Many European rightsholders make use of the DMCA, which makes a comparison of the two respective legal regimes' effects on copyright infringement quite difficult. In practice, rightsholders on both sides of the Atlantic are relying on the same legal framework for online copyright enforcement as regards intermediaries – the DMCA.

When it comes to reducing copyright infringement online, I am convinced that the availability of affordable, attractive legal streaming services is paramount. Illegal filesharing has been all but replaced by legal alternatives, especially when it comes to the music sector, where for-pay or advertising-based services with comprehensive catalogues are readily available. Illegal streaming of films and television programs is still a comparatively significant phenomenon.

While legal video streaming services have grown rapidly in popularity and revenue over the recent years, there is still a lack of comprehensive video streaming services that give users access to all the content they want to see in one place. Exclusive deals between rightsholders and streaming services are much more common than in the music industry, therefore users have to choose between a large number of different streaming services with distinct offerings. Subscribing to all major streaming services is not affordable to the average consumer.

In some jurisdictions, popular content is not legally available at all, due to geographically limited licensing deals. This problem of geoblocking is particularly rampant in the EU, which is comprised of 27 separate national jurisdictions, but it also affects Americans living abroad, including members of the armed forces and their families. Potential customers who are willing to pay but find themselves unable to do so turn to illegal sources instead. A successful strategy to reduce copyright infringement in the film sector should therefore focus on exploring alternatives to exclusive and geographically limited licensing deals.

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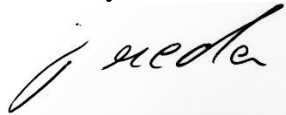
Berlin, March 26, 2020

Dear Ranking Member Coons,

It was an honor to be invited to testify before the Senate Committee on the Judiciary Subcommittee on Intellectual Property and to be able to share my experience as a European lawmaker. I am a firm believer in the importance of international exchange between legislators. I appreciate your interest in my responses to your written questions, which I address below.

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Julia Reda

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?
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?
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?

Answers by Ms. Julia Reda

1. EU law does not preclude injunctions by national courts against intermediaries to bring a copyright infringement to an end, this possibility is left to national law according to Article 12 (3) of Directive 2000/31/EC on electronic commerce (E-Commerce Directive). However, such injunctions have to comply with high standards of proportionality, must not create barriers to legitimate trade and must provide for safeguards against their abuse, according to Article 3 (2) of Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED). The Court of Justice of the European Union has established that such measures must be strictly targeted, without negatively affecting the possibility of internet users lawfully accessing information. In some instances, the Court of Justice of the EU has therefore denied site blocking as an injunction in the context of copyright infringement¹.

I believe that scholars of US copyright law are best placed to answer whether a similar framework is appropriate for the US legislator, but there are good reasons to caution against site blocking for free speech as well as online security reasons. From a free speech perspective, it is very difficult to implement site blocking that only blocks illegal content without adversely affecting users' rights to access legal content, as the CJEU requires. This is evident in the case of peer-to-peer filesharing protocols, for example, which are a very efficient means of transferring files of any type and are therefore also used for legitimate means, such as the distribution of open source operating systems. Where site blocking is done at the domain level, it cannot be excluded that legitimate websites that share the same domain with an infringing website are erroneously blocked in the process. For example, in 2016, Swiss Internet Service Provider Swisscom accidentally blocked all 15 million websites created on the platform Jimdo, including the websites of many legitimate small businesses, presumably because one of them was engaged in illegal activity².

From a security perspective, domain name blocking makes the use of security measures against phishing attacks such as the use of DNSSEC more difficult, because some phishing attacks use the same technical means as website blocking by Internet service providers, namely re-routing a request for a particular domain name to a different IP address. This means that, to implement site blocking injunctions, in particular when being obliged to re-route users to a website showing a warning message whenever the user tries to access a website that facilitates copyright infringement, service providers could have to disable existing anti-phishing measures, rendering ordinary internet users and legitimate businesses more vulnerable to phishing.

¹ Court of Justice of the European Union Case C-484/14 *McFadden v Sony Music Entertainment Germany*.

² Swiss ISP Blog: Swisscom accidentally blocks websites from Jimbo and Hostgator: <https://isp-blog.ch/swisscom-sperrt-jimbo-hostgator/>

Since website blocking is easy to circumvent through the reconfiguration of one's DNS server, and the names of websites subject to blocking injunctions must be published in order to ensure that only illegal content is blocked, website blocking may ironically even serve to advertise websites that facilitate copyright infringement. A more reliable strategy for reducing copyright infringement and increasing revenues in the entertainment industries is facilitating the development of affordable legal offers, as I have detailed in my response to the written question posed by Chairman Tillis.

2. The inability of automated content recognition tools to distinguish between legal and copyright infringing content is well-established. Even the providers of filtering software themselves have repeatedly stated in the European Commission's stakeholder dialogues on Article 17³ that their tools are unable to analyze contextual information such as whether a particular use of copyrighted content is legal.

These shortcomings are a direct consequence of the technological limitations of existing filtering systems and cannot be overcome through further technological development. There is a mismatch between the requirements of copyright law and the types of knowledge that are accessible to computation. As I have outlined in more detail in my written statement, filtering technologies are based on the comparison of uploaded files with a reference database and trying to find matches or similarities. Even a perfectly functioning upload filter can therefore only determine whether a particular registered work is present in an uploaded file, but not whether the use of the work constitutes an infringement. Filtering software has historically been used to detect and block content that is illegal independent of the context in which it is used, such as images of child abuse. However, whether a particular file containing copyrighted content is legal depends on a number of factors, including whether the uploader is the original rightsholder and somebody has wrongfully registered the work with the platform, whether the uploader has obtained permission from the rightsholder, or whether a copyright exception or fair use applies. Fair use is a qualitative criterion, not a quantitative one. It would be wrong to state that, for example, uses of less than five seconds of a sound recording are always considered fair use, whereas longer extracts are always an infringement. However, automated upload filters are only able to make such quantitative analyses. They are unable to determine whether a particular use is transformative, non-commercial, educational, satirical, or any number of other qualitative criteria that may be relevant under copyright law to determine the legality of a use.

I don't think there is any possibility, neither today nor in the near to medium-term future, to automate these decisions. Therefore, upload filters for copyrighted content will always lead to many instances of overblocking of legal speech, as many examples of automated notices sent under the current notice-and-takedown regime illustrate⁴.

³ Communia Association: Article 17 stakeholder dialogue (day 6): Hitting a brick wall. <https://www.communia-association.org/2020/02/13/article-17-stakeholder-dialogue-day-6-hitting-brick-wall/>

⁴ Electronic Frontier Foundation Takedown Hall of Shame: <https://www.eff.org/de/takedowns>

3. While a provision that would require intermediaries to implement notice-and-staydown for the same content uploaded by the same user once its illegality has been established would be less likely to directly limit the freedom of speech of Internet users, such a system would likely be relatively ineffective and costly for smaller platforms to implement.

All but the most sophisticated filtering technologies are easy for a malicious actor to circumvent. Repeat infringers are known to use a variety of techniques to trick the upload filters used voluntarily by larger platforms today, for example by changing the pitch of sound recordings, subtly changing the speed of a recording or only showing a subset of a video frame. Developers of content recognition technologies are engaged in a constant cat-and-mouse game with intentional infringers, and the determination of whether an upload can be considered identical to a previous one is far from trivial from a technological perspective.

Upload filters are more likely to stop unintentional infringements, where a user uploads content without being aware that it infringes third-party rights. Those users, however, are already unlikely to re-upload a piece of content after receiving an initial notice that their upload has been removed, there is no need for additional deterrents. On the contrary, research on the existing notice-and-takedown regime indicates significant chilling effects of takedown notices on the online behavior of users who receive such notices, leading to a decrease in online activity, including the posting of legal content⁵.

In other words, the suggested targeted notice-and-staydown provision would have no effect on the vast majority of one-off unintentional infringements. It would only be relevant with a view to the very small subset of users who are intentional and malicious infringers. However, it is precisely these intentional infringers who are very likely to know the tricks used to circumvent the notice-and-staydown provision.

On the other hand, the cost of such a novel obligation for the vast majority of smaller online platforms who do not have a significant number of copyright infringements would be disproportionate. Each hosting platform, regardless of size, would have to install the necessary upload filtering software to be able to prevent the repeat upload of the same infringing file by the same user, even if there has never been an instance of actual repeat infringement on said platform. There are many examples of online platforms that receive only a small handful of takedown notices each year, which can easily and more accurately be resolved by a human than by any automated system. One illustrative example is Wikipedia, which, despite being one of the most popular websites in the world, on average received fewer than 50 DMCA takedown notices per year⁶. A new

⁵ John Penney (2019). Privacy and Legal Automation: The DMCA as a Case Study. *Stanford Technology Law Review* 22 (1), pp. 412-486. Available at: <https://law.stanford.edu/publications/privacy-and-legal-automation/>

⁶ Wikimedia Foundation Transparency Report 2019 <https://wikimediafoundation.org/about/transparency/content/> Wikimedia Foundation Transparency Reports 2014-2017 https://meta.wikimedia.org/wiki/Wikimedia_Foundation_Transparency_Report

notice-and-staydown provision, even if limited to repeat infringements by the same user, would needlessly expose projects such as Wikipedia to disproportionate compliance costs and disrupt a perfectly functioning system based on human moderation and jointly enforced community norms.

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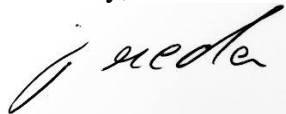
Berlin, March 26, 2020

Dear Senator Blumenthal,

It was an honor to be invited to testify before the Senate Committee on the Judiciary Subcommittee on Intellectual Property and to be able to share my experience as a European lawmaker. I am a firm believer in the importance of international exchange between legislators. I appreciate your interest in my responses to your written questions, which I address below.

I wish you and your family all the best and good health in these trying times.

Sincerely,



Julia Reda

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Ms. Julia Reda

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?**
2. **Are there examples of successful statutes or technological tools that curb digital piracy?**
3. **How were those statutes perceived domestically among different public groups when they were first introduced?**
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?**

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?**

Answers by Ms. Julia Reda

1. The US DMCA has fared relatively well in international comparisons and has become a de facto global standard for global copyright enforcement. While some national regimes shift the balance more towards the interests of users, or more towards the interests of rightsholders, as is described in the written testimony by Daphne Keller, I believe that all copyright systems struggle with a fundamental mismatch between the law and everyday cultural practice. Copyright law was designed for governing the interactions between a relatively small number of professional creators and media companies, but digital technology has turned us all into copyright holders and users. The vast majority of copyright-protected works are never commercially exploited. Most individuals, companies and even public institutions unwittingly violate copyright norms on a regular basis, because they are far too complicated to effectively govern our daily online communications. Ultimately, a meaningful reform would require drastically shortening copyright terms to align them with the expected window of commercial exploitation of works, and a mandatory, global copyright registration system, to be able to distinguish between incidental creations and those that the author really wishes to protect and commercially exploit. Such fundamental reforms, however, would require changes to the international copyright treaties such as the Berne convention and are therefore unlikely to materialize.
2. When tracking the history of online copyright infringement over the course of the last 25 years, the single most successful intervention to increase industry revenues and reduce copyright infringement has been the introduction of affordable, convenient legal alternatives. Whereas illegal music file sharing was rampant at the beginning of the millennium, it has been all but replaced by legal subscription of advertising-based streaming services. The music industry generates a significant share of its revenues from legal streaming. Even the major user-generated content platforms such as YouTube or Facebook generally license music catalogues.

Nowadays, illegal streaming of films and TV shows poses a greater challenge, but the providers of those websites are often located in foreign jurisdictions, therefore it is questionable whether legal tools are the best way to address the issue. At least partially, demand for such legal services, some of which charge subscription fees, is driven by a lack of affordable legal offers. As I have outlined in my written response to the questions posed by Chairman Tillis, I am convinced that the introduction of legal offers can turn copyright infringers into paying customers.

While legal video streaming services have grown rapidly in popularity and revenue over the recent years, there is still a lack of comprehensive video streaming services that give users access to all the content they want to see in one place. Exclusive deals between rightsholders and streaming services are much more common than in the music industry, therefore users have to choose between a large number of different streaming services with distinct offerings. Subscribing to all major streaming services is not affordable to the average consumer.

In some jurisdictions, popular content is not legally available at all, due to geographically limited licensing deals. This problem of geoblocking is particularly rampant in the EU, which is comprised of 27 separate national jurisdictions, but it also affects Americans living abroad, including members of the armed forces and their families. Potential customers who are willing to pay but find themselves unable to do so turn to illegal sources instead. A successful strategy to reduce copyright infringement in the film sector should therefore focus on exploring alternatives to exclusive and geographically limited licensing deals.

3. Major legislative interventions on copyright law are always extremely controversial and divisive, as SOPA/PIPA in the US, the failed negotiations on the international Anti-Counterfeiting Trade Agreement and the latest protests against the new EU copyright directive have demonstrated. I believe that rather than a legislative intervention, the support of better legal offers for online content is the more successful strategy to curb online copyright infringement and produce new revenue streams.
4. Yes, I believe there is room for industry initiatives to improve legal offers of online content and make copyright infringement less attractive. Some rightsholders in the film industry have reacted to the recent closing of cinemas due to the COVID-19 pandemic by introducing legal means of viewing new blockbusters online. Those rightsholders are to be congratulated on their entrepreneurial spirit in a difficult situation. It is precisely such easily accessible legal offers that have proven effective in reducing copyright infringement in other sectors of the entertainment industry, such as music and video games.
5. The new Directive 2019/790 on Copyright in the Digital Single Market (DSM Directive) will only take practical effect after it has been implemented into national copyright laws by June 2021. At this point, the intermediary liability regime for third-party copyright infringements on online platforms in both the EU and the UK is governed by Directive 2000/31/EC on electronic commerce and Directive 2004/48/EC on the enforcement of intellectual property rights. The current legal framework in the EU and the UK is substantively similar to the US DMCA rules on intermediary liability, therefore it is not yet possible to see effects of the different legal regimes on technological development. However, the impending implementation of the DSM Directive and its controversial Article 17 offers a rare natural experiment in legal regimes: The UK government has announced that it will not implement the DSM Directive following Brexit. It will be interesting to compare the development of online business in the UK compared to the EU following the application of Article 17.