

Tushnet Responses to Tillis DMCA Hearing Questions

1. How did the advent of the internet impact copyright infringement in the 1990s? What did online copyright infringement look like in the 1990s when the DMCA was enacted? And how does the infringement of the dial-up internet era compare to infringements taking place today?

I respectfully defer to Professor Litman’s profound understanding of the historical context, though I will note that dial-up infringement was certainly considered a real threat. The biggest difference today is not the speed of transfer, but the increased availability of legitimate alternatives due to the proliferation of online business models.

2. What was the historical context for the enactment of the DMCA? What were the key issues, legal decisions, agreements, and other activities it sought to address?

Again, I can’t possibly do better than Professor Litman’s *Digital Copyright*, which is available as a free download from Michigan’s website.¹

3. When it passed the DMCA Congress envisioned copyright owners and ISPs/platforms working together and reaching voluntary agreements on issues such as standard technical measures. Yet, twenty years later, very few—if any—effective voluntary agreements have been reached and there are no approved standard technical measures under 512(i). Why is that? Is it because ISPs/platforms are comfortable with the current system and have little incentive to meet copyright owners halfway?

The key fact is that there is no one internet service provider “industry” or, indeed, one copyright owner industry. Instead, empirical research reveals that, where providers receive high volumes of takedown notices, they have developed mechanisms that automate the removal process in various ways and enable collaboration with takedown senders, including by allowing trusted senders mechanisms to directly take down challenged content.² Because of persistent problems with invalid notices, it has proved important to distinguish between trusted senders and unverified senders. The largest sites, such as YouTube, have developed additional collaborative mechanisms that allow copyright owners to claim and monetize or remove content on an automated basis, though these remain contested, especially when they interfere with other creators’ work.

But such automated mechanisms are not appropriate for services—even services with a large amount of users and content—that don’t receive high volumes of notices. They are expensive to create and maintain, and they require constant monitoring for appropriate use. Given the nearly infinite variety of services, copyrighted materials, and copyright owners in the online ecosystem,

¹ <https://repository.law.umich.edu/books/1/>

² See generally Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, Notice and Takedown in Everyday Practice 3 (2016).

the core notice and takedown system remains the best cooperative baseline for service providers generally: the copyright claimant provides information to enable the service provider to locate the allegedly infringing material, and the service provider expeditiously takes it down.

The Commerce Department/NTIA document *DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices*,³ a set of suggestions developed through a multistakeholder forum of service provider, user groups, and copyright owner representatives, is an important document for understanding the state of the art in proper communication between copyright claimants and service providers. One thing that became clear to participants was that there is simply immense variety in every aspect of online content. What works well for Usenet (which still exists) would not work well for Google, and vice versa.

4. The DMCA, and more specifically Section 512's safe harbor provisions, were drafted in a way to allow pioneering internet platforms and services to innovate and grow without the constant threat of liability for the third-party content uploaded to their websites or using their services. Twenty-plus years later, internet platforms that grew up under these safe harbors have become some of the most powerful and wealthy entities in the world, and they have created business models based on their ability to monetize the content of others while turning a blind eye to infringement. Given this change of circumstances, do you think these companies ought to play a more proactive role in combating online infringement and assume more accountability for the misappropriation facilitated by their services?

This characterization doesn't describe the time of enactment—in 1998, telecom companies were very big and not at all new—and it doesn't describe the services with which I am familiar. I don't personally know any service that turns a blind eye to infringement. The ones that are willfully blind cannot invoke the safe harbor, and a number of such services have been successfully sued.⁴ There are pirate sites, but they already aren't complying with the DMCA; no change in the law is required to make them unlawful.

The giants—Google and Facebook in particular—already are filtering. The DMCA's safe harbor enables the non-giants to survive, especially since, as I noted in my written testimony, most safe harbor beneficiaries receive very few valid takedown notices.

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

The biggest unanticipated consequence has been from section 1201. Congress clearly anticipated its use to protect conventional copyrighted works whose value comes from human enjoyment of the content—music, movies, video games, and the like. Unfortunately, it has been seized on by

³ <https://www.ntia.doc.gov/other-publication/2015/dmca-notice-and-takedown-processes-list-good-bad-and-situational-practices>.

⁴ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Columbia Pictures Industries v. Fung*, 710 F.3d 1020 (9th Cir. 2013); *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 2015 WL 1873098 (S.D.N.Y. Apr. 23, 2015).

producers of products that have software in them to control the markets for the products themselves, affecting everyone from diabetes patients trying to monitor their own insulin to farmers who find themselves locked out of repairing their own tractors.

6. In order to better understand the various parties who participated in the DMCA legislative process, can you give us a sense of who the government and non-government participants were? Did individual creators or small businesses have a voice in the proceedings?

Again, Professor Litman has a comprehensive account.

7. My understanding is that when the DMCA was enacted, the online platforms proposed a system in which they would simply have to take down infringing files in response to notices from rightsholders. Why was that system rejected by Congress?

Since I lack personal knowledge, I will defer to Professor Litman and others present at the time.

8. In order for service providers to avail themselves of safe harbor protection, the DMCA established a duty to remove infringing content even without the input from copyright owners when they have actual or red flag knowledge of infringement. Do you believe that service providers have held up their end of the bargain and investigated infringing activity when they have red flag knowledge? Has case law supported the intent of congress in incentivizing service providers to be proactive when red flag knowledge exists?

Yes, the case law has supported the balance that Congress enacted, which was to require service providers to act when they knew of specific infringements. Like actual knowledge, red flag knowledge has to relate to the specific content at issue. If generalized knowledge that there is infringement going on somewhere on a platform suffices, then no service will ever be eligible for the DMCA safe harbor. The major music companies have all been sued for copyright infringement multiple times, and several have lost jury trials, such as the ones involving *Blurred Lines* and Katy Perry's *Dark Horse*. It is essentially a certainty that, with tens of thousands of songs in their catalogues, other songs are likely to be deemed infringing by a jury, especially given the recent surge in music litigation. Do the major music companies have "red flag" knowledge of their infringement? Of course not.

Both the Second and the Ninth Circuit reached the right result, based both on the structure of the statute and sound public policy. Cases finding lack of red flag knowledge as a matter of fact are fact-specific, involving, for example, a lawsuit against third-party investors who didn't control the platform itself,⁵ or, in the case of YouTube, content that was deliberately planted by the plaintiff Viacom but not identified as official.⁶ Platforms, and how people use platforms, vary a lot, and courts have been appropriately sensitive to these factual variations. Thus, truly abusive

⁵ UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011).

⁶ Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* 223 (2012).

platforms have been held ineligible for the safe harbor, while platforms that have a lot of legitimate content have been eligible. The overall picture is that courts have been able to make the relevant distinctions when applying red flag knowledge and other concepts.⁷

9. In seeking provisions in the DMCA that would minimize their exposure to liability, ISPs likened themselves to common carriers in the telecom industry who enjoyed broad immunities from responsibility for the actions of their customers because they served as a mere conduit or utility. Do you believe that this comparison between ISPs and telecom providers was appropriate 22 years ago? What about now?

Without speaking about past events, I will note that the DMCA treats different services differently. The obligations on a mere conduit—which does not keep long-term copies and can often not identify what was transmitted through its facilities—are different than the obligations on a content host or a provider of information location services. The different treatment is appropriate given their differing amounts of control and ability to identify content, not to mention the privacy concerns related to pure conduits. As we heard at the hearing, however, there are increasing problems with attempts to hold pure conduits to the standards applied to host—when the conduits simply can’t verify accusations of infringement because they have no stored content to consult.

10. Trademark law does not contain safe harbor provisions, and yet internal notice and takedown mechanism have been implemented among platforms that often deal with infringing and counterfeit materials. Shouldn’t platforms be just as willing to take voluntary action to monitor and combat copyright infringement?

As someone who teaches both trademark and copyright, I am always happy to talk about the differences between the two. First, without further information about the programs to which your questions refer, I can only speak in generalities: The platforms with which I am familiar (1) sell physical products, which is a very different matter than hosting (or transmitting) user-provided content,⁸ and (2) have each grappled with very different circumstances that make their experiences hard to generalize.

But most importantly, these platforms are operating against the backdrop of a legal regime that is basically similar to the DMCA: they are not responsible for infringement by users unless they get specific notice and don’t act on it. Nonetheless, in response to many things—including pressure from consumers who like to get legitimate goods—services have developed programs like eBay’s VeRO system, which is highly similar to the trusted notifier systems used by so-called DMCA-Plus providers. Courts have upheld eBay’s practices and not required it to proactively search for unidentified infringements.⁹

⁷ See cases cited supra note 4.

⁸ For example, Amazon can fight counterfeits with product-specific barcodes, which won’t work with digital content. See <https://brandservices.amazon.com/transparency>.

⁹ See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F. 3d 93 (2d Cir. 2010).

Meanwhile, Amazon is struggling with far broader issues about the kinds of goods that will be available on its site. Although its programs are in part dealing with counterfeits, they are also fundamentally tied into questions about how Amazon uses its algorithm to suggest particular sellers. Its current programs seem to be centered on keywords and product identification numbers assigned to specific products—something that simply wouldn't work for user-generated content, where “Harry Potter” can describe a book report as easily as the original book.¹⁰ And its current programs have significant problems of seller manipulation and abuse.¹¹ As Amazon has itself explained, when it comes to the copyrighted works it sells on its Kindle Direct platform, more than half of the takedown notices it receives are invalid—so proactively doing even more based on the mostly bad takedowns it gets would be a terrible idea for digital content.¹²

11. Projects such as the Google Transparency Report have tracked the extreme volume—75 million in February 2019 alone—of DMCA-related take down notices received. Are these astonishing numbers evidence of a system working efficiently and effectively?

The number of notices is big mostly because the internet is big, although Google has noted that a significant number of these notices appear to be automatically generated—Google didn't ever index millions of the listed URLs.¹³

But the more important point is that Google is not the internet. For ordinary service providers and the (much smaller number of) infringement claims that they receive, the DMCA is a balanced regime that protects service providers from impossible burdens while allowing copyright owners a way to get expeditious removal for clear infringements.

12. Do you believe ISPs are doing enough to educate users on copyright infringement and the related harms? If not, what more could be done?

¹⁰ See <https://brandservices.amazon.com/projectzero> (explaining that its tools look for trademarks and logos; verified rights owners have the ability to take down listings on their own, similar to Google's trusted notifier program).

¹¹ See, e.g., Bruce Anderson, *Selling on Amazon: The Good, the Bad, the Ugly*, Feb. 19, 2020, <https://www.martechcube.com/selling-on-amazon-the-good-the-bad-the-ugly/> (discussing problems of counterfeits, “hijacking” others' legitimate listings, and similar issues); Ina Steiner, *Can Amazon Catalog Withstand ASIN Hijackers?*, Mar. 10, 2019, <https://www.ecommercebytes.com/C/abblog/blog.pl?pl/2019/3/1552262906.html> (same).

¹² Stephen Worth, Assoc. Gen. Couns. of Amazon.com, Inc., *Testimony at the U.S. Copyright Off. Section 512 Study, Public Roundtable* (May 13, 2016) (transcript available in the U.S. Copyright Office website). (“[W]ith Kindle Direct publishing, authors routinely try to climb to the top spot in their category . . . by issuing bogus notices against higher ranking titles. And this for us actually accounts for more than half of the takedown notices that we receive.”).

¹³ See Google Search removals due to copyright infringement FAQs, <https://support.google.com/transparencyreport/answer/7347743?hl=en> (“As a matter of policy, Google accepts and processes DMCA notices for any URL, even those that are not in our Search index.”).

Congress has already imposed an education requirement on colleges and universities that supply students with internet access.¹⁴ It would be useful for Congress to seek information specifically from colleges and universities about the effects of this mandate.

13. Congress recognized at the time of the DMCA's enactment that the only thing that remains constant is change and that the enactment of the DMCA was only the beginning of an ongoing evaluation by Congress on the relationship between technological change and U.S. copyright law. Given how drastically technology, the internet, and our online existence has changed and evolved over the past twenty-five years, what changes or solutions would you suggest to deal with the changed circumstances?

As discussed in my written testimony, I have suggested changes to 1201 to prevent its abuse to further non-copyright interests.

14. The Copyright Office is on the verge of releasing its much anticipated 512 report. What do you think are the most important issues the report should address and what would you like to see the report propose concerning these issues?

I strongly hope the Office will be attentive to the great diversity in ISPs and the fact that the online ecosystem is not, by and large, made of infringements. Instead, it is a thriving location for all kinds of creativity, including for the products of the major copyright industries, which are all benefiting from the wide availability of legitimate content.¹⁵ The strong United States advantage both in content production and technological innovation have been sustained in significant part by 512; the Copyright Office should recognize and promote that ongoing success rather than endorsing changes that would encourage consolidation (while leaving existing, DMCA-noncompliant pirate sites unaffected).

¹⁴ See 17 U.S.C. §512(e)(1)(C) (requiring educational institutions to provide “informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright” in order to be eligible for safe harbor).

¹⁵ See Michael Masnick & Leigh Beadon, *The Sky is Rising* (2019).

**Professor Rebecca Tushnet –
The Digital Millennium Copyright Act at 22:
What is it, why was it enacted, and where are we now?
Questions for the Record
Submitted February 18, 2020**

RESPONSES TO QUESTIONS FROM SENATOR COONS

1. The Senate Judiciary Committee’s 1998 report on the DMCA stated that “technology is likely to be the solution to many of the issues facing copyright owners and service providers in the digital age,” and the Committee “strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals.” Has this cooperation worked in practice as Congress envisioned it should in connection with both Section 512 and 1201 of the DMCA? Why or why not?

With respect to Section 512, cooperation has evolved based on the fact that there is no one internet service provider “industry” or, indeed, one copyright owner industry. Instead, empirical research reveals that, where providers receive high volumes of takedown notices, they have developed mechanisms that automate the removal process in various ways and enable collaboration with takedown senders, including by allowing trusted senders mechanisms to directly take down challenged content.¹ Because of persistent problems with invalid notices, it has proved important to distinguish between trusted senders and unverified senders. The largest sites, such as YouTube, have developed additional collaborative mechanisms that allow copyright owners to claim and monetize or remove content on an automated basis, though these remain contested, especially when they interfere with other creators’ work.

But such automated mechanisms are not appropriate for services—even services with a large amount of users and content—that don’t receive high volumes of notices. They are expensive to create and maintain, and they require constant monitoring for appropriate use. Given the nearly infinite variety of services, copyrighted materials, and copyright owners in the online ecosystem, the core notice and takedown system remains the best cooperative baseline for service providers generally: the copyright claimant provides information to enable the service provider to locate the allegedly infringing material, and the service provider expeditiously takes it down.

The Commerce Department/NTIA document *DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices*,² a set of suggestions developed through a multistakeholder forum of service provider, user groups, and copyright owner representatives, is an important document for understanding the state of the art in proper communication between copyright claimants and service providers. One thing that became clear to participants was that there is

¹ See generally Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 3 (2016).

² <https://www.ntia.doc.gov/other-publication/2015/dmca-notice-and-takedown-processes-list-good-bad-and-situational-practices>.

simply immense variety in every aspect of online content. What works well for Usenet (which still exists) would not work well for Google, and vice versa.

As for 1201, 1201 didn't encourage cooperation because there were no incentives in the law for copyright claimants (including providers of devices with embedded software) to collaborate with anyone. Instead, the structure of the law encourages producers to assert the right to restrict ordinary uses, from tractors to coffee makers.³ It would be possible to do more to encourage cooperation through legislation, such as by requiring users of technological protection measures to make available the means to circumvent such measures when a legitimate user wants to make a use protected by an exemption, such as analysis of voting machines, but it would be far simpler and more effective to have an infringement nexus in 1201.⁴

2. The internet and digital content distribution mechanisms have changed drastically in the past 22 years. What technological and practical challenges exist today that may require revising the DMCA, and what revisions would you suggest?

As stated in my testimony, section 1201 needs revision to prevent anticompetitive assertions of rights over software-enabled devices, and the exemption process is broken. The simplest fix would be to add an infringement nexus, as already exists in its counterpart, section 1202 (which covers the provision of copyright management information).

In addition, broader problems of concentration in the markets for certain online services and for certain kinds of copyrighted content—particularly music and movies—justify an active role for antitrust enforcement to prevent abuses of dominant positions. Changing the DMCA cannot substitute for active competition policy—and, indeed, imposing further obligations on platforms generally, regardless of whether they have substantial infringement problems or substantial market effect, is certain to raise barriers to entry and increase problems of concentration.

3. You and Professor Litman raise concerns regarding Section 1201's anti-circumvention provisions for their lack of copyright infringement nexus. How would you revise Section 1201 without diminishing protections for copyrighted works?

My written testimony suggested several options, though the simplest and most effective would be to add a copyright infringement nexus. A nexus requirement would mean that a 1201 plaintiff would have to show that the circumvention (or distribution of circumvention tools) had some

³ See Juliana Kenny, *Keurig Under Fire for Use of DRM in New Coffee Makers*, LAW.COM: INSIDE COUNS. (Mar. 4, 2014, 4:55 AM), <https://www.law.com/insidecounsel/sites/insidecounsel/2014/03/04/keurig-under-fire-for-use-of-drm-in-new-coffee-makers/> [https://perma.cc/9PR6-L5HJ].

⁴ Some legal systems have requirements that users of technological protection measures provide access for permitted uses, but these do not appear to have been effective. 2001 EU Directive on Harmonizing Copyright in the Information Society (2001/29/EC), art. 6(4) (providing a limited and conditional obligation to allow users to override technological protection measures for certain types of exceptions). Unfortunately, article 6(4) simply assumes that rightsholders will voluntarily make available the means of utilizing privileged exceptions, and does not require Member States to act unless rightsholders fail to do so within "a reasonable time." Recital 41.

likely connection to actual copyright infringement. A tool that allows farmers to repair their own tractors is unlikely to cause infringement of the tractor's operating system software, because the most likely reason people seek access to the operating system is to fix or run the tractor itself. and so neither use nor distribution of such a tool would plausibly have a nexus to copyright infringement. The language already in 1202 (copyright management information) provides a simple starting point: "knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement." Such an infringement nexus would not diminish protections for copyrighted works because it would be explicitly tied to the exclusive rights of copyright owners.

Some courts have already read 1201 as having a nexus requirement, but other courts have refused to do so. Other possibilities include a blanket exclusion of software used to operate devices; reinstating a real rights control/access control distinction to limit "access controls" to the situation when a digital file has been authorized for only a specific number of viewings or a specific time period; and expanding the exemption process to make granted exemptions permanent. For fair uses, in particular, the exemption process is vital but extremely burdensome.

4. You and Professor Litman suggest that a duty to monitor all user-posted content would stifle online providers. Would you support a middle ground that would require service providers to ensure that once infringing content has been removed pursuant to Section 512's notice-and-takedown procedure, the same user cannot repost the same content on any platform controlled by that provider?

Unfortunately, this question presumes that there's some simple way to identify either "the same user" or "the same content." There is absolutely not.

Initially, there is simply no evidence that the "same user" is the source of persistent problems with respect to "the same content." Although some users do post substantial amounts of content, as far as the evidence I have seen, it is rarely multiple copies of the same work. In other words, this isn't a middle ground; it's just an outlying island.

Regardless, it's not feasible to identify users persistently across user identities. Although platforms do their best, banned users readily evade the feasible mechanisms used to exclude them. Users can create new email addresses, and an individual reaches any given service via multiple IP addresses because of how IP addresses are assigned. All it takes to get around a ban, that is, is for the user to go to their local Starbucks and use the free wifi there. Unless services were required to have physical locations where they physically verify a user's government identification, they simply cannot do this.

Separately, there is no feasible way to identify "the same content" without implementing an overall filtering system. I will set aside the significant problems of identifying "the same content" once even small changes to the file have been made. In order to make sure that previously posted content isn't posted again, a service has to keep the file or a "fingerprint" of the file and then build a system to scan all of a user's uploads for that file/fingerprint. Suppose the government required businesses to X-ray users (or subject them to a physical pat-down) to make sure they weren't carrying weapons, but said that the obligation only applied when

someone told the business that a specific user had unlawfully carried a specific weapon in the past, and then the search would only have to look for that weapon. Those limits wouldn't decrease the burden on businesses, because the burden is having to build the system and hire people to do pat-downs in the first place—especially if the business doesn't have a significant problem with concealed weapons.

5. In exchange for the safe harbor protections of Section 512, the DMCA established an online service provider duty to remove infringing content even without the input from copyright owners when faced with actual or red flag knowledge of infringement. Has the case law supported the intent of Congress in incentivizing service providers to be proactive when red flag knowledge exists? Your testimony and Professor Litman's testimony suggest that it has, while the testimony of Professors Aistars and Schultz paints a very different picture. How do you reconcile these conflicting narratives?

Professors Aistars and Schultz seem to suggest that YouTube should have been subject to billions of dollars of liability because its founders were aware of some infringing content on the site. Although I have my own qualms about YouTube, the standard the Second Circuit court of appeals applied to it was exactly right: red flag knowledge, to serve as a red flag, has to relate to the specific content at issue. If generalized knowledge that there is infringement going on somewhere on a platform suffices, then no service will ever be eligible for the DMCA safe harbor. The major music companies have all been sued for copyright infringement multiple times, and several have lost jury trials, such as the ones involving *Blurred Lines* and Katy Perry's *Dark Horse*. It is essentially a certainty that, with tens of thousands of songs in their catalogues, other songs are likely to be deemed infringing by a jury, especially given the recent surge in music litigation. Do the major music companies have "red flag" knowledge of their infringement? Of course not. Both the Second and the Ninth Circuit reached the right result, based both on the structure of the statute and sound public policy.

Each of the cases that Professors Aistars and Schultz identifies is fact-specific, involving, for example, a lawsuit against third-party investors who didn't control the platform itself,⁵ or, in the case of YouTube, content that was deliberately planted by the plaintiff Viacom but not identified as official.⁶ Platforms, and how people use platforms, vary a lot, and courts have been appropriately sensitive to these factual variations. Professors Aistars and Schultze don't compare the cases they don't like with the many other cases in which truly abusive platforms have been held ineligible for the safe harbor.

The overall picture is that courts have been able to make the relevant distinctions when applying red flag knowledge and other concepts.⁷

⁵ UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011).

⁶ Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* 223 (2012).

⁷ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Columbia Pictures Industries v. Fung*, 710 F.3d 1020 (9th Cir. 2013); *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 2015 WL 1873098 (S.D.N.Y. Apr. 23, 2015).

6. Professor Aistars testified that students in her clinic who went through the process of addressing online infringement on behalf of copyright owners found the process “confusing and frustrating.” How can the notice-and-takedown process be improved, particularly for small creators? Would you recommend standardizing the process across service providers? If so, who should be responsible for establishing and enforcing those standards?

As an author who has filed takedown notices, I have experienced similar frustrations, so I understand their reactions. There are several good online guides for filing takedown notices. I strongly recommend *DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices*, mentioned in my first answer. One thing this document makes clear is that there are a wide variety of services, such that a process that is simple for one service may be very complicated or even impossible for another service to adopt—a takedown notice for Google Search is necessarily different from a takedown notice for Blogger, because Google hosts Blogger and does not host material it indexes for search. Congress has already specified what must be in the takedown notice, as well as specifying that the agent must be on file with the Copyright Office—this filing requirement serves as a backstop ensuring a minimum amount of harmonization. As the Commerce/NTIA stakeholder meetings revealed, more specific mandates would likely fail to make things better and might make things worse.

**Professor Rebecca Tushnet Responses to Questions
From Senator Mazie Hirono**

1. The members of the first panel testified regarding the goals the DMCA was supposed to achieve.

a. In your view, is the DMCA currently working to achieve these goals?

Briefly, section 512 is working quite well in terms of encouraging both innovation and creation, given the way that the copyright industries are thriving without suppressing a variety of innovative and creative splatforms. Resource-rich companies like Google have gone beyond 512 through voluntary agreements with major content providers, but Google is not the internet. Even very large sites like Wikipedia and Amazon’s Kindle Direct publishing platform receive very few valid infringement claims. A policy written to impose burdens on Google will ensure that Google and Facebook are the only sites left for users to post content, except for overseas/pirate sites.

Section 1201, by contrast, is stifling competition without doing anything to decrease infringement. My written statement elaborates on both of these issues.

b. In light of changes in technology since 1998, are the goals expressed by our first panel still valid or should the DMCA be reevaluated completely?

The goals are absolutely still valid. If anything, the rise of dominant internet service providers in new sectors makes it even more important to preserve the ability of smaller providers to thrive by avoiding onerous new regulations that only the giants will be able to survive.

2. The Conference Report accompanying the DMCA states that Title II, which relates to online infringement liability, was meant to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”

Is this “cooperation” between service providers and copyright owners currently working? If not, what caused the DMCA to fail in this regard?

Cooperation has evolved based on the fact that there is no one internet service provider “industry” or, indeed, one copyright owner industry.

Instead, empirical research reveals that, where providers receive high volumes of takedown notices, they have developed mechanisms that automate the removal process in various ways and enable collaboration with takedown senders, including by allowing trusted senders mechanisms to directly take down challenged content.¹ Because of persistent problems with invalid notices, it has proved important to distinguish between trusted senders and unverified senders. The largest sites, such as YouTube, have developed additional collaborative mechanisms that allow

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copyright owners to claim and monetize or remove content on an automated basis, though these remain contested, especially when they interfere with other creators' work.

But such automated mechanisms are not appropriate for services—even services with a large amount of users and content—that don't receive high volumes of notices. They are expensive to create and maintain, and they require constant monitoring for appropriate use. Given the nearly infinite variety of services, copyrighted materials, and copyright owners in the online ecosystem, the core notice and takedown system remains the best cooperative baseline for service providers generally: the copyright claimant provides information to enable the service provider to locate the allegedly infringing material, and the service provider expeditiously takes it down.

The Commerce Department/NTIA document *DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices*,² a set of suggestions developed through a multistakeholder forum of service provider, user groups, and copyright owner representatives, is an important document for understanding the state of the art in proper communication between copyright claimants and service providers. One thing that became clear to participants was that there is simply immense variety in every aspect of online content. What works well for Usenet (which still exists) would not work well for Google, and vice versa.

3. Section 512 of the DMCA seems to have created a one-size-fits-all world where copyright owners have to police their content online by searching for pirated copies and notifying online service providers of their existence—no matter the size or sophistication of the online service provider. While a system like that may have made sense in 1998, I wonder if it is still appropriate today when certain online service providers are among the biggest, most profitable companies in the world.
 - a. **Should all online service providers be treated equally with regard to policing copyrighted content or would it be better to apply a sliding scale based on a provider's size and sophistication?**

A baseline is not the same thing as a one-size-fits-all system; the DMCA has provided a baseline, but, as mentioned above, sites that receive large numbers of infringement notices have responded by developing more automated processes and, in some cases, systems such as Content ID to allow copyright owners more fine-grained control over the works they claim.

Again, I encourage Congress to reject any equation of “big” with “has a big infringement problem.” Many user-generated content sites, including some of the most popular, receive very few valid takedown notices. And many of them, including the Archive of Our Own (with which I work), would be unable to survive filtering/staydown requirements because of the technological and financial burden they impose.

- b. **How can Congress make sure that big players like Google, Facebook, and others are taking appropriate steps to proactively search for and remove copyrighted content without overburdening small companies?**

² <https://www.ntia.doc.gov/other-publication/2015/dmca-notice-and-takedown-processes-list-good-bad-and-situational-practices>.

Google and Facebook, along with a number of other commercial platforms, already are deploying filtering technology. Copyright law is thus a poor fit for the relevant concerns. To the extent that copyright industries want more money for their deals with Google and Facebook, they are now in the realm of competition policy, where a comprehensive look at how big players use their market power would be well warranted—not just on the “tech” side, but also in the music and movie/television sectors, both of which are now concentrated at unprecedented levels.