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**SESSION 3: COPYRIGHT LAW  
3B. DMCA: 20 Years Later**

***Moderator:***

**Mitch Glazier**

*Recording Industry Association of America, Washington, D.C.*

***Speakers:***

**William Patry**

*Google, New York*

***Legislation and Business Solutions: The DMCA as an Example***

**J. Devlin Hartline**

*Center for the Protection of Intellectual Property (CPIP), Antonin Scalia Law  
School, George Mason University, Arlington*

***Twenty Years Later, DMCA More Broken Than Ever***

**Jacqueline C. Charlesworth**

*Alter, Kendrick & Baron, LLP, New York*

***Beyond the DMCA Safe Harbors: The Shifting Winds of Liability***

**Joseph C. Gratz**

*Durie Tangri LLP, San Francisco*

***The DMCA: Twenty Years of Common Law Development***

***Panelist:***

**Benjamin F. Golant**

*Entertainment Software Association, Washington, D.C.*

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MR. GLAZIER: Welcome, everybody. Are you ready for the most exciting panel of the day? My name is Mitch Glazier. I'm with the Recording Industry Association. I have never been asked to moderate in my life. I think Hugh made a terrible mistake, but I'm going to do my best because we've got a terrific group of speakers and panelists here to talk about "The Digital Millennium Copyright Act (DMCA): Twenty Years Later."

If those of us who were involved with the DMCA twenty years ago had told us that we would still be talking about the DMCA in 2019, I don't think we would have believed you. But here we are, and a lot of things have changed and a lot of things have stayed the same.

First, I want to introduce our panelists: Jacqueline Charlesworth with Alter, Kendrick & Baron, LLP, formerly of the Copyright Office; Ben Golant of the Entertainment Software Association, also formerly of the Copyright Office; Bill Patry with Google, also formerly of the Copyright Office and who also worked on the Intellectual Property Subcommittee under Chairman Bill Hughes; Joe Gratz, an attorney who represents a lot of services; and Devin Hartline, with the Center for the Protection of Intellectual Property (CPIP) at the Antonin Scalia School of Law at George Mason University.

We have a few presentations, I think a really good, balanced series of presentations; after that we are going to open it up for a discussion; then we'll participate in a discussion where I will ask a series of appropriately provocative questions; and then we are going to open it up for everybody to go at it.

Bill, let's start with you.

MR. PATRY: One of the principal questions that we were told to address is whether the DMCA is working as the 105<sup>th</sup> Congress twenty-one years ago would have thought. I believe that is really an unanswerable question. It is unanswerable for a number of reasons.

One is that it was compromise legislation and took place over a long time, and people's goalposts change. When I was still working for the House Judiciary Committee, Bruce Lehman at the time was Commissioner of Patents, and he had an idea for this. He had a White Paper that was mostly focused on anti-circumvention, which we didn't think was a good idea. That was sort of the end of that, until the House changed as a result of the 1994 elections. Bruce's vision for that, as I recall, was really a strict liability provision, it didn't have any safe harbors at all, and that was something, of course, that we objected to. But then the House changed. Mitch worked for Mr. Coble, and he certainly knows the history of this better than anybody.

We were discussing shortly before this session how things change. There was a divide politically between the Judiciary Committees in the House and the Senate and the Commerce Committees in the House and the Senate. It was really the Commerce Committees, I think, that were pushing more for what became the safe harbors. There were various iterations of it in terms of whether you're going to codify the *Netcom*<sup>1</sup> case for contributory infringement or vicarious liability, but in the end, I think it's accurate to say that the Commerce Committees were the ones that insisted on the safe harbors.

If you were to ask members of Congress who were in the 105<sup>th</sup> Congress whether the DMCA would be doing twenty-one years later what you thought it would, you would have heard different opinions on that because people had different views. And, obviously, the private parties who were involved in the stakeholder consultations on that were evidence of very different views about how the system should work.

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<sup>1</sup> Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

Google, I might add, wasn't founded until September 1998, so it had nothing to do with this. Mitch was telling me before we started that in fact none of the companies on the side that wanted the safe harbors are still in existence at this point. So it's just a very different environment that we are in now, and to say that it did or didn't meet what the expectations were of the 105<sup>th</sup> Congress I think is an impossible task.

The better task is to try to figure out whether you think the DMCA is working today. If it's not working today, then what are the fixes that are going to improve things as a sort of "do no harm" thing? If you think something isn't working, then the solution you come up with should advance where things are.

To do that you have to define what you think success is. That's another problem and why I think no one could ever answer "Is the DMCA doing what you want?" We are not going to be able to agree about what success is, and we are not going to even be able to agree about what metrics you would use to judge success if you were able to come to a common definition of it. So I think that it's an unanswerable question.

It's a political question, and that's fine. Different people will have different views on the politics of it, depending upon where you sit and where the industry that you are a part of sits, the problems that you see. It's a bit like describing an elephant.

My mother used to worry that I would never be able to keep a job for very long. I've been at Google for twelve-and-a-half years, which is the longest job I ever held. I had a number of other jobs — working for the Copyright Office, working for the Hill, as a private lawyer, working as a law professor — and each of those gave me different ways of looking things. I saw things differently, and I probably had different attitudes based upon what my job was at the time.

I now work for Google. Being in-house, I will say that, unlike when I was working on Capitol Hill where I thought that Capitol Hill was the center of the universe and since I was doing copyright legislation that was really a big deal, I don't particularly think that anymore. I think it's really important, but I have a different perspective being in-house. I see things as business problems, at least the issues that we are talking about.

I try to come up with what the business solutions are. It's not ideological, and Google, I will say, does not think about things ideologically. The issue of cooperation, those sorts of things — is the DMCA doing what it was supposed to have done to engage in making people cooperate? — that's a business question.

I read Mr. Hartline's statement, which I want to say as politely as possible I don't agree with at all, and we'll have good discussions about why. I don't think it is true that the decisions in the Second Circuit had any effect on cooperation in the least. It certainly had no effect on Google at all.

These are business problems, and you solve them among businesses, and it's done privately. If Mitch would have called me up and said, "I've got a problem with this or that," I'd try to fix it; and, if we fixed it, that would be it. We are not going to issue a press release and say, "Oh, wow, we fixed this." We have problems every single day, multiple problems every day, and you try to solve them. So the idea that some Second Circuit opinion is going to affect how you cooperate with people is just not the case.

After the two Second Circuit opinions, whether you agree or disagree on red flag knowledge, had zero impact — that's the only zero that's true — on how we dealt with cooperating with people. Not at all. We do it because it's a business thing to do.

Now, most of those things, as I say, are private. Some of them are done under government auspices.

MR. GLAZIER: Your bomb has exploded.

MR. PATRY: Oh, okay, good. We can go into all the cooperative things we have done. Some of those are technical things, but mostly they are one-on-one business relationships, and that's I think how the DMCA was supposed to work.

MR. GLAZIER: I am going to ask you about those, so put that on pause for a second.

MR. PATRY: Yes. Great. Thanks.

MR. GLAZIER: I was going to turn to Jacqueline, but now I have to go to Devlin. Go ahead.

PROF. HARTLINE: If one side says it is working and the other side says it is broken, then it's not working, right? It is easy to say that everything is going as it should be when you are on the winning team.

I disagree that Google in particular, or service providers in general, are cooperating in the way that the DMCA was structured to have cooperation, and I'll get into that when I give my presentation.

MR. PATRY: But you don't know what winning is. That's what I said about success. You can't agree about what success is. And we don't see it as winning or losing; it's solving problems.

MR. GLAZIER: This is going to be so fantastic.

Jacqueline, are you ready for your presentation?

MS. CHARLESWORTH: I think so, Mitch. Thank you.

We are so used to talking about the safe harbors and the way they've been interpreted, I want to take a different tack on this and talk a little bit about theories of liability and infringement liability. A lot of courts are deciding DMCA safe harbor issues and, at the same time, they are also deciding the background principles of liability. This is a huge topic. I am only going to touch on some ideas I have based upon what is coming out of recent case law, but I think there is a dialectic that is going on with the courts in terms of the way they are interpreting knowledge and contributory liability and so forth and the way the safe harbors have been interpreted. That's what I bring to you today.

A little bit of background here. Some of you were in the room, so you can comment further. Basically, if you look at the legislative history of the DMCA, there was a lot of focus on the *Netcom* case, which, as we all know, came out of California. When you read through the DMCA history, Congress suggested that they were codifying the *Netcom* decision, which had focused on the concept of volition, and basically said: "If you are running a bulletin board service and people are just posting stuff on there, you cannot make the bulletin board operator responsible if there is no volition," whatever that means. Then, in terms of secondary liability, the legislative history teaches us that the current criteria for finding contributory infringement or vicarious liability will be clearer under Section 512.

But in terms of the background infringement standards, meaning the common law of infringement, those would remain unchanged. In my view, one way to read this history is that Congress thought: Well, the background principles of liability are going to be the same, but we're going to put these safe harbors over here and work out this difference of opinion about the responsibility of service providers, and that will be a safe harbor; but, if you are not eligible for that, as the legislative history says, you will be evaluated under standard principles of liability — direct, vicarious, and contributory.

Just as a reminder, I took a look — not that these are particularly obscure — at what those standards were in 1998, and I found cases roughly from that period. Direct infringement: two elements, ownership of a copyright and copyright of the protectable elements of the work.

Contributory infringement, as stated in the *CoStar*<sup>2</sup> case, which came out shortly after the DMCA in 2004, but quoting an earlier Second Circuit case, the leading opinion, “one who with knowledge of the infringing activity induces, causes, or materially contributes to the infringing conduct of another.”

Then we had the *Napster*<sup>3</sup> case, which talked about the actual state of knowledge, meaning what did you have to know, and suggested it was constructive knowledge — you knew or had reason to know of the infringement. That was the state of contributory liability around the time of the DMCA.

For vicarious infringement it was a question of right and ability to control — very familiar — and a direct financial interest. That again is quoting *CoStar*, which in turn is quoting Second Circuit case law, *Gershwin*<sup>4</sup> and *Shapiro, Bernstein*,<sup>5</sup> which was the case that involved a pirate record concession within a larger department store, where the department store was just collecting a percentage of the receipts from this concession, and the court said: “You are responsible. You can be held vicariously liable.”

*Fonovisa, Inc. v. Cherry Auction, Inc.*,<sup>6</sup> which came out in 1996, was a riff on the *Shapiro* logic, which said: “I’m running a flea market, and there’s someone selling pirated recordings in there, but I’m not directly collecting the receipts.” The court said: “Well, that’s a draw. You have higher parking fees, you have higher concession sales, so there’s enough of a draw. People are coming to the flea market in part to buy these things, so you can be held responsible.”

Those were the standards that were around at the time of the DMCA. I just want to point out a few of the changes or emerging changes that have occurred since then.

First, we have the concept of willful blindness. This is a concept from the common law, I think famously articulated in the *Aimster*<sup>7</sup> case where Judge Posner in 2003 held someone who was running a service where people were trading musical works responsible under willful blindness, which is “equivalent,” as Judge Posner said, “to knowledge in copyright law, as in other areas of the law.” In other words, you can’t put your head in the sand and ignore what you would otherwise know to be infringement.

What was interesting is that doctrine then was imported into Section 512<sup>8</sup> in the *Viacom*<sup>9</sup> case in 2012, where the court said: “We hold that willful blindness” — this is the Second Circuit — “can be applied to demonstrate knowledge under the DMCA.” So you have the common law doctrine imported into the 512 safe harbor as a version of actual knowledge.

MR. GLAZIER: How much more do you have?

MS. CHARLESWORTH: A fair amount.

MR. GLAZIER: Let’s suspend unless you want to do something very quickly, and we’ll talk about it in the discussion. How’s that?

MS. CHARLESWORTH: Sure. Anyway, the point I’m making is a lot of the background doctrines are morphing as the safe harbors are being interpreted.

MR. GLAZIER: Okay. All right. Joe, tell us why the courts are right.

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<sup>2</sup> *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

<sup>3</sup> *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

<sup>4</sup> *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971).

<sup>5</sup> *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

<sup>6</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

<sup>7</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

<sup>8</sup> The Digital Millennium Copyright Act, 17 U.S.C.A. § 512.

<sup>9</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

MR. GRATZ: Great. Hi, I'm Joe Gratz. I litigate cases about technology, including a number of cases about Section 512.

I don't have reminiscences of the White Paper process or the legislative history. I regret to inform I was a younger person then, as were we all.

But I have seen how this has played out over some time as a litigator, and what I want to talk about is the ways that what Congress did and the words Congress used and the standards Congress set have developed over time and taken into account changes in the Internet and changes in the landscape since the statute was passed.

Some of the things that ended up in the DMCA are rigid rules that Congress set forth unequivocally, e.g. that a takedown notice has to be given to the designated agent and it has to be signed and it has to include certain information.

But in some really important areas Congress used language that courts have had to interpret. I want to talk about the ways that interpretation has taken into account changing business and technical circumstances since 1998 in ways that have made sense in the particular facts of those cases, and I want to talk about specifically the red flag knowledge requirement, the repeat infringer policies, and, if we have time, a couple of other items.

Starting with red flag knowledge, the requirement that even in the absence of a takedown notice, a service provider must remove material where facts and circumstances indicate that there is infringing activity. What do we know about it? What can we see about it? Certainly, it has turned out to be a fairly narrow set of situations, although I think we will hear more from Devlin about his thoughts on that.

The Senate Report says: "Under this standard, a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to red flags of obvious infringement." I think the question that has been wrestled with is: What is "obvious" infringement on the Internet at different times? The Senate Report says an objective standard should be used, and how can you tell objectively that something is obviously infringing?

The House and Senate reports give us exactly zero examples of § 512(c) red flag knowledge. There is an example of § 512(b) red flag knowledge, but we have no examples of § 512(c) red flag knowledge, so the courts are left to figure this out on their own. The example of § 512(d) red flag knowledge that we get in the Senate Report is the example of a site that's called "pirate" or "bootleg" or something like that, or that has obvious indicia of not being authorized.

But when this standard hits a set of facts — and standards hitting a set of facts is my favorite thing in the world as a litigator — something funny happened, and this is what happened in the *YouTube* case. That standard — "Well, if it looks like it was posted by someone who wasn't authorized, then obviously it wasn't authorized and you should take it down" — runs into the set of facts that occurred in *YouTube*, where a number of the clips that were posted and that were the subject of the lawsuit looked like they were unauthorized, and looked like they were unauthorized on purpose, but in fact had been posted by the copyright holder in a viral marketing campaign.

This is an instance of things turning out to be more complicated in the 2000s and today than they were in 1998. In 1998, if there was a site that said, "Everything on here is for piracy," it was probably just for piracy. The way that behavior and marketing developed on the Internet has changed.

That's true even more broadly, as the Second Circuit recognized in *Vimeo*,<sup>10</sup> where they said: "Even assuming awareness that a user posting contains copyrighted music [which was the issue in *Vimeo*], the service provider's employee cannot be expected to

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<sup>10</sup> *Capital Records, Inc. v. Vimeo LLC*, 972 F.Supp.2d 500 (S.D.N.Y. 2012).

know how to distinguish between infringements and fair use or to know how likely or unlikely it is that the user who posted the material had authorization, and even an employee who is a copyright expert can't be expected to know when the use of a copyrighted song has been licensed." What all of these things point to is that there are relatively few situations, although there are some, where infringement is objectively obvious to a reasonable person.

I think the Second Circuit got it right, though, in *MP3tunes*.<sup>11</sup> This is courts wrestling with a different set of facts where a number of users had uploaded Beatles MP3s in a way that would be permissible only if they had acquired those MP3s lawfully. But the record reflected that at that time there was no lawful source of Beatles MP3s, and the service provider knew there was no lawful source of Beatles MP3s, and under those circumstances the Second Circuit said: "That's red flag knowledge. You had knowledge of a set of facts that if you added them up, you didn't have actual knowledge with respect to a particular item that had been uploaded unlawfully, but you had knowledge of facts and circumstances that made infringing activity apparent."

To sum up with respect to red flag knowledge, courts have gotten red flag knowledge right because it has turned out that most judgments as to whether or not material is infringing are the sort of difficult judgments that Congress said they didn't expect service providers to make, and that doesn't disturb the traditional burden that rests on copyright holders of identifying infringing activity and identifying situations where they want to pursue infringing activity.

The other thing I want to talk about briefly is repeat infringer policies. This is another place where Congress left it open, just saying "adopt and reasonably implement," and the question is what is reasonably implementing and what isn't.

What the courts have done is what courts do best, take into account different factual situations to make a determination of what side of the line the infringement falls on and to develop standards. For example, in the *Cox*<sup>12</sup> case, the court imposed a pretty high set of standards on at least the level of formality with which Cox needed to run its repeat infringer policies, and found the level of formality, and in addition the substantive results of that process, wanting; that is, found it not to be reasonable. Meanwhile, in the *Motherless*<sup>13</sup> case out of the Ninth Circuit, just in the last year, for a much smaller one-man shop, it was found it to be reasonable. That is the kind of determination that courts make best, and it was right for Congress to leave those issues to the courts.

MR. GLAZIER: Wow! Right on time, at the buzzer.

Devlin, now you can tell us why the courts are wrong.

PROF. HARTLINE: Hi, I'm Devlin Hartline. I'm from Antonin Scalia Law School. I want to thank Mitch for the introduction and Hugh Hansen and his IP team for the invitation, and I wanted to let people know that a longer version of my presentation is available on the conference website.<sup>14</sup>

With Section 512 of the DMCA Congress sought to preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place online. The idea was that service providers and copyright owners would work together to help solve the online piracy puzzle. But things haven't gone according to plan. Just look at the widespread infringement that's available online.

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<sup>11</sup> *Capital Records, Inc v. MP3tunes LLC*, 48 F.Supp.3d 703 (S.D.N.Y. 2014).

<sup>12</sup> *BMG Rights Mgmt. LLC v. Cox Comm., Inc.*, 881 F.3d 293 (4th Cir. 2018).

<sup>13</sup> *Ventura Content Ltd. v. Motherless, Inc.*, 885 F.3d 597 (9th Cir. 2018).

<sup>14</sup> Devlin Hartline, *Twenty Years Later, DMCA More Broken Than Ever*, CPIP (Apr. 24, 2019), <https://cpip.gmu.edu/2019/04/24/twenty-years-later-dmca-more-broken-than-ever/>.

So why did things turn out this way? Because courts have misconstrued Section 512's red flag knowledge standards.

In order to benefit from the safe harbors, Section 512 requires service providers to do several things, such as designate an agent to receive takedown notices and respond expeditiously when they do. But importantly, service providers also have a duty to take down infringing content when they don't get a notice. If the service provider has either actual or red flag knowledge of infringement, it is obligated to remove it.

For sites hosting user-uploaded content actual knowledge is "knowledge that *the* material or an activity using *the* material on the system or network *is infringing.*" Red flag knowledge is "aware of facts or circumstances from which infringing activity *is apparent.*" Properly understood, actual knowledge requires knowledge that specific material, *the* material, is infringing; while red flag knowledge merely requires general awareness, aware of facts or circumstances, that activity appears to be infringing is apparent. There are similar provisions for search engines.

Once the service provider has actual or red flag knowledge, the obligation to remove *the* material kicks in.

With actual knowledge, it's easy. The service provider doesn't have to go looking for *the* material since it already has actual subjective knowledge of it.

But what about with red flag knowledge where the service provider only knows of infringing activity generally? How does it know *the* material to take down? The answer is simple: Once the service provider has red flag knowledge it has to investigate and find *the* material to remove it.

The examples given in the legislative history, which unfortunately only relate to search engines, give us some idea of what Congress was thinking. It's not a red flag if the service provider views one or more well-known photographs of a celebrity at a site devoted to that person since they might be licensed or fair use.

However, sites that are obviously infringing because they use words like "pirate," "bootleg," or slang terms to make their illegal purpose obvious from even a brief and casual viewing, do raise a red flag.

The legislative history states that a service provider such as a search engine that views a site and then establishes a link to it must do so without the benefit of the safe harbor. Thus, red flag knowledge applies once a service provider looks at something that is "obviously pirate," as the legislative history puts it, even if it's an entire website.

So what's the most obviously pirate site? The Pirate Bay. I did steal this image, but I don't think they'll mind.

Like the example in the legislative history, The Pirate Bay has the word "pirate" right in the title, and a brief viewing of this site reveals its obvious infringing purpose. So you'd think that search engines can't link to it and maintain their safe harbors, right?

Wrong. As of today, Google is indexing nearly 1.5 million results from The Pirate Bay. And popular current movies like *Captain Marvel* — which was awesome, by the way — abound.

And it's not like Google hasn't been told that The Pirate Bay is dedicated to infringement, not that it needs to be told. According to Google's Transparency Report, it has received a request to remove over 4 million Uniform Resource Locators (URLs) from thepiratebay.org domain alone and other related domains, such as thepiratebay.se, have received millions of requests as well. In a sane world Google would have red flag knowledge that The Pirate Bay is obviously pirate. But that's not the world we live in twenty years into the DMCA. So how is it that Google can index The Pirate Bay and not be worried about losing its safe harbor?



Well, the answer is that the courts, especially the Second and Ninth Circuits, have construed Section 512 in a way that has all but read red flag knowledge out of the DMCA.

I briefly go through these four cases in my longer presentation that is on the conference website. The gist is that these decisions have been the “Four Horsemen of the Red Flag Apocalypse.” The courts have interpreted red flag knowledge to require specific knowledge of particular infringing activity, something so close to actual knowledge as to render red flag knowledge nearly superfluous, and they have made it so that even the most crimson of flags will not suffice to trigger the removal obligation.

Contrary to Congress’s plan, this perversely incentivizes service providers to do as little as possible to prevent infringement, and instead of looking into infringing activity of which they are subjectively aware, they are better off doing nothing lest they gain actual specific knowledge that removes their safe harbor protection. And it denigrates Section 512 to a notice-and-takedown regime, where copyright owners are burdened with identifying infringements on a URL-by-URL basis. And this has enabled service providers to game the system, and they build businesses based on widespread infringing content, even if they welcome it, so long as they respond to takedown notices.

The end result is that we have an overwhelming amount of obvious infringement that goes unchecked, and there is essentially none of the cooperation that Congress intended.

Thanks again to Hugh and his team and thank you all.

MR. GLAZIER: We are going to start integrating your questions very soon because we want you guys to be a very active part of this, and now we’re going to bring Ben in as well to participate.

First, we should point out that there is a Copyright Office report that is going to be coming out. The Copyright Office has been studying this forever, and we are all desperately waiting for this.

Jacqueline, you were the one who was at the Copyright Office the most recently, so you need to tell us very briefly what you think the report is going to say. I’m going to look at Karyn’s face while you do it for clues, and then I’m going to watch to see what notes Maria passes to her, and then we are going to come back and check once the report comes out to see if you were right. What do you think it is going to say?

MS. CHARLESWORTH: I don’t know. I will say I was at the recent roundtable, the follow-up roundtable. I oversaw part of the earlier hearings with now-Register Temple, and when I opened those hearings, after having read through all the comments, I said it was really a “tale of two cities,” and that was my impression all over again at the recent roundtable.

I feel that, unfortunately, there really hasn’t been the cooperation that Congress intended. I heard you saying shortly before we started that you and Bill thought that this was an easy problem to solve. I hope that’s true. I wish it were true.

I think it could be solvable if the right parties were in the room discussing it. But I think the positions are very entrenched. So we’ll have to see what the report says. Beyond that, I would only be speculating.

MR. GLAZIER: All I have to say is they released a report on music licensing, and then we got the Music Modernization Act (MMA).<sup>15</sup> So, no pressure.

MS. CHARLESWORTH: Right, right.

MR. GLAZIER: But it was a good roadmap. Jacqueline may have had something to do with that.

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<sup>15</sup> Music Modernization Act, Pub. L. No. 115-264 (2018).

Bill, you said something I thought was really interesting, which is we're all lawyers trained to argue; but this is business, and business requires incentives; and it's a relationship, and relationships are complicated. Do you think that the incentives are there on both sides, regardless of whether it is amending legislation or coming up with a private agreement? Do you think the incentives are there on both sides to move forward where both people are carrying a green puzzle piece together?

MR. PATRY: I do. I think one problem, as I said at the beginning, is that it is really a political question based upon where you are and different definitions of what success is. If you have a meeting and people have very different expectations about what is going to happen, then some people are going to be disappointed. So I think we have to be clear about what success is.

I do find incredibly disappointing, however, the idea that there has been no cooperation at all. Mr. Hartline said that, and it's just completely false. I'll give you one example. Mr. Hartline's statement was that as a result of red flag language there has been zero cooperation among ISPs and rightholders because of the Second Circuit's decisions on red flags, which he misstates completely.

Aside from that, as I mentioned, it is absurd to say that we or any ISP<sup>16</sup> was affected in the least by those decisions. We don't say: "Oh, wow, look at that Second Circuit opinion. That's really loose on red flag. We can get away with anything we want to." That's an absurd thing to say.

I will give you an example since I said we have to be clear about the facts: 2016 was the *Vimeo* opinion, right? So, under this view, "Wow, that's a great opinion for us, man; we can let Pirate Bay do whatever it wants to" — and by the way, Google just indexes it; that's all we do. Indexing is not infringement, by the way. So, supposedly, "Wow, what a great opinion for us; man, we can do what we always want; we don't care about copyright; we don't care about business relations; we're just gonna sit back and make people complain to us, and there'll be too many complaints, so too bad for them." It's just not true.

In 2017, after the *Vimeo* opinion, the United Kingdom IPO hosted a roundtable with the following people: Google, Bing, the British Phonographic Industry, Motion Picture Association, and a ton of IP groups. The idea was to come up with an agreement under which search engines and the creative industries could work together to stop consumers being led to copyright-infringing websites.

I will point out, by the way, that there cannot be a single person in the entire world who goes to The Pirate Bay via Google Search. If you are going to Pirate Bay, you know how to get there. You don't need us to tell you how to get there.

We had four meetings at which there was a voluntary code, there was voluntary testing about metrics. I've mentioned metrics and being disappointed. We had metrics. We had particular things that rightholders gave us that they said led to results, and we tried to figure out how to deal with those for demotion signals and others. There was an outside independent group that tested those. We did it for eighteen months.

So what happened after those eighteen months? This is October 2018, by the way, two years after we supposedly decided to sit on our hands and let infringement go just however it went.

In 2018, the U.K. government indicated that they were very happy that we had met and surpassed all the numerical targets set in the voluntary code and that, even more importantly, there had developed a cooperative relationship among rightholders and search engines that would lead to significant cooperative steps going forward. It's just totally false to say that there has been no cooperation. That's a U.K. government thing.

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<sup>16</sup> Internet Service Provider.

I'll give you other examples. YouTube's Content ID: 98 percent of the disputes on YouTube are solved by Content ID, which stops stuff from ever going up. Forget about notice and takedown; there's no need to take something down if it doesn't go up in the first place. Ninety-eight percent of every dispute on YouTube is solved voluntarily by rightholders using Content ID.

There are many other things. Autocomplete, which I worked on. This stuff happens every single day because, as Mitch says, it makes sense from a business standpoint. It makes sense morally, but it makes sense from a business standpoint, and that will always win the day.

MR. GLAZIER: You just made two really important points that I want to bring Ben in on. The first is the U.K. process, which was the government calling parties together and saying, "We're highly encouraging you to do this, and we are not going to tell you what happens if you don't do something." We got a very good result. One is the model.

Ben, you sit with software on one side and hardware on another side with your members; so you're kind of like our Switzerland here. Is that where this should be headed, or should there be another way to proceed to try to get to whatever Karyn tells us is the answer?

MR. GOLANT: That's a pretty interesting question, and it hearkens back to when I was at USPTO. I know Shira Perlmutter reached out to many different parties to bring them all together to come to some sort of common understanding. There was movement afoot to create certain standards. The effort went sideways when there were other things to talk about. But I do believe that there is a role for government to actually bring the parties together in some way to make at least what you are talking about more general in nature rather than just having people from all sides continue to disagree about what the terms are.

MR. GLAZIER: The other thing that Bill raised that is really important is Content ID, which, regardless of whether you think it's perfect or not, I think most people would say is a very, very useful tool. That brings up what is the measure of success. What do you call a win? How do you move forward here?

So, Joe, if this whack-a-mole issue — it gets taken down; two seconds later it gets put up; you are never actually removing the piracy, and yet the immunity stays — seems to be where the discord is here. Would some sort of robust Content ID or a consensus by most people on a technical measure that they could use to impose Content ID get us largely to the place where you don't have to worry about this whack-a-mole problem? What do you do about people who aren't like YouTube, people who don't use Content ID? Is there some way for people to get together? Is that success?

MR. GRATZ: Voluntary agreements are one road to success or one element of success in addressing this area. Content ID is one example. I think the DMCA itself contemplates both voluntary agreements and voluntary measures where service providers and copyright holders work together — things like Content ID, things like automated submission of takedown notices, and so on — that people may choose to do. Then, at some point, if those voluntary agreements meet certain requirements, they become mandatory.

I don't think the point is actually that any of them ever become mandatory, and I think none have, but there's that path and there's that channel for the parties to work together where there are places for agreement — like Content ID, like automated submissions, like application programming interfaces (APIs) and private crawling agreements, as I think we'll probably hear about in the Sunrise Session tomorrow with streaming and privileged takedown rights for certain trusted parties. Those are all things that sit outside the text of the DMCA but address the same problem and are things that couldn't practically be made mandatory but that help solve the problem and take the pressure off the system.

MR. GLAZIER: Devlin, do you think, since we're not going to agree philosophically here, there are incentives on both sides where people could come together to start agreeing on what success is and then implementing something to get there without changing the law?

PROF. HARTLINE: I think there are just two polar opposite views. I was at the most recent Section 512 Roundtable and the one a few years back, and it seemed like at this most recent roundtable everybody was just saying the same things they had said two or three years ago. It almost seems like we are just talking past each other.

Like Bill will say things about how "You don't need us to get there with Google Search for piracy." I feel like that's a really terrible attitude. Like "It's okay if I help you commit a wrong because if I didn't do it, then somebody else would do it, right?" We wouldn't accept that kind of philosophy —

MR. PATRY: That's not what I said at all. That's not what I meant. That's just not accurate.

PROF. HARTLINE: Okay.

Then, with things like Content ID, I do think that it works great for some people, especially bigger right owners in one sense, but it's not available to smaller artists, and it results in submarket rates. You can use Content ID, but "we are going to take a license at a rate that is lower than market value" is the exchange; and, if you don't take that deal, then you're at the whack-a-mole problem and you're just sending takedown notice after takedown notice.

Can we ever meet in the middle? I don't think so. I don't know. I think that's Congress' job.

MR. GLAZIER: Well, Bill, we did it on demotion from the United Kingdom. If we can't, if we're going to stay married, who's the counselor? Is it affirmatively getting together in this sort of standard technical measures thing? Joe described it in a passive way, which is one way of looking at it, which is if it so happens over time there are things that become a consensus, you can impose it against outliers.

There is also potentially an affirmative way of people getting together, like they do in open standards meetings, and saying, "We agree on it." There are also things like our trusted partnership on taking notices.

What do we need to do to stop talking past each other and to start moving toward solutions where there are incentives on both sides?

MR. PATRY: I've been married for twenty-two years. I don't know if that's success or not, but as I think Obama said, it's hard work, and you do it, and you have trust, and you want to be together, and you need each other. If you don't need each other, you're not going to be together.

That's why I stress this is a business thing. That's why my view of the DMCA is as a business thing. Both Mitch and I and all of us who worked in the Copyright Office remember the Kastenmeier-Coble approach to legislating, which is that someone comes to you and they have a problem. First thing you figure out is, is it a problem that law can solve? People say they have lots of problems, but law may not be able to solve them. There could be other things. Then, do those other things.

But if there are things that law can solve, you have to figure out the framework for solving them, and the people who are going to live with that, just like in a marriage, are the ones who have to figure that out. Then, what Mr. Kastenmeier and Mr. Coble did is, you went away saying, "All right, it's a problem and I'll solve it." As with the United Kingdom, "We'll solve it."

As we did in abolishing the Copyright Royalty Tribunal. They came to us and they said, "We have a problem." We said, "We don't want to solve your problem. You've got a

problem, but that's a problem you have to solve. But if you don't solve it, we will." And they couldn't, so we got rid of them.

Hopefully, in most things it doesn't work that way. You go, you work things out, you come back, and then Congress does its due diligence. It makes sure that it is the right public policy, and there is a framework by which you then live with it and grow, as with a marriage. And that's the only way I think things can work.

One of the other things, of course, from working in the Copyright Office and on the Hill, is this idea that you can see into the future. Hell, I thought we were lucky if we could do something right that year. The idea that you are ever going to figure out for twenty years later what the right approach is — Google was founded in 1998. To think that in 2019 there's going to be a solution is crazy. That's why you have to make it flexible. That's why, as Joe was saying, you have to build in things that give people encouragement.

Most of the stuff that we do as a company is totally outside the DMCA. The DMCA for us is not a huge thing. It's not that it's not important. It is for the smaller creators; it's very important for them. That's why, by the way, we have Copyright Match, which is for smaller creators rather than YouTube.

But for us, it's business deals, it's licensing, it's Content ID. Those are the things that matter to us. The DMCA is there as a default for other things. It's there as a way to encourage people to work things out privately, and that involves trust.

Mitch and I, I think, trust each other completely. We worked things out last year, and I'm very confident if Mitch called me up and told me he has a problem, I would do everything I could to solve it. That's what you need.

But you need to agree that you are going to stay married. You need to agree it is worthwhile doing it. If you get to that point, then it will work out. But if you don't agree it's worth staying together, then it won't.

MR. GLAZIER: Jacqueline, you just participated in the Music Modernization Act process. Services and rightholders got together and ended up agreeing on amendments. The incentives were provided by litigation on both sides, where you had, to make an analogy here, repeat infringer cases that some of the services might view as troubling. You just had the Copyright Directive in Europe that some of the services might find troubling. You also have a whack-a-mole problem with no end in sight for the copyright owners.

If you were put into a room tomorrow, like you always are when these things come up, and you were told to help draft something, do you think that people could come together to do it, and do you think legislation is required?

MS. CHARLESWORTH: I think having the right people there is a big part of it. Again, I'm encouraged by what I'm hearing from you and Bill.

But what was discouraging to me at the roundtable was listening to the polarized positions. What I was not hearing, especially in this most recent roundtable, was any suggestion from any of the services that anything needed to change. They said, "Section 512 is great, leave it alone, leave it alone, leave it alone," and that does raise a question in my mind as to whether there are the necessary incentives.

I have to disagree a little bit with Bill. I think the law, whatever the default rule is, actually changes the leverage of the parties. If the law is what it is today, it basically sets the bargaining relationship between the copyright owners and the copyright users. So when you're having a business discussion it's within the context of that legal framework, which some would say favors you — though others might disagree. But the point is, I don't think law is at all irrelevant to the discussion.

But going back to your question, Mitch, I thought this in the music space, too. There were issues percolating in the business world, but there was also a role for government to step forward, and we had leaders in Congress who did that and said, "If you can

bring us a bill that is a consensus bill, we'll champion it," and they spent a lot of time and energy assisting the parties, pushing the parties, and doing what it took to get it done.

So I think with the right kind of leadership in Congress perhaps, and then we'll see what the Copyright Office has to say, it is possible you could get the sun, the moon, and the stars aligning to solve some of these problems.

Again, I think that the services — it would have been helpful to be hearing a little bit more concern from the services, especially about the smaller artists who don't have the leverage to negotiate with Bill, who are dealing with the whack-a-mole problem on their own, and who are having trouble: they write a book, and their book is pirated. I think the little guys have to be covered, too, in whatever is going on and not just bigger, powerful players. That's something else that needs to be factored into the equation.

MR. PATRY: If I could make one recommendation. I agree with you, and I also agree with you obviously that the legislation does provide a framework and leverage. That's certainly true. It's sort of like writing a will. You can write whatever you want, but if you don't write a will, you are going to get whatever the intestate law is. So that's important.

On the little creators, that's a problem obviously across the board in copyright. That's why the Copyright Office has had so many problems with photographers, even when I worked there. Figuring out how to deal with photographers and registration I don't think is a problem that has been solved, and it is a really troubling problem. I spent a lot of time on it in 1992 and 1993, and it still hasn't been solved.

In terms of the roundtables and public hearings, my only comment — this is a personal one, not Google's; I want to make that clear — is that the real work of legislation is done privately. When there are televised proceedings of the House and committee hearings, that's all well and fine, but we all know that the real work is not done publicly.

Those are public things. People say things for public consumption, and I'm sure they believe everything they say, but the real work of figuring out how to make difficult problems go away is never going to be done in public speeches. It has got to be done privately by people who trust each other, with the impetus of course of government, and I think the Copyright Office under the new Register, who I think is amazing and great, can do amazing and great things.

MR. GLAZIER: I have a million more questions, but I want this to include you.

MR. GOLANT: Putting aside Section 512, which we just absolutely love to talk about, we are neglecting its sister, Section 1201. I want a show of hands here to see how many people think that Section 1201 is working as intended — as I do — which I think is critically important for all rightholders. Do we have a better agreement amongst the parties that at least that part of the DMCA is working?

PROF. HARTLINE: I'll raise my hand. I like Section 1201.<sup>17</sup>

MR. GOLANT: Cool.

MR. GRATZ: I will give the inverse response, which is I think Section 1201 is working as intended, and I don't like it.

MR. PATRY: I think it's like putting a chastity belt on somebody else's wife. I don't get it.

MR. GRATZ: I don't, either.

MS. CHARLESWORTH: I'm digesting that. Okay.

I think Section 1201 is a very intensive rulemaking process, and, having gone through it twice, I think there is a lot of effort both from the people who participate and

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<sup>17</sup> 17 U.S.C.A. § 1201.

definitely the Copyright Office. I think a lot of it is actually more philosophical than having practical implications.

Going through that process every three years highlights some important tensions, but I don't think it really addresses a lot of real-world problems. So I think the cost-benefit is a little off there. I would rather see more effort put into Section 512, where I think the stakes are very large.

MR. GOLANT: Yes, I think Section 1201 is working. It's sort of like inoculation; you have protections for digital rights management and then you don't have to worry as much about the piracy on the other side because you have the content already wrapped up and making sure that no one steals it. So we are big fans of Section 1201.

MR. GLAZIER: Just because it could work doesn't mean it is always being used, like stream-ripping, for example. But I'm the moderator, so I'm not going to do that anymore.

Did you have another question?

MR. GOLANT: Oh, I have tons of questions.

MR. GLAZIER: Let's get the audience in here. What questions do you have for this fantastic panel?

QUESTION [Janice Pilch, Rutgers University]: I'm a librarian at Rutgers University, and my question is for Mr. Patry.

MR. PATRY: That's what I get for opening my mouth.

QUESTIONER [Ms. Pilch]: Not that I'm criticizing you in any way, but it might sound that way. I don't mean to.

MR. PATRY: It's okay. I don't mind.

QUESTIONER [Ms. Pilch]: You made the analogy of a marriage, and you said that people need each other. It seems to be clear that you, for example, need the rightholders because Google makes considerable money from them. They probably need you, too. And then you said if Mitch said he had a problem you would try to solve it because these matters are private, and they're business.

Well, in these Section 512 hearings you've read and heard many comments by rightholders — musicians, photographers, writers, etc. — who don't know what to do anymore to deal with their problems, and Google doesn't seem to be solving anything. So concretely what would you suggest they do next? They are coming to the Copyright Office, they are coming to these forums, and they are saying there is such a problem, but Google's not addressing it. So concretely what do you think could be done by Google to solve the problem in this marriage that doesn't work?

MR. PATRY: First of all, we make money off of ads. We don't make money off of content. [Audience reaction] No, it's true. We run ads. We are going to release our earnings on Monday, and you can see where the money comes from.

We do license deals for most of the content that's on YouTube and other places. Obviously, that's one thing we do, which is we try to have as many licenses as we can and pay people for it.

In the case of stuff that's not covered by license — is that what your question is? Obviously, we try to have as many licenses as we can, and we do.

Since we are not ourselves engaging in the conduct that's at issue — we are not copying anything — I am trying to figure out the facts of what you think is a problem that we have caused and that we can solve.

Like I said, if Mitch calls me up and says he has a problem, he'll explain what the problem is, and presumably it's a problem that he knows we can fix. If it is a problem that we didn't cause and cannot fix, that is harder to do. Your question is really broad, and that's why I'm struggling.

MR. GLAZIER: I think you raise a good point about who are we talking about here. In Europe — and the next panel is going to talk about this extensively — Google as a search engine is one very different type of platform than YouTube, which might more — I don't want to use the word "direct" — which might deal with the content that is uploaded onto its platform differently than a search engine would, for example.

I guess that raises another question. Who should receive the benefit of the safe harbors? Was it intended to reach the people who are entitled to use it today, given the time when it was written? And is there — because technology evolves and nobody could contemplate what would happen, but the law stays the same — some mechanism to assure fair competition between services that can claim the safe harbor doing the same thing essentially as services who cannot use the safe harbor, depending on who loads the content on the service?

Devlin, why don't you talk for a second about who we are talking about here?

PROF. HARTLINE: I don't even know what to say. When Bill says what he said, I think of what the guy from Spotify who said, "People are here for the platform, our awesome user interface," and it's like, "No, they're there for the content, dude. The interfaces are a dime a dozen."

If we are going to stick with the marriage analogy — and this is not at all a personal dig on Bill; it's more his employer — I just don't feel like Google is coming to the table in good faith. My example of what can we do, my idea, is: don't index The Pirate Bay; don't send people to these pirate websites. Here's another idea: with Content ID why don't you help solve the whack-a-mole problem on YouTube; like actually have "take down means stay down" if people want it? I realize that certain people can have that with Content ID, but not everybody can have that.

I feel like they could sit down at the table, and we could talk about standard technical measures and what are we going to do, like the DMCA envisioned, that we would all come together and work out these things. But they are not coming to the table.

I'm having trouble seeing how this is at all a marriage. It seems like it's enemies.

MR. PATRY: Well, it's a group marriage, and that's why I'm having problems answering the question.

If you are talking about YouTube and if you are talking about Google Play, then you are talking about a situation where it is consumptive, where your experience is one in terms of what you are talking about, which is Google should pay. We do pay for those things. Those services are licensed.

If you are talking about search, that's totally different. That was my comment about ads. We make money off of ads on search.

On YouTube it is a very different thing. On Google Play it is a very different thing. There are in the broader group marriage of Google's many different services, some of which function like Spotify, in the sense of you go there and you find what you are looking for, and there should be a one-to-one transaction, and, however it works out, artists obviously should be paid.

I have been a musician since I was six years old. I have clarinets and bass clarinet mouthpieces right back there, and after this panel I'm going over to meet somebody who plays for the New York Philharmonic. I care a great deal about musicians being paid.

Those are licensed services. That is the short answer to your question. For those services we do pay.

If people on search are going to sites that lead you to pirated things, that is a different issue. That's maybe the whack-a-mole issue.

It is not true, by the way, on Content ID that there's a whack-a-mole issue. It doesn't go up in the first place. If you are using Content ID it is blocked from ever going



up. And it is a very granular service where copyright owners get to determine in an extremely granular way when things go up and when they do not.

I will also say that over 90 percent of the time content owners allow unauthorized stuff to go up and they monetize it. It is not true that through using Content ID most stuff is blocked because people do not want it up. If you are watching, say, a video of a popular song, it is totally up to the artist to decide whether they want it up.

Content ID gives three options: (1) block it; (2) leave it up and watch what happens; (3) leave it up and then make money off of it. That's the way I think copyright law should work. You put the artist in the driver's seat on that.

It is not true that Google is not at the table. You are talking about different tables when you say we are not at the table. We do one thing here and one thing another place. Content ID is exactly in sync with the way the copyright law should work, so I totally disagree that we are not at the table on that.

For search that's a very different issue, and that's a problem. Obviously, there is a lot of stuff that is out there. There are other things that we do.

I will mention one very quickly. When you go to search and you are starting to type something in, Autocomplete leads you to what people think is a suggestion for that. Maybe it is leading you to a pirate site, as Mr. Hartline would think, that we are actively trying to get people to go to pirate sites. You typed it in and we are going to add it for you; you're typing "pirate" we're going to type "pirate bay" so that you know how to get there because you're so dumb you don't know how to get to Pirate Bay and you need us to tell you. Not true.

I have worked on an originator project called Autocomplete. It uses DMCA notices. What happens is that there is a virtuous cycle, and we block those from ever being up. You will not use Autocomplete and get to Pirate Bay; it will not take you there. And there are many things like that that we do. We don't have press releases about them, but we do them.

MR. GLAZIER: We have a question over here.

QUESTION [Carlo Lavizzari, Lenz Caemmerer, Basel]: There are certainly concerns. I wonder whether "difficult marriage" is the right paradigm. Isn't it more like pollution for the ads? Like a factory says: "I'm not making money off pollution; I'm selling my products." But the factory still has to deal with minimizing negative externalities, viz. the pollution it contributes to.

MR. PATRY: I don't understand where the word "pollution" comes from. There are many services we have where we don't run ads, like Google News. There are no ads on that. So I don't get the idea of pollution. Maybe there is no pollution in Switzerland, but there is pollution here, and we know what it is.

MR. GLAZIER: Does that mean we are actually out of time? Son of a bitch.

If we can have like one more minute, let's go down the line and say, if we got a table together tomorrow with the right people — Jacqueline, whether it was amending legislation or coming up with a solution to help creators finally end this nightmare of their works not being protected, what are the odds of it succeeding?

MS. CHARLESWORTH: Again, I think it comes down to the people in the room. You need creative thinkers and people who are willing to reach across that table. I think you can make progress. You might not solve the whole enchilada, but I think there could be some progress made.

MR. GLAZIER: Ben?

MR. GOLANT: We would invite everybody — we love players, we love actors, we love everyone in between. So I'm more than encouraged that if you sit down with people, things can happen. If you don't, then nothing will happen.

MR. GLAZIER: Bill?

MR. PATRY: God save us from ideologues. We need to have people who are in the room who have a business interest in it so that we can all understand what the problem is, as with the librarian's question. We need to have really a clear understanding of what the problem is, because without having a clear problem, you can't have a clear solution, and then everyone is going to be disappointed, and you're going to say, "Well, you weren't at the table."

MR. GLAZIER: Joe?

MR. GRATZ: The big players can figure this out for themselves. The small players, both small copyright holders and, very importantly, small services, need to be at the table because their interests in both cases are very different from those of the large players.

MR. GLAZIER: Devlin?

PROF. HARTLINE: Bring back representative lists, bring back standard technical measures, and make red flag knowledge great again.

MR. GLAZIER: All right. It's just like in *Dumb and Dumber*, remember?

He said, "Do we have a chance?"

She said, "Not in a million years."

He said, "So you're saying there's a chance."

We will see what happens. Thank you very much to this awesome panel. Thank you, guys.