

*The Digital Millennium Copyright Act at 22:  
What Is It, Why It Was Enacted, And Where Are We Now?*

**Hearing Before the United States Senate Committee on the Judiciary  
Subcommittee on Intellectual Property  
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Thank you for inviting me to testify at this hearing. You have asked me to speak about the background and purpose of the Digital Millennium Copyright Act and how it has fared in the years since its enactment. Twenty-two years ago, when you enacted the DMCA, I was paying close attention. I read all the written testimony, attended many of the hearings, and spoke with lobbyists for interests on both sides. I ended up writing a book about it.<sup>1</sup>

The DMCA had many moving parts, but the core grand bargain implemented two important additions to the copyright statute.<sup>2</sup> Title I of the law contained broadly worded prohibitions on circumvention of copy and access protection, and the distribution of devices or information that

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1 JESSICA LITMAN, *DIGITAL COPYRIGHT* (2000). In 2017, Maize Books reissued a modestly revised edition of the book under a CC-BY-NC Creative Commons license. See <https://quod.lib.umich.edu/m/maize/mpub9798641>.

2 A third important provision was a new compulsory license, added at the last minute, for webcasting of sound recordings. See Pub. L. No. 105-304, § 405 (codified at 17 U.S.C. § 114). That provision ran into trouble almost immediately, and has been revised by Congress repeatedly. The DMCA also included an amendment permitting computer maintenance and repair businesses (but not others) to turn on computers to maintain or repair them without liability to the owners of copyright in the computer software installed on the machine, see *id.* at § 302 (codified at 17 U.S.C. § 117), some modest adjustments to the extant ephemeral copying privileges, see *id.* at §§ 402, 403 (codified at 17 U.S.C. § 112), and new *sui generis* design protection for boat hulls, see *id.* at §§ 501-505 (codified at 17 U.S.C. §§ 1301-1332.)

would help consumers to accomplish that.<sup>3</sup> Title II of the law gave online services conditional safe harbors to protect them from liability for infringing material they didn't originate, control, or know to be infringing.<sup>4</sup> The motion picture, music, recording, and software industries asserted that the anti-circumvention provisions were essential to their ability to navigate the new digital marketplace. The telecommunications industry maintained that the liability safe harbors were necessary for them to provide online services. Members of Congress insisted that the two proposals be treated as a pair, and declined to enact one without the other.<sup>5</sup>

*The anti-circumvention amendment (Sections 1201-1205)*

Lobbyists and organizations representing copyright owners claimed that their members would refuse to make any content available over digital networks unless they could be sure that it would not be subject to rampant copying and unlicensed use. Software engineers had developed digital rights management [DRM] to limit access and copying, and copyright owner groups were optimistic that DRM would allow them to prevent unauthorized use of their works. They were well aware, though, that even the best copy-protection would not be completely impregnable, and might be breached by determined hackers. They therefore insisted on a broadly-worded prohibition on circumventing technological protection measures for any reason, regardless of whether the purpose was to infringe the copyright in the underlying work, and on a similar, unqualified prohibition on offering any products or services designed to enable people to circumvent DRM. Members of Congress urged copyright-owner groups to include a fair use exception to the prohibitions. Proponents of the anti-circumvention provisions doggedly opposed any fair use limitation.<sup>6</sup> Ultimately, Congress devised a fair-use substitute that commanded the Library of Congress to conduct triennial rule making proceedings at which “persons who are users of a copyrighted work” could request a temporary exemption to circumvent technological protections. The statute authorized the Librarian to grant the exception to users who succeeded in showing that the circumvention prohibition “adversely affected . . . their ability to make non-

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3 See Pub. L. No. 105-304, §§ 101-105 (codified at 17 U.S.C §§ 1201-1205).

4 See id. §§ 201-203 (codified at 17 U.S.C. § 512).

5 See, e.g., *WIPO Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts of the House Judiciary Comm.*, 105<sup>th</sup> Cong. (Sept. 17, 1997).

6 See, e.g., id. at 228-31(colloquy).

infringing uses . . . of a particular class of copyrighted works.”<sup>7</sup>

*Online service provider safe harbors (Section 512)*

Proponents of the new anti-circumvention measures had also endorsed a broad interpretation of the copyright reproduction right under which even a fleeting appearance of a file or part of a file containing a copyright work in any computer would infringe the copyright owner's rights, regardless of whether the owner or operator of the computer knew or could know what was in the file.<sup>8</sup> Online transmissions take unpredictable paths depending on network conditions. According to this view of a law, if an individual sent an email containing infringing content to another individual, and the packets containing that email passed through computer systems in Indiana, California, North Carolina, and New York in the course of transmission, the operators of every single computer in the transmission chain would be strictly liable for making an unauthorized reproduction of the work that the email infringed, even though they would have no ability to control the transmission or discover its contents. If an individual viewed a page on the world wide web that included an infringing image of a copyrighted photograph, every computer system between the web page and the viewer would face liability. Telecommunications companies initially reacted with incredulity – copyright owner organizations couldn't mean that. As it became clear that copyright owners appeared to believe that interpretation was and should be settled law, telecommunications companies came forward to ask Congress to clarify that they didn't face liability for the transmission of files through their systems. Representatives of copyright owners resisted that request. They conceded that no court had in fact imposed liability on an online service provider for unknowingly hosting or transmitting an infringing file, and emphasized that they were not seeking to sue online services for infringement. Nonetheless, they insisted, they needed the threat of strict liability to motivate online services to cooperate in their efforts to locate and block infringing content.<sup>9</sup>

Telecommunications companies responded that they had no ability to ascertain whether a

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7 17 U.S.C. § 1201(a)(1)(C).

8 See, e.g., *NII Copyright Protection Act of 1995 (part 2): Hearings on H.R. 2441 Before the Subcomm. on Courts of the House Judiciary Comm.*, 104<sup>th</sup> Cong. (Feb. 7 & 8, 1996).

9 See *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the Senate Comm. on the Judiciary*, 105<sup>th</sup> Cong. (Sept. 4, 1997).

computer file posted by a third party contained infringing material,<sup>10</sup> nor whether that person had legal authority to post it.<sup>11</sup> Members of Congress encouraged copyright owner groups and telecommunications companies to work out a mutually acceptable solution, and Representative Bob Goodlatte led multilateral negotiating sessions.<sup>12</sup>

The resulting agreement carved out five distinct safe harbors to shield online services from copyright liability for the contents of files posted by others that the services didn't originate, control, or know were infringing. In return, copyright owners received an expeditious process for effecting the removal of infringing files. Online services who blocked allegedly infringing files upon receipt of a complaint from a copyright owner were protected from liability either to the copyright owner or to the subscribers whose files were blocked in response to the request – even if the request turned out to be meritless. This freed service providers from the obligation to examine copyright owner infringement complaints to assess their validity – so long as a service had not known that specific files were infringing, and it blocked accused content when it was notified of infringement, it would be protected from infringement liability for material it neither originated nor controlled. That shield allowed it to respond to infringement complaints quickly, without needing to develop a legal opinion as to what response was warranted.<sup>13</sup> The statute expressly confirmed that eligibility for the safe harbors did not require online services to

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10 See *National Information Infrastructure Copyright Protection Act of 1995: Hearing on S. 1284 Before the Senate Comm. on the Judiciary*, 104<sup>th</sup> Cong. 35-39 (May 7, 1996)(testimony of William W. Burrington, America Online).

11 See *The Copyright Infringement Liability of Online and Internet Service Providers*, supra note 9, at 29 (testimony of Roy Neel, U.S. Telephone Assn); see also id. at 43 (testimony of Roy Neel, U.S. Telephone Assn):

Even if you had the technological holy grail, you would not be in a situation where the Internet service provider or the telephone company would be able to know if the transmission of some material has been authorized. If Paul McCartney comes into your office and says, "I just heard my song 'Yesterday' sent over the Internet and I want you to shut that down"--well, you know that song; I am sure it is one of your favorites-you would say, well, yes, absolutely, Paul McCartney wrote that song.

Well, then, 30 minutes later, you shut it down and Michael Jackson calls you and says, "Wait a minute. I sold the rights to that to America Online." You don't have any way of knowing that, so under any technological solution there is going to be a severe difficulty in a carrier or Internet service provider being able to determine if that transmission was authorized. So it has to be the initial responsibility of the content owner to identify when the transmission is unauthorized.

12 See *WIPO Treaties Implementation Act and Online Copyright Liability Limitation Act*, supra note 5, at 26.

13 Subsections (c) and (d) of section 512 outline the notice and takedown system for services that allow consumers to upload content and for search engines and other providers of information location tools. Subsection (g) includes a procedure that allows consumers whose content is wrongfully blocked to object to the takedown and to request that the block be removed. Subsection (f) permits a person who is the victim of a bad faith take down request to recover damages. See *Online Policy Group v Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

monitor their systems for infringing content.<sup>14</sup> At the insistence of Senator John Ashcroft, Section 512 also included a procedure enabling the poster of wrongfully blocked material to contest its removal.<sup>15</sup>

### *How the DMCA worked out*

#### *Anti-circumvention*

The circumvention prohibition in section 1201 has not lived up to its promise. It retains immense symbolic value for its proponents, but it doesn't seem to have been an effective weapon in the fight against piracy. The additional deterrent effect of making it illegal to hack digital rights management has turned out to be negligible.

At the time Congress passed the DMCA, many copyright owners expressed confidence that technology would soon deliver effective copy- and access-protection software that would enable them to prevent unauthorized copying or use of their products. The actual digital rights management tools that emerged were flawed. They are far from impregnable. They're also buggy – many copy- and access-protection technologies tend to prevent licensed uses as well as unauthorized ones. Automating permissions across constantly evolving software without interfering with interoperability of different programs is a difficult problem that the designers of technological protection measures have been able to solve only partially. Meanwhile DRM tools introduce new and frustrating incompatibilities. Every time I upgrade my computer's operating system, I discover that programs and content that I purchased have become inaccessible. Streaming services for which I've bought subscriptions periodically refuse to recognize my passwords for no discernible reason. Most of us have experienced similar frustrations.

Prohibited circumvention tools are widely available, and widely regarded as legitimate. Americans appear to have a firm conviction that if they purchase a copy of a work, they are entitled to enjoy that work. If the copy becomes inaccessible, they feel no compunction about seeking to repair it. If restoring their access to a copy requires the use of a circumvention tool, they will try to find one, and will often succeed.

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<sup>14</sup> See 17 U.S.C. § 512(m)(1).

<sup>15</sup> See *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the Senate Judiciary Comm.*, 105<sup>th</sup> Cong. (Sept. 4, 1997).

Meanwhile, copyright owners have resigned themselves to the fact that all DRM technology is vulnerable to the determined hacker. There will always be at least one unencrypted copy of a popular work available to those who are sufficiently motivated to find it. Some owners of popular content have chosen to forego the use of digital rights management, because they have concluded that it is not cost-effective.

The law continues to require the Library of Congress to conduct expensive and time consuming rule-makings every three years to grant temporary exceptions to the prohibition on circumvention in 1201(a)(1)(a). In past rule-makings, for example, the Librarian has repeatedly reached the reasoned conclusion that print-disabled readers should not be liable for seeking to defeat technological locks that prevent them from using assistive technology to enable them to read books. Next year, the Copyright Office will need to conduct a new rule making to enable the Librarian to renew the exemption.<sup>16</sup> Meanwhile, the statute gives the Library of Congress no authority to grant exemptions from the prohibition in subsection 1201(a)(2) that makes it illegal to make or offer to the public any product or service that would allow print-disabled readers to make use of their temporary exemption.<sup>17</sup>

The makers of software-embedded products have discovered that section 1201 can be a useful anti-competitive tool to discourage the marketing of compatible accessories and aftermarket parts, or to hobble independent repair and maintenance businesses. Manufacturers of electronic garage door openers,<sup>18</sup> printer cartridges,<sup>19</sup> vehicles,<sup>20</sup> electric coffee-makers,<sup>21</sup> and

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16 The Copyright Office recently implemented a streamlined procedure for renewing previously granted exemptions, if (but only if) there is no meaningful opposition. See <https://www.copyright.gov/1201/index.html>.

17 See Library of Congress U.S. Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. 2017-10, 83 Fed. Reg. 54010, 54011 (Oct. 26, 2018).

18 See Chamberlain Group v. Skylink Technologies, 381 F.3d 1178 (Fed Cir. 2004).

19 See Lexmark Int'l v. Static Control Components, 387 F.3d 522 (6<sup>th</sup> Cir. 2004).

20 See, e.g., Alliance of Automobile Manufacturers, Long Comment Regarding Proposed Exemption Under § 1201 (Feb. 12, 2018), [https://cdn.loc.gov/copyright/1201/2018/comments-021218/class7/Class\\_07\\_Opp'n\\_Auto\\_Alliance.pdf](https://cdn.loc.gov/copyright/1201/2018/comments-021218/class7/Class_07_Opp'n_Auto_Alliance.pdf); Harman Int'l, Long Comment Regarding Proposed Exemption Under § 1201 (Feb. 12, 2018), [https://cdn.loc.gov/copyright/1201/2018/comments-021218/class7/Class\\_07\\_Opp'n\\_Harman.pdf](https://cdn.loc.gov/copyright/1201/2018/comments-021218/class7/Class_07_Opp'n_Harman.pdf)

21 See Marcus Wolson, Why Copyrighted Coffee May Cripple the Internet of Things, WIRED (March 6, 2014), at <https://www.wired.com/2014/03/copyrighted-coffee-undermine-whole-internet-things/>; Mike Masnick, Keurig Begins Demonstrating its Coffee DRM System; As Expected, It has Nothing to Do With Safety (July 9, 2014),

medical devices<sup>22</sup> have sought to rely on section 1201's anti-circumvention provisions to protect themselves from competition. Customers who would prefer to repair their broken products, rather than discard and replace them, face legal obstacles that they should not. It is unreasonable to tell the owner of a tractor that if her tractor needs repairs, she ought to petition the Librarian of Congress for permission to make those repairs. These uses of the anti-circumvention prohibitions have nothing to do with preventing piracy of copyrighted works.

Digital rights management also enabled dominant platforms to use the incompatibility of different DRM formats to gain advantages over their competitors. Different encryption standards for recorded music limited consumers' ability to play music they had purchased from one vendor on a competing vendor's player. Apple leveraged the incompatibility of other music services with its iPod and iPhone to become the leading music retailer in the United States.<sup>23</sup> The incompatibility between Amazon Kindle and Barnes and Noble Nook file formats locks ebook owners in to a particular company's ecosystem. Amazon has exploited that problem to increase its dominance in ebook sales.

Twenty-two years after the enactment of the anti-circumvention provisions, they retain talismanic significance to at least some copyright owners, but they appear to be doing little actual work to diminish the unauthorized copying and use of copyrighted works. They're also costly: they require the Copyright Office to conduct wasteful triennial rule makings and permit the manufacturers of software-embedded products to use the provisions to harass competitors and inconvenience consumers.

#### *Online service provider safe harbors*

Section 512's safe harbors have been crucial for the operation of a diverse array of online services. The scale of the internet and the speed of digital transmissions make it impossible for services to pre-screen transmissions or uploads originated by others. Services don't know what

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<https://www.techdirt.com/articles/20140704/07112927780/keurig-begins-demonstrating-its-coffee-drm-system-as-expected-it-has-nothing-to-do-with-safety.shtml/>.

22 See, e.g., Advanced Medical Technology, Long Comment Regarding Proposed Exemption Under § 1201 (March 27, 2015), [https://cdn.loc.gov/copyright/1201/2015/comments-032715/class%2027/AdvaMed\\_Class27\\_1201\\_2014.pdf](https://cdn.loc.gov/copyright/1201/2015/comments-032715/class%2027/AdvaMed_Class27_1201_2014.pdf).

23 See Jessica Litman, *Antibiotic Resistance*, 30 Cardozo Arts & Ent. L.J. 53, 60-61 (2012).

transmissions contain, and can't know in advance whether the individuals who post them have the legal authority to do so. Imposing liability for something that even the most proactive online services cannot control, detect, or prevent is an effective way to shutter the service. Nor is the risk hypothetical. A variety of copyright owners sought to sue online services into bankruptcy over the past 20 years,<sup>24</sup> and the statutory damages provision in the law have enabled damage awards in the tens of millions of dollars. Many of the useful online services that many consumers have come to take for granted, such as email, cloud storage, Twitter, blogs, and Instagram, would be infeasible absent the safe harbors.

Courts have interpreted the meaning of section 512 with respect for Congress's intent and expectations.<sup>25</sup> Although copyright lawyers and copyright scholars dispute the results in particular cases, both district courts and courts of appeals have construed the statute with careful attention to the statutory language and structure, and have applied the safe harbor provisions with respect for the balance that Congress struck.

The online service safe harbor provisions in section 512 have continued to be vitally important, but the notice and takedown provisions are frustrating for many copyright owners and online services. The statutory system worked surprisingly well for more years than we should have expected. Instead of having to file an expensive and protracted lawsuit to remove infringing files, copyright owners had an enviably quick remedy. (Indeed, owners of trademark and other rights sought to use the statutory takedown process to vindicate their non-copyright interests, even though the section 512 process doesn't cover them. Many online services responded by adopting notice and takedown rules based on the ones in section 512.)

The principal weakness of the statutory notice-and-takedown system was that it didn't easily scale to the size of the 21<sup>st</sup> century internet. When Congress was debating the appropriate contours of section 512's notice-and-takedown provisions, the model everyone appears to have had in mind was a human-mediated one. Human copyright owners or their human employees would locate infringing material on the internet, and send a notice to the appropriate online service averring “under penalty of perjury” that the complainant was authorized to act on behalf

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<sup>24</sup> See Digital Copyright, supra note 1, at 180-181; Antibiotic Resistance, supra note 23, at 53-66.

<sup>25</sup> See, e.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9<sup>th</sup> Cir. 2015); *Viacom International v Youtube*, 676 F.3d 19 (2d Cir. 2012); *UMG Recordings v. Shelter Capital Partners*, 667 F.3d 1022 (9<sup>th</sup> Cir. 2011).

of the copyright owner and had a good faith belief that the material was infringing. A human employee of the online service would then block the file and reach out to the human individual who had posted the file, to let her know the file had been blocked because of a copyright complaint and give her the opportunity to respond with a counter-notice, again under penalty of perjury, that the file was mistakenly identified as infringing. For large copyright owners and large online services, it quickly became impossible for humans to perform those tasks, and they turned to automated solutions. Those solutions were and continue to be buggy. There are widespread documented instances of over-claiming, mistaken claiming, and false claiming.<sup>26</sup> Some of the baseless claims are doubtless due to setting search criteria too broadly in the hope of catching all conceivable instances of infringement. Others may be lodged in bad faith. But some of the errors are inherent in the limitations of current software. Even very well programmed computers can't do everything we might want them to do. Software-mediated solutions have not yet figured out a way to assess the accuracy of a claim to act with the copyright owner's authority. When Viacom sued YouTube for copyright infringement over the posting of infringing clips, discovery revealed that some of the clips Viacom sued over had been uploaded by Viacom employees as part of an effort to generate buzz for the programs.<sup>27</sup> Efforts to use computers to distinguish infringing from fair uses are, perhaps unavoidably, crude.

The computer-mediated solutions are also extremely costly. They were developed at great expense, and the businesses that devised them understandably insist on limiting their use in ways that will allow them to recoup their considerable investments. They are beyond the reach of independent authors and artists and small and nonprofit online services.<sup>28</sup>

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26 E.g., Jennifer Urban, Joe Karaganis, & Brianna Schofield, Notice and Takedown in Everyday practice, UC Berkeley Public Law Research Paper No. 2755628 (2016); Sharon Bar-Ziv and Niva Elkin-Koren, Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown, 50 Conn. L. Rev. 1 (2017).

27 See Broadcast Yourself, YouTube Official Blog, March 18, 2010, <https://youtube.googleblog.com/2010/03/broadcast-yourself.html>; Brief of YouTube in Opposition to Plaintiffs motion for summary judgement, Viacom Int'l v Youtube, 718 F. supp. 2d 518 (S.D.N.Y. 2010), (No. 1:07-cv-02103 ) [[https://static.googleusercontent.com/media/www.google.com/en//press/pdf/corrected\\_opposition\\_brief.pdf](https://static.googleusercontent.com/media/www.google.com/en//press/pdf/corrected_opposition_brief.pdf)]

28 The Copyright Office has been conducting a study of the online safe harbors since 2015, has held multiple public roundtables, and has received more than 90,000 comments. See U.S. Copyright Office, Section 512 Study: Public Comments, <https://www.copyright.gov/policy/section512/>. Many online services have complained about the inaccuracies in automated takedown notices, and suggested that every takedown request should be verified by a human before it is sent. Small service providers and independent artists have emphasized that they cannot possibly afford to use automated solutions for either take down requests or take down responses, and urged that any revision to the notice and takedown regime pay attention to the interests of the individuals who will necessarily continue to rely on humans to use the system. Many of them have a level of comfort with the current

Because the safe harbors in section 512 are not mandatory, they do not prevent service providers and copyright owners from agreeing on alternative procedures and conditions. Many of the larger online services have negotiated direct deals with large content owners that substitute bargained-for terms for some or all of the obligations in section 512, or implement alternative technological approaches to the notice-and-takedown regime. But, the statutory safe harbors have remained especially important for smaller services that don't have the resources to negotiate direct deals. None of the available technological solutions, at least so far, come close to supplying a satisfactory alternative to the notice and takedown regime in the statute.

### *The "value gap"*

The illusory promise of the anti-circumvention provisions enacted as part of the DMCA encouraged copyright owners to delay entering the digital and online markets. Initially, many copyright owners withheld their products while they waited for better encryption to appear. Movie studios and record labels were reluctant to cannibalize their existing customer base, and wary of introducing versions of their products that could easily be copied.<sup>29</sup> When they began to make their works available online, they did so gingerly, offering pallid and overpriced digital services with clunky user interfaces, often constrained by buggy and annoying digital rights management technology. By that time, however, other players had captured a large share of consumers' eyes and ears, and had come to dominate online transactions. Apple, Amazon, Facebook, and Google became providers of online music, books, and video. Soon, those companies had become obligatory partners for content owners hoping to distribute their works online. The content industries faced a market in which they could no longer dictate terms and prices.

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statutory notice and takedown system, and they expressed alarm that a revised system might be less responsive to their needs.

<sup>29</sup> While they were waiting for the perfect encryption, copyright owners sued upstart businesses that dared to offer music or video over the Internet, or even to help consumers do it themselves, to keep the field clear for their eventual entry into the digital market. See, e.g., *MGM v. Grokster*, 545 U.S. 913 (2005); *UMG Recordings v. Shelter Capital Partners*, 667 F.3d 1022 (9th Cir. 2011); *Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Warner Bros. Entm't v. WTV Sys.*, 824 F. Supp. 2d 1003 (C.D. Cal 2011); *UMG Recordings, Inc. v. HummerWinblad*, 377 F. Supp. 2d 796 (C.D. Cal. 2005); *Random House, Inc. v. Rosetta Books L.L.C.*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002); *UMG Recordings v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q. 2d 1831 (W.D. Pa. 2000). See generally, Jessica Litman, *Antibiotic Resistance*, 30 *Cardozo Arts & Entertainment L.J.* 53 (2012).

Online platforms have figured out that they can make more money by selling eyeballs to advertisers than they could by selling movies to viewers or music to listeners. Apple, Amazon, Facebook, and Google then proceeded to become impossibly wealthy.

Copyright owners resent that. They've coined the term “value gap” to describe the injustice of the fact that platforms have too much bargaining power and can therefore shape the terms of copyright licenses to call for lower royalty payments than copyright owners believe they ought to pay.<sup>30</sup> It isn't that platforms don't purchase licenses for the copyrighted content that appears on their services--they do. Because of their market power, though, they have the upper hand in negotiations and can insist on paying lower royalties than copyright owners believe would be fair.<sup>31</sup> Given how much money the big online platforms are raking in, copyright owners figure they ought to be sharing a bigger piece of it.

Some copyright owners claim, and probably believe, that the online safe harbors are what gives these online services their bargaining power advantage.<sup>32</sup> The solution that content owners propose is to narrow or eliminate the safe harbors, so that online services will once again face the threat of strict liability for material that they don't originate or control, even when they don't know and have no practical way to tell whether the content is infringing. That threat, copyright owners believe, will persuade online services to agree to pay more money for the content that they license. I have no basis for assessing whether the threat would work the way

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30 See American Assoc. of Independent Music et al., Joint Comments before the US Copyright Office in re Section 512 Study, No. 2015-7 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-89806>; Warner Music Group, Comments before the US Copyright Office in re Section 512 Study, No. 2015-7 (Mar. 31, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-86022>. See generally Annemarie Bridy, *The Price of Closing the “Value Gap”: How the Music Industry Hacked EU Copyright Reform*, Vand. J. Ent. & Tech. L. (forthcoming 2020).

31 The license agreements are private and commonly subject to non-closure agreements. See Future of Music Coalition Comments, In re Section 512 Study, Docket No. 2015-7 at 12-14 (Feb. 23, 2017) <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90370&attachmentNumber=1&contentType=pdf>. Outsiders aren't in a position to know how those royalties are calculated nor to assess whether some different formula might seem fairer.

32 See Glenn Peoples, “War of Words: Labels and Trade Groups Target YouTube's ‘Value Gap’” Billboard, 13 April 2016, at <https://www.billboard.com/articles/business/7333110/war-of-wordslabels-trade-groups-youtube-value-gap>; see, e.g., Joint Comments of the American Association of Independent Music et. al., In re: Section 512 Study, 31 March 2016, at <https://www.riaa.com/wpcontent/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf>; International Federation of the Phonographic Industry, Europe's Creators, Cultural and Creative Industries' Call to the European Council: Secure the Aims of the Proposed Copyright Directive in the DSM (12 April 2018), at [http://www.ifpi.org/downloads/EU\\_Creators\\_Cultural\\_and\\_Creative\\_Industries\\_Call\\_to\\_European\\_Council.pdf](http://www.ifpi.org/downloads/EU_Creators_Cultural_and_Creative_Industries_Call_to_European_Council.pdf).

that content owners hope that it will work. What content owners are calling the “value gap,” though, is really just a disparity in bargaining power. This is a competition problem rather than a copyright problem. Weaponizing copyright law won't solve it.

The European Union recently adopted a new copyright directive<sup>33</sup> that responds to the so-called “value gap.” Article 17 of the directive calls for member states to amend their copyright laws to impose liability on large online services if they host unlicensed copyrighted content. Support for the new provisions was fueled by arguments attacking big American companies for exploiting their less wealthy European counterparts. Proponents of the new standard claim that

[T]he draft directive will impact large online platforms and news aggregators like Google's YouTube, Google News or Facebook, making it essential for them to correctly remunerate artists and journalists whose work they monetise.

Large online platforms and news aggregators will have more reason to strike fair remuneration (licensing) agreements with artists and media houses who would have identified themselves beforehand as the owners of a piece of work. A platform will be further incentivised to strike such agreements because, in the absence of them, it would be directly liable if it hosts a piece of work with an unpaid licence fee.<sup>34</sup>

Member states are obliged to implement article 17 by June of 2021. How they might manage to do so is still under discussion.<sup>35</sup> I am aware of no feasible proposals for complying with the new standards that will continue to allow service providers to offer the services that Europeans and Americans have come to count on. There is also some danger that implementation of article will enable Google, Facebook, and other large platforms that can afford to spend a lot of money on compliance to consolidate their competitive advantages and raise

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33 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, art. 17, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>. See generally, Annemarie Bridy, The Price of Closing the “Value Gap”: How the Music Industry Hacked EU Copyright Reform, Vand. J. Ent. & Tech. L. (forthcoming 2020).

34 See European Parliament, Press Release: Questions and Answers on the New Copyright Directive (March 27, 2019). <https://www.europarl.europa.eu/news/en/press-room/20190111IPR23225/questions-and-answers-on-issues-about-the-digital-copyright-directive>

35 See <https://ec.europa.eu/digital-single-market/en/stakeholder-dialogue-application-article-17-directive-copyright-digital-single-market>

new entry barriers for their potential competitors.<sup>36</sup> We won't know how likely it is that that risk will materialize until we see how member states choose to implement article 17.

As the Senate considers whether the United States should follow Europe's lead in closing or narrowing the online service safe harbors, I would urge Senators to pay particular attention to the interests of independent authors and small online services, who won't be in a position to make private deals contracting out of any new rules they find it impossible, or even very difficult, to follow. Large copyright owners and large online services can resolve their differences by negotiating with each other. Just as the safe harbors Congress enacted 22 years ago were designed in the course of negotiations among interests they would affect, any legislative revision of the rules is almost certain to result from comparable negotiations. It is vitally important that the interests of small services and independent authors and artists, which often diverge substantially from their larger and wealthier counterparts, be protected in that process.

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<sup>36</sup> See, e.g., Bridy, *supra* note 30.