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SECTION 512 STUDY ROUNDTABLE

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MONDAY
APRIL 8, 2019

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The Section 512 Study Roundtable met in the Montpelier Room, 101 Independence Avenue, Washington, D.C., at 8:50 a.m.

PRESENT:

KARYN A. TEMPLE, Register of Copyrights and Director of U.S. Copyright Office
REGAN SMITH, General Counsel, U.S. Copyright Office
KEVIN AMER, Deputy General Counsel, U.S. Copyright Office
MARIA STRONG, Deputy Director, Policy and International Affairs
KIMBERLEY ISBELL, Senior Counsel, Policy and International Affairs
BRAD GREENBERG, Counsel, Policy and International Affairs
EMILY LANZA, Counsel, Policy and International Affairs

ALSO PRESENT:

ERICH C. CAREY
KEN HATFIELD
MIKE LEMON
MIKEY OSTERREICHER
JENNIFER PARISER
MEREDITH ROSE
AWS SHEMMERI
RASTY TUREK
PROF. REBECCA L. TUSHNET
BRIAN WILLEN
ROBERT WINTERTON
JONATHAN BAND
SOFIA CASTILLO
CALEB DONALDSON
BRIAN CARVER
STEPHEN CARLISLE
KENNETH L. DOROSHOW
DOUGLAS T. HUDSON
KEITH KUPFERSCHMID
ARTHUR LEVY
PETER MIDGLEY
SASHA MOSS
MARY RASENBERGER
RICHARD JAMES BURGESS
ALEX FEERST
DEVLIN HARTLINE
CATHERINE GELLIS
ERIC GOLDMAN
JOSEPH GRATZ
JARED POLIN
TAMBER RAY
ROBERT SCHWARTZ
CHRISTIAN TRONCOSO
KATE TUMMARELLO
PING WANG
NANCY WOLFF
STAN ADAMS
ERIC CADY

ALSO PRESENT: (CONT.)

DANIELLE COFFEY
ALEC FRENCH
ASHLEY FRIEDMAN
JOSHUA LAMEL
CARLO SCOLLO LAVIZZARI
STAN MCCOY
CORYNNE MCSHERRY
KATHERINE OYAMA
CHRISTOPHER RANDLE
STEVEN ROSENTHAL
MATTHEW SCHRUERS
LUI SIMPSON
SHERWIN SIY
ABBY VOLLMER
RACHEL WOLBERS
JANICE PILCH
VICTORIA SHECKLER
GIUSEPPE MAZZIOTTI

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P-R-O-C-E-E-D-I-N-G-S

8:54 a.m.

MS. STRONG: If everyone is just about ready. Everyone's about ready, great. So with great pleasure I'd like to introduce the Register of Copyrights, Karyn A. Temple, to launch our roundtable this morning.

(Applause.)

MS. TEMPLE: Hello, thank you. There are many familiar faces in the audience, and thank you Maria Strong. Actually, I think this is my first formal event as Register of Copyrights, so it's wonderful to be here today.

(Applause.)

MS. TEMPLE: I just wanted to take the time to welcome you to this event. We look forward to really hearing from all of you in terms of your perspectives. As many of you know, we had our last public roundtable way back, I think, in 2016.

So there have been a number of developments both on the domestic and on the international side that we really want to make sure,

as we continue our research and actual drafting of our report and recommendation, that we are aware of. So we wanted to take the time to really go over any specific developments that you think would be important for us to know that have happened between 2017 and the current day.

We look forward to a very energetic conversation. I know when we had our roundtables in 2016, my former colleague, Jacqueline Charlesworth, kind of coined the term that we were talking in terms of a tale of two cities, because we really had very, very different perspectives in terms of how the DMCA was working or not working.

And one of the questions we would like to discuss today is whether those perspectives have changed at all, whether there have been more developments on the voluntary side, more case developments, more international developments where maybe we don't have the stark differences that we've had in the past.

So again, I would welcome you. We have over 50 participants I believe in the course of the

day. So we look forward to hearing from each one of you in terms of how your perspectives may have changed since 2017, or obviously if your perspectives have not changed, hearing that as well. So thank you and we look forward to the discussion, and with that I'll turn it back over to Maria.

(Applause.)

MS. SMITH: So welcome everyone. Karyn gave a good introduction to the topics you're supposed to be hearing. So I will provide a little bit of the housekeeping orders. Just so you know, I think everyone who is participating, your mics are now on, and I think maybe starting by turning them off would be a good idea for the court reporter.

We will call on people by tipping your placards up, at which point turn your mic on. If you can remember to turn it off, I think it will help the audio. If there are those in the audience who wish to speak on other issues, we're going to have an open mic session at the end of today, and right by the water over there is a sign-up sheet.

So my name's Regan Smith. I'm the

general counsel of the Copyright Office, and I'll ask my colleagues to introduce themselves.

MR. GREENBERG: I'm Brad Greenberg. I am counsel for Policy and International Affairs.

MR. AMER: Kevin Amer, Deputy General Counsel.

MS. ISBELL: Kimberley Isbell, senior counsel for Policy and International Affairs.

MS. STRONG: I'm Maria Strong, Deputy Director for Policy and International Affairs.

MS. SMITH: So this is Session 1, which is about domestic case law. We're looking to find a way to talk about judicial decisions that have occurred since the close of the written comment period in February 2017, as well as the effects on business or user practices in your experience.

So I think we'll start with everyone going around stating your name, your affiliation and maybe very high level, 45 seconds, your view of what you think are the most important issues. Mr. Carey.

MR. CAREY: Sure, thank you. Good

morning. I'm Erich Carey here from NMPA. I'm here on behalf of the music publishing and songwriting industry, and I'm grateful to provide our perspective and developments concerning the section 512 safe harbors.

As the Copyright Office notes, the *BMG v. Cox* case highlights an important development from our perspective, namely the opportunity for the successful enforcement of the plain language of the DMCA, where a service has enabled repeat infringers in massive scale on its own network.

But for present purposes, this has not changed the music community's perspective on the DMCA. Enforcement in the *BMG* litigation involved the most extreme of circumstances. Millions of notices sent, an ISP failing to enforce its own 13 strike policy, at least $8 million in attorney's fees to bring the case to judgment.

This is not a feasible mechanism for enforcement. Indeed, this is a heavy burden for all of our members who run the gamut from major music publishers to individual creators. On a daily

basis, we continue to see an enforcement system gamed not just by whack-a-mole, but with the whole fleet of amusement park gimmicks used to confuse notice senders.

On the ground level of anti-piracy enforcement, the system shows itself to be rigged time and again. In its original embodiment, the DMCA was intended to help the development of a fledgling internet. Congress envisioned a future where "service providers and copyright owners would cooperate to detect and deal with copyright infringements." That's from the House and Senate reports accompanying the DMCA.

Now 21 years later, the DMCA has helped to create some of the world's most powerful companies on Earth, yet the onus continues to be on copyright owners to police the behavior of these tech giants. Time is overdue for recalibration. The building has been built. It is time for scaffolding to come down and traffic to be restored in the name of a more vibrant city.

While I appreciate for administrative

reasons the divide of panels between domestic and international views, I would encourage the office to not be siloed in its perspective or conclusions. The legislative process represents --

MS. SMITH: Mr. Carey, I may need to ask you wrap to it up, because I think we have a long panel of, you know, exceptional colleagues and we're going to have to limit everyone to 45 seconds.

MR. CAREY: Great.

MS. SMITH: Okay, thank you.

MR. CAREY: Represents a great opportunity for development and consideration of all the issues we'll be talking about today. Thank you.

MS. SMITH: Thank you. Mr. Hatfield.

MR. HATFIELD: I'm Ken Hatfield representing the Artists Rights Caucus of Local 802, the American Federation of Musician's largest chapter. We view section 512 as an unfair loophole that permits service providers to profit from mass infringement of our rights with near impunity.

The case law over the past three years

does little to change that, because litigation alone will not rectify the flaws in the law itself. We feel that the safe harbors adopted at the dawn of the commercial web have been implemented or interpreted in ways that are at odds with the stated intentions of Congress.

Over 20 years after President Clinton passed the -- signed the DMCA, neither the active cooperation between the platforms and the creators nor the standard technical measures envisioned by Congress have materialized. Reform of section 512 is needed to restore the rights and livelihoods of musicians. Thank you.

MS. SMITH: Thank you. Mr. Lemon.

MR. LEMON: Hi. My name's Mike Lemon, and I'm with internet Association. IA represents over 40 of the world's leading internet companies, and is the only trade association that exclusively represents leading global internet companies on matters of public policy.

We believe that the DMCA has created incentives that drive success for content and for

the internet industry. The relationship between the internet industry and content is continually shifting, and the last three years have been no different.

The DMCA has created the right incentives to increase collaboration, increase licensing, increase driving folks who use internet platforms towards content, and we think that the DMCA should continue to be allowed to do that. Thank you.

MS. SMITH: Thank you. Mr. Osterreicher.

MR. OSTERREICHER: Good morning. I'm Mickey Osterreicher, General Counsel for the National Press Photographers Association. Because online traffic is image-driven, a recent study estimates that more than 2.5 billion visual works are stolen every day, with the U.S. accounting for 23 percent of those infringements.

Faced with overwhelming litigation costs, a takedown notice may be the only alternative photographers have to combat these rampant

misappropriations, albeit without compensation. But those notices are encumbered by *Lenz* fair use repercussions, *Myeress* knowledge considerations, counterclaim requirements and whack-a-mole staydown nightmares.

We welcome another robust discussion of domestic safe harbor issues, and believe the newly-established EU obligation for OSPs could help inform our conversation. Thank you for inviting me. I look forward to a productive day.

MS. SMITH: Thank you. Ms. Pariser.

MS. PARISER: I guess if you were looking to find out whether anything's changed in the last two years, we could probably all go home now. But since I went to the trouble of writing this out, cases in the last two years around repeat infringer have been promising.

But overall, piracy continues to devastate the content industries. I'm sorry, I forgot to introduce myself. I'm Jenny Pariser from the Motion Picture Association. The *Cox* and *Grande* cases have been welcome but rather obvious outcomes

given the facts in those cases, while *Mavrix* and *Zazzle* are of limited applicability given the limited facts of those cases.

Meanwhile, the real story is about the fact that the notice and takedown cases have quietly marched on without any recognition of red flag notice, representative list. The 9th Circuit even recognized that effective red flag notice is all but gone from the law.

And from our perspective and meanwhile the service provider definitions have expanded to encompass every type of internet actor around. Accordingly from our perspective, it's still pretty much all bad news.

MS. SMITH: Okay, thank you. Ms. Rose.

MS. ROSE: Hi. I am Meredith Rose from Public Knowledge. I appreciate the opportunity to participate. Section 512 is a central part of a vast and delicately balanced body of modern copyright law. We can no more sever or upend 512 with a modern copyright than we can sever section 1201 or any other part of the DMCA, because without

it the system collapses wholesale.

Given this, we must reckon with the intersection of broadband providers specifically, section 512 and the Supreme Court's 2017 decision in *Packingham v. North Carolina*, which recognized a First Amendment interest in being able to speak and to be spoken to online.

Over 50 million homes in America have access to only one broadband provider, and their First Amendment interests cannot be curtailed based upon unverified, unadjudicated accusations alone of copyright infringement.

Packingham requires that when discussing broadband providers, who act as gatekeepers to the entire internet, we must carefully reexamine what constitutes appropriate circumstances for account termination, and how that in turn impacts the knowledge standard for secondary liability. Thank you.

MS. SMITH: Thank you. Mr. Shemmeri.

MR. SHEMMERI: Good morning. My name is Aws Shemmeri from ImageRights International, and

in our perspective the *LiveJournal* decision has certainly been a welcome one. It's a step in the right direction, and it shows the courts increasing willingness to scrutinize relationships that ISPs have had with their user communities.

Increasingly, many ISPs have been taking on a more interactive and curated relationship with their users, to their benefit and to their profit, and it's something that left out to many of the content generators who create this content.

And so there's still a circuit split, and unfortunately the Supreme Court hasn't resolved it, and so I think case law alone is not going to resolve this issue. Thank you.

MS. SMITH: Thanks. Mr. Turek.

MR. TUREK: Hi, Rasty Turek for Pex. This is my first panel, so I don't know about the case law yet, but I think that the technical challenges pose that rightsholders bear the costs of the takedowns. The true challenge is even if there is a technical solution to all of these, the

platforms essentially start pushing against any active measurements, meaning crawling or anything else.

And so they will actively try to prevent any actions from the rightsholders to be able to identify their content. As such, I think there is a disbalance, or the platforms have to be more accountable for the whole processes, or have to be more forced to be open-minded or forced to be open to the rightsholders to be able to identify their own rights at scale.

MS. SMITH: Thanks very much. Professor Tushnet.

PROFESSOR TUSHNET: Rebecca Tushnet, Harvard Law and the Organization for Transformative Works. So the case law tells us the same thing as the UC Berkeley study of takedown practices, which is that there are many successful models out there, and even very big sites like ours, which have millions of users, millions of works, can receive very few legitimate takedowns.

Amazon's Kindle Worlds, for example,

mostly receives anti-competitive takedowns from competing writers trying to get books off the list. Reflecting the difficulty of fighting back at the individual level, only one 512(f) case of which I'm aware called *Quill Ink* has been brought based on a Kindle Worlds takedown.

But generally 512 and its implementation by different platforms have encouraged an explosion of expression and, by contrast, rules written as if YouTube was the model would crush the alternatives and ensure that there was only YouTube.

MS. SMITH: Thank you. Mr. Willen.

MR. WILLEN: I'm Brian Willen, a partner at Wilson Sonsini. I've litigated DMCA cases for a decade, and I also advise a number of online services, large and small, about the safe harbors and how to comply with them.

So I'm here to tell you that the DMCA works and continues to work. The basic bargain that the statute strikes is the right one. It encourages and it actually fosters cooperation between

platforms and rightsholders. The statute puts real obligations on platforms, while keeping the main burden of enforcement where it belongs, on copyright owners who have the best knowledge of their works and who benefit the most from them.

Now while I can quibble about individual rulings, the courts are getting it right. Now in particular I would point everyone to the recent 9th Circuit decision in *Ventura v. Motherless*, which in my mind is a model of DMCA interpretation.

As a result of both the statute and the case law, legitimate services that have real social value, that are home to original works and that have meaningful anti-piracy policies have been protected by the safe harbor and thrive, while at the same time piratical services, which mainly encourage or induce infringement, have faced the consequences.

MS. SMITH: Thank you. Mr. Winterton.

MR. WINTERTON: I'm Robert Winterton. I'm representing NetChoice here today. Section 512 was intelligently created to apply copyright

responsibilities to the least cost avoider, the owner of the content. 512 avoids the unfair obligation for every platform for free speech to be aware of all copyrighted content, even if it is not registered with the Copyright Office.

We've seen a cottage industry grow to help copyright holders protect their property with services like MarkMonitor. At the same time, 512 has empowered the growth of platforms for artists, creators, and all Americans wishing to express themselves. Without 512, we would see significant de-mediation of online platforms, unlocking of large companies that might have the manpower to -- that can only have the manpower to monitor all content.

While the notice and takedown approach of 512 strikes the right balance, we are seeing efforts internationally to flip 512 on its head. Take for example Europe's recent article 13, which essentially requires any website with a comments section to note every copyrighted content in existence.

MS. SMITH: Perhaps they should take that one on the international panel.

MR. WINTERTON: Yes. I'm not going on too far.

MS. SMITH: Okay.

MR. WINTERTON: To protect American innovators, artists and platforms in the United States should take the lead in opposing these efforts to undermine creativity. This protection will come in the form of bringing 512 around the world. The U.S. Copyright Office should work with the White House and Congress to incorporate 512 into trade agreements.

Now is our time to act to stymie attempts to undermine free speech and creativity in the United States.

MS. SMITH: Thank you. So let's start talking, just diving into some of the cases and then we can see where that takes us. So Ms. Pariser, you mentioned repeat infringer had seen something evolve.

But is that a bright spot from your

perspective? Do you think that *Cox* or *Grande* or *Motherless*, do you agree with Mr. Willen that they've gotten this right?

MS. PARISER: I'm going to distinguish *Cox* and *Grande* on the one hand from *Motherless* on the other. No question, *Cox* and *Grande* were correctly decided as far as they went on the repeat infringer point. I'm going to leave aside the 4th Circuit's decision around contributory liability and the jury instruction. We take some issue with that part of the holding.

But limiting ourselves just to the repeat infringer aspect of the decision, sure, those are bright spots. But what's curious about it is why are they so bright. A court said the DMCA actually means what it says, and we all threw ourselves a party because for the last ten years that hasn't really been happening.

And instead, courts have said representative list, that Congress didn't really mean that. Red flag notice doesn't really mean that.

So finally the courts have said, repeat infringer means that if you get multiple notices for the same user, you need to do something about it. You need to have a policy and you need to reasonably implement it, and that policy needs to end in terminations. Those decisions are correct, yet frankly somewhat obvious.

Motherless is sort of a mixed bag, I would say. We take issue to a large extent with the notion that any kind of policy that a service can dream up, written, unwritten, no clear rules as to how many notices need to be sent, what termination means, what, how the operator is going to implement that and indeed, the most troubling aspect of it is that the site operator doesn't even need to keep the notices or keep track of them.

The facts of *Motherless* is that the operator simply said I -- it's like that scene in *Guys and Dolls*, I remember where the spots are on the dice. That's what the guy said. He said, you know, I kind of remember how many notices I got on a given person, and so I'm going to terminate them.

The good news is that, you know, he actually terminated some 2,000 individuals. I guess that's not good news, but in the facts of the case that actually happened, so that's a welcome hallmark.

MS. SMITH: Okay, thank you. So again, if you'd like to speak and comment upon this, you can tip your placard up. I think I did forget to mention if you have not signed a video release, you will notice the camera is there out in the back. Professor Tushnet.

PROFESSOR TUSHNET: Thank you. So I think this feeds really well into my point about the massive variety of sites out there needing and relying on the DMCA. So *Motherless* is a one-person operation, and its policies should not have to be like YouTube's policies.

The key flexibility of the DMCA, which I think the *Motherless* court recognized, is that it is not right to require the same things with respect to the clarity of the policies, the recordkeeping and so on, right.

So this is a guy who, you know, if a server goes down, all his records are gone. Should he lose all DMCA cases in the future? I think that's an important consideration going forward.

MS. SMITH: So do you think the courts have sort of harmonized that by allowing, you know, *Motherless* to implement a different type of policy so long as it's implemented, compared to, you know, the way the *Cox* or the *Grande* courts are looking at those larger companies?

PROFESSOR TUSHNET: So I think the *Motherless* court was absolutely correct to nature of the specific business. The other thing I would mention is also, you know, we see a lot of variety in the kinds of sites. So our site, although very large relatively, does not get a lot of DMCA notices because that's not the kind of thing that people post on it.

So when we talk about sort of blanket obligations and want to keep in mind that even very large sites may not be the kind of environment that you're hearing about from some of the other people.

MS. SMITH: Thank you. Mr. Willen.

MR. WILLEN: Thank you. Just picking up on what Professor Tushnet said, I think the important aspect of *Motherless* is recognizing what I think is clear, at least from the language of the statute, which is that this, especially when we're talking about repeat infringer policies, we're not talking about a one-size-fits-all policy.

"Appropriate circumstances" is the language that Congress used. The legislative history supports this. The idea is that you don't want to have a straightjacket when it comes to thinking about what's appropriate for a given site, the size of the site, the nature of the site, the nature of the content, the nature of the user base.

All of these things are critical in thinking about what appropriate circumstances are.

MS. SMITH: Do you think there's a bare minimum now and within the courts of whether a repeat infringer policy should be acceptable?

MR. WILLEN: Well, I mean I think obviously a lot of courts and a lot of policies have

focused on strikes. They're assigned based on DMCA notices or the equivalent of DMCA notices. So I think that creates a clustering in the way that -- I mean I represent, as I said, a lot of small platforms and so that's --

MS. SMITH: Big platforms too, right?

MR. WILLEN: Yeah, for sure. So but even within a strike's world, a three strikes world, a two strikes world, whatever --

MS. SMITH: Thirteen.

MR. WILLEN: Thirteen. Well I mean, but I think that -- I mean look. I think *Cox*, at least on repeat infringers, is probably right. Those facts are really bad, and it seems that they were deliberately not trying to terminate people. So fine.

But in terms of what their policy was, I think you have to understand that in the context this is an ISP. When somebody is terminated from an ISP, the consequences are quite severe and drastic.

MS. SMITH: This is Ms. Rose's point,

right?

MR. WINTERTON: Right. I mean different from losing your rights to an individual, you know, an individual service where it's just a 512(c) service. So all of those things matter.

One other thing I would say is the importance, in thinking about repeat infringer policies, of copyright education. So this is something I talk to my clients a lot about.

You know, the idea of repeat infringer is you want to get the bad users off the site. There's a lot of users who may put up things that somebody says are infringing that are not trying to engage in piracy.

They are fans of work. They don't know the rules, and part of the really important aspect of what you can do as a platform with a flexible repeat infringer policy is use a first strike or maybe even a second strike as a vehicle for educating users about the rules. So it's really important in implementing the policy not to lose sight of that.

MS. SMITH: Thank you. Mr. Carey, did

you want to engage with that?

MR. CAREY: Sure, and I wouldn't disagree with some of the remarks that were just made, specifically going back to the idea of appropriate circumstances with respect to the infringer policy.

And as Ms. Pariser said, you know, again what we've seen in these cases is the statute actually being interpreted according to its plain language and giving the opportunity to exercise that right.

I can speak a little bit to the perspective of the industry on bringing some of these cases as practicality in a larger sense with an entirety of section 512, whether this is a reasonable means for vindicating and enforcing our rights, you know. You know these cases, as I mentioned earlier, were thought of for many years and had a difficult uphill battle to try and just get these off the ground in the first instance.

Having seen them in litigation on the *Grooveshark* case for instance, as was the

predecessor, but is a tremendous amount of effort on the content owner to try and reverse engineer an ISP or a service provider's own infringer policy. Requires massive amounts of discovery, a massive amount of kind of tech knowledge.

Then, you know, once you get to that point, you're lucky to be able to try and litigate.

MS. SMITH: So do you agree that, or it sounds like you disagree that, the burden should be on the copyright owners more squarely in the DMCA?

MR. CAREY: I think I disagree that the burden should be squarely on copyright owners. I think there should be a --

MS. SMITH: And do you think these cases have helped shift that at all, at least for the repeat infringer?

MR. CAREY: I think what these are -- cases represent are successful efforts at enforcement. I think it's -- I don't see them as necessarily shifting balance, but just recognizing the proper balance and giving an opportunity to be able to enforce rights according to what the statute

intended.

In the *Cox* and *Grande* cases, if these circumstances didn't constitute a failure to enforce a repeat infringer policy, then we don't know what would.

MR. GREENBERG: But I mean you said these aren't a shifting of the balance but a return to the proper balance. Isn't that in effect a shifting balance or swinging of the pendulum back towards what you think Congress intended more, at least in the area of repeat infringer?

MR. CAREY: I wouldn't deny that these are positive developments, right? They, you know, we've seen our rights vindicated and we've seen, you know, we've been given a tool on these cases. But that doesn't mean that the entirety of the mechanism for enforcement is -- has completely shifted the balance.

MS. SMITH: Okay. I'm going to call on the people with their placards up and then try to move to another topic after that. So Mr. Osterreicher, do you agree this has become an

effective enforcement tool?

MR. OSTERREICHER: My answer is going move me to a different case. Would that be appropriate now?

MS. SMITH: What case are you moving to?

MR. OSTERREICHER: So I'd like to talk a little bit about *Fourth Estate*, and the implication --

MS. SMITH: I don't think we're going to talk about *Fourth Estate* right now. Let's try to wrap up this topic. But also when you do talk, if you can tip up the mic. I think Mr. Hatfield is next.

MR. HATFIELD: I am listening to this, and forgive me, I'm not a lawyer. But when you're talking about we have to have one set of standards for somebody that's an individual that runs an ISP on their own, that doesn't sound unreasonable to me.

What sounds unreasonable is that when that lowest common denominator is then applied to the giants. I think the solution should be focused more on things like upload filters. You want to put

the onus on the copyright owners. In the case of music, make sure that all the music has ISRC codes or something similar.

The Music Modernization Act, under the mechanical licensing collective, if your music doesn't have an ISRC code you're not going to get paid. There's incentive for the musicians to take responsibility, and I think we should. I'm sure that's going to apply to other forms of copyright protected material.

But the bottom line is we created the work. We not only spent the time and effort to do it, but if you do the kind of stuff I do, which is like live musicians playing acoustic instruments together at the same time, and you live in an urban area, there aren't any recording studios left. It's incredibly expensive.

My last project was a simple jazz project. It cost me $30,000 just to pay the musicians and the studio, and I get a statement from a streamer for a quarter of a million streams and it's a joke. It's less money than I get for selling

one CD live.

The point is that all the courts can do is interpret the law. There's a fundamental flaw in the way in which 512 has been implemented, which is that the onus is supposed to fall -- the interpretation of the large or the people that are on the other side, for lack of a better way of characterizing it, is that the onus should be on us.

There are things out here like Cloud Flare that gives complete anonymity to the user. How can we possibly chase them? When you look at the cost of litigation, just sending a simple threat letter, a takedown to somebody costs between $1,500 and $3,000.

When there are studies that say that a court case can cost from $385,000 to up to $2 million, and that's even an old estimate from the *Columbia Law Journal*, it's virtually impossible for musicians. Some musicians don't make that in like a decade or a lifetime.

So what happens is it's like when you

delay the justice because it costs so much money, you kill people like myself, musicians. Any musician that releases a record will tell you that the prime earning time is the first 18 months.

I don't know any cases that come to court that get resolved in 18 months. But meanwhile, people that are infringing our copyright are making money from that, and they use that money against us to hire better lawyers than we can hire. How can that possibly like be a fair system? I'm sorry, I've gone --

MS. SMITH: No, those are a lot of issues. But in terms of 512 like, you can -- is it --

MR. HATFIELD: 512's not, 512 has been either implemented or interpreted in ways that basically create a fertile ground for dragging the cases out. So that it basically denies copyright owners that are indie, indie musicians or indie anything, film makers, it denies us any real semblance of justice. We can't possibly afford it.

I mean I'm talking about a specific case

because I'm not supposed to. I'm involved in a -- I was put into a class action lawsuit -- no, this case I'm not supposed to talk about.

MS. SMITH: Okay. I don't want -- and I don't want you to get on the record saying anything you're not supposed to talk about.

(Simultaneous speaking.)

MR. HATFIELD: I work -- forgive me. I'm a jazz musician. What's the thing, this Shelly Mann thing, "I'm a jazz musician. I never play the same thing once." So you know, I'm improvising here, so forgive me. But the point is is that we can't possibly chase the individuals.

First of all if you catch them, they don't have any money. The idea is that the people that are profiting from it should be held to at least the same level of responsibility that they're demanding of us, which is if you profit from my work, give me an equitable percentage of that. Don't tell me that well technically there's this loophole over here that says --

MS. SMITH: Okay.

MR. HATFIELD: And that's what 512 is. It's a loophole.

MS. SMITH: Thank you, Mr. Hatfield. We appreciate the improvisation and all of your points.

Ms. Rose, does that move you at all, talking about the difficulties of enforcement, if you wanted to engage maybe on the user side, the First Amendment concerns you raised?

MS. ROSE: Yeah. So I wanted to sort of bring this back and just put this out there for further discussions. I think one of the most complicated parts of 512 is that it is applied to both broadband ISP providers and online platforms, and the stakes in both of these, as has been raised before, are very, very different levels of stakes.

And okay. Anyone who's familiar with the work of Public Knowledge will say that it is not often that we go to bat and say that ISPs, you know, are like we agree with them on something. But the reality is that it is the policy of the United States government to increase access to the

internet.

ISPs and broadband providers are the gatekeepers not just to social media, which was the degree of access at stake at *Packingham*, but to the entire internet. To eject someone from that network is a very, very serious implication of core First Amendment rights that have been recognized by the Supreme Court.

So I just urge folks when having this discussion, to be very mindful that the, you know, stakes of being punted off of YouTube and the stakes of being punted off of Comcast, when Comcast is your only broadband service provider, are two very different sets of stakes.

MR. AMER: So that brings up an important point I think, and one that came up certainly during the last roundtables, this idea that there's an important distinction between 512(a) service providers, conduits on the one hand, and for example 512(c) service providers.

And in the last roundtables we heard a lot -- this is pre-*Cox* obviously. We heard from

512(a) conduit service providers that their practice at that time was to reject notices that they would receive that were submitted pursuant to 512(c).

Cox obviously casts some doubt on that practice. I wonder if you know or any of the other panelists have a sense of the extent to which those practices have changed in light of *Cox* and the other cases?

In other words, how in your experience do content owners today go about notifying conduit service providers that infringement is occurring on their services? So has that changed in the wake of *Cox* and other cases?

MS. ROSE: I do not know. I don't have any service-specific knowledge on the content end about how the notices have been handled since then.

MR. AMER: Anyone else have insights on that?

MR. CAREY: There's just general awareness that practices have changed in response to the decisions in *Cox*. Obviously, there's

continued litigation on this front, so I think we'll continue to see how the trend evolves. We have the *Grande* case and the *Charter* cases now being litigated. But there's a general awareness that the policies having changed.

Particularly in these cases, it goes to whether this is an effective means of enforcement on a day-to-day basis. If, you know, for instance ISPs learn from these cases, implement effective repeat infringer policies and, you know, we're still trying to figure out how best to cooperate and restore this balance that we've now talked about.

MS. ISBELL: Okay. I just want to follow up a little bit with Ms. Rose. You've indicated that *Packingham* indicates that there's a First Amendment interest in being able to get onto the internet. Do you see terminations pursuant to a repeat infringer policy being state action?

MS. ROSE: So I think that there's -- I think -- so I think that there is some -- there is obviously, it is not state action directly. It's not a statute coming down and saying you absolutely

must, but you must in order to avail yourself of this 512(i) safe harbor.

I think that as a practical matter, this becomes equivalent to state action in the context that, you know, the potential damages for secondary liability for copyright infringement are so massive that the natural unnecessary reaction is to say seek a safe harbor.

MS. ISBELL: But what is it as a legal matter?

MS. ROSE: What's that?

MS. ISBELL: You said "as a practical matter." As a legal matter, do you think it's tantamount to state action?

MS. ROSE: No. I think that there -- I think that there is some gradation there. Obviously, this is, you know, in the case of *Packingham* it was a specific statute coming from North Carolina that says if you are on the sex offender registry, you may not access social media as defined with anything with a comments section. And that was a specific state bar.

I think we are, you know, *Packingham* came up two years ago. I think the degree of what kinds of safe harbors and what kinds of statutes and legal requirements constitute state action is something that we are going to be seeing a lot of litigation over in the coming years. So I think this is very much an open topic.

MR. GREENBERG: You said there's a gradation, but then where would you put voluntary measures on that, which are negotiated in the shadow of 512?

MS. ROSE: I think that those certainly raise policy concerns at a very minimum, given that we, you know, the federal government has set a policy of increasing access to the internet rather than decreasing it, and to only -- specifically to only terminate access or prohibit access in very extreme circumstances.

I mean in the case of *Packingham*, it was someone who was on the sex offender registry for child pornography, and that particular trigger for the statute was not considered sufficiently grave

to completely eliminate his First Amendment interest in being able to access the internet.

So the short answer is I think this is very much an area that is in flux and that we are going to have to watch as it goes through, and how this potentially impacts 512(i) safe harbors in the context of ISPs and broadband providers.

MS. SMITH: Okay, thank you. Professor Tushnet, did you want to respond on this issue?

PROFESSOR TUSHNET: I did, thank you. I've actually written a little about the state action question in this context -- in the intermediary liability context.

And so more than I can say here, but it's been clear since *New York Times v. Sullivan* that the scope of the rights the state enables have First Amendment implications, because the judiciary actually counts as a state actor for state action purposes.

So you know, I actually refer you -- I've written a longer paper about it, but I do think it -- that you can't just say it's private action.

Thank you.

MS. SMITH: Thank you. Ms. Pariser, did you want to add to that, and then I think I do want to move next to 512(c), we'll get out of the ISP space and talk about moderation in the *LiveJournal* case.

MS. PARISER: Yeah, just briefly. Touching on a few points that have been made, we don't disagree that an appropriate repeat infringer policy indeed takes note of the statutory command that the termination be in appropriate circumstances, a phrase that helps teach that different, can encompass not just what how many strikes, the nature of the infringement but also the nature of the service.

We don't disagree that different types of services, different types of providers can have different types of policies, provided that they are actual policies and not pro hoc made up ones that, you know, don't really pass muster. On the First Amendment consideration, you know, it's our position that a repeat infringer obligation does

not implicate First Amendment concerns because there is no state action.

Moreover, unlike in *Packingham*, termination from -- yes, there are some rural areas in the United States where perhaps a single internet provider is available. But in general, termination from one ISP is not the death knell to one's internet connectivity.

MS. SMITH: Thank you. So moving on to the *Mavrix* case, and this was a website where volunteer moderators looked for whether or not posts were new and exciting celebrity news, and over two-thirds of comments didn't cut it. Did that case some out the right way? Does that have meaningful import into section 512 in general? Mr. Shemmeri?

MR. SHEMMERI: I believe so. What was rather curious about the case, prior to the appeal and the holding, there wasn't a lot of success on plaintiff's side for appealing such decisions, unless we're talking about an ISP that's particularly pirate-oriented if you will.

You know, this case, the decision which

came right on the heels of *BWP* I believe by a number of months, which held quite differently, where some users were deemed independent contractors and not acting on behalf of the ISP, I think *LiveJournal* rightly held that many of these sites that have editorial like posts, where they have some staff uploading their own material.

They're employees and they're considered staff of the ISPs, they have this rather intricate relationship with their users in which they are curating the content. They are seeing to it that the content is favorable and worthy of generating profit on their own.

And so to kind of echo on your point, Mr. Hatfield, sites like *LiveJournal* they are profiting from this content, and there is some sort of review. So it's just natural that they didn't enjoy, if you will, 512 protections.

MS. SMITH: Mr. Willen, do you agree? Do you think cases like that are helping build out the financial benefits standard or ability to control through moderation? Does it matter that

they were, you know, volunteers or volunteers applying the standards set by the site?

MR. WILLEN: Yeah. Well let me just sort of step back and I think that there's sort of two issues. So one is the question of at what point are sites looking at and potentially reviewing or curating content? And the concern that the *LiveJournal* case raised was that any sort of pre-upload review or moderation could potentially take you outside of 512(c).

I think that was probably a misreading of *LiveJournal* at the time, but I think the decision in *Motherless* that followed *LiveJournal*, also from the 9th Circuit a few months later, very helpfully clarifies that services can do a pre-upload review and moderation of content, in particular look for infringing material, illegal material, material that doesn't fit within their service and not --

MS. SMITH: But what do you mean by the material that doesn't fit within your service? In *Motherless*, it was everything legal stays. So that, you know, seems to kind of make sense under

512(m). But the court said well, we don't know, you know, if one of you is going to kick out the cute cat videos, which certainly would make me not watch that site. But you know, would that have made a difference?

MR. WILLEN: So I mean I don't think it would have. I mean, you know, the court, there was a characterization of everything legal, everything that is legal stays. I don't think actually that was what *Motherless* was doing. There was certainly some stuff that wasn't illegal under U.S. law that they were allowing up on the site.

But in any event, I mean I think the real point is so -- and this is where I think the intersection of section 512 and section 230 is really, really important. So we know from section 230 that Congress wanted and encouraged and created a specific legal protection for online services to remove and filter and in particular to try to get inappropriate, offensive, sexually explicit content off of their sites if they didn't want it on their sites.

So the idea that simultaneously you could have a regime where services that are doing the specific thing that section 512(c) encourages them to do and protects them from doing would lose their safe harbor protection I think is a regime that doesn't make any sense, that certainly isn't good for services, isn't good for users, isn't good for society and frankly isn't good for copyright owners.

MR. AMER: So just to sort of pick up on that point a little bit, so I mean the way the *Mavrix* court articulated the standard for when material is stored at the direction of the user is to say that well, if the service provider carried out activities that were narrowly directed towards enhancing the accessibility of the posts, then you know, that was also an issue in the *YouTube* case in the 2nd Circuit, where you had sort of automated algorithms, you know, suggesting videos that you might want to watch. The court said okay, that's at the direction of users.

So is there any room in your

understanding for sort of curation within that standard? I mean the example in *Motherless* obviously is the, you know, kicking out cat videos or something, videos that don't sort of fit within the theme of the website.

Is there any sort of room for that type of activity in your view?

MR. WILLEN: Yeah. I think there is, and I think there has to be. So you know, I litigated the *Viacom* case, so I'm certainly familiar with where that language comes from. And you know there, one of the issues was the use of related videos, suggested videos through YouTube, and that's certainly a form of curation and moderation, where you're essentially telling people well, you liked this and you might like this as well.

But more broadly, this is something that really every service now does some form of. Every service is in some sense expected to do some form of. When we talk about curation, what we really mean is making some effort to sort of help users sort through a mass of user-generated content and

find things that they might like.

The idea that you can't, that you shouldn't be able to do that while still be protected by the safe harbors, I think what you'd end up with in a world where that was the law is a bunch of junkie sites that no one wanted to use.

MR. AMER: Well what about though, I mean you know, I think back to *Aereo* where Justice Scalia in his dissent said, you know, and obviously the question of volitional conduct is still sort of unsettled.

But isn't that sort of a clearly, you know, an administrable rule that says that well okay, if someone is choosing the content, that might -- ordinarily that's going to tip them over the line into direct infringement, isn't it, because they're going to -- acting with sufficient volition that they actually are choosing the content that goes up on the site.

So how is that reconcilable with what you're describing?

MR. WILLEN: Yeah, well let me

distinguish between two things. So the situation, and this is why *LiveJournal* in some ways was an unusual and maybe extreme case, and I think there's a way that the 9th Circuit probably meant to write that decision that reflects this, which is that what *LiveJournal* was essentially people were submitting things without actually making them go live on the site.

The ultimate decision about what would be posted and what would be part of the owner they didn't blog or service what was fundamentally being made by the platform. And I think there's a world in which you can say look, if what you are doing is that degree of ex-ante selection, right, you are essentially a publisher of sorts in the way that the book publisher is.

You get a bunch of manuscripts and you say we're going to publish 10 out of 100. I think that does start to put pressure on the 512(c) safe harbors. But I would distinguish that fundamentally from services, and you could talk about YouTube but there's many others that we could

talk about, that essentially let people with limits post what they want.

And then once things are up on the service they make efforts whether through search, whether through functionality that recommends content, whether through putting content into different categories, that are fundamentally designed to say here's what's -- here's what's useful, here's what's good.

At the same time those services and, you know, this is something that increasingly they are forced by public policy and legal considerations to do, is to say there's a whole bunch of stuff that we don't want on our service. We don't want terrorist content. We don't want pornography. We don't want these things.

Whether or not they're actually legal, we don't want them on our site. The idea that if you're doing that, if you're making those kinds of selections, that you're jeopardizing your safe harbor I think is from a public policy perspective is very troubling.

MS. ISBELL: I just want to circle back to your discussion of section 230 real quick.

MR. WILLEN: Sure.

MS. ISBELL: You made the point that reading section 512 in a way that's sort of negating the benefit of section 230 doesn't make sense. But Congress explicitly carved out IP from section 230. So do you think that's an indication that they think the approach should be different, or do you think that you have to read 512 in a way that supports 230?

MR. WILLEN: Yeah. So I mean so think about the conversation we're having. The way in which 230 is relevant, despite the fact that 230 doesn't protect you from copyright claims, I recognize that, is what 230 very clearly says is that online services not only have a right to, are encouraged to, and are protected from challenges where they seek to remove content from their services because they find it objectionable -- it's sexually explicit, lewd, violent, all of these things.

Whether it's legal or not, platforms are given a right by section 230 to make decisions about for their service --

MS. SMITH: Can you reconcile that though with like *UMG* talking about, you know, going to 230 and 512, right, where the service provider plays an active role in selecting and monitoring marketing content, when you're actively involved in encouraging or editing listings. I mean there's another line of cases coming out of 512 talking about this type of issue, and then maybe we'll go to Ms. Pariser too.

MR. WILLEN: Yeah, yeah. So there's certainly language in the 512(c) cases that sort of goes both ways on this. There's not a case that I'm aware of that's ever held or even actually suggested that by making decisions about what content is good or bad, what content you want on your service or you don't, you actually fall outside 512(c).

What I'm saying is that that result, which to the extent that anyone might argue for it,

to the extent that any court might suggest that that is what 512(c) requires or should be interpreted as, is inconsistent with what we know Congress wanted in section 230, and inconsistent with what I think is valuable and useful public policy that goes well beyond the issue of copyright and goes to what is the kind of internet that we want, and what are the kinds of things that we want on platforms.

MS. SMITH: Ms. Pariser, what do you think of moderating to have the kind of internet we want, but obviously no duties to monitor for infringements?

MS. PARISER: You ask what I think. Yeah. I object to the notion that a moderator curating content implies no safe harbor is suddenly bad for content, that we are at -- we should actually not embrace the *Mavrix* decision on this ground because now all these sites that would otherwise have been filtering out our infringing content will stop doing it.

So when that day happens, you know,

it -- we'll really take notice. But the reality is that nobody is curating for copyright at this moment. They are picking and choosing content that they like and do not like, in Mr. Willen's words, for reasons of their own.

Porn is bad, cat videos are bad and violence is bad, and so they're going to pull that stuff out. Bad quality files are bad, so they're going to pull that stuff out. But infringing content can stay unless and until a takedown notice is set.

And so the notion that a service provider would lose its safe harbor seems entirely right to me. If they demonstrate, if an online service provider demonstrates that it is going into the content that is being supplied by users and picking and choosing among those files, it should have the obligation to do that for copyright infringing works as well.

MS. SMITH: So do you agree with Mr. Willen that there's a distinction between, you know, prior to upload or post-upload, or where would you

draw that line at, you know, filtering out the violent videos, you know?

MS. PARISER: I actually don't make a distinction between pre- and post-upload. Whenever an online service chooses to curate for its own purposes, that is the moment they need to filter for copyright infringing content. I disagree that we will end up with a lot of junky sites that nobody wants to use any more.

I think what we'll end up with is sites that have imposed filters which are widely available and not terribly expensive. And I realize that's not what the courts have deemed is required by 512, but I think that those rulings are limited to pure upload at the direction of the user cases.

MR. AMER: Well so could I ask -- so is there any distinction in your mind between the situation in *Motherless*, monitoring at just a very sort of high level for, you know, child pornography or things like that on the one hand, and a more curating function along the lines of choosing content that is suitable for the site?

I mean there's sort of a continuum, right? I mean you talked about how image quality could be one characteristic that people rely on. Mr. Willen seemed to be suggesting -- I don't know if I'm characterizing your views correctly, but you seem to be saying that it's hard to make those distinctions, and that you know, if we say that, you know, it's unacceptable to screen out certain types of content, it's difficult to have a principled way of knowing what constitutes curation or not? Do you agree with that or --

MS. PARISER: There clearly is a continuum, I think, and the courts have zeroed in on that and made some law around it.

MR. AMER: I guess what I'm asking you, I mean do you think *Motherless* got it right? I mean *Motherless* said well at a minimum surely, you know, it would create bad incentives, wouldn't it, to say that as soon as a site decides to screen out really highly objectionable or illegal content, that suddenly that would put them outside of the safe harbor?

But the court said that's quite different from what's going on in *Mavrix*, for example, which is you know, much more focused on choosing the content that is along the lines of the theme of the site. I mean is that a distinction that's workable in your mind, or do you think that if a site has any sort of screening before stuff goes up, that that means that it's not posted at the direction of the user any longer?

MS. PARISER: I think *Motherless* makes perfect sense, given the way the law has developed around section 512(c). Part of our position in these roundtables is that the courts started veering off the correct interpretation of 512(c) ten years ago, and that it should always have been the case that if a site demonstrates that they can control the content on its site at any level, they should -- they should be filtering out for copyrighted content.

Given that the law didn't develop that way, and that's my own little science fiction fantasy, sure. *Motherless* makes a lot of sense

given the way things have developed, and to make a distinction between truly curated in the *Mavrix* situation and the somewhat more pedestrian filtering for, you know, for kiddie porn or whatever.

MR. GREENBERG: I guess I'm a little confused. Let's say we had a new 512, and I'm not saying we're going to have a new 512. But if we did, wouldn't that return us to -- it sounds like your position is that if a site filters for anything, they need to filter for copyright infringement too.

So then we get back to the position of if you're going to screen out child porn or snuff videos or whatever it is, aren't you then suggesting an obligation that they should have some sort of a filtering technology for copyright infringement?

MS. PARISER: I think it demonstrates the ability of the site to filter. I don't think there should be lines drawn. The whole point of 512 and the safe harbor is that service providers should have to do what they can in order to protect from copyright infringement.

And we got to this weird place where they can, they demonstrate their ability to do that, but they only have to do it with everything but copyrighted material, right. So it's an odd world.

MS. SMITH: Mr. Lemon, what do you think? What do your member companies think about that, the ability to filter, you know, compared to the statutory language of liability to control on some of these issues?

MR. LEMON: I think content moderation is a very difficult subject to figure out, and we're seeing that policy discussion roll out in a variety of ways. One of the things that we have to remember is that the vast majority of content moderation is fueled by users. It's by users flagging objectionable content that the platforms then are able to respond to, which is largely the way that the DMCA works. They respond to flags.

Now the fact that a platform may find that it has the resources to dedicate to some sort of proactive content moderation, the idea that they can take a hash set that exists and that can identify

specific images, and somehow apply that before things get posted.

The idea that that would automatically trigger a whole host of other responsibilities that would subject, the failure to comply with them would subject platforms to significant liability is really, really problematic in the sense that if we take the level of responsibility that platforms have to say if you can filter then you must, well then it automatically implies questions of what does "can" mean.

MS. SMITH: Well, what do you think about the Zazzle court, right, where they looked at you're taking user-uploaded content and you're sticking it on a coffee mug, right? So it doesn't even matter if it was automated or not. That would just show an abdication of their ability to evaluate that in a physical product. Do you think that court got it right?

MR. LEMON: I think that when you're talking -- I'm not sure of exactly about a coffee mug.

MS. SMITH: Right, is the line just that it goes into a physical product or does that have any meaning for other platforms?

MR. LEMON: I think that there's certainly different legal implications that are brought into play. If you are a service that proactively takes a copyrighted work and begins to market it yourself on a physical product, that it would implicate.

MS. SMITH: Is there a difference between marketing on a physical product and marketing for eyeballs for ad revenue?

MR. LEMON: I think that it gets more complicated, in the sense that it depends on the volition. It depends on the amount of active human involvement that goes into making those decisions. Much of what the platforms do relies on automated processes, and much of the voluntary measures that the platforms take rely on automated processes that honestly don't always make the right calls or the best calls. They're not human eyes.

Even human eyes make the wrong calls

sometimes, and that's why we have this back and forth collaborative process that allows the platforms and the rightsholders to be able to figure out with the user whether the specific instance of a work being posted is actually a violation of copyright.

And I think that we need to take into account the sheer number of things that we're talking about here. For example Reddit, between 2016 and 2018, had a 725 percent increase in the number of notices that it received. They went from 610 takedowns in 2016 to 26,234 takedowns, content removals.

And so now a part of this is just Reddit developing its maturity as a company. But we have to recognize that it's a very quick ramp-up. And so if we say if you can moderate then you must, then we have to ask what does "can" mean? Does that mean that you have to fire employees that you have working on other projects in order to dedicate resources to proactive filtering?

We look at what Google has done, and they've dedicated over $100 million to developing

Content ID, and to ask the platform, any platform to be prepared to make that same investment the moment that they decide that they're going to try to perform any sort of content moderation is really problematic.

MR. GREENBERG: So we heard a lot at the last round of roundtables, and even a little bit a minute ago, about different expectations for different-sized companies. Also on the content side too, that just 512 is not sort of one size fits all. It applies a little differently depending on the company and the capabilities.

Folding that into what you were just talking about, do you think there would be disincentives to having some sort of a standard like that, that kicks in at a certain level of size or staff or active moderators or whatever it is?

MR. LEMON: Yes, I think that there's some problems with that. First off, companies ramp up so quickly. In the internet world, we have members who within one year had enough users to all of a sudden lose the small business exemption for

privacy and GDPR and things like that.

If you're talking about monthly users, well then what month are they liable and what month are they not? And if you're talking about employees and it's like you said hiring a certain number of moderators, why would you hire the third moderator if it's going to bring in all of these rules that you could just stay with two and do your best to do your best with two? I think it really is complicated.

MS. SMITH: Mr. Winterton, did you want to comment on these issues?

MR. WINTERTON: Yeah. I just wanted to quickly push back on the idea that there is inexpensive filters that companies can just easily employ that prevents uploads.

In some other work that I've done in the past on internet sales tax, for example, we were told that there would be inexpensive software that online retailers could purchase, that would allow them to just basically pay tax to out of state, to other states that they don't operate in or don't

physically exist in.

Inexpensive software does not end up being inexpensive when you rely on it to be able to be able to run your business and to be legally compliant. Over time, software can raise in price and software can, you know, be very expensive to integrate into whatever company or business that you run.

On the other hand, we think 512 has struck a good balance where small platforms can survive without having to rely on software that could be too expensive for them. But larger platforms can make efforts that small platforms can't and do so.

One example that comes to mind for me is a friend of mine on social media likes uploading videos when he goes to drag shows and nightclubs, and those slide videos were taken down within a couple of minutes, and have very few views.

I think that there is a lot of evidence that we have struck the right balance, and that ruining that could do a lot of harm to expression

online.

MS. SMITH: Mr. Hatfield, do you agree with Mr. Winterton's characterization?

MR. HATFIELD: No, I don't. No, I don't. For the people in my community, the issue is monetizing the content. The issue is not whether it goes up or not. I mean, there are some people who don't want their music, say for example, on the internet.

Something like Content ID, which as Mr. Lemon just said, was created or actually it was invested into a great deal by Google. They have a very funny way of allowing certain artists to use it and others not to use it.

Now, they'll tell you you can go to affiliates, but the affiliates essentially are going to make a percentage of whatever money is generated from it being posted, so their incentive is to post it, not to block it.

So ultimately, if you read some of the stuff that the Senators talked about in additional materials when they were writing the DMCA, they

talked about the idea of standard technical measures that once they became available, that a company couldn't block other people's, artists' access to it.

So I question just how expensive something that's already been developed is to implement, and again I come back to something that is going to be required for all music anyway, like ISRC codes. How hard can it be to come up with something that -- like if I am a musician that's dumb enough not to put that in my music, then I can't protect myself.

But if it's there, how hard -- how expensive is that going to be to read when it's already in every single digital audio file that somebody might upload, and it would say who the copyright owner is. So if you're not the copyright owner, you can't post it.

MS. SMITH: Well, so let's turn to standard technical measures, whether or not they've been developing in the last couple of years, whether case law is encouraging the development of these

as the statute sort of anticipates, or whether it's done so well in the shadow of the rest of the statute.

Mr. Carey, did you want to comment on that?

MR. CAREY: Well, somewhat relatedly, you know. Given, you know, the way this case law has evolved and what I think is a bit troubling from our perspective is that, you know, there's this subjectivity that's allowed once content is on a platform and we're seeing the ability of services to somehow either curate or filter, but not incur liability.

The upshot of all of this case law from our end, we maintain an in-house anti-piracy program that's manual, not automated. The software costs are prohibitive to us as the content owners to be able to invest in broader scale copyright enforcement.

Simultaneously, we're also deprived of what's, you know, theoretically in the statute counted as plain language. We can't send a representative list because that's been denied.

The red flag knowledge has been read out of the statute.

So we on our ends have to spend all of our time gathering URL by URL for each individual piece of content that we identify as infringing, and have none of the benefit of something that's, you know, should be able to be calibrated for balance on either side.

Why can't we give a representative list, and if you're able to filter out on your own platform, you know, that content which is potentially infringing or do anything to search on your own capability, you know, there's an inherent imbalance from what we can do.

The availability of research is to us offensively, and a larger shield for them defensively.

MS. SMITH: Mr. Osterreicher?

MR. OSTERREICHER: So in following up on what Mr. Hatfield said, where they encourage musicians to put that code in, we encourage photographers to watermark. As was the case in

Mavrix, it would seem to be objectively obvious, just as you can recognize kiddie porn, you should be able to recognize at least that some image has been watermarked and do something about it.

MS. SMITH: So would you think a platform would have an obligation to screen for something watermarked? Is that your suggestion or --

MR. OSTERREICHER: I think at the very minimum, yes. I mean because, you know, short of that often times the information as to who owns those images has often been stripped out on an upload. But unless you actually crop the image to the point that you're getting rid of the watermark, that's pretty hard to do and it should be obvious to anybody that there's a watermark there and someone owns it and who that someone is.

MS. SMITH: And do you think that watermarks or other types of content management information in photography, you know, the image setting, are you encouraged that there is standards for this or do you think standards are just evolving?

Do you feel hopeful or pessimistic?

MR. OSTERREICHER: Yeah. I'm encouraged that, you know, the technology is getting there that hopefully will make it to the point that the owner of the image will not be able to be separated from the image itself, so that it will always be there no matter what's done with it, so that people then have the knowledge as to who -- owns that image and whether or not they need to get permission or a license for it.

MR. GREENBERG: And how would a service provider know if the image was uploaded by -- if the user is the content owner, if the user had been a given a license? What if it was wedding photography? I mean with my wedding, it wouldn't be my watermark on it. How would they know I had uploaded it and if I had authorization?

MR. OSTERREICHER: I think that's certainly a problem. But at least we need to be able to start with somebody being willing to identify that there's a watermark there and recognize it, and then where does that go from there? I think

that's something that we need to work on. But at least it's just not a free for all of there's an image, it's up there and we don't really care who it belongs to.

MS. SMITH: Okay. Professor Tushnet?

PROFESSOR TUSHNET: So there's a lot of stuff going on here. First of all, I want to note that the ability to match hash values for specific child porn images already identified in a database is completely different from the ability to figure out a generalized symbol and that may vary entirely in its content from picture to picture.

The New Zealand shooting actually gives us a tragic example of how the touted ability to filter has been vastly overstated. It's well reported, YouTube, which is everyone's model, even though it's the thing everyone hates, right. They're doing it as well as anyone can and they can't do it very well.

If you want a law regulating alphabet on antitrust grounds and governing how YouTube can treat musicians, the DOJ knows how to do that. This

is not the right place to do that, and let me just contrast our site. So back to what we were talking about -- about that curating.

We terminate users who harass other users. We terminate users who engage in commercial solicitation. That's against the rules of our platform. We get well under 10 DMCA notices per year for millions of works.

And to say that the fact that we have a terms of service somehow makes us liable to install filters which, by the way, Google will not sell us I think is just -- not just a rewriting of the DMCA, but a really bad idea.

MR. AMER: Well so getting, I was -- getting back to Mr. Osterreicher's watermark point, I mean, should a watermark at a minimum constitute red flag knowledge? I mean should that at a minimum trigger some further duty to investigate in your view, or does it -- is that not enough?

PROFESSOR TUSHNET: Absolutely not. So for one thing, you know, we don't filter. Like we, you know, we don't actually -- so you know,

that's not the kind of content that gets on our sites, you know. We would certainly respond to a takedown notice, but we don't have filters.

So the idea that it would be red flag knowledge, I think the example of a wedding photo is a great example, right. So a lot of the stuff that we get is, you know, created by our users.

So a user might, for example, take a picture of herself in her Catwoman cosplay and she uploads it. She may well put her watermark on it, because she wants, you know, when it's on Instagram, you know, she wants the attribution to spread.

It's still hers. The idea that we should somehow flag her as a copyright infringer and basically go to war against our users, it's not right for what we are, right. And if there are sites that you want to target with, you know, antitrust style rules, I think that's a real conversation to have. It's just not the right one for this mechanism.

MR. AMER: I guess, I mean I guess what I'm trying to get at, and this is maybe leading into

the knowledge standard topic, which I guess is okay. I mean, so you say that you'll take stuff down when you're notified. I'm trying to figure out what, short of an actual notification, would be sufficient in your mind to trigger a further, you know to --

What would constitute red flag knowledge or what should constitute red flag? I mean, give an example of something that would either for your site or for others, that would trigger a further obligation to investigate?

PROFESSOR TUSHNET: Well so, you know, I should say I have the most detailed knowledge about what we do on our own site. So you know, we would definitely investigate someone who not doing the notice said, there's a whole copy of Harry Potter up here, right? That seems like we'd take a look at that.

But there are also people who make tons and tons of mistakes about stuff. So you know, there's a lot of busybody-ness online, and it's -- sometimes we get notifications used as harassments. So we've had people actually fake being from the

copyright owner, to try and get somebody else's stuff that they're in a fight with, having that --

MR. AMER: Yeah, I know. But that all is actual notice isn't it? I mean, you know, if somebody says we've got Harry Potter on there -- that's a specific work and it's actual notification that it's up there. I'm just trying to figure out --

PROFESSOR TUSHNET: Right. Well so this is why I think courts have struggled with what red flag notice is, because it's very clear that generalized notice that there might be something out there is not red flag notice, because then we're back to same system, right.

MR. AMER: Right, right. But I mean, so what we've heard from other folks is that courts have effectively read it out and then, you know, other people say no, no, it still has meaning. And so I'm just trying to find an example of what it would --

PROFESSOR TUSHNET: Right, and so I agree. I can't remember which court was it that

said like the sports metaphor is actually not helping us very much here.

MR. AMER: Yeah, *Motherless*.

PROFESSOR TUSHNET: Yes. So yeah. I think it's very hard to say in the abstract, in part because of the variety of sites, right. So you know if you have the hypothetically Kozinski site, harassthem.com [*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, CV-03-09386-PA (9th Cir. May 15, 2007)], right, that's a -- or I think the other hypotheticals have been like stolen celebrity photos, right. You know maybe.

But has so little relationship to what most people are doing that it's actually not a great guide for like what I should do.

MS. SMITH: Mr. Lemon, do you want to comment, because I think Professor Tushnet, her site is maybe smaller as a filter, but your member companies are bigger.

MR. LEMON: I'm probably not going to solve the red flag problem.

MS. SMITH: No? That's funny.

MR. LEMON: But I do think it's really challenging, because when we talk about the scope again, and I'm going to bring that up because YouTube sees over 300 hours of video posted every minute, and Instagram sees 100 million photos and videos each day that are posted.

So then we're left with the question of do we expect people to be monitoring each of these posts before they're posted, to check against the general catalogue, or are we expecting people as they're looking through the content that's being posted, to recognize copyrighted works?

MS. SMITH: Well, do you agree with Mr. Carey and Ms. Pariser that red flag knowledge has been effectively read out of the statute?

MR. LEMON: I don't have an opinion on that.

MS. SMITH: Okay. What about if you are a company that has the ability to filter against a database, do you think -- is there sort of best practices at least to also employ that for other

types of databases such as if there were an image database?

MR. LEMON: I think there's actually a lot of collaborative work going on, especially in recent years between internet platforms and rightsholders, especially as internet platforms become rightsholders as they have in the last few years.

Some of our companies have won Oscars, GRAMMYs, Emmys, Golden Globes. Our interests are aligning in a really spectacular way, that I think has led to a lot of ongoing conversations, monthly calls, lots of efforts to try and figure out these best practices, and it really is in the interest of our membership to have the best quality experience for our users, and that usually is legal content.

MS. SMITH: So that was, pretty optimistic, or would you say it comes down to stay tuned, or is there something specific you can point to?

MR. LEMON: I think that there are lots

of ways in which folks are collaborating. Facebook, for instance, getting licensing deals with publishers and recording artists, so that we can monetize some of this product that's getting posted.

I think that there are examples of success that has already happened, and I think that we are optimistic and engaged in trying to figure out best practices going forward, and in the proactive, voluntary effective measures context.

Our only concern really with these voluntary effective measures is that by engaging in voluntary proactive -- above the requirements of the law -- activity that we are somehow suggesting that this should be the new law.

And that is just not the case. It doesn't make sense for the variety of platforms, for the size of platforms, for the ways in which people interact with their platforms. It doesn't make sense to change the law just because people are trying to do more than the law requires.

MS. SMITH: I mean the law would say

there's an obligation to accommodate standard technical measures, subject to whatever they are, right?

MR. LEMON: Yes, I just mean anything above what it requires.

MS. SMITH: The bare minimum, yeah. Mr. Osterreicher?

MR. OSTERREICHER: Yeah. Just following up on the wedding photographer example. I think, you know, more likely what's happening these days, since so many people are taking selfies and they're all in pictures. You know, if you're putting a copyright on. If you're putting, not a copyright, a watermark or if you're putting the CMI in and it's your image of someone else, I think there should be at least a certain standard that would trigger further investigation.

I know it's not an easy thing. If this was easy, we all wouldn't be here kind of going back and forth with each other. But you know, at least from our perspective as photographers, we're really hoping that there will be something that will allow

the works to at least be flagged in some way for further investigation.

Whether or not that changes how they're posted, where they're posted, when they're posted, I'm not sure that that's, you know, what that's going to be. But at least something rather than these billions of images that are out there, and they're just there with, you know, people posting them on their own or people posting the works of others.

MS. SMITH: In your view, is that better accommodated through sort of a voluntary initiative, or do you think the law would require something more?

MR. OSTERREICHER: You know, I'm open to either one. Whether a standard could be developed that wouldn't necessarily be voluntary.

But just as we've seen from some of their platforms that they're working towards way in recognizing the creative work and the monetization of that, and how to figure out a way to share that, I would just hope that that would eventually apply to small creators.

MS. SMITH: Thank you. Mr. Turek, can you talk a bit about your company's experience?

MR. TUREK: Yeah, I would like to point out that the technology is there. Content ID is by far not the state of the art, and I think the services are able to adapt content sorters at scale. I don't think there's anything much left anymore, just to kind of point out on the scale.

671 minutes of content are being uploaded now to YouTube, 671 hours every minute. That is just growing every year by 100 hours. And so I know it looks scary from where we are standing today, but imagine that we will be back in 1930s and every financial transaction will be in this situation. Eventually, you have to find ways how to identify the content and how to deal with it.

Not just on the copyright base, but on any other base, be it terrorist videos, child pornography or anything else. I do believe that once you are engaging in one, you should start -- or the platform should start being forced to look at the others. I'm not saying that everything will

be solved day one; copyright is complicated.

Fair use adds to it, but I think there needs to some start for innovation to occur. You cannot have innovation in isolation. And so because there were no forms of financial backing of the innovation, because the rightsholders tried their best but usually they took the measures from non-technical point of view.

Let's say musicians. What do they know about writing sophisticated AI code, right? And so they picked the most obvious ways, and those are usually selection of manual, with some tools that were built within the community. But you cannot get the state of the art without the backing, and the backing is not, cannot come from the rightsholders only.

So I think the platforms have some responsibility in this case, and I think I'm not talking about particular business models. But there is innovation not only just on the technology, but also on the business models being revenue sharing with something like a content filter or

similar scales.

MS. SMITH: Mr. Willen, do you want to speak to these issues, voluntary measures or the development of standard technical measures?

MR. WILLEN: Well, I was hoping to just say something about the red flag knowledge issue and the knowledge standards --

MS. SMITH: Yes.

MR. WILLEN: Because I think some of the shade that's been thrown at the -- the court's interpretation is being thrown at the *Viacom* and the law that developed after that. So I just wanted to sort of explain how --

MS. SMITH: Sure. In your view, what was the red flag knowledge?

MR. WILLEN: Yeah. I mean so the idea which I think is clear both in the statute and legislative history is twofold. So one is that the distinction between actual knowledge and red flag knowledge isn't the distinction between specific knowledge and general knowledge. It's the distinction between objective and subjective,

right?

So actual knowledge is you know in your mind that something is true, and what people call red flag knowledge is there are facts and circumstances in the world from which a reasonable person could determine that that's true. That doesn't mean that red flag knowledge is being read out of the statute when it is interpreted that way.

What it means is that it's being applied consistent with the text and intent of Congress.

MS. SMITH: So what would be red flag knowledge in the absence of, you know, getting a specific link, you know, of something that is infringing?

MR. WILLEN: Well, so I mean I think the courts have -- so every court that has looked at this, it's the 2nd Circuit, it's the 9th Circuit, it's every district court virtually has sort of come to the same conclusion, which is that this is a narrow provision. Again, and it doesn't mean that it's not in the statute. It just means that it's narrow, and there's reason for that, right.

So you can look at the legislative history and you can see things like the members of Congress debating the statute, saying the red flag knowledge would mean something that is apparent from a brief and casual viewing. So everyone recognized that the circumstances in which you would actually have knowledge, be it subjective or objective, would be narrow.

And that reflects a couple of things. It reflects one, that the main vehicle for removing things under the DMCA was never meant to be unilateral action by service providers. It was meant to be notice and takedowns, where you have a cooperative relationship, and it reflects the fact that these things are really, really difficult.

Copyright infringement, unlike child pornography, unlike figuring out whether something is terrorist content, is hard and it requires a lot of background knowledge that service providers do not necessarily have. I think the examples about photography is sort of a useful way of thinking about that.

So if something has a watermark, that tells you what, that someone owns the copyright. But that doesn't distinguish those kinds of photographs from basically any photograph that's on the internet. Every photograph that's on the internet has a copyright that belongs to somebody.

That's not the issue in terms of figuring out whether something is infringing. It starts, but doesn't even come close to finishing with the question of does somebody own the copyright.

MR. AMER: It's still hard to think of an example though, isn't it, of what would actually qualify as red flag knowledge? I mean if a YouTube user name is, you know, Pirated Songs, and YouTube becomes aware of that, I'm not sure that would qualify as red flag knowledge, would it, because it doesn't relate to specific works?

Whereas if the title of a video is, you know, Stolen Sgt. Pepper's Album, then that's actual knowledge I would think, right?

MR. WILLEN: Well, it may or may not. You know, one of the funny things about the YouTube

case is that there was a huge record that was developed that never really got into any of the opinions. But there was a very considerable factual record in that case that showed that a number of clips that had been posted on YouTube with titles exactly like that, had actually been posted by copyright owners or their agents as part of sort of stealth or viral marketing campaigns.

So that was -- we had a very, very concrete set of examples there to show look, the fact that you might see some, some description of a video or description of content as describing it as stolen, well even that didn't --

MS. SMITH: Well, if the standard's objective though, and it's called Stolen Sgt. Pepper, you don't think that's enough to investigate?

MR. WILLEN: I think there are examples like that where it might be and I think, you know --

MS. SMITH: Okay.

MR. WILLEN: You know, full length, you

know, movies that haven't been released that are being uploaded to sites, where there's no reason to think that that movie should be there. Sure. I mean I think there are some -- there probably are some obvious examples that we could all agree on. But you know, this conversation isn't really about those examples.

This conversation is about an attempt by our friends on the other side of this debate to say that somehow the courts are getting it wrong when they are saying that this is a narrow provision and they're not.

And the problem with that view is that it fundamentally ignores the reality of what's on these sites, which is a huge amount of content, all of which in some ways is copyrighted.

The question of what of that is infringing or not is going to turn on many, many factors, most of which are not in the knowledge or control of the service provider, but instead are with the copyright owners.

MS. ISBELL: Listening to this

discussion, it almost seems like we're presupposing that the ISPs never use their own site, because for example, YouTube -- when you type into it Karyn's favorite artist Beyonce, you know, half of the videos have no video component. It's just lyrics on the screen and the song.

And surely by now Google has received enough notices to say that that is infringing. This is not, you know, the video that has been put up by the record company. Or, you know, another example, as much as I love Pinterest, and I spend way too much time on there, the entire model, is that it's a great bookmarking site, but it bookmarks by taking images.

I have no need to bookmark my own site. So if I'm bookmarking something on Pinterest, it stands to reason that I don't have a license for what I'm bookmarking. So at what point do you just have to sort of say we live in the real world and these people have been on their sites, and they should know something?

MR. WILLEN: Well yeah. So I represent

both those companies, so there's certain things I can't say. And I would also want to let the Google and YouTube witnesses that are speaking at the next panel talk about that, although I would -- I think that with respect to YouTube, almost all that is licensed at this point, all that music.

So some of these issues, you know, certainly on the bigger platforms have been dealt with through licensing. So we're in a very different world now than we were 10 or 15 years ago. You know, and then with respect to Pinterest just very generally, you know, the other part of the equation here which we've touched on a little bit but haven't really talked about is the fair use piece, right.

And particularly when you're talking about the use of things like images as social bookmarks, you get into case law which comes from the 9th Circuit in particular, that was in the context of image search and says that there are many instances where using thumbnails or versions of photographs for some different purpose can

constitute fair use.

So we have to think about that part of the equation as well when we're having these conversations.

MS. SMITH: Thank you. Ms. Pariser, did you want to comment on that, or really at this point anything else since we're nearing the end.

MS. PARISER: Yeah. Sort of watching all these cases evolve over a very long period of time, what strikes me is how the goal keeps moving from the content owner's perspective. *Motherless* is an interesting case because the court says they're looking at the pornography that Motherless received, and the plaintiff says well you should have known that it was infringing because it was so well produced.

And the court says you know, a lot of porn is very well produced now, and conversely, a lot of professionally produced porn looks kind of amateurish and grainy because that's a style of its own. It's not as if they're dealing with a full length version of a Marvel movie.

So the court is holding up the professionally produced studio movie as the paradigmatic example of what would confer knowledge. But in the case where the Marvel movie is the subject of the copyright infringement case, there's some other reason why that would not be sufficient notice.

For example, we didn't send a notice that specifically identified that file. So going back to the YouTube decision, which I think Mr. Willen very accurately summarized, if you put -- if we go back in time to the moment when that case was brought, when those files were not licensed, those were full length music videos at issue in the case, and the court said yeah, but the site didn't get a notice that specifically identified that file identifier. So no red flag knowledge there.

And I also think you have to understand this in the context of representative list and the red flag notice both, you know, going down with the ship, because you can't even send a catalogue of your works and have that confer red flag knowledge,

which is what the plaintiff in *Zazzle* tried to do.

They sent a catalogue of their photographs, and the court said yeah, but those aren't DMCA notices so that doesn't count either. So moral of the story is, as I think Ms. Isbell and Mr. Amer were saying, we've yet to see the case where red flag knowledge or representative list has actually worked in all of this time.

MS. SMITH: Thank you. I think we'll kind of doing the last call, going clockwise. So Mr. Shemmeri?

MR. SHEMMERI: Thank you. I did want to just briefly address the efficacy or perhaps the lack thereof in requiring copyright notices as a form of policing.

I mean I'm almost surprised that a representative from a copyright agency is going to be saying this, but unfortunately in our experience while we don't discourage the use of copyright notices and works or, you know, embedding copyright notices in the EXIF data for especially digital photography, unfortunately most of what we see in

terms of infringements, therefore images, where all that data has been stripped and it's very easy to do so.

And the copyright notices have been stripped, either legally or perhaps through a license, but that it was copied over by some third party.

And I think going back to this discussion we're having and a lively one about red flag knowledge, I mean, I think because a lot of these ISPs that have some level of human curation can retain that kind of red flag knowledge for a lot of works out there.

We deal a lot with celebrity photos or even some historical photos. It's obvious that a user who selected their age as 20, 21 years old does not own -- very likely does not own the copyrights to an image created in the ‘70s or early ‘80s.

At least that will raise a red flag to someone who's working at the ISP or acting at the behest of the ISP, to understand that that is very likely an infringement, or very likely not owned

by that user. So the use of a copyright notice has no effect in that equation unfortunately.

MS. SMITH: Okay, thank you. So we're out of time. We want everyone who has their placard up to speak. So Professor Tushnet?

PROFESSOR TUSHNET: Super fast, two things. A note on repurposing sites. You don't actually necessarily know what your users are going to do.

So Pinterest and vaccine denial has been much in the news. Political uses of Instagram. Be careful not to assume that you know what sites are for when you're thinking about the variety here. Secondly --

MS. SMITH: Do you take statements at a certain point that you kind of do know how people are using the site?

PROFESSOR TUSHNET: So, no. So actually there's great reporting on YouTube about the different verticals in YouTube. So there are actually like six or seven different YouTubes.

MS. SMITH: Okay, I mean that six or

seven is still kind of --

PROFESSOR TUSHNET: Well actually, and there's debate about which one of them they should be. But I also briefly want to say about the representative list. From the other side of this, like, we occasionally get people sending us a search string that's dynamically generated, and it looks different when we look at it.

They say everything here is infringing, and that's obviously not even true. Like, even if you believe everything about what they say they own, it's obviously not true. So for example like it would be, you know, somebody who claims a single photo and they say the search string for the Harry Potter fandom, every link here is infringing. So just it's not one sided.

MS. SMITH: Not all this work, yep.

PROFESSOR TUSHNET: Thank you.

MS. SMITH: Thank you. Mr. Carey.

MR. CAREY: Very quickly, just to respond to the question we've been talking about a little bit. I would love to be able to send a

takedown notice that subjectively conveys red flag knowledge. Objectively, I have absolutely no idea how I would do that. I wouldn't have any idea how to tell someone on my anti-piracy team how to send something broader than what we send currently, which is URL by URL.

MS. SMITH: Mr. Hatfield.

MR. HATFIELD: Congress originally stated its intention to appropriately balance --

MALE PARTICIPANT: Your microphone.

MR. HATFIELD: Sorry. Congress stated in its intention to the DMCA to appropriately balance the interests of content owners, online service providers and information users. It seems to me that the balance between freedom and individual responsibility is a bit askew.

For the onus to always be on the copyright owner seems to me to be at least unfair. There is technology out there. ISRC codes for music anywhere are going to be required, or you're not going to get paid through the Mechanical Licensing Collective of the Music Modernization Act.

So as a starting point, since if you go back to the dawn of when all this stuff started and when the law was written, AOL was the dominant thing online. Look what we've got now. There's no way of knowing where any of this stuff is going to really go. It's like several people have said, we're in unbelievable times of evolution and change.

All I'm suggesting is that if you use something like upload filters and you can identify who owns the copyright by the ISRC codes, it's there. The information's there. You registered your music with the Library of Congress, you've got ISRC codes. Nobody --

MS. SMITH: That's not quite how it works on the ISRC codes.

MR. HATFIELD: They know, they basically know, they know who owns it. If the person that's uploading it either isn't the copyright owner or doesn't have the rights to upload it, you block it.

MS. SMITH: Okay. Mr. Osterreicher, and I know you had mentioned *Fourth Estate*. If you

know. Up to you.

MR. OSTERREICHER: I'm going to just give an overview. Having been on the roundtable three years ago, I still think this is a tale of two takedowns, you know. It's the one side versus the other side. I think three years ago we were really talking past each other.

I think, at least from my perspective, there's just a little bit of recognition at least for the plight of the individual creators, as to there's a problem and hopefully, you know, we can work towards solving it. I appreciate you having us all here to continue that discussion, and maybe in three years we'll even get a little bit further.

(Laughter.)

MS. SMITH: Well we -- we all very much appreciate everyone coming today and everyone being in the audience. I think we are now going to take the ten minute break and start again at 10:45. But thank you all so much for your contributions.

(Whereupon, the above-entitled matter went off the record at 10:34 a.m. and resumed at

10:47 a.m.)

MR. AMER: Okay, welcome back, everyone. We are about ready to get started on our second session of the day, which again focuses on domestic case law developments since the close of the comment period. I've been asked just to remind everyone, all of our panelists, to please remember to speak into the microphone when you're making a comment, and then if you could please turn off your microphone when you finish speaking. That will help from the audio recording standpoint.

So again as before, I'd like to invite our panelists to introduce themselves and to state their affiliation, and then again we invite you to just make a very brief summary statement, and we urge you again to please try to keep those to about 45 seconds. So we'll start with Mr. Band.

MR. BAND: So I'm Jonathan Band, and I represent the Library Copyright Alliance. We're most concerned with the 9th Circuit's decision in *Mavrix v. LiveJournal*. In *Mavrix*, the court found that a service could lose section 512 safe harbor

by virtue of moderating the content being uploaded to its site.

Thus, a service provider that complies with the EU's new filtering requirements could find itself losing its DMCA filter. This is a perverse result. The *Motherless* decision may undo some of the damage, but *Mavrix* remains a potential land mine. Thank you.

MS. CASTILLO: Sofia Castillo from the Association of American Publishers. AAP continues to believe that a legislative fix to section 512 is necessary to ensure that ISPs that rely on copyright infringement as their business model are not eligible for safe harbor protection.

The decisions in *Cox* and *Grande* provide helpful elements that the Copyright Office might include in its report, with respect to the finding of a reasonably implemented repeat infringer policy.

Similarly, to address the contours of platform responsibility, the Copyright Office might look at the rulings in *LiveJournal* and

Motherless, which clarify that screening material for potentially infringing content does no expel an ISP from the 512(c) safe harbor.

MR. CARLISLE: Stephen Carlisle of Nova Southeastern University. I need to preface my remarks. All of my comments here today are my personal opinion, and do not necessarily represent those of Nova Southeastern University.

Through the good graces of Nova, I have managed to maintain one client from my previous law practice, a small music publisher of jazz, who has perhaps 100 songs. From our viewpoint, 512 is simply unworkable. The whack-a-mole program on its own makes it simply unaffordable from a time standpoint and a financial standpoint, to send out the number of notices required.

As to the red flag knowledge, which was discussed earlier, I did this last night courtesy of my good friend Google. I put the name of my artist into a Google search. What I got back was recommendations for two videos.

Both of these videos consisted of

nothing more than my client's song with a static image of the album cover, top two hits. Now as far as red flag knowledge, I think if you have an entire work that is not modified in any way so it can't possibly be fair use, and all there is is the album cover on there, I think that's sufficient to confer red flag knowledge. Thank you.

MR. DONALDSON: I'm Caleb Donaldson for Google. The DMCA framework provides a balanced approach to intellectual property enforcement, and we can see that in the flourishing of not only the tech sector but the creative industries as well. We've heard already about the volume of searches, and video that is uploaded to YouTube.

We haven't heard that, those videos have paid $6 billion in ad revenue to the music industry alone. But the creative sector is not just established industry players. A study last year showed that in 2017 there were almost 17 million American independent creators offering their works for money online.

So this just shows the variety of

creativity that the DMCA can support. It's also laid the foundation for Google's Best in Class rights management tools. Not only our $100 million investment into Content ID, but also our bulk removal tools from search results. We've processed 693 million requests from URLs from search results last year, and we did it very quickly and with a high degree of accuracy, and we're very proud of those tools. All that rests on the framework of the DMCA. Thank you.

MR. AMER: Thank you.

MR. DOROSHOW: I'm Ken Doroshow. I'm with the Recording Industry Association of America, and I know there's going to be a certain amount of redundancy from this morning, so I'll try to edit on the fly to keep that to a minimum.

But from the perspective of the recording industry, little has changed over the two years since the last comment period, and we stand by our comments from a couple of years ago. Cases like Motherless, for example, continue the trend of judicial opinions that read the red flag

knowledge requirement out of the statute.

We are pleased to see those repeat infringer cases that the Office has noticed, the *BMG Cox* case, the *Grande* decision. But we hesitate to take too much comfort in those decisions because as was discussed this morning, they don't really teach us very much. These were very extreme cases and it shouldn't be controversial or newsworthy that a service provider that effectively has no repeat infringer policy is not entitled to the safe harbor.

And of course the *Motherless* court's willingness to excuse evident problems with the, that particular service provider's repeat infringer policy suggests that even *BMG v. Cox* and *Grande* can't be taken for granted.

MR. AMER: Thank you. I think we should move on. Thank you.

MR. DOROSHOW: Sure.

MR. HUDSON: Hi. My name is Doug Hudson from Etsy. We have two million microbusiness creators that might not be fully represented in some of these discussions, and in that, I think there's

some points that they see that might come together between the two sides.

One is that I've heard from IP owners and marketplaces and others that there's a dramatic increase in the amount of the fraud in the process. Fraud in terms of false takedowns, in terms of phishing and scamming, and in terms of like, gaming the system.

On the other side, they're seeing -- people are seeing fraud in counter-notices. I think we need to seriously look at 512(f) and find a way to put some more teeth into the process to protect both copyright owners, marketplaces and end users.

Second, I think we need to work on simplifying the DMCA for small IP owners, for microbusinesses, for people who have a small library of materials. It's hard for them to use the process.

Finally, there have been solutions here, in Europe. People have recommended pre-filters. Pre-filters don't work for everyone.

It's not a one-size-fits-all solution.

When you deal in physical goods, when you deal in creative services that don't match digital content, it's not a viable solution. So we need to understand how the flexibility of a system like 512 helps creates things in all sorts of creative endeavors, but not just digital, audio or video.

MR. AMER: Thank you.

MR. KUPFERSCHMID: So I'm Keith Kupferschmid with the Copyright Alliance. When it passed section 512, Congress intended to encourage copyright owners and OSPs to work together to combat existing and future forms of online infringement.

However, over the past 20 years, court rulings and other unanticipated changes in the online environment have rendered these provisions less effective, creating an ecosystem where mass copyright infringements are an unfortunate and regular occurrence, and ISPs are routinely shielded from liability and encouraged to avoid responsibility and accountability.

Over the past two years in particular we have experienced more of the same. The courts have effectively written the red flag knowledge standard out of the statute, and while there have been some good recent decisions relating to the repeat infringers standard, these decisions are not the panacea that some would make them out to be.

The *Fourth Estate* decision has compounded these problems by effectively adding a new requirement to the DMCA, that the works be registered before sending a DMCA notice. If you combine these decisions with the new limits on WHOIS database, there can be no doubt that we are clearly worse off that we were when we attended these roundtables two years ago.

MR. AMER: Okay, thank you.

MR. LEVY: Art Levy, Association of Independent Music Publishers. Since the last roundtable with some narrow exceptions, problems with the DMCA have gotten worse for independent music publishers and songwriters, not better. Courts continue to write copyright owner

protections out of the DMCA, most recently in cases that have interpreted the Act's provisions on constructive knowledge and misrepresentation, among other issues.

As a result, service providers have less incentive to work to prevent infringement, and it's even more burdensome for copyright owners to do so. The whack-a-mole problem has not been solved, yet ISPs continue to benefit from the safe harbor and from the perspective of indie publishers, songwriters and other small copyright owners lacking the resources to enforce their rights under the DMCA; the DMCA essentially offers them no remedy. The Copyright Office should promote significant DMCA reform, seeking a rebalancing of the DMCA.

MR. MIDGLEY: My name is Peter Midgley. I'm the Director of the Copyright Licensing Office at Brigham Young University. We're a private non-profit educational institution, and because we're private we don't enjoy sovereign immunity from copyright infringement lawsuits.

We're here because we believe that universities are somewhat unique in the DMCA ecosystem. We -- obviously, our primary role is to educate our students, many of whom are dreaming about careers in creative industries. At BYU, our animation program and advertising programs are among the most highly rated in the world.

So we've definitely recognized the value of a robust copyright system. We're by no means copyright abolitionists. But at the same time, we are also service providers and we manage a very large network to support our students, our faculty, staff and even visitors to our campus. In that context, we've received numerous 512(c) notices and the imposition that it presents for us, the administrative burden in processing those notices and the uncertainty associated and following the Cox and Grande cases are somewhat problematic for us as universities.

MR. AMER: Thank you.

MS. MOSS: Thank you to the Copyright Office staff for inviting us to speak here today.

My name is Sasha Moss, and I'm here on behalf of the R Street Institute, a center-right think tank based in Washington, D.C. and the states.

So as the internet has grown, so have the amount of takedown requests. As such, the burden has high end for both rightsholders and service providers to combat infringement. Now consider this. Consumption of legal content is continually rising, as R Street and the Center for Democracy and Technology articulated in our last round of statements.

In 2015, audiences legally consumed 3.5 billion hours of movies online. So as we see, as legal options become available, users will genuinely gravitate towards that option. Now, motivation might differ from user to user. Some users are afraid that pirated content might come with malware. Others may fear having their internet cut off for the entire household.

Regardless, legal options as they become available will be used, and we need to continue to gravitate towards that direction. Not

to end with nothing's ever easy, DMCA as written is not perfect. But as we know, perfect is the enemy of the good. I want to thank you for your time and look forward to your questions.

MS. RASENBERGER: Hi. Mary Rasenberger from the Author's Guild. The Author's Guild is a membership organization and advocacy organization with 10,000 members. We have a number of about a least a third of our members, maybe half, do some self-publishing. So they are trying to deal with piracy themselves.

In the last two years, e-book piracy has blossomed, bloomed. It is becoming a real issue. Frequent readers are more frequently reading from piracy sites.

The new cases in the last couple of years only affirmed the collapse of the actual knowledge and the red flag standards into notice and takedown. And, as we all know, notice and takedown is an absurd way to deal with piracy. 512 is not incentivizing cooperation as it was intended to do; and for authors the main issue we're dealing with is that, under

512, we cannot address the e-book piracy sites; that is, the sites that are devoted to e-book piracy. They hide behind 512.

MR. AMER: Okay, thank you.

MS. RASENBERGER: We need to re-think 512 and switch the burdens to the ISPs, and I just want to suggest that we look to the EU Directive as some kind of model.

MR. AMER: Okay. Thank you very much. I'd like to start this session with repeat infringer policies. Mr. Doroshow, I think you said that the recent cases don't have much to teach us.

But nevertheless, I'd like to throw the question out there, a general question, and that is to what extent have recent decisions on repeat infringer affected or clarified the state of the law in this area, and more specifically does anyone see any conflict among the decisions? I'm thinking particularly conflict between *Cox* and *Grande Communications* on the one hand and *Motherless* on the other hand. Mr. Midgley.

MR. MIDGLEY: Yeah. So I actually tend

to agree, that the recent case law has not been as helpful. For those of us who are earnestly seeking to implement repeat infringer policies, I think what we have now are a couple of cases that make it clear that -- it actually isn't even clear if a 13 strikes and you're out policy is an adequate policy under the statute.

What is clear is that if you don't enforce it, you're not eligible for the safe harbor, which really isn't all that helpful for those of us who are trying to implement whatever is an acceptable repeat infringer policy.

We heard a lot of talk in the earlier panel about what constitutes red flag knowledge, and somebody said they would love to know how to put somebody on red flag knowledge. Well as an ISP, I would love to know how to implement a repeat infringer policy that's going to be held to be adequate, and what it means to reasonably enforce such a policy.

I can just tell you in a university setting, again we're somewhat unique because we have

pretty close proximity to our subscribers, it's pretty easy -- I mean what our policy is at BYU at least, is to forward, to do our best to try to identify whoever was associated with a given IP address included in the notification of claimed infringement, which can be a very difficult process and we don't, we can't do it all the time given the dynamic nature of our network.

But when we can, we forward the notices on to the people involved. And just anecdotally, I can tell you that these students, they see this big scary legal notice. They show up in my office and they say I have no idea what you're talking about, I don't know what this is.

So I have, you know, some rightsholder on one hand telling me somebody has a problem. I have a student on the other hand saying I have no idea, and now the question is well what's my obligation? You know I'm -- I guess I'm one of the few ISPs that actually has a moot courtroom on my campus, so I suppose I could start holding hearings and have the student show up and invite the

rightsholders in.

But I don't know if Cox or Grande or, you know, who else could take advantage of that process, and really whether it should be expected of us as ISPs. What level of adjudication? What burden do we bear as ISPs to ferret out what are actual instances of infringement?

MR. AMER: Could you elaborate a little more on sort of what's taken place with respect to these notices the students are getting? I mean what sort of activity are these targeted towards? Is it sort of peer to peer activities that go to you and then you forward them to the students or how does the process typically work?

MR. MIDGLEY: Yes. So in almost all instances, we get these notices. They purport to be under 512(c) but they're really aimed at 512(a) activity, which again makes it very difficult because in order to even do any kind, you know, we're different than YouTube, we don't have a copy on a server that we own and operate that we can go and check.

This is just content that has flowed through our network, and to be eligible for 512(a) we can't keep copies of it. We have no way of verifying whether or not, you know -- the only thing we have to go on is the fact that a rightsholder has sent us a notification.

So we do our best to identify who's involved. We forward the notice on, and what we do on our campus, we refer the matter over to our Honor Code Office, which does have some fact-finding capability that we don't have in our office.

And so to the extent a student wants to dispute it, they can go and avail themselves of that process.

MS. SMITH: So it sounds like at BYU under 512(a), you take these notices as, you know, indicative data as to whether or not there's an infringement problem, right?

MR. MIDGLEY: That has been our current policy. You know again, we're looking at the *Cox* case and the *Grande* cases and, you know, we're left wondering what precisely is an adequate repeat

infringer policy? I don't think the courts have told us that or the statute certainly doesn't appear to tell us that.

So we're just, you know, doing what we think is reasonable and hoping that it will -- that if and when we're challenged, that we will be eligible for the safe harbor under 512, given the policy that we've adopted.

MR. AMER: So it sounds like you would favor the statute having more specificity; is that correct? I mean and I guess, you know, the second part of that question is that obviously we've heard from a lot of people that the repeat infringer policy was not intended and should not sort of impose a one-size-fits-all policy.

And so I wonder what your response is to that, and what your suggestions are for ways that would provide more clarity to universities and others?

MR. MIDGLEY: Yeah. So I do think -- I agree with the notion that a one-size-fits-all policy does not work very well. You know again, I'm

here as one example of a large number of organizations for whom internet service is not our primary function. It's an ancillary function that we provide, you know.

If I were the general counsel of Cox or Comcast or some other more traditional ISP, I would be paying very, very careful attention. For us as a university, and there are lots of organizations that have broadband access, you know, to supplement some other service they're providing.

And so, you know, one of the things that we have to consider is whether or not the potential liability associated with providing internet access is justified by the benefits that are provided and, you know, again with statutory damages and all these other things looming out there, I think that's a very real conversation.

So that's something the office needs to consider is, you know, if it's difficult for the Coxes and Grandes of the world to adopt and reasonably implement repeat infringer policies, how much more difficult is it for those of us that

aren't in traditional ISP businesses, to wade through all of the statutes and the case law on this?

My final point, I guess, would be at least in the university-specific context, there is 512(e), which is -- I don't know what its original intent was, but I can just tell you as somebody who's a copyright officer at a university, it's virtually useless.

So if there -- if you wanted to do something specific for non-profit educational institutions, which I do think would be a worthwhile thing to do, I would encourage you to consider clarifications and revisions of 512(e), and I'd be happy to talk about that further.

MR. AMER: Thank you.

MS. ISBELL: So I just want to ask sort of a practical rather than a legal question. Does your university either post what its repeat infringer policy is, or communicate that to rightsholders once they've complained about a particular student or particular topic on your network?

MR. MIDGLEY: Yes. Our repeat infringer policy, it's available on our internal university policy network. It's publicly viewable through our website, copyright.byu.edu. I encourage everyone to visit, and so -- and we -- one other issue -- again, this is a university-specific issue. But we also have to deal with the Higher Education Opportunity Act, which includes provisions specific to copyright infringement.

So in compliance with the HEOA, we send out an annual notice to every member of our University community, all faculty, students and staff that make them aware of our repeat infringer policy, direct them to legal alternatives and, you know, the other provisions that are in the HEOA.

So that's another area. Again, if you're -- if you're looking to do revisions and it's specifically aimed at the non-profit educational sector, I would encourage the Office to consider the interplay between the HEOA and 512, which it's not clear to me that that was considered in the

original implementation of those two statutes.

MR. AMER: Thank you. Mr. Band.

MR. BAND: So we, the Library Copyright Alliance filed an amicus brief in the *Cox* case, and what we were concerned about was exactly sort of this one-size-fits-all problem, and we wanted to make sure that, you know, the court didn't sort of say okay, this is the standard and this is the standard that's going to apply to everyone.

Everyone needs to have this kind of policy, because exactly as Peter was describing, certainly universities are one kind of service provider. Libraries are another kind of service provider for many Americans, you know, who aren't in school. I mean they're the place where they get internet access is at the library.

So it's very important that, you know, that sort of the standards that apply to Verizon and Cox and Comcast not necessarily be the standards for, you know, for policy, a repeat infringer policy for a university or for a library.

I mean we don't see a need for statutory

amendment. We think the language as is provides enough flexibility, especially because the idea of appropriate circumstances. Let me just also add, just to take a step back and this sort of connects to points made in the previous session, and maybe you'll be getting to that here too.

Less about the constitutional dimension, about the importance of internet access, but more the practical concern. So as I indicated, for many, for something like 30 or 40 percent of the population, the only place where they can get broadband access is at the public library.

I mean we all walk around with our iPhones, but a lot of people don't, or they're in regions where there isn't good coverage. The access to the internet, I mean in a sense it sort of goes beyond the First Amendment. I mean it really goes to the ability to function in this society.

I mean as you've read stories, you can't apply for Medicaid in places or you can't meet the Medicaid work requirements unless you file things

routinely on the, you know, on a website. So that assumes that you know, that you have internet access and that you know how to use a website, and that you can know how to make, apply for things online.

MS. SMITH: Do you think libraries should educate, and they probably do, right, about the need to not infringe copyright if you're depending on this right? Repeat infringer, you have more than one -- you have to repeatedly infringe in order to be potentially terminated.

MR. BAND: Right now, and you know certainly libraries, particularly in the higher ed situation, take that very seriously and they have the same Higher Ed Opportunity Act requirements. But my point is this, is that when we're balancing the issues relating to terminating internet access, we need to be aware.

It really -- it goes beyond -- I mean even though the First Amendment is important, you know, I'm saying that it goes -- you know right, life, liberty and the pursuit of happiness. You can't do those things in this country unless you

have internet access.

MR. AMER: So -- go ahead.

MS. ISBELL: I just want to ask a very maybe hyper-technical question. Does LCA view the fact that libraries provide the physical facilities to access the internet as making them 512(a) ISPs?

MR. BAND: Yes we do, only because we're -- you know, we feel we fall squarely within the definition of 512(a).

MR. GREENBERG: Related to that, then I have two follow-up questions. One is that in LCA's initial comments, you wrote that "Service providers have been applying a repeat infringer policy that was actually at a higher standard than the law requires."

I'm curious if you still feel that way, and exactly what that standard is?

I'll add that, and -- we haven't actually talked about this yet -- this might be a good time to begin talking about it, but at the last round of roundtables, the service providers were largely saying that repeat infringer means adjudicated

repeat infringer.

That is not what the court said in *Cox*, and I'm wondering if that understanding among service providers has changed, or if they think that the court just got that wrong?

MR. BAND: Well there's -- as this conversation indicates, there's lots of different kinds of service providers, and I'm sure you know, the different service providers have different opinions. You know, it would seem to me that this, you know, an infringer is an infringer, not an alleged infringer. That seems to me what the plain language of the statute is.

But I agree with you. The courts seem to be going in a different direction and, you know, so that you know, I'm not an Article III judge, so I guess the law is what they say not what I say.

MR. AMER: So just, and one last follow-up question. Just to sort of drill down, I mean so -- I mean I think we take your point about the importance of internet access. I guess the sort of bottom line question is so then what are you sort

of suggesting in terms of either a potential change to the repeat infringer provision to accommodate these sorts of concerns?

Is that what you're suggesting? Should there be a different statutory provision for non-profit institutions? Should the repeat infringer policy not apply in those situations? I mean what is the sort of bottom line proposal that you would favor?

MR. BAND: No. I think the statute as written, even though it's a little awkward that provision. But you know, because it's also talking about terminating infringers, which I don't think we want to do. We want to terminate the subscriptions of infringers.

MR. AMER: I just mean that if, you know --

MR. BAND: Just saying, I don't think that was that well drafted. But I don't think it needs -- I don't think that oddity is enough to require Congressional intervention. I think as long as courts continue or courts don't start

imposing additional restrictions on what appropriate circumstances, so that we, you know, a library can decide what's an appropriate circumstance, a university can decide what's an appropriate circumstance and say look, you know.

Because again, if you're a university student and you don't have access to the network, you can't get your homework. You can't get your assignments. You can't take your exam.

MR. AMER: Right, right. So but I mean I guess so the statute obviously contemplates that at some point, people will be terminated if they are repeat infringers and -- right, their subscriptions.

MR. BAND: Your account, your access.

MR. AMER: That their subscriptions will be terminated, and I take your point about the need for that standard or, you know, appropriate circumstances to vary depending on the nature of the service provider, particularly given the importance of internet access.

But on the other hand, that's what the

statute seems to contemplate. So are you suggesting that, you know, for certain institutions that requirement should not apply?

MR. BAND: No, no. What I'm suggesting is that in your report, you talk about how appropriate circumstances could be interpreted in different, you know, that what's appropriate at a public library or a public -- or what's appropriate for a university may be different from what's appropriate for a large commercial service provider.

MR. AMER: Okay, thank you. Ms. Castillo.

MS. CASTILLO: Well first of all, I would like to push back or disagree with the notion that it was difficult for *Cox* and *Grande* to implement a repeat infringer policy. In those cases, it was clear that it was not difficult. They just decided not to do it.

Cox had a policy and it just decided not to implement it, and Grande didn't even have a policy and it just decided to ignore all the millions of

notices that it received for repeat infringement. So I don't think it's about difficulty levels in those cases.

I think for purposes of the Copyright Office study, there are a couple of elements in the *Cox* decision that are helpful about repeat infringer policies in general, and it's what Mr. Greenberg was alluding to before, about the concept of repeat infringer.

The court said that a repeat infringer is someone who infringes copyright more than once, and there is no need for adjudication. I think that is something that the court got right, and that the Copyright Office in its recommendations should stand for.

Secondly, the *Cox* decision also ruled that repeat infringer policies should be assessed from an ISP's general practices and I think that is also the correct interpretation of the law. Then in terms of what constitutes reasonable implementation of a repeat infringer policy, there are three things that the Copyright Office can

include in its report.

First is that an ISP should meaningfully and consistently enforce its own policies, whatever that policy is. We don't, it's true that we don't have guidance from the courts on that, but at least we do have guidance on meaningful and consistent enforcement of such policy. This is from the *Cox* decision.

And then from the *Grande* decision, it's clear that an ISP should be keeping a log of repeat infringers, in order to be able to say that it has reasonably implemented a repeat infringer policy. In third place, AAP believes that ISPs should prevent terminated subscriptions or terminated users from opening a new account using simply a different email address or a different user name, but still be the same person.

These decisions are also helpful in pointing out what is not a reasonable implementation of a repeat infringer policy. So for example in *Cox* and *Grande*, the courts concluded that refusal to terminate known repeat infringers is one way to not

comply with the statute. So I think that's an easy recommendation for the Copyright Office to follow through on.

Another one would be the termination followed by the immediate or thereafter, shortly thereafter reactivation of repeat infringers. That also seems to be inconsistent with a reasonable implementation of the statute. And then on the question of the contradictions between *Cox* and *Grande* on the one hand and *Motherless* on the other, there are at least two problems with the *Motherless* decision regarding the repeat infringer policy.

The first one is that 512(i)(1) requires ISPs to inform their users and subscription or account holders of the repeat infringer policy. In *Motherless*, the policy was simply anything legal stays. That hardly conveys to a user that there is a potential for termination if they repeatedly submit infringing content.

Then another thing that the *Motherless* court got wrong was it ruled that implementation

of a repeat infringer policy based on the operator's personal judgment and without a log of repeat infringers was reasonable under the statute. We believe that Judge Rawlinson's dissent is very illustrative of why this is problematic.

We also think that the *Cox* decision, with its standard of meaningful and consistent enforcement, is actually more in line with Congress' intent in implementing the DMCA as a system of shared responsibilities between ISPs and copyright owners.

MR. AMER: Thank you. Mr. Midgley, did you want to follow up?

MR. MIDGLEY: Yeah, just a couple of quick points. First of all, I am interested if there is any guidance on, you know, unlike *Cox* or *Grande*, at least our university we're forwarding these notices on and we do receive actual notice from the subscriber, to the best of our ability, that there is no infringement.

So what is an ISP to do if in the implementation of their policy they get conflicting

information? Is that now considered an infringer when they've denied that they're an infringer, and whose word are we supposed to take and how do we deal with that? That's a question.

I would just also like to say that 512(i)(1) refers to a service provider system or network. This is a very important distinction. In a university setting, we provide a network which has the First Amendment implications we talked about.

We also provide the system, which is how our students access our university. If the statute isn't clear about what precisely we have to terminate once we've decided that there's a repeat infringer, whether it's the system or the network that's a very, very important distinction for us and we would appreciate some clarity on that.

I can just tell you that non-profit educational institutions are notoriously risk-averse, and so if -- uncertainty is going to make it very difficult for non-profit educational institutions to continue to provide the robust

environments that I think we all depend on to provide the socially beneficial functions of those institutions if there isn't certainty around how to avoid, you know, potentially catastrophic liability.

MR. AMER: Thank you. I think I'm going to go to Mr. Donaldson and then Mr. Doroshow, and then unless there are further comments on repeat infringers, we're going to move to the next topic. Mr. Donaldson.

MR. DONALDSON: Sure. I just wanted to say that *Cox* on the one hand and *Motherless* on the other shows that the courts are getting involved in whether these policies are appropriate, the nature and purpose and size of the platform, and that truly one size doesn't fit all. These are sort of -- they provide -- the cases taken together provide a good example of why it's hard to write a regulation that would cover all of this.

Even putting aside 512(a) providers, the number of different kinds of 512(c) platforms and the different resources available to them

dictates that repeat infringer policies will be, will have some variation. That's true not only from the perspective of a big company to a little company, but even within Google's 512(c) products, of which there are many.

You know, we tailor repeat infringer policies to the appropriate circumstances, given what the purpose of the platform is.

MR. AMER: Mr. Doroshow.

MR. DOROSHOW: This may help with the segue to other aspects of 512. But I just want to make a comment about the importance of the repeat infringer policy and the termination requirements and so on. Very important obviously. These are important developments with the *BMG* and *Grande* decisions.

But they're not the be-all and end-all for a couple of reasons. First, if you look at the facts of these cases, in order just to make the point, to prove the case that there was a failure here, the rights owners had to send millions of notices.

So there's sort of an up-front burden that's put on the copyright owner that is really unreasonable, even to make this threshold bare minimum case that these ISPs had not implemented a repeat infringer policy reasonably.

And then I think this is to echo Ms. Castillo's point from earlier.

Even if you have a perfect situation and a perfect system of repeat infringer policy and terminations and so on, you still have the problem of users finding other means, these infringing users finding other means of access to the internet.

Whether it's through a different service or because there's a lack of know your customer rules, they can show up again using different identification, different account information. So again, the real action, it seems to me, is the issue of red flag knowledge and the representative lists, sort of the more substantive obligations that go to the knowledge of the ISP and then what obligations they have upon acquiring that sort of knowledge.

MR. AMER: So that I think picks up on a question that I had during the last panel, which is how do content owners typically go about notifying conduit service providers of infringement on their platforms, because that was obviously --

You know, it sounds like Mr. Midgley, you still are receiving notices that purport to be 512(c) notices in some cases.

There was an issue previously in the *Cox* case about service providers rejecting those sorts of notices. I wonder if you have any sort of insight that you can provide as to the practice in your industry of how rightsholders typically go about providing this information.

MR. MIDGLEY: I mean it's somewhat variable, depending on the nature of the service. But we do send DMCA-compliant notices both to 512(a) providers and 512(c) providers.

MR. AMER: I wanted to -- Ms. Rasenberger, did you have comments on repeat infringer or -- you did, okay.

MS. RASENBERGER: Yes.

MR. AMER: Because I think -- okay.

MS. RASENBERGER: Thank you. As I listened to the issues raised here and in the earlier session, it occurs to me that a role that the Copyright Office might have, if 512 isn't completely revamped as I earlier suggested it might be, it would be to provide best practices, to convene the different industries, the different types of service providers and have best practices for both adequate repeat infringer policies, and also for going into probably the next question, for red flags knowledge, where it really differs by industry.

And in that way, the service providers couldn't say oh, a watermark doesn't necessarily mean infringement. I mean they would be educated in terms -- industry by industry.

MR. AMER: Good, sure.

MS. MOSS: Just to quickly branch off that note, something that R Street's been looking into with the Legislative Branch Capacity Working Group is this idea of capacity within the

legislative branch, so the first branch, which copyright ethics is part of Library of Congress, so y'all include that.

Something the PTO has instituted is the PTO Inventor Assistance Center, almost like a toll free call number where I can call PTO and ask a question. We have that for basic services like the internet. I can call my internet provider and say I have a question, how to fix something and because I am paying the service provider, they have to offer me an answer.

I think there could be an interesting avenue, maybe through the registration process and fees allotted to offer this kind of assistance to rightsholders.

MS. SMITH: So we have the Public Information Office, and they answer hundreds of thousands of questions every year. So that might be something where they could call.

MS. MOSS: It could be looked into in the Copyright Office, and I just think that will be an easy way not to solve the problem by any means, but

to offer avenues for the legislative branch to continually beef up its capacity. If the PTO could have it within the administrative branch, there's no reason why the legislative branch can't do the same.

MR. AMER: Thank you. I'm going to go to Mr. Kupferschmid, and then I think we're going to have to move to the next topic.

MR. KUPFERSCHMID: Yeah. I'll try to be brief and sorry for getting in the way of you moving on. But there's a lot of discussion so far on this panel and also on the first panel about this one-size-fits-all does not work, and I don't disagree with that.

But if we're going to consider that for ISPs, we really need to consider that for the other side of the equation, which is the creative community, right? One size fits all for the DMCA doesn't work for the notice system either, for the little guy, the small businesses, the individual creators. It just -- it just doesn't work.

They can't afford to bring these

expensive suits against these ISPs, these repeat infringer suits. They can't afford to be sending these millions of takedown notices that, you know, that the music industry might be sending or anyone else for that matter. They are truly sort of -- if you watch Star Trek, they're the guys with the red shirts, right? They get beamed down to the planet and they're toast, you know. Immediately the guy has to die. They're the expendable group here if you will.

So I think that needs to be taken into account if we're going to take into account how the DMCA works or doesn't work. For the small platforms, we also need to take into account how it works or frankly doesn't work for the smaller creators.

MR. AMER: Thank you. So I'd like to turn to the issue of storage at the direction of the user, and how that relates to the no duty to monitor provision, and Mr. Band, I know you mentioned the *Mavrix* case.

So obviously we've had two recent 9th

Circuit cases, *Mavrix* on the one hand and *Motherless* on the other, both of which involved service providers that provided some level of human monitoring. And so I wonder what your views are on the extent to which these cases have clarified the law with respect to 512(c) eligibility, particularly on the issue of when something should be considered storage at the direction of the user.

MR. BAND: Well, I don't think they've clarified the law. I think they've muddled it and like I said, I think *Mavrix* sort of went in a bad direction. *Motherless* sort of improved it a little bit. But I guess it just really seems to be treading in a very dangerous area, especially as was indicated on the previous panel.

I mean this issue of moderation, what is appropriate moderation, really it's a very fundamental issue that goes way beyond copyright and it gets into 230. But then it also gets into, you know, these broader issues of, you know, what do we want the internet to look like. And it seems --

MS. SMITH: Well, it also goes to copyright though right, because it says -- 512(c) says ability to control such activity and some of the case law. We have to reconcile copyright, you know, think about it in context of these other issues that are very important that we've heard about from the panel too.

MR. BAND: Right. But 512(m) says you know, you can't condition eligibility on monitoring. So it really, you know, sort of the sense of Congress, both in 1996 when the CDA was being discussed and then 1998 when the DMCA was being discussed was, you know, that there wasn't going to be a requirement to monitor, but that people were going to be encouraged to do it, because there was this recognition that monitoring was a good thing and moderating was a good thing. Moderating, not monitoring.

But that you wanted to have, if possible, human involvement because, you know, you couldn't make all these determinations algorithmically and so forth. And so we just, that's what's so

troubling. Now it could be that in the specific facts of *Mavrix*, you could sort of say well, okay.

They were - there was so much human involvement and, you know, that they sort of numerically were filtering out, you know, two-thirds, three-quarters of the content. So it really was sort of a situation like a publisher, that where, you know, 100 submissions and 100 authors submit novels and only one gets published.

MR. AMER: Well that's what -- I'm sorry to interrupt, but I mean that seems to be the point that, you know, I think we were trying to get at. I mean at the beginning you said that, you know, *Mavrix,* I don't know if you said it was wrongly decided, but you know you said that it has sort of muddled things.

And you know, it seems to me that there was quite a lot of content-based selection going on in that case. You know, if that doesn't constitute storage at the direction of the service provider. I don't know. It's hard to think of examples that would, isn't it?

MR. BAND: Well, and I guess -- and I don't remember -- my recollection was that in *Mavrix*, there wasn't anything that -- I'm sure there was in the trial court, but I don't remember in the appellate decision if there was any, any sense of quantification, and obviously you don't want to have hard and fast rules. But I think quantification does give you a sense of how much --

MR. AMER: Quantification in terms of how much --

(Simultaneous speaking.)

MR. BAND: Well right, right, right. Again, right. At what point do they stop, does it really -- if I'm a service provider and I'm a platform and I'm getting in, you know, hundreds or thousands of submissions a day and I'm just kind of doing this very quick and dirty, you know, cat video, yes; something else, no.

You know, that kind of -- and again, it's not even me. It might even be again the community that's sort of volunteers who are doing that. That's one thing, and then if you end up with let's

say 80 percent or 90 percent of the content that is submitted by users, that ends up going up.

I think it's pretty easily to say yeah, that is -- that is storage at the direction of the user. On the other hand, if you have a situation where, you know, 90 percent gets screened out for a variety of reasons, you know, including that it's not appropriate or the quality isn't good enough, I mean you really do have these sort of editorial decisions, then it starts looking a lot more like a publisher.

Then you could sort of stay well, that starts to look -- and again, it is a continuum, and in the specific facts of *Mavrix*, I don't know. I don't know if it was: were they screening out ten percent or were they screening out 90 percent or were they -- is it somewhere in the middle?

But all I'm saying is that some of the language and -- in that decision was troubling and reflected a lack of sensitivity that again, *Motherless* will to some extent correct it. But still, you know, the bigger point is that we don't

want to make -- we don't want to put platforms in this impossible place where if they try to moderate or try to look and make sure that the stuff is really appropriate, that they end up losing their safe harbors.

MR. AMER: Thank you. Ms. Castillo.

MS. CASTILLO: Thank you. I think it would be helpful for the Copyright Office to look at these two cases, to stand for the proposition that screening material for potentially infringing content is an activity that enhances public accessibility of content stored at the direction of the user, and does not expel an ISP from the 512(c) safe harbor.

The types of screening in these two cases were very different. *Motherless* was screening for illegal content. Their policy was again, anything legal stays. And so the court there found that this was an activity that was acceptable for purposes of the safe harbor, because it would still render the content to be stored at the direction of the user.

The type of screening in *LiveJournal* was different. It was for substance. The court called it manual, extensive and substantive. It was a much closer call, and one thing they were not screening for was infringement.

So at that point, I think what's helpful from these two decisions is that if an ISP is screening for substance and is not screening for infringement, then it is possible that it will lose its safe harbor.

In *Motherless*, the ISP was simply screening for illegal content, including copyright infringement. I think these decisions are helpful in that they attenuate to some extent the ISP's incentive not to look at user submissions for infringement, and they also clarify that screening content for substance is not an accessibility-enhancing activity, and that the ISP might lose its safe harbor if it engages in this behavior.

I think one other point I would like to make is that we disagree with the courts'

interpretation of section 512(m) so far. The title of that provision is "Protection of Privacy." Both the Senate and the House Reports make it clear that Congress' intent with this provision was to prevent ISPs from violating privacy laws, such as the Electronic Communication Privacy Act, when they were pursuing efforts to address infringement.

This section was not meant to say that ISPs have no obligation to monitor whatsoever when it comes to copyright infringement.

MR. AMER: Thank you.

MR. GREENBERG: I want to ask a quick follow-up question on that. If I understood correctly, you were saying that to the extent that a service provider is screening for illegal content, they should also be screening for copyright infringement, which is illegal.

So the question there I have is does that mean that if a service provider is screening for child pornography and snuff films only, that they are going to suddenly be out of the safe harbor? If that's not what you're saying, what is the

limiting principle between screening for no illegal content and all illegal content?

MS. CASTILLO: No, no, that's not what I'm saying. What I'm saying is what the court said in *Motherless* was that screening for illegal content of any kind, so child pornography and copyright infringement, were things that Congress could not have meant to discourage by eliminating the safe harbor.

So what I'm saying is that if ISPs are screening for illegal content, including copyright infringement, then they shouldn't lose their 512(c) safe harbor. Does that make sense?

MR. GREENBERG: It does. My question is what if they're only screening for some illegal content but not copyright infringement?

MS. CASTILLO: That's a closer question, right, because according to the *LiveJournal* decision, where there isn't any discussion of screening for any kind of illegal content, in that case the court seemed to think that on remand, the ISP might lose its safe harbor.

MR. AMER: Mr. Carlisle.

MR. CARLISLE: I think that content moderation is a good thing and it should definitely be encouraged, because the alternative to that is no moderation at all and it just becomes an absolute, you know, free for all and cesspool.

I think that perhaps by getting better practices out there that we can solve a lot of these particular problems, and I'll reference that from my own experience. I used to be a musician and write songs. Now in order to get these heard, I placed them on a website called ReverbNation.

Now according to ReverbNation terms of service, I had to warrant that I was the author of the material or I had licensed, properly licensed the material or it would not go up at all.

I think that a lot of the problems that we're experiencing with red flag knowledge and a lot of the experience of well, it's got a watermark on it but who owns it, we can have better practices along these lines.

Before we get a "posted it at the

direction of the user," perhaps the threshold question is who owns the material? Is the user who's posting material claiming to be the owner of the material? Are they the proper licensee of the material, or is the material in the public domain?

I think that these factors would go a long way to eliminate a lot of the questions, the guesswork and the problems that we're experiencing between the *Mavrix* case and the *Motherless* case about how much content, you know, moderation is required.

MR. AMER: Doesn't Google already, and Mr. Donaldson, maybe you can answer this. But I mean doesn't Google require people to affirm that they have the rights to upload whatever it is they're uploading?

MR. DONALDSON: Yeah. Our terms of service include that you have the right to upload what you're uploading.

MR. AMER: So Mr. Carlisle, I wonder sort of are you suggesting something kind of from the regulatory standpoint that would --

MR. CARLISLE: Yes.

MR. AMER: Okay.

MS. STRONG: Actually if I can follow up with Mr. Donaldson. So I mean following up with Mr. Carlisle, could you maybe explain a little bit if this situation happens, you know, when folks are using Content ID. I understand there are a variety of additional products that are offered on the YouTube platform, to answer the question about of your connecting the copyright owner and the alleged infringer, to take their dispute offline to go to the contract question that Mr. Carlisle raised.

Is there anything you can share about maybe some of the experience you guys have seen in the use of both not only just Content ID but also some of the other tiers of service that your platforms offer?

MR. DONALDSON: Sure, absolutely. Content ID resolves 98 percent of the copyright disputes that arise on YouTube, so it's been very effective.

We've also just recently introduced the

Copyright Match tool, which you've alluded to, and that allows smaller creators to easily find matches to their works and file takedown notices in a much more streamlined way.

We've rolled that now to 400,000 smaller creators, and we're continuing to expand the universe of people who are eligible for Copyright Match tool. So you know, we've seen, we've seen good results. You know, to circle back to the Beyonce question from earlier, those songs are a demonstration that the record label wants those songs on the platform, Beyonce's record labels.

They're licensed and, you know, in most of the cases if you recognize the song, so can Content ID. And if, you know, if Beyonce or some other artist chooses to monetize some fan's upload of the printed lyrics and the song, we're happy to help with that.

MS. SMITH: Can I ask you, is that always -- is that always going to be clear, that the Beyonce or whoever the rights owner has opted to leave that up or how do we know that that's true. I mean YouTube

may know but --

MR. DONALDSON: Yeah. It's complex. I don't think there's an easy way for the public to find out. It's true, though, that YouTube has more than 1,000 deals with music rightsholders, including all of the largest music rightsholders. So the vast majority of content on the service's music is licensed.

I'll say further that in general in the music industry, there's a huge problem with incomplete data, that publishing houses and record labels to some degree and collecting societies can't or won't reliably tell you who -- exactly what the list of works is that they represent, and so we're working with incomplete information.

MS. SMITH: Mr. Levy, did you want to say, to engage in that, because I think sometimes independent musicians have a slightly different perspective.

MR. LEVY: I absolutely did. Yeah, oh I'm sorry. I absolutely did. Content ID and content match rely on representative lists, and the

-- it's fine for publishers that have direct arrangements with YouTube.

But a lot of our independent publishers and certainly songwriters don't have those direct deals, and therefore as far as I know are unable to submit a representative list that would keep their content off of YouTube. Is that right?

MR. DONALDSON: Content ID doesn't rely on a representative list. It relies on ingesting a copy of the music to make a -- fingerprint is even too simplistic, to make a statistical representation of that song.

MR. LEVY: Submitted by the labels, which is essentially the same thing, right? It's here's a list of content that we want to put up.

MR. DONALDSON: It's not a representative list. It's a complete list of the things that we'll protect.

MR. AMER: Well what about the broader point, you know? In the last roundtables we did hear from individual music creators in particular who were concerned that Content ID wasn't available

to them. Has that changed in the intervening years, and is that -- you know, have there been efforts made to sort of expand the universe of rightsholders who are eligible?

MR. DONALDSON: There has been some growth in third party aggregators of claimants, so that people who work with the smaller rightsholders to send Content ID notices. There's the Copyright Match tool which I just mentioned that we're very proud of. That's a tool better tailored to smaller creators.

MR. AMER: Why is it that Content ID isn't, doesn't work well for smaller creators?

MR. DONALDSON: Content ID is inordinately powerful. It's very complicated to operate and administer, and it allows sophisticated larger partners to specify amounts of their material that they're willing to use, for example, thresholds.

You know we've seen examples where even from those Content ID partners, some user who isn't as experienced in Content ID can, you know, take

down or wrongly monetize a broad swath of content.

MS. SMITH: Is there an obligation, this may already be in the record, but is there an obligation to monetize a certain amount of material through Content ID, or could you just use it all for takedown?

MR. DONALDSON: If you were a Content ID partner, you could take it all down.

MR. AMER: Mr. Doroshow?

MR. DOROSHOW: Yeah. Just returning to the discussion about moderation and when, if a service provider chooses to screen certain illegal content but not copyright infringement, should they lose a safe harbor?

I think our position is if the means to screen for copyright, if the copyrighted material exists and they do [screen other content], then there is that obligation.

You know, if a service provider is interacting with the content on its site for the purpose of improving its bottom line and making a more appealing site and benefitting from the

presence of the copyrighted material, and it has the means available to screen that copyrighted material out, then we would say yes. You would lose the safe harbor for that reason.

And this, there was enough discussion I suppose in the first panel so I won't belabor it, that the availability of these tools -- now Content ID obviously Google invested a lot of money and built its own solution. There are other solutions out there that are not so expensive and costly, and if those are reasonably available then we think that that is an appropriate condition of the safe harbor.

MR. GREENBERG: Well, so I want to follow up on that question, but first I do want to go back to Mr. Donaldson just to clarify a point. At the outset you said that Content ID was an $100 million system.

The last time we did these roundtables, I know it has been three years, it was a $60 million system that everyone was saying should be given to every single ISP in the world.

Is that because of subsequent

investments? Does that include other things like content match and stuff?

MR. DONALDSON: I think we said more than 60 million, but I'd have to check the record. And as far as I know, the number is accurate of $100 million.

MR. GREENBERG: Okay. So I just want to follow up on this. Last time around we heard that everybody needs to be using filtering technologies. Maybe they can't afford things as sophisticated as Content ID that certainly would take years to develop even if they could.

But since then, and even at the time, numerous large service providers had some sort of filtering technologies they were using. I'm sure more have been developed in the three years since or two years since the last round of comments. So I'm curious to hear a little more on what has been added to the ecosystem, and what the feelings are as to whether or not we've reached a point where filtering technologies, whether it's Content ID or something a little more rudimentary, are STMs?

MR. DONALDSON: Just a quick follow-up on your first question, it's inaccurate to refer to -- to think of Content ID as a static entity. It's the subject of major ongoing investment all the time at Google.

So you know, an additional $40 million of investment give or take in the last three years sounds reasonable to me. It's the work of many, many people at the company.

As to whether they've become standard technical measures, I mean under the statute I'd say no because they're not in widespread use. And so that, you know, that's something we would, you know, we'd have to consider.

MR. AMER: Mr. Hudson.

MR. HUDSON: So I think some of this fails to account for the long tail, that you know when you're dealing from long tail content, non-digital content, small creators, this filtering technology for the foreseeable future isn't going to be comprehensive.

Just like with the repeat infringer

policy, you're now faced with a question of how much of a filtering technology is sufficient for you to stay inside the -- to stay inside the protection of 512? It's not going to be comprehensive. If it's not comprehensive enough, do you now lose protection?

We're just kind of -- we're moving the question over, but the uncertainty still remains. I think that's why the flexibility of the current regime and the ability to tailor based on the size of the entity, the type of content, the type of content creators needs to be taken in to account.

Simply just changing it to add a filtering requirement isn't going to solve the problem.

MR. AMER: What's your response to the argument that, you know, at a minimum you could filter entire works, for example, and that the universe of instances where the uploading of a full work is going to be licensed or fair use or otherwise permitted is relatively small. I mean why couldn't, why couldn't filtering technology at a

minimum capture full works?

MR. HUDSON: What if the full work is a quilt? How do you -- our minds are set for like digital content, and a lot of the content that's being shared or discussed isn't digital and maybe a picture of digital -- the picture of it may be digital.

But it is -- it gets inordinately complex when you're going one or two levels beyond that. If you're talking about a, you know, a full copy of a movie or an audio work, I think that's where there's been technological work done here to help solve that problem.

But my point is that there's a huge long tail, and that long tail when you add it up is significant, that the technology that everyone's been talking about just doesn't work for.

MR. GREENBERG: I don't want to lose the forest for the trees here, but just so we're talking about the kind of content that might be uploaded to Etsy. Let's say a full image of a movie poster printed on a tee shirt, right? Why isn't that the

kind of thing that could be screened out?

MR. HUDSON: I think it depends on the type of technology available, and how reverse image search or other technologies could be applied. You know, I can't speak to any one particular instance and there are also issues where there are things that are old and things that are new.

We can't determine -- for example, there could be a vintage tee shirt that has, that has something on it or a vintage poster. So we're not generally in the position to know whether the vintage is correct or not unless we get assistance from the copyright holder.

MS. SMITH: Has Etsy changed its policies at all following the *Zazzle* decision, or do you view that as just like qualitatively entirely different, because in that case they're printing and they're producing it themselves, that model?

MR. HUDSON: We do view it as qualitatively different. Etsy is kind of a pure marketplace, a pure platform. We don't handle goods. We don't do drop shipping. We don't print

on demand. Users are responsible for their own content. So we view it as a different set of facts and a different issue.

That said, we do have a repeat infringer policy. We do have kind of comprehensive sort of policies to deal with intellectual property issues, and corner case intellectual property issues such as counterfeiting, which we view as slightly different.

MR. AMER: Mr. Kupferschmid?

MR. KUPFERSCHMID: Thank you. So on the issue of filtering, I'm going to take a line from what Sasha said earlier, which is about the DMCA, that perfect doesn't need to be the enemy of the good. Here, we tend to talk -- when we talk about filtering and screening and monitoring, we seem to just focus on the extremes.

There's a huge middle ground there, right, and this isn't just a black-and-white issue. There can be monitoring and screening and filtering or whatever you want to call it, that can be done in a way that takes into account different concerns

and different types of examples.

Just to identify a few, I think Brad you had mentioned sort of the full movie example. What about a test that is never licensed to anyone, is held sort of in secrecy and never found online. I mean if you notify a platform that the test shouldn't be up, that should be good enough so it never sees -- never sees the light of day. I mean that's just, you know, one example.

The example that Mickey was talking about earlier today, about metadata on a photo, and then the response to that question was well, what if that photo is licensed? Well just because you find metadata on a photo doesn't mean that that photo is automatically just taken down.

Why isn't there a middle ground here, right? Why isn't the question asked to the person who's posting or trying to post that photo is do you consider this fair use? Are you the copyright? Are you a copyright owner? Are you licensed because your name differs from the name that's on the metadata.

There's a middle ground. I mean hell, every time I go to a website I'm asked if I'm a robot. You'd think that you could come back and just ask a question, ask a question in that regard. I think in short, and what this roundtable and all the roundtables are about are not about solving the problem.

It's about getting us closer to solving the problem, getting us to a place where we are right now where things are really, really not working. We need to close that gap. We really do, because I mean there's a desperation out there. I've spoken on behalf of little guys, but it's not exclusive to little guys; it's across the board.

And you know, when it comes to filtering and screening, monitoring, there's absolutely more can be done.

MR. AMER: I'm going to jump back, if it's okay, to Mr. Band, just to see if you had a response to that last point about filtering.

MR. BAND: Right, and I think this gets -- this gets to the whole moderation point, and

certainly, you know, the example that we heard from Etsy.

I mean if you have an image from a movie on a tee shirt, I mean that very well might be fair use. It all depends on what the, you know, if there's -- on the context and the purpose of the image.

And that could obviously, if you have an automatic filter that could be a problem. But with respect to -- so again back to Sofia's point about moderation, so imagine you have institutional repositories. So that's a lot of the kinds of platforms that libraries and universities have, or they have a platform where people can upload -- for a department or whatever.

Now it could be that in some cases, especially if you start having a very large repository, that you want to have some degree of moderation to make sure that the stuff that's being uploaded really belongs there.

Well, why should you -- it doesn't make sense that you would lose your 512 safe harbor by

virtue of that, by virtue of making sure that the stuff that is uploaded there is appropriate to that website, as opposed to just looking to make sure that it's not illegal content.

I'm even thinking of a repository like SSRN, which is owned by one of your members, Reed Elsevier. You know, they have huge amounts of content and you know, a lot of us in the room have probably uploaded content to that site.

It doesn't go up automatically. It first, you know, it has to be reviewed by someone at SSRN who is -- and I don't know what they're screening for, but among other things they're deciding where, you know, where it's appropriate to go. But it's also --

MR. AMER: But doesn't that mean -- I'm sorry to interrupt, but I mean that sounds like volitional conduct to me. I mean that sounds like, you know, someone making a choice, the intermediary, the service provider making a choice about whether or not to post something.

I mean if I were just to email you, you

know, some materials and you had your own website and you decide, you know, even if you post 100 percent of them, it seems to me that there's an argument that, that you know while I have expressed my view that I think they should be uploaded, ultimately you're the one who kind of says yes or no.

MR. BAND: Right. But I still think, at least for purposes of 512(c), it is that uploading is at the direction of the user.

MR. AMER: But if you have the ultimate choice, then how is it at the direction of the user? I mean I take your point about, you know, a sort of high-level filtering for illegal content or something of that nature. But I just wonder how we sort of draw the line properly if we at some point are talking about whether the content is suitable for the platform?

MR. BAND: Again, it just seems to me that it's, if it's under the terms of the statute, I mean you know, it is the user that is sending this stuff and if basically everything was going to end

up on the site, so long as it is, you know, the kind of thing that should be on that site.

That's a very different situation from the traditional publishing model, where you really can say okay, because they are making that kind of qualitative decision that only, you know, one submission out of 100 or out of 1,000 is going to be disseminated, I think that that just falls on a different place on the spectrum.

MR. AMER: Oh, I'm sorry. Ms. Rasenberger. You've been patient, thank you.

MS. RASENBERGER: Thank you. A couple of points. I want to go back to what Mr. Carlisle said about, having [uploaders click] some sort of I affirm that I own this, I licensed it or it's fair use and terms of service are not enough for that. I mean we all know nobody reads the terms of service.

So to echo what Keith said, I think it would be really good if you, whenever you uploaded something to any site, you have to say I own it or I licensed it or I believe it's fair use. Why not?

I mean not only do you have to now say

I'm not a robot, but you have to identify bikes or storefronts or something, and if you don't have very good eyesight that's sometimes hard to do in those photos.

So I also thought -- one thing we haven't talked about, and I want to make sure we do, is the question of who the user is. I know that the *Mavrix* case touches on it. But I want to -- we also haven't talked about the bad actors here, and how ineffective 512 is against the really bad actors.

So I want to give an example of a site right now that we've been dealing with a couple of years already. It's Ebook.bike. It's owned by a gentleman named Travis McCrea, who founded the Pirate Party in Canada. He also is one of the principal members of a religion called Kopimism, and hosts their website.

The sacrament for Kopimism is that copying is a sacred duty. So he owns the site. He hides behind section 512, and I will say for most of the ebook piracy sites, that is true. They say oh, we don't know anything about it. It's all user

uploaded content.

Now to upload content, you have to become a member. Most of the members we know are part of the Piracy Party or related. If you're a member, you are instructed on how to buy an ebook, strip out the DRM, upload it to the site and then return it, so you don't even have to pay for the ebook.

So I just want to make sure that we think about these kind of cases. We have sent notices to -- the authors have independently, and we organized groups of authors to do this, send notices to Ebook.bike. Sometimes it works, sometimes it doesn't. I mean sometimes the site doesn't even work, the notice form.

We have sent notices to Google. We have sent notices to the servers. Now the server provider did take it down, but of course he just went and got another server, right? And this is has been over two years we've been struggling with this, completely ineffectually.

When it started, it was mostly the independent authors' books that were there. Now

every, all fiction works are there, particularly any popular fiction books, can be found on Ebook.bike, and we are left without anything that we're able to do, other than to bring a lawsuit and litigate whether they're protected by 512.

But with all of these open issues, we can't do that. Those cases cost millions and millions of dollars, which authors can't afford to do, and who knows what the outcome would be?

MS. ISBELL: I just want to follow up on that a little bit. You know, in the first roundtables we also heard a lot about these sort of pirate and bad actor sites. But do we really think Congress ever intended to cover those types of sites in section 512?

MS. RASENBERGER: Of course not, of course not. But the way that the courts, particularly the *Viacom v. YouTube* case and the *Veoh* case, which has now become the ingrained law in all of the circuits, make it possible for the bad actors to be protected. Or I mean it's possible that we could win a litigation, but you have to go

through --

Because the burden has been put on the copyright owners in pretty much every aspect of 512 except for the repeat infringer policy, those cases are very, very hard to prove.

MS. ISBELL: But what is the answer? Is the answer to pull back section 512 for everyone, including the good actors? Is it to have a clearer off ramp for the bad actors? I mean how do we deal with this without blowing the system up?

MS. RASENBERGER: Well, that's a really good question. So as I said before, I think that we should have best practices that are in the law or at least regulations for what red flags knowledge is, and I think Congress should step in and say, and clarify that knowledge and red flags knowledge do not mean only knowledge of a specific infringing item at a specific location.

That is the problem, knowledge that your site is a place for piracy, that pretty much everything on the site is pirated should take you out of 512. That you should be able to win, you know,

on summary judgment.

MR. AMER: Thank you. So we're running low on time. So I'm going to ask Ms. Moss, if you have a comment on this topic and then I'm just want to -- because we're short on time, I want to sort of introduce the next topic.

One or two of you during the introductions mentioned 512(f), and so I invite folks to state their views about, you know, the state of the law with respect to 512(f), particularly post-*Lenz* and post the denial of cert in *Lenz*. Feel free to answer -- yes, go ahead.

MS. MOSS: So three really --

MR. AMER: Oh, I don't think your mic is -- oh, it is. Okay.

MS. MOSS: Three brief notes. The first is regarding my friend Ms. Rasenberger and Mr. Kupferschmid's point regarding the idea of verification when you upload. That's putting onus on the user, and I don't know about you. Most users don't have a legal education and they don't know what fair use is, and they might not read the terms

of service to find out what fair use may or may not be.

The second brief point is regarding filtering technology and upload filters. Upload filters are not working as properly as I think many around the table would like to say they would be. For example, in the EU a parliamentarian had her video taken down off of YouTube because it said there was infringing content in her video. It was a speech on the floor of the EU Parliament.

And the third note I just briefly want to mention is the moderator's dilemma, this idea of seeking after content that may or may not be infringing.

As we saw with the passage of FOSTA and SESTA in CDA 230, this creates the moderator's dilemma of what can or cannot I take down or am I taking down legal content versus the infringing content as I intended to do so. And that will wrap me up, so you can start doing 512(f).

MR. AMER: Okay, thank you. Mr. Levy.

MR. LEVY: Yeah. Now we're on 512(f)?

MR. AMER: Yes.

MR. LEVY: Excellent. So *Lenz* is still a major problem for us, because it appears to require and it does require that a copyright owner consider fair use before a takedown notice is sent. It doesn't give any real guidance as to what that means, what considering fair use is. It's kind of hanging out there as a potential time bomb for us.

Again for small publishers and certainly for songwriters, who may have just massive amounts of infringing examples of their works out on the internet. To have to engage in a four-point analysis of fair use prior to sending a notice for each and every one of those would be truly burdensome and potentially expensive if you have to have someone on staff to do it.

MS. SMITH: Well, do you interpret that case as imposing a one-size-fits-all standard on everyone, or can you look at whether it is an individual copyright owner or an individual user filing a copyright -- a counter-noticer who may be less sophisticated than the defendant in that case?

MR. LEVY: I don't think the ruling really helps us make that determination.

MR. GREENBERG: It seemed like you mentioned that *Lenz* is a problem. But didn't actually -- I didn't hear you actually talk about automation, in fact whether or not you can use automation in making the fair use assessment.

The last time we did these roundtables, we heard some -- there was some sense that there probably was still some room there. My question is your thoughts on -- with the *Lenz* cert denied -- whether and how the 9th Circuit has left in place room for automation.

MR. LEVY: Well again it -- I'm not sure if it's addressed it directly. It seems as if language regarding automation has been taken out of the second version of the opinion. That's a concern for us. It might very well mean that they're going to interpret it so that we cannot use automation, which again increases our cost burden and ability to protect our works.

MR. AMER: So we're running out of time,

so I think we're just going to do kind of a lightning round. I urge you all to be brief. Mr. Hudson, do you have a response to Mr. Levy's concerns?

MR. HUDSON: Only that you just need to keep in mind that the platforms are in the middle there. We're not in a position to make various determinations. You have to rely on the data provided by the copyright owner, the responses provided by users. And in the world of filters, where does liability lie for the intermediary trying to just enforce the system as it is?

So this is why in an enforceable mechanism for 512(f) when either side violates their duty to follow the laws, it's important for platforms to enable copyright owners to get protection, and enable users to express their own creative content.

MR. AMER: Mr. Carlisle.

MR. CARLISLE: I think that for small creators, independent musicians, *Lenz* becomes a good news/bad news joke. Fair use is incredibly complex. We can't even get the courts of this

nation to agree on a simple standard for fair use. Everything has to be examined on its merits, and for an independent musician to be required to make that kind of assessment before taking -- sending a takedown notice is really burdensome, especially when the alternative, I mean you take red flag knowledge, when you have these very sophisticated companies professing that they have no idea what a red flag knowledge is or whether something infringement.

From my standpoint as a musician or a creator, it's much easier to figure out whether something's infringing, than whether something is in fact fair use.

MR. AMER: But I mean isn't the statute sort of premised on the idea that really, you know, it's going to be the copyright owners who ordinarily are going to, you know, have the most knowledge about whether the use is authorized and in general should have the responsibility for monitoring platforms? I mean isn't that sort of the basic bargain that was struck?

MR. HUDSON: Yes, and I think that's the wrong bargain to strike. I think putting the sole onus on policing the entire vast internet on copyright owners, some of whom are very, very small and don't have the money or the time or the ability to monitor the entire internet 24/7, I think was the wrong balance to strike.

MS. SMITH: But to drill in on the misrepresentation part of the statute, 512(f), I mean this is only liability for knowingly, materially misrepresenting that something is infringing or doing, you know, the same type of representation for a counter-notice.

So if you were someone and you have an honest mistake as to whether something is fair use or not, why is that a problem? If it's complicated and you do your best, and you're not knowingly materially misrepresenting, is 512(f) really a risk?

MR. CARLISLE: I think that the problem again is it goes back to material misrepresentation and what the ultimate standard on that's going to

be. It seems to me that even the court in *Lenz* struggled mightily with what Mrs. Lenz was doing -- or rather what Universal Music Group did was a material misrepresentation.

There you have a very sophisticated, you know, actor. I think that -- I think it's a very gray area and I think it's a problem.

MS. SMITH: I think I'm suggesting for the little guy, where knowingly is very helpful on both sides of, you know, the system.

MR. CARLISLE: Yes but again, you're dealing with somebody who may be a creative person. They may know something about copyright. But again that knowingly part of it, musicians can get incredibly aggressive when it comes to asserting their rights, and sometimes they're right and sometimes they're wrong.

And especially in an area with music where there is a lot of homogeneity, and there's a lot of musicians out there who will hear any similarity as being infringing.

MR. AMER: Okay. Ms. Castillo.

MS. CASTILLO: Just a quick response to Ms. Moss' concern with the taking down of legal content by over-aggressive filtering. I think that's what you were referring to. I think for those cases we have the counter-notice system, and that is working.

So I think concerns with the accidental takedown of legal content should not be a reason not to implement filtering or not to look at filtering as a solution for rampant infringement online.

MR. AMER: Okay. We're going to go to Mr. Band and then I think we're going to have to close things down. But we do have our open mic at the end, so if there are things left unsaid, feel free to sign up for that.

MR. BAND: So this is in response to Mary's point about, you know, litigation being expensive. Yes, it is litigation and many lawyers in the room like the fact that litigation is expensive. But putting that aside, the point is, courts are very good at figuring out who's a good

guy and who's a bad guy, and if you're a bad guy courts find a way to hold you liable.

Napster lost. Grokster lost. I think sometimes the -- sometimes rightsholders, either they're not as careful as they should be in selecting their defendants, or they have a misperception of who's a good guy and who's a bad guy.

It didn't really make sense to go after YouTube. It really didn't make sense to go after Google. It doesn't make sense to go after HathiTrust, you know.

Courts, you know, when they look at these defendants, they look at the balance of what's going on and they will usually -- they're very good at figuring out who's abusing the system, and they will find a way to shut them down.

MR. AMER: We had, I think, a reference to the HathiTrust case, so I think we're going to let Ms. Rasenberger respond.

MS. RASENBERGER: Thank you, I appreciate it. I won't talk about HathiTrust, which I was not at the Authors Guild when that was

brought. But I do want to just mention good actors, because I mentioned bad actors before. Good actors who want to keep pirated ebooks and audio books off their sites can do it and they do do it.

Amazon uses fingerprinting and they are pretty successful at keeping pirated copies off their site. And when something slips through, they work with us, they take it down.

MR. AMER: I think we're going to have to leave it there. Thank you all very much. We will start back up at one o'clock.

(Whereupon, the above-entitled matter went off the record at 12:19 p.m. and resumed at 1:02 p.m.)

MS. ISBELL: Okay, welcome back everyone. I hope you had a good lunch. So we are about to start the third and final domestic developments panel of this roundtable. The next panel will be talking about international developments that have happened.

Once again, I want to remind everyone, try to keep your remarks succinct, so that we can

let everyone have an opportunity to get their points out. If for some reason during this panel you don't get to say everything you want to say, or someone says something that you feel needs to be responded to, please do remember there is an open mic at the end of the afternoon.

There is a sign-up sheet. We welcome even audience members who may not have participated on one of the panels to speak and offer their views at that point. So with that, we're going to do a quick round of introductions. Your name, your affiliation, a very brief description of why you're here, why you care about this issue, and we'll start with Dr. Burgess.

DR. BURGESS: Thank you. Okay. My name's Richard James Burgess. I'm the president and CEO of the American Association of Independent Music. From our members' perspective, things are not that much different than they were in 2017 or before.

Notice and takedown hasn't helped much with staydown. We still have repeat infringers,

and we still have to send amazing amounts of notices to get anything done. We're cautiously optimistic that the EU Copyright Directive might improve things, and it does establish a large regulatory body, realizes that the spirit of the law is not being adhered to.

MR. FEERST: Good afternoon. I'm Alex Feerst. I am head of Legal at Medium. It's a publishing platform. We have about more than 10,000 posts a day go up on Medium written by various folks including more than 15,000 writers who get paid for their work.

I also run a team of content moderators at Medium, which is called Trust and Safety sometimes in the business. I'm here I think most of all to help embody and talk about the moderator's dilemma, and the way that red flag knowledge sort of hangs over the head of my team that's trying pretty hard to make a thoughtful and civil space on the internet for people to write and engage, while taking down things like violent content and terrorist content and all sorts of other things,

and trying to be mindful of the rights of creators who come to our platform to write.

MS. ISBELL: Okay. Professor Hartline.

PROFESSOR HARTLINE: Hi, I'm Devlin Hartline. I'm at George Mason University. I'm here to talk about how I think section 512 is not intended to be solely a notice and takedown regime. Congress intended to preserve incentives for service providers and copyright owners to cooperate, to detect and deal with copyright infringements.

So the idea was that service providers would also play a role in preventing infringement, and they would do some of the work in finding and removing infringing content without input from copyright owners. And the main way that Congress intended for this to happen was with the red flag knowledge standards.

That is, service providers would lose their safe harbors if they're aware of facts or circumstances from which infringing activity is

apparent and failed to act. But the courts have read the red flag knowledge standard so narrowly that only a fire engine that's actually on fire will suffice. One need look no further than the fact that Google can index the Pirate Bay with no concern for losing its safe harbor, to see how things have gotten out of hand.

512 on the other hand was supposed to be commonsensical, and it wasn't meant to only turn on knowledge of specific infringements. Properly understood, red flag knowledge is general knowledge. It is a subjective knowledge of facts or circumstances that a reasonable person would understand to be apparently infringing, and the burden of investigating a red flag should fall squarely on the service provider. Thank you.

MS. ISBELL: Okay, thank you. Ms. Gellis.

MS. GELLIS: Thank you. I'm Cathy Gellis. I am a technology lawyer and I've given some oral testimony under my own auspices at the last hearing, and I've filed comments on behalf of

The Copia Institute when the comments were solicited. There's two rounds of that, and I'm here today under the auspices of The Copia Institute as well.

The first point I want to make is not to let the sky is falling rhetoric skew the recommendations that you may feel driven to make. The sky is not in fact falling; it is in fact rising. The pie is growing. There are -- there is more revenue, there are more works, and all of this upward trend is due to the internet.

So we have to be really careful not to kill this golden goose and ruin this benefit that we have, and make sure that we have in place what's allowed this pie to grow. The Copia Institute just today, in partnership with CCIA, has put forth a report aggregating a lot of the data providing the evidentiary record for that statement. It's available at skyisrising.com. But the second point --

MS. ISBELL: Okay.

MS. GELLIS: Oh, I'm sorry. I don't

want to cut off any interest in that report whatsoever. But the second point I want to make turns the corner a little bit and to say that even though things are good, there's still cause for alarm. And I'm thinking of cause for alarm about the pressures that are falling on platforms and ultimately on individual creators, expressors, internet users.

We're discussing these cases. I imagine you'll ask us the questions again about *BMG v. Cox* and *Mavrix*. In all of these cases, there's many differences between them, and many things that could be said. But the chief cause of alarm is something that we flagged in our previous testimony and also in the comments that we made, which is what the effect is of unadjudicated claims of infringement.

This is the only area of law where somebody can just say I think I've been wronged, and all of a sudden everybody needs to react, without any court ever adjudicating whether a wrong has actually happened. This is something we need to

pull back on.

MS. ISBELL: Okay. Let's put a pin in that, and we'll definitely get back to it. Professor Goldman.

PROFESSOR GOLDMAN: Hi, I'm Eric Goldman. I'm from Santa Clara University School of Law. I'm going to answer Mr. Amer's question about section 512(f). I pulled all of the cases that referenced section 512(f) since January 1, 2017. There have been about 25 such cases. Less than half of them actually substantively analyze the doctrine. Other times it was just a stray reference.

And I did not find in my research any cases where a plaintiff under 512(f) has actually won in court during the time period. In fact, that's not inconsistent with past jurisprudence. I am aware of only two times in which a 512(f) plaintiff has ever won in court in the last 21 years.

MS. ISBELL: Mr. Gratz.

MR. GRATZ: Thank you. I'm Joe Gratz. I'm a partner at Durie Tangri in San Francisco. I

litigate cases at the intersection of technology and copyright law.

There haven't been that many cases since the last set of roundtables, and I think what that reflects is that the system is working, that the players have at least on the whole and in the main, reached a rough modus vivendi that is leading to at least somewhat less large scale litigation on 512 than we've seen in the past in, for example, a *Giganews*-type case or a *Viacom v. YouTube* type case.

What case law there has been since 2017 has shown the importance of the flexibility of the current law, and the ability of courts to take into account the particular circumstances of a case, whether that's in the context of what it means to be expeditious, in the context of what it means under the circumstances to make a knowing misrepresentation under 512(f), or in the context of the repeat infringer standard, taking into account the differing circumstances in, for example, Cox and Motherless.

MS. ISBELL: Okay. Mr. Polin.

MR. POLIN: Hello. My name's Jared Polin from FroKnowsPhoto.com. I'm a content creator. I'm a photographer. As of nine years ago I started a YouTube channel, and I create free, fun and informative content that helps photographers and creatives around the world figure out how to take better pictures, but also make money as -- on the internet.

I build everything off of free, so I give away all of this content in the hopes that people will support me by purchasing some of the things that I do end up selling. So I'm here to lend my hand as a creator, somebody who makes a living doing this, has two full time employees off of a YouTube channel that I pay benefits for and 401(k).

So as a small business I'm here to help as the guy that's creating content, to be a voice for -- well, I don't know if reason counts, but for something.

MS. ISBELL: Okay. Mrs. Ray.

MS. RAY: I'm Tamber Ray with NTCA, the

Rural Broadband Association.

MS. ISBELL: Make sure your light is green.

MS. RAY: Thank you. I'm Tamber Ray with NTCA, the Rural Broadband Association. Among NTCA's members are approximately 850 rural small broadband providers who cover approximately 33 percent of the land mass in the United States.

As the sole broadband provider in many of their communities, they're having a hard time reconciling cases, the *Cox* and *Grande v. Peckingham* cases. In many cases they have implemented and followed through on repeat infringer policies.

Despite these efforts, they continue to see in most cases the same number if not more of DMCA notices coming through. As a result, they're looking for guidance, looking for perhaps refinement of the repeat infringer policy, so that the purpose of section 512 can be carried out, and they can be aware of their responsibilities. Thank you.

MS. ISBELL: Okay, Mr. Schwartz.

MR. SCHWARTZ: I'm Bob Schwartz with the law firm Constantine Cannon. I'm here as outside counsel to Consumer Technology Association. In my career for CTA, we focused on so-called gray areas of the law, and we've learned that the daily outcomes are really based on toleration, accommodation, and implied license.

For example, just yesterday in my side career as a performing jazz musician, and I stress I'm not a full time pro like Mr. Hatfield whom you heard from this morning, and I fully note and respect the difference, I fairly routinely quoted four bars of the in-copyright tune Manhattan, while heading for the end of the public domain tune Love Will Find a Way.

This is quite routine in jazz solos and even jazz arrangements. So the notion that if you curate for one thing you need to curate, you know, whatever is uploaded or whatever appears, just cannot possibly work in this sort of context, ignoring fair use, ignoring accommodation, ignoring all sorts of other considerations.

And if it were tried, it would probably hurt the people that do need some help and that it's really intended for.

MS. ISBELL: Okay, thank you. Mr. Troncoso.

MS. TRONCOSO: Thank you and thanks for convening this roundtable and for undertaking the study that you guys are in the midst of. My name is Christian Troncoso. I'm here on behalf of BSA, the Software Alliance. We represent a coalition of software companies that provide an array of enterprise cloud services.

We bring somewhat of a unique perspective to these conversations because in addition to representing our members on policy issues, we also operate a robust online enforcement program on their behalf, because their software is also subject to large volumes of piracy.

So at the same time, our companies, in operating those enterprise cloud services that I mentioned earlier, are very reliant on the safe harbors themselves. So we have a bit of a dual

perspective on these issues, and from our perch we see the DMCA framework largely operating as intended. Certainly, there are frustrations when you look at the framework from one perspective.

If we talk only to our content protection folks, they have many of the same concerns that others have mentioned today. But when we talk to our companies in terms of their operation of enterprise cloud services, it's sort of -- we see the frustrations from that side.

And sort of, it's one of those classic situations where there's a little bit of frustration on both sides, tends to show that the compromise was fair in the end.

We think that the DMCA, the other sort of important stakeholder in these conversations are end users, who are also subject to the outcomes here. So just I'll sort of leave it at that, and we can talk about the case law.

MS. ISBELL: Okay, thank you. Ms. Tummarello.

MS. TUMMARELLO: Hi. I'm Kate

Tummarello, Policy Manager at Engine. We're a non-profit based in DC and San Francisco that advocates on behalf of start-ups for pro-innovation policies.

The American start-up ecosystem in thriving, in part because of our balanced copyright laws including the DMCA, which have allowed innovators to create new platforms for users to share ideas and content.

Start-ups support section 512 safe harbors because they reduce the risk that a company could face ruinous litigation over alleged infringement occurring on its website. While issues do remain concerning bad actors sending false notices to start-up, we fully support the DMCA framework and will continue to engage with the Copyright Office to protect section 512 and internet safe harbors. Thank you for the opportunity to join the panel.

MS. ISBELL: Thank you. Mr. Wang.

MR. WANG: Yes. My name is Ping Wang. I'm a writer and a freelancer for 20 years. It's

an honor to be here today to learn from you and to share my stories and opinions on this important issue.

As you all know, the EU has just passed the Copyright Directive. I have been closely following the development, and I have been developing a similar U.S. version since 2001, and have spent almost $20,000 from my own money to work on the same thing. So I think I have a little bit different perspective to present to you guys. But I think it's necessary and important. Thank you.

MS. ISBELL: Thank you. Ms. Wolff.

MS. WOLFF: Yes, good afternoon. Thank you for convening the roundtable. I'm here -- well, I'm a partner at Cowan DeBaets Abrahams Sheppard, but today I'm here on behalf of a trade association I've represented for many years, now called the Digital Media Licensing Association. That's an association of aggregators that help content owners in the visual arts, whether it's still or motion, monetize their content by licensing.

We were here three years ago, and I would

say I don't think there's been much improvement in the balance of the DMCA when it comes down to trying to encourage licensing and decrease piracy.

The internet would be empty without visual content, yet the burdens of the notice and takedown exist, and the way the courts have been interpreting things such as red flag knowledge, there's really the lack of incentives to cooperate and work collaboratively with the content licensing industry, particularly in the visual arts.

There's like, there's much internet, there's much fingerprinting technology available, yet there's little incentive ever to do any type of filtering, and there's also it seems to be little, little incentive to develop licensing systems.

You can see from *Mavrix* that curation makes a much better website, but there doesn't seem to be any encouragement to develop the licensing models to make that happen.

MS. ISBELL: Okay, thank you. So since this is the last domestic panel, we're going to shake things up a little bit, and we're going to start

with a topic near and dear to Professor Goldman's heart, which is 512(f).

And I actually want to begin by asking Mr. Gratz a question. In the San Francisco roundtable, you mentioned that 512(f) needed to have more teeth when dealing with abusive notice senders, and you suggested statutory damages. What have you thought of the recent 512(f) decisions in the wake of *Lenz*, and do you still think 512(f) needs to be changed, and if so how?

MR. GRATZ: I do, thank you. I do. I think that 512(f) as the review that Professor Goldman has recently published on his blog that I'm sure he'll be talking about, as well as sort of the experience in the world is that 512(f) is not a sufficient deterrent for many kinds of abusive notices and counter-notifications.

There haven't been many litigated cases on this, purely because I think what is at stake in any given situation is not always enough to support litigation.

But I think that we may be seeing a

greater, a greater number of those cases coming in the future even under the current standard, not because of anything that comes out of Lenz, which I think sort of restated what I think the way that most people had already been operating, but because of increasing and new ways that as the internet becomes and as internet intermediaries become a more and more important part of more and more economic activity, especially on marketplaces like Etsy and other online marketplaces.

The competitive incentives to send bogus counter -- notifications and counter-notifications will become so large that there will all of a sudden be an economic incentive or situations that support economic incentives for litigation.

MS. ISBELL: So sort of on that point, on the last panel Etsy alluded to an increasing amount of fraud in both notices and counter-notices, and there have been various discussions that sometimes it's used to harass and for non-legitimate purposes.

And in your opening statement Professor Goldman, you mentioned that there have been several cases under 512(f) since we last heard from people in this study, but that no plaintiffs have won. Do you think that's a good thing; a bad thing? Is it a problem with 512(f)? Is it a problem with the courts? What's going on?

PROFESSOR GOLDMAN: Yeah. I think that the data suggests that either there aren't abuses that are worth litigating or the law is miscalibrated to protect those abuses. And I think we have plenty of evidence that suggests the latter, that there really is no meaningful incentive to do homework before sending a notice, and that creates lots of opportunities for bogus notices to be sent.

And in addition, there's often a lot of background context that's taking place. One of the 512(f) cases for example involves a dispute over a screenplay, that then morphed over into one of the marketplace cases that Mr. Gratz mentioned.

The service provider isn't in a good position to resolve that, and the 512(f) claim is

really just a chance to tweak the rival over the screenplay, not actually to resolve the merits of the underlying copyright dispute. It's just an ancillary way of the parties fighting with each other.

MS. ISBELL: And just a reminder if other people want to chime in, feel free to turn your card up and I'll call on you. Otherwise, I'm going to keep singling people out.

MR. GREENBERG: I do have a follow-up question to that. So Professor Goldman, you mentioned abuse of notices, and I know relatively few counter-notices are filed. There are obviously abusive counter-notices too.

My recollection, I want to be corrected on this if I'm wrong, is that the recent 512(f) cases, I'm thinking specifically, I think it's *Johnson v. New Destiny Community Church*, are applying the same standard, whether it's counter-notices or notices, is that right?

PROFESSOR GOLDMAN: That's my understanding, yes. Right. But to your point

about counter-notices as a counter-balance against the abuse of notices, there's so many things that have go right for a counter-notice to even be filed, let alone be effective.

First, the service provider has to acknowledge that they want to honor counter-notices. The user has to understand those rights. The user has to feel confident that they're willing to submit it, and they have to be prepared for the consequences of filing a counter-notification.

So there's a whole bunch of things that are stacked against filing counter-notices. So to think that the current system encourages counter-notices as an appropriate counterweight against abuse of notices, I just don't think that the system is designed that way.

MS. SMITH: Well, I guess I have a question to that, because if you're focused on a user being confident enough and educated enough to even file a proper counter-notice, sort of making it easier to be liable for filing an improper

counter-notice doesn't seem to encourage the filing of counter-notices. Or would you decouple the two standards?

PROFESSOR GOLDMAN: I'm sorry. Could you try that question again?

MS. SMITH: Yeah. So if it's the same standard under (f)(1) and (f)(2), and under (f)(2) you're not seeing counter-notices because users may not realize or may be a little intimidated to file a counter-notice, will that make it harder for users to file counter-notices if you loosen up the standard for liability under (f)(1) or (f)(2) since they are the same standard?

PROFESSOR GOLDMAN: To the extent that counter-notices are a non-factor today, I don't think that making it harder to file counter-notices will have a material impact on the overall ecosystem. So to me, that doesn't really -- that's like the tail wagging the dog.

Focusing on the abuses of the notices will be the place to start, and I think that the material impact on counter-notices will be

relatively de minimis.

MS. ISBELL: Okay. Mr. Polin.

MR. POLIN: Thanks. So on YouTube I get hit on occasion with some claims, saying that I've uploaded something that is copywritten, and many times I have permission to use it or it's fair use. Then other times, I can file a counter-claim. It's super simple to do on YouTube. It walks you through. It asks are you this person. Are you sure you want to do this, are you -- you know, and I do.

So I go against it and I generally win because we try to stick to general good practices when we're posting content that it's my content, or if we're in fair use acknowledging something. We're talking directly about what that is, and then file the counter-notice and then it's taken care of in a matter of days. So YouTube does a very good job of that for us.

MS. ISBELL: Okay. Ms. Wolff.

MS. WOLFF: Yes. I actually think that in particular with visual content that's online, that filing the counter-notice really puts the

content owner in a disadvantage, particularly if the counter-notice is in bad faith, because you really can't afford to go to court within ten days and file a claim, because the damages aren't high enough and there isn't any alternative to federal court.

And typically, if you don't have a copyright registration before that, you'd have to spend at least minimum $800 and then find a lawyer. So I think that if counter-notices are done improperly, there's actually more harm to the copyright holder.

MS. ISBELL: Okay. Mr. Wang.

MR. WANG: Yes. Regarding this issue, most answers could be found, you know, the questions you guys raised if you keep closely following the EU, Europe, how they developed this Copyright Directive. Most answer is clearly the answer, means upload filters, fair use, legal uncertainty.

I don't want to talk more about that. You guys could easily find the answers online. One thing when we talk about this internet content, you

mention YouTube. But that's only parts of it. Most, you know, companies like Google, they earn money not this way. Say hundreds of my pieces are taken advantage of this way, this 2002.

Some guys just post my content, my writings there and Google just ran its site. 2002, 2003, 2008, 2012, 2013, 2016, '17, '18, '19, last month. They keep doing that. For this piece only, they run six ads or three. It's like parasites around my content. They keep, you know, it's things bad for this piece, you think it's numbered and I just cut it for easy to review.

It's got for this piece alone, I'm writing normally in Chinese but occasionally English. It got millions clicks online. It's the hot topic of day for only for this size. These online advertising companies could earn tens of thousands dollars, but I get nothing.

That's the point. You know, when you talk about YouTube it's the account that they posted on their servers, oh, they have some responsibility. But how about these things? I called the Google's

engineers. Can you fix it. They said we can, we easily can.

Easily they can fix it, but why you just don't do it? Because they earn money this way. It's so simple. They said we can handle the account and ID. We can do it even on video, let's do a test. It's very easy for them, and I presented them with 2001 or 2011, many years ago to them.

I asked them, Google production team, is this a good idea to fix the problem. They all agree. The engineers agree. But why you don't do that? They said well, you know. Because it costs them money. But it's very easy to fix. That's one point I want to mention.

MR. AMER: Can I just ask, just to clarify. So where are those works being posted?

MR. WANG: You know, you Chinese write around the world. Some content's pasted in Chinese community in United States, some in Canada, Malaysia, Taiwan, Japanese, all around.

MR. AMER: So different peoples' blogs or websites?

MR. WANG: Yeah different, different websites. It's just out of control. Just out of control. You know, I don't blame these small forums, you know. There's just a couple of hundred peoples.

But for Google, this big company, they can use this, you know. They told me, they told us they give how much money to the content creator through YouTube Content ID. It will be easier, and I tell them why you don't do that.

MS. SMITH: Sir, are you issuing a take -- sending a takedown notice in that case?

Are you sending a takedown notice in that case?

MR. WANG: Yes. Another issue I want to mention. I closely follow the issue. Europe Parliament members, I talk to them. They told me one thing. Why should we do something to prevent you doing something wrong? Why we have to notice you? You need to ask permission first. Without permission, you just don't do this business. You just don't use my stuff.

Why I have to find my stuff being infringed? Why I have to always do something? I write, you know, hours a day. I don't have time. See, it's more than hundreds of pieces and more than hundred websites. I ask lawyer, how much you charge for letter? A thousand dollars, US dollars. How much money could I have? I already paid $20,000 my own money to do this. I cannot keep like this anymore. Thank you.

MS. ISBELL: Thank you. Mr. Gratz.

MR. GRATZ: Returning briefly to the issue of why we see a relatively low rate of counter-notifications, and whether, whether that's consistent or inconsistent with the idea that 512(f) needs to be strengthened, I think that they are unrelated in that I don't think that the -- I don't think that anyone who ought to be sending a counter-notification is failing to do so because of a concern about 512(f).

I think that lots of people who ought to be sending counter-notifications are doing so because of a concern that it will potentially lead

to litigation. And I mean that especially in situations where the person is very certain that they would prevail in any litigation.

That is, sending a counter-notification is sort of waking a sleeping dragon, even if you're really, really sure that the dragon is wrong, because the dragon -- because litigation, as Ms. Wolff rightly says, in this area can be so expensive.

MS. ISBELL: Okay. Ms. Gellis.

MS. GELLIS: Yeah. Thank you. I'm half backing up to the 512(f), and half perhaps anticipating that we may speak more on the Cox case later and the 512(i) issues.

The first thing I wanted to flag is comments that we made at the last hearing and then other comments about the First Amendment problems with how important it is to protect the right to anonymous speech, and how 512(g) forces a user to self-unmask, and how it is a deterrent to people unmasking themselves, especially when they end up in crosshairs where they've made anonymous speech against a more powerful person, and that powerful

person wants to shut them up.

Then the notice and takedown becomes a weapon that that person can use and abuse, and if 512(f) has no teeth, it's very easy for them to abuse it, and if 512(g) is the only remedy, that's kind of game over for that speaker. So that's an important point to flag.

The second point is 512(f), we're largely dealing with -- I agree with what Professor Goldman and Mr. Gratz have said about the lack of adequate teeth. But I think also, in leaping ahead a little bit to the *Cox* case, is that for the 512(i) safe harbor, we don't even have the same notice requirements built into the notices.

So never mind that 512(c)-type notices are not being filtered out for abuse very well because we don't have the deterrents built in. We have even fewer deterrents for the types of notices that end up going to the 512(a) platforms.

And then if all of a sudden that's running into their termination policies, where they have to tally up each particular some form of

complaint that they received, when there's even fewer deterrents to make sure that those complaints are valid.

That's a more serious concern, especially when we look into not only that are these notices being used to remove specific forms of expression, but they are increasingly getting gamed to cause a speaker to be removed, where people are sending notices to platforms with the understanding that they're going to use up the number of strikes that they believe that whoever spoke would have.

I think there's a lot of myth that there may be three strikes and then you're out. Obviously, that's not necessarily the law. But the more important it is for a platform, especially perhaps the larger platforms to have some sort of specific rubric, where there's a tally, a quota of how many complaints they can receive before all of a sudden they have to take action to terminate a speaker on their site, the easier it is for people to game that.

And they're gaming it not just to hit

a specific form, or a specific item of expression, but they're trying to get at the whole speaker, to make sure that they get turned off from that platform entirely, and that's something we need to be really cognizant of not allowing to be gamed, or else it will totally silence speakers entirely.

MR. GREENBERG: So I mean interesting point you just made, and I haven't actually heard about this. Because we heard a lot before about YouTube competitors who issue largely fraudulent takedowns so that their competitor's video will be taken down. By the time it gets put back up, they've sort of lost their marketable window.

I haven't heard this before, where you're saying that there are people who are targeting their competitors by trying to get them, you know, three strikes and they're out or whatever the strikes is. Where did you see this? Have there been studies on this?

MS. GELLIS: I don't know if there's studies. I was rummaging around trying to find some of the anecdotes that I've seen. I can't say that

it's not competitors trying to do that. I imagine if we have this roadmap that will happen if it hasn't happened already.

Where I've seen it is social media, where people are saying things that people don't like. People may be the type of speaker that other people don't like, and I've seen righteous tweets about, I didn't like this, so I sent a takedown notice to Twitter, not just because I wanted that to come down, but I wanted to use up his quota so that that's a strike against him so he can't keep doing it.

I'm remembering that one in vague and concrete terms, but I don't think it's the only example I've seen. I've seen that kind of logic percolate up in discussions, where people think that's how it works. And I'm really concerned about that becoming how it works. So that's my point to make.

MS. ISBELL: Okay, thank you. Professor Hartline.

PROFESSOR HARTLINE: So I just want to say of course bogus takedowns are a problem

absolutely. But I feel like the hyper-focus on this is missing the forest for the trees. So I'm looking at Google's transparency thing. It's very helpful. So they've been asked to take down four, over four billion URLs, right, and as far as I know the vast, vast majority of those requests are legitimate.

So that's the forest, and we're focusing on a couple of trees when we're talking about bogus takedown notices. And in fact it seems to me that if the standard under 512(f) is bad faith, that -- I'll bring it back to 512(f) by talking about the Lenz case. Hopefully, you'll let me do that because cert was denied after your deadline.

So I just -- I just want to say that I think the court in Lenz got it totally wrong and here's why in one sentence. So the 512(f) standard is that you have to have a knowingly materially misrepresentation, right? So that is you have created bad faith in your mind.

The thing about good faith, what the court was trying to bring it in under is the fact that you haven't formed a good faith opinion that

it's, you know, bad material. So, but there's a difference between having actually have, you know, formed bad faith versus not having formed good faith, and the court conflated those two things.

MS. ISBELL: Okay. Mr. Feerst.

MR. FEERST: Yeah. I just had a couple of sort of concrete experiences I thought I'd share from this. One of them is that, so for my team when we get a DMCA notice, if it's defective or if it seems like it's for whatever reasons it doesn't make sense, we'll engage with the person who sent it to try to help them and talk about the statute and get the information that seems necessary to make it compliant.

I think I'll leave the nuances of 512(f) to others, and I'll just sort of say that there's a large number, a substantial number that suggests to me that at least for some percentage of folks, the gravity of what they're doing, which is sending a notice that extrajudicially causes something to be taken down, is not apparent in the way that they interact with us.

Because they will say things like I'm not going to do your job for you, and send an incomplete notice without the URL of the infringing material, which is an extreme and relatively unusual. But I think the tenor of all this is that I think for us, we want to try to help folks give us information that will cause us to take down anything that's going to be inadvertently on the site.

But the relative sloppiness or sometimes the lack of complete information that we get is just a frustration that we try to engage with people on, try to get all that information. But I think --

MS. SMITH: Can I ask you a clarifying question?

MR. FEERST: Yeah.

MS. SMITH: So it sounds like you feel that the provision of the law giving you some time to expeditiously remove material is forgiving enough to allow you to have this back and forth with sort of like a potentially wonky takedown, where

you can figure out if it's really a copyright claim or if it's really a takedown that you're going to honor before, as opposed to an obligation to like act immediately.

MR. FEERST: So I'm not sure. I mean I think I would say the way that you're framing it, that that is risk that we would have taken on, because the definition of expeditiously is something that might be defined later in whatever form.

So I think in the instances where we take on additional risk in order to help folks, I think that's what we're doing. Whether that's proper or fair I sort of leave to others. But I think you're saying that we have the time to do it is really the fact that we've made a determination that we're going to take on the risk that --

(Simultaneous speaking.)

MS. SMITH: Yeah, that you're comfortable in assuming the risk that these actions you're talking about fall within -- you know, still qualify as expeditious removal?

MR. FEERST: I'd say it's because we care. I don't know if we do it comfortably, but it's something that we're doing.

MS. ISBELL: Okay. I'm going to let Dr. Burgess speak as well, but after that I'm going to switch to a slightly different portion of 512, and talk about automated notices versus forms versus other ways of doing it, and whether there's been any change. So Dr. Burgess.

DR. BURGESS: Well, I wanted to express concern about the emphasis on hearsay and rumor that I'm hearing coming from Ms. Gellis, and also address something that she brought up earlier. I mean we need to go back to first principles here. I represent more than 600 independent labels. The majority of those labels have given up on the notice-and-takedown system. It's not working for them. They can't afford it.

And these are not sole proprietors. They're reasonably successful, independent labels for the most case, but they've just given up.

MS. ISBELL: So you disagree with Mr.

Gratz, that the last couple of years have shown the modus operandi of how we can get on from the perspective of the individual labels?

DR. BURGESS: I'm sorry. I couldn't catch that?

MS. ISBELL: Like Mr. Gratz said starting out, you know, the last couple of years there's been relatively few big cases and that kind of shows everyone has figured out how to work within the system voluntarily. Do you --

DR. BURGESS: No. It's that people have given up on our side, and it just -- that's why I say, you know, we sort of have some hope that maybe the EU Copyright Directive might actually shift the conversation. But then Ms. Gellis said something in her opening speech which is that the internet is the golden goose, and that, you know, the industry's rising.

Actually content is the golden goose, not the internet. And it's worth remembering that, you know, the music industry, I'll just speak about the music industry for example, is now on a retail

basis somewhere around the eight billion mark. In 1999 it was on adjusted dollars at about 21 billion. It was 14 billion at the time. It's about 21 billion today.

So the music industry is still only slightly above a third of what it was 20 years ago, before it was disrupted by pirates. And we still have that situation, basically. So it's fine to focus on these counter-notices and everything.

But when I'm hearing immense amounts of rumor and hearsay and, you know, voices that are obviously funded by these platforms that benefit from the piracy of our content, then I just wanted to go back to first principles. We own this stuff. We should not have to be responsible for other peoples' wrong use of it.

MS. ISBELL: Okay. Mr. Polin, I'm going to let you respond, but then we are switching topics.

MR. POLIN: Thank you. I just -- as a content creator who gives away a lot of my stuff, the one thing I don't want to see happen is the

gatekeepers shutting the gate again that we've been able to open up through the platforms that we have access to today, that gives me the ability to make money off of free and then sell it.

We talked a lot about musicians not making as much money as they used to. Well, a lot of them, some of them don't deserve it. They're not working hard enough some of them, you know. They're not doing what they need to do. They're stuck in the old ways.

So you've got to use what's here today to grow. I work with a lot of musicians and a lot of the musicians I've photographed, I have a larger online presence than they do. And I've built it off of free. So what I don't want to see is a gatekeeper come and shut the gates again on us for being able to do what we're doing, and that's, you know, content is a major thing. So that's it. That's what I've got.

MS. ISBELL: Okay. And so sort of switching gears a little bit, there was a lot of discussion in the prior roundtables and I think no

consensus reached about, what is the optimum way to have a notice-and-takedown system?

On the one hand we hear people like Mr. Feerst complaining that some of the notices they get are sloppy or are not complete. We heard some discussion that sometimes those are maybe more from smaller content creators than larger ones. We heard other ISPs complaining about the volume of automated notices they were getting from some of the larger content owners, and then we had yet more individual content creators complaining about, for example, Google creating a form rather than allowing notices to come in via email.

And I think Ms. Wolff -- DMLA mentioned in their initial comments that they had some concerns after *Lenz* as to whether that was going to shut the door on automated notices or whether it was going to somehow bring the system grinding to a halt.

So I'd like to hear people's experience. Has anything changed? Is there more consensus about what the best way to handle these notices are?

Are there preferences? Is it hopelessly lost? Mrs. Ray.

MS. RAY: Thank you. I'd just like to speak to the issue of the volume of notices and where they're coming from, and to the notion of whether streamlining would help. Many of our members have commented that the volumes in some cases come repeatedly from different email addresses, even though they may have and do have a single DMCA-registered email address and that's where the notices are supposed to come to.

They'll come to there, they'll come to multiple email addresses, and they may or may not be identical DMCA notices. So they're having to struggle the compare the notices first of all, to make sure they are in fact duplicates. If they're not, of course, then they act on them.

The other difficulty that they're running into is many times they will get notices for the same subscriber for the same song from the agency representing the copyright owner, resulting in multiple notices for the same song for the same

subscriber.

So to the extent that those can somehow be minimized to more effectively identify where the concerns are, where the copyright infringement may be occurring, because from an ISP standpoint looking at the court cases that have come around, and similar to what we were talking about earlier in the 512(f), is what about these instances where you get the same notice at multiple email addresses, but they don't count as just one notice.

So to the ISP and to the court and to somebody challenging the ISP in court, they're going to say hey, you got hundreds of notices for this single subscriber in one day, and you only acted on one. While they could probably perhaps hopefully defend that, it's going to take a whole lot of recordkeeping on the part of the ISP and a whole lot of attorneys' fees.

MS. ISBELL: Okay. Ms. Wolff.

MS. WOLFF: You know, I would say yeah, that I'm not sure *Lenz* has changed the landscape for members of DMLA. They may use image recognition

technology to find matches, but there's always been a level of human involvement to review. I mean it's very complicated. It's not easy to check because you have to check whether a work was licensed or not.

And I think there always was a look at whether something could legitimately be a fair use or not. I mean I have recommended that members actually assert that in their letters, to say they have considered fair use. I think the real problem is just the entire system itself, and I agree with Dr. Burgess that I think many just have given up on doing it because there's only so many hours in a day and the members of the organization represent content owners that are in the business of trying to make money, and they could spend all day searching the internet and trying to determine, you know, who has licensed what and who hasn't.

But I think they feel very frustrated at the process, not just 512 but, you know, the expense of litigation and of course have been very much in favor of having to copyright small claims

for the infringement area.

MR. GREENBERG: If I could jump in here with a follow-up to that, because you're now the second person in a very different area of content that's mentioned this frustration and maybe dropout from the notice-sending system.

In 2016, Google's representative in San Francisco, Fred von Lohmann mentioned that the high volume of notices shouldn't be taken as a negative, but actually a sign the system's working. Since then, which is right about the time that Google's notice reception peaked at about 20 million I think it was per week or per month, 20 million takedown requests per week.

Now it's down closer to I think about 15 million, and I was going to try to put on the spot Mr. Gratz, who one of his hats obviously is as a Google lawyer. Could you give any, shed any light on why -- what you make of that?

MR. GRATZ: Thank you. I want to clarify that I'm here on my own behalf though. As you say Mr. Greenberg, I have previously represented

Google in litigation.

So I think that with respect to the number of takedowns sent to Google or the number of takedowns that are reported in Google's transparency report, that number verges on meaningless because the takedowns that are -- the vast bulk of those takedowns are for sites that or items that were never indexed by Google in the first place, or that never appeared in Google's search results.

That is, people are using the Google search result takedown form as a general, you know, I haven't seen this anywhere, but there is infringing material somewhere on the internet. So to that extent, I don't think that the number reported there as a bellwether of anything in particular is likely to be particularly meaningful, particularly at the difference between double digit millions that are probably mostly sent by a relatively small number of automated submitters.

MS. ISBELL: Okay. So we're going to go with one of our quiet folks, Mr. Troncoso.

MS. TRONCOSO: Yeah. I just wanted to briefly return to your original question about sort of what would be the ideal structure for a takedown framework, in order to create the most sort of efficient system. I think part of the difficulty in answering that type of question is the sheer diversity of stakeholders that have to operate under the statute.

And that's true both from the service provider side, you have search engines, you have social media companies. Then you also have enterprise cloud companies who are 512(c) companies who provide services to 512(c) companies that sit on their infrastructure.

So coming up with a single system that is going to work for all of those stakeholders is very difficult to imagine. At the same time on the content side, right, you have a lot of different types of content with industries that have different licensing processes and how they like to interact with services.

So coming up with one ideal framework

probably isn't going to work, which is why we think the DMCA has done a fairly good job of allowing for bespoke sort of systems to arise. So you have, Mr. Gratz mentioned earlier, Google is doing things that are not necessarily required by the statute, like de-indexing content before it has even appeared on their service.

The DMCA provides the incentives for those types of behaviors, because Google has the incentive to make sure that they are limiting the sort of resources that they need to throw at a problem by dealing with it sort of on the front end, before these sort of links have populated on the service.

So again, just making the point that sort of there's a lot of actors and sort of balancing the interests of all of them is not easy. But we think all things considered, the DMCA has done a pretty good job.

MS. ISBELL: Okay. I see we have one more person who hasn't spoken yet who wants to speak. So Mr. Schwartz.

MR. SCHWARTZ: Well, Google is also of course a member of CTA, and CTA's view has been that with all of these variables and difficulties, the burden has to be -- for initiation has to be on the rightsholder.

Now in a previous round, CTA made a public comment discussing the progress that has been made, not only in automated filtering, you know, based on agreements and material provided by content owners and Google's technology, but also in automated takedown notices and how all of that was working.

And in discussing progress in this area, one of the organizations of content holders jumped in and said well, it's glad that CTA agrees with us that the burden -- they're doing so well at this -- the burden really needs to be on the host and the platform, not on the rightsholder.

No. The top of the funnel, knowing what's there, knowing what the complexities are, and it's tough for everybody, has to originate with the rightsholder. I'm sure I'm not going to

persuade everybody on this panel of that, but I'm here for CTA and that certainly has been CTA's position consistently.

MS. ISBELL: Okay. I think the order of requests went Professor Goldman, Mr. Wang, and then Professor Hartline. So we're going to go with that.

PROFESSOR GOLDMAN: My apologies. I'm going to state the obvious, that there's a lot of activity that's now outside the scope of 512(c) and 512(f) altogether. And so it is a little bit hard to number crunch based on historical data, and it also is a reminder about the waning scope of both of those laws because of the fact that there are two different ways in which action is taking place that isn't regulated by them.

First is what I'll call the fast lane for rightsholders, that services may develop systems that allow rightsholders to have more trusted interactions with the service. And when they interact with the service using the tools provided by the service, then their actions are not governed by 512(c) or 512(f).

The alternative thing that's taking place was as mentioned, these pre-filtering type removals that never get logged to the site. Those aren't taken down by 512(c)(3) notice and not regulated by 512(f). And so there's a lot of activity that is outside now the scope of this entire regulatory scheme.

So to your answer about can we develop an optimal scheme for 512(c) or 512(f), we have to acknowledge how much activity is taking place outside of the scope of those, and then we can draw our own conclusions whether that's actually a good thing that the DMCA facilitated, or a problem because now all this activity no longer is being properly regulated by Congress' scheme.

MS. ISBELL: Okay, Mr. Wang.

MR. WANG: Yes. As to see the transparency and the taking down policy, Google always and YouTube always claim how much money they gave to content creators, how many links they removed, how many videos they removed. But they never tell us how much money they earned by using

content creators' work without permission.

I think it's technically doable. If everyone else this is too complicated, let's go one step by step, or one step by step. How much money you earned each year or each quarter by using content creators' work without permission and the links, the videos you removed. Are you removing me, do you keep the money? That's the best business I have ever heard.

I just take your business and then I take it back. That doesn't make any sense. My seven years old son took a book from the gym and -- no one's there. He read it and he returned back tomorrow morning first thing. He said no one noticed that. Then later today, did I do the right thing? Even seven years old boy understand this is not the right thing to do, you need to ask permission first, okay.

I think Google should do way, way more than that, just taking down and keep the money. At least I have the right to know how much money you earned using my stuff without my permission. Did I ask too much? You can keep the money, but just

tell me how much money you earned. Is this a fair question?

MS. ISBELL: Okay, thank you. Professor Hartline.

PROFESSOR HARTLINE: All right, three quick points. *Lenz* is wrong.

(Laughter.)

PROFESSOR HARTLINE: The absence of good faith is not the same thing as bad faith. So it's wrong on the merits, but it's also wrong as a matter of policy, right, and it makes no sense if we have to consider fair use, then why don't we have to consider all of the other possible defenses, and the court doesn't have an answer for that.

But even within the *Lenz* framework, I think it's totally possible to use an algorithm to assess whether you can take something down in good faith. And so I believe that with an algorithm, you can tell that something is infringing, but it's much more difficult to tell if something is not infringing, i.e. if it's fair use.

So for example, the entire Harry Potter

movie is on a website. The algorithm can take that down; that's good faith within Lenz. The second point is --

MR. AMER: Can I -- before you go to your second point sorry.

PROFESSOR HARTLINE: Sure.

MR. AMER: So just to make sure I'm clear. So you're arguing that *Lenz* is wrong both as a matter of legal interpretation, but also policy?

PROFESSOR HARTLINE: Correct.

MR. AMER: Okay. Now on the first point, I mean could you sort of walk me through why you reached that conclusion? I mean if the statute says that you can't, you know, that in 512(c) there has to be a statement that there's a good faith belief that the use of material is not authorized by the law.

PROFESSOR HARTLINE: Yeah, and so you --

MR. AMER: So why is making that affirmation not a -- without having made an inquiry, not unknowing misrepresentation?

PROFESSOR HARTLINE: Because the absence of good faith isn't the same thing as having actually subjective bad faith, right. So the 512(f) standard is subjective bad faith. The 512(c) standard is you have good faith. There's a difference.

MR. AMER: The 512(f) standard is --

PROFESSOR HARTLINE: A knowing --

MR. AMER: Knowing misrepresentation.

PROFESSOR HARTLINE: Right.

MR. AMER: If you know that you have not acquired --

PROFESSOR HARTLINE: Well it could be -- but it's not always both is what I'm saying. And so under the 9th Circuit's reasoning, they were equated, where there can be overlap.

MR. AMER: Anyone, can you --

PROFESSOR HARTLINE: It's a distinction of a lawyer, right. I'm sure many disagree.

MR. AMER: Anyone else want to weigh in on *Lenz*? Mr. Gratz.

MR. GRATZ: Very briefly. A good heart

and an empty head is not good enough for 512.

MS. ISBELL: Okay. Now I'm going to let Dr. Burgess speak to this topic, and then we're going to move away from 512(f) and to some of the more neglected sections of 512. So Dr. Burgess.

DR. BURGESS: Well, I just wanted to say the idea that the DMCA is working is not supported by any content creators that I know. By the way, you know, I'm an artist myself, you know. I've signed with six major labels in my career. I still see royalty statements.

So I have very firsthand knowledge of how this is all working. To Mr. Polin's point about gatekeeper, I mean Google is the new gatekeeper. I know this roundtable is loaded with Google advocates, but you know Google. For example, YouTube threatens our labels not to promote their content unless they agree to all their content being available on their free service.

DMCA was designed to work in a completely different world. UGC did not exist when the DMCA was written. The idea that it works, I mean it

doesn't work for content creators at all. It's not working right now.

MS. ISBELL: Okay, thank you. So moving away from 512(f), I want to start talking about two sections of the DMCA that we didn't hear a lot about at the initial roundtables, and we haven't heard much about today, and those are 512(i) [sic] [512(h)] and 512(j).

And so starting with (i) [sic] [(h)], during our time period there was one case, *Strike Three Holdings v. Doe*. The court found good cause to issue a subpoena because the plaintiff did not request a subpoena from the clerk of the court pursuant to 512(h), but instead filed a lawsuit that seeks the John Doe defendant's identity through a Rule 45 subpoena.

Does this standard run contrary to Congress' goal with the DMCA, to encourage cooperation between the online service providers and the rightsholders, and to reduce the burden of pursuing remedies in court? Is it correct? Is it wrong? Was the court misapplying how they should

be thinking about subpoenas under the DMCA? Who wants to take that? Ms. Gellis.

MS. GELLIS: Well so there is another provision which we've also somewhat ignored, which is 512(h), and I know that at the last roundtable hearing, I complained about it. Mostly because I don't know if there's actually been a ton of case law that's really percolated up, certainly not to an appellate level, and you tend to see things that are happening more at the beginnings of litigation, so things wash out at that point.

But I've been very -- I think it's really important to drive home the fact that what we are talking about with the internet is expression online and that expression is protected, and that includes the full suite of First Amendment expression rights, including the right to anonymity.

Even outside the copyright context, where you deal with people trying to subpoena the identity of the speaker, there's some significant due process problems that arrive when we start to litigate through that. But there seems to be even

graver problems when we start putting it in the copyright context of what the due process protections are.

In terms of the *Strike Three Holdings*, I did look at that case before I came here, and I kind of threw up my hands in horror because none of it --

Whether we're leaning towards Rule 45 or whether we're leaning towards 512(h), I'm not convinced that there's adequate protections built in for users. How ever we consider the subpoena context in copyright cases, especially arising out of the DMCA, we need to make that a point of emphasis, to protect that right to anonymous speech and make it meaningful from a due process perspective.

MS. ISBELL: Okay, and just to clarify for the record, since I saw some very confused looks over there, it is 512(h) that we're talking about. I was reading -- I was reading from my outline and it's numbered (i), and so I just sort of flipped them around.

So no. We are talking about 512(h).

Does that mean anyone else has comments that they would like to -- Mr. Gratz.

MR. GRATZ: One brief comment with respect to 512(h). There have certainly been a large number of 512(h) subpoenas from *Strike Three Holdings*.

One thing that on, in the context not of that particular case, where the subpoena was denied, but in the context of a number of other cases where subpoenas have been issued, one thing I think to note about in a development in the 512(h) sphere is that many courts have, because of the potentially embarrassing nature of the copyrighted material at issue in the *Strike Three Holdings* cases, have placed protections in place to allow copyright infringement cases to proceed without permitting the public disclosure of the identity of the accused infringer.

I think that's an important development that helps separate out copyright interests from anonymity interests and prevents copyright cases from being brought not for a legitimate purpose of

seeking recompense for infringement, but in order to hold up someone's reputation in order to disclose that they like a particular kind of copyrighted content.

The other thing I want to mention briefly, and I wanted to -- I know she is on the next panel, but Ms. McSherry of the Electronic Frontier Foundation is counsel in a case where a recipient of a 512(h) subpoena is moving to quash that subpoena on the ground that the very --

The very thin copyrighted interest there, that is posting a portion of a published work in order to criticize the published work itself, doesn't counterbalance the anonymity interest there of someone criticizing a religious group that is seeking the identity of the person who may still be a member of the religious group and face serious social sanction, rather than any sort of copyright related concern.

MS. ISBELL: Okay. I think I saw Ms. Wolff, then Professor Goldman.

MS. WOLFF: Okay. Three quick points,

it's kind of unfortunate too many copyright cases come out of the pornography industry. Sometimes I think it skews some decisions. I think just uploading content should not per se be equivalent to making speech, you know.

If you're commenting or criticizing, that's one thing. But I think just, you know, uploading other people's content is not the equal, I think, of speech.

The other is I think the ability to make subpoenas are going to be more and more important because particularly you can't find identities of hosts and sites to even do takedown notices sometimes, or to contact infringers because of the privacy laws coming from Europe, that many identities are now protected and you won't even be able to determine, even if you're outside 512 who, you know, who's using content.

MS. ISBELL: Okay. Professor Goldman.

PROFESSOR GOLDMAN: Yeah thank you, and I appreciate your clarification, because I was one of those puzzled people because I thought -- I know

the 512(h) holding on *Strike Three*. So just a few points. 512(h) is an artifact of a different time. If we were to draft the statute today, almost certainly we would not draft it the way it's currently drafted.

And part of that's because we really don't provide the same kind of court unsupervised access to identity in other types of legal doctrines. This is a very copyright-specific solution. In almost all other circumstances, if a person who wants to identify a tortious actor must go and get the court's permission. But 512(h) says you don't need the judge's permission at all. You automatically get it as a matter of right.

I don't think that's the deal we would strike today, so 512(h) is I think just an anachronism more than anything else. I'd say 512(h)'s fast lane to getting identity has become one of the sources of copyright trolling, that it has enabled people to go and bring lawsuits with the sole intent of extracting settlements, not of litigating.

That's why the particular ruling you mentioned went nowhere, because the judge said I'm not going to do it. I'm not going to allow you to have that kind of unfettered access to identity, knowing that the consequence is that you're not going to come back in court. You're going to resolve this extra-judicially without my supervision, without necessarily the legal merits to do so.

I will also point out that privacy law would make 512(h) look even more of an anachronism. We've seen that in the WHOIS context that the availability to sue people who might be alleged trademark infringers for domain names is now not going to be automatically given either, and in fact most domain name registrants now use a privacy protective service anyway to overcome the WHOIS model.

Those were the models of the 1990's. The 2010's would have a much more privacy protective approach than 512(h).

MS. ISBELL: So speaking of potential

anachronisms, I mentioned earlier 512(j). That's one section of the statute that sort of nobody talks about. There are very few cases. Is that just DOA now? Is there anything left? Do we care about 512(j)? Should we care about 512(j)? Professor Goldman.

PROFESSOR GOLDMAN: I have blogged almost every 512(j) case I've seen, because I do find them so interesting. Because 512(j) to me was an integral part of the DMCA structure. The DMCA safe harbor does not say that service providers can avoid liability.

The DMCA safe harbor says that they can avoid financial damages and be subject to a limited injunction, which is spelled out in 512(j). So for me, the idea is that 512(j) is available to all of the copyright owners who are upset about infringement online.

There's still the possibility of exercising the rights that are permitted under that, and I do not understand why that has not been more widely explored. That does not make sense to me.

MS. ISBELL: Okay. Mrs. Ray, then Mr. Gratz.

MS. RAY: Thank you, and my comment just goes back to the previous one on 512(h). I just wanted to echo their comments and their support, their notion that with the subpoenas what we have found a lot is that these subpoenas are used unfortunately instead of to protect copyrights, they're used to gain access to personal information that is then used to try to reach a settlement, try to embarrass.

We're just trying to find a way to get support for that, as well as in the instances where some of these cases where they're actually asking for the information it pertains to individuals who aren't even in that particular location, that they are outside the court's jurisdiction.

So that while the goal of the Act was to try to provide another avenue for protecting copyrights and give them another method of enforcing or method of resolving it, most cases we're finding the same as they have, that it's not being used for

the intended way.

MS. ISBELL: Mr. Gratz.

MR. GRATZ: I have been puzzled about the same thing: that is why is nobody using 512(j)? My -- the best answer I've been able to come up with is this. The lack of cases in which 512(j) is invoked is an indication of how cooperation has happened between online service providers and senders of takedown notices.

Not in the sense of necessarily holding hands, singing kumbaya, and trying to do things that are the best possible thing that could be done for the enforcement of copyrights. But instead in that what 512(j) gets you is you can force the online service provider to do the thing that the online service provider is otherwise provided with pretty good incentives to do, and we want the online service provider to do, that is to take things down, to terminate, to terminate subscribers who are involved, who are habitual infringers and so on.

Because those things happen anyway without the need of a 512(j) injunction, we don't

see a lot of 512(j) injunctions because the purpose of that injunction has already been achieved.

MS. ISBELL: Okay. So we're coming down to our last 15 minutes or so, and I know that we've had a very lively discussion on earlier panels about repeat infringers. So I'm going to give all of you the opportunity to discuss repeat infringer as well.

Obviously, you know, we've heard a lot about *Cox, Motherless*, *Grande*, how the three of them can be reconciled. Can they be reconciled? Did they get it right, did they get it wrong? I'd be interested to hear any panelist's thoughts on that.

MR. WANG: Getting along? You mean the providers and the content owners right?

MS. ISBELL: It's on the repeat infringer policy. So requiring that ISPs take notices in of infringers and then ultimately terminate their accounts.

MR. WANG: Oh.

MS. ISBELL: Ms. Tummarello, you haven't spoken today.

MS. TUMMARELLO: Yeah. I think an earlier panelist described it as a spectrum between *Motherless* and *Cox*, and we appreciate that flexibility, considering start-ups often don't have the manpower to kind of deal with this the way a large company does. And I think earlier someone said *Motherless* was run by one person who was dealing with all this.

So definitely appreciate that flexibility. That being said, I think a necessary condition for start-up growth is certainty and clarity on repeat infringer policy would really help companies to make sure they're operating within the lines, and when they're trying to do the right thing know that they're doing the right thing and can tell the investors that they're doing the right thing, that they don't have to worry about litigation down the road.

MS. ISBELL: So what would that type of certainty look like? Are you talking about changes to the statute? Are you talking about guiding documents that the industry comes up with? I mean

what is --

MS. TUMMARELLO: I think there's a bunch of different avenues that could work here, and I don't want to say one is specifically the right thing. Obviously anything, anything that could be consensus-based and incorporate the perspective of small companies would be really important in developing something that -- like an industry guidance document.

But we want to make sure that there's flexibility here and there's a chance for start-ups to have input so their perspective is seen.

MS. ISBELL: Okay. Mr. Schwartz.

MR. SCHWARTZ: Well for CTA and also CCIA, we got into the *Cox* case as an amicus. It was on the contributory infringement side. Others addressed the 512 side. But generally in getting into that case and looking at what happened, one thing that hasn't been mentioned is the terrific abuse that was a part of the notices that *Cox* received.

They out of hand rejected the ones that

had license offers attached to them and other things, which I think the courts have generally taken a dim view of. That's not to justify, you know, a lot of the unfortunate stuff that came into the record.

The other thing we observed is that when that unfortunate stuff of, you know, people saying oh, the heck with it or we'll reinstate the guy the next day, came into the record, when the judge said 512 has nothing to do with this case, when they got to the contributory infringement trial it all came in as metrics having to do with 512 compliance.

It had nothing all to do with contributory infringement, and you can search the record for anything that really did. But the jury nevertheless was allowed to consider all of it. So in view of the shortness of time, that's really what I can add on it. But I think it's a couple of points that have stuck with me since we got involved in that case and it wasn't completely cleaned up on the contributory infringement side by the 4th Circuit.

MS. ISBELL: Okay. Ms. Gellis, then Mr. Gratz, then Mrs. Ray, then Mr. Feerst.

MS. GELLIS: Thank you. Well this is what I was alluding to in my opening comments, and the *Cox* court, the 4th Circuit, dealt with this head on, where they basically -- *Cox*'s argument was that accruals for purposes of termination policy should not be contingent on anything but adjudicated claims, and this is the problem with the DMCA system.

To the extent that an alleged claim can cause such sanction and effect for the platform, for the user, for expression, for a speaker's future expressive rights, and this is a problem. The *Cox* court didn't seem to think that this was a big problem, but this is a big problem.

Because this essentially becomes prior restraint, where you are causing censorship on a non-adjudicated claim. I think that's not going to pass First Amendment muster. The second point that's related that is also an undercurrent through all the cases we've been discussing today is how it's not black and white.

Sometimes maybe infringement is black and white, where it's clearly infringing or clearly not. But it's rarely certain, and I know in the first session we were discussing even whether you could derive certainty if you saw a watermark. One of the differences between the *Mavrix* case and the case that came afterwards was the second one didn't have watermarks, the first one did, and the court was critical in the second case, saying well why didn't you even put a watermark on it. But you still can't get that certainty.

In any sort of -- when you're looking at a bit of expression, the things that you need to figure out: whether there's infringement, is it copyrightable, who owns it, is it jointly owned, who posted it under license, was it posted as a fair use and this is -- and there's other considerations.

And the senders are getting this wrong. If the senders are getting it wrong, the platforms won't have any hope of getting it right either. But they're being forced to essentially defer to the complaint and presume it legitimate and take actions

accordingly, and those actions are hostile to individual expression. And especially when we start talking about termination policies, to the future expressive rights of users.

Just to double back to what I was mentioning with that Twitter anecdote, I've also seen it in the context with people on YouTube who are worried not just that their video got taken down, but it was a strike accrued. I'm sorry I don't have direct data on this, but I think that they're -- I think there are accruing anecdotes of people stressed out, that it's not just that they're losing the individual expression, but that they're losing the ability to make future expression because they're stuck in a system where there's been some injustice, where they think their video is fine and the problem is not just fine, that video's down and whatever, but that it's going to affect their ability to make future videos and contribute future expression to it.

MS. SMITH: I mean when you're reading *Cox*, you're not really struck necessarily by the

expression of these repeat infringers, and we also heard earlier like don't make the perfect the enemy of the good. I mean do you have any room for there being a continuum here for the ISPs to employ these policies?

MS. GELLIS: Well, one of the things that I believe Mr. Schwartz was just pointing out is in *Cox* itself, there were severe problems with significant numbers of the notices that were received. In fact, the court itself, the district court dismissed all the claims based on -- I believe it was the Round Hill publishers -- as not being valid expressions of copyright claims.

It took an enormous amount of -- the overall record, there had been voluminous notices sent to Cox, and the court itself crossed out a considerable volume of those voluminous notices as not being valid expressions of copyright, and then ignored what the impact would be because it acknowledged that there were problems with so many of them, but then still managed to default to the presumption that the ones that remained inherently

must have been good, and that the platform needed to have immediately regarded them as being valid, when the platform had significant experience to know that there were validity problems with the copyright notices, not just in terms of the claims but also in terms of their form.

The court criticized them for having blacklisted Rightscorp notices prior to BMG having hired Rightscorp. But it didn't discuss why Rightscorp had been blacklisted. So even if we want to go to the idea that file sharing is a certain type of infringing activity, and on a full-service ISP that's a certain type of thing and we want to treat it differently. We still have the abuse problem built into it.

And then if we try to build a system that ignores that abuse and then we extrapolate it out to more of the more -- I think the point that you're making is like social media tends to be more expressive type of platforms, it's the same system that rules them all.

Granted, they were in a 512(c)

environment, but if we don't have adequate ways of getting rid of the abuse and yet we still have these incredible sanctions falling on users who are expressers, we'll take out all of it, including the stuff that we think should actually have been an easier, an easier decision.

MS. ISBELL: Okay, Mr. Gratz.

MR. GRATZ: I want to begin by answering Ms. Smith's question to Ms. Gellis regarding a continuum, and my answer is yes. That is, a continuum is critically necessary in the context of a repeat infringer policy. Especially when you distinguish, as we must, between different kinds of service providers, different kinds of subscribers and different kinds of activity.

I think all of those things go into the question of whether the implementation of a repeat infringer policy is reasonable, and indeed ought to go into each individual service provider's individual decision-making on whether to terminate a particular user.

And in my experience, the service

providers who in Mr. Feerst's words care, take all those things into account and want to get rid of abusers, but don't want to trample either lawful speech or the non-infringing speech of people who make mistakes.

And so I think what I come back to here is the difference between conduit ISPs and edge services in this context. With respect to conduit ISPs, the continuum, one way the continuum was implemented and maybe one model for voluntary implementation of that continuum is the copyright alert system that we haven't heard a lot about, that was a way of doing a graduated response where the ultimate, the ultimate sanction, the thing at the end of the road was a very serious thing.

And I think the seriousness of terminating conduit ISP service is of critical importance. I mean it's not that hard to square with the goals of the DMCA. I think the reason on an earlier panel we heard *Packingham*. The reason *Packingham* is important is not necessarily because the First Amendment imposes limitations on

Congress' ability to act in this area, though it may.

I think the reason that *Packingham* is important is because it points out as a policy matter, these other things that we consider so important as a society, avoiding spousal abuse and child abuse, yield to the necessity of using, of people using the internet. People who make mistakes and maybe even repeated mistakes on those same sites, those interests at least in some cases where it's appropriate, where it's reasonable, also yield to the necessity of participating in society using the internet.

MR. GREENBERG: So you mentioned the difference between conduits and other types of service providers. They all have the same knowledge standards, but notice and takedown doesn't apply to 512(a)'s, although with *Cox* and *Grande* maybe it does apply to 512(a)'s in that they are expected to be at least keeping track of some of the notices they're receiving, even though they don't have a formal system for it.

So I guess the question I have, and I'm also hopeful that Mrs. Ray can respond to this in terms of what her members are doing, that is since *Cox*.I know *Grande* is too recent to have effected any sort of practical response. But since *Cox*, how are conduit types reconciling the fact that maybe there isn't that much of a difference between them and the other types of service providers, in terms of obligations?

MR. GRATZ: So I don't have any information for you about what is happening on the ground. What I can -- all I can add before I defer to Ms. Ray is to say that from the point of view, it still isn't, even after *Cox*, a notice and takedown type regime. That is, notices that are received are one input to a reasonable determination whether someone is a habitual, abusive infringer.

MS. ISBELL: Okay. Since you were called out, I'm going to go to Mrs. Ray and then Mr. Feerst, we'll let you have the last word.

MS. RAY: Thank you. Just quickly I wanted to, you know, second the notion of Ms. Gellis

and Mr. Schwartz on their comments about whether there's a need to forward the actual notices and what the obligations and responsibilities are on behalf of the ISP when they forward those actual notices, especially if they contain the settlement language like as in *Cox*. That left a big question mark for our members after the court decision.

Secondly, you know, to Ms. Gellis' point about sort of invalid DMCA notices, in particular the question that's come up for us is whether it's sent to multiple email addresses as opposed to just to the DMCA email address. Can they completely disregard any emails, any notices that come to an email address other than their DMCA one, assuming of course they have a valid, operational DMCA email address?

But more to your question and thank you for the opportunity. The members that we're seeing, that they are concerned with the *Grande* opinion, recognizing that it's only summary judgment phase. But it really did put a pretty hefty obligation on the ISPs, and does not seem to

take into account the concerns that have been raised here about the number of valid email addresses, the number of valid notices.

The other question and concern that comes up is what do we do with public WiFi, that we have had some success through technology with seeing a reduced number of copyright infringement notices or DMCA notices through instances where peer to peer networking is no longer used, where they're -- the members, the subscribers are using more of a streaming service to get their videos, to get their music. That has helped.

But where it hasn't helped is in the public WiFi context, that they have educated their members. A lot of times they find that members have kind of an open WiFi, and when they educate their -- I'm sorry, when they educate their subscribers as to how to close down their public WiFi so that, you know, people can't park on the street and use it, that helps until another one pops up somewhere else.

And in the case of WiFi in hotels, WiFi

in restaurants, they are kind of concerned of what, what are they going to do about that. So any clarification in that respect would be helpful. Then finally to the extent there's an expectation/obligation of ISPs to disconnect their subscribers at some point, we need further clarification and perhaps coordination with a state government, with the Federal Communications Commission.

State governments have considered internet service as an essential service. Therefore, there's going to be certain very concrete steps that would be needed prior to disconnecting. From the FCC's standpoint, there are performance obligations that these ISPs are required to meet to comply with FCC requirements.

So they're kind of in a box here, and any further guidance, any absolute clarification would be helpful. Thank you.

MS. ISBELL: Okay, thank you. Mr. Feerst.

MR. FEERST: Yeah. I wanted to provide

a very partial answer to Mr. Greenberg's question before on repeat infringement, which is what examples do we know of strategic behavior of sort of either batching or serially sending infringement notices, and then using that to sort of strategically try to get a particular user removed?

If you look through our Lumen notices, I will say I do see these. It's infrequent, so I don't want to overstate it. It's a rarity but they do happen and it may happen more elsewhere and it may increase.

If you look in the Lumen notices we upload related to infringement, one of the very idiosyncratic but interesting cases on this is an investigative journalism publication run out of Ecuador, that was using Flickr photographs of politicians posted by the government of Ecuador's Flickr account, and the government of Ecuador then sent some copyright takedown, some DMCA takedown notices along with a request that that account be banned based on their repeat infringement.

So as I say, that is at the margins of

what we're talking about, but I think it really suggests the potential for mischief that can be done with strategic behavior around these repeat infringement policies. From my perspective, the risk and the lack of clarity around the necessity of going to summary judgment to have it evaluated, whether the way that we responded to that was appropriate, is a six figure cost that is gigantic for a start-up.

So we very much want to do the right thing and it's very clear that that's a form of political speech that we want to be very careful about. But at least as to how repeat infringement policy works in the existing cases, there wasn't really any guidance for me to de-risk that in a way that was meaningful. Thanks.

MS. ISBELL: Okay, thank you. So with that, we've come to the end of the domestic portion of the day. I just want to remind everyone there is going to be an open mic. If you have additional comments or other concerns that you want to raise that we didn't get to, please feel free to sign up

so that you can speak during that.

We're going to take a 15-minute break, and then we will be back with the international panel at 2:45.

(Whereupon, the above-entitled matter went off the record at 2:31 p.m. and resumed at 2:46 p.m.)

MS. STRONG: Good afternoon everybody. If we could start taking our seats please? Thank you.

(Pause.)

MS. STRONG: All right. Thank you everybody. We're going to have our final formal session of this afternoon. This is the session on international. Just as a reminder, there will be an open mic that follows immediately after this panel. There is a sign-up sheet on the back table on the wall. So if you could please sign up in case you'd like to participate. As mentioned earlier, both panelists and members of the audience are free to participate. So just please sign up.

My name is Maria Strong, Deputy Director

for Policy and International Affairs. We continue to be joined by Kim Isbell of PIA and Kevin Amer, Deputy General Counsel. We're joined this afternoon with Emily Lanza, Counsel in Policy and International Affairs as well.

So welcome to the session on international issues, and as we indicated in the roundtable notice, participants in this are "invited to identify and discuss recent law and policy developments in other countries that bear on issues related to the effectiveness, ineffectiveness and/or impacts on online service provider liability since early 2017."

So this session on international issues is intended to supplement the record for our report to Congress. As you know many of our reports, including those on the making available right, small copyright claims, resale royalties, orphan works just to name a few, do contain discussions of copyright-related activities and developments.

So the companies and creators on this particular panel, this table, are involved in the

global creation and distribution of copyrighted content, and some may have business as well as enforcement operations in other countries. The Office believes that your views and experiences in participating in other regimes outside the United States will be very informative and insightful for this setting.

As you can tell, we have the largest panel of the day, the most time, and we have plenty to talk about. So let's get started with a 45-second introduction and tour de table. For scheduling issues, I'm going to invite Carlo Lavizzari of International STM Association to start first, and then we'll go back in alphabetical order. Thank you so much.

MR. LAVIZZARI: Good afternoon. Thank you very much. So I'm a lawyer in private practice, Lenz Caemmerer, and I'm the legal counsel to the STM Association, which does not stand for Standard Technical Measure. It is Scientific Technical and Medical Publishers, some 138 members that publish science technology medicine, but also arts,

humanities and social sciences publications. Together, they represent about 60-65 percent of what is being published in those areas.

So picking up on the panels we have had the pleasure of listening to earlier today, I think in -- I will focus on European developments.

There, I would say the internet in the last 30 years has not been static, and the developments are dynamic in Europe, basically moving from a system of platform liability and safe harbor to one of responsibility.

That is not just borne by legislation, but especially by case law, case law in the European countries such as Germany, France, Italy, Spain, the UK for the time being, and also by the Court of Justice of the European Union. The question today in Europe is not how to fix a broken notice and takedown whack-a-mole system; the question is how do platforms deal with their responsibility? How do they discharge the duties that they have, and not in a one-size-fits-all way but based on the risk that they introduce based on these service

models that they have chosen for themselves.

MS. STRONG: Thank you very much. Mr. Adams.

MR. ADAMS: Good afternoon. I'm Stan Adams with the Center for Democracy and Technology. Through both our D.C. and Brussels office, we advocate for an open internet, one in which all people can express themselves freely. While we view articles 11 and 13 or whatever their current numbers are of the EU Copyright Directive as fundamentally problematic to free expression, we continue to believe that section 512 preserves an appropriate balance between the interests and abilities of stakeholders in the online ecosystem.

It's worth noting that although the internet and the web are incredible tools for the marketing and distribution of content, those are not their only functions. It is important to remember that the web is also the default option for sharing and expressing between people.

Section 512 is a foundational element for this capability, giving rise to many of the

platforms that allow creators of all kinds to share their work with more people than ever before. The EU has removed this foundational stability.

MS. STRONG: Thank you. Mr. Cady.

MR. CADY: My name is Eric Cady, and I am senior counsel with the Independent Film and Television Alliance. Thank you for the opportunity to continue IFTA's participation in the section 512 study and for today's discussion on service provider liability for infringing content online.

This continues to be a global problem for IFTA members, who are faced with massive online infringement with no way under current law to prevent or stop the introduction and rapid proliferation of illegal copies across the internet.

IFTA represents more than 145 companies in 23 countries around the world, the majority of which are small to medium-sized U.S.-based businesses that have produced, financed and distributed many of the world's most prominent films, including 80 percent of the Academy

Award-winning films [for Best Picture] since 1980.

In terms of developments, we are encouraged by the European Parliament's recent approval of the Copyright Directive, to the extent that it recognizes the serious need to rebalance the notice and takedown framework with respect to online content sharing service providers, which to date have had no incentive to discourage users from further uploading infringing content, because that content drives revenue to the platforms. We look forward to discussing these issues further. Thank you.

MS. STRONG: Thank you. Ms. Coffey.

MS. COFFEY: Hi, I'm Danielle Coffey. I'm with the News Media Alliance, and we represent over 2,000 news publishers in the U.S. and internationally.

FEMALE PARTICIPANT: Pull the microphone closer to you.

MS. COFFEY: Can you hear me? Danielle Coffey with the News Media Alliance. We represent 2,000 publishers, news publishers and we -- I spend

most of my days making sure that we have a better business arrangement through favorable regulatory treatment, which will lead to a business model to sustain quality journalism.

I think we can all agree that that's critical to an informed democracy in a civic society, and thank you for having us here today so that we can represent the news media's views with regard to article 11, the EU Publisher's Right, which is now known as article 15 in the Copyright Directive, which we hope will be passed expeditiously.

MS. STRONG: Thank you. Mr. French.

MR. FRENCH: Hi, Alec French here with Thorsen French Advocacy. I have a number of creative community clients but I'm not speaking on any of their behalfs today. Rather, I'd like to speak as someone who has been an advocate for creators since before section 512 reared its ugly head as the legislative price to pay for the rest of the DMCA.

I want to focus on one aspect of article

13 or now 17 adopted by the EP. Specifically, the differing obligations. Article 13 applies to large and small UGC sites. I think it's a really reasonable principle that the U.S. should consider adopting more broadly.

The Europeans clearly decided innovation by internet start-ups would not be impacted by requiring companies with $500 billion market caps and more than $100 billion in cash on hand to secure licenses from rightsholders and filter and keep down infringing material. Similarly, limiting the availability of current section 512 to internet start-ups will not impair their ability to innovate, but may prevent section 512(c) in particular from continuing to operate as a legislative license for multi-billion dollar companies to ignore and profit from infringement with impunity.

In short, the big versus small distinction drawn in article 13 is one European export I think we should welcome in the U.S.

MS. STRONG: Thank you. Ms. Friedman.

MS. FRIEDMAN: Can you hear me? My name is Ashley Friedman. I'm the Senior Policy Director of the Information Technology Industry Council. ITI is a trade association representing about 70 companies in the hardware, software, internet, semiconductor, fintech, basically all aspects of the technology sector.

We do business -- our companies do business in every market in the world, and we cover from a policy perspective pretty much every policy issue that impacts the tech sector. We appreciate the opportunity to be here today to exchange our views and hear from the others on the panel, because really for us the DMCA overall and this section in particular is really fundamental to providing that balance between innovation and strong protections. So thank you.

MS. STRONG: Thank you. Mr. Lamel.

MR. LAMEL: Thank you. Thank you for the opportunity to speak today. I am the executive director of Re:Create. My coalition members are very concerned about recent developments in Europe.

Specifically, we are concerned about the impacts of articles 15 and 17, formerly 11 and 13.

I hope today we'll get the opportunity to talk about the impact it will have not just in Europe, where European consumers, innovators and creators will be harmed, but also here in the U.S. where it will have an impact on American investment in the internet. Many smaller start-ups who can't meet the test under the bill, as well as the operations of large U.S. platforms and U.S. creators, who will have a lot more trouble reaching the American market.

Since the last roundtable, two things have changed. Number one, profits are up in the creative industry. Number two, piracy is down, and I think those are two important things that have changed over the last two and a half years that we need to note.

Additionally, we've seen exponential growth in the amount of creators choosing to forego traditional internet industry intermediaries and reach their audience directly through platforms

like Amazon Publishing, YouTube, TikTok, Etsy and many more.

We recently did an extremely conservative estimate that only looked at nine of these platforms and only the top source of income on each of these platforms, and found that approximately 17 million Americans are creating and distributing content online without traditional intermediaries.

Some are doing so for fun. Others are still trying to make it, while others have turned into their own small businesses with their own employees while making a nice living, and Europe's new Copyright Directive threatens all their ability to do so. Thank you.

MS. STRONG: Thank you. Mr. McCoy.

MR. McCOY: Good afternoon. I'm Stan McCoy and I run the European arm of the Motion Picture Association. We support the EU approach to no fault injunctive relief reflected in article 8-3 of the 2001 Directive. As to liability, we would suggest that you look to recent ECJ case law, rather

than the new EU Directive as the model.

While the original proposal to clarify communication to the public in that Directive was good, in the end we find we have to agree with European audiovisual sector rightsholders, who dislike the burden of inconsistent notification rules in article 17, dislike its emphasis on licensing where AV needs enforcement, and dislike its UGC language, which contradicts the Commission's own impact assessment.

The ECJ has done much better in cases like the Pirate Bay and Filmspeler. I'd be happy to talk at greater length about any of those subjects if you'd like. Thank you.

MS. STRONG: Thank you. Ms. McSherry.

MS. McSHERRY: Hi. My name's Corynne McSherry and I'm the Legal Director for the Electronic Frontier Foundation, and EFF's been involved in most of the section 512 litigation over the past two decades, either as amicus or lead counsel, and I was lead counsel on the *Lenz* case, which I'm more than happy to talk about, but that's

not why I'm here today.

I'm here to focus my remarks on article 17 in particular. EFF worked very closely with our partners in Europe to oppose the inclusion of article 17 in the new Copyright Directive, and we did that because we know that article 17 would inhibit online expression, forcing service providers to embrace upload filters.

At EFF, we understand that the work we're doing here today in thinking about copyright policy, when you're formulating copyright policy, you're formulating speech policy and innovation policy. That is what we are talking about here today and we understand that.

If as we expect we're going to see the adoption of upload filters across Europe in order to avoid liability, those filters are inevitably going to flag lawful as well as potentially infringing content. Why do we know this? Because we have a decade of experience with Content ID, where we have seen Content ID in which YouTube has invested millions of dollars.

Despite that investment, Content ID regularly misidentifies all kinds of content, bird songs, white noise, public domain performances, clear fair uses like clips and lectures. So we know that those mistakes are going to happen, and for those who say well, those mistakes are the exception, Stan Adams actually pointed out that roughly 300,000 new YouTube videos a day, a system that incorrectly flags only one-tenth of a percent of them still removes or blocks 300 lawful posts.

That's a lot of lawful speech, and that's what we're talking about. So that's just one of many reasons that millions of internet users, not to mention the technologists who built the internet, and the U.N. Special Rapporteur on Free Expression all spoke out on article 13. I hope this Office will as well in your report, and expressly recommend against importing this very bad policy to the United States.

MS. STRONG: Thank you. Ms. Oyama.

MS. OYAMA: Good afternoon. I'm Katie Oyama with Google. We do agree that the DMCA has

allowed for an explosion of creativity and economic growth. It's led to the development of robust anti-piracy tools. Today, the internet enables more than $27.7 trillion a year in global eCommerce.

The growth of these legitimate online services made possible by the balanced U.S. legal approach, has also driven billions of dollars to the entertainment industries that might otherwise be lost to piracy. We're really happy to see that global box office revenue is up, global recorded music revenue is up.

On the specific topic of the EU Copyright Directive, we believe that the Directive will not help but will rather set Europe backwards. We believe they will harm Europe's creative and digital economy. Unlike the recently-passed U.S. law, the Music Modernization Act, which was a win, win, win for rightsholders, for users, for platforms, the EU Copyright Directive poses the potential for massive and dramatic consequences, particularly in over-blocking of content as platforms become fearful of additional liability.

The details will matter and the implementation will matter, and so we look forward to working with in particular the member states as the Directive is implemented across Europe. Thank you.

MS. STRONG: Thank you. Mr. Rosenthal.

MR. ROSENTHAL: Hi. My name is Steve Rosenthal.

MS. STRONG: Oh sorry.

MR. ROSENTHAL: I'm wondering why you skipped.

MS. STRONG: There you go. Mr. Randle. My mistake.

MR. RANDLE: No problem. Chris Randle with Facebook. It's great to be here today. Facebook has submitted previous comments, and we want to reiterate our strong support today for the U.S. DMCA framework. We also wanted to update the panel today on the innovative steps we're taking to protect intellectual property rights, all of which are enabled by the strong and balanced DMCA approach.

The purpose of the DMCA was to encourage collaboration between rightsholders and platforms, to effectively combat piracy, and that is entirely in line with our approach. We're excited about the new tools and partnerships we've been developing over the past years. For example, we've invested in building our video-matching tool, Rights Manager, which provide control to rightsholders regarding their content on Facebook.

This is in addition to our decade-long employment of Audible Magic, an investment in building the Commerce and Ads IP tool. These are important illustrations of how this kind of collaboration can lead to real and effective technical solutions, but only if it's voluntary, adaptable and flexible.

Over the past few years, we've also been developing strong partnerships with rightsholders in all sectors. We're proud that we empower content creators of all types with new avenues of sharing their content, driving offline viewership and publicizing their new creativity.

We partner with various rightsholders, including those in the music, entertainment and publishing industries. Our partnerships have resulted in testing new monetization structures that support new publisher subscription-based models.

The flexible legislative frameworks like the DMCA allow us to take into account changing needs and new market solutions, in order to offer rights owners top IP tools for protecting and promoting their content. We look forward to sharing additional views today.

MS. STRONG: Thank you. Now Mr. Rosenthal.

MR. ROSENTHAL: Thank you. My name is Steve Rosenthal. I'm Senior Director of Anti-Piracy for McGraw Hill Education. Piggybacking on the 512(h) discussion of last session, one of the tools that rightsholders rely on to enforce their rights against pirate websites is the WHOIS system that is intended to identify who is responsible for a domain name or an IP

address.

Having this identifying information is integral to pursuing the operators of these infringing sites. However, the goal of resources like WHOIS has recently conflicted with the interests of the EU GDPR that seeks to restrict public access to details of private individuals, including those operating these sites.

We have seen a number of instances where identifying data previously available on a WHOIS or similar search result was suddenly redacted and hidden from public view. At the same time, we have seen a proliferation of content delivery networks such as Cloudflare providing services that anonymize the identity of online service providers in the pretext of furthering security interests.

This impacts the rights owners' ability to enforce against the bad actors. Unfortunately, the DMCA subpoena process often provides no alternative solution to this problem, as these subpoenas many times lead to useless, inaccurate identifying information, which is self-reported by

the infringer.

These impediments negatively impact rights owners' ability to effectively enforce their rights.

MS. STRONG: Thank you. Mr. Schruers.

MR. SCHRUERS: Thank you. My name's Matt Schruers. I'm with the Computer and Communications Industry Association, a trade association of internet and tech firms which range in size from small start-ups to household names. At the same time that there is growing consensus over the protections and obligations of the DMCA and that approach is being increasingly adopted by our trading partners overseas, there's a unique exception to that, which is the increasing uncertainty emanating from Europe about its own approach, which until now has been more in harmony with the U.S. approach than in conflict, but that is starting to change.

Now with respect to the U.S. approach, as the recent research report actually released by CCIA today, the latest in our Sky is Rising series,

demonstrates, data from numerous third party content industry organizations shows growth across the creative sector, indicating that the current notice-and-takedown system is working.

By contrast, the extraordinary controversy over and criticism of articles 13/17 of the EU Directive from all sectors, as we've already heard from other speakers, ranging from creative industry interests, academics, start-ups, civil society and human rights organizations, all of that criticism suggests that the EU is out of step with the U.S. norm and increasingly the international norm, and that that's creating great uncertainty which we should regard with some skepticism if we're going to take any policy lessons from that. Other than that this is a source of business investment deterrents and potential risk to free speech and consumer expression interests. Thank you. I look forward to discussing the issue further.

MS. STRONG: Thank you. Ms. Simpson.

MS. SIMPSON: Lui Simpson, Association

of American Publishers. AAP encourages the U.S. Copyright Office to take account of the disruptive effect website blocking has on blatantly pirate sites. There are now some 40 countries with a website blocking statute or are considering its adoption.

In Europe alone, some 1,800 websites and over 5,300 domains have been blocked, and yet despite these blocks, the internet has not and is not broken. Publishers have successfully pursued the remedy in six European countries against a notorious pirate site engaged in providing unauthorized access to STM journal articles.

It is high time the U.S. looked to adopting additional, meaningful tools to enable rightsholders to tackle online piracy, as a mere takedown is not enough to effectively address the nature and scope of online piracy that rightsholders face today.

MS. STRONG: Thank you. Mr. Siy.

MR. SIY: Thank you for the opportunity. My name is Sherwin Siy. I'm here on behalf of the

Wikimedia Foundation. We are the non-profit that supports various projects including Wikipedia. Actually, Wikipedia's in nearly 300 different languages, as well as Wikimedia Commons.

We are very concerned with the provisions of the European Copyright Directive recently passed, particularly article formerly article 13, now article 17. And I think in contrast to some suggestions that have been made, I don't believe that it is a good model for proceeding in copyright policy.

This is in part because it has just passed and its results are, I think, unclear and how it will affect the online ecosystem is unclear, both in its provisions and in its implementation in member states. Beyond its novelty, there is also the uncertainty within it.

There is tension between some of the recitations and its provisions, and tensions within the provisions themselves that raise a lot of the issues that we've been discussing for the previous several hours, as well in more settled legislation

in the United States.

Beyond this, I think I'd also like to make the point that Wikipedia's and Wikimedia Commons occupy an interesting space in this discussion, in that they are very large websites, at least very prominent websites with a very small staff, with a very large user base and a very large contributor base, but that exist for very specific purposes that aren't often discussed in these conversations.

And the effects of these policies on a fairly unique system like ours and many others that don't fit the model of a general purpose, a general purpose sharing site often get ignored. Thank you.

MS. STRONG: Thank you. Ms. Vollmer.

MS. VOLLMER: Thank you for convening this panel. I'm Abby Vollmer, Senior Policy Manager at GitHub.

GitHub is the world's leading platform for developers to build software, and from the perspective of software development we're driving innovation across countless industries, and the

safe harbor has been essential to enabling innovation to thrive over the past few decades.

GitHub itself relies on the safe harbor because software code is subject to copyright, and the notice-and-takedown system has generally worked well for us. When we learned of the proposed article 13, now article 17 in the EU, we were very concerned because it puts the safe harbor that software development relies on at risk.

We were able to secure a carveout for open source software developing and sharing platforms, but there are countless other services that software developers are building that are not within the scope of that exclusion. This underscores the fact that tinkering with the safe harbor in the way that the EU policymakers did puts the economy and innovation at risk.

I made a few trips to Brussels and I spoke directly with EU policymakers there over the course of the negotiations of this Directive, and I'd be happy to chat with you and look forward to today's discussion. Thank you.

MS. STRONG: Thank you. Ms. Wolbers.

MS. WOLBERS: Last but not least. I'm Rachel Wolbers, the Policy Director at Engine. We're a non-profit that advocates on behalf of start-ups. The internet allows entrepreneurs to scale quickly by reaching a global audience. But in order for American start-ups to thrive, foreign markets must offer a similarly balanced copyright framework like the one we have in the United States.

Recent developments in copyright law, notably the EU Copyright Directive, will stifle American start-ups and reduce competition abroad. Article 13/17 forces start-ups and other platforms to use expensive and ineffective content moderation tools to police user-generated content and the start-up exception is not workable.

The impact of this Directive will likely be felt across the world, as start-ups are forced to reimagine their global presence and restrict user-generated content. Thank you for the opportunity.

MS. STRONG: Thank you very much. So we

have a busy agenda today. I'm hearing a lot from the table about the concern over Europe and that's understandable. I do want to accomplish at least through this session issues on liability and, you know, various kinds of notice systems around the world.

Second, how do we view effectiveness in other markets. Third, what is the status of cooperation between local ISPs and rightsholders. That was a subject that came up in some of our earlier sessions today, and last but certainly not least, the scope of injunctive relief and the availability of website blocking, and I'm sure several of you will speak to trends on that.

But if we start at the first kind of bucket, which will be notice systems and liability, I think we just need to sort of start with Europe, because that is right in front of us. So I'm going to start off with a little bit of a softball question.

Realizing that, as Mr. Siy noticed, that this was just recently adopted, it's still not been

finally adopted. There are two years of implementation, 27 or 28 different ways. But what I'd like to hear from you is what might be your top one or two issues that you see in the Directive. Because as I think Ms. Wolbers so accurately noted, is what will this Directive require American companies and users, whether you're [technology] stakeholders or on the content side, how will it affect your doing business in Europe?

And then thinking ahead, how might that affect your doing business here? So I'm looking for the top two issues with the Directive, whether it's the definitions, the big/small issue, the liability issue. I'm curious to know since we have a lot of experts at the table. The flag is up for Mr. Lavizzari.

MR. LAVIZZARI: Thank you. Well, I think that the top two issues are to what extent will article 17 codify really the case law that has been created by the Court of Justice specifically on active platforms, platforms that are structurally infringing and that are accordingly

held themselves not to be able to hide behind the user, not to pretend that they stand in the user's shoes but are in fact carrying out the communication to the public?

In this regard, two cases, YouTube and Elsevier are cases pending in front of the Court of Justice, and we are very eager to see to what extent they will now take into account the article 17 and hopefully see the previous case law confirmed.

The second issue will be the -- not the different standards for platforms, how they carry out their responsibility. Will that change? The Court of Justice at the moment has different standards, depending on the risk profile. If you choose to have unidentified, anonymous users, you are held to a much higher standard, and to make sure the risk you create through your business model does not negatively affect copyright holders.

We would hope that this case law that is quite robust is not impaired by the promises of licensing that article 17 also creates.

MS. STRONG: Thank you. Ms. Simpson.

MS. SIMPSON: So we don't think article 17 is actually going to be a problem, because in the recitals it does say that this is intended to be a clarification of existing EU law. So if you looked at the German court cases, I know it's going back before 2017. But the *Rapidshare* case actually was a clear enunciation of the Störerhaftung principle in German law.

It made clear in that case that, as Carlo mentioned, if you have set up your platform so that it does intend to facilitate infringement, you've actually taken it upon yourself to undertake certain responsibilities as enunciated in Störerhaftung. So that does not change with article 17. So obviously there are uncertainties with respect to how individual countries will implement that statute.

But the fundamental position here is that EU law is sound with respect to how its case law has developed on the question of platform responsibility, and not just mere liability and

safeguards as Carlo and I think also Mr. McCoy has stated.

MS. STRONG: Thank you. Ms. Vollmer.

MS. VOLLMER: So I think that the number one problem from our perspective is filtering, and even though like I mentioned there is a carveout for open source software platforms so GitHub itself seems to be okay with respect to the EU, there is so much else that goes on that's important for software development, important for innovation that's not there, and whether or not the statute, the Directive actually says the word "filtering," the reality is the requirements are going to incentivize a lot of platforms to filter, so that they don't have to potentially subject themselves to liability.

So I just want to say a few words about for us why filtering is very problematic. So GitHub is the home of open source software. Open source refers to open source licensing, and that's a form of copyright. So software developers who choose to license their code under an open source license,

there are various licenses but there are four main tenets, freedoms that are present in open source licenses.

So the ability to study, the ability to use, the ability to modify and the ability to redistribute. So rightsholders that are software developers who've created software code and are sharing that on the internet want it to be shared, and they're not making money off of that and GitHub is not making money off of that either.

So this is, you know, it took a lot of conversations with the policymakers in Brussels, but this is kind of where we were coming from, that hey if you're going to legislate on this level, you need to really think about the kinds of content that's copyrighted on the internet, and figure out whether the way that you're going about applying requirements is actually helping all rightsholders or not.

Because in our case, if that content disappears, not only is that cutting into the open source software holders' rights, but also the way

that code is built collaboratively online means that you have hundreds of different dependencies, like blocks of code. They're all licensed potentially differently, and if a filter, if a false positive from a filter detects a block of code and that disappears, then you've got a broken software project.

So I understand this is, you know, not necessarily applicable to all kinds of content. But the point I want to make is that, you know, we really do need to be thinking nuanced here about how we go about doing things, and as I mentioned, even though we are able to carve ourselves out, we're very concerned about the bigger picture and everything else that didn't get carved out.

MS. STRONG: Thank you, point taken. Mr. Siy.

MR. SIY: Thank you. Yes, as the recipients of another carveout, I'm aware that our potential liability under this might be limited, though I will, you know, the online encyclopedias are only one part of our projects. I would argue,

I would want to argue that our other projects would similarly be excluded from being considered within the scope of article 17.

However, I think we are -- our concerns remain that, you know, should we be found to be included or should additional projects be found within the scope, there is this unresolved tension between what it means to make best efforts to obtain authorization for content that we do not intend to be on our projects.

Even with Wikimedia comments, which is devoted to hosting media, it's devoted to hosting media that is either in the public domain or that has been granted a license, an open license by its creator. And even certain types of creative commons licenses would not be permissible under the rules for creators to upload to Wikimedia Commons.

So we have no intention of hosting on Wikimedia Commons even perfectly legal works that would be hosted under fair use. And so the question of what it takes to seek permission for those uses at the same time and make best efforts to obtain

those authorizations is an open question, and also what it means to make best efforts to ensure unavailability of works while also trying to ensure that various other provisions are met, such as not preventing, not resulting in prevention of lawful uses being, you know, not resulting in the prevention of lawful uses, not leading to general monitoring obligations and so on.

MS. STRONG: Thank you. Mr. Cady.

MR. CADY: Thank you. So from IFTA's perspective, article 17, is not perfect legislation. It's the result of a very lengthy process. A lot of political compromises were made during that process. But we do take two positives from article 17, the first being that it's premised on getting authorization, the second being that the larger platforms would have to prevent future uploads of notified works.

So from that perspective, we are encouraged by article 17. We look forward to working with the Commission in their stakeholder dialogues that will be forthcoming and local

implementation throughout the 28 EU [member] states.

MS. STRONG: If I can follow up with you. Given the worldwide nature of your IFTA members and the way you license and finance films, could you say a little bit more about how you see the "shall obtain an authorization," especially from the licensing point of view?

MR. CADY: It's an interesting question and thank you. IFTA members license on an exclusive basis. So the premise of these platforms obtaining the authorization may not work out. IFTA members may not want to license their works to the platform. So that's one challenge that we're going to have to face during this process.

But you're right. It does have the potential to vastly impact the way that members finance their productions.

MS. STRONG: Mr. Lavizzari, you may also have comments on that authorization point?

MR. LAVIZZARI: Yeah. I think one of the beauties of the emerging case law and article

17 is that it creates sort of an incentive now for platforms and rightsholders to cooperate, which is perhaps lacking in the 512 context. So rightsholders do want works to be available, for authors of scientific works to share their work.

So there is ample opportunity now to come up with reasonable -- with reasonable policies that will not lead to a stifling of freedom of expression or of works that should be available not being available. Quite the opposite. STM's members for a long time already now use artificial intelligence to deal with plagiarism, and some of you know this from student days, Turnitin.

But there are many more sophisticated other options and identifiers, and we are very eager to work with the platforms that now have very good incentives to work with us, to devise a system that will work for everybody.

MS. STRONG: Thank you. We have a bunch of cards up. We're going to go with Mr. McCoy, Ms. Oyama, Mr. Schruers, Ms. Simpson again and then back to Ms. McSherry. So almost around the corner.

Stan.

MR. McCOY: I'll be brief, thank you. I'll take your question as an invitation to expand on the first two points that I mentioned as criticisms of article 17, and I should say that we strongly disagree with a lot of the criticisms you're hearing around the table here. But the question here is, what you should look upon as a model, and we do have some concerns about the way this piece of legislation wound up.

One of them is Berne-inconsistent notification requirements, and here I'm referring to paragraph four, where the structure says that, online content-sharing service providers shall be liable unless, and then it has some subsidiary requirements, one of which is to act expeditiously upon receiving sufficiently substantiated notice.

So you have liability that only kicks in there when a formality has been accomplished, and that of course raises concerns under the Berne Convention. We would have preferred that, along with other AV sector rightsholders that the EU

legislator wait until after the decision on the YouTube cases that have been referred now, which will squarely address some of the same issues that are in question here.

And the second point that I mentioned was emphasis on licensing over enforcement. I just want to emphasize in my remarks here that for many rightsholders, the idea of licensing UGC platforms, for example, is not something they're particularly interested in because they're functioning on exclusive distribution models.

So for those rightsholders, the really key thing is enforcement. So to the extent that this provision really emphasizes the need to obtain a license, it leaves us a little bit concerned about how it's going to be implemented for the benefit of those rightsholders who are really relying on the ability to enforce their rights. Although the implementation of filtering solutions along the lines of the sorts of things that entities like Google already have in place is one promising step that we could look forward to.

MS. STRONG: Thank you. Ms. Oyama.

MS. OYAMA: In terms of primary concerns, I think it's like tempting to dive into the weeds. But when we are looking at the EU Copyright Directive, we're first just taking a step back and our primary concern is the conflict between the two frameworks and the potential for conflict.

You know up until now, as Mr. Schruers said, there has been relative harmony between the DMCA safe harbors and the eCommerce Directive. From the perspective of a service provider, we know that if we're notified by rightsholders, notified by our partners that there is infringement on our platforms, we can then take action.

There's a significant shift in the approach that the EU is taking, leaving open the possibility for direct liability for a service provider for any type of content that anybody uploads. And that does inject significant confusion, fear, legal risk and legal uncertainty.

One place in particular that we would like to be really focused on in implementation

through discussions with policymakers would be making more clear what is sufficient notice for a platform to act.

In the final version, there were some positive steps taken beyond where the Parliament had landed, which is this concept that platforms that are making a good faith effort to help rightsholders identify and protect works should not face direct liability based on these best efforts.

But there's a real need for clarity around what those best efforts look like, and how we work with rightsholders and partners. What -- are there specific URLs? Is there specific information in the way that we've been able to work in particular with Content ID, where we can work very collaboratively and understand the intent of rightsholders.

We've seen a huge benefit from user-uploaded content, user-generated content. If we were at this roundtable, you know, five years ago the idea of users uploading was much more controversial, and even on YouTube we saw the

majority of rightsholders when notified that a user had unloaded content that matched their rights they would set to block, and now the vast majority choose to leave the content up on the platform and choose to monetize.

In fact, on YouTube more than 50 percent of revenue that we send out to music rightsholders we've sent more than $6 billion out to the music industry. More than 50 percent of the revenue that we're sending out is generated from claims against UGC.

And so that's the real concern, is that this will harm not only EU creators but U.S. creators. For U.S. creators, more than 68 percent of their views come from outside of the United States. And so if service providers operating in the EU are so fearful of this direct liability and so uncertain of what it takes for them to act, there is a significant risk of overblocking this type of content.

MS. STRONG: Thank you. Mr. Schruers.

MR. SCHRUERS: Thanks. So to summarize

my primary concern and my answer to the question in a nutshell, it's a manifestation of the deficiencies of the EU approach in dealing with intermediaries' liability for user content through what is essentially a direct liability lens, as opposed to an indirect liability lens.

The way that it translates into specific concrete problems is primarily in paragraph four of the article, which was previously alluded to, which requires this obligation to secure a license for effectively all communications on the platform, and then to ensure the unavailability of that while, it's worth noting, there are obligations elsewhere in the Directive to ensure the availability of particular content like parodies, but not satires.

And because there are interpretations of the communication-to-the-public and making available right, that attached liability at the moment of availability, then that results in an essentially unmanageable filtering obligation. And then add on top of that the obligation to prevent the future upload of all problematic works, when

the only technologies that are really proven for that, and they are imperfect technologies, pertain to audiovisual works.

And yet the article is not so similarly circumscribed. So we have a situation where the system has -- the legislative proposal has created mandates to implement technologies that have not yet been deployed in the marketplace.

MS. STRONG: Thank you. Ms. Simpson.

MS. SIMPSON: So going back to address the notion of filtering, I think yes there may be concerns about how it is implemented and how well it's done. But frankly the European Union is all about proportionality and reasonableness of measures, and those standards are already in their laws.

So when you look at again the German case law, you have -- you don't have a general obligation to filter or to monitor. But according to that case law, once you have been notified of infringing content on your platform, there does arise the responsibility to take additional measures that

prevent the re-upload or the reappearance of the infringing content.

So it's not coming out of nowhere. The existence of the obligation or the responsibility is already there. Störerhaftung again. Obviously there are processes that have to be put in place, so as Mr. Schruers said, there isn't yet an effective filter for all types of content.

But surely the notion of legislation is to get us to that point. So here's a nudge. Maybe we don't agree with the fact that this law is perfect, and certainly it's not. But you can't just keep saying that we can't do something because there's no framework. The reason you have a framework is to move us towards a direction we can actually find a workable, reasonable and proportionate solution to the problem.

MS. STRONG: So are you in the same, or similar situation like Mr. McCoy, or would you have preferred to wait for the court in the YouTube case. It sounds like you would rather take the Directive as it is, first?

MS. SIMPSON: No. I frankly think that at this point, since the Directive isn't law, and it may not become law since there is a vote coming up on the 16th of April I believe, let's not yet look to that as the primary problem. It may become a problem when it is actually adopted, and then we have 24 months to see how either they get it right in certain countries or they mess it up entirely.

The case law is there; this Directive is supposed to clarify that case law, and at least as Carlo said maybe codify it. But I do think that one thing that is extremely problematic about probably article 17 is the fact that it seems to say again that you rightsholders, you just have to put up with whatever's being done with your content.

Obviously that is contrary to the fundamentals of copyright. You as the creator and you as the distributor have the ability to control or should have the ability to control that content. When that ability is taken from you and then you have no choice but to either monetize it or take it down, that's really moved us far from where

copyright is. But that is the world in which we are operating.

And so if that is our world, then rightsholders do need the requisite, effective, necessary and adequate tools to combat that problem.

MS. STRONG: Okay, thank you. So we have a line up. We're going to Ms. McSherry, then Ms. Wolbers and then down this line. So Mr. Lamel, Ms. Coffey, Mr. Adams.

MS. McSHERRY: So okay, a few quick points. So I agree, just responding to Ms. Simpson, that copyrights holders have lots and lots of -- have the right in many instances to control how their works are used. But those rights are not unlimited, and that's the part that I'm worried about.

I'm worried about the content that's subject to limitations and exceptions, or in the United States if we imported it to fair use, where you don't need a license. So I'm hearing a lot of talk about well, we'll just move to a nice licensing regime and that will be fine. But when -- but there's lots and lots of content that doesn't need

to be licensed. You don't need prohibition. You don't need authorization, and robots are very bad at telling the difference between the content that needs to be licensed and the content that doesn't.

So I don't think moving to a licensing regime works for many, many different kinds of content. It may work for some, but it's not -- it's not the answer. So I want to resist that as sort of an automatic direction that we should all accept.

The second problem I want to make or the second point I would make is that I would point over the course of the article 13 being negotiated, there was a lot of back and forth about were filters going to be mandated, were they not. For a while it was like no, no, no, we don't mean filters. It's okay.

But then a German regulator just last week said yes, of course we need filters. That's what you're going to need to comply with article 13. So I'm just resisting a little bit the notion that we're reaching any kind of clarity, except for that filtering's going to be required.

And that brings me to my third point.

Sorry if I'm talking too fast. I'll slow down. We have a competition problem here as well. I'm actually not here to be worried about Google and Facebook. I like them very much, they'll take care of themselves. They'll be fine.

I'm worried about the people that for example Ms. Wolbers represents. I'm worried about the people, the platforms that I'd like to see emerge so we can have competition in this space, so we can have competition in the social media space and for other services.

I want those platforms to be able to emerge, and the exemptions in the -- the exemptions on size really don't satisfy that need. The reason why is if I'm an investor and I'm looking at a start-up, I'm going to ask them okay, how are you going to comply with article 13?

If their answer is well, we'll just never go to Europe, I'm going to say oh, I don't think this is a good investment for me. So you're going to have to build into your business plan some ability to filter at some point down the line, and not

everybody can afford to invest millions of dollars in doing that. So I worry about that as well.

MS. STRONG: Thank you. Let's see. We're going to Ms. Wolbers.

MS. WOLBERS: Corynne just made most of my points for me, but I have a few other things that we're concerned about. As Corynne mentioned, I think for small start-ups, you're really looking at scalability.

If you have conflicting legal regimes, the concept of having to build separate platforms, one for the United States and then maybe 27 or so other different platforms for each country within the EU is not particularly something investors want to see, but it's also not really feasible.

And then when you add on the cost of implementing filters, that will be an even greater setback. And while we've seen in article 17 a number of exceptions, and I think for start-ups, you know, it sounds really good and I know that it's politically very popular to say oh, we'll just carve out the small guys.

But that doesn't actually do start-ups any service. If you are creating in the article 17, it's three years old, $10 million in annual turnover and five million monthly active users, it creates these perverse incentives to try to stay under those numbers, and not grow your company in a more organic way.

And then when you're seeing exceptions that were made, and I respect my friends over here with Wikimedia and GitHub, but when you're creating in law exceptions for certain companies and industries, you are not really future-proofing your legislation. You are essentially writing in companies that will now have an advantage and a leg up in their business model.

My friends at Google and Facebook are in similar positions, where they now have legislation that's written in a way that helps protect their business models from potential new incumbents or new entrants into the marketplace. So I generally and at Engine we try to avoid these start-ups exceptions or even exemptions within the

law.

MS. ISBELL: So I just want to follow up on that point a little bit. You know, first the comment that you might need 27 different platforms. It seems to me that the purpose of the Digital Single Market is so that you need one platform for Europe. But you know, I do take the note that if you have to have platforms for the U.S., EU, Thailand, China. But to a certain extent, don't we already have that issue?

You know, Germany requires you to monitor hate speech. Thailand requires that anything that's derogatory to the king be taken down. In some ways isn't that just the cost of international business? You know, it always was in the analog world, that if you went into a country you had to comply with their safety laws or whatever. So why -- why do we treat the internet differently?

MS. WOLBERS: So that's a great point, and we've worked with a number of much smaller U.S. companies like Kickstarter and Bandcamp and SoundCloud who, you know, a lot of the content that's

being unloaded does not necessarily get into the German hate speech law.

It's something that they think about, and that their one or two lawyers on staff might flag for their trust and safety team. But it's not a fundamental shift in the way that user-generated content is uploaded, in the same way that article 17 would be, and yeah.

MS. STRONG: Okay, thank you. We still have to have Mr. Lamel, Ms. Coffey, Mr. Adams and then we have three new folks, Mr. Lavizzari, Mr. Siy, Mr. Schruers.

MR. LAMEL: Thank you. So I'll reiterate what Rachel said, that Corynne and now Rachel have said most of what I was going to say and why I put my placard up. I just, you know, I want to note then, you know, two more things. So what I will say is Corynne perfectly outlined my three biggest concerns with the legislation, and so thank you.

But adding one or two more things to think about. Number one is, you know, not all

creators are the same and not all creators create the same, and not all creators want the same thing and creators want different ways of doing things. Very often I come to these roundtables and things like this and I'm frequently saying, you know, there are 17 million people out there who aren't represented right now.

The truth is is there's no organization, I mean EFF tries to, Public Knowledge. But there's no trade association or industry association or some sort of like forum advocating for the 17 million people in the United States who are distributing their content, you know, on these platforms and not through the traditional ways.

And again, these are people who are not signed to a record label or don't have a deal with a major movie studio, et cetera. So I'd just like to note that like, you know, they're not really present in any of these debates. They really weren't present in Europe, they're not really present here today.

Jared Polin was the only one, I think,

who represented that group today, and I think it's important. I think most of them don't have lawyers. They don't have sophisticated understanding of copyright law. Like they're just trying to do their thing.

The second point I want to make, and under the European law, those 17 million people in the U.S. are now going to be impacted unearthing their European base and their European customers. And as Katy noted, this is the first time I've heard this stat, 65 percent of U.S. users are overseas, of U.S. creators who are using YouTube have an overseas audience. I would venture to guess based on population, access to the internet and other things, a significant part of that is in the EU.

The second thing I think that's just exceptionally important to note here is Europe has very, and Corynne touched on this but I think it's really key. Europe has a very different view of issues like fair use than the United States. In over 50 percent of European countries right now, there's no educational exception for digital

content.

So in other words, if a teacher chooses to show a YouTube clip in their classroom, they are technically violating copyright law in over 50 percent of the EU countries right now. These are things that are like, just like basic stuff that we look at in the United States and go oh of course we want that.

You know, I think that brings up the point, and you brought this up, you know, to Rachel when you brought up things like speech, you know, hate speech in Germany, you brought up the King of Thailand. The U.S. should be the place that stands up for human rights around the world.

And when you have a Thai government, right, that's saying you can't criticize the king, that is the Thai government violating human rights, and if a U.S. citizen uploads content, let's say you have an immigrant from Thailand who uploads content to a platform and it's highly critical of the King of Thailand, and YouTube or SoundCloud or Apple Podcast has to take that content down, that

is violating the speech rights of someone in the United States, and that is something that the U.S. should just be -- it's just paramount that the U.S. stand up for.

It shouldn't be, you know, you already -- it's the idea that we already do this to comply with these laws, yes. Platforms are already doing this to comply with these laws. They have to deal with it. We see the perils of any platform trying to enter China and what that means right now.

You know, that is something the U.S. should stand up for, U.S. companies and U.S. speech and make sure it doesn't happen.

MS. STRONG: Thank you. Ms. Coffey and then Ms. Oyama will be at the end, and then we're going to close out the EU schedule and we're going to move onto the next thing. So it's Ms. Coffey right now.

MS. COFFEY: Thank you, and to switch gears --

MS. STRONG: No, no. I'm sorry. We

still have the six people, Coffey, Adams, Lavizzari, Siy, Schruers, and Oyama. After those six, we're done with Europe. Thank you.

MS. COFFEY: While we're still on Europe, just switch gears a little bit --

MS. STRONG: Or anything you'd like to say.

MS. COFFEY: Okay. Just switch gears a little bit and talk about the news publisher right, the article 11 and article 15. You asked how is it effect, going to affect our business in the EU and how is it going to affect our business here. Our business in the EU, that's pretty clear because we represent Axel Springer among other news publishers that have a presence in the EU.

So it will obviously give them a copyright over their news publication that's a compilation. That would create efficiencies and parity with film and television and music that already exists. So we're very pleased about that, and that's pretty clear cut.

Where it becomes a little bit more

complicated is when with our U.S. publishers, and whether or not they have the ability to assert the right in the EU. When it was being discussed in the Trilog, they were talking about having language that would restrict it to press publications established in a member state.

And there were questions that were raised by the USG, who were present in those negotiations, as to the reciprocity that would be permitted to the U.S. publishers, you know, availing EU -- EU publishers being able to avail themselves of the benefits of U.S. regulations, and the reciprocity of being able to do the same once the publisher's right is passed.

You know, we weighed in there because if you have a presence in the EU, obviously the national papers would have an easier ability to do that. But here, I think where we should be more concerned and more focused on our attention is on the local publications who may not have the presence in the EU but may be more vulnerable and benefit more from this new right.

As it's implemented in the member states, we're obviously going to work with them in implementation like the other parties here. But that's something that we're certainly going to look at, as well as maybe implementing trade regulations that may allow this to apply to U.S. publishers.

MS. STRONG: Thank you. Mr. Adams.

MR. ADAMS: Thank you, and so I'll just try to bring it all back to your question, Ms. Strong, about will this impact companies in the United States. And I think playing off of Corynne's points and Rachel's points, it absolutely will and for some subset of start-ups at Engine and elsewhere, the decision will not be well, can I afford to build to all of these different legal regimes, but do I want to continue doing business at all, in which case I'll build to the most stringent one, right?

And best case scenario in the EU, that means some sort of authorization program and for filtering, both of which counteract fair use here. I know that's not the same program they have there,

but it will impact fair use on platform and users here. Thank you.

MS. STRONG: Thank you. Mr. Lavizzari.

MR. LAVIZZARI: I just wanted to react to the carveouts and the intention behind them. I think if you want to -- as a start-up you shouldn't build a system that will become a victim of its own success.

So it's your intention -- if your business model is to attract customers on the basis of creative works being shared on your platform or you having links, or you're working with linking sites, then you'd better in fact seek to have a compliance mechanism early on, not only after the three years' grace period.

If you're however a bakery or a mom and pop shop that doesn't principally attract customers through creative works of others, then you will be quite safe and uninhibited from the law.

MS. STRONG: Thank you. Mr. Siy.

MR. SIY: Thanks. I did want to touch upon your earlier question about the different types

of content, and sort of why there's a difference between those and copyright. Wikipedias of all languages are banned in Turkey currently, and they're blocked because of a dispute about the characterization of the government of Turkey.

So in certain cases, that choice is made based on certain types of restrictions not to operate or to allow ourselves to be blocked in those countries. I think one of the reasons that there is a distinction between the copyright discussion and these discussions is questions of Lese-majeste, hate speech definition.

They typically aren't premised on ex ante actions by the platform. It's something that can only be determined after the fact, since it's not a specific file. It's a specific content of speech that's covered.

That does lead into another point I did want to make, I promise briefly, which is with regard to a number of issues were raised with regard to anonymity and privacy, and it is because Wikipedias are available throughout the world and edited by

people all over the world that we do take privacy very seriously, and we ensure to keep as little personal data and reveal as little personal data about editors in various countries, including restrictive regimes as possible.

And just that the considerations that we are engaging in mostly today on copyright issues do exist within the larger sphere. Just as *Packingham* is relevant, privacy is relevant as well. Thank you.

MS. STRONG: Thank you. Mr. Schruers.

MR. SCHRUERS: Thanks. Going back to the question as to whether or not the inconsistent outcome or inconsistent implementation of the Directive has taken the single out of the Digital Single Market, and I think that's right that we've seen what's essentially sort of a potential for an anti-federal outcome, which is going to have distributional consequences across industry as a number of speakers have already cautioned.

That concerns me very much, representing both large and small firms. I

recognize that some will be able to comply with this and others will not, and that's going to have I think precisely the opposite impact to what EU policymakers want.

But more to the general question about whether or not we should just accept it because we already have other similar market access barriers like Lese-majeste or overly restrictive hate speech policies. You know, I think the fact that we cannot resolve all access barriers doesn't mean that we shouldn't be worried about some, you know, particularly because as Sherwin mentioned, the ex ante implications, excuse me, of this particular rule set means that simply operating in a marketplace is prohibited.

Whereas I think in a lot of other countries, there are services that are available in the marketplace and they deal with these Lese-majeste issues when and if they arise.

MS. LANZA: I'd like to follow up on that. When you're advising smaller companies, how do you advise them to, I don't want to say ignore,

but ignore some access barriers as opposed to others? Like which ones, how do you decide which ones to pay attention to and which ones not to?

MR. SCHRUERS: That's a great question. I haven't directly advised companies like this in over a decade. As an association, we're not legal counsel to these companies. But I think there is an understanding across industry that some of these rules are enforced more in the breach than, you know, holistically.

A lot of nations, you know, it is our -- in some cases 30, 40, 50 page submission to the USTR that we make every year about foreign access barriers shows there are a lot of problems that arise from laws on the books that are infrequently enforced.

And so there's a great amount of uncertainty around that. But they are all ex post enforcement. And so the reality is that it is possible for services to be available in a marketplace until the government gets around to blocking them, and in some cases that simply doesn't

happen.

So, fortuitously, there are services where content that might in theory violate Lese-majeste laws appears, even in nations that have such laws. This is a different scenario, where you have to meet the technological mandate almost as soon as you're in the market, or as soon as your user base spikes over five million because you had one piece of content that went viral.

MS. STRONG: Thank you. The last question for EU goes to Ms. Oyama. The next subject, get ready for your questions and answers, will be on injunctions.

MS. OYAMA: Thanks. Just a quick point kind of on the practical implications sitting as a service provider to respond to one of the questions about recognizing kind of different categories of speech. The way that our systems would view that, that is different. It is a different aspect of the technology to -- and in addition to human reviewers, to recognize that speech is hate speech or to recognize that speech is insulting the king.

That is a different process than recognizing whether a piece of content is licensed or not. We're living in a day and age where there's so much content created, you know. Every single individual or user is the creator of a copyrighted work, and there is no place today to find, you know, authoritative, comprehensive rights ownership information.

And so that's the place where the collaboration and specific information is really necessary, so that the service provider would know if something is licensed or not. We have experiences all the time with music, where we may be able to complete, you know, 95 percent of the rights ownership chart between different publishers and different labels.

But it's very common that there is a sliver that's still undefined or contested, and if the default is to stay down any time there's imperfect information, that's going to be a very, very high occurrence.

And then just the last piece on article

11, because I know that didn't get quite as much time. Ensuring that news publishers do still have control and have the ability to decide, you know, whether -- on our service they have the ability to be out of search if they want.

But also if they do want to appear in news aggregation, that's also important. We have really good examples in Europe looking at, and copyright regimes in Germany and Spain, to understand what types of options give news publishers maximum control and which ones when their rights are not waivable, can lead to unintended consequences that are, you know, later regretted across the board.

MS. STRONG: Does anyone else have a final word? I don't see any more flags. So we're going to switch to the issue of injunctions, and according to some reports, we've seen that anywhere of over 40 countries have adopted or implemented, or were obligated to adopt and implement, measures for ISPs to take steps to disable access to infringing websites.

By this I mean this is often accomplished through court orders for site blocking, and it can address either, you know, the URL or the IP, the protocol address or the DNS blocking. But you know, I'm looking for information or your views and experiences on perhaps what seems to be a recent trend from other countries outside the U.S., to be using this remedy of an injunctive relief to attack a specific problem.

I'm going to limit it only for copyrighted content. I understand there may be some overblocking issues. But to the extent there are more than three dozen countries around the world, most recently appeared in our notice Australia passed a copyright amendment to its copyright law that would provide copyright owners with this tool.

So I welcome comments. The floor is open for views on the effectiveness or non-effectiveness of that kind of a remedy. Mr. McCoy.

MR. McCOY: Thank you for the question.

As I mentioned in my opening remarks, this is an EU model that we strongly support, and , has inspired the adoption of similar regimes for injunctive relief in countries around the world is a testament to its effectiveness.

This has been, you know, article 8-3 has been in place now for 18 years. It's functioning well. None of the dire consequences that have sometimes been forecasted around injunctive relief measures like this have come to pass. And I want to emphasize, for this audience in particular, the complementarity of an injunctive relief regime to the goals of a notice and takedown regime.

Because you can really by -- what the EU experience illustrates is having those two things functioning in parallel with one another can really give you a flexibility of tools to address the underlying problems of piracy, where certain types of particularly egregious actors are ready targets for an injunctive relief action under article 8-3.

So my only criticism related to article 8-3 in the European context would be the lack of

complete implementation of article 8-3 across the member states. There are still some EU member states where 18 years later the remedy has not been properly implemented.

But aside from that, where it is up and running as intended and the implementations of it of course are tailored to national law and national systems as is appropriate, we've found the remedy to be a very good one. Not always, not always perfect, not always perfectly implemented, but highly dissuasive in terms of interfering with access to illegitimate content.

I think it's very important that we emphasize that, this is by no means cutting off consumers' access to legitimate -- to legitimate sources of film and television content, of which there are now very, very many. This is rather, redirecting them from piratical sources towards the many legitimate sources that are available there in the marketplace.

So this is something that's working well. We're glad to see it being picked up in other

parts of the world, and we are major users of the remedy where it exists.

MS. STRONG: Just a question to the table. Has anyone noticed any increased use of injunctions in those territories where there is not a notice-and-takedown system? I mean apart from Europe and the U.S., and obviously there's a couple of countries in Asia that have kind of a notice-and-takedown system, it seems that the use of injunction actually is being used by courts, regardless of whether there's a notice system.

So I'm just curious if anyone has any experience, and while you're thinking about that, I'll go to Ms. Simpson.

MS. SIMPSON: I think while I agree with all the points that Mr. McCoy raised, for the publishers we've certainly taken advantage of the remedy in Europe. As I mentioned in my opening text, we have pursued the remedy successfully in six European countries, and the main goal of these website blocking injunctions is really to disrupt the availability of that service in that particular

country.

I will note that because it is of limited jurisdiction, there are limits to the effectiveness of this particular remedy. Obviously, a site when it is blocked on a particular or within a particular jurisdiction, sometimes the operator of that website will simply try and move to a different server.

What has progressed in Europe is they've now expanded the availability of those injunctions so that you don't have to redo the entire process. The orders themselves can be amended, so that the new sites that have come up as a way of masking the originally identified site, can then be included in the previous orders so that rightsholders don't have to engage in that long process of seeking that injunction.

I think for objections that these injunctions might be broad, the court processes or the administrative processes that are in place actually are very rigorous, and rightsholders themselves have been rigorous in identifying which

actually are viable targets under this particular model.

So the notion that it could be abused we haven't seen that, and I think rightsholders themselves would be very careful with respect to how they bring these actions, because as everyone knows we are all of course very budgetarily limited. So bringing an action that doesn't really result in anything is something that we would not be likely to do.

And as to the second question of have we seen it coupled with a notice-and-takedown system, I don't think we necessarily have. I think in jurisdictions where the statute has been made available, whether it's through a court or through an administrative process, if the country has defined that this is actually a worthwhile tool to make available to rightsholders, the availability of a notice-and-takedown system doesn't really need to be accounted for in this framework.

MS. STRONG: Ms. Oyama.

MS. OYAMA: I think when you're talking

at a global scale, it's hard to say that we never see cases of abuse. You know, there are certain remedies that even if they work, many times there are, you know, instances of abuse where legitimate sites are targeted.

On the Australian implementation, I believe it's a recently passed measure. So I don't actually think that any orders, I'm not aware of any orders that have actually been issued under the new law yet.

I did just want to mention one approach that we've taken in search that does kind of run parallel to site blocking regimes, in our view for search they have benefits of being more scalable.

So just as a practical matter, if there is a site-blocking order that an ISP receives, even if a link were to show up in search if a user were to click on the link, they wouldn't actually ever be able to access the site.

But another measure that we did announce is the search ranking demotion signal, which does work with the DMCA. So when rightsholders are

sending to Google Search DMCA notices, that will have an effect on the ranking. We have demoted more than 66,000 sites in search. On average, the amount of traffic from Google that has been reduced is about 90 percent.

I think we're adding about 500 new sites to that a week, and in my discussions with rightsholders, one of the benefits they've seen is that these suppressions do apply globally rather than country by country so --

MS. STRONG: I was just going to ask you that. The demotion does apply to Google websites around the world?

MS. OYAMA: Yeah.

MS. STRONG: Mr. McCoy.

MR. McCOY: Just picking up on that topic, I can confirm from the MPA perspective that some of the enhancements that Google has made to demotion on a global basis have been -- have had a noticeable impact. So it's a positive development that's certainly worth confirming.

In regard -- I wanted to speak to your

question about whether there's any -- whether there's any sort of link between the presence or absence of notice and takedown, and whether site blocking is used in a market.

I don't know empirically of any data that speaks to that. I'll certainly go back and inquire with my, with my colleagues, who know more about the data and see if we can get you any data that would help on that.

One point to bear in mind is, the panels this morning drew out some of the experience on the expense of notice and takedown, and you know consequently rightsholders are selective about what markets and systems they will target for notice and takedown.

So in some cases, the availability of a -- the availability of an injunctive relief remedy might provide an alternative way of addressing the worst of the worst pirate sites in markets where notice and takedown -- that weren't a high priority for notice and takedown.

MS. STRONG: Yeah, thank you. As sort

of a segue, I've also heard that in other countries, Mexico comes to mind, which does not have a notice-and-takedown system and doesn't exactly have a secondary liability system that applies in this space, that some ISPs are honoring basically the equivalence of notice and takedowns being sent to Mexican ISPs, kind of a la the U.S. style on a very informal basis.

I would assume that that is happening in a couple of other countries. Can anyone here speak to that experience, where sort of an informal notice and takedown, maybe it's not exactly a cease-and-desist order, but notices that are being recognized by ISPs in locations that do not have a formalized system? Mr. Schruers.

MR. SCHRUERS: So that's a very -- it's a helpful observation, because for a long time before the Canadian system was implemented some years ago, there was an informal inter-industry agreement that enabled notice forwarding primarily, which is what rightsholders in that marketplace wanted.

And it was widely adopted. We've also seen that happen in other markets, where intermediaries don't want their services and environments to be perceived as a venue for misuse. And so they do work on this. One of the benefits of that approach is that it allows the more capable services to invest more substantially in that kind of compliance, whereas start-ups obviously that don't have the resources do what they can.

So you know, it's just important to take away that the absence of a particular statutory mandate doesn't mean that services aren't implementing misuse and misconduct policies to prevent infringement where they can.

MS. STRONG: Yeah. I think that was my question, were there examples of that kind of informality that actually are in place? Ms. Simpson.

MS. SIMPSON: Well, it's not to the notice and takedown point, but when we were successful in obtaining an injunction against Sci-Hub in the District Court of New York, strangely

enough a Chinese website or Chinese operator actually, on the basis of reciprocity, said we'll recognize that judgment and did block the site in China, or at least on its -- to its subscribers.

So I guess the point that you need not have a mandate in place is plausible, but obviously if one isn't in place there are so many loopholes through which an ISP can act that it will choose not to do something if there isn't an obligation to do something.

MS. STRONG: Could you explain a little bit more about how the Chinese recognized the judgment?

MS. SIMPSON: Well, we sent the copy of the judgment to the Chinese operator, and frankly two days later the site was just not available on that -- to the subscribers of that particular operator or that service. There was no formal process in place but I think --

MS. STRONG: It was totally informal? You didn't go through like a Hague Convention --

MS. SIMPSON: No, we just, no, we just

sent them the notice and said FYI. This has been adjudged a notoriously infringing site. You should not have it on your service and if you would like, please take it down or at least block access to it and they did.

MS. STRONG: Has anyone else had a similar experience on the either ease or difficulty of getting a judgment, perhaps some injunctive relief recognized outside the originating jurisdiction? I'm just curious.

MS. SIMPSON: I guess I should add, I don't want to make it seem that that was easy. Those are few and far between instances.

(Laughter.)

MS. STRONG: I thought I'd follow up.

MS. LANZA: As we're talking about website blocking, Canada comes up and the CRTC recently denied FairPlay's application for a website blocking regime. They said that alternative avenues were available. If anyone would like to speak about what those alternative avenues are, and if they disagree or agree with the

CRTC decision.

MS. STRONG: We can level it up a little bit and maybe ask does anyone have any views on Canada's implementation of its notice regime that went into effect in 2015? It's a Canada question.

(Off mic comment.)

MS. STRONG: Ms. Simpson.

(Off mic comment.)

MR. McCOY: No, I wasn't going to speak to the Canada element of it so --

MS. SIMPSON: I guess I'll just go ahead and say, on the Canada situation, we obviously think that the notice and notice system is, as someone has said before, a notice and nothing system because frankly you send the notices forward, but do not ever really hear of anything being taken down?

In the past, there were some I guess private cooperation agreements that were favorable to rightsholders in the sense that something was being done. But on the notion that notice and notice alone will accomplish anything, I think we've seen frankly that it doesn't.

If we're having problems with the notice-and-takedown system, think of what a notice and notice does, which is frankly nothing.

MS. STRONG: Thank you. This is a good transition to one of the earlier points I said at the beginning to talk about, and it has to do with what your experiences are in seeing the kinds of cooperation between ISPs and content holders at the local level, as we've spoke this morning and, you know, the intent of the DMCA to incentivize that kind of cooperation between these two groups.

We'd really appreciate hearing your experiences at the local level. How are or are not local ISPs working with your local rightsholders? We can start by region or Stan can start. Thank you.

MR. McCOY: Well just to get things moving, I would say at the local level in Europe, which is where I'll begin here, we find that in a lot of territories the ISPs, as content becomes more and more important to their business models, are more and more interested in finding ways to work constructively with IP owners to implement

anti-piracy solutions.

One important example of that is in the field of -- in the field of implementing injunctive relief under article 8-3 of the Directive.

So we have several jurisdictions, Belgium is one that comes to mind, where we've been able to achieve good voluntary arrangements with ISPs, not to bypass the adjudication process around injunctive relief, but rather to treat aspects of that process as non-opposed for cases that meet certain threshold requirements.

That, we find, can be a way to reduce the overall cost of implementing an injunctive relief solution, both for the ISPs and for the rightsholders.

MS. STRONG: Thank you. We'll go to Mr. Adams, Mr. Cady, and Mr. Lamel.

MR. ADAMS: Thank you. I just wanted to contribute a more technical observation regarding ISPs' compliance with various legal mandates such as copyright protection and to the site blocking thing as well, in that where implementations of site

blocking are DNS-based, the DNS market is undergoing let's say significant changes currently, in that as more private operators enter the DNS scene supporting DNS over HTTPS in particular and more people move to those, it reduces the visibility of ISPs into DNS traffic at all. I'll leave it at that.

MS. STRONG: Thank you. Mr. Cady.

MR. CADY: Thank you. I'll contribute more of a practical contribution. We recognize the importance of cooperation, but legislative changes is fundamental to our members having access to effective measures.

Our observation has been that without government oversight and full participation in any voluntary program, the benefits simply don't reach independents, and in practice have not offered any effective mechanism to stop any specific instances of illegal activity.

And moreover, historically these agreements have been cost-prohibitive.

MS. STRONG: Thank you. Mr. Lamel.

MR. LAMEL: I guess I just want to note

here and talk about something just primarily from the user perspective and the consumer perspective in the United States, which is when you're looking at ISP level blocking, the United States does not exactly have the most competitive broadband and ISP marketplace out there.

For many consumers, they only have one choice for an ISP in the marketplace, and I think within the context of markets and how these things work, I think that's something really important to take into account, is to look at competition in the ISP marketplace globally, and specifically as you look towards the U.S. marketplace, the lack of competition in that marketplace for most consumers.

MS. STRONG: Thank you. Just to follow on another question I think Mr. Cady sort of suggested, there are a couple of countries out there that have administrative systems where rightsholders -- usually under the color of a code or a statute -- are able to come together and help streamline the evaluation process for notice.

So for example, what is happening in

Japan and in a different way what's happening in Korea comes together, and those are obviously unique legal situations. But both countries have actually quite advanced copyright laws, liability systems, notice and takedowns, and a very active ISP community.

So I was wondering does anyone have any views on how those systems are operating with respect to addressing, you know, infringement in the online environment, and especially via the use of notices? Ms. Wolbers.

MS. WOLBERS: So in a number of the platforms, the smaller platforms that we work with, they provide it and when we've talked to them about DMCA, the amount of notices that they receive, what types of notices that they've received, almost all of the smaller platforms that I'm thinking of, there are about ten that have all signed an article 13/article 17 letter, all provide internal dispute resolution mechanisms.

For instance, Patreon. Many times a rightsholder will upload something to Patreon and

occasionally dispute with another Patreon creator about, you know, whose copyright it is.

I think that while countries may have more flexible processes to deal with this, we do see a lot of companies taking the initiative to allow rightsholders to dispute and settle their differences on the platform, rather than having to resort to the legal system, which for many small creators is prohibitively costly and is not an avenue that most small creators are going to pursue.

No matter if it's our legal system or, you know, maybe the legal system of Japan or wherever it may be. I think a lot of platforms are offering those dispute resolution mechanisms within the platforms themselves.

MS. STRONG: Mr. Schruers.

MR. SCHRUERS: So I -- with the exception of a few cases, I think we should be wary of assuming that inter-industry standard-setting, for example, is something that's viable at scale, in part because there's so much heterogeneity across internet services and how they function.

And so if you look at social media platforms versus host -- just even within social media, they're highly unique in how they're structured. So the frameworks that might work for one are not necessarily going to work for another.

I know for some years there was basically a notice forwarding system here in the United States between rightsholders and broadband providers, which is at least plausible because of the homogeneity on both sides of the equation there.

But that doesn't necessarily scale beyond the broadband sector into internet services that are highly differentiated, and new ways of sharing both the user's content and third party content evolve all the time. So there's always a risk that if, you know, domestic rightsholders and certain domestic industries get together, there are going to be standards written that don't have sort of U.S. exporters' products in mind, and may have -- may function as, in sort of an exclusionary manner.

It's something we should be mindful of

before endorsing a particular framework.

MS. STRONG: Thank you. Mr. McCoy.

MR. McCOY: Thank you. Concerning administrative systems and how well they function, I don't have any notes with me on Japan and Korea. So I'm happy to come back to you at a later date about that. But I certainly have some experience of dealing with the administrative systems that exist to implement article 8-3 in Europe.

Italy and Portugal would be two examples of that, and you know, the overarching important thing for us is that injunctive relief is accomplished in a manner that's consonant with the rule of law, and often that means judicial oversight. In some systems like the systems in Italy and Portugal, the appropriate implementation has been an implementation by an administrative agency, which itself is subject to judicial oversight.

So it's very much a creature of the national system in terms of how the rule of law is best implemented in the context of that system. But

having the rule of law dimension, that oversight is important to a viable injunctive relief system, and we do find that those systems in Italy and Portugal are working well, with the possible exception that those are both systems that to my knowledge still focused on blocking -- on DNS blocking rather that IP blocking.

That is a technical, that is a technical detail that matters to the effectiveness of the overall remedy. But even DNS blocking are our analyses have suggested, contributes greatly to dissuading the ordinary consumer from going to pirate sites rather than legitimate services.

MS. STRONG: Thank you. Ms. Simpson.

MS. SIMPSON: I was just going to go back and address a point Mr. Schruers raised about -- and I think it was raised throughout the day, that one size solution does not fit all, and that's absolutely true. Perhaps the problem is that we do not have an adequate definition in the statute about what is an internet service provider versus what is an online service provider.

Because if you are a mere ISP, meaning you manage the pipes, then I think your responsibilities will be very different from what an OSP should be, and that OSP could cover share hoster sites, could cover social media sites. So perhaps that is a question that the Copyright Office can look at more closely, of whether there does need to be a parsing out of what these different types of intermediaries really are.

If there are different types of intermediaries, what are the appropriate responsibilities that should be crafted onto that particular platform or infrastructure.

MS. STRONG: Thank you. I'd just note we're starting to run out of time. I have one more question, and then if you have any last observations that we can make within the time frame we will. If not, open mic is going to follow directly after this.

My question is: we spent a lot of time in the prior sessions on the repeat infringer policy, and to the extent there seems to be, on behalf of some folks, some interest in having the

certainties of 512 outside the borders of the United States, I'm curious to know for those people who want that, when you are looking at a 512-type situation outside the U.S., do you and your companies support the implementation or an obligation to have a repeat infringer policy?

Because I think we've seen in some countries outside the U.S. they tend to take the phrase "repeat infringer," meaning adjudicated infringers, you know, by a court. So I'm just curious to know if anyone has views on implementation of repeat infringer policies outside the U.S.? Or maybe I answered my own question. I don't know. Ms. Simpson.

MS. SIMPSON: So I think it's very important that, given how a notice-and-takedown system does have to work efficiently and expeditiously, to have an adjudicated infringer or repeat infringer requirement simply does away with that. Because if you have to go to court, to then have this -- this particular individual or operator judged a repeat infringer, the material that you're

seeking to be brought down because it is in fact infringing, it's been available for, what, more than 24 hours, more than a week before you even get that order.

So to me, the notion that a repeat infringer must be adjudicated in a court of law simply will strip out, frankly, what even makes a notice-and-takedown system workable. It's not workable now, but if you include that particular requirement, I think you're not going to have a system that actually does anything for the rightsholder.

MS. ISBELL: On that point though, is it necessary to go to court before sending a notice and takedown? Couldn't you do both in conjunction with each other?

MS. SIMPSON: I suppose yes you would. I mean your goal is to notify the ISP or the OSP that there is material on their system that is actually infringing your rights. If they come back to you and say it must be adjudicated, perhaps you do need to do that.

But the goal is to notify that particular actor that you are actually facilitating infringement, and that could perhaps lead to another cause of action for you. But if they come back to you and say you've not actually shown us that there has been adjudication of whether this particular infringer is a repeat infringer, that does present problems for rightsholders.

MS. STRONG: Mr. Schruers.

MR. SCHRUERS: So I think it's important to distinguish between what the statute says and what happens in practice. You know, the statute says, repeat infringer. It doesn't say repeat alleged infringer. I'm aware that some courts have interpreted that differently. But the language of the section is the language of the section.

But that being said, I've seen many online services operate a far more strict process that functionally encompasses repeat accused infringers. That's, I think, very reasonable because in an arm's length relationship in the private sector, if you have a user who's causing

a lot of problems, who is the source of complaints, it's entirely reasonable that an intermediary might want to discontinue service to a troublesome user.

And so under the terms of use of most services, you know, I'd say many online services terminate users long before the statutory definition comes into play. I think that we shouldn't though think that that changes what the statutory definition actually says. It says, repeat infringer.

But frankly speaking, that's not what's really always all that relevant in the marketplace.

MS. STRONG: Ms. McSherry.

MS. McSHERRY: So I think when we're thinking about this issue, we have to realize a couple of things. One is that the world has changed in the past two decades, and people are reliant upon their internet service in a way that they weren't two decades ago, such that it's really fundamental to so many different things in households, right.

So the fact that there might be someone in that household who's engaging in infringing

activity, to impose the punishment of cutting off internet access for that household will have very, very severe consequences. That's just the reality nowadays, and I think it has to change how we think about the issue.

And secondly, getting back to Mr. Lamel's point, it's also true that here in the United States anyway, we don't have a lot of choices for service, for internet service, particularly high speed internet access service. So really I think our approach to repeat infringement, you know, really needs a fundamental re-think.

And I think trying to embrace a notion that we should make it easier to terminate people's internet access I think would be -- cost far too many unintended consequences and collateral damage, far beyond speech. Far beyond speech, but just for people's ability to work and get educated and so on.

MS. STRONG: Thank you. Mr. French.

MR. FRENCH: Thank you. I want to make one I guess general point that touches on what you

just raised, but also the first part of the discussion on the EU. I'm taking off of Ms. McSherry's point that, you know, I think probably the strongest policy justifications for some kind of ISP safe harbor, you know, that have been raised are certainly the critical access issue, the effect that to participate in today's society you have to have access to the internet.

And then I think, you know, the argument that's been made historically that to promote innovation among start-ups, struggling new entrants in the market, they need some kind of protection from liability.

But I think, I think those two justifications for a safe harbor, you know, apply to online access providers, what I would call folks who help you get onto the internet, not to UGC sites, not to digital media services online, not to basically anyone except someone who actually enables you to access the internet.

The start-up point is one that I take as a real point. But again, once a provider has a

$500 billion market cap and $100 billion in the bank, you don't, you don't deserve that kind of protection anymore. I think, you know, as I understood the goal of this whole day was to incorporate into y'alls report possibly any ideas for Congressional legislation in this area.

You know, I'd say that the important insights from article 13/17 is that that approach was incredibly narrow. It only applies to for-profit UGC sites that are consumer-oriented. In that very narrow context, even there that it says if you're a start-up, basically you don't have the types of obligations that they found to be onerous, that large players will be treated differently than small players.

I think that framework, that idea is something that would be useful to bring into U.S. law, to ask the idea if core internet access issues aren't on the table and we're talking about sites online that make their money off of exploiting copyright works, even if they're works that users have put on there, should large players have the

obligations that Europe is putting out, and should small players be treated differently until they become large players?

If they've made that affirmative decision that they want to be large, well maybe they do have some more responsibilities then. But that's my takeaway from, you know, what you all should be thinking about and recommending to Congress.

MS. STRONG: Thank you. Mr. Lamel and then the final word goes to Ms. Vollmer.

MR. LAMEL: So it's come up a lot in the context, and Corynne just brought it up again, which is the idea that these conversations around copyright policy are happening around a broader conversation around internet policy generally, and it's very hard to just look at something from the context of copyright policy in today's world, right?

A decision like repeat infringer policy has an impact on basic economic policy for that person and their ability to participate in the economy, participate in our democracy. If you see

the internet as an important place for democratic participation, all sorts of other policy implications that go far beyond the jurisdiction of the Copyright Office.

We heard earlier a conversation, which hasn't been discussed since but brought up who is within the context of privacy and cybersecurity policy, right, and decisions that we might be possibly making and thinking about from the perspective of a copyright professional.

There might be -- there are really important other issues that come into play in these things from the context of privacy, which Stan Adams brought up, or cybersecurity, economic policy more generally. I just think it's important that at this juncture there's a notation made that this conversation goes beyond just copyright policy because we looked at all these other things, and it's something that the Office should take into account.

MS. STRONG: Thank you. Ms. Vollmer.

MS. VOLLMER: I just wanted to respond

to some of the comments. Oh thanks. One thing to note, as I mentioned, I was in touch with policymakers in Brussels and when the SME exception was -- the final one between France and Germany was proposed, one of the lead negotiators made the point that -- she asked, you know, is there anybody who actually fits within this exception?

So it may sound nice to have, you know, these three categories and if you meet them you're preserved. But in reality, people are sort of hard-pressed to find an example that actually works there. So I mean I would just recommend some caution in just trying to take that concept and really making sure it's effective.

Also, you know, the idea of access to the internet, you know, it's really not just about who controls the pipes. I mentioned before, you know, we have software developers building all sorts of programs, apps, websites on our platform, 31 million users, 100 million different projects, all sectors. I mean software's everywhere.

So if you think about, you know, cutting

into people's ability to collaboratively build that software, that's a really serious impact and it's not just about can you access this website or not.

MR. AMER: On this point about access, can I just ask? I mean do you -- you know, and we've had a lot of people sort of invoke that concern, which obviously is very serious. But I mean do you -- do you see that concern mitigated at all by the fact that, you know, this is a voluntary system, as part of which ISPs are, you know, have the choice whether or not to participate?

But if they do choose to participate, they're afforded really quite a significant benefit, right? I mean they have the limitation against monetary liability, and in exchange for that benefit, they're asked to do something that is that -- you know that we think should be regulated, because it's against their economic interest, right?

They need to -- I mean it's not in -- as we saw in *Cox*, it's not in their economic interest to terminate customers who are repeat infringers.

So we want to make that part of the legal framework. I mean so does that sort of -- I don't know. To me, you know, is there sort of a response that this concern about cutting people off from the internet is sort of mitigated by the fact that this is sort of something that ISPs are choosing to engage in, with the expectation that they'll be provided a legal benefit?

MS. VOLLMER: Was that for me.

(Laughter.)

MS. STRONG: You know, I think we're going to be running a little -- Ms. Vollmer, and then we'll go straight down the line. Who has flags up? So that's going to be -- and Mr. Lamel.

MS. VOLLMER: Thanks. I guess, you know, I get your point about it being voluntary, but I don't see the cost of access going away being the fair collateral damage. I think the point that I was trying to make is that the goal of notice and takedown is trying to find a way to prevent infringement. I mean we don't want to have infringers on our platform either.

And so we're voluntarily taking steps to help make that happen, but I think the cost of even like earlier this morning we were talking about counter-notice, I mean that exists. But the amount of counter-notices that we get is such a small fraction compared to the takedown notices for a bunch of reasons that were mentioned this morning.

And I think, you know, to assume that if something comes off, that there are mechanisms there that bring you back up. I mean that's something, but it's really a cost when something comes down, and it might not come back up. Maybe the counter-notice isn't going to be effective; maybe the person's not going to know to do it.

So that was more my point, that I feel like the access is something that we should really -- there's gravity there when you remove access.

MS. STRONG: Thank you. Mr. Siy.

MR. SIY: Umm, I think just from a practical matter, the idea that it's a voluntary system is not -- it's not something that is practically voluntary, if the alternative is to

subject ourselves to a strict liability copyright regime with statutory damages, etcetera, etcetera. I think it's --

And in terms of the distinction between an ISP and an OSP as an OSP that provides what we'd like to think of as a public service, we'd like to think that this ability to provide that access to knowledge and free knowledge is something that matter, despite the fact that we're not a conduit.

MS. STRONG: Thank you. Mr. Schruers.

MR. SCHRUERS: Well so I think two things that Sherwin touched on, the need to distinguish between what we would think of as sort of 512(a) services and 512(b) through (d) services, and then the eCommerce Directive makes a somewhat similar distinction, right.

The calculus for those two constituencies is I think quite different and reasonably so. And so we shouldn't necessarily, you know, ask 512(b) through (d) businesses about the incentives for 512(a) businesses, and actually I think while they may have been represented earlier

today, aren't actually on this panel. That is to say sort of the OSPs. I'm sorry, the ISPs, the mere conduits, if you will.

I mean I think that's a very different calculus that should be -- and that question should be presented to that constituency.

MS. STRONG: Mr. Lamel and then Mr. McCoy has the final word, and really.

MR. LAMEL: So first of all, I think you know, my ISP competition point comes in really key here, that if most users only have a choice of one or two ISPs as their ISP, there is the third party to this conversation which is consumers, which are important.

I think second of all and even more importantly, we're seeing an integration between the ISP business model and the content business model, and you have to take that into account in the economic incentive conversation around this. You can make a legitimate argument that the two largest ISPs in this country right now, and I don't know exactly what market share, are members of MPAA

right now because of their holdings in Comcast and AT&T now.

And so you also have to take into account that we're seeing this massive integration between the ISP business model and the content creation business models and these traditional methods, in a way that that economic incentive is going away.

MS. STRONG: And Mr. McCoy.

MR. McCOY: The whole point about the -- about not taking away access to the internet kind of speaks to this, the larger balancing of interests that has to take place here.

I just wanted to commend to you the jurisprudence in Europe on these issues, because the European Court of Justice and subsidiary courts in Europe have taken very seriously their obligation to weigh the different rights at stake in these cases, including for example in the *UPC Telekabel* case in 2014 that involved an early application of injunctive relief in an ISP context.

So what you find there is, courts carefully weighing these different interests in the

context of European legislation, and concluding that indeed, site blocking that meets certain basic criteria is consistent with fundamental rights.

MS. ISBELL: Okay. With that, I think we're going to conclude the official roundtable portion, and we're going to open up the open mic. If you've signed up to speak at the open mic, start making your way over here. Unfortunately, we cannot move the mic stand.

If you haven't signed up and you want to, find Brad. Just one thing to keep in mind, it is now 4:41. How long you talk will determine how long you have to stay.

MS. STRONG: And those of you sitting at the table can stay if you'd like, stay seated where you are. That's fine. It would be comfortable. Thank you all.

(Pause.)

MR. GREENBERG: I did leave behind like three or four additional sheets, so up to another 80 people I think can sign up, although I can't guarantee time for all of those.

(Pause.)

MR. GREENBERG: So if I could ask the rest of the room to kind of quiet down so we can get started with those who have already lined up. Feel free to walk to the back if you do want to add your name to the list. But we are on a time crunch here, so we do want to get started with Janice Pilch.

MS. PILCH: Hello. Is this on? No? My name is Janice Pilch. I am a faculty librarian at Rutgers University in New Jersey, but speaking as a member of the public in my personal capacity. I'd like to comment on both of the topics being discussed today.

First, domestically it seems obvious and has been reinforced today that litigation on section 512 cannot change the systemic problem of infringement, disregard by service providers and their users for the rights of others, interference with the markets for works, and the impossibility for most rightsholders to undertake extensive, prolonged litigation.

Section 512 sets up a permanent conflict

between service providers and rightsholders that case law can only act out unsuccessfully, too often in legal arguments that protect and increase the wealth of service providers. This to me is an illusion of balance. The conflict won't end until section 512 is amended to create a functional balance, to effectively give creative people and other rightsholders their rights back, and not make that the responsibility of the courts. I hope that the Copyright Office will make that recommendation.

Secondly, internationally the same conflict plays out between efforts to create laws that are fairer to all members of the public, such as the laws envisioned by the new EU Directive that will hold all platforms that bring works to the public more equally responsible for their content, and on the other hand the drive by private internet and technology corporations, some of the richest and most privileged corporations, in the world to fight laws that would constrain their profit from user-generated content. That their war on rights is often waged by corporate-backed activists posing

as public advocates is a problem that has become global.

It has become more clear in the past several years how some private technology companies are using their dominant economic position, a position made possible in part by the flaws in section 512, to distort public perception of law and the legislative process through influence campaigns, coalition-building, funding, misinformation, and technological disruption.

We see fleets of academics, law school centers and programs, NGOs and non-profit and civil society organizations, internet users, professional associations and others, paid or otherwise motivated toward coordinated action that creates an illusion of public interest support and supporting logic for specific corporate interests.

These groups pride themselves on the power of their coalitions, employing tactics from rhetoric, linguistic play, misinformation, confusion, omission of fact, flipping of definitions to censorship, and threats to those with

opposing views, to infiltration of lawmaking bodies and hacking of information systems.

It's commonly known that a technical war was waged on the EU Copyright Directive and that the U.S. Copyright Office itself was compromised in 2016, on the day that written comments on section 512 were due, crashing the system and making it difficult for people to file real comments before the deadline.

MS. SMITH: Are you contending that certain people were not able to file comments?

MS. PILCH: There were delays because of the interruptions involving roughly 90,000, we think, bot submissions.

MS. SMITH: Okay. I think we think that everyone who wanted to file a comment was able to do it, and we're not aware of any actual denial. But we appreciate that clearly 92,000 is way more comments than we normally get.

MS. PILCH: There is common opinion that that was a technological disruption. We see in South Africa a concerted effort to frame a copyright

bill as being about a creator rights agenda, written to benefit, quote, suffering creatives, no less, when it's not a secret that lawmakers in South Africa were heavily influenced by U.S. tech interests and their allies to adopt what is essentially a pro-tech bill.

For years we have seen the deployment of concepts like freedom and democracy—free speech, freedom of expression, free internet—used to defend the safe harbors, to legitimize what is too often the freedom to rip off members of the public and make it look like a public need backed by a public outcry.

Who loses? The public, including authors, musicians, songwriters, photographers and film makers, and also any member of the public who is trying to gain objective knowledge on the internet. The actual damage to the public interest and to public knowledge caused by this type of misinformation has yet to be calculated, but it's an activity that functions like any other online falsehood.

Singapore has proposed a law called the Protection From Online Falsehoods and Manipulation Bill that would cut off profits of sites that spread misinformation that drowns out authentic speech and ideas, and undermines democratic processes and society.

With respect to sites that manipulate in order to incite feelings of animosity towards the rights of others, perhaps there should be a law in the United States too. The U.S. Copyright Office always welcomes input on its initiatives, but if the public's view of section 512 or of copyright law in general is distorted by misrepresentation of fact, by corporate-supported advocates marching under the flag of freedom of speech and freedom of expression as justification for private freedom from the constraints of law, it would seem that this issue would benefit from government study, or even better from a new law.

Thank you to the Copyright Office for providing to the public an opportunity to express our views.

MR. GREENBERG: Thank you. Keith Kupferschmid, if you can come up. I should have noted. We have 15 sign-ups. I'll check in the back to see if anybody else has signed up since. But considering the time limits we have, no more than five minutes per person, and we may interrupt for some questions, so just keep that in mind.

MR. KUPFERSCHMID: All right. Well thank you very much. I'm going to touch upon a few issues that I had my tent card up at the end at my panel, but I wasn't able to talk about. So I figured I'd raise them here and then a few other issues that came up after the panel.

So the issue of burden came up during my panel, and also I think the panel that followed. Like who should have the burden; is the burden placed on the right person. I think frankly that kind of misses the point, or at least misses the point with the problem with the DMCA as it exists today, because the primary problem is not that the copyright owners shoulder most of the burden, the problem is that when they do take on that burden, they have very

little to show for it.

Because the notices they send basically have very little effect. The material goes back up on line and, you know, and it's sort of this game of whack-a-mole, which we heard earlier. And so the result, the result in the burden being mostly exclusively placed on the creative community is that we are not achieving the balance that Congress had intended here.

And so once again just on the issue of burden, it's really not so much who the burden is placed on or whether it should be placed on the creators, the fact is it is placed on the creators now, there's no doubt about it. But when that happens, when they take on that burden it basically is not having the effect that was intended by the DMCA.

There was a discussion on my panel on fraudulent notices. I just wanted to mention what we are doing to try to rectify not only fraudulent notices, but frankly just to educate creators. If you go to our website at the Copyright Alliance

website, you'll see we have not only FAQs but we give presentations across the country on the DMCA and other issues.

We've been at VidCon several times to explain kind of how the DMCA works, answer questions, things like that. For the creators who are members of the Copyright Alliance, we created a DMCA tool kit, which explains the DMCA and we answer their questions.

But perhaps most importantly we have a video series that's online about the DMCA, both from the sender perspective and also the recipient perspective. So we talked about notices and counter-notices to try to educate people.

Hopefully to the extent that there are fraudulent notices being sent, that that is significantly limited, and we would encourage others to similarly do educational programs to educate the individual creators, because to the extent there are sort of wrongful or I think you called them wonky notices, wonky notices out there it largely comes from non-educated people. I think

there are a few people that certainly do try to abuse the system.

And then there was a discussion also about these fraudulent notices in 512(f) and why there are so few 512(f) challenges. I've got a wonderful bill for you to support, the CASE Act. If you really want to see these challenges come to fruition because that's one of the claims in the CASE Act that can be brought, and it would be a lot less expensive to do it in that context than try to bring one of these claims in federal court.

And then just very quickly on a few other issues. Red flag knowledge, I just want to reiterate these. We talked about that at the first panel, but then it really didn't get too revisited or revisited very much. But I think it was very, very interesting that no ISP, no platform around the table, either at the first panel or in subsequent panels, could come up with one example that was red flag knowledge, would qualify or wasn't, you know, that wasn't actual knowledge.

And so I think, I think that is extremely

significant. We have made the claim, a bunch of us made the claim that the red flag knowledge standard has been written out of the statute. I think that helps prove our point, because it really, really has. One of the speakers earlier in the first panel talked about well, it was intended to be narrow.

I'm not so sure it was intended to be narrow, but it certainly wasn't intended to be so narrow that it was never used and never applied, and so that certainly isn't the case. A couple more points.

MR. GREENBERG: Actually, I'm going to have to ask you to sort of wrap up quickly.

MR. KUPFERSCHMID: Okay. I'm going to wrap up. I'll just make one more point then, which is on the *Fourth Estate* case because that came up, and we never got to talk about that. I mean basically the *Fourth Estate* case has created a new DMCA requirement that didn't exist.

So if under 512(f), if a copyright owner files a notice and the alleged infringer files a counter-notice, the OSP must repost the infringing

material, unless the copyright owner files a complaint against the infringer within 14 business days. So given the pendency times, at least as they exist today, and high cost of expedited registration, especially in a case of mass infringement, this decision effectively requires notice senders to register their works with the Office first to the extent they can.

Those who have large portfolios, as well as individual creators and small businesses, simply can't afford to do that. So this is -- this is, this *Fourth Estate* case, which shockingly wasn't really discussed during any of the panels --

MS. SMITH: Well the *Fourth Estate* opinion doesn't mention section 512.

MR. KUPFERSCHMID: Sorry, what's that?

MS. SMITH: The opinion doesn't mention section 512.

MR. KUPFERSCHMID: It doesn't, but it has a real life effect on section 512.

MS. SMITH: In the circuits that were applying the other rule.

MR. KUPFERSCHMID: Well yeah. But that's now the Supreme Court has handed down a decision in that case, it certainly has a real life effect.

MR. GREENBERG: Thank you. Ms. Rasenberger.

MS. RASENBERGER: Hi, thank you. I just want to also follow up on a couple of issues that were raised in other panels. First, I want to second and support Mr. Wang's testimony from the third panel, I believe it was.

As a writer, I hear authors saying exactly the same things literally every day. They feel completely helpless vis-a-vis piracy, there is nothing they can do. We have members who spend -- one has admitted she spends 50 percent of her time dealing with piracy.

It's shocking. This is taking away from their writing time. Most of the authors, just they give up. They literally -- we did a recent survey where we found that the mean author income is $20,000 a year for full-time authors. That's full-time

authors. They do not have the money or the resources to fight.

We are allowing ISPs to profit from infringing content without compensation to the creators, and I do want to note that there was a large absence of creators here today, and one that was because this was billed as an update on the law on the cases. Most creators don't know the law very well. They're not lawyers or the creative groups don't have a lawyers on staff or that they can afford to send here.

We are part of a group that I organize of 20 different creator groups. We talk monthly and not a single other one of them thought it was appropriate to come today. So I do feel like there's been an absence of that voice.

So I think we just -- we need to step back and decide whether as a country we want to protect copyright, and if we do, we need to amend 512. I agree that ISPs have real concerns, but this is really a matter of who bears the responsibility and risk.

We've already seen how the major internet platforms have really drained money out of various content industries, and I'm happy to get you some of those stats. John Taplin in his book, Move Fast and Break Things, cites a number of those.

The balance that was -- that Congress thought it struck with 512 is not working, and I don't think we need any other proof than to see the transfer of wealth that has already happened. If we don't fix this, really shame on us, shame on us. The EU has the courage to take it on; we can too.

The second thing I want to mention is 512(j). It has not been used because of how narrow the relief is, and the uncertainty as to its application, particularly with what the courts have done with other sections of 512. The relief provided is very narrow. I won't, given the limited time, you can go through them, the sections yourself. My page is not scrolling down.

There is -- it's providing the first -- injunctive relief is providing access to specific infringing material. The second is for

terminating accounts of subscribers and specific subscribers. And the third is, such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material, if such relief is the least burdensome, etcetera.

It costs a lot of money to sue. 512(j) does not give you the ability recover costs. For subsection (i) you have to bring a case to get rid of one account. So the value proposition just is not there. The same for subsection (ii). You can get the same relief from filing a takedown notice, so it doesn't address the whack-a-mole problem. For three, we can't figure out when we could bring that honestly.

I also want to -- the last thing I'm going to mention is in the last panel it was mentioned Google's demotion of sites was mentioned, and I want to say that they have been helpful to us in telling us how to use that. We've actually gotten authors together to do these massive takedown notices to Google to get sites demoted, and that has worked.

However, it does not address the problem where the users know the name of the site, because they can just type it into the URL box. That's all I have.

MR. GREENBERG: Thank you. Ms. Pariser.

MS. PARISER: Thank you. I just want to make a couple of brief points. First of all, I'm going to reiterate the point that I made at the New York roundtable two years ago, when asked what can the Copyright Office do to help in this situation. What I said then was other than write a great report that will utterly support our side on my wish list, I also think the Copyright Office could hold a roundtable much like this around the idea of standard technical measures.

You heard me say and others say today filtering technologies are plentiful, they are reasonably priced, they are effective and they are working. You heard others say no, they aren't to each of those things. These are facts that can be determined, and I think would be very helpful in

everyone understanding what is out there.

We might never get to the point where any of them rise to the level of a statutorily mandated standard technical measure within the definition of 512. But at least if we knew kind of factually what was out there and what was true and what wasn't, I think that could help move the conversation so that two years hence, we won't be sitting here saying there's filtering technologies, no there aren't, etcetera.

So I think that would be a tremendous service to all of us. The other point I wanted to make is at -- in the reply comment notice, you asked. It is indeed a tale of two cities. Are there any neutral principles we can look to to determine who is correct for lack of a better term? And our answer to that question at the time was look to notices.

There's a huge amount of notices. They are not dropping, and therefore it can't possibly be the case that this system is working in any real sense because if it were, piracy would be dropping and that would be evidenced by a diminution of

notices.

Now it appears that notices are dropping. So this is a very important fact, but it's important to understand why notices are dropping. They are not dropping because piracy is dropping. To the contrary. There's a number of different explanations for this. I'm not here to tell you that any one is controlling.

But they include the fact, as you heard today, that copyright owners have notice-sending fatigue. In addition, copyright owners in part because of the demotion system that Google has thankfully put in place, a lot of copyright owners are now focusing on what we call top of search.

They are sending notices just for these sites that appear on that first page because all of the links further down are in fact less important. So we're not, they're not going to run up the numbers just for the sake of running up the numbers. They're going to use their notice-sending tools in a more surgical fashion. So naturally the number of notices are going to drop.

Third, the piracy landscape is shifting. It is shifting from peer to peer and in particular Torrent to search and other forms of piracy, the result of which is the number of notices drop. Torrent, as you probably know, can generate tens of thousands of noticeable links for particular work, and indeed if you're the copyright owner and you have the resources, you send tens of thousands of notices for all those links.

But now as piracy shifts to search, that's now going to be 10, 20, 30 links because a site is basically doing all of that aggregating for you that the peer to peer system used to have to do the work of. We can explain this in more detail if you have questions about it. But the bottom line is that sites that deliver searchable, streamable content, I'm misspeaking. I think I'm saying search instead of stream. I'm misspeaking. That's the problem, sorry.

The problem is that piracy is moving from peer to peer Torrent-type piracy to streamable piracy, and a site that delivers streams is going

to give you many fewer links that can be noticed, the result of which is it looks like piracy's getting better, but all that's really happened is we've moved it into another area.

MS. SMITH: Does that make the notice system easier for copyright owners to enforce against streams or not?

MS. PARISER: Not really. I think there are fewer notices, but the result we've complained about, which is that the titles repopulate instantaneously. So we're in whack-a-moleland hasn't changed, and there are many more streaming services. They're very -- they proliferate very easily, and so we're kind in the same world we always were. It's just that it looks like from the transparency report that notices are going, that piracy is dipping but in fact it's just shifting from one to another.

Finally, you can look at money. You heard a lot today about the fact that everybody's making money and tech services are paying content billions of dollars and it's a rising tide and it's

lifting all boats and everybody should be happy and content should be happy.

But the fact is that that's not really what's going on. Tech companies are making vast amounts of money and becoming the most profitable businesses the world has ever known, while content is relative to what it had been shrinking. You heard Dr. Burgess give you the statistic that today the Industry is worth a billion dollars, whereas on an adjusted basis previously music would be $21 billion.

Yes, not every industry is being devastated equally. The motion picture industry is doing all right. But relative to what it would be doing absent piracy, it would be a completely different story. Whereas internet services are spending a tiny fraction of their revenue on takedown tools, on piracy, on response to notices and it obviously has not affected their bottom line to any great extent.

So perhaps another neutral factor you can look to to find out who's right.

MR. GREENBERG: Thank you.

MS. PARISER: You bet.

MR. GREENBERG: Ms. Sheckler.

MS. SHECKLER: Thanks. I'm Vicky with the Recording Industry Association of America. A couple of points.

MR. GREENBERG: Can you please repeat that for the court reporter?

MS. SHECKLER: Vicky Sheckler with the Recording Industry Association of America. So a couple of points. On the third domestic panel, there were some statements made about some facts that are completely inapposite of our experience, particularly with respect to counter-notices and to notices that are sent to search.

I refer you to the comments that we submitted to the Copyright Office in the past on our experience with counter-notices and fraudulent counter-notices, as well as our experience with search notices and, you know, we have 96 percent takedown rate with Google right now with the search notices, and the other 4 percent that were never

indexed that we're giving them proactively to say, you know, these are in your index, but these are still infringing links.

As you may know, we send millions of notices annually, to give you a sense of our experience on that. Second, Jenny mentioned to you, you know, the evolving nature of piracy.

One thing that the RIAA -- that our members -- experience that may be different from some of the others is the problem that we call stream-ripping, which you may have heard, wherein these infringing sites circumvent and the anti-circumvention measures for an audiovisual piece of content, rip out the audio of it and then distribute the audio to whoever may choose to get it.

These stream-ripping websites sometimes do not have any type of static URL that we can send a notice to anybody about. So that is an evolving nature of piracy. It is an area where the 512 notice system simply will not work because there's no deep link notice to send on that one.

And then lastly as Jenny noted and as Richard told you earlier, you know, yes we are happy to see that recording revenues are starting to rise finally. However, let's be absolutely clear. They are nowhere near the peak where they used to be. We were 14 billion in actual dollars. In the United States in 1998, 21 billion in inflation-adjusted today's dollars, and now we're at nine.

So have we been devastated in real economic terms? Yes, we have. Thank you so much.

MR. GREENBERG: Thank you. Mr. Hatfield.

MR. HATFIELD: Thank you. One of the things that I have not heard discussed is the downward economic pressure that free access places on the entire ecosystem for what I do, which is create music, invest money to document it and then put it out into the world.

No one in any market can compete with free, and when the free that we're being forced to compete with is our own music, music which we

invested a great deal of time to create and a great deal of money and in which -- that we invested to document it, in the hopes that we might get a return on that investment so we can come up with the money to do the next project, it's devastating. It's incredibly unfair.

In 2014, a professor named Eric Priest wrote an article and he published it anyway at that time, he might have written it earlier, that examines what happens when copyright owners are unable to monetize their works, at the points where consumers derive value from them. He focused on the experience of the film and music industries in China and found that it illustrated three ways in which the diminishment of capital revenue streams harms producers.

One, monetization opportunities for smaller and independent producers are drastically reduced. Two, market signals are sent to producers. Market signals sent to producers are reduced and distorted, and producers are disproportionately exposed to idiosyncrasies of

peculiar markets and exploitation by intermediaries.

China's experience monopsony intermediaries that pay minuscule royalties to copyright owners provides a glimpse into what may possibly be our own dystopian future, a future in which few legitimate digital distribution platforms become dominant, while piracy remains unchecked. Despite all of the -- forgive me -- crocodile tears for the small start-ups, the consolidation in the big tech industry makes it really clear that there's something else going on.

If and when a winning platform or platforms in this space emerge and become ubiquitous and reach monopsony status, they will have little incentive to maximize royalty payouts and it will be difficult for copyright owners to withhold content and reject their terms.

In other words, undervalued inputs in one part of the music ecosystem impact all parts of the ecosystem, creating systematic dysfunction and prejudicing creators. If music is devalued

anywhere, it's devalued everywhere.

I've been doing this for over 40 years. I don't know any musician that hasn't had their music illegally posted on user-uploaded sites, and I don't know any musician, no matter how famous they are, that have more live gigs now than they used to have.

We used to have -- part of why so many musicians agreed, I was there debating and arguing with people when the DMCA was created. We saw this as an opportunity, because we saw the internet as this glorious thing that would allow us to get directly to our customers.

We were replacing a group of middle men that were greedy, record company executives. But at least those greedy record company executives invested in us. They have so little money now that it's commonplace for indie labels, I'll go spend 10 to 30 thousand dollars to make a record, I paid for everything.

I'm going to go to the label, they're going to charge me five to ten thousand dollars to release it, and that's not enough. I grant a five

or a ten year license with any additional revenues, like if somebody uses it in a film, they make that money.

That's not enough. They then want to give, want to take a percentage of our tour money. Before the internet, the record companies used to give us tour support. That's all gone. So just to kind of wrap this up, the DMCA was intended to balance --

MS. SMITH: Can I just clarify? Were you saying more live touring or less live touring --

MR. HATFIELD: Less live touring and less money from it. I mean I can name some famous acts that don't even pay their opening act anymore. They charge them for the exposure. That's how devastating this entire thing has become. The DMCA was intended to balance the interests of service providers, content creators and owners, as well as the consumers of content.

It's not that we failed big media companies; it's that we failed to capture the

potential of the internet to empower artists and to allow them to determine the contours of their own careers. When we reform rules like section 512 of the DMCA so that it does not take an army to enforce copyright, we expand the choices of artists.

And these artists want to create. They will be empowered to create even more wondrous things for all to behold, and service providers will benefit from that. For anyone that questions the value of artists' work, just ask yourself a simple question.

Who wants a device or a subscription or even free access to a platform devoid of interesting content? The music community values the internet and the tech companies that helped create it. But our content brings value to their enterprise too. We only ask for a fair and equitable percentage of the revenues our works generate.

It's time that tech companies realize that without our content, their platforms will be less valuable. We ask that they join us in contributing to the creation of a fair and

sustainable digital ecosystem, one where all the participants share equally in the benefits, as well as the responsibilities required for the internet to fulfill its promise.

If you doubt what I'm saying, the easiest way to understand things like this sometimes is just I'm in Washington. Forgive me for quoting Deep Throat, but follow the money. Look at 1998, and I'm not even adjusting it. The RIAA said the music industry was worth $15 billion. Last year it was worth 9.8.

Look at the dominant internet things. You look at -- they measure their worth in millions, maybe hundreds of millions. AOL was at the top. Now --

MR. GREENBERG: I'm sorry, I'm going to cut you off.

MR. HATFIELD: It's my last point, and it will be over. Now it's a trillion-dollar industry. So just the last time I checked, the remuneration paid out by streaming services is less than six-tenthousandths of a cent per spin. The

user uploaded content services like YouTube pay even less. To generate the U.S. monthly wage, minimum wage of $1,400 on YouTube, one needs 2,133,300 monthly spins, and that's if they pay you everything.

The mechanical licensing, the publishing, the composer and you happen to own all of that. That's not sustainable.

MR. GREENBERG: Thank you. I'm actually going to jump now to Professor Goldman, who has a train in about 30 minutes to catch.

PROFESSOR GOLDMAN: I'm so sorry to jump out of line. Thank you for accommodating me, I'll keep it brief. The statement that no one can compete with free, we did hear from a representative today, Mr. Polin, who told us how he competes with free. So we do know that there are different content creation models, different that we need to support.

I've been confused by all the discussion that there's been no examples of red flags of infringement, because the 9th Circuit told us what

constitutes red flags of infringement, told us that third party notices about content could constitute red flags of infringement. So this is from the 9th Circuit's UMG v. Shelter Capital case. I don't understand why there's been such fuss on that topic.

I do want to remind everybody there's a lot of references to tech giants and/or to the dominant platforms. Google and Facebook are integral parts of our ecosystem, but they are not the internet. There's a whole lot of internet that's worth fighting for, and we have seen over and over again regulator temptation to think that Facebook and Google's activities need to be corrected and applying that across the entire internet. That, I think, would be a terrible, terrible mistake.

The last thing I'm just going to mention is about the discussions about when services curate content and what consequence that has had. I just want to mention some things that we've learned from section 230, which says the websites aren't liable for third party content, with some minor exclusions

or some statutory exclusions, including IP.

And we don't ask those questions because section 230 categorically protects all editorial decisions on the part of the service. It protects not only selecting what to publish or not, but also then all of the other steps in the curation process, what to prioritize, how much to show, what metadata would be appropriate around it.

And that model has worked really well at helping sites understand now what they can and cannot do. In section 512 land, I would propose a way of thinking about the creation question as once it starts out as third party content, it remains third party content. The only question then is is it still being stored at the direction of the user? What evidence do we have that the user did not want to store that?

Section 230 actually offers some insights on that. There's a case called *Batzel* which said that when someone submits content to a site without intending to be published and then the site publishes it anyway, that's now no longer

protected by section 230 because of the fact that the site made that publication decision and not the user themselves.

So we have some models from section 230 that will help inform this curation question, but recognize that one of the things that section 230 is that just moots that curation question, because there's a thousand different editorial decisions that sites can make, and if we try to parse between these decisions don't constitute editorial discretion, these do, it's a losing game. We can never solve that. Thank you so much for doing this. We really appreciate the opportunity.

MR. GREENBERG: Thank you. I'm actually going now to Mr. Wang who --

MR. WANG: Thank you very much. Thank you. Yeah, I see many guys has already addressed very important issues, but I'd like to add four points. One is the big companies always say that with new law, it might left them faced with a legal uncertainty. This quite a common question asked in Europe.

You know, who didn't face uncertainty in your life and in your career? Everyone faced. When you do something wrong, when you want to take others' work without permission, you of course at least face uncertainty. That's the thing we want. Right now, the only certainty some big companies want is just making money, no responsibilities. That's the certainty they want.

They don't want to face any. A law, potential law that feels anything uncertainty they don't want to face. But that's not fair. Two, I'd like to address this, you know, it's not my opinion but I agree that some Europe Parliament members. They reached this issue to human rights level.

When I first heard this, whoa, big words, human rights. But I checked online and I checked their message, and it is. Many guys always say this, you know, the upload filter, the First Amendment, the freedom of speech. Yes, that's important. That's why I came to this country, right?

But according to the U.N.'s Universal

Declaration of Human Rights, article 17, seventh item, no one shall be actually deprived of his property, and IP properties are their properties. So when you emphasize the freedom of speech, you're also violating the people's human rights, and against their will, the author, the content creator's will.

They want to be treated this way. It's their property and you're using it for profit. That's not fair.

Three, the lobbying. Right now this issue is global issue, but in United States I can't -- I'm not right. It's kind of like, you know, it's not well-presented on public, on internet. Quite often you see Americans argue for the comments with religious issue. Ahh, this lobby, lobby, lobbying fight between the publishing companies and the new tech companies.

Oh, this time the big companies win. Next time big publishers, the movie industry wins. Honestly, if just lobbying counts, you know, no matter who wins, the people, the individuals lose.

When the law is made by and for those who has more lobbying power, the system got a problem.

I think laws should be guaranteed to protect the individuals, to protect public interests. If the law is influenced by these lobbying powers, it's to me essentially no difference from how law is made by dictators around the world.

And last, democracy, about democracy. I want you guys to remember the creators, only very few are internet. We are minorities. Majority internet users are just read, listen, watch, enjoy the contents. They don't create the content.

That's why this, the -- Europe, you hear so many overwhelming voice against the Copyright Directive. Most are copyright users, the internet users. Yes of course, one Europe Parliament member told me -- told us, not only me, you know you are minorities here. If we don't voice for you, no one would have. They're going to crash you.

Your voice will be submerged by the -- everyone is oh, it's just a link, oh, it's just a

poem. It doesn't matter. It's just music. They just enjoy this. So it's helpless for creators. Let's see, okay. I think I have enough time. Thank you very much.

MR. GREENBERG: Thank you. Mr. Levy.

MR. LEVY: Hello again. Art Levy, Association of Independent Music Publishers. In some of the panels today, we discussed the fact that the possibility of using a representative list in a notification has been essentially written out of 512 by the courts, and that, combined with how the red flag concept has been narrowed, may ultimately mean that any DMCA notice must identify specific instances of infringement, as opposed to identifying copyrighted material that is representative of the material generally being infringed.

Lenz may also require some form of fair use analysis for each notice, which in turn may prevent rightsholders from being able to use automated systems to identify infringements and make notices.

All of this means that publishers and song writers are effectively prevented from protecting their works, due to the massive investment in money and time required to specifically identify each instance of infringement.

We've heard that many copyright owners have simply stopped sending DMCA notices, and we've also discussed how there are filtering tools that are currently in use like Content ID and Content Match, that can be used to efficiently identify and take down multiple works after the import of certain information specific to a copyrighted work, as opposed to the location of a specific infringement. These are tools that can be used to slow the tide of infringement.

So, we have a problem. We have the tools that can help fix it; what we need now is some help to rebalance the DMCA. While there are problems with some of the developments in Europe, recent cases and the passage of Directive 13 or now 17 I guess, provide a positive road map of sorts for U.S.

reform efforts, which should focus more on shifting the burden of policing the internet from the copyright owner to the copyright user.

Finally, I just wanted to thank the Copyright Office for this opportunity. With the speed of developments in the technology sector, it makes a great deal of sense to reevaluate this law periodically. If, as we hope, the Copyright Office recommends some improvements here, I hope that you all will recommend that we continue to reevaluate and make adjustments to the law when necessary. Thanks, guys.

MR. GREENBERG: Great, thank you. Next is Mr. Mazziotti.

MR. MAZZIOTTI: Good afternoon everyone. I would like to thank the Copyright Office for this opportunity. I'm an EU Fulbright Scholar. I'm here at NYU from Trinity College Dublin to conduct a study on the issue of remuneration of creators in the online environment. I am placing a particularly strong emphasis on social media.

So I'm here to say a few things, hopefully filling gaps in the discussion that we had today. First of all, I'm very grateful to the U.S. government for their support on my Fulbright, but I heard today, earlier today that the EU should be careful with human rights.

I think the EU has little to learn from the U.S. on human rights. Also for the sake of Transatlantic relationships, we should say that the vast majority of European countries are exceptionally good in providing free health care, free education, and also in guaranteeing rights to asylum seekers and refugee law beneficiaries.

So and I think that we should be a little bit more careful in using words. This is, I think, something that we all agree upon. The EU Copyright Directive. This has been a long journey. I wrote together with the Center for European Policy Studies in 2013, a report after having led a task force that is, was a little bit like based on meetings like this, even though it was not the European Commission holding them, a report that has been downloaded

almost 15,000 times, whose title was Copyrighting the EU Digital Single Market, which is more or less the same title of the upcoming Directive.

That was 2013. It was the aftermath of the ACTA and here SOPA/PIPA debates and let's say clashes between sectors or between parts of the public opinion, and there was very little willingness to discuss constructively about the developments in copyright law.

There was a consultation, more or less the same process that you follow here at the Copyright Office. If you read that report, not because I want to do publicity for my work, but you can see clearly in that report that incorporates also policy recommendations, what has been done. I would say very little in this Directive. This is part of the alarmed reactions in the U.S.

What we have in this new Directive is relatively little, and what has not been done yet, because we don't have a federal system of copyrighting in the European Union, we have a bunch of national copyright systems that we are doing our

best to harmonize. And also if you look at the article 15/new article 17, I understand the concerns of the technology companies, of the civics society organizations.

But you have to understand that for us, it was also an issue of harmonizing secondary liability law. It's something that we don't have because we don't have a common tort law. I'll be as quick as possible. On article, former article 11 and 13, obviously these are not perfect provisions.

As someone has stressed, this is the result of very complex policymaking and lawmaking process. Someone has correctly emphasized the fact that the governments, the EU Council has not approved the Directive yet. The approval and the entering into force is expected in the next few days.

Article 13 and article 11, obviously these are not provisions that convince the European Parliament to vote in favor of this Directive. What I have not heard one, I would say one single time today is the fact that Europe in harmonizing

copyright is driven by cultural policies.

France, now the biggest enemy, let's say, of the tech companies, now the most outrageously conservative government in the European Union, said the French and in past shared their views. France negotiated the Copyright Directive at the government level through its Ministry of Culture. Not the Ministry of Economic Growth, not the Ministry of Industrial Development.

So you already understand a significant difference with the U.S. What really motivated the European Parliament to grant a decent majority in the final vote a few weeks ago was not, as I said, article 17 or article 11. It was mostly, I would say, two components of the new Directive.

The first is the new exceptions. Someone correctly emphasized we don't have fair use. We have a significant modernization with a few exceptions in the new Directive, teaching someone and emphasize the fact that we lacked a compulsory teaching of the exception. Especially in the digital environment we will have it, thanks to this

Directive.

We also have text and data mining exception, which is beneficial to tech companies, especially in their public partner -- private partnerships. I would say something that I've not heard today. Read the final part of the Directive, because what motivated the European Parliament in its approval of the overall bill is the new rights that are being granted to authors and performers.

The idea that European Parliament, especially now, is run by a sort of awkward majority which is socialists and democrats play a role, and it's suspected in the next elections that this majority will no longer be there. So there will be --

MR. GREENBERG: I'm going to have to ask you to wrap up.

MR. MAZZIOTTI: Sure. So pay attention to the next frontier of European regulation. It's platform regulation, it's data regulation, it's transparency and fairness, something that could upset the technology companies even more than

article 17 and article 13.

And a final thing. I'm conducting interviews and I'm collecting data here, so if after this meeting some of you could actually give me his or her business cards, I would be very happy to arrange a conversation in order to be as informed as possible because I would like to reflect this kind of comparison, EU/U.S. in the best way. Thank you.

MR. GREENBERG: Thank you. Ms. Wolff, and then after Ms. Wolff will be Ms. Gellis and then Mr. Band.

MS. WOLFF: Okay. All right, thank you. I'll try to keep things short. Yeah, I agree with a few of those speakers who were just before me, that after 21 years it's good to reflect on what's working and what's not working.

I think from the perspective of those that represent and try to monetize and license the work of professionals, and in this case visual artists, whether it's motion clips or graphic design or photographs, the notice and takedown really isn't

adequate because professionals can't spend their life doing notice and takedown.

What they really need is incentives for this community to work with the providers, to find ways to just stop the infringement and also to encourage some type of licensing system that would really work.

If you have a system where your only -- your only resource is just to have content taken down, most of the benefit has been used, particularly if anything is time-sensitive in the amount of time that it's already been up before it can be taken down, and you're really, you're not encouraging an economic system where you're going to be able to sustain yourself through the actual licensing of content.

And as you all know, no one looks at any website without some kind of video or images these days. So the balance that was promised in the beginning really needs to be re-examined. Part of it is I think the way the courts have interpreted a lot of these cases is it discourages real activity

between content creators and ISPs, which can be defined as almost anyone.

There is filtering that can work. There is image recognition technology. I think everyone's afraid that they may be doing too much, that they will lose the safe harbor protection if they do too much review or curation. Perhaps there's a way that that can be clarified, that you don't lose it if you do take steps in that area.

And I think the other problem which we didn't address today, which is the definition of standard technical measures. The way it's defined just doesn't work because technical measures aren't done by a broad consensus of users and technology companies. They really come out of different sectors that are familiar with their own type of content.

So what may work for the music industry won't work for the motion picture industry, or work for the visual arts community. So I think that --

MR. GREENBERG: Do you think the statute leaves that kind of flexibility, to have

industry-specific STMs?

MS. WOLFF: Well, it's very unclear because it says it has to, and I don't have it, well, I have it -- the definition --

MR. GREENBERG: It's really -- basically, I believe the entire explanation is it must accommodate and not interfere with standard technical measures.

MS. WOLFF: Well, but the definition of standard technical measures requires that those standard technical measures are developed over broad, I think, consensus. I have to -- yeah. I have to find it.

MS. ISBELL: So it says develop --

MS. WOLFF: It means used by copyright owners to identify or protect copyrighted works, and have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.

And so that whole, the idea that it's a multi-industry standard process with everyone

involved, I don't think that's the way that really has worked. I haven't seen any of that happening.

MS. SMITH: And you don't think multi-industry could just mean, you know, a platform and you know, visual artists for example. I mean, in other sectors there might be standard facilitating efforts --

MS. WOLFF: It's possible, but in 21 years it hasn't happened.

MS. SMITH: Right.

MS. WOLFF: And so the incentives to encourage that seem not to be there, and -- yeah. I think that the great protections that have encouraged ISPs to takedown have also discouraged -- they just designed their platforms around fitting within the boundaries and edges of 512, when perhaps there could be much better platforms, much better content if there was more curation and more working with content creators to create a system where you wouldn't have just to do notice and takedowns, but you would have opportunities for broad licensing. And I'll turn it over to the next one. Thank you

very much for having this today.

MR. GREENBERG: Thank you. Ms. Gellis.

MS. GELLIS: Thank you. Two main points. One, I want to go back to the study skyisrising.com and the question was raised about where the data came from. This is largely industry data, and the final page of the report lists the sources that built it.

Also, it's not just showing that like all media, video, books, music, video games, that the overall pie is growing for all of them, but also that, as we've discussed throughout the day, that for independent creators their market, their markets are also increasing.

When we do our advocacy, we're not just speaking about the hypothetical idealized citizen speaker. We are speaking about independent creators who need access to these platforms in order to be able to commercially exploit their creativity.

The second point is I wanted to talk about *Mavrix*, because we didn't really do that in my session, largely echoing what Professor Goldman

said. I think the *Mavrix* decision itself was a wrong turn. As a litigator, I'm going to litigate as if it were a wrong turn, especially given that the follow-up decision moved away from it.

I think the error was the at the direction of the users. And I think that the -- Professor Goldman's comments are important in that regard, that that's creating the universe and the fact that the platform may be shrinking the universe of content that's going to appear on the platform should not change that ultimately liability hinges on whether the material was at the direction of users, who put it in that potential universe of content to be posted.

But the big point I wanted to make on *Mavrix* is this idea we have this collision now between section 230 and 512, and this is not a good collision, because one of the things we see with section 230 is the enormous censoring effects, and I know that that's my bailiwick and I keep harping on that but it's because it's true.

When there's the fear of liability, it

pinches platforms and they crack down on speech, if they can exist at all. We see with amendments that we've just had to section 230 widespread damage, where whole swaths of content that used to be able to live quite happily on the internet, legal, lawful content has now been taken down by platforms because they're so afraid of the new liability regime that may target them.

Do you have a question? Yeah.

MS. ISBELL: Can I just ask a question about that? So a lot of people have said that SESTA has created these vast chilling effects on the internet. But didn't section 230 already exempt out criminal activity in the first place?

MS. GELLIS: So I think the question is why did they bother to do SESTA when you already had some language in 230 that would do the job, of which I can say there was no good reason. What they ended up doing was making a statutory change that certain promoters thought was going to be -- certain promoters may have thought it was minor. Other promoters may have thought it was actually major

and this was entirely what they thought happened.

But it was unnecessary, but the consequence of it is it changed just enough to cause so much uncertainty to the immunity, because it's more than a safe harbor. It's an immunity. You don't even have to litigate it and spend the cost to litigate to find out whether you have the safe harbor, which we do in 512 land.

It caused so much damage that platforms have reacted to -- I mean one of the first and most famous was Craigslist deleted its entire adult personals ads. This is legal, lawful content but because it had enough qualities where it could possibly be caught up in this awful definition of the way the statutory changes happened with --

It was SESTA. It became FOSTA, so just for clarity we'll call it FOSTA. But those changes ended up removing the safety that the platforms were relying on in order to allow this great cacophony of user dialogue, discourse, speech, etcetera, where the censoring effects have been real, measured, observable, and they're now being

challenged in the courts about whether is constitutional at all.

But the point is this is something we should be very reluctant to look for in a regime. Small changes can have huge impacts on the amount of speech that we can still have online.

The one other point I wanted to flag with *Mavrix* was this idea that if you moderate, moderation shouldn't challenge it.

But one of the other things is just to echo what I was saying before, about if you moderate. I think there's this idea that moderating you're looking, you're seeing. Well then you're seeing the infringement, so therefore now your safe harbor is in jeopardy if you don't do something about it.

And again, I think the same challenges that happen with a takedown notice or happen with any sort of content of is it copyrightable, who owns the copyright, was there fair use, was there a license somebody who's moderating the content, and particularly in a position where the LiveJournal moderators were, they're not going to have access

to that information to truly know anything that should be driving their decision or risking their safe harbor.

I think it's really important and as we were discussing with 230 and 512, that for these protections to be useful and valid and ultimately protect the platforms, to protect the speech, they have to be robust and reliable, and we should be really reluctant to mess with that. Thank you.

MR. GREENBERG: Thank you. Mr. Band and then Mr. Gratz, who I already see in the back, you'll be next.

MR. BAND: Thank you. First, I wanted to agree with our colleague from the European Union. I support Medicare for all. So if you could make sure that that's included in your report. Two overarching points, aside from that.

First, I guess at a high level the message from a lot of the 512 supporters is that in your report we don't -- we would really urge you not to take 512 in isolation or view it in isolation. You need to first view it in its societal context.

We talked about the importance of internet access, both in terms of, you know, from free speech dimensions but also in terms of employment and participation in democratic institutions and so forth. So that's the first thing.

You really need to view the -- and as well, the impact of -- potential impact of filtering and the adverse consequences that could have, well beyond the area of copyrights. So first the importance of the internet in its societal context.

Second of all, the legal context, that 512 was part of a broader legal framework. We only touched on that briefly; Meredith Rose mentioned that. But that you, you know, we really can't view 512 in isolation from 1201, which the rightsholders have repeatedly said has been so essential for the success of all kinds of content on the internet, which leads to my third point, that you can't separate --- you shouldn't view section 512 in isolation from the content context, which is that there is so much now, in part because of 1201 I have

to concede that.

But for other reasons as well, there is just such an abundance of content available on the internet. If any, you know, I remember at least certainly when we were talking about the DMCA 20 years ago, there was this notion well, you know, we have cable television, we have 500 channels and nothing to watch, right?

Whereas now we have a situation where there is such an abundance of content it's almost like you have content overload anxiety, right? I mean, you can't possibly consume all the great content, whether it's between all the television shows on Netflix and Amazon, or all the podcasts.

I mean it's just -- we're overwhelmed with content, and also when you talk a lot with many rightsholders, you know, in this context they complain about piracy. But in other contexts they basically say well, we can't -- there's just too much competition. There's too many photographers out there. There's too many musicians. The barriers to entry have gotten so low.

But I'm not sure that that's a bad thing. I think from certainly the -- from the Copyright Office point of view, the more content, and a lot of this is very high quality content, certainly the better. So that's the first big area, that we want to make sure that 512 is viewed in context.

The second point is one of -- in the last panel someone mentioned the publisher's right. I was on a -- I heard a panel last week in Geneva about -- where the publishers were talking about the publisher's right and why it was so wonderful, and they said they weren't trying to regulate facts and they weren't trying to regulate free expression. They weren't trying to undermine the quotation right and they weren't try to limit access to news of the day.

However, they did say that they thought that four words from a headline would be an infringement. Now, I'm sorry, four words from a headline sounds to me like facts, sounds to me like slowing free expression, infringing the quotation right and undermining news of the day.

So I think that that, you know, we really need to be very, very wary about this publisher's right and make sure it doesn't come here. It would clearly be unconstitutional, and so you know that is like a horrible idea. I know it's beyond the scope of this report, I hope.

MR. GREENBERG: Yeah, but you have 50 more seconds left if you want to keep talking about that.

MR. BAND: Yeah. And so then the last, the very final point then is that, you know, also when we're looking at the Directive and it has some bad ideas like, you know, article 13, article 11. But it also has some good things. So I just wanted to say the one thing that I think is, you know, there's a couple of good things.

Like I think the preservation right for cultural heritage organizations is great, and also the contract override. So that the notion that there are certain new exceptions created in the Directive, and then it says that those cannot be overwritten by contract.

But again, I know that's beyond the scope of this panel or of this report. But again, if we're looking at bringing good ideas from the Directive, that's a really good idea you should consider. Thank you.

MR. GREENBERG: Thank you. Mr. Gratz, and following Mr. Gratz will be Ms. Castillo, then Mr. Carver and finally Mr. Troncoso, unless anybody else had signed up and I haven't seen it.

MR. GRATZ: Thank you very much. I'm Joe Gratz. Recognizing that it is late in the day, I will limit myself to one minute and three case citations. My first case citation is to the MP3 Tunes case. There's a question that came up a number of times about what is a real world example of something that would qualify as red flag knowledge, and we get one from that case.

In that case, there were a lot of facts. But one set of those facts was about Beatles songs, that is the service knew that they were only allowed under their legal theory to have Beatles songs up that -- have songs up that were lawfully purchased

on an online MP3 store, and they knew that Beatles songs weren't available on the online MP3 stores, and they knew that Beatles songs were available in a very particular place on their service.

All of that being true, the court said they had red flag knowledge, and I think that's right. That's the first case citation. I want to turn briefly to expeditiousness. I think courts have been correctly recognizing that expeditiousness depends on the circumstances.

My second case citation is Long against Facebook, in which I represented the defendant, came out about a month ago.

MR. GREENBERG: Is this the same as *Long v. Dorsett*?

MR. GRATZ: It is. You're aware of the case. I won't belabor it, except to say it reflects the flexibility with which courts are taking into account the different facts that can add up to expeditiousness.

MR. GREENBERG: I do unfortunately want to now ask a question though, which is: how unique

do you think the outcome of that case was to the facts of that case, right? In that case, they basically say five days is expeditious. But it dealt with the fact that I think Facebook was receiving more than 100 notices from this one user about infringing content, is that right?

MR. GRATZ: So Facebook was receiving a lot of different communications from this particular user about a variety of different grievances, and when asked which one he wanted Facebook to deal with first, it took a little while to get around to dealing with this one first, and once it got there it was taken down.

And so the point I want to make there is that -- and so to answer your question, yes I think that it is somewhat specific to the factual situation.

That is, there may be situations in which that amount of time isn't expeditious, and there are likely to be lots of situations where a much longer amount of time might well be expeditious, particularly where one service provider receives

a notice, and there are downstream 512 online service providers downstream of them who are in contact with the actual user.

The case said on that is think about this in the context of the trademark case where there were multiple layers of service providers involved, some of which were liable and some of which were not, and they were passing things between them. Thanks.

MR. GREENBERG: Ms. Castillo.

MS. CASTILLO: I'm Sofia Castillo with the Association of American Publishers, and I would like to go back to a point that was discussed during my panel, that would be Panel No. 2, and also a little bit during the international panel.

And it's the notion, it's the question of whether bad faith actors should be eligible for the safe harbors, and right now the definition of service provider is so broad that a lot of bad faith actors are taking advantage of the safe harbor even though they shouldn't.

The court in the Zazzle case said, the

definition of service provider is very broad. Indeed, it is difficult to imagine any online service that the definition would not encompass.

And so for that, AAP has proposed in the past, and I would like to reiterate that today, that one thing that Copyright Office could recommend and the legislative fix is to include an element of good faith into the definition of service provider for purposes of eligibility for the safe harbor.

This would be helpful and it would also maintain flexibility to include different types of safe harbors. So it wouldn't -- it wouldn't exclude certain types of safe harbors as long -- service providers, as long as they are operating in good faith. Thank you.

MR. GREENBERG: Thank you. Mr. Carver.

MR. CARVER: Hi. My name is Brian Carver. I'm copyright counsel for Google. Mr. Hatfield's remarks about bad record deals reminded me of an interview I saw with Snoop Dog, where he described those as 360 deals, and he said, what that means is they take 360 percent of everything.

But what I actually wanted to talk about was that I've spent the last three and a half years advising the Content ID teams and the Copyright Operations teams at YouTube, and to address some of the things that happened in the third domestic panel, in particular with regards to abusive notices and counter-notices, based on sort of our experiences, you know, directly with that.

First on abusive notices, I can say across all Google products we probably receive more abusive notices in a week than most other platforms receive in a year. It is a real thing. If we didn't remove removal requests, if we didn't -- sorry, review removal requests and didn't have other technical safeguards in place, then you know, Justin Bieber would not be on YouTube. I think that would be a net loss for society. I'll go on the record.

There was also some complaint about sort of the generic mention of abusive notices without specific examples. So I wanted to give you just one from very recent history. You can read a number of news articles about this that happened near the end

of January, the first few weeks of February, the Verge article from February 11th which you can find unfortunately with the search term YouTube Extortion, would let you read all about this.

But there were two small gaming creators who got two -- each got two fraudulent copyright takedowns against their channels, and then they started receiving extortionist threats that if they didn't pay money, they were going to get a third takedown sent against their channels, in the hopes of terminating their channel.

We were glad to learn about this while it was ongoing, so that we could prevent that termination. But this sort of thing definitely does go on.

MS. SMITH: But you didn't, I mean you used the sort of flexibility Mr. Gratz referred to in expeditious removal to address that are you saying or --

MR. CARVER: I'm not sure I understand the question.

MS. SMITH: How did you handle that

situation?

MR. CARVER: So you know, it was a sophisticated attack. We were fooled initially and we did remove some videos and apply some strikes to those accounts. But once we learned about it, then we were able to say okay, like we see that this is fraud and we're going to resolve the situation and not take punitive actions against these channels.

So just in one week last June, when a particular fraudulent reporter decided to automate their submission process, over 50 percent of the DMCA notices we received that week were fraudulent, that we were able to detect, right?

MR. GREENBERG: Can you clarify? When you say fraudulent, do you mean inaccurate or do you mean abusive?

MR. CARVER: Abusive.

MS. SMITH: In that case, do you abide by them?

MR. CARVER: No. We try to detect them and prevent them.

MS. SMITH: Okay. So you would not -- you would not follow it if you determine it's abusive?

MR. CARVER: Right.

MS. SMITH: Okay.

MR. CARVER: On another point about counter-notices, you heard earlier that 98 percent of copyright management on YouTube happens through Content ID. That other two percent is copyright removal requests, and any time I ask the team to pull the stats on counter-notices within that two percent, they always come back with a number between one and two percent of removal requests ever see a counter-notification.

So we are talking about a tiny fraction of the sort of overall universe. When we were building the Copyright Match tool that you heard about, we interviewed a lot of small creators to try and figure out what they needed from this tool, and we learned that small creators really are scared to counter-notify, even when they feel they're in the right.

There is a real fear out there. You heard today from a creator who understands copyright really well, who says he's not afraid to send counter-notifications when he thinks it's appropriate. I actually don't think that's a common viewpoint with most small creators. They're very concerned about the threat of litigation.

Another -- on the other side of counters, we also do see problems in counter-notices that are sent. That's why even though the law doesn't require us, we review them for obvious misunderstandings of the process. So we'll see an outraged uploader write something like, this is my video. I recorded myself singing in my bedroom this cover song. This is outrageous, you know.

When the takedown is from a composition copyright holder, we recognize that music copyright is complicated and even those who like to sing cover songs may not understand it fully.

MS. SMITH: So what do you do in that case?

MR. CARVER: We refuse to forward that

counter-notification, and in fact through reviews like that, YouTube now refuses to forward more counter-notifications than it does forward, right. Over 50 percent of them after review we just never pass along.

That's something we don't talk about a lot. We don't get a lot of credit for it, but we're doing it to try and spare rightsholders from these obvious misunderstandings of the process. And this point about understanding of copyright law among average users goes to the repeat infringer points that we talked about.

So I think it ought to influence how you implement the repeat infringer policy, because what we find at YouTube is the vast majority of users never get a copyright strike at all, okay. And then of those who ever do get a copyright strike, the vast majority of them only get one.

We make you go to copyright school, make you take a quiz and then after that those folks stay out of trouble. Of those who do go on to get three copyright strikes and have their accounts

terminated, the vast majority of those reach that point within 90 days of creating their account.

So what we find is sort of two drastically different groups, right? Sort of regular people who are trying to do the right thing, who don't understand copyright very well, but who you can guide into doing the right thing. Then another group of people who are probably dedicated to infringement.

So having or forcing platforms to do sort of just one thing with respect to repeat infringer policies would be a big mistake. It wouldn't address these two very different groups of people. I think the DMCA has already done a great job on that front, right, because it talks about that we have to reasonably implement a repeat infringer policy, and that we have to do it, terminate in appropriate circumstances.

These kinds of phrases build in the flexibility that you need to deal with those sorts of situations. Thanks.

MR. GREENBERG: Great. Mr. Troncoso,

quick apologies to you. Mr. Willen is going to jump up and has 30 seconds, he said, of responsiveness to what Mr. Carver just said.

MR. WILLEN: Thank you very much. It was actually in response to what Ms. Castillo said about bad faith actors. So the idea that we need to somehow redefine the definition of service provider in order to deal with truly bad faith platforms I think is just not consistent with where the law is.

Both the 2nd Circuit in the *Viacom* case and the 9th Circuit in the Shelter Capital and Fung cases have said that services that actively induce infringement and therefore that potentially violate the *Grokster* rule, are almost certainly going to be found to have control and financial benefit, and so are going to be in all likelihood excluded from the safe harbors already.

So the courts are doing a great job in interpreting the statute as written, in separating the sheep from the goats, and the idea that we should do that through the definition of service provider

I think is neither necessary nor would it be a good public policy choice.

MS. SMITH: Do you think there's a problem with it?

MR. WILLEN: Excuse me?

MS. SMITH: What would the problem be? Is there a problem with Ms. Castillo's -- I mean it's unnecessary I think your point is that but --

MR. WILLEN: Right. Well I mean I think the idea of having a broad and flexible definition of service provider is precisely that Congress in 1998, when the safe harbors were enacted, couldn't envision a range of potential services that would potentially arise. So having a rule that allows for new kinds of businesses and new kinds of companies to get the benefit of the safe harbors, provided that they're doing the things that the safe harbors substantively require, makes a tremendous amount of sense. Is that -- did that answer your question?

MS. SMITH: I think so, but I thought Ms. Castillo was just suggesting adding good faith as a requirement, and I wasn't sure if you were

concerned that that might, you know, that seems to be also flexible?

MR. WILLEN: Yeah. I mean I think the problem with that is I don't, I don't know what it means. So we have a standard, right, that comes out of the Supreme Court's decision in *Grokster*, that tells us this is a category of bad faith actor, a service that is essentially instructing users to infringe or actively inducing infringement.

That's the law. We've lived with it for a decade, and having that inform who's in and who's out makes a certain amount of sense.

MS. SMITH: I understand. But I think her point is if that's one category of bad faith actor, why not have all the categories? I mean she's proposing an expansion I assume, but --

MR. WILLEN: Right. I mean I guess I would say without knowing what we mean when we talk about good faith, we open the door to something that is going to be impossible to actually implement in any systematic way.

I think that the idea, the question of

whether a service is acting in good faith or bad faith is one that whether through control or through the general way that courts interpret and apply the DMCA, is already infused in everything the courts are doing, and you can see that in the results of the cases.

MR. GREENBERG: Thank you. Mr. Troncoso.

MS. TRONCOSO: Yes. I realize I stand between everyone and the door.

MR. GREENBERG: Actually, you're fortunate, you don't; Professor Tushnet's going to have that honor, I believe.

MS. TRONCOSO: I'll still try to keep it pretty short. So I just wanted to say I have a little bit of a concern that the conversation at times has taken on a bit of an adversarial content versus tech sort of tone, as if the DMCA is sort of a zero sum game where there's going to be a winner and a loser if changes are proposed or not made.

But I think really as you look at the statute, it's really important to bear in mind that

there's a broad diversity of stakeholders even within single categories, right? So on the content side, we heard today that the licensing models that certain industries use are going to affect what they think are better solutions in Europe, or whether the new Copyright Directive is going to be workable.

On the service provider side, there's just a tremendous range of diversity, even on just the 512(c) side. I think a lot of the complaints that we've heard have centered around a few stakeholders.

But there's just a much broader range of 512(c) providers that rely on those protections, and whose services could be threatened by sort of sweeping changes along the lines that we've seen proposed in a certain context.

And then on the user side, we've also seen how for particular users, the DMCA either works or it doesn't work for very particular reasons, and how proposed changes would work or be disastrous for very different reasons.

So Ms. Tushnet, sorry, Professor

Tushnet rather, has talked a lot about the fan fiction community, and how they have particular interests in the administration of the DMCA and how filters could be, you know, quite problematic for them.

We heard the same from Ms. Wolbers about sort of open source software developers. So I think as you're developing this report, it's really -- I would just ask that you make sure that you bear in mind the diversity of stakeholders that are even within these individual categories, and that it's not sort of binary, sort of content versus tech issue. With that, I will yield to my colleague.

MR. GREENBERG: Thank you. Professor Tushnet.

PROFESSOR TUSHNET: So, thank you. I just want to pick up on what Eric Goldman said. So what counts as content stored at the direction of the user? When I'm on the bus home and I pull the cord, the bus driver stops at my direction, even though she's the one hitting the brake and opening the door. She may even decide not to stop

immediately, depending on what the circumstances are. But it's still at the user's direction when she does. That's all.

MR. GREENBERG: Thank you. You want to close this?

MS. SMITH: I think that was a great moment to end on, short and sweet.

MR. GREENBERG: All right. I believe that's it. Thank you for everyone who was here and participated. I have nothing else to add.

(Whereupon, the above-entitled matter went off the record at 6:05 p.m.)