UNITED STATES COPYRIGHT OFFICE

SECTION 512 STUDY

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9:00 a.m.

+ + + + +

Monday, May 2, 2016

+ + + + +

Thurgood Marshall United States Courthouse

40 Centre Street

New York, New York

+ + + + +

U.S. COPYRIGHT OFFICE:

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6 JONATHAN BAND, Library Copyright Alliance and Amazon
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12 ANDREW BRIDGES, Fenwick & West LLP
13 RICHARD BURGESS, American Association of Independent
14 Music
15 STEPHEN CARLISLE, Nova Southeastern University
16 ALISA COLEMAN, ABKCO Music & Records
17 SARAH DEUTSCH, Mayer Brown
18 DAMON DIMARCO, Author
19 JOSEPH DIMONA, Broadcast Music Inc.
20 TROY DOW, Disney
21 SARAH FEINGOLD, Etsy, Inc.
22 ADRIENNE FIELDS, Artists Rights Society
23 PATRICK FLAHERTY, Verizon
24 KATHY GARMEZY, Directors Guild of America
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3 LISA HAMMER, Film Director
4 TERRY HART, Copyright Alliance
5 MICHAEL HOUSLEY, Viacom
6 DAVID JACOBY, Sony Music Entertainment
7 GEORGE JOHNSON, Author, Geo Music Group
8 HILLARY JOHNSON, Author
9 BRUCE JOSEPH, Wiley Rein LLP (for Verizon)
10 DAVID KAPLAN, Warner Bros. Entertainment
11 MARCIE KAUFMAN, Ithaka/ Artstor
12 THOMAS KENNEDY, American Society of Media
13 Photographers
14 NATALIE MADAJ, National Music Publishers Association
15 MICHAEL MICHAUD, Channel Awesome, Inc.
16 CHRISTOPHER MOHR, Software and Information Industry
17 Association
18 EUGENE MOPSIK, American Photographic Artists
19 MICKEY OSTERREICHER, National Press Photographers
20 Association
21 MARC OSTROW, Law Offices of Marc D. Ostrow
22 JENNIFER PARISER, Motion Picture Association of
23 America
24 MICHAEL PETRICONE, Consumer Technology Association
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6 STEVEN ROSENTHAL, McGraw-Hill Education
7 KEVIN RUPY, USTelecom
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19 Works
20 JEFF WALKER, Sony Music Entertainment
21 MICHAEL WEINBERG, Shapeways
22 LISA WILLMER, Getty Images
23 CHARLYN ZLOTNIK, Photographer
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25

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

2 9:01 a.m.

3 MS. CHARLESWORTH: Good morning, everyone.

4 And welcome to the section 512 roundtables. This is

5 our first day of hearings on the DMCA notice-and-

6 takedown process. I'm Jacqueline Charlesworth, General

7 Counsel of the U.S. Copyright Office.

8 To my left is Karyn Temple Claggett, who is

9 the Associate Register and Director of our Office of

10 Policy and International Affairs and to my right is

11 our colleague, Kim Isbell, who is Senior Counsel in

12 the Policy and International Affairs office. Brad

13 Greenberg is floating around somewhere. He is Counsel

14 for Policy and International Affairs. Cindy Abramson

15 -- walking around -- is Assistant General Counsel in

16 the Office of the General Counsel. And Rachel Fertig,

17 to my far right, is a Ringer Fellow in the Copyright

18 Office.

19 So we are all delighted to be here to hear

20 your views on this very important part of the

21 copyright law.

22 It took a lot of planning to host this here

23 at the Thurgood Marshall Courthouse, and I want to

24 thank the people at the court who helped us, in

25 particular Ed Friedland, who is the Southern District

1 of New York District Executive, his assistant Elly
2 Harrold, Sheila Henriquez, the Space and Facilities
3 Assistant, and then we also have been helped out by
4 Anthony, who is helping with our AV, and Sammy, who
5 helped arrange the room. So we're very grateful to
6 the staff at the courthouse.
7 And I will say this, having some experience
8 with Article I and Article II facilities, Article III
9 really rocks. This is a really -- a nice moment to be
10 up here, having clerked in this courthouse. And I
11 always wondered what it felt like to sit up on the
12 bench. Now, I know.
13 So as I mentioned, we're here to discuss a
14 very important aspect of our copyright law, section
15 512, enacted in 1998 as part of the Digital Millennium
16 Copyright Act. And it's approaching the 20-year mark.
17 Unlike some other provisions of the act, it's not
18 nearly of interest only to sort of copyright nerds or
19 particular narrow industries or subsectors of
20 stakeholders. It really affects anyone who interacts
21 with the Internet, anyone who posts content, who
22 enjoys content.
23 So it has a very broad reach and it has had
24 a dramatic impact on the way the Internet has evolved
25 and content services have evolved in the United

1 States. And its impact -- the impact of 512 -- is
2 growing. Somewhat astonishing to me is the fact that
3 Google I think is on track to receive 1 billion
4 notices of infringement -- alleged infringement --
5 this year. And that's just an astounding and
6 exponential number that I think may not have been
7 apparent back in 1998 when Congress was looking at
8 takedowns on bulletin boards.
9 And I guess some of the questions we'll be
10 discussing here is what does that mean and how is that
11 a good thing. Is it a bad thing? Is it - - how are
12 we managing that level of the takedown process. And
13 reviewing the comments in preparation for this
14 hearing, I was struck by a fairly wide chasm between
15 those who perceive the system as working in
16 essentially a good way and basically very beneficial
17 and those who see it as seriously flawed. And I'm
18 sure we'll be hearing more about that during the
19 course of these hearings.
20 In the past, I've been known to open a
21 roundtable discussion with a humorous quote from Dr.
22 Seuss. However, today I'm going to turn to Dickens
23 because section 512 I think calls for something a
24 little bit more serious. And it really is -- there's
25 a bit of A Tale of Two Cities going on here, I think,

1 when you read the comments. And it calls to mind the
2 famous quote, "It was the best of times. It was the
3 worst of times. It was the age of wisdom. It was the
4 age of foolishness. It was the spring of hope. It
5 was the winter of despair."
6 I've seen all of those sorts of themes
7 throughout the comments. And I hope -- my hope, and I
8 think the hope of my colleagues here, is that the
9 exchange of views at these roundtables will lead to
10 more hope than despair. I think we need to find some
11 common ground, or at least ideas for how to manage
12 this process going forward. And we look forward to
13 hearing from all of you regarding your thoughts on how
14 to make 512 what it can and should be.
15 So now, turning to some rules of the road -
16 - those of you who are participants have placards in
17 front of you. If you want to speak, turn your placard
18 up like this and we will call on you. We may not do
19 it in precise order. But we really do try to get to
20 everyone. Before you speak, I'm going to ask you to
21 introduce yourself generally at the beginning of the
22 panel. But before you speak, if you could give your
23 name for the Court Reporter, that would be helpful to
24 her.
25 So when she's transcribing, she'll know

1 whose voice it is. There are a lot of you.
2 Some of you have mics, and I think we're
3 going to try and get this adjusted, that turn on and
4 off. It's probably a good idea to turn them off when
5 you're not speaking. But remember to turn them on if
6 you want to make a comment. If yours doesn't go on
7 and off now, it may later in the day, after that's
8 fixed.
9 Your remarks are being, as I indicated,
10 transcribed by a Court Reporter and they will be made
11 public once we get the transcripts reviewed and we
12 post them on our website. We ask that you avoid
13 making speeches or just sort of reiterating what's in
14 your comments, and that you keep your remarks to two
15 minutes because it allows other people time to speak.
16 And what we're really trying to do here is to explore
17 your positions, the positions in your comments which
18 we are very familiar with. We've read them. And we
19 want to actually join the issues and try to have a
20 robust discussion and a back-and-forth between people
21 with competing views.
22 Last but not least, we will be taking
23 breaks. So you can address your caffeine addiction or
24 your cell phone addiction and go down and check your
25 phones out. We're sorry that you couldn't bring the

1 phones up. But I think that the courthouse staff are
2 very cooperative and if you need to check your phone,
3 you should have time to do that. You can check it out
4 and check it back in. And without further ado, I
5 guess we'll go on with the first session. Are there
6 any questions before we begin? Okay.
7 SESSION 1: Notice-and-Takedown Process—Identification
8 of Infringing Material and Notice Submission
9 So I think if we could, as I mentioned,
10 introduce the panelists, or have you introduce
11 yourself, starting with my left, Mr. Flaherty, and if
12 you could just give your name and your affiliation,
13 your interest in the proceeding.
14 MR. FLAHERTY: Good morning. My name is
15 Patrick Flaherty and I'm in-house counsel for Verizon.
16 I manage trademark and copyright and the DMCA
17 processes.
18 MS. AISTARS: My name is Sandra Aistars.
19 I am a law professor at George Mason
20 University, where I run the Arts & Entertainment
21 Advocacy Clinic.
22 MS. SHAFTEL: Lisa Shaftel, National
23 Advocacy Liaison for the Graphic Artists Guild.
24 MS. SHECKLER: Vicky Sheckler, with the
25 Recording Industry Association of America. I'm the

1 Deputy General Counsel.
2 MS. SCHONFELD: Samantha Schonfeld, General
3 Counsel at Amplify Education Holding.
4 MS. PILCH: I am Janice Pilch, the
5 Copyright and Licensing Librarian at Rutgers
6 University. I address online infringement and
7 liability and provide assistance to faculty and other
8 members of the Rutgers community in filing takedown
9 notices as well as in responding to takedown notices.
10 MS. GARMEZY: I'm Kathy Garmezy, from the
11 Directors Guild of America. I'm the Associate
12 National Executive Director for Government and
13 International Affairs.
14 MR. KAPLAN: David Kaplan, from Warner
15 Brothers. And I run the Content Protection Group at
16 the studio.
17 MR. BAND: Jonathan Band. On this panel, I
18 represent Amazon.
19 MS. ROBINSON: Deborah Robinson. I work at
20 Viacom and handle content protection and antipiracy
21 issues for the company.
22 MR. BURGESS: Richard Burgess, the American
23 Association of Independent Music.
24 MS. COLEMAN: Alisa Coleman, COO of ABKCO
25 Music & Records, Inc. We're a content owner that owns

1 compositions and master recordings by the Rolling
2 Stones, Sam Cooke, and others.
3 MR. MOPSIK: Eugene Mopsik, with American
4 Photographic Artists.
5 MR. JOHNSON: George Johnson, Geo Music
6 Group. I'm a singer-songwriter from Nashville,
7 Tennessee.
8 MR. GIBBS: Melvin Gibbs, President of
9 Content Creators Coalition, artist -- an artist-run
10 advocacy organization.
11 MR. ROSENTHAL: Steve Rosenthal. I am a
12 Director of Antipiracy with McGraw-Hill Education.
13 MS. SCHNEIDER: Maria Schneider, musician,
14 composer, conductor, producer.
15 MS. SCHRANTZ: Ellen Schrantz, Director of
16 Government Affairs and Counsel at the Internet
17 Association.
18 MS. MADAJ: Natalie Madaj, National Music
19 Publishers' Association. I oversee our antipiracy and
20 takedown program.
21 MS. HAMMER: Lisa Hammer. I'm an
22 independent filmmaker and musician.
23 MR. MICHAUD: Mike Michaud, cofounder and
24 COO of Channel Awesome.
25 MR. CARLISLE: I'm Stephen Carlisle, with

1 Nova Southeastern University. I'm their Copyright
2 Officer and responsible for educating faculty and
3 staff on copyright uses and answering all questions of
4 fair use.
5 MS. CHARLESWORTH: Okay. Well, thank you
6 very much and thank you all for being here.
7 The first panel really focuses on the
8 takedown part of the takedown process -- in other
9 words, preparing notices, filing notices and
10 identifying content and so forth.
11 I'll start with a pretty broad question,
12 which is, for those of you who are involved in
13 identifying content and sending notices, how is the
14 system working for you. Okay.
15 I was expecting to see everyone's card up
16 on that one. But okay, so I'm going to start - -
17 forgive me, because sometimes it's hard to see the
18 cards.
19 Is that Ms. Hammer?
20 MS. HAMMER: Yes.
21 MS. CHARLESWORTH: I'm going to start with
22 you --
23 MS. HAMMER: Great, thank you.
24 MS. CHARLESWORTH: And then we'll go around
25 the room.

1 MS. HAMMER: Hi. Lisa Hammer. I haven't
2 even put my film out yet. This is just thoughts.
3 It's only been sent to film festivals and I've already
4 got to do three takedown notices a week just for
5 YouTube alone.
6 MS. CHARLESWORTH: Okay.
7 MS. HAMMER: That's taking up a lot of my
8 time, where I could be actually working on my art
9 instead and it's very time consuming to keep searching
10 for all the torrents that I now have to take down.
11 MS. CHARLESWORTH: Okay. And can you
12 explain a little bit more about how you go about doing
13 that?
14 MS. HAMMER: Well, YouTube alone, I get
15 three a week, maybe four. So I just contact them and
16 ask them to do a takedown notice. And I had to prove
17 to them that it was my -- in fact, my material. And
18 they've been very good about it.
19 But it's very time consuming, just on that
20 platform alone.
21 MS. CHARLESWORTH: And how --
22 MS. HAMMER: -- not to mention all the
23 other platforms, all the other torrents.
24 MS. CHARLESWORTH: Okay. And how do you go
25 about searching for your film, copies of your film

1 online?
2 MS. HAMMER: Well, as I'm editing and doing
3 my work, my partner -- you know, in a very upset
4 fashion -- gets in contact with me and says, oh,
5 there's another one. Can you have them take it down?
6 So she's actually looking for it while I'm trying to
7 get the work done and get the editing done. And she
8 brings it to my attention.
9 So I don't even have time to do that.
10 And then, I initiate the takedown notice.
11 And then, somebody told me the other day to type in
12 the name of my film next to the word "torrent" and I
13 made that mistake this morning. And I found hundreds
14 of them and it's not even released yet.
15 So I'm going to have to be doing that for
16 the next few weeks.
17 MS. CHARLESWORTH: And can I ask, you say
18 you film has not been released. But do you have any
19 idea how copies of the film got out and online?
20 MS. HAMMER: It's possible that when I
21 uploaded them to film festival websites, that there's
22 a leak --
23 MS. CHARLESWORTH: Okay.
24 MS. HAMMER: -- either with Withoutabox or
25 FilmFreeway. I'm not sure.

1 MS. CHARLESWORTH: Okay. Thank you.
2 MS. TEMPLE CLAGGETT: And about how long or
3 how much time do you end up having to spend in terms
4 of trying to police content online?
5 MS. HAMMER: Oh, it's daily. Yeah, it's
6 every day, when I should be editing or singing or
7 writing songs. I'm doing that instead.
8 MS. CHARLESWORTH: Okay. Ms. Madaj?
9 Did I say that correctly?
10 MS. MADAJ: Yeah. So as I said, I'm with
11 National Music Publishers' Association and run our
12 takedown program. For us, the DMCA takedown process
13 has proved time consuming and ineffective, and I work
14 with music publishers. We send takedown notices on
15 behalf of music publishers, both large and small,
16 including those that we've partnered with through the
17 MPA, which represents primarily print music
18 publishers, many of whom report less than $50,000 of
19 annual revenue. So they're not working with a lot of
20 resources to be able to take the time and money that
21 it costs to actually send out these notices on their
22 own.
23 So policing the Internet on behalf of all
24 of these publishers has proved very time consuming.
25 We've had to undertake everything manually. We've

1 looked into automated processes but have been quoted
2 six-figure licensing fees to use such processes.
3 Further, under the Lenz decision, we would probably
4 have to manually review anything that was picked up by
5 an automated process and do a fair use analysis, which
6 probably needs to be done by an attorney, which I am.
7 But for other creators and publishers out
8 there who are not that would like to undertake this
9 process on their own, they would probably have to hire
10 legal counsel to review the notices and sending an
11 order to make that fair use determination.
12 MS. CHARLESWORTH: So NMPA offers this
13 program on behalf of its constituents. And how much
14 staff time or how many resources -- what is the
15 resource level committed to the program?
16 MS. MADAJ: Yeah, so the resource level is
17 fairly low. I am the only attorney in the office
18 that works on the program and we have one intern who
19 will help me pull URLs since, like I said, we're doing
20 that all manually and she spends a lot of her time
21 just searching the Internet for infringement uses.
22 MS. CHARLESWORTH: And this is -- I'm sorry
23 -- you said for print uses or --
24 MS. MADAJ: So for print uses, for -- we
25 partner with the MPA, which is the print music

1 publishers. So we look for sheet music either in
2 printing arrangements or reproductions of copyrighted
3 arrangements online for them. And then, we also, on
4 behalf of the other music publishers who focus mostly
5 on pop music, and not just print music, we look at
6 mobile apps, streaming services, online, lyric sites,
7 all that.
8 MS. CHARLESWORTH: Okay. Thank you.
9 MS. TEMPLE CLAGGETT: One quick question.
10 MS. CHARLESWORTH: Oh.
11 MS. TEMPLE CLAGGETT: So what level -- what
12 is the volume of notices that you typically have to
13 send out?
14 MS. MADAJ: Well, for example, for one of
15 the sheet music sites, and this is going to sound very
16 small in comparison to a lot of the other people who
17 do have the resources to use the automated processes,
18 but for one service called musescore.com, which is
19 primarily sheet music, we've sent 54 takedown notices
20 with over 13,000 URLs. And they still haven't shut
21 down or implemented any sort of repeat infringer
22 policy.
23 But unfortunately, we just don't have the
24 resources at this point to actually file a lawsuit, so
25 --

1 MS. CHARLESWORTH: Okay. Ms. Schrantz?
2 MS. SCHRANTZ: Yeah. Ellen Schrantz,
3 Internet Association. We represent both platforms and
4 creators. Alliances between those industries have
5 worked quite a bit in recent years. And so, in our
6 view, with all of our companies, some of what we're
7 talking about I think with this question in fact
8 indicates robust success. And I say that because
9 we're turning to the topic of 512.
10 The most fundamental point I think is
11 without that law, creators and long-time owners would
12 not have an expeditious system for removal.
13 They would still be faced with the task of
14 identifying infringing content, except without 512,
15 there wouldn't be that expeditious process to get
16 platforms to take it down. You'd have to get an
17 attorney and face a much longer, more costly process
18 to protect your content. And so, 512 has allowed that
19 and the volume of notices is in fact an indicator of
20 that success creators are using.
21 MS. CHARLESWORTH: Well, excuse me --
22 I mean, but 512 also has safe harbors,
23 right? So if the safe harbor is removed, the whole
24 ecosystem might be a little different, wouldn't it?
25 MS. SCHRANTZ: You mean in terms of how

1 platforms respond?
2 MS. CHARLESWORTH: Yes.
3 MS. SCHRANTZ: It would --
4 MS. CHARLESWORTH: I mean, how they respond
5 to the whole -- in other words, 512 is a two-part
6 system, right? There's the takedown system and
7 there's the safe harbor. So --
8 MS. SCHRANTZ: There is, absolutely.
9 It's compromise and it's a shared
10 responsibility.
11 And I think that that's a more important
12 point to be made. But I think that when we talk about
13 the removal of infringing content, we're talking about
14 512. And our point is only that without 512, an
15 expeditious system would not exist and in fact the
16 system would be much worse. And what we have now
17 under the shared responsibilities is high incentives
18 for participation and a collaborative relationship.
19 And that should be protected and encouraged.
20 MS. CHARLESWORTH: Yeah. Okay. Thank you.
21 Ms. Schneider?
22 MS. SCHNEIDER: Maria Schneider. So I face
23 all different kinds of infringement. It's mostly my
24 recordings. But it's other groups performing my work,
25 my printed music, instructional videos that I sell on

1 my site that end up on various sites. So all the
2 different kinds of infringement that I face. So
3 there's the issue of things going up again, you know,
4 the whack-a-mole game.
5 There is the issue of things showing up on
6 torrent sites where I have no DMCA -- there's nothing
7 I can do about it. There's the issue of foreign sites
8 that -- there's nothing I can do.
9 There is the issue of sites that in order
10 to check and make sure I'm doing a correct takedown,
11 that I've got to check the download and face the
12 possibility of getting infected by a virus. You
13 know, there's so many things that stack these odds
14 against me.
15 And you know, I would do Content ID on
16 YouTube except they don't accept me because I'm not
17 big enough and because I'm not monetizing or, you
18 know, drinking the purple Kool-Aid of, you know,
19 giving them my entire catalog to monetize.
20 So it's you know, it's an endless game.
21 It's a game that is stacked for us to lose and for
22 other people to make money off of.
23 It's plain and simple. Ask any musician.
24 This is what we're facing on a daily basis. And
25 you know, I hire somebody to help me do this stuff

1 and, you know, I need her to do other things for me.
2 I don't have the time. I don't have the
3 money to keep up.
4 And most of us, honestly, we just give up
5 and we say, okay, I can weigh my life today.
6 Am I going to spend my day doing this or
7 trying to make another piece and try to make some
8 money on that, you know? And it's a sick game.
9 MS. CHARLESWORTH: Okay. Thank you, Ms.
10 Schneider.
11 Mr. Johnson?
12 MR. JOHNSON: Yes. I just wanted to agree
13 completely with Ms. Schneider and completely disagree
14 with Ms. Schrantz. And it's absolutely not working.
15 It's only working for Google and for the people who
16 license music. It does not work for the copyright
17 creator. And I think the problem is that we don't
18 really respect the exclusive right of copyright,
19 whether it's the constitutional Article I or the
20 section 106 exclusive right.
21 And so, I think it's the job of the
22 Copyright Office to protect our exclusive right.
23 And I have a copy of the Digital Millennium
24 Copyright Act here, from a Copyright Office summary.
25 And it just starts off and it says that Title I is the

1 WIPO Copyright Performances and Phonograms Treaties of
2 1998. And so, what we're doing is the DMCA
3 implemented the World Intellectual Property
4 Organization, United Nations rules on copyright, not
5 my exclusive right and not my -- you know, the
6 supremacy of the Constitution, the supremacy of my
7 copyright was not respected.
8 So all we did was implement some European
9 Union, United Nations copyright rules to destroy
10 American copyright. And I think that's the problem.
11 And so, you can talk all you want about safe harbors
12 or the notice-and-takedown.
13 But it's what's behind it. So of course we
14 should -- I think we should abolish 512. We should
15 start putting people in jail from ISPs and from other
16 companies that abuse individual copyright. And I
17 think that's our problem, not notice-and-takedown or
18 safe harbors.
19 MS. CHARLESWORTH: Thank you, Mr.
20 Johnson. Mr. Mopsik?
21 MR. MOPSIK: Yes, thank you. Eugene
22 Mopsik. I think for the image space, which I'm here on
23 behalf of, we're the poster children for whack-a-mole
24 and we -- the number of occurrences and the
25 reappearance of images after notice-and-takedown is

1 startling.

2 A friend of mine who engages regularly in

3 notice-and-takedown said that until recently, in

4 trying to get notice-and-takedown with Google, when

5 they coded their field for putting in the URL, they

6 wouldn't allow you to paste. You had to manually take

7 the very long URL and type it into the space and until

8 very recently, that's the way it was.

9 But actually, it has been changed, much to

10 their chagrin, I'm sure. I agree with the last two

11 speakers. The number -- the amount of resources that

12 photographers have to dedicate to notice-and-takedown,

13 if you wanted to try to adequately police your works

14 on the Internet, this would be a full-time job. And

15 most of our practitioners are one- and two-person

16 studios.

17 They simply don't have the manpower. And

18 most of the time, you're chasing a phantom. You can't

19 even identify who it is you're after.

20 And beyond that, the Lenz decision I think

21 has had a chilling effect on the bringing of notice-

22 and-takedown because our photographers couldn't

23 evaluate fair use prior to that and going forward, I

24 don't see how they stand a chance. And then, even

25 when you do identify the infringing uses, there's no

1 adequate means of recourse for visual artists to take
2 because there's no small claims alternative at this
3 time.
4 MS. CHARLESWORTH: Okay. Thank you.
5 MS. TEMPLE CLAGGETT: I had a quick follow-
6 up question for you, Gene. As you know, the Copyright
7 Office has looked at the issues of copyright law
8 affecting visual artists I think in some detail. Is
9 there something unique about visual art or visual
10 artists in terms of how section 512 affects your
11 ability to police online infringement?
12 MR. MOPSIK: Well, I think it's the sheer
13 volume. I mean, I have to believe that visual artists
14 create many more works on a daily basis than any other
15 genre. And the ease at which they're abused or taken
16 -- I mean, it's just too easy to, I guess, retransmit
17 and display images without attribution. It's easy to
18 script metadata. And there's no means of enforcement.
19 MS. TEMPLE CLAGGETT: Thanks.
20 MS. CHARLESWORTH: Ms. Coleman?
21 MS. COLEMAN: Good morning. My name is
22 Alisa Coleman, ABKCO Music & Records. For us, we feel
23 that section 512 is broken, that we spend way too much
24 time trying to figure out ways to find where our
25 content is being used in the wrong manner in order to

1 go after it. We have to come up with alternate
2 methods. We're a small office, a small company with
3 valuable content. And we have to download apps to see
4 if people are using our content.
5 We have to search through NOIs to see if
6 there's a correlation between our compositions and
7 international recordings that are being illegally
8 imported digitally. There's a whole host of things
9 that we have to do, that we have two people working on
10 almost constantly in order to place and protect our
11 property for the writers and for the artists.
12 MS. CHARLESWORTH: And can I ask -- I mean,
13 do you find the effort yields sufficient returns to
14 commit those resources?
15 MS. COLEMAN: No, not necessarily because
16 as soon as we're taking something down, it's popping
17 back up somewhere else. It's a constant battle,
18 constantly.
19 MS. CHARLESWORTH: Okay. Thank you.
20 Mr. Burgess?
21 MR. BURGESS: Richard Burgess, American
22 Association of Independent Music. I want to say
23 firstly that I thought your Dickens quote was
24 perfectly chosen. And I think that really sums up
25 where we're at. The music industry in general has

1 been through a pretty tough winter over the past 15
2 years. And frankly, it's just starting to turn to
3 spring. Many services are now paying reasonably well.
4 And we're starting to see where streaming can actually
5 really make the industry recover. As you probably
6 know, we're way, way below the numbers we were at 15
7 years ago.
8 But because we have this one service out
9 there in particular that hides behind -- cynically
10 hides behind section 512 notice-and-takedown, we
11 really just cannot control our content, our works to
12 the extent that we need to in order to be able to
13 build a good business again. And from -- we represent
14 hundreds of independent labels and of course many more
15 hundreds of artists and their content.
16 And I would say that most, if not all of
17 our labels have just really given up sending takedown
18 notices. We have labels with 250 staff and we have
19 labels with five staff who are clearly at the lower
20 end, who simply do not have the resources to be able
21 to send these notices and to be able to police those.
22 But even if you do, it is the whack-a-mole game that
23 you talk about. You just simply cannot win.
24 And it's particularly shocking when the
25 worst abuses are coming from a company that has the

1 technological resources to solve this problem without
2 question and you can see that with the way in which
3 they deal with pornography and things like that. So
4 it's completely broken, I think.
5 You know, we all understand why the DMCA
6 was written and what was good about it. And I think
7 it could still be good if it wasn't being used so
8 cynically. But therein lies the problem. So we need a
9 notice-and-stay-down, not notice-and- takedown at this
10 point.
11 MS. CHARLESWORTH: Okay. Thank you, Mr.
12 Burgess. Ms. Robinson?
13 MS. ROBINSON: Good morning. Deborah
14 Robinson, Viacom. Can you hear me okay?
15 MS. CHARLESWORTH: Yeah. I mean, if you
16 want to pull the mic a little closer, that might be
17 easier for you. Oh, it doesn't? Oh, I'm sorry. We
18 can hear you.
19 MS. ROBINSON: All right. So like I said,
20 Deborah Robinson, from Viacom. At Viacom, we're a
21 company that thrives on fan engagement.
22 So online is important to us and yet, still
23 we spend a lot of time and resources and money to work
24 on the problem. I think I'm repeating some of the
25 things of the other panelists when I say that we have

1 to -- we have to use multiple people. We have to use
2 vendors. We have to take corrective measures. We
3 have to take reactive measures and that's a problem in
4 both the manual and automated processes.
5 I think it's fair to say that in the last
6 12 months, there -- our takedown notices have been in
7 the millions. And with that said, we focus on full-
8 length content. And so, if our focus was somewhere
9 different, the numbers might be higher. I think one
10 of the panelists mentioned a collaborative
11 relationship. I think that there's room to be
12 collaborative if we work together on new technologies
13 and in both sides coming together to work on
14 technologies that would help in the filtering or
15 takedowns -- or not just takedowns, but takedown and
16 stay-down.
17 MS. CHARLESWORTH: Can I ask a question?
18 Did you say that you have both automated
19 processes and processes involving human review?
20 MS. ROBINSON: Yeah.
21 MS. CHARLESWORTH: Can you sort of give us
22 a little bit more of a flavor of, how much of your
23 takedown effort is automated versus human review and
24 what the interaction or intersection is between the
25 two?

1 MS. ROBINSON: Right. So I'd have to say
2 that there's an absolute intersection and I'm glad you
3 mentioned that because even though we have automated
4 processes, a lot of those processes require the second
5 level as well of a manual approach. So we spend a
6 great deal of time, depending on what kind of content
7 it is, manually looking for content. And we spend a
8 great deal of time manually looking at content once
9 the automation has gone into play. So it's often not
10 just automated, but it's automated plus manual.
11 MS. CHARLESWORTH: So is it fair -- is it a
12 system where you do like a first cut through an
13 automated process? And then are those finds, as it
14 were, sent for human review? Is that how it works?
15 I'm just trying to get a general sense, as much as you
16 can share.
17 MS. ROBINSON: Yeah. So oftentimes, yes,
18 there is a -- like you said, a first process in
19 automation and then it's sent to a queue where there
20 is human review involved.
21 MS. CHARLESWORTH: And what kind of
22 resources does Viacom commit to the entire takedown
23 process?
24 MS. ROBINSON: So we spend a great deal of
25 money, a great deal of time and not just on staff

1 accounts but also multiple vendors to combat the
2 problem.
3 MS. CHARLESWORTH: Okay.
4 MS. TEMPLE CLAGGETT: And just as a follow-
5 up, you mentioned that you focus more on full-length
6 content. Is that because of the time or resources
7 that are necessary that you'd need to prioritize that
8 type of illegal content as opposed to potential
9 content that might still be improper or illegal but
10 isn't a full- length film or something or a television
11 show?
12 MS. ROBINSON: So I think it's two-pronged.
13 I mean, we focus on full-length content because we
14 want to be fair and we believe in, you know, our fans
15 first. And we think that focusing on full-length
16 content also provides a fair breadth to fair use. And
17 quite frankly, it takes a lot of time to focus on
18 content other than that because there's a manual
19 review process involved.
20 MS. CHARLESWORTH: Okay. So, and by that,
21 you're referencing fair use review, for example.
22 MS. ROBINSON: Right.
23 MS. CHARLESWORTH: Okay. Mr. Band?
24 MR. BAND: I'm Jonathan Band. I'm
25 representing Amazon. So Amazon is on multiple sides

1 of this issue. Amazon now creates content that it
2 distributes, award-winning content, won a couple Emmys
3 last year. It provides a platform for others to
4 distribute content. It also is a Web-hosting service.
5 It has Amazon Web Services, which is one of the
6 leading cloud-service providers. So it receives
7 takedown notices. It sends takedown notices and has
8 sort of, by being on all sides of the issue, it feels
9 like the system is working.
10 It's a reasonable compromise. Yes, it's
11 burdensome to have to identify infringing content when
12 Amazon has to go out and find places that are
13 infringing its content and deal with it. On the other
14 hand, it's burdensome to have to respond to takedown
15 notices. But in Amazon's view, it's better than any
16 possible alternative. And so, overall, the view is
17 that it works.
18 Also, focusing on small creators, Amazon
19 feels that it has a system in place that works
20 efficiently and effectively for small creators who
21 feel that their content is being infringed on one of
22 Amazon's platforms and it believes that it responds
23 expeditiously to those takedown notices.
24 Also, the balance that is provided by the
25 DMCA allows Amazon to offer through its Amazon Web

1 Services the infrastructure that allows small startups
2 to provide streaming services -- we heard about
3 streaming services. I mean, those -- now, they're
4 large companies. But they started as small companies.
5 But Amazon provides the infrastructure which allows
6 those new distribution models to exist and flourish,
7 to get off the ground, you know, without the DMCA
8 framework, those services perhaps would not be able to
9 exist or Amazon wouldn't be able to enable those
10 services to take advantage of Amazon's infrastructure.
11 And so, ultimately, you know, it's the
12 business models. New business models are the roadway
13 out of this situation. And the DMCA gives a framework
14 that enables those business models to exist.
15 And just one last point, sort of not on
16 behalf of Amazon but in my capacity representing other
17 clients, I represent a university press.
18 And sometimes some of its publications are
19 posted online without authorization. And the DMCA is
20 amazing. I mean, I just -- you know, the client says,
21 okay, this book is appearing on such and such a
22 website without authorization. I send a takedown
23 notice and, you know, the next day it's gone. And so,
24 you know, the client thinks I'm brilliant.
25 But the point is I don't want them to know

1 how easy it is for me to do this for them because they
2 really could be doing it themselves. But the point is
3 that for that -- certainly in that context, where you
4 have academic content that's being posted online, it
5 works incredibly well, the notice-and-takedown system.
6 Thank you.
7 MS. CHARLESWORTH: With your Amazon hat on,
8 how much -- like what level of resources of Amazon are
9 committed to locating infringing content? What kinds
10 of content is Amazon concerned with in terms of
11 infringing content and how is it identified and is it
12 a manual process? Does Amazon use automated tools?
13 MR. BAND: Well, so Amazon now, through
14 Amazon Prime, is distributing original video content,
15 among other kinds of content. And it also is -- has
16 its own publish -- you know, it publishes content as
17 well. So that's the kind of content that -- and
18 especially the video -- that's the kind of material
19 that it's looking for in trying to identify infringing
20 activity.
21 In terms of resources, I'll have to get
22 back to you. I'm not familiar with the amount of
23 resources they spend and exactly what the nature of
24 the process is.
25 MS. CHARLESWORTH: Okay. Thank you.

1 MS. TEMPLE CLAGGETT: And I had just a
2 quick follow-up. Putting back on your other hat in
3 terms of what you mentioned for your academic clients,
4 you thought that the process was really easy for you
5 to do. It didn't require a lot of resources.
6 Is this something that's unique to academic
7 clients in terms of the volume that is necessary or
8 the volume that you see in terms of infringing
9 material that you would have to address through the
10 DMCA? Is there something different about academic
11 clients as opposed to some of the other content that
12 has been discussed previously today?
13 MR. BAND: Well, that's a good question.
14 I mean, the copyright system touches many,
15 many different kinds of works and there's many, many
16 different kinds of creators. And so, you know,
17 certainly academic works are not in as much demand as
18 Taylor Swift. Maybe that's a sad thing. But that's -
19 - I think that's the case
20 MS. CHARLESWORTH: Unfortunately.
21 MR. BAND: And so, you don't necessarily
22 have as many sites that would be infringing -- or I
23 mean, in terms of the number of works, it might
24 actually be a much larger number of works total.
25 But the number of sites might be smaller.

1 And so, it could be easier to target when you're
2 dealing with that kind of content. But again, you
3 know, they're copyright owners like anyone else.
4 MS. TEMPLE CLAGGETT: Thank you.
5 MS. CHARLESWORTH: Okay. Mr. Kaplan?
6 MR. KAPLAN: Yes. I'm David Kaplan.
7 I'm from Warner Brothers. I have been at
8 the studio working in this space for almost 20 years.
9 I wanted to echo what Deborah had said
10 about focusing on full-length content. I would say
11 over -- you know, overwhelmingly, almost all of the
12 work that we focus on -- with respect to enforcement
13 is focused on full-length content and we handle TV,
14 interactive games, and films.
15 The only exception I can really think to
16 that is in situations where we're talking about pre-
17 release content, so content that hasn't actually been
18 released on any type of platform.
19 Should, you know, something appear online,
20 it wasn't the full thing but it's something that's,
21 you know, a key part of it, no one's ever seen it, we
22 would in that situation being something that was less
23 than the full episode or film.
24 But otherwise, it's really focused on full-
25 length content for the reasons that Deborah mentioned.

1 I would say that my experience dealing with 512 has
2 been that over the last several years, we've seen an
3 increase in efficiency in terms of platforms making it
4 easier to submit notices, submit notices in bulk,
5 faster response times.
6 But there hasn't been an equal emphasis on
7 efficacy. So I would argue that the fact that you
8 have millions of notices submitted isn't necessary a
9 measure of the system working. It could actually be
10 an indication of the system not working because I
11 think that, as four people already say, the words
12 whack-a-mole, that could become a mantra I think for a
13 lot of the content owners who are speaking today. I
14 take the point that there are some situations for
15 which the DMCA seems to work super well. Oftentimes,
16 that's -- you know, the edge case, we were able to put
17 the genie back in the bottle because nobody was really
18 that interested in looking at your work in the first
19 place. So that has happened.
20 I can think of some isolated examples where
21 we were sort of able to get a piece of content off and
22 it was pre-release but so far, you know, nobody was
23 really looking for it. We were able to send a DMCA
24 notice and get it taken down quickly enough so that it
25 didn't proliferate. I can think of one or two

1 examples in 20 years where that's been the case. When
2 you're dealing with popular content, it spreads like
3 wildfire. So I always tell people we can try to --
4 you know, make it less accessible. But essentially
5 it's out. And once it's out, it's going to
6 proliferate widely.
7 So I think we need to focus on measures
8 that result in the stay-down piece as opposed to just
9 simply the takedown piece. For us, that would be key.
10 In terms of how many notices we send, we send millions
11 of notices.
12 Last year, we sent about 25 million. Only a
13 tiny portion of those -- I know that there was some
14 focus on the number of notices that Google receives
15 with respect to, for example, Search.
16 Only about 1 or 2 percent of notices we
17 sent were Search-related notices last year. The vast
18 majority were not.
19 In terms of use of automated tools, it's
20 kind of always a mix, frankly. There's human review
21 or, you know, human processes in the setup of the
22 automation that's going to be used. So in every kind
23 of case, there's different ones from whether you're
24 talking about peer-to-peer, whether you're talking
25 about streaming sites, hosted sites, Search. There's

1 almost always a combination of the technology used,
2 some automation used as well as a human review as
3 well.
4 MS. CHARLESWORTH: And as part of -- it
5 sounds -- do you set parameters for the automatic
6 search functions, or the automatic identification
7 tools?
8 MR. KAPLAN: Sure. So it depends on
9 exactly what specific part of online piracy we're
10 talking about. But for example -- well, with respect
11 to Search, the vendor -- and I should say also that we
12 do this through a combination of in-house resources as
13 well as probably half a dozen or really more outside
14 vendors because some specialize in very niche parts of
15 online piracy that maybe have expertise only in
16 certain specific countries. So probably we've got
17 anywhere from 6 to 10 vendors helping us to address
18 the problem.
19 MS. CHARLESWORTH: And is it a worthwhile
20 effort, investment of company resources to engage in
21 those processes?
22 MR. KAPLAN: Well, to a certain extent it
23 is. I mean, our focus is always on trying to sort of
24 differentiate what would hopefully be a clean,
25 legitimate experience for online consumption versus

1 what we would consider the illegitimate pirated
2 experience of online consumption.
3 So there's a number of ways to do that.
4 But one way is to try to make sure that
5 when people click on links, that the content that they
6 think they're going to get is actually not there, if
7 they're going to a pirate site. So to the extent
8 we're able to inject some friction into the system, it
9 works to our benefit. I just don't think -- we have
10 had some success in that area.
11 But you know, certainly not as much as I
12 would have hoped.
13 I think there's a lot more that can be done
14 and I think the key is going to be the stay- down
15 piece. We've seen situations where pirate businesses
16 are particularly adept at stacking URLs, if you will,
17 so that essentially the user experience is
18 continuously positive. If you're, you know, clicking
19 on certain links from certain sites, because the hosts
20 invariably have a version of that film, let's say, or
21 TV show available almost continuously. So even if you
22 take one down, another URL kind of like immediately
23 switches to be in its place and platforms just need to
24 be I think more adept at preventing that kind of abuse
25 of the system for us to have any chance of the

1 takedown process be effective.
2 MS. CHARLESWORTH: And when you have that
3 situation with stacked URLs, are you able to see into
4 the next one down the stack? In other words, your
5 takedown notice would address the one that's the top
6 of the stack, as it were.
7 MR. KAPLAN: Right.
8 MS. CHARLESWORTH: Is there any visibility
9 into what else is in the stack?
10 MR. KAPLAN: Not at that exact same time.
11 But if you continue to search, then you see the next
12 one pop up.
13 MS. CHARLESWORTH: So after it's taken
14 down, just -- I just want to make sure I'm clear on
15 this. After the first URL is taken down, the next one
16 is -- is it automatically replaced or --
17 MR. KAPLAN: It appears -- it appears that
18 there must be some sort of like automation because
19 it's happening so quickly that it can't be like a
20 person that's actually manually switching to a
21 different URL. Because it's almost instantaneous.
22 MS. CHARLESWORTH: And how -- I mean, you
23 may not have an answer for this. But how prevalent is
24 that phenomenon, like in your experience taking down I
25 guess full-length film content?

1 MR. KAPLAN: I would say becoming
2 increasingly prevalent.
3 MS. TEMPLE CLAGGETT: And so, does -- in
4 terms of the process then -- does this mean that you
5 just send out another notice for the same content but
6 it might be identifying a different URL?
7 MR. KAPLAN: Yes.
8 MS. ISBELL: And one more follow-up.
9 You mentioned that only 1 to 2 percent of
10 your notices are sent to Search. Are there particular
11 other platforms or types of services that receive the
12 majority of your notices?
13 MR. KAPLAN: So of the 25 million that we
14 sent last year, about close to 17 million were to ISPs
15 related to peer-to-peer infringements.
16 About 5 million or so were to hosting sites
17 that were where you could download the content. And
18 about 3 million were to sites from which you could
19 stream the content, hosted sites from which you could
20 stream the content.
21 MS. CHARLESWORTH: I'm sorry. I have one
22 more follow-up on this stacking issue. Has that ever
23 come up in discussions with some of the large online
24 service providers? Has there been any discussion
25 about how to address that phenomenon in a more

1 efficient way?
2 MR. KAPLAN: Yes.
3 MS. CHARLESWORTH: Is there anything you
4 can share? I mean, we have more panels where we'll
5 talk more about that. But has there been any progress
6 made on that front?
7 MR. KAPLAN: We have flagged that issue.
8 Unfortunately, it's largely a black box on
9 the other side. So the information is taken in and
10 we're often told that they're going to look at the
11 issue and see if they can do something about it,
12 possibly, you know, along the lines of making it more
13 difficult for people to have, you know, hundreds of
14 different accounts from which they can rotate, you
15 know, from one to one to one. If one gets shut down,
16 they can immediately go to another one. But despite
17 talking about this issue for quite some time now, the
18 better part of, you know, a year or two, we haven't
19 really seen progress.
20 MS. CHARLESWORTH: Okay. Thank you.
21 MS. TEMPLE CLAGGETT: Just to follow up on
22 that, in terms of progress to see if there's some way
23 to -- I mean, I think earlier Deborah might have
24 mentioned collaboration and communication. Are there
25 incentives or disincentives in terms of the 512 regime

1 in terms of encouraging that type of communication or
2 collaboration?
3 MR. KAPLAN: I think as 512 currently
4 stands, there's a disincentive for platforms to really
5 take what would be effective actions to address that
6 situation.
7 MS. TEMPLE CLAGGETT: And why, I guess, in
8 terms of why you think that there are disincentives?
9 MR. KAPLAN: Because they don't feel that
10 there's any kind of liability coming on their side
11 from failure to do so.
12 MS. TEMPLE CLAGGETT: Thanks.
13 MS. CHARLESWORTH: Okay. We've grilled you
14 enough, Mr. Kaplan. We're moving on to Ms.
15 Garmezy.
16 MS. GARMEZY: Garmezy.
17 MS. CHARLESWORTH: Garmezy, Garmezy. I
18 apologize for mispronouncing your name.
19 MS. GARMEZY: No. No problem. A common
20 occurrence all my life. We're obviously concerned
21 about this issue for all our members. Luckily, some
22 of our members enjoy the resources of the studios and
23 their efforts, those who are doing bigger films.
24 But our independent directors have none of
25 those resources and the often own their own copyright

1 and have all of the same problems that others here
2 have noted. They usually find out that their film has
3 been pirated by somebody they know telling them
4 because they don't have the resources or anything
5 automated to do any kind of searching for them. They
6 don't usually have lawyers. Sometimes they resort to
7 having a lawyer look into it.
8 But the problem of the content reappearing
9 right away is very discouraging to them. And we would
10 emphasize how important the stay-down is. And a final
11 comment that -- you know, because I don't want to echo
12 everything that everybody said, but that may not
13 always be mentioned, but that's been experienced by a
14 number of our independent directors is everybody
15 thinks of the sites that they're going to and asking
16 them to take down as being the Googles and the larger
17 sites.
18 Well, sometimes they aren't, and in fact
19 sometimes our members are threatened and threatening
20 statements are made to them and threats are made to
21 them. We've even had some who've had notices --
22 threatening notices left on their door.
23 So I think it's important to remember that
24 not every site is a big aggregator, that it will be
25 maybe very difficult to get your work off of but

1 they're not going to be threatening. There are sites
2 who take very seriously wanting to keep themselves in
3 business and are very threatening about every effort
4 to take it down. That too is incredibly discouraging.
5 And obviously worrisome to our members who are trying
6 to get their works taken down.
7 MS. CHARLESWORTH: I saw in the comments
8 that in some cases the online provider may forward
9 contact information, sometimes personal, for an
10 individual creator. Is that how -- in your
11 experience, is that how the threats are being
12 communicated, because of the takedown process, or is
13 it outside of that process?
14 MS. GARMEZY: No. It's because of the
15 takedown -- at least, from what we know is anecdotal
16 from our members. But it's within the takedown
17 process that it happens.
18 MS. CHARLESWORTH: So the poster receives
19 the personal information, then uses that to issue a
20 threat. Is that correct?
21 MS. GARMEZY: Right.
22 MS. CHARLESWORTH: Okay.
23 MS. GARMEZY: That's correct.
24 MS. CHARLESWORTH: And what is the nature
25 of the threats?

1 MS. GARMEZY: I know where you are.
2 Don't try. I'm not going to take your film
3 down.
4 I know where you are. Don't try to bother
5 me again. That kind of thing.
6 MS. CHARLESWORTH: Okay. Thank you.
7 Ms. Pilch?
8 MS. PILCH: Is this on? It's on.
9 MS. CHARLESWORTH: Yes.
10 MS. PILCH: Janice Pilch, Rutgers
11 University Libraries. I need to offer a disclaimer
12 that the comments I make today are my own opinions and
13 they're not based on the views or official positions
14 of Rutgers University or of any library association.
15 Even when one works in a university in
16 which people rely heavily on the availability of
17 copyrighted works for education, scholarship and
18 research, I would say that it is quite obvious that
19 there is a serious problem with section 512.
20 One of the main problems we have at the
21 university is that of user-generated, so- called
22 course learning platforms, sites that pride themselves
23 on being revolutionary methods for learning but seem
24 really just to be making money from infringed academic
25 content.

1 This affects instructors who use their own
2 course materials and other copyrighted works in
3 certain limited contexts to teach, like in course
4 management systems. And then, they find the material
5 up on the open Internet. They usually find out by
6 accident because they're not doing searches on this.
7 Material most often has been uploaded by their
8 students into user- generated sites that aggregate and
9 monetize course material.
10 And the instructors often find themselves
11 unable to take the material down. It affects their
12 ability to reuse their own course material, requiring
13 reinvention of courses every semester, exams, quizzes,
14 et cetera so that the students won't be cheating. And
15 there's a serious loss of credibility when an
16 instructor becomes associated with infringed content.
17 I know many faculty members who have had a
18 difficult time dealing with these sites and many can't
19 really understand how the law would allow these sites
20 to operate. They're kind of shocked when they find
21 out about it. The time and effort to formulate the
22 takedown notices takes away valuable time from their
23 academic work and instruction. They may not file
24 notices on third- party works.
25 Representative lists are not generally

1 accepted. The sites may refuse to take the works down
2 or may lend them to other sites if they're taken down
3 on the original site. As I said, the sites often
4 undermine instructors' efforts in providing course
5 material. And exams need to be redeveloped.
6 I would say also, to emphasize that the
7 process for -- it's not too easy for ordinary faculty
8 members and instructors to navigate the process of
9 takedown, how to construct a notice, how to contact a
10 service provider. Many sites don't list a designated
11 agent. Contact information is not made available. It
12 takes hours, days, even weeks in a kind of context of
13 anxiety and doubt as to whether the process will even
14 succeed. And often it does not succeed.
15 Beyond that, we have the issue of
16 commercial so-called scholarly networking tools that
17 aggregate and monetize scholarly works, mainly
18 articles and book chapters through user- generated
19 uploads that are often infringing. And then, there
20 are the pirate sites like Sci-Hub, of over 147 million
21 scholarly articles this particular site describes
22 itself as the first pirate website in the world to
23 provide mass and public access to tens of millions of
24 research papers.
25 So people are struggling even in

1 universities where we generally appreciate the
2 availability of copyrighted works. We're struggling
3 with how to deal with notice-and- takedown.
4 MS. CHARLESWORTH: Can I ask you a
5 question? I notice in some of the comments there was
6 reference to the HEOA. Are you familiar with that,
7 the --
8 MS. PILCH: I am familiar with that.
9 MS. CHARLESWORTH: -- which is a set of
10 standards applied under federal law to universities in
11 terms of educating. This is a little apart from what
12 you were saying. But since -- picking on you, since
13 you're in that environment, it's a standard -- they're
14 standards about educating students and about copyright
15 and so forth and plans for addressing online
16 infringement. And I'm wondering do you have any
17 experience with that and, if so, do you view it as
18 helpful in terms of the university environment?
19 MS. PILCH: Well, that law requires
20 universities to establish copyright policies, among
21 other things. And generally speaking, universities
22 have done that. And my own university has a copyright
23 policy and a copyright website. But the extent to
24 which people read the website, to the extent that we
25 can reach, through outreach, everyone in the

1 university on how copyright law works, that's a
2 different story.
3 But it -- my emphasis in the comments that
4 I just made were not on infringement -- well, by
5 faculty members, perhaps by students. But I should
6 say that often -- often I think students don't realize
7 that what they're doing is wrong.
8 And so, we do need more education, I would
9 say an emphasis on more copyright education at
10 universities would be a good thing.
11 MS. CHARLESWORTH: Okay. Thank you.
12 MS. TEMPLE CLAGGETT: And I have two really
13 quick follow-up questions. Maybe you can just address
14 together. One is just this is kind of a unique
15 perspective because we hear often about the major
16 entertainment content that is online and dealing with
17 the DMCA in that type of context. But this is a
18 different perspective.
19 So do you have any idea in terms of the
20 scope of the problem in terms of academic content,
21 one? And then, two, do universities themselves help
22 assist their faculty in terms of being able to send
23 the DMCA notices or is this primarily something that
24 is all on the individual professor to have to try to
25 address?

1 MS. PILCH: I can speak only for my own
2 university, and I don't have statistics, in part
3 because I don't hear about all these situations.
4 Questions might come and go to the
5 university counsel's office. They might come to me.
6 They might come -- or go to some other administrator.
7 It's hard to say how many instances there
8 are, you know, of situations like this.
9 But I can say that when it happens, people
10 tend to be very upset and it comes a burdensome and
11 time-consuming process for them.
12 And again, people are very, very surprised
13 that the law allows this kind of aggregation and
14 monetization of faculty works to be made.
15 MS. TEMPLE CLAGGETT: And does the
16 university itself -- as some of the other panelists
17 noted, they get together and either have organizations
18 that send notices on their behalf -- is there anyone
19 in the university that you would be able to go to as a
20 faculty member to say, look, I think that my content
21 is out there. Can you send the notice for me? Or
22 again, is this something that the individual faculty
23 member has to typically handle themselves?
24 MS. PILCH: In my experience, they can go
25 to the university counsel's office. They can go to

1 the IT department or they can come to me.
2 But they do have to construct the notice
3 themselves.
4 MS. TEMPLE CLAGGETT: Thanks.
5 MS. CHARLESWORTH: Thank you. Ms.
6 Sheckler?
7 MS. SHECKLER: Vicky Sheckler, with
8 Recording Industry Association of America. To your
9 point about Google receiving almost a billion notices,
10 in our view, that is an indication of failure of the
11 DMCA. We have sent over 175 million notices in the
12 past three years to a variety of entities that claim
13 DMCA status, or DMCA safe harbor status. And yet, we
14 continue to see our members' works show up again and
15 again and again on these sites. To give you some
16 examples, in 2014, we sent about 278,000 notices to
17 one site that claims DMCA safe harbor. Ninety-four
18 percent of those were for content that had previously
19 been noticed to that site.
20 MS. CHARLESWORTH: Are you running into
21 this stacked URL problem, do you think or do you know?
22 MS. SHECKLER: Absolutely we are. And I
23 even had one, you know, considered legitimate service
24 provider tell me that they did have several URLs from
25 different -- these are going to the same piece of

1 content and if we sent a notice for one of those URLs,
2 they would not take down the others because those
3 others might have authorization. And from our
4 perspective, we don't know who the user is that put
5 that content up. We just know that we did not
6 authorize that content to be up on that site.
7 MS. CHARLESWORTH: Okay. So that raises an
8 interesting question because one of the sort of themes
9 that I saw from the people who were responding to the
10 notice is that, especially in an automated process or
11 in -- I guess we'll get into this a little more in the
12 stay-down, but you might -- a full-length work might
13 be authorized to be posted by someone and not by
14 someone else. How do you manage that issue of who's
15 licensed and who's not in terms of your takedown
16 protocol?
17 MS. SHECKLER: At RIAA, we focus primarily
18 on full-length works. And so, we work with our member
19 companies on a daily basis to review sites, review
20 sites mainly to determine that yes, they are in our
21 view a full-scale infringing site, shouldn't have the
22 benefit of the DMCA. But they claim it nonetheless.
23 And then we send them that site. So we do check in
24 with our labels on whether a site has been authorized
25 or not regularly.

1 MS. CHARLESWORTH: Okay. Thank you.
2 I'm going to go through the last three
3 here. And then, I'm looking at the time and I'm going
4 to put out another question or two questions for the
5 group. But we'll finish up over here and then I'm
6 going to pose a couple more and hopefully we can move
7 pretty quickly through the other topics so we can get
8 to everyone. Ms. Aistars?
9 MS. AISTARS: (Off mic.)
10 MS. CHARLESWORTH: Oh, did you? Oh, I'm
11 sorry. You put your sign down. I'm sorry.
12 MS. SHAFTEL: Lisa Shaftel. Excuse me,
13 Lisa Shaftel, Graphic Artists Guild. I'd like to
14 reiterate a number of the points that Maria Schneider
15 and Gene Mopsik made about individual creators. And I
16 won't restate them. But from my observation, I think
17 that the most infringed works on the Internet are
18 music and images.
19 There are websites that exist solely for
20 the purpose of infringing music and images, such as
21 Pinterest. And we have all seen the flood of cartoons
22 that are infringed online. And everybody in this room
23 has made infringing use of cartoons they thought were
24 funny or cute and passed them around to friends,
25 posted them on social media, used them in a business

1 situation. So the artists are really getting
2 clobbered in this.
3 Many websites strip the metadata of the
4 images when the images are uploaded. So even when
5 visual creators make the effort to identify themselves
6 in their image files, that data is stripped,
7 especially when uploaded to social media websites.
8 Often the infringers will simply crop the image so
9 that the creator's name is removed from the image or
10 they do the opposite and they include attribution of
11 the artist or the photographer, presuming that if they
12 give attribution to the visual creator, then that
13 makes the infringing use okay.
14 Creators have found that they can't satisfy
15 the requirements from a lot of the ISPs in their
16 takedown notices. In particular, artists have said
17 that many ISPs have required that they prove copyright
18 registration as part of their takedown notice or other
19 means of proving ownership of the image. The majority
20 of visual creators, artists, photographers don't
21 register their works and will not register their
22 works. If they did, the Copyright Office registration
23 system would be absolutely overwhelmed.
24 We create more images daily, as Gene said,
25 than any other creators. So many artists can't

1 satisfy the ISPs' requirement for copyright
2 registration to prove ownership. And even if they --
3 if they don't have copyright registration, how do they
4 prove that they created the image?
5 And even those who have registered their
6 works, the nature of the registration system is the
7 certificate doesn't have a thumbnail of the image on
8 it. So there's the ISP saying, well, you have a
9 registration certificate and it has your name on it.
10 But you can't prove to me that this registration is
11 for the image that's on our website.
12 MS. CHARLESWORTH: Can I --
13 MS. SHAFTEL: So that's a really unique
14 situation that artists and photographers face.
15 MS. CHARLESWORTH: Can I interrupt you - -
16 I'm sorry -- on that point -- to comply with the law -
17 - you can send a takedown notice that you swear or
18 you're authorized to act on behalf of the copyright
19 owner. Are you saying that there are sites that demand
20 more than that?
21 MS. SHAFTEL: Absolutely. They make up
22 their own requirements, especially for images.
23 MS. CHARLESWORTH: And what is -- so is
24 there any pushback on that in your experience where
25 you say, well, this notice complies with the statute?

1 I mean, how does that happen that they're able to
2 impose a higher requirement than the statute requires?
3 MS. SHAFTEL: Who's policing what
4 individual ISPs or web hosts choose to create for
5 their takedown requirements? I mean, even Facebook,
6 their takedown requirements for images are really
7 convoluted. Every ISP has a different process.
8 There's kind of no standardization. And most artists
9 give up. As Maria said, how much time are we going to
10 spend on this every day?
11 MS. CHARLESWORTH: And do some of the sites
12 require -- I mean, I just want to make sure I
13 understand -- require you to submit a copyright
14 registration?
15 MS. SHAFTEL: Some have. Some have
16 required copyright registration to prove ownership of
17 the image --
18 MS. CHARLESWORTH: Okay.
19 MS. SHAFTEL: -- which is not in the
20 takedown-notice requirements. But they have asked for
21 that, you know.
22 MS. CHARLESWORTH: Okay.
23 MS. TEMPLE CLAGGETT: And presumably,
24 adding additional requirements that are not under the
25 DMCA would take you out of the safe harbor. I mean,

1 it has. Are the artists suing the ISPs or hosters who
2 are doing this in terms of adding additional
3 requirements before they will actually take down the
4 content? Is there any situation where you guys are
5 following up with lawsuits or some type of aggressive
6 response to the additional requirements?
7 MS. SHAFTEL: No, no. It's not possible.
8 And for individual creators, especially if the work
9 isn't registered, we have no recourse.
10 You know, and this ties into the need for
11 copyright small claims as well. And as songwriter
12 Rick Carnes said a couple of years ago, that in
13 reality, copyright protection lasts only until the
14 work is posted on the Internet and then it's out in
15 the world.
16 And in reality, it's impossible for an
17 illustrator or photographer to grant a client an
18 exclusive license to use an image online on their
19 website or in conjunction with their business because
20 once that image is online, it's infringed.
21 It's out there.
22 MS. CHARLESWORTH: Okay. Thank you.
23 MS. TEMPLE CLAGGETT: Well, one quick
24 follow-up.
25 MS. CHARLESWORTH: Oh.

1 MS. TEMPLE CLAGGETT: I know that in other
2 contexts people have talked about the fact that there
3 are additional mechanisms, kind of DMCA-plus
4 mechanisms that have been put in place like Content ID
5 in terms of content on particular sites.
6 Have you seen any type of additional
7 measures or licensing mechanisms or any DMCA-plus-
8 type activity in terms of sites that are focused on
9 images, that are hosting images? Is that something
10 that is being developed or in collaboration with those
11 types of sites at all?
12 MS. SHAFTEL: Well, yes and no. There is
13 the PLUS licensing system. But by and large, there
14 are a lot of websites whose entire business model
15 exists to get viewers because of the images on their
16 website. And then, they either sell advertising, they
17 sell the images, there's some other monetization of
18 the website. But the entire purpose of the website,
19 the reason the users come there is to look at the
20 images. And they don't want to comply. This is their
21 business model.
22 MS. CHARLESWORTH: Okay. Ms. Aistars?
23 MS. AISTARS: Thank you. Speaking as the
24 last person speaking for independent artists, a lot of
25 what I would have intended to say has been said by my

1 colleagues on this panel. I'll just emphasize that
2 the artists who we work with are constantly making a
3 decision on a daily basis whether to create or to
4 police and enforce their copyright interests. They do
5 not have the same tools available to them as larger
6 corporate owners of copyrighted works do. They often
7 are not afforded access to copyright-plus, or DMCA-
8 plus-type tools that you mentioned, like Content ID
9 and so forth.
10 There are very varied requirements imposed
11 by websites. There are various additional hurdles
12 that people need to jump through in order to submit a
13 DMCA notice. These are all things that have been
14 discussed among industry participants and individual
15 artists in other contexts. But the situation is not
16 much improved.
17 I will underline one issue which my
18 colleague, Kathy Garmezy, mentioned occurs with
19 directors and in this instance, that one of the
20 photographers, a photojournalist who we interviewed
21 for comments relayed a very similar situation where
22 because of the imbalance of information that's
23 disclosed about the artist when she submits her
24 takedown notice versus what's disclosed about the user
25 who has posted the infringing work. Artists are

1 frequently afraid to send DMCA notices for fear of
2 retaliation.
3 And this instance came up with regard to a
4 noted photojournalist. She works in conflict areas.
5 She was taken captive by Somali warlords.
6 So this is not a meek woman. But her
7 images are often taken and misrepresented as being
8 something that they are not. So for instance, she's
9 taken an image in Kosovo and it's misrepresented by
10 another political group or revolutionary group as
11 being representative of something else. In that
12 situation, she relayed to us that she is fearful of
13 disclosing her personal information to a group that,
14 you know, potentially employs radical tactics because
15 of the fear for her safety and her security.
16 So it's an issue that people don't
17 typically think about or talk about in the context of
18 DMCA takedown notices. But it's actually a reality
19 for at least a certain category of independent
20 artists. And I'll leave it at that.
21 MS. CHARLESWORTH: Thank you. Mr. Flaherty?
22 MR. GREENBERG: If I could ask a quick
23 follow-up question to that?
24 MS. CHARLESWORTH: Sure.
25 MR. GREENBERG: Sorry. This actually came

1 up in a number of the comments, just the concern over
2 personal info and an asymmetry.
3 Should we be requiring less info from
4 submitters and can it be balanced with the concern
5 about inaccurate notices? I wonder if there's a
6 workable solution, that anybody has been discussing
7 ways we could do.
8 MS. AISTARS: So I think there's a lot of
9 asymmetry in terms of how the takedown-notice system
10 works in practice. So for instance, if you are
11 uploading an image, there is typically -- or a
12 copyrighted work of some sort, there's typically not a
13 lot asked of the user. There's no real attempt to
14 educate the user as to what's appropriate or what's
15 not appropriate. Some sites will point you to a page
16 that says, you know, here are our terms of service and
17 our copyright policy.
18 On the flipside, when you're submitting a
19 takedown notice, most sites will, you know, certainly
20 walk you through the requirements of the DMCA takedown
21 notice. Many of them will emphasize the penalties
22 that might be associated with sending an inaccurate
23 notice, the fact that the notice and your personal
24 information will be made publicly available, the fact
25 that the notice will be forwarded on to the Chilling

1 Effects website and so forth.
2 So I think there's an asymmetry in terms of
3 the type of education that we're doing as people are
4 submitting -- are first publishing a work and then
5 submitting a takedown notice.
6 MS. CHARLESWORTH: Okay. Thank you.
7 Mr. Flaherty, you've been very patient, all
8 the way at the end of the line.
9 MR. FLAHERTY: Thank you. Patrick
10 Flaherty, from Verizon. I also wanted to say that
11 Verizon is also a copyright owner. And we send DMCA
12 notices. And as we get more and more into content
13 through acquisitions like AOL or news services like
14 Go90, all we find is that for the notices that we do
15 send, that they're acted upon quickly and when the
16 content does come down, it usually doesn't reappear.
17 Our biggest concern relates to just the
18 over-volume of conduit invalid notices that we receive
19 related to peer-to-peer file sharing and the many
20 millions and millions and millions we receive from
21 companies like Rightsorp. It just makes it more hard
22 for us to respond to legitimate takedown notices and
23 in some instances have even crashed our email server.
24 MS. CHARLESWORTH: Okay. Now, are you
25 saying that if someone sends you a notice indicating

1 infringement on P2P, that that's not a legitimate
2 notice in your view?
3 MR. FLAHERTY: Correct.
4 MS. CHARLESWORTH: And why is that?
5 MR. FLAHERTY: There's no takedown
6 capability.
7 MS. CHARLESWORTH: Right. But does that
8 mean that you can't receive a notice of infringement?
9 I understand that 512(a) doesn't have a takedown piece
10 to it. But -- and I saw this in the comments -- the
11 question I have is, if I just forget about 512, what
12 if I just sent a lawyer's letter saying I'm concerned
13 because I know that there's illegal stuff flowing
14 through your pipes. Are you saying that that's not
15 legitimate? Or I'm just curious to --
16 MR. FLAHERTY: Well, that would be an
17 allegation of infringement --
18 MS. CHARLESWORTH: Right.
19 MR. FLAHERTY: But when it's disguised
20 within a DMCA notice, then no, it's not.
21 MS. CHARLESWORTH: Well, if they're sending
22 you a notice, it's formatted like -- I think they're
23 formatted like 512(c) notices. Is that what you're
24 saying?
25 MR. FLAHERTY: Yes.

1 MS. CHARLESWORTH: So, and you do take them
2 in, right?
3 MR. FLAHERTY: Well, they come in
4 automatically by email. That's how we process it.
5 MS. CHARLESWORTH: Right, and you process
6 them. So why -- I mean, so if -- is that a yes, you
7 process the 512(c) notices?
8 MR. FLAHERTY: Correct.
9 MS. CHARLESWORTH: Okay. So why do you do
10 that then, if they're not valid in your view?
11 MR. FLAHERTY: Oh, when I say process them,
12 they just simply come into the inbox.
13 That's the only way we can receive those
14 types of notices when people try to contact us using a
15 DMCA email address.
16 MS. CHARLESWORTH: Right. But do you act
17 on them?
18 MR. FLAHERTY: No, not if it's conduit.
19 MS. CHARLESWORTH: So you just -- so you do
20 not act on them.
21 MR. FLAHERTY: No. We reject them.
22 MS. CHARLESWORTH: And does the person who
23 sends them know that they've been rejected?
24 MR. FLAHERTY: Correct.
25 MS. TEMPLE CLAGGETT: You send an automatic

1 notice back saying that you're not going to act or is
2 there some automatic notification sent back to the
3 sender?
4 MR. FLAHERTY: It's not automatic because,
5 again, we process all of our DMCA notices through
6 email. So when it comes in, until somebody gets to
7 it, then they get a response.
8 MS. CHARLESWORTH: Now, if someone sent you
9 a notice, however it's labeled, that said there's
10 infringement going on, here it is, there's P2P file
11 sharing, you're saying you would just reject that and
12 send it back?
13 MR. FLAHERTY: Yes.
14 MS. ISBELL: And one quick follow-up.
15 When you reject those, do you keep track of
16 those for the purposes of a repeat infringer policy or
17 does it just go into a black hole?
18 MR. FLAHERTY: Not for those types of
19 notices where it's simply an allegation of copyright
20 infringement for conduit activity. And if it's sent
21 to us as a DMCA notice.
22 MS. ISBELL: So you don't have a repeat
23 infringer policy under 512(a)?
24 MR. FLAHERTY: We do, but [we do] not
25 [consider] those types of conduit notices that are

1 sent to us in that email format.
2 MS. CHARLESWORTH: So --
3 MS. TEMPLE CLAGGETT: So to calculate the
4 repeat infringer or to consider someone a repeat
5 infringer, do you require adjudication of actual
6 infringement by a court of law? Is that what you're
7 saying?
8 MR. FLAHERTY: Primarily yes. So we feel
9 that the courts are best suited to make those types of
10 decisions and not an ISP. We have obviously voluntary
11 agreements through the CCI and agreed to forward
12 notices as part of that.
13 MS. TEMPLE CLAGGETT: And one I guess final
14 question on this, although it kind of gets into some
15 of the later panels, but in terms of receiving these
16 notices under mere conduits, do you consider them
17 improper notices under 512?
18 Do you see any recourses under the existing
19 512 regime in terms of 512(f) in response to these
20 notices that you consider improper or are you just --
21 you consider them to be improper but don't think that
22 there's any actual recourse that you have under the
23 current system in response to these notices?
24 MR. FLAHERTY: Yes. I don't think there's
25 any proper recourse. We would consider them to be an

1 abuse of the DMCA. But there's no specific wording
2 that points to that currently.
3 MS. CHARLESWORTH: Okay. We have limited
4 time available and many, many people who have a lot to
5 say. And fortunately, we have other panels. And is
6 common in these roundtables, there's overlapping
7 discussions. But I have two sort of key areas I
8 wanted to ask about and then you can think about -- I
9 think you'll each have about one minute at best to
10 address these.
11 So the one area is for those who are
12 looking for a stay-down regime -- and there are many
13 on the content owner or copyright owner side who seem
14 to be advocating for that -- should that be focused on
15 full-length works?
16 How do you address issues in terms of
17 sending notices concerning whether a second use of the
18 same work might be licensed?
19 So that's sort of one area in terms of how
20 the takedown process would work or what the focus of
21 the stay-down effort would be. And the other
22 question, which I think is related but is a little
23 different, is there seems to be a diversity of
24 experiences between individual copyright owners and
25 larger corporate citizens in this ecosystem. In other

1 words, those who can take advantage of, say, automatic
2 processes and those who can't.
3 And I was just wondering if anyone wanted
4 to elaborate on that difference and in particular
5 whether smaller entities or individual copyright
6 owners have any access or are able to access automated
7 takedown tools.
8 So I'm going to do what I did before, go
9 right to left. But unfortunately, this is going to be
10 a bit of a lightning round, just because we want to
11 make sure we get to everyone who wants to speak. Mr.
12 Carlisle?
13 MR. CARLISLE: Thank you. As part of my
14 duties, I also run a copyright blog. And I do
15 continue to have at least one legacy client who is a
16 small copyright owner, controls about 15 musical
17 compositions. So as an exercise, I decided to see how
18 an individual person, an individual attorney like me
19 might want to send a takedown to Google, who gets more
20 takedown notices than anybody else.
21 And I will tell you this. If you go to
22 Google's filing with the Copyright Office and say here
23 is where to send your copyright takedown notice, if
24 you copy that and paste that into your browser, you
25 land on a page that does not take you to a takedown

1 form. It takes you to a page which is several
2 different pages removed from ever getting to the
3 takedown form.
4 Along the way, you are asked a series of
5 questions to justify your takedown before you can even
6 file your takedown, including the fact are you the
7 subject of the photograph, in which if you say yes,
8 you get this bright red warning saying if you're the
9 subject of the photograph, you're most likely not the
10 copyright owner, as if the selfie had never been
11 invented. Okay. And they will also -- Google will
12 not let you file a takedown notice unless you create a
13 Google account, which requires you to agree to
14 Google's terms of services.
15 This includes a choice of jurisdiction and
16 venue in Google's favor. And this is before you even
17 get to the takedown page. And this is Google, that
18 takes -- gets more takedown notices than anybody else,
19 which echoes what Ms. Shaftel said, where we have
20 entities who are placing barriers for the simple act
21 of filing a takedown notice, which is supposed to be a
22 right under federal law.
23 MS. CHARLESWORTH: Okay. Thank you very
24 much. And then, next -- I'm sorry, I can't see your -
25 - Mr. Michaud.

1 MR. MICHAUD: Mike Michaud, with Channel
2 Awesome. I mean, takedowns -- I find it hard to
3 believe that there are so many issues with issuing
4 them when the ones I see are actually completely
5 false. There are people who've had takedowns issued
6 on just talking about snow. There are bird sounds
7 that get taken down by DMCA takedowns. We had a video
8 that was a three-minute review that got taken down.
9 There are so many issues we see where
10 takedowns are used as threats now to people.
11 Actually, it kind of echoes what you're
12 saying, Sandra. People that are trying to counter the
13 takedowns that are false, that are truly false, have
14 to give their personal info to these companies. And
15 generally, the ones who are battling are these small,
16 independent movie companies that do not want any
17 negativity of what they created online.
18 MS. CHARLESWORTH: Okay.
19 MR. MICHAUD: And they're scared to
20 actually go forward with that.
21 MS. CHARLESWORTH: Thank you. Ms.
22 Hammer? One minute.
23 MS. HAMMER: Hi. Thank you. Okay. As a
24 small content provider, I would love to have more
25 education and more outreach to people like me so we

1 would know exactly how to go about doing this because
2 I've had a lot of trouble even with just YouTube,
3 trying to prove that it's my copyright. And I don't
4 have the machine behind me that a lot of the companies
5 have with the lawyers and, you know, search engines. I
6 don't have all of that. So if there was some kind of
7 outreach and education for the smaller artists, I
8 would really appreciate that.
9 MS. CHARLESWORTH: Do you think -- and
10 actually this is related -- would it help to have a
11 standardized takedown form that was universal?
12 MS. HAMMER: Possibly. I'm not an expert.
13 But that would be something that I would love to hear
14 about.
15 MS. CHARLESWORTH: Because one of the
16 themes -- one of the things we saw in the comments was
17 that there's just a lot of variation, especially with
18 the service providers who have specific requirements
19 and what those requirements are. And I guess that
20 naturally leads to the question of whether a universal
21 form that everyone could use might be helpful.
22 MS. HAMMER: It might be helpful,
23 especially if it's generated from the Copyright
24 Office. If you -- if you copyright something, we can
25 like take you through the next steps to make sure that

1 it's safe and that you're guarding our copyright. It
2 would be great.
3 MS. CHARLESWORTH: Okay. Ms. Madaj?
4 MS. MADAJ: So I think NMPA probably falls
5 somewhere between the level of resources we're able to
6 contribute between individual creators and larger
7 organizations and that we do not use the automated
8 processes. We've attempted to sign up for Google's
9 trusted content provider tool that allows you to send
10 bulk takedown notices to be removed from their search.
11 But the formatting process we found was
12 very difficult and time consuming, particularly when
13 we're in an office of 12 people with very limited
14 resources again. And then, in addition to that, I
15 know that a number of people have brought up the fact
16 that the DMCA allows a mechanism for content to be
17 removed expeditiously. We don't feel that there's a
18 clear definition of what is required for expeditious
19 removal. There aren't really any clear guidelines in
20 the DMCA about what constitutes expeditious.
21 So that means that we're forced to go back
22 constantly and click URL by URL to see whether
23 something has been removed and sometimes it takes
24 weeks. But since we're not clear on what the strict
25 timeframe is or whether there is any sort of strict

1 timeframe, it's not clear when the safe harbor no
2 longer provides to that service provider.
3 MS. CHARLESWORTH: So in your experience,
4 it can take -- just to be clear -- it can take weeks
5 to have something removed after the notice is sent?
6 MS. MADAJ: Yes.
7 MS. CHARLESWORTH: Okay. Ms. Schrantz?
8 MS. SCHRANTZ: Ellen Schrantz, Internet
9 Association. And I think we'll get to this in some
10 later comments. But on the question about stay-down,
11 I think it's critical to emphasize two very
12 fundamental problems that would occur with such a
13 regime. The first being that that improperly shifts
14 the burdens under the DMCA, that under 504(m) and just
15 the legislative history that we see, there is a reason
16 that the identification of infringing content belongs
17 to the rightsholder. And shifting that over would
18 endanger the limitations and exceptions that are
19 critical to copyright law, fair use and others would
20 not be protected under a stay-down regime and would in
21 fact endanger free speech and creativity online.
22 And that's a very dangerous thing --
23 MS. CHARLESWORTH: Okay. And you're right.
24 We'll be exploring, I think, the stay-down possibility
25 more in the next panel.

1 MS. SCHRANTZ: And then, on the point
2 that's been made about educational efforts and DMCA-
3 plus, whether it's for those unable to access
4 automated tools, our companies -- I can't even
5 enumerate the number of programs that they have in the
6 education efforts. The reason they're able to
7 innovate and come up with those and educate creators
8 is because of the floor of the DMCA and because that
9 allows them to go forward with that.
10 And if you endanger those protections, then
11 they may not be able to innovate in ways that are best
12 for content creators and rightsholders.
13 MS. CHARLESWORTH: Okay. Ms. Schneider?
14 MS. SCHNEIDER: As it stands, the DMCA is
15 like the goose that laid the golden egg for these
16 companies. They can do anything that they want, how
17 they want. YouTube also requires you to sign on to
18 their terms and services and get a Google account. You
19 have to -- you know, the whole thing of accepting
20 [limited] liability, you know, all their terms of
21 services.
22 It is such an intimidating process for a
23 musician at every level. The stay-down is impossible.
24 Now YouTube has saddled up with TunesToTube that
25 allows you to upload a full track or a full album in

1 four seconds. We all know there is no fair use. Show
2 me a fair use of a full track or a full album in the
3 context of YouTube that's fair use. It does not
4 exist. So the fact that they're allowed to use these
5 technologies against us to make this a constant battle
6 is impossible.
7 So you know, stay-down depends on a
8 required fingerprint technology, something like
9 Audible Magic, Content ID that they all have to use in
10 the same way. Even Content ID, YouTube touts it to be
11 something to catch infringement.
12 They're actually using it to monetize
13 entire catalogs. It's not used for infringement. It's
14 used to make money. So you know, it's an endless and
15 a losing battle.
16 MS. CHARLESWORTH: Thank you, Ms.
17 Schneider.
18 MS. TEMPLE CLAGGETT: One quick follow- up
19 question, just really quick. You mentioned that there
20 are, I guess, additional requirements that are imposed
21 on content creators when they're sending these DMCA
22 notices. Has anybody challenged these additional
23 requirements to sign up for an account or to provide
24 other types of information that's not required in the
25 DMCA as somehow taking the service out of the DMCA

1 safe harbor? I'm just curious as to whether this has
2 been challenged.
3 MS. SCHNEIDER: I wouldn't know -- I
4 wouldn't know how else to do that except to say yes.
5 Today, I'm challenging it. I'm challenging it today
6 because how do you challenge a company like YouTube?
7 The intimidation is so great. And honestly, people
8 are scared. I know many musicians that are scared to
9 death. YouTube is offering a million dollars to
10 protect people now, you know, that have a counter-
11 notice.
12 And one more thing I'd like to say to Mr.
13 Flaherty. What we really need is a system to rate
14 people. I've never had a counter-notice against me.
15 So when I -- you know, we rate everything on the
16 Internet. We rate every user.
17 So when I come to you and I say I want my
18 music down, I have a good rating, it should come down.
19 It should not be like, you know, oh, this
20 is a DMCA kind of a thing. We can't believe this
21 person. Do it according to our own rules. No, the
22 DMCA is a law. I'm a person that has a good rating.
23 I should be one click to Google. I shouldn't have to
24 go through the 46 steps that he described. No way.
25 MS. CHARLESWORTH: Okay. Thank you.

1 Mr. Rosenthal?
2 MR. ROSENTHAL: Hi. Steve Rosenthal, from
3 McGraw-Hill Education. I'll speak fast.
4 It's an enormously burdensome and onerous
5 process to monitor and enforce unseemingly limitless
6 landscape of infringing content available on the
7 Internet currently. Certainly the proliferation of
8 certain educational content that greatly -- that's
9 available greatly impacts our ability to ensure the
10 integrity of the pedagogical process.
11 Notwithstanding issues surrounding
12 automation of notice sending, the process of searching
13 for infringing content on many sites is becoming
14 increasingly more difficult with sites taking
15 offensive measures to prevent the automated scraping
16 of their site by limiting metadata that would be used
17 to identify content. It becomes frustrating that
18 after we find infringements on a site, that that
19 reference to a particular file or content in a notice
20 does not necessarily impact all instances of that
21 content on the site.
22 MS. CHARLESWORTH: Thank you.
23 Succinctly put. Mr. Gibbs, one minute.
24 MR. GIBBS: Melvin Gibbs. I thought Mr.
25 Flaherty's comments were a great

1 illustration of the massive asymmetry between large
2 corporations and small business owners and individual
3 creators.
4 We don't have the resources, either
5 financially or in time, to jump through the kind of
6 hoops that have been set up to basically prevent us
7 from making a living, if I can be so blunt.
8 The American system is a contractual
9 system. It's based on good faith. We neither have in
10 situations for musicians where we're dealing with fair
11 use and statutory license, we don't have any -- we
12 don't have any way to contractually enforce any
13 provisions. In addition, there is no good faith. So
14 the idea that there's going to be a collaboration, I
15 have a hard time seeing it, even though that's where I
16 tend to move.
17 I wonder -- how I see this and how my
18 organization sees this is that the way the DMCA is
19 working now, it's a de facto subsidy for large
20 corporations because small -- because our license rate
21 is being shrunken by this asymmetry between our
22 ability to deal with these large corporations and our
23 ability to enforce our basic rights. And that's
24 pretty much it.
25 MS. CHARLESWORTH: Thank you, Mr. Gibbs.

1 Mr. Johnson?
2 MR. JOHNSON: Yeah. I'd just like to say
3 that I think the entire problem here is that the
4 burden of proof is on the copyright creators.
5 And the burden of proof should be on Google
6 and YouTube and the people who license our individual
7 copyrights. And just from a common sense point of
8 view, I think the only way that this can happen is
9 that there has to be some kind of fingerprint
10 technology that automatically -- as soon as that new
11 URL comes up, that it goes and pings it.
12 And you should be able to have that pinged
13 through metadata or a full fingerprint, like Shazam,
14 or through -- if you have a movie, it's just a section
15 of it. You can say, oh, that's that movie. But you've
16 got to automatically fingerprint these things and the
17 burden of proof should not be on the copyright
18 creators. The problem is we're doing all this
19 copyright reform. This is my third roundtable in two
20 years. We can talk about it all day.
21 But ultimately, the Copyright Office turns
22 around and says these are our recommendations to
23 Congress. Then, Congress can't agree that it's
24 Thursday. So we're doomed basically. You know, this
25 is all a big waste of time. We can talk about it and

1 it's fine and we're coming up with great ideas. But
2 as a creator, to say, oh, I've got to file a lawsuit
3 against Verizon, you know, give me a break, much less
4 I've got to file a takedown notice.
5 And sure, it'd be a great idea, whether
6 it's a photograph, whether it's a piece of paper,
7 whether it's a musical composition, to have one
8 notice. That's a great idea. But who cares? Because
9 you know, the law was written to benefit Google,
10 YouTube and the people who license music, period, a
11 hundred percent. And the individual, independent
12 copyright creator is -- it's over.
13 And as Don Henley says, who knows what he's
14 talking about, the Internet is slowly destroying
15 copyright and it already has, 15 years ago. So with
16 the WIPO and with the DMCA. So I don't know what we
17 can do. I think we're doomed and -- but it'd be great
18 if there -- if Google and these ISPs could just, you
19 know -- they can do whatever they want. So that would
20 be great if that wouldn't happen. But I don't ever,
21 ever see it happening.
22 MS. CHARLESWORTH: Thank you, Mr.
23 Johnson. Mr. Mopsik?
24 MR. MOPSIK: Following the Grim Reaper--
25 MS. CHARLESWORTH: Yeah, I was going to

1 say, you can only go up from there.
2 MR. JOHNSON: I hate to be right.
3 MR. MOPSIK: I want to say, first, in
4 regard to your comment about a standardized form, I
5 think that's a great thing. I think currently the
6 DMCA supports a system that allows for the display and
7 transmission of images, certainly without compensation
8 to rightsholders. And I think rightsholders are not
9 looking for the whole pie. They're just looking for
10 some reasonable piece of the pie.
11 In regard to automated processes, for image
12 creators, there are things like PicScout and eBay and
13 other services. The problem is that what they will do
14 is those -- you submit a thumbnail to them. They
15 scour the Web. They come back with occurrences of
16 your image. There may be hundreds of thousands of
17 occurrences of your image. And then, you have to sit
18 down and manually evaluate whether or not any of those
19 are in fact licensed uses.
20 It's a tremendous burden. And until there
21 are persistent machine-actionable identifiers that
22 aren't easily scrubbed from the images and things like
23 the PLUS registry are in effect where you can deposit
24 images and these registries are federated and they
25 will search the Web and they'll have identifying

1 information, we're at a loss for having any control
2 whatsoever over the licensing of imagery on the Web.
3 MS. CHARLESWORTH: Okay. That was not as
4 uplifting as I thought it might be. Ms.
5 Coleman, can you get us out of this?
6 MR. MOPSIK: We try, in our own way.
7 MS. COLEMAN: I'd like to try to make it
8 uplifting. But I wanted to talk a little bit about
9 the automated takedown services. I wanted to make
10 sure that everybody understands that when it comes to
11 the music sector, in order to take advantage of those
12 automated takedown services, you have to have
13 agreements with those services.
14 You can't just have access to YouTube's
15 back end unless you have a contract with them in order
16 to get to see their CMS management services. The same
17 thing happens with SoundCloud.
18 If we didn't have organizations like the
19 NMPA negotiating deals with them to build backend
20 takedown services, automated websites that we could
21 look at, we wouldn't have access to that. And for
22 small companies, that's vitally important to our day-
23 to-day operations in order to not take away from
24 everything else that we're doing in order to benefit
25 our writers and artists.

1 MS. CHARLESWORTH: Can I just ask a
2 question? What about third-party vendors? Have you
3 ever explored that option?
4 MS. COLEMAN: Oh, there's a whole cottage
5 industry of people that are these takedown cowboys.
6 You know, then you have to figure out who you want to
7 be in bed with and who you think is representing your
8 interests to the right ability. You know, it was one
9 of the other points I was going to make.
10 MS. CHARLESWORTH: I'm sorry.
11 MS. COLEMAN: So I appreciate that. But
12 there are also a lot of other companies that don't
13 have takedown mechanisms in the same way and that we
14 have negotiated independently the ability to give them
15 white lists or black lists so that we can say these
16 are the songs and these are the recordings that should
17 be up and these are the ones that shouldn't be up. And
18 there's a catch- 22 with that. We're still playing
19 whack-a-mole with that system and trying to monitor
20 what they're doing. But what we're finding out is that
21 they do have the ability to take things down and keep
22 them down.
23 They do have the ability to work with us to
24 make that happen.
25 MS. CHARLESWORTH: Thank you.

1 Mr. Burgess?
2 MR. BURGESS: Thank you. Well, with
3 respect to Alisa's takedown cowboys, I like that, the
4 -- you know, there are a lot of companies out there
5 that do this. But that expense then falls on the
6 copyright owner, the copyright creator.
7 And I see no reason why it should. It
8 should be incumbent upon the services to solve that
9 problem.
10 They're creating the problem and they're
11 making a fortune out of this.
12 And you know, it's worth looking at the
13 size of these companies and seeing the fortunes they
14 have built from effectively retreating into the safe
15 harbor and then monetizing piracy, which is what's
16 happening. So in the end, a small- or medium-sized
17 enterprise like the companies we represent and
18 individual copyright creators just don't stand a
19 chance unless this law is changed and we do wind up
20 with notice-and- stay-down and not notice-and-
21 takedown.
22 I want to address your issue of second
23 uses. There are so many technological solutions to
24 that that we could arrive at if we were in any kind of
25 reasonable dialogue. Now, bear in mind that when --

1 and I know you know this, that when the DMCA was
2 written, it was written to provide a balance between
3 service providers and copyright creators. But that
4 balance is completely gone.
5 It went many, many years ago because of
6 this, as I see it, cynical abuse of the DMCA safe
7 harbor and takedown notice provisions.
8 MS. CHARLESWORTH: Thank you, Mr.
9 Burgess. Ms. Robinson, one minute.
10 MS. ROBINSON: (Off mic) -- address your
11 question about stay-down and second notice. I think
12 you were asking how to deal with the issue of second
13 notice possibly being licensed. At Viacom, we are
14 very sure about who owns exclusive licenses,
15 territory. The licenses that we have, for lack of a
16 better word, are maintained rightly so that we're very
17 sure when there's a second incident of the same
18 infringement that it's not licensed.
19 And so, we have to handle it just like we
20 handle the first one. And so, in terms of focus, I
21 think that is why technology and, you know, we're
22 certainly -- (off mic) -- copyright holders are more
23 than willing to work with service providers because --
24 (off mic) -- but it seems like based on how copyrights
25 work right now that technology probably already exists

1 to be able to have that stay down. And so, I wouldn't
2 see it as necessarily a shift of a burden, but just a
3 use of technology.
4 MS. CHARLESWORTH: Thank you, Ms.
5 Robinson. Mr. Band?
6 MR. BAND: So Amazon would oppose amending
7 the DMCA to mandate a notice and stay-down system. In
8 addition to the reasons that Ellen already mentioned,
9 Amazon would think that it would be very difficult for
10 small Internet companies, startups to comply with any
11 kind of notice-and-stay-down system. So it would
12 actually advantage big companies like Amazon.
13 MS. CHARLESWORTH: Can I --
14 MR. BAND: But that would ultimately harm
15 the system.
16 MS. CHARLESWORTH: Oh, I just want to ask
17 what about if there was some consideration about the
18 size of the company that had to engage in the stay-
19 down process.
20 MR. BAND: Well, that would address the
21 issue that I'm raising. But it wouldn't address all
22 the issues that Ellen raised before. The exceptions
23 and limitations of the fair use and so forth. And so,
24 it's great if companies can enter into voluntary
25 arrangements under contract or the companies can come

1 up with their own systems. But the law shouldn't be
2 changed to require a notice- and-stay-down system.
3 MS. CHARLESWORTH: Thank you, Mr. Band.
4 Mr. Kaplan?
5 MR. KAPLAN: So just two quick points.
6 One, I'd reiterate what Deborah said about
7 how we make sure that a second notice isn't going to
8 somebody where the use is licensed. I think there may
9 be a misunderstanding about kind of the way that like
10 the online Internet enforcement works.
11 It's not -- people will tell you they're
12 scanning the whole Internet. In fact, actually, when
13 vendors are looking for pirated content, particularly
14 full-feature content or full episodic content, they're
15 really focused on specific pats, you know, specific
16 sites.
17 We're scanning, you know, specific sites.
18 There's like, you know, a human review of the site to
19 make sure that it's the kind of site that in fact
20 actually is linking to or hosting the -- you know, the
21 pirated content. And then, it's those sites that are
22 being scanned. So it's not the whole -- not the whole
23 universe. So we know if it's a stay-down situation,
24 that site has not been licensed to have that content
25 and won't be.

1 So there isn't an issue of like, you know,
2 somehow having a stay-down in a situation where in
3 fact subsequently the license -- the use became
4 licensed.
5 I mean, it could happen over time.
6 Sites that are pirate sites, eventually
7 some of them do kind of morph into legitimate sites.
8 But that's not a -- it wouldn't happen on sort of a
9 day-by-day basis, like over a long period of time that
10 could happen. And you'd be aware of that actually as
11 it was happening.
12 The last thing I would say is just about
13 technology and the use of technology to identify
14 content. I think that is the key to the stay- down.
15 We use that technology widely, both Content ID
16 obviously on YouTube but as well as other
17 fingerprinting technologies that allow the match.
18 And I think it makes sense actually. It
19 suggests what about focusing on, you know, full-
20 length or substantially full-length content as a
21 priority in that area and I think that totally makes
22 sense.
23 MS. CHARLESWORTH: Thank you very much.
24 Ms. Garmezy?
25 MS. GARMEZY: Kathy Garmezy. Just to

1 reiterate what a number of people have said, I think -
2 - and that you have also suggested that it might be
3 under consideration. Ease of access is incredibly
4 important and a simplification of the process by which
5 people have to apply, apply to perhaps everybody.
6 The use of technology we would agree exists
7 in terms of stay-down and should be applied and that
8 perhaps to begin with, full-length, clearly not fair
9 use. Pieces of films or music would seem like a place
10 to begin. Smaller creators could have access to
11 technology and other ID technologies that would
12 perhaps make it easier for them. And finally, perhaps
13 it is worth considering some type of a policy being
14 put in place for repeat offenders, for repeat
15 infringers, rather.
16 MS. CHARLESWORTH: Okay, and that subject
17 will come up a little later. Thank you. Ms. Pilch?
18 MS. PILCH: Janice Pilch. One of the
19 challenges for people and entities that don't have
20 automated processes for takedown is monitoring, is
21 identifying the infringement in the first place, which
22 is left to chance at this point. Beyond that, they're
23 uncertain of the entire process, takedown, counter-
24 notification or possible filing of a federal lawsuit.
25 Important to point out that currently, rightsholders

1 and creators are faced with policing -- those who
2 don't have automated systems, they're faced with
3 policing not just once, but multiple times, constantly
4 and forever.
5 Think about that. For the rest of their
6 lives, they have to police their works because right
7 now there's no system to do that and no system to
8 create takedown. And so, it seems like really the
9 time has come to make effective standard technical
10 measures a requirement for the safe harbor, to make
11 them available to any person on reasonable and
12 nondiscriminatory terms, to make them open source. And
13 with this, service providers will be required to take
14 on some of the responsibility for monitoring their
15 services and to, according to the law, affirmatively
16 seek facts indicating infringing activity consistent
17 with standard technical measures.
18 MS. CHARLESWORTH: Okay. Thank you. I
19 know we're running over. We have two more commenters.
20 So two more minutes and then we'll take a quick break.
21 Ms. Schonfeld?
22 MS. SCHONFELD: Thank you. And let me just
23 preface this by saying that I'm not speaking on behalf
24 of Amplify Education Holding. But I wanted to say
25 that what we've heard today, the concerns identified

1 today, particularly on the part of rightsholders
2 should come as no surprise to this group. We are
3 continuing to attempt to fit the square peg of the
4 present and the recent past into the round hole that
5 is the unpredictable future in terms of technological
6 advancements relating to the creation and distribution
7 of content.
8 And I'd just like to echo what I believe it
9 was Ms. Robinson said recently as well as Ms. Pilch,
10 that this is a technological problem first and
11 foremost. And it lends itself to technological
12 solutions. And I would encourage the panel throughout
13 the day and as future legislation is being considered
14 to explore creative technological and legal solutions,
15 including and certainly without limitation to
16 compulsory license and compensation schemes.
17 Thank you.
18 MS. CHARLESWORTH: Thank you very much.
19 Ms. Sheckler, I think you have the last
20 word.
21 MS. SHECKLER: Thank you. We believe that
22 in today's world, there are technological solutions to
23 this. They can be thoughtfully implemented. They can
24 address questions of fair use. It is not a -- (off
25 mic) -- issue. I believe that's a red herring. In

1 terms of price, there are commercially reasonably
2 available solutions today that are as low as a
3 thousand dollars a month for service providers.
4 I don't think that's an impediment in
5 today's world. That's less than a full-time
6 equivalent employee. We would love to talk with the
7 Copyright Office, with Congress and with the service
8 providers about the type of technological solutions
9 that make sense today. Thank you.
10 MS. CHARLESWORTH: Okay. So I apologize
11 that we ran over, although this was -- this and the
12 next panel are very heavily subscribed. We're going
13 to shorten our break a little bit. But come back at
14 11:00 for panel two, if you're participating in panel
15 two. And we will proceed from there. Thank you.
16 (Break taken from 10:47 a.m. to 11:02
17 a.m.)
18 SESSION 2: Notice-and-Takedown Process—Service
19 Provider Response and Counter-Notifications
20 MS. TEMPLE CLAGGETT: Okay. I think we're
21 going to go ahead and get started. We obviously have
22 a number of people in this round, as we did in the
23 first one, and we want to try to not go into your
24 lunch as much as we can. So just a couple of quick
25 housekeeping items. You might have noticed from the

1 first panel that we have someone holding up signs in
2 terms of timing.
3 So once again, we're trying to give
4 everyone an opportunity to actually discuss and
5 provide comments. So we are trying to limit comments
6 to about two minutes. You'll notice from the signs
7 when you have one minute left and when you have 30
8 seconds left. So if you could just look up there and
9 make sure that you limit yourselves to the two
10 minutes.
11 So also, we're going to try to avoid, as we
12 did in the first panel, opening statements.
13 I'm just going to ask everyone to go around
14 and just identify themselves and their affiliation and
15 then as we did in the first panel as well, if you
16 would like to speak, just raise your placard and then
17 we'll go around as well.
18 So this panel focuses on notice-and-
19 takedown, but really from the service provider and
20 user context. It will look into counter-
21 notifications. So we heard a lot from the creative
22 community about how notice-and-takedown affects them
23 and the burdens that it places on them. And so, we
24 want to hear also how notice- and-takedown affects
25 service providers, how that process has been working,

1 has it been burdensome for service providers, both
2 small and large.
3 Also, how it affects users, the concept of
4 improper notices, whether that is a significant
5 problem, as well as the counter-notification process.
6 Is that working effectively for everyone, for users
7 and for businesses as well? So first, I just want to
8 go around the table and ask everyone to just briefly
9 identify themselves and their affiliation, starting on
10 this side.
11 MS. SHEEHAN: I'm Kerry Sheehan. I'm a
12 policy fellow at Public Knowledge. Public Knowledge
13 is a nonprofit organization that advocates for freedom
14 of expression and open Internet and access to
15 affordable communications, tools, and creative works.
16 I'm here today because 512 has proven critical to the
17 Internet's ability to support open platforms for
18 communication, public dialogue and new means of
19 disseminating creative works.
20 MS. TEMPLE CLAGGETT: Okay.
21 MS. SHEEHAN: And any proposals for
22 filtering, including --
23 MS. TEMPLE CLAGGETT: I'm going to have to
24 cut you off and ask just for your statement.
25 MS. SHEEHAN: Sure.

1 MS. TEMPLE CLAGGETT: Yeah, thanks.
2 MR. BASHKOFF: Hi, everyone. I'm Perry
3 Bashkoff, with Warner Music Group. I've lived in the
4 Content ID system for probably the past 10 years.
5 MS. ZLOTNIK: Charlyn Zlotnik, freelance
6 photographer.
7 MR. WEINBERG: Michael Weinberg, Shapeways.
8 It's a 3D printing marketplace.
9 MS. TUSHNET: Rebecca Tushnet, Organization
10 for Transformative Works.
11 MS. SCHOFIELD: I'm Brianna Schofield, from
12 UC-Berkeley School of Law.
13 MR. RUPY: Kevin Rupy, with the United
14 States Telecom Association, USTelecom.
15 MR. ROSENTHAL: Jay Rosenthal, from
16 Mitchell Silberberg & Knupp, representing ESL Music
17 and the music community centers.
18 MS. PRINCE: Thank you. Rebecca Prince,
19 also known as Becky Boop on YouTube. I'm a content
20 creator.
21 MS. PARISER: Jennifer Pariser. I'm a
22 Senior Copyright Executive at the Motion Picture
23 Association. I've been working on content issues for
24 over 15 years.
25 MR. OSTROW: Marc Ostrow. I'm a sole

1 practitioner, primarily in the music space. I
2 represent individual songwriters and recording artists
3 as well as small publishers.
4 MR. OSTERREICHER: Mickey Osterreicher.
5 I'm General Counsel for the National Press
6 Photographers Association.
7 MR. KENNEDY: Tom Kennedy. I'm the
8 Executive Director of the American Society of Media
9 Photographers.
10 MS. KAUFMAN: Marcie Kaufman, in-house
11 counsel for Ithaka Harbors and Artstor. We're a
12 nonprofit organization and we kind of stand on both
13 sides as being content providers and also being
14 service providers.
15 MS. JOHNSON: Hillary Johnson. I'm an
16 independent author and direct journalist.
17 MR. HOUSLEY: Michael Housley, Content
18 Protection Counsel at Viacom.
19 MS. FIELDS: Adrienne Fields, Director of
20 Legal Affairs at Artists Rights Society. We represent
21 the rights of over 80,000 painters, sculptors,
22 architects, and art photographers.
23 MR. DIMARCO: Damon DiMarco, author,
24 journalist. My business is just me.
25 MR. BRIDGES: I'm Andrew Bridges, from

1 Fenwick & West, San Francisco. I counsel individuals,
2 entrepreneurs, small companies, and mature companies
3 on Internet, intellectual property rights. I litigate
4 a lot of cases and have clients that fall under all
5 four of the branches of section 512.
6 MS. TEMPLE CLAGGETT: Great. And I already
7 see a placard up, although I haven't actually asked a
8 question yet. So I'm going to ask my question first
9 and then potentially if you already know what the
10 question was and you want to respond to it, then
11 certainly feel free to do so.
12 But I wanted to -- before we go into more
13 detail in terms of the concept of improper notices or
14 counter-notices, I wanted to just ask a high level
15 question in terms of the experience that the service
16 providers have had with the DMCA. So we asked that
17 general question initially of the content creator side
18 and I want to ask that question of the service
19 provider.
20 Is the DMCA working effectively for service
21 providers, especially when you're considering the
22 volume of notices that you might see and the concept
23 of the more increasing use of automated notices, how
24 is the DMCA working for service providers and does it
25 depend on the size of the service provider?

1 Anyone who wants to respond to that? Mr.
2 Weinberg?
3 MR. WEINBERG: Yeah. I think that the
4 concept -- the high-level concept works reasonably
5 well, given the stakes and the circumstances. I think
6 that what we see as a service provider that receives
7 notices is that the notice quality we receive is
8 highly variable and that variability doesn't
9 necessarily track to the size of the content owner,
10 as you might think.
11 But we also see people assuming the 512
12 notice-and-takedown model for complaints that are
13 unrelated to copyright. And I think at least on some
14 level, that suggests that it's a model that people
15 feel comfortable with, the idea that if they identify
16 something on the site and they want it taken down,
17 they can go through this notice- and-takedown process.
18 There are problems with abuses. There are problems
19 with quality. But the fact that it is being used, sort
20 of used in other contexts that are well beyond the
21 scope of 512, which is a conceptual model, people are
22 comfortable with it very often.
23 MS. TEMPLE CLAGGETT: And are you able to
24 handle the volume of notices that -- I mean, we've
25 talked a lot about the volume in terms of the last

1 panel. Are you able to handle the increasing volume
2 of notices that are out there?
3 MR. WEINBERG: You know, our notices, for us
4 it tends to be a bit bursty. And so, it can be -- you
5 know, there could be a week where we get very few
6 notices and then a week where we get a lot of notices.
7 And that is problematic for us because, from a
8 stack allocation standpoint, it's not like we have a
9 steady stream of notice of quantity notices, which
10 means that we have a steady stream of people we
11 need to allocate to handling the problem.
12 But right now, we're at a place where we're
13 able to handle. I think we as a company are kind
14 of right at the line where as we see the numbers go
15 up, we're going to have to have a significant internal
16 discussion about how we build internal tools that can
17 handle them even more quickly.
18 MS. TEMPLE CLAGGETT: And what is your
19 size, and how many -- what is the volume that you
20 actually are seeing right now?
21 MR. WEINBERG: Yeah. So last year, we
22 released a transparency report. Last year, we
23 received just under a thousand notices. And we're
24 seeing that -- that was an increase from the year
25 before and we're seeing a trend to go significantly

1 beyond that.
2 And one of our problems, which we raised in
3 the comments, was that those notices tend to be a bit
4 of a grab-bag from a not for property law standpoint.
5 And so, part of that I think is due to the fact that
6 our site allows you to 3D print physical objects,
7 which tends to be beyond the scope of copyright
8 sometimes.
9 And so, there's an additional burden of
10 processing the notice in terms of identifying what
11 their real complaint is. Although I know that's a
12 problem. I mean, our comments were joined by a number
13 of other startups who have a similar kind of combined
14 IP claim issue.
15 And so, it's not as simple. Because not
16 all of our notices are simply copyright-takedown
17 requests, we have kind of a gaping question of before
18 we can get to the copyright analysis, first parsing
19 out what the actual concern is. And that increases
20 our real-world compliance burden in a way that's easy
21 to forget when we're thinking about this from kind of
22 a policy standpoint, from a pure policy standpoint.
23 MS. CHARLESWORTH: Can I just ask one I
24 think pretty quick follow-up? I asked this of the
25 other panel. Would it be helpful -- and I know some

1 of your concern is maybe they're not copyright claims.
2 But would it be helpful to have a clear form for DMCA,
3 like a standardized form that maybe said for copyright
4 claims on the top?
5 Do you think that would aid you in your
6 processing?
7 MR. WEINBERG: Honestly, I think one of my
8 biggest concerns with that is that when we were --
9 last year, we were trying to update our service
10 provider registration with the Copyright Office.
11 It took four months to find out what we
12 should do if we don't have a fax number. And so, I
13 just worry that while a standardized form could be
14 useful, the structure of the form, maybe -- it may not
15 even be the information, just the way that it would
16 connect to a backend system -- would probably evolve
17 over time.
18 And if I'm being honest, I'm not a hundred
19 percent confident that there are mechanisms in place
20 to evolve a standardized form, even if it was agreed
21 to and it was correct at the time it was deployed.
22 Three, five, seven, ten years down the line, if
23 requirements change but you're kind of shackled into a
24 standardized form, that could be a problem.
25 On the flipside, if part of the

1 standardized form was to make data about the notice-
2 and-takedown process more public in an automatic way,
3 that could be worth of the cost of having a slow
4 evolution of the form.
5 MS. CHARLESWORTH: Thank you.
6 MS. TEMPLE CLAGGETT: Thanks. Ms. Tushnet?
7 MS. TUSHNET: Sorry. Rebecca Tushnet.
8 Actually, I solved that problem by using
9 Georgetown's fax address. But I had it too. So we
10 have over 600,000 registered creators on our site.
11 They posted over 2 million works. And they and our
12 small, all volunteer coding and legal teams appreciate
13 the opportunity to participate here and make the point
14 that most ISPs are like us. They're like Wikimedia.
15 They're like the Internet Archive, who also submitted
16 comments.
17 We receive relatively few notices.
18 They're generally illegitimate to test
19 certain rights over titles. That's the biggest
20 category, or fair uses. We hand review each one and
21 we have no capacity to build automated systems nor any
22 need to, even if we agreed that it was a good idea.
23 And so, we just want to emphasize the variety among
24 ISPs just as there's variety among creators.
25 MS. TEMPLE CLAGGETT: Did you have a

1 follow-up?
2 MS. CHARLESWORTH: I did. I mean, and do
3 you think that -- picking up on your last point, that
4 larger entities, though it might make sense for them
5 to have automated processes even if smaller ISPs don't
6 --
7 MS. TUSHNET: I certainly can't speak for
8 them. I do know that when I read the submissions, the
9 long form submissions, it became clear to me that the
10 best automated process is the one that your group
11 isn't using. So UMG, Warner, Sony, they hate Content
12 ID. They say it's 60 percent effective. It skips
13 millions of things.
14 Whereas everyone else is, oh yeah, Content
15 ID seems great, let's make everybody use Content ID.
16 So I am certainly not here to say that big
17 sites should use automated processes because, like
18 Angelica Schuyler, it seems like the notice senders
19 are never satisfied.
20 MS. TEMPLE CLAGGETT: Hamilton reference.
21 Ms. Schofield?
22 MS. SCHOFIELD: Hi. I, together with
23 Jennifer Urban at UC-Berkeley and Joe Karaganis at the
24 American Assembly, have been looking into this very
25 question and looking at the diversity of the online

1 service provider ecosystem.
2 We've conducted three studies in the past
3 couple of years, one of which really sheds some light
4 on this very question. And that is that there is a
5 tremendous diversity in the way that online service
6 providers interact with the notice-and-takedown
7 system. And you've heard a little bit about that from
8 Mr. Weinberg and Professor Tushnet.
9 So we categorize service providers into
10 three different buckets. The first we call DMCA-
11 classic. And this is by far the largest group that
12 was in-taking very manageable numbers of notices and
13 reviewing them by hand. As has been alluded to, there
14 is varying degrees of quality of those notices. But
15 this group of providers was able to process this very
16 manageable number of notices. In fact, 9 of the 29
17 service providers that we spoke with received fewer
18 than a hundred notices per year.
19 Another group has received growing numbers
20 of notices and this is what you hear more vocally
21 described in some of the policy debates, the large
22 influx of notices. But we found this to be not really
23 the predominant thing that is happening for most
24 online service providers. So we broke this into a
25 category called DMCA-auto, which the online service

1 providers have reacted to this influx of notices by
2 developing their own automated systems to process the
3 notices.
4 And then, beyond that, what we call DMCA-
5 plus, which are service providers that go beyond the
6 requirements of the statute to proactively manage
7 potential infringement on their platforms by
8 developing measures such as filtering that fall
9 outside what is required by the statute.
10 So I think any policy discussion and any
11 potential solutions need to take into account this
12 diversity.
13 MS. TEMPLE CLAGGETT: And just to follow up
14 on that, I think that some of the comments mentioned
15 that our database of registered DMCA agents has about
16 90,000 or something ISPs. Were you able to calculate
17 the number of ISPs that fall into any of the three
18 categories that you just mentioned?
19 MS. SCHOFIELD: So we have to be careful to
20 limit our -- you know, the statements that we can make
21 about the overall system because, you know, we
22 surveyed a small number, although we did make some
23 efforts to make sure that the sample we surveyed is
24 representative of the broader ecosystem.
25 MS. TEMPLE CLAGGETT: And did you -- in

1 your view, are DMCA-auto ISPs -- are there more of
2 them than DMCA-classic or --
3 MS. SCHOFIELD: Oh, so by far and large,
4 DMCA-classic seems to be the dominant mechanism.
5 MS. TEMPLE CLAGGETT: And then just one
6 last follow-up question, based on the question that
7 Jacqueline just asked, does this suggest to you that
8 different policies need to be made, depending on the
9 type of ISP that is involved?
10 MS. SCHOFIELD: I think it suggests to me
11 that the system is, in part, self-managing and
12 creating their own voluntary measures to react to the
13 needs of their platforms. So I think it would be very
14 hard to draw lines from a policymaker's perspective
15 that tries to put online service providers in these
16 buckets based on any arbitrary decision that we might
17 view from the outside.
18 So for example, some service providers that
19 you might expect to be getting very large numbers of
20 notices because they have platforms that receive large
21 numbers of visitors that have a lot of content on them
22 are actually service providers that are just not
23 getting that many notices and therefore don't need to
24 implement any proactive filtering measures or
25 automated processing measures.

1 MS. TEMPLE CLAGGETT: Great. Thank you.
2 Mr. Ruby? Or Rupy, sorry.
3 MR. RUPY: Quite all right. So I'm Kevin
4 Rupy. I'm with the United States Telecom Association,
5 USTelecom. And our membership, we basically represent
6 the broadband service providers, large, small and
7 everything in between.
8 So the membership of our companies include
9 small rural broadband providers with a couple thousand
10 lines to some of the largest traditional -- what are
11 deemed traditional ILEC broadband providers, AT&T,
12 Verizon, Century and such, what were the old phone
13 companies and now are broadband providers. And
14 generally speaking, as we state in our comments, we
15 generally believe that the safe harbor provisions
16 under section 512 are -- they're functioning as
17 intended.
18 However, where we do have issues and where
19 we do have concerns is that our member companies are
20 increasingly receiving millions of notices, 512(c)
21 notices, even in those instances where they are acting
22 as a mere conduit under 512(a). And it's clear, under
23 the statute and the case law, that those types of
24 notices are not valid. Those -- that that's not how
25 the framework was established.

1 We are of the view that notices of claimed
2 infringement alone pertaining to section 512(a)
3 services do not render someone a repeat infringer and
4 that the DMCA expects termination of repeat infringers
5 only in instances of appropriate circumstances. And
6 we believe those appropriate circumstances should be
7 narrowly construed and should be subject to some type
8 of judicial determination.
9 Where we think there is significant tension
10 within these frameworks is that both Congress, this
11 administration and certainly our -- one of our main
12 regulators, the FCC, views broadband deployment and
13 adoption as a primary objective. It is a principle
14 goal of Congress and the administration to deploy
15 broadband and to encourage adoption.
16 And we think when you start talking about
17 terminating an alleged repeat infringer, that is a
18 measure that we need to ensure that there is some type
19 of determination to ensure that that is an appropriate
20 determination.
21 MS. CHARLESWORTH: I have a couple of
22 questions on that. So if someone doesn't pay their
23 bill, do your companies terminate their Internet
24 access?
25 MR. RUPY: Well, under our terms of

1 service, in that instance, we would terminate the
2 Internet access.
3 MS. CHARLESWORTH: Okay. So your companies
4 do act to terminate subscribers for other reasons?
5 MR. RUPY: Correct.
6 MS. CHARLESWORTH: Okay. And the other
7 question, this relates to some questions I had before
8 about the 512(a) and 512(c). Now, courts have
9 basically said it doesn't mean -- at least, right now
10 as the law stands, you don't need judicial
11 determination of infringement to fall in the repeat
12 infringer category, at least some courts have said
13 that.
14 MR. RUPY: And I --
15 MS. CHARLESWORTH: Assuming -- so assuming
16 that that's the law, and taking what you're saying, I
17 mean, how -- how would a copyright owner communicate
18 with you about repeat infringements on your site? Like
19 how is it that you're able to implement a repeat
20 infringer policy without taking in information from
21 the outside world, as it were?
22 MR. RUPY: Well, I think that's happening
23 in the marketplace and you're seeing that happening in
24 the marketplace, to a great effect, with some of these
25 voluntary mechanisms that are in place, like the CCI,

1 where you have the content community working with
2 broadband providers to effectuate that goal and
3 identify and address the issue of repeat infringement
4 or alleged repeat infringement.
5 MS. CHARLESWORTH: But that -- as I
6 understand it, that process doesn't end in
7 termination, does it?
8 MR. RUPY: In some instances, it may end in
9 termination, depending on the nature of the
10 escalation. That's my understanding.
11 MS. CHARLESWORTH: Okay. So in other
12 words, you're saying on a voluntary basis, that your
13 companies have agreed to take in notices and consider
14 them and measures to address the infringement. But
15 you're not -- you don't want the notices served under
16 512(c) or some other mechanism.
17 MR. RUPY: Well, a 512(c) notice, you know,
18 to the extent it relates to, you know, an issue
19 relating to hosting, then certainly those compliant
20 notices should be addressed. Where you run into the
21 issue or the challenges with 512(a), where the
22 broadband provider is acting as a mere conduit, there
23 is nothing for that broadband provider to take down or
24 remove. They're --
25 MS. CHARLESWORTH: That much I understand.

1 I'm just saying like how would -- if someone becomes
2 aware of massive infringement a P2P issue that's being
3 facilitated through one of your companies, how would
4 they notify you of that? I mean, it doesn't need to be
5 512(c). It could just be notice of infringement.
6 I mean --
7 MR. RUPY: Sure --
8 MS. CHARLESWORTH: Do you accept that, just
9 general like notices of infringement?
10 MR. RUPY: I think in instances you'll see
11 where there has been, you know, through judicial due
12 process, you know, some type of civil action that has
13 been taken --
14 MS. CHARLESWORTH: No, I'm not talking
15 about that. I'm talking about a stakeholder --
16 someone, a copyright owner becomes aware of a massive
17 amount of infringement and wants to notify you of
18 that. How would they do that?
19 That's the question. Outside of a judicial
20 order.
21 How would they do it?
22 MR. RUPY: It would depend on the nature of
23 the infringement. So in instances of where the ISP is
24 hosting that content, the 512(c) notice --
25 MS. CHARLESWORTH: Not -- you're not

1 hosting.
2 MS. TEMPLE CLAGGETT: I guess to follow up
3 on --
4 MS. CHARLESWORTH: I think I'm saying
5 instead of sending -- I'm sorry, Karyn. Instead of
6 sending a 512(c) notice, is there an alternative that
7 would be acceptable to you that would communicate
8 essentially the same information, not labeled 512(c)?
9 MR. RUPY: I don't know what those -- I
10 mean, that's something I assume we can talk about
11 today. But you know, as we view the framework
12 currently, the sending of millions of notices to ISPs
13 under 512(c), when they are acting in a 512(a)
14 capacity is not how the DMCA was set up.
15 And I think to your point, that is one of
16 the reasons that you're seeing ISPs working with the
17 content community so that we can establish a voluntary
18 framework whereby we can address repeat infringement.
19 MS. TEMPLE CLAGGETT: And yeah, to follow
20 up, I guess your legal basis for that is just that
21 you're saying that a notice is an allegation of
22 infringement, -- and is not in fact infringement. So
23 we talked -- Jacqueline just talked about how can
24 somebody notify you of infringement, in your view,
25 absent an actual adjudication. Is that not actually

1 something you would consider infringement? You would
2 just consider it to be an allegation that's not
3 proven?
4 MR. RUPY: We would view that as an
5 allegation of infringement.
6 MS. TEMPLE CLAGGETT: And you mentioned
7 that, nevertheless, you are receiving millions of
8 notices that would kind of be considered 512(c)
9 notices that are sent to ISPs that are operating as
10 512(a) ISPs.
11 What is causing this phenomenon? Is there
12 just a difference of opinion in terms of the legal
13 basis for that actual activity? And I asked this at
14 the previous panel. Is there any recourse that you see
15 in 512 that would prevent that, if you consider that
16 to be an improper use of 512?
17 MR. RUPY: We would view that as an
18 improper use of section 512, the sending of, you know,
19 millions of notices under 512(c) when we're clearly
20 talking about a 512(a) instance.
21 MS. TEMPLE CLAGGETT: And is there anything
22 in 512 itself that explicitly prohibits that conduct
23 and/or has some type of recourse that you would be
24 able to take against some type of content owner who
25 was sending those to you in your context as a mere

1 conduit?
2 MR. RUPY: I can't speak to that. I don't
3 -- I don't know.
4 MS. TEMPLE CLAGGETT: And then, I guess
5 just one last question. Is there, in terms of where
6 those -- in your view -- improper notices are coming
7 from, are there specific stakeholders that are sending
8 them or is it across the board, all types of content
9 that you see this?
10 MR. RUPY: You know, I think generally
11 speaking, our member companies have certainly seen an
12 increase in these types of notices over the last few
13 years. You know, whether there are different entities
14 that are, you know, behind that, you know, I would
15 defer to other folks and the records speaking to that.
16 I mean, we address this in our comments at sort of a
17 broader level, that it is occurring and it's occurring
18 at a very high rate.
19 MS. TEMPLE CLAGGETT: And just one last
20 question on this point, which I think we touched on in
21 the last panel a little bit, but in terms of your
22 reaction or response to those notices, you just ignore
23 them?
24 MR. RUPY: That's going to vary by provider
25 and it's going to vary by situation. So you know, as

1 an example, under some of the voluntary frameworks or
2 the voluntary frameworks that are in place, in those
3 instances, you may see those notices being forwarded
4 on to the individual subscriber.
5 And then, other companies may have
6 different mechanisms in place. But again, you know,
7 we would fall back even with the forwarding of those
8 notices, it's an allegation of infringement.
9 MS. TEMPLE CLAGGETT: Thank you. And I'll
10 turn to Ms. Pariser. And if you want to actually
11 respond to anything with respect to the mere conduit
12 issue, that would be helpful as well.
13 MS. PARISER: Sure. So I wanted to make
14 two quick points. First, obviously, we're not a
15 service provider. But as an observation, I'll say
16 that the reference to Dickens was very apt because
17 obviously the city for whom 512 has been the best of
18 times are service providers online, of every size. If
19 you're a small service provider and you're only
20 getting a hundred notices and you can manually process
21 them, it's fairly easy and routine.
22 If you're Google and you're getting a
23 billion, you've created an automated system to do
24 that. And it is a cost of doing business, a large one
25 presumably but one that is manageable for them. And

1 this is where on the content side we feel the
2 imbalance comes, that it's a cost of doing business
3 for an online service provider that is relatively
4 manageable for them, whereas on the creation side,
5 we're being killed by piracy. And having to bear
6 enormous burdens to deal with 512, to relatively
7 little effect.
8 In terms of the specific issue of 512(a)
9 versus 512(c), first, CCI, the Center for Copyright
10 Information, is -- it's not a voluntary organization -
11 - it's a contractually based organization that
12 encompasses the Motion Picture Association, the
13 Recording Industry Association and the five largest
14 ISPs in the United States, but only those five. So
15 any other members in the broadband coalition are
16 simply not members of that deal. They are invited to
17 be members but have chosen not to be.
18 And so, whatever minimal effect that that
19 program has in terms of combating piracy, it's only
20 for subscribers of those five services.
21 It only deals with peer-to-peer piracy and
22 it does not end in termination.
23 MS. TEMPLE CLAGGETT: Thank you. Ms.
24 Kaufman?
25 MS. KAUFMAN: Hello. Ithaka and Artstor

1 are in an interesting position because we end up being
2 on both sides of this issue. On the one hand, we're
3 stewards of content that is licensed to us by many
4 third parties and we provide access to that content to
5 thousands of libraries across the world, sometimes for
6 free and sometimes -- and also, we have a free media
7 access model for individual users. So we sit directly
8 between the sometimes conflicting concerns between
9 content providers and users and, therefore, have to
10 issue our own takedown requests regarding the content
11 that's licensed to us.
12 At the same time, Artstor has a service
13 provider model called Shared Shelf, in which we, as a
14 nonprofit, provide a content management solution that
15 enables academic institutions to upload catalog and
16 integrate digital collections to -- their own digital
17 collections together with licensed materials. And
18 through that, they -- the institutions that subscribe
19 to Shared Shelf do their own screening of their IP
20 rights and generally are cautious about this because,
21 again, we're dealing with academic institutions. The
22 service -- this service fills an important niche out
23 there that enabling the institutions to integrate the
24 materials that they teach with and because of that, we
25 -- like I said, it becomes a valuable tool.

1 Now, Artstor could not have created Shared
2 Shelf if it was not for the DMCA's safe harbor because
3 we serve as kind of a lockbox for that content and
4 don't monitor it. If we were on the hook for what the
5 academic institutions are choosing to teach with, the
6 materials that they're choosing to teach with, we
7 wouldn't have been able to create this service.
8 And I do think that there needs to be some
9 consideration of the service provider, the service
10 provider, the size of the service provider, the size
11 of the service and any changes made that are going to
12 be considered about the takedown, like this takedown-
13 and-stay-down regime or generally about how broadly
14 the service provider -- the definition of the service
15 provider is interpreted because there needs to be
16 innovation out there. And any sort of a narrowing of
17 the scope of those protections would really affect
18 services like our own.
19 MS. TEMPLE CLAGGETT: Thank you. Mr.
20 Bridges?
21 MR. BRIDGES: Thank you. I'm going to go
22 back to the original question that was asked when the
23 discussion was over at that part of the table. I
24 think from the standpoint of the companies I know and
25 individuals who are service providers, overall the

1 DMCA is working extremely well. Nobody's happy with
2 it. That, in litigation, is usually the sign of a
3 good settlement.
4 Here, it may mean it's a sign of a good
5 law, that nobody is happy with it particularly.
6 I'd like to make four points however, I
7 think three of which -- four points of concern about
8 the DMCA, three of which I think can be solved by
9 education, but one of which has to be solved by
10 legislation. And the four points are these.
11 First, there is a broad misunderstanding
12 that the safe harbor under the DMCA has replaced the
13 substantive standards of copyright infringement or
14 that the DMCA gives copyright rights to creators. The
15 reality is that the DMCA simply limits remedies only
16 for infringers.
17 Before you reach the safe harbor, which is
18 a limitation on remedies, there has to be an
19 adjudication of liability.
20 And then, a case in litigation would move
21 to remedies and the question of whether the safe
22 harbor applies would come in as to whether just those
23 remedies should be limited. So there's rampant
24 confusion that the DMCA has replaced the rights of a
25 copyright holder or the substantive standards. And

1 that can be cured by education.
2 Second, as we've seen already, there is
3 rampant confusion about the role of a 512(a) conduit
4 service provider in the overall framework where people
5 send invalid and improper 512(c) notices to conduits.
6 And I can talk -- if you have follow-up questions, I
7 can talk about some of the problems that have been
8 alluded to earlier, with specifics.
9 Third, we have seen, in a number of abusive
10 and highly litigious companies, that the DMCA is used
11 as a business model itself, as a monetization strategy
12 by copyright agents and as a litigation strategy,
13 rather than what it's supposed to be, which is to be a
14 framework to encourage collaboration. It has become a
15 weapon. That can be solved by education, as
16 everything I have discussed beforehand.
17 The fourth is a pervasive problem
18 throughout copyright law and it is the extreme
19 statutory damages situation, because of the statutory
20 damages dysfunction in copyright law, which allows
21 unbelievable amounts of damages -- which people in
22 other countries think are just bizarre -- that creates
23 windfall incentives for people to abuse every aspect
24 of copyright law, including the DMCA process. And the
25 legislation that is needed is reform of statutory

1 damages. Once that is done, then many other complex
2 questions of copyright law become easier to solve.
3 Thank you.
4 MS. TEMPLE CLAGGETT: Thank you. I'm
5 sorry. I can't see your sign. It's Ms. --
6 MS. SHEEHAN: Sheehan.
7 MS. TEMPLE CLAGGETT: Ah, Sheehan.
8 MS. SHEEHAN: I just wanted to respond
9 really briefly to what Ms. Pariser said earlier.
10 I think it's clearly tempting to see 512
11 and the future of 512 as being solely about the
12 interests of Internet service providers and/or content
13 creators. But what we've seen in 512 is that it's
14 also very critical to the public interest and to the
15 interest of Internet users as a whole. And that's a
16 voice that needs to be included in these
17 conversations.
18 Anytime you're increasing the burdens on
19 ISPs or increasing the risk of liability for alleged
20 user infringements, you're increasing the risk that
21 lawful user content will be removed, will be taken
22 down with little recourse and with the dramatic
23 consequence for freedom of expression online and for
24 innovation in new services and innovation in culture.
25 MS. TEMPLE CLAGGETT: Thank you. And I'm

1 going to have some follow-up questions with respect to
2 that in a few minutes. Mr. Rosenthal?
3 MR. ROSENTHAL: Thank you. I'd like to
4 join Jenny and talk just for a second or two about
5 this issue of contrasting those who get the notices
6 and deal with them and those who send them. I think
7 at the end of the day, when you -- it's nice to hear
8 that everything's okay on the ISP side. It's working
9 well.
10 And yet, on the content owner side, if you
11 have a company that has resources, it is an incredible
12 drain and for those copyright owners, they have just
13 stopped using it. Therefore, they might have a
14 copyright, maybe not under 512, but they may have a
15 copyright that they have no functional remedy. It's
16 comparing someone who's starving to somebody with a
17 healthy appetite. And I think that what we have to
18 contrast here is the burden on the ISPs and those
19 getting these.
20 And I understand the differences between
21 512(a) and the 512(c) issue and maybe education is
22 helpful in that realm. But there's got to be, for our
23 ecosystem to survive, especially small copyright
24 owners, a shift in this burden, a shift of policing
25 the Internet even more so at the point where they're

1 feeling pain and the copyright owner is feeling pain.
2 Maybe we've come to that right balance.
3 But right now, it is totally out of balance
4 and the fact that we're hearing these comments about
5 it's working relatively well and yet on the copyright
6 side it's a debacle, this should push public policy
7 towards considering a shift in that burden. Thank
8 you.
9 MS. TEMPLE CLAGGETT: Thank you. Mr.
10 DiMarco?
11 MR. DIMARCO: I couldn't agree -- I
12 couldn't agree more. And I note that I'm one of the
13 only two independent copyright holders I believe at
14 this table right now. So here's a list that I brought
15 with me. I set up Google Alerts.
16 I'm an author and I've written nine books.
17 So that's, you know, some of them with major big five
18 companies, publishing companies, some with boutique
19 companies and some with midsized companies.
20 I set up my Google Alerts to tell me every
21 time a pirated copy of one of my books comes up.
22 Here's the list for April. Approximately 40, four of
23 which just came in last night. These are pirated
24 instances of my copyright that I can't get back. Yes,
25 I have DMCA. Thank you for that.

1 It's toothless. It doesn't work.
2 I love Penguin, Random House and I wish
3 that they were here today because they, being a
4 larger-scale publisher, have the resources through
5 digital mark securities, a policing firm, that if I
6 see any of these pop up that are a Random House book
7 that I've written, they'll take it down usually,
8 usually.
9 But my existence now as a creative content
10 provider is all about trying to invoke DMCA. You're
11 telling me that there's a -- that it's all great from
12 the ISP side. Hogwash. From my point of view, I
13 spend the majority of my time running after people who
14 are stealing from me.
15 It's as if I go to the bank every day and I
16 say, hey, somebody just took an illegal electronic
17 wire transfer. Can you help me to get it back? Yeah,
18 fill out this notice, which won't work, day after day
19 after day.
20 It's gotten to the point now where I tell
21 my agent, who's the publisher, can't work with them.
22 Why? They can't afford protection.
23 They're not going to go after the copyright
24 infringers, who by the way are not American companies
25 a lot of times. Is there anybody here from TzarMedia?

1 No? Any Panamanian companies?
2 No. DMCA is in effect but who's going to
3 serve the notice? People tell me, well, you should
4 have an attorney. Yeah, I should. I can't afford an
5 attorney who's going to go after nine of my books.
6 It's ridiculous.
7 So I understand that things are well from
8 certain points of view. But from the point of view of
9 an independent copyright producer, somebody who holds
10 the copyright, a writer, a musician, an artist, it is
11 a complete debacle. It is not working. And I wish I
12 had an answer. But I don't. But you need to know
13 what the ecosystem is like and you need to know that
14 at this point, it is stratified against independent
15 producers of content.
16 MS. TEMPLE CLAGGETT: Thank you. I'm going
17 to go down the row. I do have another question that I
18 want to focus on based on something that Ms. Sheehan
19 said based on the user perspective. But I'll go --
20 I'll ask that question and you can either answer it or
21 you can address the initial question. But I just
22 don't want to lose that.
23 And that really is we talked a little bit
24 about the concept of improper notices and how the DMCA
25 affects users. In terms of improper notices, there

1 have not been many studies on kind of the actual
2 amount of improper notices. But I want to drill down
3 more specifically on the types of improper notices
4 because I want to really drill down on the amount of
5 improper notices that are targeting legitimate content
6 that would have negative effects on people's free
7 expression.
8 So I know that there have been studies that
9 have suggested that there are a large number of
10 improper notices. But are they improper procedurally
11 or are they improper substantively? Because those
12 would potentially raise different concerns if, for
13 example, there is a notice that just identifies Prince
14 as the sound recording versus Michael Jackson.
15 Would those have the same concerns with
16 respect to free expression and protecting legitimate
17 content as opposed to a notice that is actually
18 targeting someone's free expression? So I wanted to
19 see if we could drill down specifically on the amount
20 of notices that are improper because they are
21 targeting legitimate content. But first, I'll go to
22 Ms. Johnson to continue from the first question.
23 MS. JOHNSON: Thank you. As an independent
24 author, I thought I would follow up on what Mr.
25 DiMarco said. I've written two books.

1 But my major book was published in 1996, 20
2 years ago. I sometimes think it's the most infringed
3 upon, plagiarized book of the 20th century.
4 I'll just give you an example of the most
5 egregious situation, which is a particular Facebook
6 user who's probably published my book on his Facebook
7 page three times over in the last 10, 15 years. I
8 have started initially by sending takedown notices to
9 Facebook and what I learned was it took about three
10 days of my time to satisfy Facebook's demands to prove
11 that I was the author, that I owned the copyright.
12 I actually got my copyrights reverted to
13 me, which I sometimes wish I hadn't done because maybe
14 I'd have a publisher like Crown behind me to help me
15 with these kinds of things. But what happens is that,
16 you know, the Facebook might take the posting down,
17 three or four paragraphs, a page or two. But you see
18 it pop back up, you know, two or three hours later, a
19 day later.
20 And so, to get it down again, you've got to
21 spend three days of your time doing this. I did this
22 off and on for a couple of years. A friend was ill. I
23 helped him for two years until he died. During that
24 time, I simply took screenshots of what was going on.
25 I thought, well, when the time comes, I can present

1 this to Facebook. I had thousands of screenshots of
2 one Facebook user's infringement on this book or, you
3 know, postings, not plagiarizing but just simply
4 taking paragraphs and entire pages, multiple pages and
5 posting them.
6 I hired a $500 an hour Park Avenue
7 copyright attorney. Meanwhile, I live on Social
8 Security. And he presented 75 instances of copyright
9 infringement and Facebook told this guy to take -- to
10 cease and desist. I don't know what they said. I
11 never saw the letter. I didn't -- I wasn't privy to
12 the communication. He stopped but for about two
13 months -- but with a lot of profanity, a lot of, you
14 know, everything you hear about how women are treated
15 on the Internet. It all happened. A lot of anger,
16 hostility directed towards me. It stopped for a
17 while. But that was a year ago.
18 Since then, he is now posting material that
19 appeared elsewhere on the Internet on other people's
20 websites and Facebook. And it's sort of like, well,
21 they did it. So I'll just take what they -- what they
22 posted and use it. He is now plagiarizing the book
23 instead of, you know, just posting it verbatim and
24 saying this is from Osler's Web, which is the name of
25 the book.

1 He'll plagiarize it or he'll just put --
2 he'll plagiarize a sentence or two and then he'll just
3 put page 458, because he's now got 5,000, 6,000
4 followers as a result of his self- aggrandizing, using
5 my book. And many of his followers do the same. They
6 feel that the bottom line is that I feel that my book
7 has been utterly devalued. My efforts to try to
8 protect it have been absolutely futile. It was my
9 understanding that the Digital Millennium Copyright
10 Act would insist that --
11 MS. TEMPLE CLAGGETT: And I hate to cut you
12 off, but I think we're past the --
13 MS. CHARLESWORTH: Although I do have one
14 really quick question --
15 MS. TEMPLE CLAGGETT: A quick follow-up,
16 yeah.
17 MS. CHARLESWORTH: So when you sent a
18 takedown notice or send -- I don't know if you're
19 still doing it -- to Facebook, do they then respond
20 and say prove you're the owner of the copyright? How
21 is it -- and what are they demanding from you and is
22 that still their policy, if you can quickly answer it?
23 I know we have a lot of people waiting to --
24 MS. JOHNSON: I know. I know. I'm sorry.
25 MS. CHARLESWORTH: No, that's okay.

1 MS. JOHNSON: This is probably in 2012-
2 2013. 2011, I was sending notices to Facebook.
3 They -- you can never talk to a human
4 being. They send a form back. They want proof. So
5 you need to scan in, you know, the letter saying that
6 you own the copyright. You need to scan in the
7 material that was stolen. You need to go through
8 several steps to prove to them that you are the
9 author, that it is your book, that you wrote those
10 words.
11 And only then, you know -- on average, it
12 was three, three or more days basically before -- to
13 just satisfy their demands. The burden of proof of
14 course was on me. And the thing would come down and
15 then it would go back up shortly.
16 MS. CHARLESWORTH: Okay. Thank you for
17 that.
18 MS. JOHNSON: Okay.
19 MS. TEMPLE CLAGGETT: Mr. Kennedy?
20 MR. KENNEDY: Thank you. I would just
21 simply echo what you've already heard in the first two
22 sessions, that this is an incredibly asymmetrical
23 situation that we're dealing with right now and that
24 the rights of individual creators are really being
25 abused in ways that I don't think were intended when

1 the DMCA was first thought about. I have many, many
2 photographers that I work with who are independent
3 photographers who just simply tell me that they cannot
4 afford the time that's required to administer the
5 takedown notices nor can they afford the time and
6 resources to engage lawyers when they are
7 vituperatively attacked for simply trying to secure
8 their rights as they exist in the system.
9 And I think that we really -- I disagree
10 that -- I'm very upset in fact that, echoing Mr.
11 DiMarco, that the reality is being portrayed as such
12 that we are not getting a clear understanding of the
13 fact that the big ISPs and the big OSPs are not
14 engaging in a collaborative manner with individual
15 creators nor the groups that represent them at this
16 time.
17 MS. TEMPLE CLAGGETT: Thank you. Mr.
18 Osterreicher?
19 MR. OSTERREICHER: Thanks for the
20 opportunity to be here. Listening to the first panel,
21 this panel, it's almost like it's a tale of two
22 takedowns. I mean, it's almost self- evident from the
23 testimony that we've heard so far that the haves and
24 the have-nots have a completely different view of how
25 this is working. And you know, to hear from my side,

1 at least anyway, representing visual journalists that
2 they're reaping windfalls from trying to use the DMCA
3 I just find incredible.
4 I mean, I get calls all the time from our
5 members who say, my work has been infringed.
6 [They ask,] what can I do? [I tell them,]
7 go through the process. [I ask,] have you registered?
8 [They answer,] no. We've already discussed that
9 photographs very rarely register their work and news
10 photographers are probably the worst of that group.
11 And then, we go through the process. Have you sent a
12 cease-and- desist? Finally, I tell them, well, at
13 least you can use the DMCA takedown. You may not get
14 paid for your work.
15 You probably won't. But at least you'll
16 have the satisfaction of knowing that it's not being
17 misappropriated.
18 Unfortunately, from what we're seeing now,
19 in terms of case law and things like that, the fair
20 use concept has gone from being the exception to the
21 rule, from being a shield to protect people to being
22 used as a sword for people to have to actually go
23 through an analysis of whether or not it's fair use
24 before issuing a takedown notice, when the courts
25 themselves having difficulty in deciding. I think

1 that's going to be really problematic and I think
2 education is absolutely there.
3 But there needs to be an incentive rather
4 than just a safe harbor because the more content --
5 and I hate that word when we're talking about created
6 work -- but the more content that's up, the more it
7 benefits some of the people that are getting the
8 protections of the safe harbor.
9 And we need to incentivize their
10 willingness to take down that work when it's
11 infringing.
12 MS. TEMPLE CLAGGETT: Thank you. Mr.
13 Ostrow?
14 MR. OSTROW: Yes. I'd just like to make a
15 few quick points because I could very easily say what
16 he or she said on the content creator side.
17 But one point that I'd like to make is to
18 borrow the Nixonian phrase of the silent majority. As
19 somebody who represents a lot of the individual
20 songwriters, recording artists and small businesses,
21 record labels and music publishers, there are lots and
22 lots of people who never bother to send notices
23 anymore to the YouTubes and the Facebooks of the world
24 because they see what has happened to people like Mr.
25 DiMarco, to people like Ms. Johnson. And when you

1 look at the statistics of the fact that Google and
2 YouTube, the notices are going up and up, that doesn't
3 even take into account the probably millions of small
4 creators who are themselves small businesspeople,
5 including myself, that don't even send notices because
6 the system is so useless.
7 In terms of counter-notifications, that is
8 a system that in my experience, and those people I
9 know and my clients, very few counter-notices are even
10 served because of the whack-a-mole situation. The
11 person who has the content taken down will simply
12 repost it and over we go again. I'd like to address
13 quickly two things that Mr. Bridges had said, that the
14 DMCA doesn't create rights for content creators. Well,
15 it kind of does. The bargain that was struck in
16 exchange for a limitation on liability was supposed to
17 be this takedown mechanism that avoids litigation
18 because statutory damages, which really aren't that
19 high when you consider the Copyright Office's own
20 study on the cost of prosecuting a litigation to
21 trial, which averages for a case under a million
22 dollars, over several hundred thousand dollars, this
23 is supposed to be the incentive that we get. And when
24 we do use this mechanism, it is ineffectual and I have
25 had my own clients subject to the kind of personal

1 attacks that Ms. Johnson has described, that people
2 get angry with how dare you take this down, I'm a fan,
3 I'm promoting you.
4 Well, if you really want to promote me, buy
5 my stuff or go to a service that legitimately puts it
6 up. Thank you.
7 MS. TEMPLE CLAGGETT: Thank you.
8 MS. CHARLESWORTH: I had a -- oh, I'm
9 sorry, Karyn. Just really quickly, I know we're
10 pressed for time again. But you said that in your
11 view, people don't use the counter-notice process.
12 Instead they just repost the content?
13 MR. OSTROW: Correct.
14 MS. CHARLESWORTH: Is that a common
15 experience? I mean, have you seen that in --
16 MR. OSTROW: Well again, I have a
17 relatively circumscribed universe of people I deal
18 with. But in that universe of individual creators and
19 small publishers and labels, yes, that's exactly what
20 happens. The one time that I'm aware that somebody
21 sent a counter-notice is I represent a small classical
22 publisher and this is a work that's not released on a
23 commercial recording. And it was a university concert
24 where they posted the entire performance and the
25 publisher, in speaking with the composer, didn't like

1 the performance and didn't want that out there. And
2 of course, as has been stated before, posting an
3 entire work without transforming it in any way is
4 certainly not fair use. And you know, that was the
5 one instance where the person sent a counter-notice,
6 claiming it was fair use. But generally, people just
7 repost.
8 MS. CHARLESWORTH: And did you pursue legal
9 action?
10 MR. OSTROW: No, because what's the -- you
11 do a cost-benefit analysis and, you know, which would
12 cost thousands of dollars to even file a complaint. I
13 mean, what are you going to do?
14 MS. CHARLESWORTH: So did the content
15 remain up then in that case?
16 MR. OSTROW: I think the content did come
17 down in that particular instance. But in other
18 instances, it would just be reposted.
19 MS. CHARLESWORTH: Okay.
20 MS. TEMPLE CLAGGETT: And I do have some
21 follow-up questions on counter-notifications a little
22 bit -- if we have time a little bit later.
23 I know, Jenny, you had spoken before. So I
24 don't know if you're going to answer my second
25 question?

1 Because I did want to make sure again that
2 we talked about how the DMCA notice-and- takedown kind
3 of affects individual users in the interest of the
4 public. And so, on that point, I really wanted to
5 focus on the concept of improper notices that may or
6 may not target legitimate content and freedom of
7 expression as opposed to something being improper
8 because, again, you're just misidentifying the
9 illegal content.
10 So if you and others have response to that,
11 Jenny?
12 MS. PARISER: Yeah. That is what I
13 wanted to address and specifically the Berkeley-
14 Columbia study that has gotten some
15 attention recently. I wanted to dispense with the idea
16 that that study really has very much to tell us, at
17 least about the magnitude of the so-called improper-
18 notice problem.
19 So first of all, the study, as you probably
20 know, has three parts, only one of which is really an
21 empirical study about improper notices. The other two
22 pieces are more kind of interview-type analyses. But
23 the one that's empirical deals with the Google Search
24 database.
25 So first of all, it only relates to Google,

1 only relates to Search and doesn't have anything to
2 tell us about the rest of the Internet ecosystem and
3 Internet piracy elsewhere on -- in the Internet.
4 Second, the study looked at some 1,800 so-
5 called improper notices or notices within the confines
6 of a limited period of time, a couple of years ago.
7 The conclusion that has gotten so much headline is
8 that some 30 percent of the notices sent were
9 improper.
10 So let's break that down a little bit.
11 Fifteen percent of the notices, according
12 to the study, were some variety of technical mistake.
13 First, about 1 to 2 percent were truly
14 technical in the sense that the notice failed to claim
15 that the person sending it was the copyright owner.
16 So really kind of miniscule technical mistakes. A
17 larger percentage, about 4 percent, was a mismatch
18 between the copyright owner and the target work.
19 So the owner of Usher's -- the musical
20 artist Usher's musical works were sent to take down a
21 motion picture called "The House of Usher."
22 So that's kind of a whoops, but not
23 necessarily I think the sort of thing that people are
24 really exercised about when we talk about the
25 curtailing of legitimate expression because the target

1 work is itself a copyrighted work of someone's that
2 shouldn't have been up on that site to begin with.
3 About over 10 percent of the notices that
4 they were talking about were ones in which the notice
5 pointed to a page that had more than one URL on it,
6 making it difficult for Google to know which of the
7 works should be taken down.
8 That's a problem for Google. Sorry about
9 that.
10 But you know, nevertheless, Google was
11 somehow able to take down 97.5 percent of the works it
12 received -- the notices it received. So probably not
13 that great a problem really for Google.
14 And ultimately, the fact that there's this
15 kind of quirk in the match-up between the notice and
16 the number of works is again more of a problem for
17 Google and the user and Google's efficiency mechanism
18 and for the copyright owner who's sending the notice
19 if the work doesn't get taken down, not really a
20 problem for the person who posted it.
21 Finally, they talk about the fair use
22 bucket. About 7 percent of the notices they found
23 were subject to some kind of fair use analysis.
24 First of all, they are way over-generous in
25 their assessment of what might be considered a fair

1 use. Covers, ringtones, not unrecognized as fair use
2 under U.S. law at this moment. The remaining amount
3 of works that they looked at there, mashups, that sort
4 of thing, could conceivably be a fair use in a court
5 of law. But in no way tells us anything about whether
6 the copyright owner lacked the requisite good faith
7 basis to send the notice, even if there might be some
8 color of fair use on it.
9 Finally, let's look at Google's own numbers
10 on this issue. Last month, Google's transparency
11 report reported over 85 million notices sent in their
12 submission. In response to your NOI, they said
13 hundreds of improper notices per month. Even if we
14 give them a thousand notices a month are improper, as
15 a percentage of the 85 million hat they got, that's
16 less than 1 percent.
17 We are not here to say there's never been
18 an improper notice in the history of the world. And
19 I'm sure Mr. Bridges can give us some anecdotes about
20 people using them as weapons or whatever. We're not
21 here to say that doesn't happen. It's a
22 microscopically small percentage of the overall number
23 of notices sent and not the thing that should be
24 driving this particular bus.
25 MS. TEMPLE CLAGGETT: Okay. And just this

1 one time, I want to go out of order, just because you
2 mentioned the study. So I want to give Ms. Schofield
3 an opportunity to respond to some of the questions you
4 raised.
5 I do want to reiterate what my initial kind
6 of question was from the kind of user perspective and
7 public-interest perspective.
8 Did your study conclude that in terms of
9 the volume of improper notices, there is a large
10 problem of improper notices that are targeting
11 legitimate freedom of expression as opposed to some,
12 as Ms. Pariser mentioned, some procedural defect that
13 might nevertheless still be illegal content? Because
14 the question is focused on protecting users and the
15 public interest.
16 MS. SCHOFIELD: Sure. Yeah. I think it's
17 important to look at all three studies when you're
18 looking at this question. I'll start with the first
19 study, which was the -- excuse me, the qualitative
20 look at a bunch of different online service providers'
21 experience with this. Across the board, hosts of all
22 size did talk about the problem of improper notices
23 targeting what we're calling legitimate content, non-
24 infringing content.
25 And you know, the problem there is that

1 there is a tendency to take down that content that the
2 service providers have -- are facing liability risks
3 and large statutory damages if they're making
4 incorrect decisions. So in many cases, their risk
5 tolerance leads them to taking down content even if
6 they think that it's likely to be legitimate content,
7 to the extent that some just across the board take
8 down content in response to a hundred percent of
9 notices.
10 Now, you can see some of the transparency
11 reports made public in recent years that some
12 providers have a higher degree of risk tolerance and
13 are actually rejecting quite high numbers, some 50, 60
14 percent. So that does also indicate that there is
15 some problem with improper notices.
16 Now, on the study two, which Ms. Pariser
17 discussed a little bit, yeah, these are largely
18 automated notices sent by large professionalized
19 senders, REOs, trade associations. You'll note that
20 we noted in the study that they're often targeting
21 problematic sites. So we've heard that again in the
22 discussion today, that some of the large rightsholders
23 are focusing their efforts on sites that they are
24 reviewing and deem to be trading in infringing
25 content.

1 So one thing that we did to look at
2 different things that might be going on in the
3 ecosystem beyond the large rightsholders targeting
4 what might be called sites that are trading in
5 infringing content is we pulled out a different subset
6 of the notices, which largely dealt with notices
7 outside this large professionalized sending.
8 So we looked at notices sent to Google
9 Images search and these notice senders tended to be
10 individuals, smaller businesses and we saw a much
11 different dynamic here in that these were targeting
12 sites that we might be more fearful would compromise
13 legitimate expression, so blogs, message board
14 threads. And indeed, here again, we saw flaws with 15
15 percent of these were targeting subject matter that
16 was improper subject matter for the DMCA. So 15
17 percent weren't even copyright complaints to start
18 with. They were submitted as a DMCA complaint but
19 they were actually complaining about privacy or
20 defamation, this sort of thing.
21 MS. TEMPLE CLAGGETT: And that was with
22 respect to the image?
23 MS. SCHOFIELD: Correct, correct. Yeah.
24 So overall, I think that, you know, your
25 question related to the amount of legitimate content

1 that's targeted, there are problems to studying this.
2 And you know, one of the reasons that we
3 can only look at the Google Web search notices and the
4 Google Image search notices is because this is not a
5 transparent system that allows researchers to really
6 get to the bottom of these questions that would
7 benefit everybody that's trying to participate in this
8 conversation about the percentage of legitimate
9 notices.
10 So you know, my challenge would be, you
11 know, help researchers that are trying to understand
12 the system and provide good data by sharing notices
13 with us that are, you know, beyond the Google Search
14 set.
15 MS. TEMPLE CLAGGETT: And just a -- just a
16 follow-up question on that in terms of the focus on
17 the legitimate content, I know that in the study, you
18 list a number of different examples of improper
19 notices. And some of those seem to be examples of
20 procedural defects because the examples were of -- I
21 think Usher was one of the examples in terms of House
22 of Usher versus Usher, the artist.
23 Would you be able to go back and determine
24 whether in terms of the calculation of the improper
25 notice, it was based on legitimate content or free

1 expressive content versus otherwise illegal or
2 infringing content? Is that possible for the study?
3 MS. SCHOFIELD: Well, again, I think that
4 would be a little difficult for us without having all
5 the information, in the same way that it is difficult
6 for online service providers to always understand
7 whether something is authorized content or not. It
8 would be difficult to know what licenses exist for
9 those works.
10 I do think, stepping back a little bit, you
11 know, one might be able to concede that notices sent
12 to sites that are trading in infringing content are
13 unlikely to be as challenging for user expressions as
14 other notices.
15 But one of the wider things that we took
16 from this is as we move to more and more automated
17 sending systems using these mechanisms and apply those
18 outside of these types of sites, you might lead to
19 more problems.
20 MS. CHARLESWORTH: Can I -- just a quick
21 follow-up on that. I mean, you looked at some human
22 review processes and automated processes in the study,
23 correct?
24 MS. SCHOFIELD: When we spoke with online
25 service providers and rightsholders, we looked at all.

1 MS. CHARLESWORTH: I mean, did you draw any
2 conclusions about which is more accurate?
3 MS. SCHOFIELD: So it depends on the type
4 of rightsholder. So we did find problems in the
5 notices that seemed to be sent by humans. In the
6 study three, the Google Image search set, that really
7 human attention to the issue in that set was not
8 necessarily a panacea to the problems.
9 Largely, they were unsophisticated
10 rightsholders who are actors in the system who didn't
11 actually have a copyright. So there are problems
12 there as well.
13 MS. TEMPLE CLAGGETT: And following up on
14 that, I think that the study said that I guess the
15 automated -- the notices that were sent by
16 professional vendors for kind of large entertainment
17 entities typically had less inaccuracies than the
18 individual or small business owner notices. Is that
19 because of who they targeted or of their understanding
20 of the law? And is that a fair statement as to what
21 you concluded?
22 MS. SCHOFIELD: Yeah. So depending on how
23 you count the Image search notice problems, overall 70
24 percent of the notices had issues that we flagged. But
25 there was one particular sender that dominated the

1 set. So we set hers aside and the number we have
2 there is 37 percent of the notices have problems
3 compared to roughly a third of the automated notices.
4 And I think that that largely has to do with level of
5 sophistication of the human senders in the second --
6 the third study looking at the Google Image search.
7 MS. TEMPLE CLAGGETT: And I think I'll
8 perhaps get to this a little bit later. But does that
9 suggest in terms of recourses or trying to prevent
10 abuse, does there need to be a different solution
11 depending on -- I don't know -- the type of notice
12 sender, if the problem is, for example, individuals
13 and smaller businesses.
14 Does a solution of higher damages apply to
15 individuals? Does that make the same amount of sense
16 as if it was applied to a large corporation? Should
17 there be a different solution if there's a different
18 problem?
19 MS. SCHOFIELD: Yeah. We recommend
20 solutions that are tailored to all different aspects
21 of this problem. So I think that by in large, for the
22 automated sending, there are definitely some best
23 practices that we discuss with rightsholders and
24 online service providers about how to refine these
25 systems to minimize these types of errors.

1 We've subsequently spoken with rights
2 enforcement organizations who reached out to us after
3 we published the study who have said that absolutely
4 there are mechanisms to refine the algorithms, to
5 limit the targeting of -- the mismatch in targeting of
6 problems and emphasized that some rights enforcement
7 organizations are weighing their degree of success
8 based on numbers over quality whereas there are ways
9 to improve the quality as well.
10 For the smaller senders, I think there's a
11 lot of educational efforts -- other people have said
12 this as well -- that could be targeted at smaller
13 senders to help them understand what the processes
14 actually used for.
15 MS. TEMPLE CLAGGETT: Thank you. And we
16 are almost actually out of time. But I'm going to --
17 we're going to -- because the previous panel went a
18 little bit over, we're going to probably hold you
19 until 12:30, as opposed to 12:15 in terms of the lunch
20 break.
21 But we're going to have to make this
22 another kind of rapid round. I actually did have
23 another question about the counter-notification
24 process. But we'll see if we'll be able to get to
25 that now or have to hold that to a later panel.

1 But I'm going to go back to the order and
2 call on Ms. Prince.
3 MS. PRINCE: Thank you very much. I wanted
4 to address your original question as an individual
5 creator who's been the subject of improper notices.
6 And I believe I create legitimate content, which I
7 also have to defend under fair use. So there were two
8 cases of improper notices that also tie into counter-
9 notification that I would like to address.
10 So the first is the most obvious, which is
11 DMCA strikes or takedown notifications by competitors.
12 Now, I create video content on YouTube, which is one
13 of the few platforms where you get AdSense revenue
14 specifically for your content and mostly within the
15 first few days of publishing your content. Competitors
16 can just lob copyright takedown notices at you, which
17 will result in the punitive damages of YouTube
18 completely terminating your account, which as a small
19 creator may leave you with no recourse to even get in
20 touch with YouTube to reinstate your account. And if
21 this is how you're making a living, such as it is for
22 me, this is a very serious concern.
23 The second issue would be dealing with
24 YouTube's Content ID system, which some of you are
25 familiar with, and how it ties into the DMCA takedown

1 notice. So for that, the point was made before by Mr.
2 Ostrow that sometimes people don't bother submitting
3 counter-notifications and just re-upload content. I
4 have the opposite problem, where I will submit a
5 counter-notification and the company will let that
6 claim run out and at this point, this can be a month
7 into having my video taken down.
8 So I've lost the majority of my revenue.
9 And at that point, once it runs out, they
10 use a different branch of their company under a
11 different contract with YouTube to come back and start
12 another claim. And they can keep your content down
13 for months, which not only affects the type of content
14 you produce, but it also has a chilling effect that
15 makes you not want to produce that content more
16 because you can lose your entire account over a few
17 specific cases of work.
18 MS. TEMPLE CLAGGETT: Are you suggesting
19 that -- just to clarify in terms of you said that you
20 would file a counter-notification and it would remain
21 down for months. Are you saying that the ISP is not
22 complying with the DMCA --
23 MS. CHARLESWORTH: Put-back.
24 MS. TEMPLE CLAGGETT: -- put-back
25 requirements under 512?

1 MS. PRINCE: That's a great question.
2 And to clarify, in this case with YouTube
3 being the service provider, what will happen is the
4 material will be reinstated. But then, the company,
5 ignoring their initial claim, will create a follow-up
6 claim. And because all of these claims are automated,
7 there's nobody checking them to see that this is in
8 fact the same company initiating a second follow-up
9 claim. And that will keep your content down, again,
10 for another period of time as you have to go through
11 the process again.
12 MS. CHARLESWORTH: Is this through Content
13 ID or a separate process on YouTube?
14 MS. PRINCE: This is through Content ID.
15 And then, the Content ID process segues
16 into the DMCA takedown notification process. So if
17 you've sent in a counter-notification and the person -
18 - the claimant isn't happy with that, they will put
19 through a DMCA takedown notice, at which point you're
20 into the DMCA takedown notice system.
21 MS. CHARLESWORTH: Okay. Thank you.
22 MS. TEMPLE CLAGGETT: Mr. Rosenthal?
23 MR. ROSENTHAL: Yeah. A couple of things.
24 First of all, talking about the study, since you're
25 looking for input, one of the areas that you

1 identified in the study as a legitimate, I guess,
2 exercise in deciding whether or not something is
3 fair use is cover versions of songs.
4 I think that's already covered under
5 section 115.
6 The music publishing community would not
7 like to see that as being debated anymore as to
8 whether or not something like that is fair use.
9 But dealing directly with your question
10 about improper notices, I think it's small and
11 insignificant. And I think that the stifling of
12 innovation argument that's being made really should
13 be made much more from the user side.
14 Copyright law already takes into account
15 the dichotomy between expression and idea. You can
16 take all the ideas you want. You can't take the
17 expression. And if an original copyright owner wants
18 to try to stop that, they should have the right to do
19 it.
20 And it shouldn't be used against them,
21 that somehow they are stifling somebody else's right
22 to create works. The copyright law already takes
23 care of that.
24 I think that in general, we're talking
25 about mistakes on the notices. I'm all for

1 education. I'm all for fixing up the loopholes in
2 terms of understanding what these notices are.
3 But from the original copyright owner's
4 perspective, if they don't have a remedy -- and we're
5 really talking about a remedy here -- to stop somebody
6 from using their expression, the only stifling of
7 innovation will be from those artists who stop
8 creating. That's the danger that we face, not that
9 those users out there won't have a right to somehow
10 use their work in a way that goes beyond what the
11 copyright law allows them to do. Thank you.
12 MS. TEMPLE CLAGGETT: Thank you. Ms.
13 Tushnet?
14 MS. TUSHNET: So, good point. I would
15 suggest that there are a lot of problem notices on the
16 substantive grounds you are seeking in the comments
17 of, among others, Engine, Red Bubble, Matthew Neco's
18 discussion of Docstoc, Yahoo, Automattic, Siteground,
19 SoundCloud, the Internet Archive, Wikimedia -- they
20 all list a bunch of these problematic ones that
21 they've experienced. Jon Penney's study of Blogger
22 and Twitter takedowns also finds a substantial
23 minority -- they're a very clear minority but a
24 substantial percentage of what look like fair uses.
25 And this is a situation not of ISP versus content

1 owners or content creators, we're calling them now.
2 Our users are creators and copyright owners
3 too. In fact, we sometimes assist them with
4 information about the DMCA, when someone is selling
5 their works on Amazon, which happens.
6 I've sent takedown requests myself. But
7 what we get and what our users are mostly at risk of
8 are invalid takedown notices, mostly for critical
9 works, sometimes for review. When we ask for proof of
10 ownership, by the way, we do so because there are
11 people who pretend to be HBO, who pretend to be Warner
12 and all sorts of other crazy things. The Internet is
13 full of people and people do all sorts of things kind
14 of on every side of this issue.
15 And it's worth noting that the calls for
16 education are what were condemned in the last panel as
17 barrier after barrier because when YouTube asks is it
18 a picture of you, the reason they're asking that is to
19 figure out if it's a copyright claim because people
20 don't understand that. And so, you can't have
21 everything that you want here.
22 I just want to point that the haves and
23 have-nots exist on both sides. When you get a DMCA
24 notice from a big copyright owner, people are scared
25 to counter-notify. You know, if they consult a

1 lawyer, the lawyer has to tell them about statutory
2 damages.
3 We just worked with someone, a woman whose
4 videos had been shown at a number of museums, at
5 curated shows in multiple countries.
6 And she still thought long and hard about
7 her counter-notification because she had to say, okay,
8 I'm willing to be sued. Small creators do often
9 decline to interact with the legal system. But please
10 recognize that if you accept the argument that they're
11 declining to interact on the notice side, it is also
12 true that they are declining to interact on the
13 counter-notice side and so the numbers here actually
14 do not tell us the normative thing that we need to
15 know.
16 MS. TEMPLE CLAGGETT: Thank you. And I
17 have another follow-up question, but I'm going to ask
18 it -- maybe we'll get it in written comments. The lack
19 of counter-notifications is often cited on both sides.
20 Some are saying it's a lack of counter- notification
21 because of the process, it's burdensome. Others are
22 saying it's because the notices are valid.
23 In terms of just my focus on legitimate
24 expression, is there any possibility, I suppose, that
25 people are not counter-notifying because the notice

1 may be improper procedurally, but substantively, they
2 posted otherwise illegal content. So you would
3 presumably not have a counter-notification if you
4 received a notification for Prince when you posted
5 Usher.
6 It's unlikely, I guess, that that would be
7 a counter-notification. So I didn't know if that was
8 part of the issue.
9 MS. TUSHNET: Yeah. So I've never
10 encountered that personally. I will note the Digital
11 Media Association actually has a comment.
12 Now, they are actually pro changing 512.
13 They think it's not enough. But it's an interesting -
14 - they surveyed people and it's not a statistically
15 valid survey or anything.
16 But 9 percent of the respondents to their
17 study experienced counter-notification, which is kind
18 of interesting, higher than the numbers that are
19 floating around. And also, even their respondents
20 experienced a bunch of invalid claims against them,
21 what Becky was talking about.
22 MS. TEMPLE CLAGGETT: Claims with respect
23 to legitimate content.
24 MS. TUSHNET: Yeah, and they worked it in
25 because there was no place to say I've had a claim

1 against me. But they wrote it in in the comments.
2 MS. TEMPLE CLAGGETT: Thank you. Mr.
3 Weinberg?
4 MR. WEINBERG: Thank you. Yeah. So I
5 mean, I personally review every single takedown
6 request that we get. You know, that's one of my roles
7 at the company. And I think when you're hearing about
8 this process being messy is very true. We get every
9 single permutation of incorrect or skewed takedown.
10 We get many facially legitimately properly
11 formatted requests. But we get takedown requests from
12 people who are not -- neither the rightsholder nor the
13 user on the site. We get people who are using
14 takedown requests because they have some collateral
15 legal interest because they are using it to resolve
16 some sort of dispute that's completely unrelated to
17 copyright law.
18 The Internet is big. The Internet is
19 messy. And when you open up a path to people to say
20 this is the way to get something taken down from the
21 site, you get a huge amount of data. And even
22 sometimes you might code it as a technical error in
23 the notice.
24 So we might say if we got a notice -- a
25 takedown request from someone who wasn't the

1 rightsholder and we might code it as they did not --
2 they were not willing to assert that they were the
3 copyright holder. You know, and an error rate of that
4 data might look like, oh, that's a technical error on
5 behalf of the claimant.
6 But in fact, what that means is the person
7 didn't have any claim to -- when challenged and said,
8 do you have a copyright in this, that was when the
9 process resolved itself. And I think that one of the
10 challenges that we go through -- as I said, when you
11 want to file a takedown request on Shapeways, you send
12 an email to a single email address that essentially
13 comes to me and my team.
14 And we struggle all the time trying to set
15 a balance between either setting up gates on the front
16 end of that takedown request process to ask people
17 are you sure that you're a copyright holder, do you
18 -- try and kind of standardize the errors that we see
19 over and over or working a way in the backend
20 through what is essentially an email conversation to
21 get from the unstructured complaint that we received
22 initially to something that we're willing to act on
23 because we take it -- we're a community of designers.
24 So we take both infringement allegations
25 very seriously and removing something from our site

1 because, like YouTube, many of our users, their
2 sales, their 3D prints on Shapeways are a
3 significant chunk of their income. And so, taking that
4 seriously means creating a structure that takes the
5 kind of requests that come in and turn it into
6 something that you can stand behind and figuring out
7 how to do that in a way that doesn't burden -- unduly
8 burden rightsholders but also doesn't result in
9 takedown claims that are no in fact based in law.
10 And I know you've been asking a couple of
11 times between kind of the size of users and
12 specification of users. We get what you would fairly
13 describe as incorrect claims from users up and down
14 the line. Very often, the larger users, the type of
15 incorrect claim we get is when they have done a search
16 on a generic noun that happens to be tied to a
17 property they own and then everything that included
18 that word, they are then willing to send a takedown
19 request in, whereas with less sophisticated users, it
20 tends to be they have a claim that's not quite fully
21 maturely formulated. But the impact of both is the
22 same, which is we then have to institute a process to
23 clarify the request.
24 MS. TEMPLE CLAGGETT: Thank you. And just
25 in terms of timing, I just want to apologize to those

1 on this side of the room because I don't know that
2 we're going to be able to get to you.
3 We only have three more minutes. We've
4 already gone 15 minutes into your lunchtime and I
5 don't want to take away your lunch completely.
6 Certainly if I don't get to you, we will be
7 able -- we will have the opportunity either on later
8 panels to provide additional comments, as well as the
9 last panel. Anyone can come forward and speak. So I
10 probably will only be able to get to three more
11 people, which means the rest of this panel. Jacqueline
12 had a good idea -- is there anybody on this side who
13 actually has not spoken at all? I will include you
14 too.
15 So I'll include the last three here and
16 then the two who haven't spoken.
17 Everyone else who has already spoken on
18 this panel, sorry that I'm not allowed the time to
19 have you speak again. But certainly, again, you'll
20 have the opportunity towards the end of the afternoon
21 to raise any concerns that you wanted to raise that
22 you haven't been able to do so, so far. So I'll go to
23 Ms. Zlotnik.
24 MS. ZLOTNIK: Okay. I would say five years
25 ago I sent notices to ISPs and didn't even receive

1 replies. I also had a lot of things on YouTube and
2 they responded and the material was removed. Lately,
3 I've been going directly to the people that have
4 posted things on the sharing sites like Flickr or
5 Pinterest.
6 And it seems like -- I mean, it used -- you
7 know, it was always -- the burden was on photographers
8 to register your work and send out these notices. But
9 it's so out of hand now that I think these sharing
10 sites like Flickr and all of them, there should be
11 notices in real simple English on the front.
12 If you have scanned something from a book
13 and not gotten permission, do not post it because now
14 all my older work that's in books is being scanned.
15 People load high-res images. And it's really hard to
16 keep up with this. And once it goes on one of these
17 sites, it just -- everyone puts it on their wall. And
18 it's everywhere.
19 MS. TEMPLE CLAGGETT: Thank you. Mr.
20 Bashkoff?
21 MR. BASHKOFF: Yeah. Hi. Perry Bashkoff,
22 Warner Music. I just -- you know, I think everything
23 has been said, to be honest. My only addition to the
24 conversation would be the practicality of utilizing
25 the tool sets that are given to content owners -- and

1 I would encourage the decision-makers, whomever they
2 are, to, for lack of a better analogy, an undercover
3 boss kind of thing.
4 Go sit with the content owner, whether it
5 be a photographer, writer or a major content owner
6 like a Warner Music Group, where we represent, you
7 know, millions of copyrights. The tools are good. We
8 always refer to them as good, not great. And the
9 manpower hours to spend protecting the rights and
10 protecting the works of our artists and our talent, it
11 is simply not manageable.
12 So I just think the practical and reality
13 of the discussion here I think should -- you know,
14 there's been some questions asked that in my opinion,
15 again, being YouTube Content ID owner number one,
16 there are very elementary questions I think that if
17 someone spent time seeing what it means to receive a
18 counter-notice that says, my grandmother bought me
19 this CD, I'm good, or get lost, right.
20 We see those a lot and we spend a lot of
21 time doing that. And I mean, not to reiterate what
22 everyone else has said, spending real time, seeing
23 what is available to us and what can actually be done
24 as opposed to what is said can be done would be very
25 beneficial.

1 MS. TEMPLE CLAGGETT: Thank you. Ms.
2 Sheehan?
3 MS. SHEEHAN: Regardless of how you
4 characterize mistaken or improper notices, whether you
5 characterize them as intentional targeting towards
6 legitimate free expression or just mistaken or
7 procedural defects, you're still seeing -- even though
8 it's a small percentage -- millions of takedowns of
9 what in the end is wrongfully taken down content. And
10 those mistakes and procedural defects can have the
11 same kinds of effects on speech as deliberate
12 targeting.
13 I don't know if you're familiar with the
14 every single word in the mainstream Hollywood film
15 video series. But it reduces -- it takes mainstream
16 Hollywood films, edits them down to every single line
17 spoken in them by a character of color, showing often
18 the very few lines that are spoken by characters of
19 color in mainstream films.
20 And it's this excellent and creative
21 critique of racism in Hollywood. And they received a
22 takedown notice for every single line in Gone with the
23 Wind, and their content was removed. Fortunately, they
24 were able to get it back up because there had been a
25 great amount of public attention to this series.

1 But it raises the question of what happens
2 in these millions of other situations where content is
3 taken down and there's not a large public uproar about
4 that takedown. And my second point is just a response
5 to Mr. Rosenthal--
6 MS. CHARLESWORTH: Can I -- I'm sorry.
7 I just wanted to know -- was a counter-
8 notice filed in that situation --
9 MS. SHEEHAN: I think that --
10 MS. CHARLESWORTH: I mean, why isn't that
11 an answer to a situation like that?
12 MS. SHEEHAN: I don't have all the facts
13 for that situation. The content was put back up I
14 believe because the rightsholder who had sent the
15 request rescinded the request after public outcry.
16 MS. CHARLESWORTH: Okay. But I mean, I
17 guess one of the questions is when you have a
18 situation like that, I mean, we have -- there is a
19 counter-notification procedure and so--
20 MS. SHEEHAN: Yes. And I think that people
21 on this panel other than I have spoken to some of the
22 defects of the counter-notice procedure, that it is
23 very intimidating for Internet users to fill out the
24 counter-notice procedure that requires them to swear
25 under penalty of perjury that their use is definitely

1 non-infringing.

2 And I think there's inadequacies in the

3 imbalance of responsibilities between counter- notice

4 senders and actual notice of infringement senders. And

5 I think I also just want to comment very briefly on

6 what Mr. Rosenthal said.

7 I think the Supreme Court has made it very

8 clear on numerous occasions that you are allowed to

9 use the expression, that this is part of fair use and

10 this is one of the Constitution's requirements for

11 copyright law, one of the First Amendment requirements

12 for copyright law.

13 MS. CHARLESWORTH: No, I understand that.

14 But the point is when you're -- when you have say a

15 debate, there is a process.

16 I was just pointing out that when you have

17 content that goes up and there's an unfair notice that

18 --

19 MS. SHEEHAN: Sure.

20 MS. CHARLESWORTH: -- you know, an unfair

21 takedown notice is served, there is a procedure

22 available under the law --

23 MS. SHEEHAN: Yes, and I think we've seen -

24 -

25 MS. CHARLESWORTH: -- and so, apparently --

1 MS. SHEEHAN: -- in Ms. Schofield's study
2 that that counter-notice procedure isn't working to
3 the extent that we need it to work in order to
4 continue to protect expression.
5 MS. CHARLESWORTH: Well, maybe --
6 MS. SHEEHAN: So maybe we need to refine a
7 little bit of the requirements for the notices to make
8 sure that the notices are proper and also find a way
9 to make counter-notices work a little better for
10 users.
11 MS. CHARLESWORTH: Do you think that's an
12 area where some education might be helpful for
13 posters? In other words, it seems like the procedure
14 isn't really used a lot. So that's what we're
15 hearing.
16 MS. SHEEHAN: And I think that people have
17 spoken that there's a variety of reasons --
18 MS. CHARLESWORTH: Wait. We can't talk
19 over one another.
20 MS. SHEEHAN: Sorry.
21 MS. CHARLESWORTH: Sorry. So perhaps, you
22 know, your group and other organizations could do more
23 to educate posters of content about how that process
24 works.
25 MS. SHEEHAN: And I think that the

1 Copyright Office and all of us here could also do a
2 lot to educate rightsholders on the limitations of
3 copyright and when it's appropriate to send a notice,
4 a takedown notice. And I think that there's things
5 that we can do to ease some of the burdens that are
6 placed on users and on rightsholders in using the
7 notice and counter-notice system.
8 I think there's also a lot of reasons why
9 people might not want to use a counter-notice and it
10 might not simply be an education issue but also the
11 kind of intimidating factor of having to kind of swear
12 under a penalty of perjury that your use is non-
13 infringing.
14 MS. TEMPLE CLAGGETT: Okay. Last quick
15 follow-up question. You mentioned millions of
16 improper -- did you say millions of improper notices?
17 And if so, could you provide I guess a cite? That was
18 a number I --
19 MS. SHEEHAN: Sure. I think Ms.
20 Schofield is more able to answer that
21 question.
22 MS. TEMPLE CLAGGETT: So were there
23 millions of improper counter-notices in your study?
24 I'm just curious.
25 MS. SCHOFIELD: Yeah. Oh, counter-

1 notices?
2 MS. TEMPLE CLAGGETT: No, I'm sorry.
3 Improper notices. I'm sorry.
4 MS. SCHOFIELD: Yes, if you extrapolate the
5 percentages across the whole six-month sample, yes.
6 MS. TEMPLE CLAGGETT: Okay, great.
7 Thank you. We only have time for two final
8 points and those are for people who have not had an
9 opportunity to speak earlier. So I'll go with Ms.
10 Fields right now.
11 MS. FIELDS: I'll keep my comments very
12 short. But I just want to point out how incredibly
13 burdensome this notice-and-takedown process is for
14 creators.
15 As I mentioned before, we represent 80,000
16 visual artists and some are very well-known names,
17 like Picasso and Warhol and Matisse. And if I spent
18 all day doing nothing else but taking down the works
19 of those artists, then nothing would ever be licensed
20 and we wouldn't even be able to reach a fraction of
21 the infringing uses on the Internet.
22 And I want to point out that quite often,
23 notices that I've filed -- I have all the requisite
24 elements -- are rejected by service providers for no
25 apparent reason. And if service providers want to

1 take on that role of combating proper notices, then
2 they should be responsible for the infringing
3 activity. And in some ways, service providers are
4 incentivized not to remove infringing content because
5 they like the traffic that's derived from having works
6 by these big name artists on their sites. So when a
7 notice is submitted, it should be taken down.
8 One example that I have is a video that
9 included about 30 works of art by an artist member
10 that most of the people in this room have probably
11 never heard of. And when I submitted the notice to
12 the website, I was declined, asked to provide more
13 specific information. And in my notice, I had
14 included a timestamp of exactly where this artist's
15 work appeared in the video and the artist's name was
16 also included on the actual video itself. So I think
17 that many times works are removed as they should be.
18 But then other times, service providers are not doing
19 their job and removing works that are legitimately
20 complained of and used in an unauthorized manner.
21 Also, works of art are different than films
22 and music in that they're not excerpted.
23 They're not quoted. They're copied
24 wholesale.
25 They're applied to products. They're

1 commercialized in ways that you can never imagine and
2 we work really hard to take down unauthorized items.
3 One other comment to something Mr. Rupy
4 said earlier is that when an organization like ours
5 applies a takedown notice to a mere conduit, it's
6 because we can't reach the website in any other
7 manner. There are many websites that use proxy
8 services with hidden addresses. And the only way to
9 find them is to go through a Web host.
10 MS. TEMPLE CLAGGETT: Thank you. And the
11 final comment, I'm sorry, I can't see your sign -- Mr.
12 Housley?
13 MR. HOUSLEY: Yes. I'll be super-fast.
14 I just want to call back to something we
15 heard on the earlier session about efficiency versus
16 efficacy. We talk a lot about notices here and
17 problems with notices, edge cases with notices.
18 But even assuming that all notices were
19 perfect, that large content creators and individual
20 artists had all the resources they need to send
21 notices, that doesn't necessarily speak to the problem
22 that piracy is growing.
23 So there needs to be more collaboration to
24 find other solutions beyond just notice and sending,
25 like so-called whack-a-mole. And I think that, you

1 know, we'll get into filtering later, I think. But
2 there are other technologies available now that can be
3 used not just for antipiracy purposes but for all
4 sorts of content identification and measurement that I
5 hope that everyone can collaborate on.
6 MS. TEMPLE CLAGGETT: Great. Well, I
7 wanted to thank everybody from this panel. We did go
8 over. Since we did, we are going to give a little bit
9 of more time for lunch. So we're asking that
10 everybody be here and ready to start the first panel
11 after the lunch break, session three, at 1:45. So
12 we'll start back at 1:45.
13 Thank you.
14 (Break taken from 12:39 p.m. to 1:46
15 p.m.)
16 SESSION 3: Applicable Legal Standards
17 MS. CHARLESWORTH: Okay. Hello, everyone.
18 And welcome back. Hello, hello, hello.
19 We are here back at the section 512
20 roundtable.
21 We're up to session three, which is a
22 discussion of the legal standards that have developed
23 under section 512, and the rules of the game are the
24 same. When you want to speak, for those of you who
25 are new, tip your placard up like this. These are

1 rather large roundtables. We have a lot of interest.
2 So we'll do our best to get to as many people as we
3 can.
4 Before we begin, I'm going to ask people to
5 quickly give us their name and affiliation around the
6 table so that we know who's here. This panel is to
7 discuss how courts have interpreted the section 512
8 safe harbors and qualifications for those safe
9 harbors. We'll be looking at actual and red flag
10 knowledge, financial benefit and right to control,
11 willful blindness, the repeat infringer language of
12 the statute, good faith requirements,
13 misrepresentation, fair use, and particularly the Lenz
14 decision and use of representative lists, as well as
15 other areas of the law that people may want to comment
16 on.
17 There's a lot to cover. We probably won't
18 get to quite all of it. But I think there are
19 certainly some areas of the statute that have been
20 litigated a fair amount and I think you will --
21 various people will have a fair amount to say about
22 them. So without further ado, I'm going to start on
23 my left, I think, with Ms. Sheehan. If you want to
24 quickly give your name and affiliation, then we'll go
25 around.

1 MS. SHEEHAN: Kerry Sheehan, Public
2 Knowledge.
3 MS. SCHONFELD: Samantha Fisherman
4 Schonfeld, Amplify Education Holding.
5 MS. RASENBERGER: Mary Rasenberger, the
6 Authors Guild.
7 MR. JOSEPH: Bruce Joseph, Wiley Rein, here
8 for Verizon.
9 MR. JACOBY: David Jacoby, for Sony Music
10 Entertainment.
11 MS. PRINCE: Rebecca Prince, also known as
12 Becky Boop on YouTube. I'm a YouTuber.
13 MR. PETRICONE: Michael Petricone, of the
14 Consumer Technology Association.
15 MR. OSTROW: Marc Ostrow, lawyer in private
16 practice primarily focusing in the music business.
17 MR. MOHR: Chris Mohr, Software and
18 Information Industry Association.
19 MS. KAUFMAN: Marcie Kaufman, Artstor and
20 Ithaka.
21 MR. JOHNSON: George Johnson, Geo Music
22 Group, singer-songwriter in Nashville, Tennessee.
23 MR. HART: Terry Hart, Copyright Alliance.
24 MR. HALPERT: Jim Halpert, DLA Piper, for
25 the Internet Commerce Coalition.

1 MR. DOW: Troy Dow, with the Walt Disney
2 Company.
3 MR. DIMONA: I'm Joe DiMona, the Vice
4 President, Legal Affairs of BMI, the music performance
5 rights licensing organization.
6 MS. DEUTSCH: Sarah Deutsch, Mayer Brown.
7 And I was formerly at Verizon and was one of the five
8 telecom negotiators for the DMCA.
9 MS. CHARLESWORTH: So we have you to blame
10 for this.
11 MS. DEUTSCH: You're welcome.
12 MALE: You have several of us to blame for
13 it.
14 MS. BESEK: June Besek, Kernochan Center
15 for Law, Media and the Arts, Columbia Law School.
16 MR. BAND: Jonathan Band, now for the
17 Library Copyright Alliance.
18 MR. ANTEN: Todd Anten, Quinn Emanuel
19 Urquhart & Sullivan.
20 MR. ADLER: Allan Adler. I'm the General
21 Counsel for the Association of American Publishers.
22 MS. CHARLESWORTH: Okay. Well, I will say
23 this is a very nice diverse group and I'm sure we'll
24 have a lively discussion. Well, we'll just dive right
25 in.

1 I think one of the areas where we've seen
2 the most perhaps litigation is in the knowledge
3 standards.
4 In other words, what counts as knowledge of
5 infringement, both actual knowledge and red flag
6 knowledge. And the question is have courts properly
7 interpreted this. If so, how so? And if not, why
8 not? Mr. Joseph, we'll start with you.
9 MR. JOSEPH: Okay. I hadn't actually
10 planned to be the first, but I might as well. By the
11 way, I'll add to Sarah. I was one of the five service
12 provider negotiators also. I know Allan was one of
13 the five content owner negotiators.
14 Jim Halpert sat at Ron Plesser's shoulders.
15 Troy Dow was on Senator Hatch's staff.
16 And I think as I look around, Karyn, I will
17 give you another Hamilton reference. No one else was
18 in the room when it happened.
19 MS. CHARLESWORTH: Well, it's always good
20 when lawyers write law and then spend the rest of
21 their life litigating about it.
22 That's a good business model.
23 MR. JOSEPH: It proved to be -- it proved
24 to be a brilliant professional development strategy.
25 MR. Halpert: It has contained litigation,

1 though, significantly.
2 MS. CHARLESWORTH: All right. Well, Mr.
3 Joseph, take it away.
4 MR. JOSEPH: With respect to knowledge,
5 which was the question on the table, the courts have
6 basically gotten it right. The intent of the
7 negotiators at least was that content be -- that
8 infringing content be identified specifically and that
9 also applies to red flag. If you look at the
10 structure of that provision of the statute, red flag
11 is a surrogate for actual knowledge.
12 There's a subjective component, as the
13 Senate report says, and an objective component.
14 And the -- what you need actual knowledge
15 of is specific infringing material. And it follows in
16 parallel that what you need red flag knowledge of is
17 specific infringing material. From the structure of
18 the statute, I think that comes clearly --
19 MS. CHARLESWORTH: Can you -- I'm sorry.
20 I'm going to be lawyerly on you. Can you
21 parse that out for us, like how the --
22 MR. JOSEPH: Only if I get a copy of the
23 statute in front of me. Excuse me.
24 MS. CHARLESWORTH: We can help you with
25 that if --

1 MS. RASENBERGER: I have one.
2 MR. JOSEPH: Okay, thanks.
3 MS. RASENBERGER: Clean.
4 MR. Halpert: Bruce, I've got it, if you
5 wanted to read it.
6 MR. JOSEPH: Yeah, I actually have a bit --
7 Mary has it. I'll start there. Oh my God, have you
8 changed this? No. If you look at the structure of
9 512, you have to have -- not have actual knowledge
10 that the material is infringing or, in the absence of
11 actual knowledge, is not aware of circumstances from
12 which infringing activity is apparent. The red flag
13 standard substitutes for the actual knowledge standard
14 in precisely the same context. What is infringing?
15 Is this specific material infringing?
16 MS. CHARLESWORTH: Well --
17 MR. JOSEPH: There's nothing here that
18 suggests a general standard with respect to the red
19 flag standard.
20 MS. CHARLESWORTH: Well, it does say in the
21 absence of actual knowledge.
22 MR. JOSEPH: Well, that's correct.
23 MS. CHARLESWORTH: So --
24 MR. JOSEPH: It's a surrogate for actual
25 knowledge. The red flag -- subjective knowledge, if

1 you look at the Senate report also, subjective
2 knowledge of the information from which infringing --
3 the existence of infringing material is apparent is
4 the requisite of the red flag standard.
5 MS. CHARLESWORTH: Okay. So your position
6 is the statute supports a view that -- I think you're
7 using the word surrogate, where red flag is a
8 surrogate. There's another -- for actual knowledge.
9 But then, you also said the red flag knowledge has to
10 be of specific infringing material. And I was
11 wondering where you got that.
12 If it's from the statute, where in the
13 statute or --
14 MR. JOSEPH: Well, the courts on full
15 briefing in parsing the statute between the no
16 monitoring provision and the ability of service
17 providers to identify and take down material, from the
18 structure of the statute, said that the actual
19 knowledge standard requires actual knowledge of
20 infringing material.
21 I'm starting from that premise. Once you
22 start from that premise, the red flag substitute for
23 actual knowledge also requires red flag knowledge of
24 specific infringing material.
25 It follows from the fact that the actual

1 knowledge standard is actually knowledge of specific
2 infringing material.
3 MS. CHARLESWORTH: So --
4 MR. JOSEPH: Now, we can -- you can
5 challenge that. But I think you've got two of the
6 most respected copyright courts in the country, courts
7 of appeals on the basis of full briefing and full
8 records, concluding that that's the standard for
9 actual knowledge. And they've also, on the basis of a
10 full briefing and a full record, concluded that that's
11 the standard for red flag knowledge.
12 MS. CHARLESWORTH: Okay. So in some of the
13 comments, there's a suggestion that that leaves --
14 there's really then no distinction. Is that your view?
15 I mean, you're saying it sounds like you think they're
16 pretty closely related when you use the word
17 surrogate. But is there a difference in terms of your
18 view of how courts interpreted these two knowledge
19 standards? Is there any distinction -- really
20 meaningful distinction -- between them?
21 MR. JOSEPH: I believe there is.
22 MS. CHARLESWORTH: And what is it?
23 MR. JOSEPH: And I believe when the statute
24 was negotiated, it was intended that there be. One is
25 actual knowledge of infringement. The other is -- if

1 you don't have actual knowledge that the material is
2 infringing, if you have knowledge of facts and
3 circumstances from which an objective viewer would
4 conclude that the material is infringing. I don't
5 think they're identical.
6 I think there are meaningful differences
7 between them. But I don't think it goes beyond that.
8 MS. ISBELL: One quick follow-up question.
9 In your view, is there any relevance to -- or any
10 import to -- the fact that the actual knowledge
11 standard talks about materials or activity and the red
12 flag knowledge only talks about activity?
13 MS. CHARLESWORTH: That's a good question.
14 MR. JOSEPH: It's a good question. I don't
15 think there's significant import to that distinction.
16 MS. CHARLESWORTH: Okay. Let's see. I
17 think you -- I'm going to go from left to right
18 because I don't know who put their card -- so I guess
19 it's Ms. Rasenberger. Oh, no. I'm sorry.
20 Ms. Sheehan, your card is up -- if you
21 could put your card in front of you, that would be
22 easier for me to see it. Ms. Sheehan?
23 MS. SHEEHAN: You couldn't see it last
24 time. Sorry about that. So I think speaking from a
25 policy perspective purely, I think that Congress made

1 a very explicit choice when it wrote 512(m) and that
2 explicit choice was to reject the idea that ISPs had a
3 duty to monitor or a duty to affirmatively seek out
4 facts indicating infringement on those services
5 because of the substantial risk that that kind of
6 monitoring and that kind of pervasive surveillance of
7 user activity has on the public's ability to openly
8 speak, openly express themselves, openly engage with
9 each other on the Internet.
10 And I think short of imposing that duty,
11 even expanding the knowledge requirements to require
12 more general knowledge would have the same result.
13 You'd have Internet service providers who are
14 incentivized in order to maintain a safe harbor to
15 actively police and surveil use of their system and
16 the activities of their users.
17 MS. CHARLESWORTH: Well, let me -- I just
18 want to ask you -- so I understand your point about
19 active monitoring, I think. But red flag knowledge,
20 which is sort of what we were just going back and
21 forth about, suggests that not necessarily that you
22 reached out to acquire that knowledge, but that facts
23 became known to you that suggest or indicate
24 infringement. And don't you see a distinction between
25 active monitoring and simply, as the statute says,

1 becoming aware of facts?
2 MS. SHEEHAN: I don't really. I think I
3 would agree with what Mr. Joseph has said about active
4 -- that red flag knowledge requires information about
5 specific instances of infringement, not a kind of
6 general duty to investigate facts that may or may not
7 point to it generally.
8 MS. CHARLESWORTH: I'm not saying that.
9 I'm saying --- I'm sorry. Becoming aware -
10 - do you acknowledge that there's a difference between
11 becoming aware of facts, you're passively sitting
12 there and facts are thrust at you, versus actively
13 monitoring? Do you see a distinction between those
14 two?
15 MS. SHEEHAN: I think in practice there
16 would be kind of very little distinction if you were
17 to talk about relaxing those standards. I think it's
18 also important to note that the statutory requirements
19 for notices of infringement are there for due process
20 reasons. They're there to provide the process that is
21 due and they provide due process for targets and
22 Internet users. And I think when you start talking
23 about circumventing those notices and finding
24 knowledge infringement in other ways, you start
25 undermining those essential protections.

1 MS. CHARLESWORTH: But red flag knowledge
2 doesn't require a notice.
3 MS. SHEEHAN: It requires notice of
4 specific instances of infringement. And if you start
5 requiring ISPs to look more generally, then I think
6 you're going to start eroding some of the statute's
7 existing protections.
8 MS. CHARLESWORTH: But it doesn't require a
9 takedown notice. Are you talking about takedown
10 notices? I'm confused now about what you're saying.
11 MS. SHEEHAN: The statute requires notice
12 of specific instances of infringement.
13 MS. CHARLESWORTH: Well, it requires --
14 you're notified or you become aware, right?
15 MS. SHEEHAN: Of specific instances of
16 infringement.
17 MS. CHARLESWORTH: Well, that's a little
18 different from a notice.
19 MS. SHEEHAN: Sure.
20 MS. CHARLESWORTH: Okay. So --
21 MS. SHEEHAN: So can you give me an example
22 of how a service provider would become aware of a
23 specific instance -- a specific and identifiable
24 instance of infringement that wouldn't require active
25 monitoring?

1 MS. CHARLESWORTH: Well, I think that in
2 some cases -- in some of the case law, it suggests
3 that people who were operating the service were
4 interacting with content that was -- they knew was
5 infringing. I mean, I don't know that it was a result
6 of active monitoring. In other words, some courts
7 have found some degree of red flag knowledge in
8 limited circumstances.
9 MS. SHEEHAN: Red flag knowledge of
10 specific identifiable instances of infringement?
11 MS. CHARLESWORTH: Yes.
12 MS. SHEEHAN: And I'm talking about the
13 dangers of expanding beyond that to acquire more
14 generalized knowledge.
15 MS. CHARLESWORTH: Okay. I --
16 MS. TEMPLE CLAGGETT: I did have a quick
17 follow-up question, actually, just about kind of the
18 overall concept of red flag knowledge and what impact,
19 I suppose, changing the standard might have or
20 interpreting the standard differently than what some
21 courts have interpreted. So in your view, is there
22 ever an instance where a website that has -- I mean,
23 kind of almost exclusively infringing content would
24 meet that -- would be able to provide that red flag
25 knowledge to a service provider in the absence of a

1 specific notice?

2 I mean, a situation where you have a very

3 flagrant, clearly just exclusive, website that is

4 being hosted that has all infringing content. In your

5 view, is there ever an appropriate standard for red

6 flag notice not to cover or not to require specific

7 instances?

8 MS. SHEEHAN: It's hard to speak so

9 generally about a hypothetical. But I think there's a

10 policy reason why copyright holders bear the burden of

11 identifying the infringement to the right holder.

12 They're the ones that are best able to assess whether

13 a use is infringing, assess whether it has the

14 appropriate licenses.

15 And we generally in a system of private law

16 place the burden of enforcing rights on the people who

17 have that right. And so, I think there are instances

18 where if a copyright holder were to provide notice to

19 the ISP that their content was infringed on that site,

20 that's obviously red flag knowledge. But I can't

21 speak more generally than that.

22 MS. CHARLESWORTH: Okay. We're going to

23 move on down the line. I think we're up to Ms.

24 Rasenberger now.

25 MS. RASENBERGER: Thank you, Jacqueline.

1 So I think I'd like to -- as you might
2 imagine, I take a different view. 512 is a mess, from
3 a creator's perspective. It doesn't work. We've heard
4 that in the prior panels. And it doesn't work because
5 it's been turned into a notice-and- takedown statute
6 by the courts. Congress actually created a fairly
7 complex statute to create incentives to cooperate.
8 There are three different ways in the
9 statute to acquire knowledge. One is, as you said,
10 through actual knowledge, in which case you have an
11 obligation to take down; two, red flags; and three,
12 notice-and-takedown. The requirement to have
13 knowledge of the specific location under red flags and
14 actual knowledge in 512(c), it's 1(a), under 1(a). The
15 courts are now requiring that you know the specific
16 URL for even red flag knowledge, which is clearly not
17 what Congress intended.
18 I mean, the provision for red flags is
19 awareness of factors and circumstances from which
20 infringing activity is apparent. That doesn't say you
21 need to know exactly where it is. Now, so we really
22 have turned a three-pronged test into one prong. The
23 courts now only find knowledge if there's been a
24 notice taken. I think if we look at what's happened
25 in the courts, it's clear that they do not interpret

1 the section (a) to have any separate meaning. We got
2 here -- the courts got here I think because they see
3 the statute as providing blanket immunity.
4 And also, as was mentioned by Kerry,
5 because of 512(m). There are some inconsistencies in
6 the statute which is understandable. It's a very
7 complex statute. So we feel very strongly that
8 Congress needs to amend section 512, specifically
9 512(m) to carve out sections (c)(1)(a) through (c) and
10 (d)(1) and (2) and also to clarify that red flags is
11 what it says, that you do not need to have knowledge
12 of specific instances and infringement. And why this
13 is so important is that if we are relying, as we have
14 been in recent years, on notice-and-takedown to stop
15 piracy, it's just it leaves us with an absurd
16 situation. It doesn't work.
17 The burden on the rightsholders,
18 particularly individual creators, it's so huge that it
19 just simply isn't workable. And we've also heard
20 earlier that there are many ways where it doesn't work
21 for service providers as well. We need a more robust
22 statute. And Congress gave it to us. We now need
23 them to step in and clarify that these other
24 provisions actually have some meaning.
25 MS. CHARLESWORTH: Okay.

1 MS. TEMPLE CLAGGETT: Just a quick follow-
2 up. If, in your view, the statute should be
3 interpreted more broadly in terms of red flag
4 knowledge to not require specific instances, can you
5 give some examples of what you would actually say
6 would be something that would trigger red flag
7 knowledge in the absence of specific instances of
8 infringement? What would actually require some
9 obligation on an ISP in absence of a specific
10 infringement?
11 MS. RASENBERGER: Well, for instance, if
12 the service provider is notified many times over about
13 infringement of a specific piece of particular
14 copyrighted work or set of copyrighted works by a
15 rightsholder, then they should know that those works
16 keep popping back up and they're there and they need
17 to take action to bring those works down before
18 receiving a notice.
19 Also, I think the YouTube v. Viacom case is
20 a very good example where YouTube at the time of the
21 facts that were the subject of the litigation had
22 clear evidence that there was infringing content on
23 the site.
24 In fact, I think they estimated that 75 to
25 80 percent of the content on the site was copyrighted

1 content there without authorization.
2 That to me, that type of massive
3 infringement that you know is occurring on your site,
4 should trigger responsibility. And that would be under
5 red flags or under the provision for financial control
6 and financial benefit and right and ability to
7 control, which I imagine we'll get to later.
8 MS. TEMPLE CLAGGETT: Thank you.
9 MS. CHARLESWORTH: Okay. Mr. Jacoby?
10 MR. JACOBY: Thank you. I want to expand
11 on some of the comments that were just made and with
12 which I wholeheartedly agree. Red flag knowledge, to
13 require a specific knowledge -- if you need to know
14 facts regarding specific instances of infringement,
15 that's actual knowledge and that collapses two
16 separate prongs of the statute.
17 More importantly, it incentivizes services
18 to avoid learning or acknowledging infringements so
19 they can avoid monitoring it, avoid implementing
20 technical solutions. This is contrary to
21 congressional intent. Congress intended that services
22 and content providers work cooperatively to minimize
23 infringement, to deal with infringement I think is the
24 language used -- the Fourth Circuit used to minimize
25 infringement.

1 Instead, the opposite is what's occurring.
2 I think that it's indisputable that Congress meant the
3 statute to apply to neutral passive intermediaries,
4 innocent entities. It was never meant to apply to
5 companies whose business were predicated on infringing
6 content. So companies like Grooveshark and Mp3Tunes,
7 businesses that are built on the distribution of
8 commercial sound recordings, movie content and other
9 content should not be permitted to hide behind the
10 statute.
11 The decisions we're discussing have enabled
12 these services to convert the content owners' assets
13 into their own assets for free. It has devastated our
14 industry. I think you asked for specific examples.
15 One specific example is the recent Mp3Tunes case.
16 There was a JNOV decision which sets forth a lot of
17 facts in which the jury found there to be clear red
18 flag knowledge. The court, in imposing punitive
19 damages, decided that the company and the individual
20 running the company, you know, set up his entire
21 service to trade on infringing content.
22 In fact, he wrote in one email if they rule
23 for us, it unlocks $270 billion of music, really
24 laying an incredible upside for MP3.com.
25 Despite that and despite knowing that, for

1 example, The Beatles content was not approved for any
2 digital distribution and that his own employees had
3 uploaded, side-loaded that content, the court still
4 allowed the service to hide behind the safe harbor and
5 did not find red flag knowledge with respect to other
6 Beatles tracks.
7 These are exactly -- this is exactly the
8 type of conduct which a reasonable juror could clearly
9 find red flag knowledge. But the court decided as a
10 matter of law that there was none.
11 And I think that this is a real problem.
12 And as Mary said, it has turned the statute
13 into a notice-and-takedown statute, something that was
14 proposed when the DMCA was first enacted and was
15 specifically rejected.
16 With respect to 512(m), I just want to say
17 that the courts have also misinterpreted that, in my
18 view. They have taken -- they have -- when a service
19 is informed that there's massive infringement going
20 on, with specific instances of infringement, there
21 should be some action that's required to be taken.
22 512(m) does not prohibit it -- prohibit action taken
23 after you are informed of such infringement. It does
24 not impose an affirmative duty to monitor. But it
25 does not absolve a service from doing nothing when

1 informed of infringement. Thank you.
2 MS. CHARLESWORTH: Okay. Mr. Petricone?
3 MR. PETRICONE: Hi. First of all, thank
4 you for the opportunity to be here. At the Consumer
5 Technology Association, most of our members, the
6 significant majority of our members, are small
7 businesses. So we tend to focus on those who are
8 young, scrappy and hungry, to keep the Hamilton
9 references going. And the Internet has certainly been
10 the greatest platform for startups and entrepreneurs
11 ever seen in history.
12 And the 512 protections had a great deal to
13 do with it.
14 And I just wanted to briefly raise the
15 point that if we were to move toward a general
16 awareness or willful blindness standard, that would
17 certainly heighten the burden and the resources
18 necessary for intermediaries. And it would do so in a
19 way that larger firms may well be able to deal with
20 and handle. But smaller firms and startups would not.
21 And that would be of concern.
22 MS. CHARLESWORTH: And why couldn't they?
23 MR. PETRICONE: Because that level of
24 monitoring would require a resource commitment that a
25 startup, that is not a large company, would generally

1 have a hard time committing.
2 MS. CHARLESWORTH: Well, I mean, just to
3 play devil's advocate a little bit, I mean, right now,
4 the system -- what I'm hearing from most of the
5 providers is that the monitoring burden should be
6 entirely on the copyright owner.
7 So I guess a question -- and this is a
8 general question for everyone -- is why -- why is that
9 perceived as a balanced solution? I'm asking you
10 because, I mean, you're sort of saying your companies
11 can't monitor or don't want to --
12 MR. PETRICONE: Sure --
13 MS. CHARLESWORTH: -- don't want to respond
14 to red flag --
15 MR. PETRICONE: Right, right.
16 MS. CHARLESWORTH: You know, that this
17 would be a terrible burden. But the question is,
18 given that I think most people think that Congress
19 wanted the burden to be -- or at least for there to be
20 a level of cooperation and shared goals and
21 responsibilities -- are there things that your
22 constituents could be doing to help improve the
23 ecosystem?
24 MR. PETRICONE: Sure. Technology companies
25 are working with content companies in all kinds of

1 ways to go above and beyond the DMCA, obviously from,
2 you know, Content ID that Google does to the best
3 practices process they participated in with the
4 advertising board.
5 I do want to say that Congress, when it
6 developed the DMCA, was really prescient.
7 And what they did was they divided
8 responsibilities, right, that if you're the content
9 owner, it is your responsibility to identify the
10 content that's infringing because only if you hold the
11 rights do you know if it's being used in an infringing
12 way. And then, it's the service providers'
13 responsibility to take it down. And that has largely
14 worked. You know, the Internet economy has exploded
15 over the last 15 years. There is more music and art
16 being produced than ever before. And the digital
17 music industry is also growing quite quickly. So
18 Congress deliberately set that balance and I think it
19 has proven to be the correct balance.
20 MS. TEMPLE CLAGGETT: I just had a quick
21 follow-up. I guess you mentioned that Congress struck
22 that balance at the time in 1998.
23 Given, I guess, just from the previous
24 panels, the numbers in terms of the volume of notices
25 that are being sent because of the amount of

1 infringing content that's potentially out there, does
2 that in any way justify recalibrating the balance if
3 now just because of the changes in technology and the
4 way that the Internet operates, the balance somehow is
5 not quite as much of a balance as it was at the time
6 that the DMCA was enacted.
7 MR. PETRICONE: Sure. I would say that in
8 light of the exponential growth of the Internet since
9 the DMCA was enacted in 1998, section 512 has actually
10 scaled remarkably well. And the reverse is also true,
11 right? The balance that has been enabled and promoted
12 by section 512 has enabled the Internet to grow as it
13 has.
14 And it is also no coincidence that pretty
15 much every leading Internet company is located in the
16 United States, right? That's because we made a series
17 of good decisions and section 512 was one of those
18 good decisions. And I would suggest that we should
19 all be wary of upsetting that balance.
20 MS. TEMPLE CLAGGETT: Thank you.
21 MS. CHARLESWORTH: Mr. Mohr?
22 MR. MOHR: Thanks. Just a few thoughts from
23 our members and my experience in working with them in
24 conjunction with this proceeding. You know, in our
25 view, this statute works best when there is

1 cooperation. And there are instances, and we list a
2 number of them and other folks do, where technology
3 folks and content providers have adopted voluntary
4 standards to ameliorate ongoing infringement on their
5 platforms.
6 Where the statute gets out of whack, in our
7 view, is when those incentives to cooperate are
8 absent. And that's really, at least in our opinion,
9 one of the flaws in the way the red flag standard has
10 been interpreted.
11 The way it is now, it is exactly -- if you
12 read it as our friends suggest, that it is basically
13 -- in our view, the two prongs converge and you are
14 endlessly playing the now clickgame of whack-a-
15 mole. That is an odd construction for an exception
16 to a regime of liability. And it is one that
17 potentially the courts could fix, although it is going
18 to take a while.
19 And I think you see that same -- those same
20 incentives against cooperation ripple through other
21 areas that are less -- that still relate to knowledge
22 but not specifically under the red flag standard, for
23 example, under the duty to terminate repeat infringers
24 under 512(a).
25 MS. CHARLESWORTH: Okay. And that's I

1 think an important theme that ran throughout a lot of
2 the comments is that the way courts have interpreted
3 this, aside from -- apart from whichever side you are
4 on, on that issue, is it sort of left, as you're
5 suggesting, little incentive to actually come up with
6 better solutions to the problem. And I think
7 obviously it was in your comments, but I think that
8 was a theme that was shared by many of the commenters.
9 So I'm interested to hear more about that
10 as we continue down the line. Ms. Kaufman?
11 MS. KAUFMAN: Is this working? Okay.
12 The problem -- the problem with the recent
13 decisions on the actual versus red flag knowledge is
14 that it really wasn't compelled by the statute or is
15 consistent with the legislative history.
16 It rests on the erroneous supposition that
17 a service provider has no duty to investigate further
18 once it becomes, quote, "aware" of facts and
19 circumstances from which infringing activity is
20 apparent. That's not how 512 is supposed to work.
21 It's indeed true that a service provider must, upon
22 attaining actual red flag knowledge, act expeditiously
23 to remove or disable access to the material and in the
24 YouTube case, the Second Circuit was correct to note
25 that near red flag knowledge a service provider would

1 not know which specific material to remove.
2 But the obvious answer to that is a service
3 provider with red flag knowledge must investigate
4 further to locate that specific material so that it
5 can remove it. So there's a big middle ground between
6 willful blindness and a duty to monitor under 512(m).
7 And I think there's a path to walk through there. And
8 I just want to make sure that we're not kind of
9 missing that as we discuss this.
10 MS. CHARLESWORTH: So under your sort of
11 proposal, once someone became aware, however they
12 became aware or the service became aware of red flag -
13 - facts suggesting infringement, there would be a duty
14 to investigate? Is that what you're proposing?
15 MS. KAUFMAN: Exactly. You know, if you
16 think about it, like many service providers, they run
17 reports. They see their top 10, top 10 hits.
18 You know, if you've got the -- if you find
19 that a top 10 hit in the name is bootlegged copy of
20 XYZ, I mean, I think there's a duty to investigate.
21 Check. Look a little further. I'm not
22 saying that you have to -- I'm not saying that you
23 need someone to file notice-and-takedown in that
24 situation. There's got to be some obligation to look
25 further.

1 MS. CHARLESWORTH: And how do you -- and
2 just to put a finer point on it, I know you said it,
3 you can square this with 512(m). But I'm just
4 wondering how you do that.
5 MS. KAUFMAN: Well, there's a duty to --
6 that's why I'm saying it's not like you don't have to
7 run that report. You don't have to run a report that
8 looks at your top 10 most hit-upon items like, you
9 know, top 10 content items. But these are things that
10 service providers do regularly to increase their
11 business, to see, hey, we're getting a lot of hits
12 from XYZ content or ABC content. And therefore, if
13 they are becoming aware through their regular business
14 dealings, there's a very easy way that at that point
15 you've got maybe some kind of obligation to
16 investigate.
17 Now, I'm not sure. I mean, we can discuss
18 many different ways that that duty to investigate can
19 come up. But they're -- that's the whole purpose of
20 red flag knowledge. You've got something that's like
21 posing a red flag to you. And that doesn't mean you
22 have to run your reports. And the problem when you
23 look at willful blindness, well, all of a sudden,
24 maybe they don't want to run their reports.
25 Maybe there is no obligation to run a

1 report or maybe it's like we don't want to look any
2 further because if we peel back the cover and look any
3 further, all of a sudden, we're not going to be able
4 to get -- be able to qualify under the statute and the
5 statute's protections.
6 MS. CHARLESWORTH: Okay.
7 MS. TEMPLE CLAGGETT: I had a quick follow-
8 up to that, and other people can answer this as well
9 if you have views on this. I mean, I guess you said
10 that there was a huge kind of middle ground here
11 between actual knowledge and red flag knowledge and
12 the obligations on the part of the ISPs.
13 But in some of the concerns that have been
14 raised on the other side in terms of lacking specific
15 infringements, how would they have -- how would they
16 know what they needed to take down? So would this
17 impose an obligation that they would actually have to
18 filter content and employ some type of filtering
19 technology, and in your view, is that appropriate or
20 is that, you know, just part of doing business?
21 MS. KAUFMAN: Well, I definitely -- I mean,
22 I can't really speak to -- I don't really want to
23 speak to filtering technology specifically because we
24 don't necessarily -- that's -- I mean, we're not that
25 size of an organization where we're going to be --

1 where we really have the budget to be implementing
2 that, but -- or even -- but it would be -- but for
3 larger -- like as I mentioned --
4 MS. TEMPLE CLAGGETT: Okay, because that's
5 kind of why I was mentioning like --
6 MS. KAUFMAN: Yeah.
7 MS. TEMPLE CLAGGETT: -- would this --
8 would the standard that you're suggesting require all
9 ISPs to filter?
10 MS. KAUFMAN: No. I don't think you have
11 to go to -- I mean, I don't think you have to say
12 every single ISP has to institute filtering
13 technology. I think filtering technology is a
14 laudable goal for many to institute. And I think, as
15 I discussed previously in the earlier session, I do
16 think there is a difference between the types between
17 the big players in this world and the small players in
18 this world. So maybe, you know, different standards
19 apply in those circumstances.
20 But I do think -- like I said, the duty to
21 investigate has to come -- has to start somewhere. And
22 I think that you are -- if you are a service provider,
23 it can't just be a pure lockbox. We know it's not a
24 pure lockbox. They are well aware of the content they
25 have on their sites. So if you're aware -- if there

1 is some awareness of that content -- and we don't want
2 to set into place to incentivize the idea of it being
3 a purely, like, lockbox of content that we don't know
4 what's in place.
5 So I think there's a path to walk. I don't
6 think -- maybe for the larger organizations, for the
7 larger service providers, filtering technologies is a
8 great way to go. But for the smaller guys, I just
9 want to be a little bit careful about implementing
10 that and making that a mandatory requirement.
11 MS. TEMPLE CLAGGETT: Thank you.
12 MS. CHARLESWORTH: Okay.
13 MS. TEMPLE CLAGGETT: I was just saying
14 thank you.
15 MS. CHARLESWORTH: That's it? Okay.
16 Mr. Johnson?
17 MR. JOHNSON: Yeah. The reason why I put
18 my card up, Mr. Petricone -- I can't pronounce, he was
19 talking about -- Petricone, I apologize. I couldn't
20 read it sideways. He was talking about how there's
21 more music being created than ever. And I'm not sure
22 where you got that statistic. But there may be more
23 music out there, you know, access to it and streaming.
24 But I'm on Music Row for the past 20 years
25 and I think I've told you before, NSAI did a study

1 based upon Music Row Magazine and -- did a
2 publishers/writers edition every year and in 2000,
3 there were 3,000 to 4,000 professional songwriters and
4 publishers on Music Row. Now, in 2015, there's 300 to
5 400 left. That's a 90 percent drop. Where do you
6 think it's going? And that's directly because of the
7 Internet. You can copy a file, copy a copyright. It's
8 because the Copyright Royalty Board has set the rate
9 at zero, honestly, and third, the DMCA and the safe
10 harbor.
11 And there's a great movie out there called
12 Downloaded. You can watch it for free on YouTube. And
13 -- but it's -- it has Sean Parker in it and all these
14 guys. But on the earlier panel, I thought the thing
15 that came to mind was what was the first thing that
16 happened when the DMCA passed? Napster. And when you
17 watch Downloaded and you watch Sean Parker in his own
18 words say, hey, safe harbor, safe harbor, we can do
19 anything we want. And that's what's Spotify is doing.
20 That's what Google's doing. That's what Pandora --
21 that's what everybody is doing. That's what the pirate
22 sites are doing.
23 And when you say -- when Mr. Flaherty was
24 over there talking about, you know, we see this stuff
25 come up on Verizon and we know it's there; we just

1 don't do anything about it. Nobody does anything about
2 it. And what Google does is they know all these
3 pirate sites and they know that everybody's hiding
4 behind safe harbor.
5 And what do they do? They sell advertising
6 off, you know, illegal copyright sites. And they know
7 exactly what they're doing. They've got jihadi videos.
8 Chris Castle, an attorney, calls it YouTubeistan. And
9 so they have all these horrible videos up there and
10 copyright infringement is about number six on
11 list]. And they're selling advertising on it.
12 So they know darn well what they're doing.
13 It's a scam. It's a con. And it's the Copyright
14 Office's job and the federal government needs to
15 protect our private property, not give it away. And
16 that's what we're doing. And when I saw you at the
17 Grammy thing three years ago, you gave a presentation,
18 Ms. Charlesworth, my question to you was how can I
19 register my copyright and spend $55 or whatever. And
20 then the Copyright Office turns around and sells it
21 out the back door for nothing.
22 Between the Copyright Royalty Board, but
23 really the DMCA and the safe harbor, you are taking
24 people's personal property and you are devaluing it to
25 zero because whether a judge sets it at zero or

1 whether someone steals it at zero or whether Google
2 allows you to give it away at zero or the DMCA says,
3 oh, it's okay, it's legal to give it away at zero.
4 You're still devaluing people's property
5 point] where you are confiscating it.
6 And that's what's going on with all these
7 big corporations. And it's a hundred percent burden
8 on the songwriter, the copyright creator and zero
9 burden on the Google, on the ISPs and it's got to be
10 at least 50/50.
11 And again, to me, the only way to do that,
12 if you have a Rolling Stones song, if you have I Love
13 Rock 'n' Roll, you know what it is, okay? It's not
14 just some selfie or it's just some new video of your
15 kids -- you know, it has a copyright but it's not a
16 professional copyright in that terms. You know what
17 it is and there should be some system to ding, to ping
18 those and to say, whether it's on Comcast or Verizon
19 or XFINITY, we can see that this one site's going and
20 we can see we're getting a lot of pings on all of
21 these known copyrights.
22 And you know, you're talking about a
23 database and that kind of thing and maybe that's what
24 would be part of it. But that may never happen or who
25 knows. But that's my view and that's it.

1 MS. CHARLESWORTH: Thank you, Mr. Johnson.
2 Mr. Hart?
3 MR. HART: Thank you. Terry Hart, from the
4 Copyright Alliance. We are a nonprofit that
5 represents thousands of creators, individuals and
6 organizations across the spectrum of all different
7 copyright disciplines. But most of them are involved
8 with section 512 in some form or another. And I think
9 when you look at what Congress wrote 20 years ago,
10 it's a good framework.
11 The intent behind it was, primarily, to get
12 the OSPs and the copyright community to cooperate in
13 order to address infringement. And as several
14 panelists have said, the problem is the courts'
15 interpretation of some of the provisions have fallen
16 short of that intent. And specifically, the knowledge
17 provisions that we're talking about here. I don't
18 want to reiterate what's been said. I think Mary did
19 a really good job of explaining how these knowledge
20 provisions kind of work together within the statute.
21 But I think I want to take a step back and
22 suggest that at the very least we have to recognize
23 that some courts have interpreted the red flag
24 knowledge pretty much out of the statute. It's really
25 difficult to see what, if anything, is left of red

1 flag knowledge after decisions in the Second Circuit
2 and the Ninth Circuit, that really gives it any work
3 to do within the statute.
4 I think you could semantically parse
5 differences, like the Second Circuit did. It said
6 actual knowledge is a subjective standard. Red flag
7 knowledge is an objective standard. But when you look
8 at how the courts have then gone on to apply it,
9 there's really very little that you could consider red
10 flag knowledge, especially if it's in the absence of
11 actual knowledge as the statute says. The Ninth
12 Circuit in CCBILL said these websites are called
13 whatever, stolen celebrity pics. But you can't really
14 tell if it's infringing unless you went there and
15 investigated.
16 And other service providers will certainly
17 say, yes, we got a hundred notices, we got a thousand
18 notices for a specific work. But we don't know for
19 sure if the 101st one is actually infringing because
20 it might be fair use. It might be licensed.
21 So in other words, you can't really see a
22 situation where you have red flag knowledge that's
23 indistinguishable from actual knowledge.
24 So I think at the very least we have to
25 recognize that indeed there are courts that have

1 literally removed this section from the statute. And
2 then, once we recognize that, we could go from there
3 to see what exactly does that mean. What should red
4 flag knowledge be? Can there be more guidance?
5 Can there be clarity? Can it be better
6 defined?
7 And then, what does that mean as far as
8 obligations of service providers go.
9 I think Ms. Kaufman made some excellent
10 points about maybe this triggers some kind of
11 investigation. Maybe it's different, depending on the
12 type of online service provider.
13 But that's a road I think we need to start
14 going down and I think this study is a good place to
15 start there.
16 MS. CHARLESWORTH: Thank you, Mr. Hart.
17 And just to -- and I think you started to
18 address this, and this theme of sort of if you don't
19 have a specific URL, if you're not being -- the
20 service receives a notice or receives -- let me back
21 up -- withdrawn. The service acquires some sort of
22 red flag knowledge.
23 Let's take The Beatles example. It gets
24 notices on a couple of Beatles songs but it has other
25 Beatles songs on the service. I mean, are they --

1 what is the obligation, in your view, of the service
2 to, to use your word and Ms. Kaufman's word, to
3 investigate and how do you square that with 512(m)?
4 MR. HART: Yeah, I think that -- I mean, I
5 think that's the million-dollar question. I would say
6 I don't think we should be drawing bright lines here.
7 I think it really depends on the specific facts, the
8 specific circumstances. I don't think the 512(m)
9 prohibition on monitoring necessarily means no
10 investigation absolutely, like a blanket prohibition
11 on investigation.
12 I think at some point, you know, I do
13 think, as in other areas of the law, there might be
14 some kind of obligation triggered, whether the service
15 provider -- you know, a lot of service providers,
16 especially if they're in the business of also
17 providing content services, like music or video, they
18 might be in business relationships with licensees.
19 So if they see music being uploaded outside
20 of, you know, the known partners, you know, maybe they
21 go and ask the licensors, you know, is this one of
22 your guys, is this somebody else.
23 But I think there needs to be some minimal
24 trigger of obligation at some point there. Maybe it's
25 a sliding scale. Maybe it's, as I said, dependent on

1 the facts and circumstances.
2 MS. CHARLESWORTH: Okay.
3 MS. TEMPLE CLAGGETT: And just to follow up
4 basically with a question I asked Ms. Kaufman, in your
5 view -- I mean, you both mentioned kind of the same
6 type of obligation to investigate.
7 Do you think that this would impose a de
8 facto kind of obligation to filter, if this type of
9 red flag knowledge was interpreted by the courts to
10 not require a specific instance of infringement or
11 specific URLs or do you think there could be some sort
12 of middle ground between an obligation of red flag
13 knowledge that says you have to in fact filter as
14 opposed to some other kind of activity?
15 MR. HART: I can't speak specifically to
16 filtering. I would point out though that -- and I
17 think it's 512(m), you know, it's tied into the
18 standard technical provisions measure as well. So you
19 know, obviously we don't really have many standard
20 technical measures that are required under the DMCA.
21 So again, that's another one of these requirements
22 that have kind of taken the teeth out of the DMCA. So
23 that's at least contemplated in the statute. It was
24 at least contemplated by Congress that part of this
25 can be technological.

1 MS. TEMPLE CLAGGETT: Thanks.
2 MS. CHARLESWORTH: Okay. Mr. Halpert?
3 MR. HALPERT: I was one of the people who
4 helped to work on the language of the DMCA.
5 And I actually am the person who suggested
6 the use of the word apparent in the red flag standard.
7 And I believe that it does have a different
8 meaning than actual knowledge.
9 But it's information that the service
10 provider must come across. And in counseling many
11 Internet companies on copyright risk, they have a
12 platform, I frequently have discussions about what
13 they're going to see and what sort of measures to put
14 in place if they're, for example, moderating content
15 that's going to be posted or discussion about a news
16 article or otherwise. They do need to be looking out
17 for obviously infringing posts.
18 And there's no question that that is the
19 law.
20 At the same time, I think a lot of what
21 we're hearing in terms of disappointment on this panel
22 is that a blanket notice from a rights owner that does
23 not indicate what information actually is infringing
24 can somehow tag the service provider and give the
25 service provider an obligation to monitor and go look

1 for infringing material. And I want to direct
2 everyone's attention to the legislative history, which
3 says very specifically at the end of the analysis of
4 (c)(1)(c), neither actual knowledge nor awareness of a
5 red flag may be imputed to a service provider based on
6 information from a copyright owner or its agent that
7 does not comply with the notification provisions of
8 subsection (c)(3) and the limitations of liability set
9 forth in subsection (c) may apply.
10 So rights owners can provide notice. It
11 needs to be DMCA-specific notice. And if the service
12 provider is involved in looking at content on its
13 server or its website and encounters information that
14 is looked -- that is a red flag from which -- if it
15 says stolen content or whatever it would be,
16 infringing content, the service provider clearly has
17 an obligation to take that material down. On the
18 other hand, the actual identification of material that
19 is infringing from the rights owner needs to provide -
20 - this is an independent requirement. It's not enough
21 to provide a list of works under subsection
22 (c)(3)(a)(iii).
23 There's a requirement to provide
24 identification of the material that is claimed to be
25 infringing, so what is the specific work and

1 information reasonably sufficient to permit the
2 service provider to locate the material. So it's not
3 enough to say here's our playlist. Go find all the
4 infringing material.
5 The rights owner, under the statutory
6 scheme, needs to provide information so that the
7 service provider can find the material or if the
8 service provider's looking at what's on their site and
9 they see something that is apparent as infringing
10 material, the service provider has an obligation to
11 act. The protection against monitoring, which is not
12 a protection of the service provider, it's a
13 protection for Internet users. And if we recall some
14 of the ideas that came from some of the organizations
15 represented in this room about a way around the DMCA
16 in SOPA, it was not very popular with Internet users.
17 So we do need to think about any change to
18 this sort of provision because this is a privacy issue
19 and a monitoring issue. It's very clear in subsection
20 (m) that nothing shall condition the applicability of
21 the safe harbors on a service provider monitoring its
22 service or affirmatively seeking facts indicating
23 infringing activity, except if there's an agreed
24 standard technical protection measure. So this is the
25 statutory framework and it's I think important to keep

1 this in mind and not to try to shoehorn an additional
2 monitoring obligation, particularly where there isn't
3 information saying it's in this location where
4 someone's posted infringing material.
5 In terms of the general statement that the
6 Internet is awash in infringement and there are rogue
7 sites out there making money, the major infringing
8 sites including Napster and Grooveshark, a host of
9 others, are out of business. DMCA does not protect
10 those sorts of business models in the end. And
11 furthermore, this notice-and-takedown structure
12 provides an extra-judicial, extraordinary method for
13 rights owners to be able to get material removed from
14 the Internet without having to go to court and sue.
15 So net-net, I guess compared to how this
16 might work ideally from a rights owner perspective,
17 it's not ideal. But on the other hand, it provides a
18 lot of additional ways to get material removed from
19 the Internet that would not exist otherwise and
20 ultimately these very well- briefed, very well-argued
21 decisions in the two leading courts of appeals for
22 copyright matters I think accurately reflect where the
23 law is. There is lots of room for voluntary
24 cooperation. You'll hear more about those on panel
25 number five.

1 But the statute isn't broken. It actually
2 is working. And I don't think there's a lot of room
3 for shoehorning in monitoring obligations, which is in
4 effect what we're hearing from a number of
5 participants, including my good friend from law
6 school, who it's great to see.
7 MS. CHARLESWORTH: Mr. Halpert, I just - -
8 I'm sorry. You said something about information
9 sufficient to locate the material. So does that mean
10 if I send you a link to a page that has, say, 10 items
11 on it, -- and maybe I've identified I'm an owner of
12 such and such a catalog of sound recordings, say The
13 Beatles, just to continue that example -- how specific
14 do I need to be? I mean, is there any duty to look
15 beyond an individual URL? Is there any duty to look
16 at a page that lists a bunch of URLs? I mean, what --
17 is there - - I mean, why didn't Congress just say--
18 MR. HALPERT: There's an obligation to
19 notify and say this work is at this online location --
20 the statutory -- the framework refers to an online
21 location. So it can be URL. I guess it could be an
22 IP address if there was a unique webpage that was
23 located with the name of material. And then, the
24 service provider has an obligation to take down all
25 instances of that specific song or work that's been

1 identified that are located at that location or risk
2 not having the protection of the safe harbor.
3 MS. CHARLESWORTH: Okay. So -- and the
4 other question I had for you is, you know, I saw a lot
5 of this mention of this as an extra-judicial process.
6 It's a very powerful tool for copyright owners.
7 But that all assumes that there's no secondary
8 liability, doesn't it, that line of thought because if
9 there was secondary liability available, then the
10 copyright owners presumably could take action against
11 the provider.
12 MR. HALPERT: Well, let's be clear about
13 where this is not working. It's not working because
14 the statute has been successful in moving infringing
15 activity off of most servers in the United States. And
16 there are a lot of online sites in other parts of the
17 world that need to be addressed.
18 A very good way to do that is -- and we
19 hope that the rights owners will join hands with the
20 service providers in asking USTR to insist that all
21 free trade agreements contain obligations that the
22 signing country on the other side implement and follow
23 the notice-and-takedown system, in fact, the DMCA
24 structure. That's in the KORUS free trade agreement.
25 It's in the U.S.-Australia free trade agreement. Those

1 regimes are working well.
2 And I think that there is a way if the U.S.
3 government would actually embrace this, that would be
4 very helpful if rights owners would ask them to. We're
5 delighted to work with you to have this system spread
6 internationally and become much more effective to
7 remove infringing material.
8 MS. CHARLESWORTH: Okay. Mr. Dow?
9 MR. DOW: Thank you. So just quickly, in
10 reaction to the interaction that you just had, I think
11 there's no reason to construe the term online location
12 to be so specific to refer to a file-specific URL. And
13 we can talk about that more. But I think that the
14 legislative history makes pretty clear that Congress
15 didn't have in mind something so specific as a file-
16 specific URL when it talked about something at a
17 particular online location that goes to the
18 representative list issue that I hope we'll get back
19 to.
20 But what I really wanted to sort of bring
21 to this is I think in looking at this and how to
22 construe the red flag knowledge provision, we need to
23 look at the statute and what we're trying to achieve
24 with the statute, right? Mr. Petricone talked about
25 how Congress struck a balance here and suggested that

1 balance was to put the burden on copyright owners to
2 provide a notice and the burden on service providers
3 to respond to those notices. But that's not the
4 balance that Congress struck. That was actually the
5 proposal of some of the service providers,
6 particularly folks like AOL, to begin with, was that
7 that's what the statute should do.
8 It should strike that balance. Congress
9 didn't strike that balance. They struck a balance in
10 which service providers had an obligation, independent
11 of notice and copyright owners, to respond to obvious
12 information, when they become aware of information
13 that makes it obvious to them that there's
14 infringement happening on their sites.
15 And I just wanted to talk a little bit from
16 the legislative history that goes to this issue
17 because the 512(m) provision was addressed and its
18 relationship to the red flag was actually addressed in
19 the Senate report, which talks about this in terms of
20 establishing a rule in which, quote, "a service
21 provider would have no obligation to seek out
22 copyright infringement. But it would not qualify for
23 the safe harbor if it had turned a blind eye to red
24 flags of obvious infringement."
25 And then, it goes on to provide a variety

1 of examples, things that would constitute red flag
2 knowledge under this statute. So every example that
3 it highlights gives examples that talk about things
4 that go well beyond item- specific knowledge of
5 infringement. So for example, one of the provisions
6 here talks about the red flag standard being met where
7 a service provider gains awareness of infringing
8 activity by viewing a site that was clearly, at the
9 time the directory reviewed it, a pirate site, where
10 sound, software, movies or books were available for
11 unauthorized download in public performance or public
12 display.
13 You contrast this to a website dedicated to
14 a famous celebrity that might have one or more
15 pictures of the celebrity and how it wouldn't be
16 incumbent upon that service provider to seek out and
17 to go through a difficult analysis to decide whether
18 those images were licensed. But contrast to these
19 sites that were clearly pirate sites, they said that
20 would suffice to meet the red flag standard.
21 The next example that it gave said that the
22 important intended objective of this red flag standard
23 is to exclude pirate directories from the safe harbor
24 based on those directories referring Internet users to
25 sites that are obviously infringing because they

1 typically use words such as pirate, bootleg or slang
2 terms in their URL and header information to make
3 their illegal purpose obvious to the pirate
4 directories and other Internet users.
5 And then, it says because the infringing
6 nature of such sites would be apparent from even a
7 brief and casual viewing safe harbor status for a
8 provider that viewed such a site would not be
9 appropriate. And the last example they give says that
10 the common sense of this red flag test is that online
11 editors and catalogers would not be required to make
12 discriminating judgments about potential copyright
13 infringement. If, however, an Internet site is
14 obviously pirate, then seeing it may be all that is
15 needed for the service provider to encounter a red
16 flag.
17 The provider, proceeding in the face of
18 such a red flag, must do so without the benefit of the
19 safe harbor. The purpose here was to try and
20 distinguish between innocent service providers and
21 those who are not innocent. When we were trying to
22 figure out how you do that, the concern was not that
23 actual knowledge was a bad standard.
24 Everyone agreed that actual knowledge was a
25 perfectly acceptable standard.

1 But there was disagreement about how you
2 deal with the traditional standard of constructive
3 knowledge. They should have known. And they should
4 have known standard was too broad and too malleable to
5 give comfort to service providers who, in the Internet
6 environment, needed greater certainty than that. And
7 so, the decision was made to land on something in
8 between.
9 The red flag knowledge standard was that
10 something in between. But its purpose was to
11 distinguish between people who were truly innocent
12 providers and those who were not. And so, this is the
13 -- this is the test, to say, do you have knowledge.
14 Are you aware of information that makes the
15 infringement of these locations obvious to you? And
16 if so, you are stripped of your innocence and you're
17 required to respond accordingly. And so --
18 MS. TEMPLE CLAGGETT: One quick follow- up.
19 Presumably, courts that have disagreed with that
20 interpretation did have the benefit of legislative
21 history. So in your view, why did they not find that
22 argument and the reliance on the legislative history
23 that you just cited persuasive?
24 MR. DOW: Honestly, I have no idea. I have
25 -- I mean, I think -- I think that the Second and

1 Ninth Circuit were clearly wrong deciding that you had
2 to have item-specific knowledge that go down to the
3 level of a URL. The Fourth Circuit got this right in
4 ALS Scan, where they said the service provider loses
5 its immunity the moment it loses its innocence.
6 And then, the problem with the Second and
7 Ninth Circuit decisions in Veoh and YouTube and others
8 that they have clearly said that the purpose -- that
9 service providers are free to make decisions even if
10 their purpose is to take advantage of infringement, so
11 long as they respond to notices or so long as their
12 knowledge level or their level of right and ability to
13 control essentially rises to actual knowledge or
14 actual participation in the infringement.
15 I think that they clearly read those
16 provisions of the statute down essentially to
17 nullities and you have a standard now that requires
18 either a showing of knowledge or a showing that
19 someone actually participated in the infringement or
20 induced the infringement, which by the way would kick
21 you out of the statute for other reasons, so that
22 again renders those provisions duplicative.
23 MS. TEMPLE CLAGGETT: Thanks.
24 MS. CHARLESWORTH: Okay. Mr. DiMona?
25 MR. DIMONA: Thank you, Jacqueline. I'd

1 like to start by saying that I hope -- this mic is
2 working well. Secondary liability has always been
3 very important to the licensing of public performing
4 rights. Now, you started off with having the dance
5 hall cases, which demonstrated that the bar or club
6 owner was liable for the infringements, not the
7 particular band or singer. And you can see how
8 difficult it would be to chase bands and singers for
9 licensing purposes.
10 I think Judge Posner recognized this in the
11 Aimster case, where he recognized that individual file
12 swappers are ignorant or commonly disdainful of
13 copyright and in any event discount the likelihood of
14 being sued or prosecuted for copyright infringement.
15 Nevertheless, the firms that facilitate their
16 infringement are also liable. And he said that
17 chasing an individual consumer is time consuming and
18 is a teaspoon solution to an ocean problem. And I
19 think that's exactly what we have here in the case of
20 streaming of music and films on online sites.
21 Secondary liability comes in two forms:
22 vicarious liability and contributory
23 infringement. We believe that both forms were
24 incorporated expressly into the safe harbor. And in
25 terms of vicarious liability, this arises when one

1 with the right and ability to control the
2 infringement, as a service provider would have,
3 directly financially benefits from it.
4 So what has happened in the case law? I
5 think the cases have gone astray, where they have held
6 that in order to have the right and ability to control
7 the infringement, you have to know about the specific
8 works. Vicarious liability never required knowledge.
9 It simply was the right to control it and the
10 financial benefit. So they've imported a knowledge
11 requirement into it which essentially eradicates
12 vicarious liability and makes -- you have to show
13 someone's equivalent to a direct infringer in order to
14 prove them secondarily liable, which doesn't make a
15 whole lot of sense.
16 In terms of contributory infringement,
17 where it's knowingly aiding somebody to do something,
18 there's been a lot of communication today about what
19 red flag awareness is. In my opinion, obviously
20 “awareness” has to mean something different than
21 “knowledge.” That's a statutory construction.
22 Congress uses two different words to mean two
23 different things. Infringing “activity” meant
24 something different than “material.”
25 This was clearly a way to try to limit the

1 scope of these safe harbors to people who truly were
2 innocent. You have -- in the knowledge standpoint,
3 you have the concept of willful blindness, which is
4 part of contributory infringement. And there is even
5 a court decision that has held that in order to show
6 someone who is willfully blind to something, you have
7 to show that they were willfully blind to a specific
8 work, which is a logical fallacy. I mean, you can't
9 be blind to something that you know about.
10 So the courts have gone off the rails in
11 interpreting these things to the benefit, the happy
12 benefit of the service providers and to the detriment
13 of the creators, who are suffering a tsunami of
14 infringement. The statute is utterly imbalanced. It's
15 totally broken. And it has to be rebalanced or
16 tweaked. And you know, regardless of what was in the
17 mind if people at the time, and I think you can debate
18 that going back and forth, and regardless of whether
19 the words could have been amenable to the right
20 construction, they just haven't been. And the
21 situation is intolerable.
22 One billion takedown notices? That is not
23 a symptom of a functioning statute that would make
24 sense to anybody, the burden totally being on
25 creators. I guess I'll pass the mic because I know

1 there have been a lot of patiently waiting people. But
2 we can talk some more.
3 MS. CHARLESWORTH: Well, I just want to --
4 I have a follow-up --
5 MR. DIMONA: Sure.
6 MS. CHARLESWORTH: I mean, maybe for you
7 and anyone else. You know, we're going to run short
8 of time and I have a plan. But -- sort of.
9 But a question that's sort of coming up is
10 -- and your comments kind of suggested this to me. If
11 courts had interpreted this differently, say more
12 along the lines of what you and some of the copyright
13 community are suggesting would have been the correct
14 interpretation, do you think the statute would be
15 balanced?
16 Like in other words, is the problem here
17 that the statute is not well-conceived or is the
18 problem more a question of how it's been interpreted
19 and if you could restore your view of -- or your
20 apparent view of what it should be -- would that work
21 better? Would we achieve something closer to what you
22 would see as a balanced regime?
23 MR. DIMONA: I think that the answer is yes
24 to all of the above. The statute was drafted in a
25 manner in which, with hindsight, when you look back at

1 it, you would regret some of the choices that were
2 made because they may have led the courts to go down
3 the path that they went down. I think the courts
4 could have come out in a more balanced way under the
5 current language. But they didn't.
6 And I think that the language on its face
7 and the intent of Congress at the time was a balanced
8 sharing of responsibilities, as Mr. Dow just said. If
9 you become aware of rampant infringement and you're
10 inducing it by encouraging people to do this and
11 you're making money off it and you're doing all these
12 things, at some point, the burden is supposed to shift
13 to you. And those who say that I never have a
14 monitoring obligation, that's just wrong. I mean,
15 that was for innocent conduits and other people who
16 really don't have any, you know, relationship with the
17 content.
18 And you know, I think at a minimum,
19 monitoring has to be required for certain types of
20 services that are in the entertainment area or using
21 entertainment content to sell other products, which
22 we're seeing a lot of. So there has to be fixes to
23 the language, I think, is the best way to go about it.
24 I don't know if that answered your question, but --
25 MS. CHARLESWORTH: Well, no. Thank you.

1 It's definitely a response. Ms. Deutsch?
2 MS. DEUTSCH: Thank you. So you know,
3 we're talking about congressional intent. But I think
4 the reality is that this deal was struck by 10 people
5 in a room together and a larger circle of people
6 around them and if you actually go and look at the
7 congressional language of what was adopted, with very
8 few changes, Congress took exactly the words we all
9 agreed to. Whether we like them today or not is a
10 different question.
11 But at least at the time, they made changes
12 like putting the counter-notice back in. So they were
13 actually protecting consumers.
14 And if you look at the no monitoring
15 provision, the language that Congress added was
16 protection of privacy. So it was very important for
17 them that the service provider not monitor and those
18 words, not affirmatively seek facts indicating
19 infringing activity, it was clear that with the red
20 flag knowledge that when notice came from the content
21 owner, it was supposed to comply with notice-and-
22 takedowns provisions. When notice came from some
23 other source, it was clear that at least in the Senate
24 report, the service provider was not required to be
25 making discriminating judgments about potential

1 infringement just because we were not in the best
2 position.
3 So yes, it was a limitation on liability
4 for service providers and it is a shared burden, but
5 it's also important, and I don't know that everyone in
6 the room really appreciates this, that the burdens
7 were based on the functions that the service provider
8 performed. So for example, where we were hosting
9 material, there was a lot more we could do and we are
10 doing and so for people, for example, who say that
11 Verizon isn't doing anything, that is just not true.
12 We've spent -- I think the service
13 providers generally have spent millions of dollars on
14 systems dealing with infringements, both takedowns,
15 having people 24 hours a day taking things down, law
16 enforcement officials dealing with subpoenas, notice
17 forwarding, all these things have required substantial
18 good faith. And I think there should be an assumption
19 that everyone in this room is acting in good faith.
20 But as Professor Nimmer said, when the
21 notice -- the red flag notice is coming from a source
22 other than the content owner, it has to be waving
23 brightly and it must be very bright indeed.
24 So I'll stop there. I know there's a lot
25 more I could say.

1 MS. CHARLESWORTH: Professor Besek?
2 MS. BESEK: Well, I want to start by saying
3 I do think that this statute was intended to be a
4 balance. And whether that was intended by Congress or
5 the drafters, who weren't in Congress, however that
6 may have been, you know, the goal was to both create
7 an environment where the Internet and technology
8 companies could thrive but also one where copyright
9 owners could put their works out without, you know, an
10 undue or unreasonable fear of infringement. And I
11 think it's safe to say that it's really not working
12 today.
13 And I just want to step back from the
14 technical legal stuff. I think the bottom line is
15 content holders can't get their stuff down. And I
16 don't mean that service providers aren't in good faith
17 taking things down as requested, but just the whole
18 time sequence is such that there's not any time when
19 it actually comes down because it keeps getting back
20 up there. So it really is, you know, to some degree,
21 the whack-a-mole problem that everybody refers to.
22 Specifically, with respect to the red flag
23 issue, I wanted to make two points. One is that I
24 think the courts have construed it too narrowly. I
25 mean, when you read Viacom, for example, the

1 likelihood that there actually will be red flag
2 knowledge with respect to any -- that you'd be able to
3 demonstrate it with respect to any particular
4 infringed work is vanishingly small. I mean when you
5 are doing discovery and you find certain things that
6 were said or email messages, the likelihood that it
7 will be about your thing is just really remote.
8 The other point I want to make is that I
9 don't think that the duty to investigate upon getting
10 red flag knowledge, however it's obtained, is at odds
11 with the duty to monitor. I think the duty to monitor
12 is an ongoing kind of thing. But when you have a
13 trigger, that's something else.
14 And so, I don't think that having some
15 obligation in response to red flag knowledge is
16 inconsistent with that.
17 MS. CHARLESWORTH: Okay. Thank you.
18 Mr. Band?
19 MR. BAND: So I didn't have the pleasure of
20 being one of the 10 people locked in the room.
21 But I was one of the people outside the
22 room. I represented Yahoo in the course of
23 negotiating the exact language that Troy was referring
24 to, the red flag legislative history. And like every
25 word related to the DMCA was negotiated, both the

1 statutory language and the report language. And I
2 believe I was negotiating with Mark Traphagen of SIIA.
3 I think he was my counterpart. So that's Chris Mohr's
4 predecessor at SIIA.
5 In any event, what we were trying to do was
6 Yahoo was concerned -- because Yahoo in those days was
7 a directory that hired surfers, people, individuals
8 who actually went and visited websites. That's how
9 the directories worked in those days. And they were
10 afraid that if by visiting a website that might have
11 infringing content, they would lose a safe harbor.
12 And so, the idea was to fashion report language to
13 make it very clear that they didn't lose the safe
14 harbor.
15 And I agree completely with Troy that the
16 idea was to find something in between actual knowledge
17 and constructive knowledge, something -- you know, the
18 idea was red flag would be somewhere in that in-
19 between, between actual knowledge and a should-have-
20 known standard. But I think that the courts have
21 gotten it right. I think that they found the right
22 balance and just so that -- to avoid repeating what
23 everybody else said, I think in terms of the overall
24 balance, you know, yes, it's important to have a
25 balance within section 512. And I think certainly

1 that's what everyone was trying to achieve, was trying
2 to achieve a balance.
3 But to the extent that Congress really
4 got involved in balancing, where Congress got
5 involved was the grand balance between section 512
6 and section 1201. And the understanding was
7 basically section 512 at the end of the day, while it
8 would try to have an internal balance, was a balance -
9 - it was a provision that was there for the service
10 providers. And 1201, even though it had safety valves
11 and there was an attempt at balance, ultimately that
12 was the rightsholder.
13 That was for the rightsholders. And that
14 was the legislative bargain. That was the balance
15 that Congress achieved.
16 And I think, you know, even when you read
17 the various decisions, when they sort of do their
18 introduction of what was going on, I mean, they -- a
19 lot of the decisions start at the very beginning and
20 was, okay, that there were these two provisions and
21 that's what Congress was trying to do, that it was,
22 you know, one provision was implementing the WIPO
23 Copyright Treaties and another provision was abiding
24 these safe harbors.
25 And so, I think that is the prism through

1 which you have to look at a lot of this is that, yes,
2 there is a specific balance but there's this bigger
3 balance and I certainly urge in your study that, yes,
4 you are looking at 512 and you have a separate 1201
5 study. But these are not totally separate provisions.
6 Courts are to some extent viewing them together.
7 MS. CHARLESWORTH: Mr. Anten?
8 MR. ANTEN: I'll keep this brief. Is this
9 on?
10 MS. CHARLESWORTH: Yes.
11 MR. ANTEN: Thank you. I'm not going to
12 add on to the many things that people have said today.
13 I just want to focus a little bit on the red flag
14 issue to bring forward three points that I think
15 haven't yet been addressed.
16 The first is that it would be disastrous to
17 not consider the fact that we want to encourage
18 service providers to remove things from their sites
19 that they do not want there, such as pornography or
20 hate speech, bullying or other things that the service
21 provider may make the reasoned decision that they
22 don't want there.
23 And yet, if you have this expansive view of
24 red flag knowledge, by merely looking for those items
25 that they don't want there, they are suddenly opening

1 themselves up to potentially massive liability because
2 if they make the decision that x is not hate speech,
3 suddenly they're now possibly on the hook that it
4 could nonetheless be potentially infringing and remove
5 that material when they have absolutely no obligation
6 to.
7 So by reading the red flag statute so
8 expansively such that by even coming across any kind
9 of material they are possibly on the hook, it's the
10 kind of thing that would actually lead to, if
11 anything, service providers either not looking at
12 what's on their sites at all or overcorrecting and
13 over-removing things that aren't even a danger to
14 copyright infringement in the first place.
15 The second thing that follows up on that,
16 and I don't know if we're going to hear from our
17 YouTuber today, but there is many things that are out
18 there that are posted that are not infringing at all.
19 It could be licensed. It could be a fair use. And to
20 make the -- to put the service providers in the
21 position of making these discriminating judgments is
22 the kind of thing that, again, as a logistical matter,
23 will lead to the overcorrection and removing of
24 materials that are not infringing at all and that
25 possibly wouldn't even be subject to a DMCA notice.

1 And that's not the kind of policy that we want service
2 providers to be put under where they are removing
3 materials that are perfectly innocent because they
4 merely fear potential lawsuit.
5 To this point, I note that the Recording
6 Industry Association of America once submitted an
7 amicus brief in the Lenz decision -- or in the Lenz
8 case, where they said that one of the most confounding
9 doctrines in copyright law and one that is notoriously
10 troublesome to apply and does not lend itself to rapid
11 or simple judgments is fair use. And so, when a
12 service provider comes across material that happens to
13 contain copyrighted material, it doesn't mean that
14 it's infringing material.
15 Copyrighted doesn't mean infringing because
16 there are all kinds of reasons for why it would be
17 permissible. So to come along the lines of mass
18 filtering or searching for Beatles or searching for
19 entire categories, that can't be something that is
20 reasonably fair to not only the service providers but
21 to the posters of this information who are complying
22 with copyright law.
23 They may be engaging in fair use and their
24 materials are more likely to be removed because the
25 service provider is acting out of an abundance of

1 caution, feel obligated to take these materials down,
2 lest they face potential legal liability.
3 The last thing I'd like to piggyback on
4 that Mr. Petricone mentioned was that such an approach
5 can also be disastrous for small innovators who aren't
6 necessarily in a position of willing to stand up
7 against a potential lawsuit that isn't necessarily
8 meritorious just to protect its users because it can
9 take years for these lawsuits to go through the
10 courts. It can cost a lot of money. And ultimately,
11 what makes the most sense for those small innovators
12 is to simply overcorrect and take down anything that
13 has even a potential whiff.
14 But that's not what the red flag knowledge
15 standard is supposed to do. It's supposed to do --
16 address material that is blatantly or obviously
17 infringing, not potentially, not even probably
18 infringing. And so, the role of the small innovators
19 in this land should also be considered when reaching
20 this balance.
21 MS. CHARLESWORTH: So just to -- you say
22 red flag is supposed to address blatant infringement.
23 So if someone who is investigating pornography
24 voluntarily, a site is doing that, I mean, is it your
25 position that if they encounter something that --

1 let's say it happens to be a full Beatles track and
2 they happen to know there's no license. Would that
3 qualify as red flag knowledge in your view?
4 MR. ANTEN: Well, I think the best example
5 of what might -- and this is something that we have
6 been talking about, what is red flag knowledge. And
7 there's -- and it's not inconsistent with the
8 structure of the statute for it to not be expansive,
9 for it to be very narrow in particular examples.
10 An example of where I think there could be
11 red flag knowledge is let's say that there's a movie
12 that's posted up on a website from beginning to end
13 with a watermark on it and the person in the comments
14 writes, I ripped this off of a DVD. I'm just seeing
15 how long it takes before they find it. That's the
16 kind of thing that could possibly lead to a question
17 of fact that would allow that to go to a jury to make
18 that determination.
19 That's an example of what could ostensibly
20 be red flag knowledge.
21 But as the legislative history showed, just
22 merely coming across copyrighted material alone can't
23 be enough. It has to be something else accompanying
24 that copyrighted material that would indicate to the
25 person that this cannot be licensed and it cannot be a

1 red flag.
2 MS. CHARLESWORTH: Well, what if the person
3 knew it wasn't licensed? What if they were running a
4 small website and they knew they didn't have a license
5 to use Beatles material?
6 MR. ANTEN: Well, there's two things. I
7 don't know if it's possible for somebody to know the
8 entire structure of all licenses for all Beatles
9 material --
10 MS. CHARLESWORTH: It's my website and I
11 know I don't have a license.
12 MR. ANTEN: Well, then that would be actual
13 knowledge because that is the --
14 MS. CHARLESWORTH: And I'm investigating
15 pornography.
16 MR. ANTEN: -- objective versus -- the
17 subjective versus the objective. The red flag
18 provision is supposed to be about objective and not
19 subjective knowledge. And so, that would -- putting
20 aside whether it could possibly be red flag in this
21 example, or whether it could be fair use in this
22 example, that's the determination that they made. And
23 so, there can't be enough.
24 As the legislative history that Mr. Halpert
25 pointed out, it can't be enough to simply have

1 copyrighted material there. There has to be something
2 there in addition that reflects that it can't be
3 licensed, it can't be a fair use, in order to put this
4 burden on somebody to say not only is it possible that
5 this is infringing, or even probable, but that it is
6 obviously infringing.
7 MS. CHARLESWORTH: So what do you make of
8 the legislative history that talks about obvious
9 pirate sites?
10 MR. ANTEN: Well, there's two things about
11 that part. I think that that was actually in 512(d)
12 versus 512(c), although it still applies. That
13 legislative history deals with the -- not with the
14 people who are listing at the direction of a user. But
15 putting that aside, it's one thing to say for the
16 Groovesharks of the world, where the entire site is
17 nothing but an attempt en masse to try to infringe
18 copyrighted material as much as you can.
19 That's very different from the
20 individualized assessment of going to a site like
21 YouTube, which has a lot, I think everybody would
22 agree, of perfectly permissible content on there and
23 yet trying to put the burden onto YouTube of having to
24 make these individualized, discerning judgments about
25 every single video that they happen to come across.

1 MS. TEMPLE CLAGGETT: Well, not to ask
2 another hypothetical, but I guess in that instance, in
3 terms of what would give you comfort in terms of
4 making the determination that it is in fact
5 infringing, absent a specific notice with a specific
6 URL -- if, for example, a content owner sent a notice
7 or a letter to the ISP and said I have not licensed
8 any of my content to appear on this website, any
9 content on this website would therefore be infringing.
10 Would that be -- and you come across that
11 Infringing content -- would that be enough to provide
12 the red flag knowledge?
13 MR. ANTEN: Well, I don't think so, for two
14 reasons. First of all, I think that
15 512(c)(3)(a)(iii), it says that the -- that in order
16 to be on notice, that the material that is claimed to
17 be removed must provide information reasonably
18 sufficient to permit the service provider to locate
19 the material.
20 So there always needs to be enough
21 information to tell the service provider exactly where
22 it is, as opposed to, again, shifting the burden onto
23 them to search for any potentially infringing
24 material. But putting that aside, even if somebody
25 sends let's say an email that says I've licensed all

1 of this particular material and somebody comes across
2 and finds that material, it could still, (a) still be
3 a fair use or, (b), just because that person hasn't
4 licensed it doesn't necessarily mean that that covers
5 the entire gamut. That would require the person to
6 start going into investigations to call back the
7 person and say, do you still have the license, did you
8 -- did you give them a license later.
9 Circumstances are always changing. And red
10 flag knowledge is supposed to be something that is
11 very powerful but very -- but addressing a very narrow
12 circumstance, where subjectively it simply cannot be
13 anything other than an infringement.
14 MR. GREENBERG: As a policy matter, why are
15 creators better than ISPs at identifying what's a fair
16 use? They can figure out if it's licensed or not,
17 probably. But when it comes to determining fair use,
18 if it's so murky, why are creators better at that?
19 MR. ANTEN: Well, the person that's the
20 least qualified to do that is the intermediary that
21 neither owns it nor posted it. If anybody, it would
22 probably be the person who posted it who could explain
23 why they believe that it's a fair use. But to then
24 hold the service provider in the middle, which didn't
25 do anything but come across it as anybody else,

1 wouldn't be the appropriate way to balance that. It
2 should be something that's between the person who
3 posted it and the copyright owner.
4 MS. CHARLESWORTH: Okay. We're going to go
5 to Mr. Adler. And then, I'm going to give you a
6 heads-up. We're still running quite late.
7 We're willing to eat into the break a
8 little bit.
9 There are many other legal issues,
10 including the issue of representative lists and repeat
11 infringers and I'm sure you see them all listed on
12 your agenda.
13 So we'll give everyone a very quick
14 opportunity to comment, as many who want to do this,
15 to comment on another legal issue quickly after Mr.
16 Adler I guess finalizes our comments on the knowledge
17 standard.
18 MR. ADLER: Yeah. I'll try to call upon my
19 New York heritage to speak quickly. Two points I
20 think are fairly clear. One is that you can find
21 anything you want or anything you need in the
22 legislative history of the DMCA. And that shouldn't
23 surprise anyone. After all, there were reports from
24 three separate committees and a negotiated conference
25 report. So there's a lot of legislative history to go

1 around.

2 The other thing I would point out is that

3 it's not uncommon in the history of copyright law in

4 the United States for Congress to have to go back and

5 fix the mistakes that the judiciary has made in

6 interpreting the handiwork of Congress. And that's

7 the reason why what happens here with respect to the

8 Second Circuit's ruling in the Viacom case and the

9 Ninth Circuit's ruling in the UMG case is kind of

10 interesting because this was a case of statutory

11 construction, where there was very little statutory

12 construction actually done.

13 As has already been pointed out, neither

14 court paid much attention to considering what the word

15 “awareness” meant, let alone tried to parse what was

16 meant by “facts or circumstances,” “infringing

17 activity” or the term “apparent,” all of which are

18 critical if you're going to try to say what the red

19 flag standard means in practice and how it relates to

20 the actual knowledge standard.

21 I would also point out that this was true

22 with respect to things they ignored about the language

23 of the provisions that they were construing generally

24 because someone mentioned earlier -- I think it was

25 you, Ms. Charlesworth -- that the provision on actual

1 knowledge refers to “the” material or “an” activity
2 using the material whereas the red flag standard
3 refers simply to “infringing activity” with no article
4 at all.
5 That's not an accident. Whether you say
6 that was the handiwork of a group of negotiators from
7 the private sector whose work was endorsed by Congress
8 or it was the work of Congress, ultimately it's what
9 was enacted into law. And you have to read that
10 wording as being different.
11 So the decisions by the Ninth and Second
12 Circuit that ultimately conflated these two in terms
13 of their practical effect and created a single
14 mandatory notice-and-takedown requirement really can't
15 in any way be squared with any of the various versions
16 of the intent of Congress.
17 I would also point out that there has been
18 over the years kind of a fetish made by service
19 providers over 512(m), the so-called no monitoring
20 duty provision and what it actually means. But again,
21 most of the courts that have tended to echo that
22 representation have done so without actually carefully
23 looking at the wording of that provision. That
24 provision actually says that nothing in this section
25 shall be construed to condition the applicability of

1 the safe harbors on a service provider monitoring its
2 service -- that's easy enough because monitoring its
3 service would be an ongoing operation, having nothing
4 to do with either actual notice of specific
5 infringement or awareness of facts or circumstances
6 that might make infringing activity apparent.
7 And the second part is really instructive.
8 It says not only monitoring a service or affirmatively
9 seeking facts indicating infringing activity. It
10 didn't say confirming facts indicating infringing
11 activity or reacting to facts. It said affirmatively
12 seeking facts.
13 That's not the same thing as doing either
14 of the other two things I mentioned. And it's not
15 unreasonable to believe, based upon the overall
16 framework of these provisions and the various
17 statements of legislative intent, that Congress indeed
18 would have assumed and anticipated that the red flag
19 standard would lead to some reactive action on the
20 part of the service provider.
21 Now, how much of investigation would be
22 required? That's certainly subject to debate.
23 Certainly it has never been considered by
24 any of the courts that have ruled on what the meaning
25 of the red flag standard is. But that certainly would

1 be useful in helping us to recognize why there are
2 these distinct standards and why conflating them in
3 the way that the Ninth Circuit and Second Circuit
4 decisions did ultimately makes the red flag standard
5 superfluous. And it doesn't have a legitimate
6 meaning.
7 But it does have a meaning in the sense
8 that because Congress also warned against the idea of
9 service providers being willfully blind to information
10 that comes their way regarding infringing activity, we
11 have to remember that when Congress was looking at
12 this question of secondary liability on the parts of
13 service providers, it looked at a lot of different
14 areas of law.
15 One of the areas it looked at were the so-
16 called flea market or thieves market cases, the
17 Fonovisa case and other cases of that sort, to
18 determine what the liability is of somebody who
19 essentially provides the venue and the opportunity but
20 not the intent for some other individual to engage in
21 illegal activity.
22 And I think the fact that that was also on
23 the minds of Congress is very important in
24 understanding what Congress actually meant by 512(m).
25 It didn't say that there would never be a

1 responsibility on the part of a service provider to
2 look into facts that came its way that made it
3 apparent that there was infringing activity. It just
4 didn't define exactly what that quota of investigative
5 activity would be.
6 MS. CHARLESWORTH: Okay. Well, thank you
7 very much. I will give credit to Ms. Isbell for the
8 observation about the language earlier.
9 So we have just a very few minutes. And
10 actually, we have less than a few minutes.
11 But I just wanted to quickly sort of canvas
12 the group in terms of, if you have just a really brief
13 statement about any other aspect of the legal
14 interpretation of section 512 that you'd like to add
15 to the record. If we can do it quickly, hopefully I
16 can get to -- it looks like virtually everyone again.
17 But I mean, really, really quickly, like just a couple
18 of sentences.
19 And I apologize. We've had -- as you
20 probably realize, we have many people who wanted to
21 participate in these hearings. And so, the
22 roundtables are more crowded than usual. So we're
23 sorry we can't get more conversation in. But this is
24 such as it is.
25 Ms. Sheehan?

1 MS. SHEEHAN: I just wanted to comment
2 really quickly on the repeat infringer policy
3 requirement. I think there's a tendency to assume or
4 pretend that all Internet service providers are the
5 same when it comes to repeat infringer policies. And
6 while it's a severe penalty to be cut off from all of
7 your cloud storage for allegations of repeat
8 infringement, for example, losing all your family
9 photos, et cetera, it's a far more draconian
10 consequence to lose your Internet access in an era
11 where people rely on the Internet to find a doctor,
12 complete their homework, find a job and do their jobs
13 or even, in some cases, call 911.
14 So I think there should be a flexibility in
15 interpreting that -- continue to be flexible in
16 interpreting that requirement and what it means for
17 conduit ISPs, ISPs that provide Internet access versus
18 online service providers and possibly consider getting
19 rid of the requirement altogether for conduit ISPs.
20 MS. CHARLESWORTH: But they would still be
21 able to terminate service for nonpayment?
22 MS. SHEEHAN: I think that's a question for
23 the ISPs.
24 MS. CHARLESWORTH: Okay.
25 MS. TEMPLE CLAGGETT: Just one quick

1 follow-up on that in terms of trying to distinguish,
2 Ms. Sheehan, between 512(a) and 512(c) and (d) ISPs.
3 To your knowledge, have courts in fact taken up that
4 proposal to interpret repeat infringement policies
5 differently depending on the ISPs or not?
6 MS. SHEEHAN: So I'm speaking mostly from a
7 policy perspective here. But to my knowledge, courts
8 have been fairly flexible with that interpretation.
9 The statute says only that they have to adopt and
10 reasonably implement a policy that allows for
11 providers -- that policy that provides for the
12 termination in appropriate circumstances. And I think
13 the courts have flexibly interpreted that requirement.
14 MS. TEMPLE CLAGGETT: Thanks.
15 MS. CHARLESWORTH: Ms. Schonfeld?
16 MS. SCHONFELD: Yes, and I don't want to
17 reiterate -- especially given our lack of time -- but
18 I just wanted to reference, I think it was Mr. Band
19 who raised the past, 20 years ago when Yahoo was
20 concerned about its ability of the people that it
21 hires to troll the Web to create the search engine
22 that it was becoming. It just goes to show how far
23 we've come in two decades. And I would just caution a
24 certain mindfulness of the way that technology
25 inexorably moves forward and how difficult it is to

1 understand what the known unknowns are going to be two
2 decades from now.
3 And I think that the technology -- the
4 technology component here obviously has -- I think
5 it's been clear now from the past three panels, has
6 swung in favor far so towards the service provider and
7 against the rightsholder. And going forward, to maybe
8 revisit legislation in some time less than 20 years.
9 MS. CHARLESWORTH: Okay. Ms.
10 Rasenberger?
11 MS. RASENBERGER: Thanks. I want to
12 address the right and ability to supervise and control
13 the infringing content and have the requirement --
14 also you have direct financial interest, or that you
15 can't have a direct financial -- just this is the
16 vicarious liability standard. It's clearly right out
17 of the common law. Congress intended to adopt the
18 common law standard.
19 The courts, however, have said that on the
20 right and ability to control, there must be something
21 more than the right and ability to remove infringing
22 content or to remove the -- discontinue service. And
23 they've done this because they've seen a perceived
24 conflict with the fact that you have to be able to
25 take content down or kick infringers off of the site

1 in order to be within the safe harbor.
2 The problem is that the only way that ISPs
3 can assert control over the infringing activity, it's
4 precisely by blocking, taking it down or discontinuing
5 service to the infringer, just as in the common law
6 cases, the owner of the music hall or the swap meet
7 could prohibit the infringing conduct on its site. So
8 I'd like to see Congress address this by either
9 eliminating that prompt or just adding a sentence that
10 explains that right and ability to remove or control
11 is included within that.
12 Now, it would mean that you sweep in a lot
13 of service providers right now, namely those that are
14 profiting from piracy. And well, that's true. It
15 would make them available to liability, which would
16 force them to cooperate, which is exactly what 512 was
17 intended to do. And I would suggest there that if
18 somebody does fall out of this provision, then they'd
19 be required to work with the copyright holders to
20 really get that content off the site through filtering
21 or other automatic means.
22 You know, you asked who should bear the
23 burden of policing. I think it's got to be shared and
24 I think that's clear under 512. Let's not forget that
25 search services are in the business of automated

1 search. They know how the find the stuff. They know
2 how to find the infringing content. They have the
3 tools and ability to do it. And I think by putting
4 the burden on the rightsholders, particularly
5 individual creators, it's greatly upsetting the
6 balance. They don't have access to the same
7 information. Sorry to take so long.
8 MS. CHARLESWORTH: Thank you.
9 Mr. Joseph?
10 MR. JOSEPH: Thank you. I'd love to
11 respond to Ms. Rasenberger. But I think my client
12 will shoot me if I don't talk about repeat
13 infringement. I agree with Ms. Sheehan. First of
14 all, infringer, as in the term repeat infringer, does
15 not mean alleged or claimed infringer. I'll rely on
16 our comments for that.
17 There's an excellent article by Professor
18 Nimmer that makes that very point. It says the
19 statute was very careful to distinguish between an
20 infringer and an alleged or a claimed infringement.
21 And that is an important distinction. In addition,
22 this is a standard, the repeat infringer termination
23 policy, that's intentionally flexible.
24 Indeed, this one you can say -- you really
25 can say Congress intended one of only four substantive

1 changes made by Congress from the text agreed in the
2 Senate-sponsored negotiations was the addition of "in
3 appropriate circumstances." So there was clearly a
4 concern about terminating Internet access even in
5 1998. And as we make clear in our comments, in today,
6 that concern has to be even greater.
7 MS. CHARLESWORTH: Thank you.
8 Mr. Jacoby?
9 MR. JACOBY: Thank you. Really quickly, I
10 want to talk about the URL-by-URL search, which reads
11 the representative lists straight out of the statute.
12 I just want to say that with respect to repeat
13 infringer, I agree that there needs to be guidance.
14 Courts have allowed services that don't track
15 infringers to benefit from that. And I think that
16 everyone would benefit from specific guidance.
17 With respect to right and ability to
18 control, I think that courts have gone way beyond what
19 was originally -- what was originally meant by that
20 with respect to the vicarious liability standard, now
21 to require active participation, extreme activity
22 which would amount to direct or contributory
23 infringement. And I don't think that is consistent
24 with the statute.
25 I also want to talk about, very briefly,

1 storage at the direction of the user. Even if
2 Congress intended to cover more than storage or
3 hosting, even to the point of access, access cannot
4 mean the permanent distribution of exact copies.
5 Access does not mean downloading. And I think the
6 courts are mistaken there.
7 And finally, I just want to respond to Mr.
8 Anten, who talked about -- and I think everyone agreed
9 that Grooveshark is an example of a bad actor. I just
10 want to point out that Grooveshark was still able to
11 take advantage of the standards set by the courts with
12 respect to red flag knowledge because they did not
13 have necessarily the specific knowledge. Even though
14 everyone recognized what a bad actor they were, they
15 lost the case on direct infringement and on the lack
16 of a repeat infringer policy.
17 MS. CHARLESWORTH: Thank you.
18 Ms. Prince?
19 MS. PRINCE: Thank you. I would like to
20 address something that Mr. Anten brought up and also
21 address your -- or give the answer to the question
22 that, you, Ms. Charlesworth asked and, you, Mr.
23 Greenberg, in regards to fair use from the content
24 creator's perspective. And I want to address this
25 with one particular example.

1 Let's say you want to critique something
2 and you're just an individual content creator.
3 You reach out to a large company or whoever
4 it is that you want to use a very short clip to
5 critique, a clip of a video, for example. And you
6 can't access that. You can't get permission. So I
7 know I'm operating without a license. I've tried to
8 obtain one. There's no way to get it.
9 And I know I'm going to have to defend
10 myself under fair use.
11 When it comes to automated systems, there's
12 a chance that I won't even have the chance to defend
13 myself. And here's the problem. Using YouTube as an
14 example, since it's what I'm most familiar with, they
15 have Content ID which automatically scans your content
16 to see if there's a match.
17 And as Mr. Anten mentioned, just because it
18 is copyrighted doesn't mean it might not be able to be
19 used. So even though I might be speaking over that
20 clip, even though I am critiquing that clip, without
21 taking Lenz v. Universal into consideration at all, it
22 is being anatomically being blocked worldwide, which
23 immediately means that I have to be put into a 14- or
24 30-day process of disputing that before I even have a
25 chance to share that speech or critique.

1 And with YouTube being the world's second
2 largest search engine and of course being tied to
3 Google, it really limits your ability to speak period.
4 MS. CHARLESWORTH: Okay. Thank you.
5 Mr. Petricone?
6 MR. PETRICONE: Okay. In terms of the
7 repeat infringer challenge, so the DMCA succeeds
8 because it doesn't try to impose hard and fast
9 mandates in the very dynamic tech sector.
10 Instead, what it does is it sets a floor of
11 legal certainty upon which content owners and service
12 providers are expected to build voluntary measures.
13 And if you look around, that seems to be happening.
14 If you look at the Copyright Alert System
15 set up by the five major ISPs, you look at Google's
16 work in search to highlight authorized content and
17 down-rank infringing sites, you look at the Internet
18 advertisers' best practices to cut off revenue to
19 pirate sites and the YouTube Content ID system, in
20 which YouTube invested tens of millions of dollars and
21 worked with the record labels. So it looks like
22 things are thankfully moving in that direction.
23 MS. CHARLESWORTH: Okay. Thank you.
24 Mr. Ostrow?
25 MR. OSTROW: Yes, I just want --

1 MS. CHARLESWORTH: We're trying to focus on
2 comments -- very quick comments on legal
3 interpretations. Yeah.
4 MR. OSTROW: Well, I just want to be very
5 brief in terms of what was discussed in terms of
6 policy and that a couple of my colleagues on the panel
7 have spoken about, small businesses and entrepreneurs
8 and innovators.
9 And from my perspective, the small
10 businesses and entrepreneurs and innovators that I
11 represent, mostly musicians and record labels and
12 publishers, they have been having their work infringed
13 to essentially subsidize these other small businesses,
14 entrepreneurs and innovators.
15 And I think that the balance needs to be
16 re-struck and I think some of this needs to be made
17 easier.
18 We haven't discussed in any detail the fact
19 that representative lists have been essentially
20 written out of the statute. And I think that to have
21 a burden upon a content creator, a content owner to
22 provide individual URLs, which is not in the statute
23 and which many of the sites impose, is an undue burden
24 that needs to be shifted.
25 MS. CHARLESWORTH: Thank you very much.

1 Mr. Mohr?
2 MR. MOHR: Very briefly, one of the --
3 certainly I think one of the largest sources of
4 frustration for our members is the repeated sending of
5 notices to a specific site for a specific -- for a
6 specific work, where, you know, a thousand or a couple
7 of thousand will have to be sent per month to get a
8 textbook down.
9 There is yet no case law upholding an
10 injunction under section 512(j). That's an area that
11 we think ought to be explored due to the factors for
12 issuing the injunction. The injunction would by
13 definition have to be tailored to address many of the
14 concerns that the service providers have raised. And
15 I can get into those.
16 Those reasons are in our comments a little
17 more and there's some scholarship that is being
18 developed in this area. But we would I guess urge the
19 office to explore that as a way of perhaps
20 ameliorating some of the problems that are occurring
21 under the statute.
22 MS. CHARLESWORTH: Thank you. Ms.
23 Kaufman?
24 MS. KAUFMAN: Hi. I want to respond to Mr.
25 Greenberg's discussion before about the burden of

1 proof in regards to fair use and Ms. Prince's
2 comments. You know, Mr. Greenberg asked why the
3 burden of proof is better -- why the fair use burden
4 is better on the copyright owner versus the user. It
5 isn't. It should definitely be on the user.
6 We have a situation after Lenz where the
7 court, after holding that a fair use analysis shifts
8 the burden, it really distorts the burden of proof and
9 in the right -- makes rightsholders have to do that
10 analysis before sending a notice for a notice-and-
11 takedown. But traditionally, the fair use burden of
12 proof is based on the fact that the alleged infringer,
13 rather than the rightsholder, is the one who possesses
14 the facts needed to explain the nature of the use.
15 I mean, if you see content posted by
16 sexy123, I have no idea if that's -- if that is
17 someone critiquing content, if they've just posted
18 like a piece of journal content from Ithaka, from one
19 of our third party licensees. I can't do any analysis
20 on that. I have to send a takedown notice to even get
21 maybe some information via a counter-notice, a
22 counter-notification that there was some fair use
23 alleged.
24 So there is the counter-notification
25 process in place to get us -- to get a conversation

1 started on fair use and to put that burden on the
2 initial rightsholder when they really are lacking the
3 information to do that analysis is really -- seems
4 substantively unfair.
5 MS. CHARLESWORTH: Thank you very much.
6 Mr. Johnson?
7 MR. JOHNSON: I would agree with all that
8 she just said. And I'd also like to say, Mr.
9 Adler, what he said about the flea market
10 providing a venue is exactly what ISPs are. And to me,
11 that's the problem. If you're an ISP, you know you're
12 going to have a lot of infringement.
13 And it'd also be nice when these attorneys
14 are negotiating these things, they always work for the
15 people who license music.
16 There's never a pro copyright attorney in
17 there saying, why, what about the -- the creator. So
18 it would have been nice if there was a pro copyright
19 attorney in there negotiating when this red flag was
20 being done. And to me, it's just -- since it's
21 virtual, then there's no penalty. And I've said
22 before, you know, if I do an album that cost me
23 $30,000 or $50,000. But if you steal it off of --
24 because of the DMCA or any kind, you might as well
25 come to my house and steal my car out of my driveway.

1 And so, maybe there needs to be some kind of copyright
2 911.
3 But the last thing I'd like to say is just
4 -- as far as background, and the other day, I was -- a
5 couple of weeks ago, I Googled, you know, stuff on the
6 DMCA in preparation. And I was curious who sponsored
7 the DMCA. And it turns out it's the late Mr. Coble,
8 Congressman Coble, who was a great man and a great
9 friend of songwriters. And I mean nothing at all to
10 disparage his reputation or his name. I just -- when
11 I Googled the name and I went to -- it took me to Open
12 Secrets.
13 And I was just looking there and it says
14 1996, '97, all those years, Congressman Coble got
15 $200,000. And then, 1998 hit and it went to $1.2
16 million. And then, 1999, it's back to $200,000.
17 And I just think it's kind of interesting.
18 Maybe there are other congressmen that got money. And
19 that's the way it works. I understand. But it's just
20 interesting it just went to $200,000 and then it went
21 up to $1.2 million in '98 and then it went back down.
22 So that's it. Thank you.
23 MS. CHARLESWORTH: Okay. Mr. Hart?
24 MR. HART: Thank you. So I just want to
25 real quickly mention 512(f), since that didn't come up

1 too much in this panel. And setting aside what
2 language said about, you know, requiring a fair use
3 consideration as part of that, I do want to point out
4 that I think the Ninth Circuit was correct in
5 rejecting the calls to overturn its early decision in
6 Rossi, which said that there's a subjective standard
7 that's applied to the good faith requirement under
8 512(f), rather than a higher objective standard, which
9 I think would have definitely placed an undue burden
10 on copyright holders who are sending notices.
11 But also I want to point out that because
12 512(f) applies not just to notices but also to
13 counter-notices, it would place a higher burden on
14 users who are receiving notices and want to send
15 counter-notifications, if they had to meet an
16 objective standard. I think that would reduce the
17 already small number of counter-notices we see.
18 MS. CHARLESWORTH: Thank you.
19 Mr. Halpert?
20 MR. HALPERT: Thank you. I join with
21 Joseph's remarks earlier with regard to repeat
22 infringers. I will point out that there is one case
23 in particular that -- sort of writers think is wrongly
24 decided, that's going up on appeal to the Fourth
25 Circuit related to repeat infringers.

1 We are not here asking in any way that the
2 Copyright Office recommend reopening the DMCA.
3 There's some cases that go the wrong way
4 from our perspective. And we are on that basis not
5 saying that we want a new game.
6 I would also point out with regard to right
7 and ability to control and the swap meet scenario that
8 the DMCA specifically adopts a different standard. It
9 would not make sense to have a limitation of liability
10 that had the same standard as the limitation for --
11 the standard for liability. Furthermore, the
12 legislative history is replete with specific
13 explanations that direct financial benefit does not
14 mean receiving an ordinary fee or even a volume-based
15 fee, that direct financial benefit really is akin to
16 aiding and abetting. Otherwise, the entire Internet
17 would be vicariously liable for actions of infringers
18 and we would not have seen the enormous success of the
19 Internet in the United States. The insurance cost
20 would have been absolutely massive.
21 Finally, Grooveshark is dead. Whatever the
22 theory, it was held directly liable. The DMCA safe
23 harbors do not protect rogue sites like that and we
24 should be very --
25 MS. CHARLESWORTH: I think it had a long

1 and painful death, however.

2 MR. HALPERT: But it's dead.

3 MS. CHARLESWORTH: All right. I'm going on

4 to Mr. Dow, really just a couple of sentences because

5 we really need to move on.

6 MR. DOW: Okay.

7 MS. CHARLESWORTH: For everyone left, I'm

8 so sorry that we can't accommodate more.

9 MR. DOW: I can do that. Quickly, I want

10 to respond to your question and say that I do not

11 believe that section 512 is inherently broken.

12 I think that the courts have gone awry. I

13 hope that the exercise you're undertaking can help set

14 them right on some of these paths. But I think if

15 properly construed by courts and by relevant actors,

16 that this is a system that fundamental can work.

17 As far as the legal issue, let me just say

18 that in terms of the right and ability to control

19 language, I think I disagree with Jim in terms of

20 whether or not it reflects a vicarious liability

21 standard. But even assuming his statement is right, I

22 think courts in construing that something more than a

23 standard vicarious liability provision have set that

24 bar so high that at this point they have allowed

25 intermediaries to provide the site and facilities for

1 infringement and to shift the burden of policing those
2 sites entirely to content owners.
3 And courts have sanctioned that and said
4 that even if those decisions are made to shift that
5 burden to copyright owners for the financial benefit
6 of the service provider, that that's simply placing
7 the burden where it lies under the DMCA and that is
8 not where the burden lies under the DMCA. And
9 hopefully you'll look at that.
10 MS. CHARLESWORTH: Thank you, Mr. Dow.
11 Mr. DiMona?
12 MR. DIMONA: Thank you. Two quick things.
13 Representative lists, that was something that we were
14 looking forward to when it was placed into the act, as
15 considering we're a performing rights organization
16 with 10 million musical works and we face websites
17 that have hundreds of thousands of musical works, we
18 thought if we would give them a representative list of
19 our catalog, that would somehow shift the burden from
20 them to recognize what they were, which was a music
21 website and cause them to do some of the investigation
22 that was discussed earlier. It didn't turn out that
23 way. The courts have basically read that completely
24 out of the act. So it was a disappointment there.
25 The other thing I'll say briefly in passing

1 is that I'd point people's attention to the very
2 excellent making available report that the Copyright
3 Office put out. There's a right of making available
4 that's recognized in the treaties. The safe harbors
5 directly impact that right to the extent that they
6 just immunize activity that maybe shouldn't be. So
7 that's just something for how we think about when
8 someone looks at the safe harbors again.
9 MS. CHARLESWORTH: Ms. Deutsch?
10 MS. DEUTSCH: I just had three quick
11 points. But on the representative list, you know, when
12 the statute was drafted, it was very clear that
13 identification of the copyrighted work included a
14 representative list of works at the site.
15 But the parallel provision about the
16 identification of the material claimed to be
17 infringing did not have the representative list
18 language. And in fact, it just said that information
19 reasonably sufficient to permit the service provider
20 to locate the material, not the representative list.
21 And if representative lists were to be in the statute,
22 it would have been in both sections. So the reason it
23 wasn't should be significant.
24 I also want to touch on the 512(j)
25 injunctive relief. That language has remained there

1 for 20 years. There have been no cases brought, for
2 whatever reason. It's not the service providers' duty
3 to bring those cases. But it's really a microcosm, in
4 my view, of the entire balance of the DMCA. So in
5 considering whether to grant an injunction, courts
6 need to consider the burden on the service provider or
7 their system or network, the magnitude of harm to the
8 copyright owner, whether the implementation would be
9 technically feasible and not interfere with non-
10 infringing material and also whether there are less
11 burdensome and comparably effective means of
12 preventing or restraining access to the materials.
13 So to me, it's a very good balance, a
14 perfect balance.
15 And then, finally, I would point out that,
16 in case it wasn't clear before, you know, I don't
17 think it's wise to reopen the DMCA and I think that in
18 fact, you know, as I mentioned earlier, when the
19 service provider is acting as a conduit, the only way
20 the service provider can cooperate, when we're not
21 hosting any material, is either to block or filter
22 infringing material that's residing somewhere else,
23 like foreign websites. And that blocking,
24 monitoring, termination, these are all draconian
25 remedies that are even more important to avoid today

1 than when the DMCA was enacted. Thank you.
2 MS. CHARLESWORTH: Professor Besek?
3 MS. BESEK: I just want to talk briefly
4 about the Lenz case and the requirement that the Ninth
5 Circuit placed on copyright holders to essentially
6 screen for fair use before filing a notice. It's too
7 bad that the amended opinion eliminated the discussion
8 of rightsholders using automated systems.
9 But I don't think that that means that it
10 can't be reasonably done by the right holder.
11 That case, it could -- it's just as likely
12 that the court decided since there were no automated
13 systems at issue in that case, it wasn't going to
14 discuss them. But it seems to me that the use of an
15 automated system would be appropriate.
16 It really depends on the parameters
17 involved and how they're set. So it's going to depend
18 on what that does. But I'm sure there are cases where
19 an automated system would do better than a human.
20 And also, I think it would be ironic to
21 impose a human review requirement on right holders
22 when, you know, one of the principle reasons for 512
23 is we couldn't expect service providers to do it,
24 given the volume of material and given the difficulty
25 in judging fair use. Those difficulties exist

1 regardless of where you are, whether you're the
2 copyright owner, whether you're the user, whatever.
3 MS. CHARLESWORTH: Thank you, Professor.
4 Mr. Band?
5 MR. BAND: So we've heard a lot of
6 frustration today from rightsholders about how the
7 courts have been interpreting and applying section
8 512. A lot of these same rightsholders have been
9 expressing a lot of frustration, both here and
10 elsewhere, about how the courts have been interpreting
11 and applying fair use. And I'm sure a lot of them are
12 wondering how can all these courts be so wrong.
13 Well, I submit that the courts aren't
14 wrong. They're right. And I think what the courts are
15 doing is they understand that copyright is the area of
16 law that affects more people more directly in every
17 aspect of their life than any other aspect of the U.S.
18 Code. And the courts are acting appropriately in that
19 context.
20 MS. CHARLESWORTH: Thank you very much.
21 Mr. Anten?
22 MR. ANTEN: Just an addendum to that.
23 The fact that the Groovesharks of the world
24 have been killed without having to change the standard
25 for red flag knowledge shows that red flag knowledge

1 is not an impediment to stopping bad actors when you
2 consider the red flag standard in its current form.
3 MS. CHARLESWORTH: Okay. Mr. Adler, a
4 closing --
5 MR. ADLER: Yeah, we've already mentioned
6 512(m), which needs to be reviewed because of the
7 critical importance it has in distorting the meaning
8 of the red flag awareness standard, as well as the
9 doctrine of willful blindness. I'd also like to
10 associate myself with the remarks that were made
11 previously about representative lists. Let me make
12 two points, one about Lenz and one about another
13 issue.
14 The Lenz case is not just about fair use.
15 The rationale the court used to require the good faith
16 belief of the copyright owner to include a review of
17 fair use was that fair use is one form of
18 authorization under law. And what that would mean is
19 that a copyright owner would not only have to consider
20 fair use, but would have to consider every other
21 limitation and exception in the Copyright Act on the
22 exclusive rights of copyright owners. And that means
23 that information that is clearly not in the possession
24 of the copyright owner, such as the identity and
25 status of the alleged infringer, the alleged

1 infringer's intent and purpose must all be assumed
2 somehow or investigated by the copyright owner, which
3 makes no sense.
4 I would also like to mention the
5 substantial compliance doctrine, which has been
6 distorted in the two major court decisions that are
7 usually cited for it. One is Perfect 10 v. CCBill and
8 the other is the Hendrickson case.
9 Congress provided that substantial
10 compliance with notification requirements would exist
11 if basically three of those notification requirements
12 had been met in the notification.
13 And yet, those two cases decided that in
14 the cases before them, substantial compliance was not
15 achieved, despite the fact that they pointed to
16 problems with notification that did not involve any of
17 those three elements that the Congress had said
18 constitutes substantial compliance. That's an
19 important aspect to look at if we're ever going to be
20 able to resolve some of the issues about notification.
21 MS. CHARLESWORTH: Well, I want to thank
22 this panel very much for commenting on all the legal
23 issues. I see we're still in a tale of two cities.
24 The theme continues a bit. We're going to -- in light
25 of the fact that this panel ran substantially over, we

1 are going to take a break because probably everyone
2 needs -- I think it's an eight-minute break.
3 If you can come back at five to 4:00, the
4 last panel, which I think will -- there will be some
5 overlap on -- will be a little bit shorter. And we do
6 plan to release everyone at 5:00. The court actually
7 wants us out of here.
8 So please be back at five of.
9 (Break taken from 3:48 p.m. to 3:57
10 p.m.)
11 SESSION 4: Scope and Impact of Safe Harbors
12 MS. TEMPLE CLAGGETT: Okay. This is our
13 last panel of the day. It is on the scope and impact
14 of the safe harbors. I will just say that since we
15 are running a little bit late, this is going to
16 definitely be a speed round. I'm going to
17 unfortunately have to hold you to two minutes in terms
18 of responses. So please look over at the end and
19 you'll know when you have a minute left or 30 seconds
20 left. But we're going to have to hold you to that.
21 And we're going to have to reduce this panel,
22 unfortunately for now, for just one hour because we do
23 actually have a hard stop to be out of the courthouse.
24 So we're going to go until 5 o'clock.
25 Again, this panel, I'm hoping to go over a

1 number of issues that's on the scope and impact of the
2 safe harbors. I'd like to discuss some of the issues
3 with respect to the service providers that are covered
4 under the DMCA and whether they cover the appropriate
5 service providers. We touched upon the issue of
6 counter-notifications and the counter-notification
7 process. And so, hopefully we'll have an opportunity
8 to discuss that process in a little more detail and
9 remedies under that process and whether it's
10 appropriate.
11 And then, just finally, if we have the
12 opportunity, I have a couple of questions about the
13 cost of the system and the impact on licensing. But
14 before we begin, I wanted to just go around just to
15 get everyone's title and name, as we have before. So
16 I'll start over here on this side.
17 MS. WILLMER: Hi. I'm Lisa Willmer.
18 I'm VP Corporate Counsel at Getty Images
19 and we represent over 200,000 photographers and
20 license over 80 million images.
21 MR. WEINBERG: Michael Weinberg, with
22 Shapeways, a 3D printing marketplace.
23 MR. WALKER: Hi. Jeff Walker. I oversee
24 business and legal affairs for the digital group of
25 Sony Music Entertainment.

1 MS. TUSHNET: Rebecca Tushnet, the
2 Organization for Transformative Works and Georgetown
3 Law.
4 MR. PETRICONE: Michael Petricone, of the
5 Consumer Technology Association.
6 MR. SCHRUERS: Matt Schruers, Computer and
7 Communications Industry Association.
8 MS. SCHRANTZ: Ellen Schrantz, Internet
9 Association.
10 MS. SCHNEIDER: Maria Schneider, musician.
11 MS. MADAJ: Natalie Madaj, National Music
12 Publishers Association.
13 MR. FLAHERTY: Patrick Flaherty, Verizon.
14 MS. FIELDS: Adrienne Fields, Director of
15 Legal Affairs, Artists Rights Society.
16 MS. FEINGOLD: Sarah Feingold, Etsy, Inc.
17 Etsy is an online marketplace for people around the
18 world to connect both online and offline to make, sell
19 and buy unique goods.
20 MR. DOW: Troy Dow, VP Counsel with the
21 Walt Disney Company.
22 MR. DIMONA: Joe DiMona, Vice President
23 Legal Affairs of BMI, the music licensing company.
24 MS. DEUTSCH: Sarah Deutsch, Mayer Brown.
25 MR. BARBLAN: Matt Barblan, with the Center

1 for the Protection of Intellectual Property at George
2 Mason Law School.
3 MS. AISTARS: Sandra Aistars. I am a
4 professor at George Mason University Law School and
5 run the Arts and Entertainment Advocacy Clinic there.
6 MR. ADLER: I'm still Allan Adler, General
7 Counsel, Association of American Publishers.
8 MS. TEMPLE CLAGGETT: And as we discussed
9 in earlier panels, I want to kind of start off high
10 level and then we can kind of drill down into some
11 specific details.
12 But first, in terms of the scope of the
13 DMCA safe harbors, someone mentioned earlier in one of
14 the earlier panels that the purpose of the DMCA was to
15 protect innocent service providers.
16 And so, the question I have is: is what in
17 fact is the DMCA protecting now? Is the definition of
18 service providers appropriate or has it been
19 interpreted too broadly or too narrowly to either
20 protect those service providers who are not in fact
21 innocent service providers or has it been interpreted
22 too narrowly not to protect service providers that it
23 should.
24 So are there any responses to that in terms
25 of the definition of service providers and service

1 providers that are protected under the DMCA? Sorry, I
2 can't see your -- Ms. Willmer?
3 MS. WILLMER: Yeah. I think the scope of
4 who's covered under the DMCA at this stage of the game
5 is too broad. And originally, when it was planned, it
6 was true technology services providing the pipes,
7 behind the scenes. And what it's now moved into is
8 companies -- technology companies engaged in the
9 storage and display of content who bear no cost for
10 that content and no liability.
11 And make no mistake, it's the content that
12 draws users to their site and allows them to generate
13 advertising revenue. And there's really no basis in
14 policy and it shouldn't be a basis in the law for them
15 to have a different cost structure than other
16 companies that are content companies and that are
17 trying to do it legitimately and who actually
18 compensate creators.
19 MS. TEMPLE CLAGGETT: Thank you.
20 Mr. Walker?
21 MR. WALKER: Hi. We firmly believe that
22 the DMCA was supposed to balance the interests of
23 content creators with DSPs. But what has happened is
24 that it actually today provides a broad safe haven
25 that's very harmful and allows entertainment platforms

1 that aren't passive to simply exist to offer content
2 that -- to consumers.
3 I find in my day-to-day job, I negotiate
4 deals with legitimate platforms as well as partners
5 who take advantage of the safe harbor.
6 And what we find is that we have this
7 Hobson's dilemma where we have to make a choice
8 whether to accept less than fair value for our content
9 or to simply go toward the broken notice- and-
10 takedown.
11 And most of the DSPs that we go to today
12 and approach to tell them they need a license simply
13 tell us, no, no. We're not interested.
14 And when we start to send them takedowns,
15 then they'll reengage in the conversation but insist
16 that they will only accept much, much less than the
17 fair value of our content. You know, the recording
18 music business, which, you know, Sony Music invests
19 hundreds of millions of dollars every year to create
20 content, and our business has shrunk more than 50
21 percent since the advent of the DMCA while platforms
22 that rely on the safe harbor have, grown exponentially
23 and seem to be thriving.
24 MS. TEMPLE CLAGGETT: Thank you. And
25 before I go to the next person, one follow-up I'll

1 ask, so you can answer this in response to this
2 question, is if you think that the covered service
3 providers are -- is the issue that the statute itself
4 too broadly defines service providers or is it that
5 courts have broadly interpreted who should qualify
6 under the safe harbor? And when you answer that
7 question, if you have an opinion on that, that would
8 be helpful as well.
9 Mr. Schruers?
10 MR. SCHRUERS: So first, let me say I'm not
11 really certain where exactly the sort of objective
12 notion of innocent service provider resides in 512.
13 That's not a term we generally see arising in the
14 statute. Service providers that comply with the
15 statute are -- receive its protections, irrespective
16 of its objective evaluation of innocence.
17 The statute was intentionally broad.
18 Congress did not intend to lock in 1998
19 service providers from protection and create a
20 situation where people who did things in circa 1998
21 structures would receive protection and would have the
22 obligations of engaging in notice-and- takedown
23 whereas newer services did not. There's very clearly
24 two specific categories in this statute; obviously,
25 (a) and 512(b) through (d), which I think jointly were

1 designed to encompass a broad understanding of what
2 sorts of services could be provided on the Internet
3 with the expectation that those would grow.
4 And so, that's why we have not only I think
5 what we would consider broadband providers under
6 512(a) but virtually every kind of Internet service
7 that we have today, whether it's information location
8 tools in the form of search or information residing
9 online at the direction of a user, which encompasses
10 many of the other platforms we have. That was an
11 intentional broad stroke that Congress intended.
12 And so, I don't think we should attempt to
13 circumscribe that to exclude some particular new
14 service. First, I don't think that would be a very
15 useful exercise. Secondly, I don't know where that
16 would reside in the statutory language.
17 And third, I think it would be comically
18 destructive because it would say, well, if you do
19 things like we did back in 1998, you get to benefit
20 from the statute.
21 And if you want to do things in a new or
22 innovative way, then it's a more uncertain
23 environment. We're talking about an industry that is
24 one of our -- if not our largest service exporter,
25 trillions of dollars of commerce every year. I don't

1 think that's something we want to upset by tinkering
2 with the liability standards that enabled it.
3 MS. TEMPLE CLAGGETT: Thank you. Ms.
4 Schrantz?
5 MS. SCHRANTZ: I agree with what Matt said.
6 So I won't go too far into those details.
7 But just to say that it's critical that we
8 keep it broad, both in the statute and the courts,
9 because either way, if you limit it, not only are you
10 favoring incumbent services over platforms that we
11 don't know that they will exist in three years and
12 five years -- most of our companies didn't exist when
13 the DMCA was created, let alone just five years ago --
14 but you're also going to insert such uncertainty that
15 investments into new services won't occur and we've
16 seen that time and time again through studies outlined
17 in our filed comments, that investors, VCs, angels are
18 unwilling to boost new services.
19 And a danger in that that I think is
20 critical in pointing out is we're here having a
21 conversation about how do you stop infringing uses.
22 It's been proven that one of the best ways to stop
23 infringement is to grow the legal online marketplace.
24 And statistically speaking, if we can provide legal
25 platforms like the ones that the Internet Association

1 represents, the ability to grow and offer those
2 services, that reduces piracy and that should be
3 encouraged when we're outlining policy, which I think
4 necessarily includes ensuring that there's a broad
5 coverage under the statute and through the courts.
6 MS. TEMPLE CLAGGETT: Thank you.
7 Ms. Schneider?
8 MS. SCHNEIDER: Firstly, safe harbor is a
9 privilege, not a right. And under the safe harbor,
10 when they created the DMCA in 1998, I don't think
11 anybody, like Ms. Willmer said, anybody could see that
12 this company, a company like Google and YouTube, the
13 alphabet empire, would grow a data -- you know, an
14 amount of data that would become the most powerful
15 asset in the world, more -- bigger than they say
16 GDP of] a hundred different countries, including
17 Sweden and Switzerland.
18 And it's odd that this thing -- and it's
19 ironic that it's built on copyright, the abuse of
20 copyright. Yet it is IP, it is trade secret and they
21 guard that like Fort Knox. And you know, they have
22 grown -- YouTube has grown by substantially,
23 definitely influencing users' behavior, as was
24 indicated by the judge in the Viacom case, in a
25 multitude of ways.

1 So firstly, infringers are allowed to
2 monetize illegally -- illegal content. The
3 checkpoints for fast -- there's no checkpoints for
4 fast uploads, like partnering with TunesToTube when
5 it's full cuts, full albums. We all know that's never
6 fair use under YouTube. By baiting users with Content
7 ID, to put up content they don't own and mix it with
8 illegal content that isn't under Content ID, turning a
9 blind eye to obvious infringement, publicly offering
10 to pay attorneys' fees, misleading users on copyright
11 rights and misleading them on fair use.
12 There's, you know, demonizing, intimidating
13 musicians by giving our name and various things. I
14 know I'm out of time. But the list goes on and on.
15 MS. TEMPLE CLAGGETT: Thank you.
16 Ms. Madaj?
17 MS. MADAJ: So the definition of service
18 providers has been interpreted much too broadly. Most
19 of the services that currently are offering our
20 members' works act as content distributors rather than
21 service providers that are neutral facilitators. Some
22 of these services, like YouTube and SoundCloud, have
23 built successful business models off the back of our
24 members' content and then use the DMCA as a weapon to
25 negotiate below market rates once they finally do

1 choose to enter into license agreements with our
2 members.
3 And I have to completely agree with what
4 Mr. Walker said. I work in business affairs. So I
5 handle a lot of the licensing on behalf of our
6 members. And in these licensing negotiations, there's
7 either a choice to accept a low rate that they're
8 offering or to just continue to police the service and
9 not do a license at all. And in most cases, our
10 members are going to take that small amount of money,
11 even though ultimately it may be to their detriment.
12 MS. TEMPLE CLAGGETT: Thank you.
13 Mr. Dow?
14 MR. DOW: Thank you. So to answer your
15 question, I think that the definition of service
16 provider -- I think that the statute has been applied
17 in ways that protect non-innocent service providers. I
18 don't think that's necessarily because the definition
19 of service provider in section 512(k) has been
20 misapplied.
21 I think that Mr. Schruers is right, that
22 that definition in 512(k) is a very broad definition
23 and purposefully so. But I do think that in the
24 statute, you see the attempt to distinguish between
25 innocent intermediators and non-innocent

1 intermediaries in the conditions that are placed on
2 each one of the individual categories of safe harbor.
3 And those go to the issues of what distinguishes a
4 good actor from a bad actor.
5 And so, I think that we have seen courts
6 who have misapplied those provisions in ways that
7 allow them to protect bad actors, whether it's by
8 applying section 512(c) to include people who -- go
9 far beyond merely hosting content, but going into
10 things like manipulating content, curating content,
11 forming distribution channels for content that was
12 uploaded for streaming and other things the courts
13 have found to be covered under the auspices of a
14 storage at the direction of the user, even though they
15 go way beyond.
16 I think you've seen cases where the Ninth
17 Circuit has applied section 512(a) to apply to a
18 hosting service in the form of a Usenet service that
19 hosts material for 14 days and they do it on the
20 grounds that it was the Usenet service that was the
21 defendant in the Netcom case.
22 In the Netcom case was intended to be
23 codified or at least reflected in the DMCA. And yet,
24 it fails to account for the fact that that decision
25 held that Usenet service accountable for reacting to

1 knowledge or infringement.

2 And yet, the courts have applied 512(a) now

3 to that type of service, which would obviate any sort

4 of requirement to employ notice-and-takedown. So

5 there's examples in 512(b) as well.

6 I think that in applying each one of those

7 individual buckets of safe harbors, courts have done

8 that in a way that protects bad actors and they've

9 done it to apply to types of service providers that

10 aren't necessarily the service providers that those

11 sections, those buckets were meant to apply to.

12 MS. CHARLESWORTH: Mr. Dow, what was the

13 case you were just referencing? Is that the Giganews?

14 MR. DOW: The 512(a) case?

15 MS. CHARLESWORTH: Yeah, the one that you -

16 -

17 MR. DOW: That was the Ellison case.

18 MS. CHARLESWORTH: Oh, the Ellison.

19 Okay.

20 MS. TEMPLE CLAGGETT: Mr. DiMona?

21 MR. DIMONA: Thank you. I'm going to echo

22 what Mr. Dow was just saying and what Natalie was

23 saying. The safe harbors should be limited to

24 innocent services. However, they have been applied

25 far too broadly. There's always been a mere conduit

1 exemption, a passive carrier exemption, if you will,
2 in section 111 of the Copyright Act and it's never
3 really been an issue.
4 But what we see today is websites claiming
5 and gaining the benefit of the safe harbors who are
6 far from innocent. I think that a service should not
7 be eligible for safe harbor if they do things like
8 actively inducing the posting of entertainment content
9 where they well know the rights are not cleared by the
10 posters, or requiring the users to grant the ISP a
11 license right. So if you read the terms of service,
12 the ISP is getting exclusive licenses from their
13 content posters in all media, including flowing
14 through to third parties that no one is aware of.
15 Actively licensing their own content and marketing it
16 in combination with the supposed innocent passive
17 content. Failing to use commercially available
18 reasonable filtering technology that's in the market
19 that anybody could use at a relatively reasonable cost
20 if they wanted to do this kind of a service.
21 Those are the things that should keep you
22 off the safe harbor island. I want to say something
23 which is I'm going to characterize it as my own
24 opinion and borrow something my friend, Bruce Joseph,
25 once -- I once heard him say that I reserve the right

1 to change my own opinion down the road if it should
2 turn out to be necessary to do so.
3 But I think we should look hard about what
4 the definition of direct financial benefit means in
5 the modern world. What it meant in the 1990s was one
6 thing. But what we see Internet companies doing,
7 they're using entertainment content as sort of a
8 giveaway so that they can make money, whether selling
9 search or whether selling merchandise or whether
10 selling other types of content, and not to mention
11 even data mining and the abilities that they can get
12 out of data mining. So that's something that should
13 be looked at.
14 MS. TEMPLE CLAGGETT: Thank you.
15 Ms. Deutsch?
16 MR. DIMONA: Sorry I went over.
17 MS. TEMPLE CLAGGETT: Thank you.
18 MS. DEUTSCH: Well, so if we look at the
19 DMCA as it's actually written, I agree with my
20 colleagues that it was drafted intentionally broad to
21 cover all different kinds of ISPs, from hosts to
22 conduits to providers of facilities.
23 So that is how it was drafted and there was
24 no discussion in the DMCA, and you can look.
25 There's nothing about passive or innocent.

1 You know, this discussion of mere conduit, that goes
2 more to the function of the service provider, as I was
3 mentioning earlier. And so, your duties were tied to
4 how much control you had over the content.
5 If you were the host, you had a duty to
6 take down, in which case, acting in good faith to
7 remove the material under 512(g) created -- it says
8 that you're not liable to any party. That means any
9 third party.
10 But on the flipside, under 512(l), the DMCA
11 said that failure of a service provider's conduct to
12 qualify for limitation of liability shall not bear
13 adversely upon the consideration of a defense by the
14 service provider that the provider's conduct is not
15 infringing under this title or any other defense.
16 So failure to qualify did not mean that you
17 were necessarily infringing. It wasn't intended to
18 create passive or innocent, you know, that kind of
19 flag for infringement.
20 MS. TEMPLE CLAGGETT: Thank you.
21 Mr. Barblan?
22 MR. BARBLAN: Thank you. I think it's
23 important to keep in mind how the scope of the safe
24 harbor affects not only the amount to which we protect
25 innocent service providers but also the extent to

1 which we fulfill the other purposes of the DMCA, chief
2 of which is also creating an online ecosystem where
3 copyright owners can safely disseminate their works
4 without fear that they're going to be misappropriated
5 and stolen and otherwise infringed.
6 And I think that, you know, we've heard
7 from the creative community today a resounding voice
8 that that second purpose is really not being fulfilled
9 and that it's not working for them. And I think that
10 we can place the blame on that pretty squarely on the
11 overly broad scope of the safe harbors. And I'd just
12 like to give a couple of examples of instances I've
13 noticed where the safe harbors seem to be operating
14 extremely broadly and it's hard to imagine that this
15 is what Congress intended when they enacted the DMCA.
16 The first one is the ability of search
17 engines to continue to index a site like The Pirate
18 Bay, for which they have received, you know, millions
19 of takedown notices, a site that's called The Pirate
20 Bay, clearly targeted at infringement. And if you
21 read the Senate report, it even seems like the
22 senators explicitly recognized that not being able to
23 avail yourself of the safe harbor when you index a
24 site like that was specifically one of the things that
25 they had in mind. And yet, the way the legislation

1 has been interpreted by the courts allows search
2 engines to continue to do that without fear of losing
3 their safe harbor.
4 And the second one is -- in the cases of
5 sites that host user-generated content -- courts have
6 interpreted the safe harbor in such a way that even if
7 a website was aware that -- or generally aware that,
8 say, half or 60 percent of the content on the site was
9 likely infringing, they could still avail themselves
10 of the safe harbor. And I find it hard to believe
11 that that was Congress' intent. And I think that it's
12 that kind of interpretation and that kind of broad
13 scope is directly what leads to the inefficiencies of
14 the DMCA with respect to how it helps creators.
15 MS. TEMPLE CLAGGETT: Thank you.
16 Ms. Aistars?
17 MS. AISTARS: So much of what I was
18 intending to say has been said already. So I'll just
19 associate myself with the comments of Mr. Dow and Mr.
20 DiMona and Mr. Barblan and Ms. Willmer and underline
21 what I hear from independent creators like Ms.
22 Schneider. And that's the fact that the environment
23 that currently exists in terms of enforcement, whether
24 it's created by court decisions or created by the
25 circumstances of the parties involved, is leading

1 actually to a disincentive to create.
2 The morning panels talked quite a bit about
3 the fact that artists are having to make a decision
4 between creating new works or enforcing their rights
5 with respect to old works. And I think we find
6 ourselves in this position not so much because the
7 statute is drafted too broadly.
8 Actually I agree with Mr. Schruers on that
9 point as well. It's intentionally broad. But the
10 obligations of the statute have been interpreted too
11 narrowly in many instances.
12 And so, we find situations like the ones
13 that Mr. Barblan references, where I share his view
14 that I'm skeptical that Congress intended the statute
15 to be interpreted that way as it was drafted.
16 MS. TEMPLE CLAGGETT: Mr. Adler?
17 MR. ADLER: I think we saw from the
18 previous panel that basically anyone can set up shop
19 on the Internet and as long as they notify the
20 Copyright Office that they have a designated agent to
21 receive notifications from copyright owners, as long
22 as they implement a repeat infringer policy,
23 “reasonably implement” it -- whatever that means these
24 days -- and respond to notification that gives them
25 actual knowledge by either removing material or

1 blocking access to it, they [can] qualify for safe
2 harbor protection.
3 And the problem is that this now means that
4 there are sites that have active business models in
5 which they invite users to continually upload
6 attractive material [that] tends to define itself
7 largely as the kind of things that people want --
8 films, music, books, all the things that are the
9 subjects that we're talking about.
10 And they do this in order to attract
11 traffic to their sites so that they can earn money
12 either through advertising or by subscriptions or a
13 variety of other things. And yet, they still are able
14 to claim safe harbor protection.
15 So we think it would be healthy for
16 Congress to consider eligibility for safe harbor
17 protection should now include consideration of an
18 evaluation of whether a service provider employs a
19 business model or site structure that attracts
20 infringing uploads and, if so, takes reasonable
21 business measures to prevent rampant infringement from
22 occurring on its site.
23 Just to give you a couple of examples of
24 things to combat this kind of passive aggressive
25 behavior, you should look to see whether a service

1 provider allows users to upload anonymously, whether
2 they reward or incentivize users for uploading content
3 that's likely to be infringing because it is so
4 attractive to people and brings traffic to the site,
5 whether they enable an uploader to obtain links to
6 publicly distribute their uploaded content or whether
7 they allow unlimited downloading by anonymous third
8 parties who are completely unknown to the uploader.
9 These are all things that are behaviors
10 that can be tracked. They can be assessed. Right
11 now, occasionally you'll see this happening in court
12 cases, such as the Hotfile case. But we think that
13 this should be something that's considered by Congress
14 to be embedded into the consideration of who qualifies
15 for safe harbor protection.
16 MS. TEMPLE CLAGGETT: Thank you. And
17 before I go to a completely I guess different subject,
18 I want to -- well, I will address the issue of
19 counter-notifications. But a couple of people
20 mentioned licensing and the impact that the DMCA has
21 on licensing negotiations.
22 So I was just going to ask another
23 question. In your view does the DMCA regime negatively
24 impact licensing, or not impact it at all? What effect
25 does the DMCA system have on your ability to negotiate

1 with ISPs with respect to licenses or even just
2 generally in the kind of licensing regime? I'll start
3 over here with Ms. Willmer.
4 MS. WILLMER: I would say, yes, absolutely.
5 The DMCA is affecting the licensing markets. Many
6 times, we'll approach companies in order to start
7 negotiations over a license and what we get is the
8 DMCA as a shield. And basically, they'll say, nope,
9 you know, we know your content's up here and your
10 remedy is to send us takedown notices.
11 And so, the license negotiations are often
12 cut short immediately. When we are able to come up
13 with creative -- let's say creative ways to find win-
14 win solutions above and beyond just having the content
15 available, then we're still looking at less than fair
16 market value.
17 MS. TEMPLE CLAGGETT: Thank you.
18 Mr. Walker?
19 MR. WALKER: Yes. I also want to respond
20 to one of the comments that the appropriate remedies
21 is for us to license more legal online services. In
22 our conversations with license partners that aren't
23 relying on the DMCA, the Apples and the Spotifys of
24 the world, one of the number one complaints is that
25 they are at a competitive disadvantage.

1 They have to compete with services that
2 basically offer the content for free. You know, they
3 pay rates that allow us to create the content, to
4 sustain the business while safe harbor- reliant
5 platforms contribute miniscule amounts of money to the
6 business. We find that when we call in or have a
7 meeting with a partner - - Dubsmash was a recent
8 example in our filing -- we asked them if they wanted
9 to license.
10 They said, no. We started to send them
11 takedowns.
12 They said, we're not able to respond to
13 these takedowns. Please stop. We said, well, okay,
14 then we have to discuss a license.
15 They sent us a proposal that was just
16 laughable. We couldn't -- you know, we've gone back
17 and forth several times. And we're left with a
18 choice. Do we sue this platform? Because what
19 happens is as we send -- we'll dedicate hundreds of
20 thousands of dollars to a service like SoundCloud to
21 send takedowns and to try to keep our content off the
22 platform. Then, the audience moves to Mixcloud. And
23 then, we refocus our efforts.
24 So whack-a-mole, which used to refer to
25 notice-and-takedown, in my mind now refers to all the

1 different sites that are all entertainment platforms
2 that exist that we have to, one-by-one, have
3 conversations with, all of which that are very
4 frustrating from a commercial perspective because they
5 won't pay enough to actually justify the use of the
6 content.
7 I think it may bear repeating, but I think
8 you've heard the statistic that the recorded music
9 industry made more from the sale of vinyl records last
10 year in the U.S. than it made from all ad-supported
11 streaming combined across all platforms, including the
12 YouTubes of the world.
13 MS. TEMPLE CLAGGETT: Thank you.
14 Ms. Tushnet?
15 MS. TUSHNET: So just one thing about that.
16 My understanding is that that actually conflates net
17 and gross, which seems like a pretty unfair comparison
18 for streaming versus physical vinyl with all its
19 associated costs.
20 But just a quick reminder here. Just
21 because you want to license something, like, doesn't
22 mean you're entitled to license it. And we've seen
23 that very clearly in the HathiTrust case and Google
24 Books. And the DMCA was created contemplating that
25 people would be able to say we have a notice-and-

1 takedown procedure in place.
2 We're compliant with the DMCA. So no, we
3 don't have to actually have a relationship with you
4 because we want to focus the site on other things.
5 And that's a valuable thing to have.
6 MS. CHARLESWORTH: I just want to follow up
7 on that. Now, so for commentary and other works where
8 there's a fair use, I understand your point, I think.
9 But what about a site that's just loading up what's
10 clearly just full-length, I don't know, movies, books,
11 sound recordings? Is it your view that if they comply
12 with the DMCA, that they don't need to take a license
13 or that's what Congress intended?
14 MS. TUSHNET: Well, so it's interesting to
15 me. You know, I have not heard anyone advocating for
16 changing 512, say, that they think that they'd lose a
17 case against these sites. They say the sites say
18 they're protected by the DMCA.
19 They say they disagree. And I suspect that
20 they think, and they're probably right that if they
21 sued them under the current standards, like
22 Grooveshark, you know, like Hotfile, that they would
23 win. I don't know that that's evidence that the DMCA
24 is failing.
25 MS. CHARLESWORTH: Well, but that's sort of

1 a different question. I'm sort of going to the
2 congressional intent here. I mean, do you think that
3 it was Congress' intent that sites be able to just
4 sort of -- the sites that I think Mr. Walker was I
5 think describing, which are just sort of encouraging
6 people to upload fully protected content, not in a
7 transformative way, not transformative uses, and to
8 say, well, we're engaging in takedown and therefore we
9 don't need a license or do you think that that --
10 I mean, is that a viable sort of policy, I
11 guess, for copyright purposes?
12 MS. TUSHNET: Well, I'm sorry. What I'm
13 trying to say is that even if you think that Congress
14 wanted Hotfile and Grooveshark-like sites to go down,
15 they do. Congress certainly didn't assume that you
16 wouldn't have to sue if you found one of those sites.
17 MS. CHARLESWORTH: No. But they wouldn't
18 go down if they were -- under -- I mean, what we're
19 hearing is that under the current legal structure, if
20 you're really rigorous and careful about your takedown
21 policy and you don't acquire any -- well, it's hard to
22 acquire red flag knowledge -- and that you're just
23 very meticulous and you're not interacting with the
24 content, that you could just in theory sort of sustain
25 a site where you're just responding to takedowns of

1 just fully protected content. I mean, what's your
2 view of that?
3 MS. TUSHNET: My view is that when you look
4 at the cases that have actually been litigated, in
5 discovery, things show up. So I don't think that if
6 those descriptions -- which, right now, they're just
7 descriptions. Let's be clear, right? We don't
8 actually have the evidence in front of us. If those
9 descriptions are accurate, it's going to show up in
10 discovery and those sites will go down the same as the
11 others.
12 MS. CHARLESWORTH: No. But if they have a
13 -- I'm sorry to -- but if they have a repeat infringer
14 -- if they're fully compliant with the DMCA, they're
15 in the safe harbor. Let's assume they're in the safe
16 harbor. What's the lawsuit?
17 MS. TUSHNET: So the idea is that you
18 encourage people to upload infringing content. I
19 mean, that sounds like outside the safe harbor to me.
20 MS. CHARLESWORTH: That's not what Viacom
21 said -- it said welcomed, welcomed infringing content.
22 MS. TUSHNET: That's -- I don't think
23 that's --
24 MS. CHARLESWORTH: That's what the court
25 said.

1 MS. TUSHNET: The court said that they, you
2 know, didn't do anything to turn it down.
3 MS. CHARLESWORTH: No, they said welcomed.
4 MS. TUSHNET: You know, I think actually
5 this is a great example of why the safe harbor is
6 important. So YouTube is a great example of something
7 that evolved, right?
8 So you take a snapshot of something at one
9 point and you take a snapshot of it five years later
10 and it's a completely different service, which we
11 wouldn't have and we wouldn't have, you know, the
12 billion dollars that YouTube has returned to content
13 owners if it had been shut down based on a snapshot of
14 what it was like when it was getting started up. So I
15 do think that that is actually a perfectly appropriate
16 use of the safe harbor.
17 MS. TEMPLE CLAGGETT: I was going to follow
18 up on that one because it sounded like you were saying
19 it was an appropriate use of the safe harbor to build
20 a business on infringement and then switch into a
21 licensing -- a licensed or an appropriate website,
22 which I don't think is what you meant.
23 MS. TUSHNET: Well --
24 MS. TEMPLE CLAGGETT: But I know that that
25 is an argument that people debate. But --

1 MS. TUSHNET: Right. So you know, YouTube
2 starts out with a guy going to the zoo, which I think
3 nobody thinks is infringing. It's just this fellow at
4 the zoo. And it, you know, takes a while to figure
5 out where the audience is and people do very different
6 things on it in the part where they're figuring out
7 what's going on.
8 And I do think that that's actually what
9 Congress contemplated, that wouldn't -- that YouTube
10 would not be destroyed because of how it was used by
11 different people in its original stages.
12 MS. TEMPLE CLAGGETT: Because it's
13 complying with the DMCA at the time.
14 MS. TUSHNET: Right.
15 MS. TEMPLE CLAGGETT: Right.
16 Mr. Schruers?
17 MR. SCHRUERS: So just to speak briefly to
18 the previous exchange, I think hypotheticals or
19 potentially real cases that have not actually been
20 brought and where parties haven't actually been
21 exonerated under the DMCA are probably not a very
22 compelling example of the DMCA not working.
23 The only real case that we were talking
24 about just now was Viacom, which is a somewhat unique
25 situation. I mean, in Viacom's case, Viacom's own

1 coms people were uploading infringing works to the
2 site. So I'm not sure that's an ideal example either.
3 But I want to make sure to speak more abstractly and
4 actually answer the specific question about the
5 licensing landscape because that's how we got down
6 that rabbit hole.
7 And I want to question whether or not
8 that's actually germane to a conversation about the
9 structure of DMCA section 512. Maybe it is.
10 Maybe it's not. I think in a narrow
11 conversation, it probably isn't. in a broader
12 conversation, perhaps so. But if that conversation's
13 going to occur that broadly, I think it's important to
14 acknowledge that that's a two-way street and that
15 licensing practices also have an impact on what
16 content is available online.
17 And so, we know, for example, of very
18 aggressive windowing strategies do in fact increase
19 infringing content on platforms. And so, if we're
20 going to get into the interplay between licensing and
21 the DMCA, I think we need to take that into account as
22 well.
23 MS. TEMPLE CLAGGETT: Thank you.
24 Ms. Schneider?
25 MS. SCHNEIDER: You know, as an individual

1 musician, the whole licensing thing is very, very
2 difficult. And I now there was an article by Zoe
3 Keating in Billboard where she talked about, you know,
4 she was talking with a representative of YouTube and
5 unless she gave them her entire catalog, you know, she
6 couldn't partake in just giving them a few works to
7 have monetized on Content ID. And I know I wasn't
8 accepted on Content ID. So it's kind of this thing
9 like how do you play this game as a small musician.
10 And what are you forced to give away because of the
11 power of these companies?
12 And to call, you know, YouTube a legitimate
13 company, all you have to do is type into the search
14 "no infringement intended." Hundreds of thousands of
15 uploads come up. Fair use -- they give the same drivel
16 that Fred von Lohmann gives in his copyright basics
17 video on fair use or their pirate video on fair use,
18 which is a completely inaccurate assessment of fair
19 use.
20 And you get hundreds of thousands and then
21 millions of plays of people thinking that that's fair
22 use. It's just constant intentional misleading of
23 people on this site. You know, it's pathetic from the
24 musician's perspective. There is no way to have a
25 career in music.

1 I'm going to teach right after this at NYU.
2 I'm going to be talking to a room of composers. I do
3 not know what to tell these people. Do something
4 else. You know from your report you did, the
5 wonderful report, and I thank you for it. Eighty
6 percent of musicians in Nashville have quit. What has
7 this done to our culture? It's beyond.
8 MS. TEMPLE CLAGGETT: Thank you.
9 Ms. Madaj?
10 MS. MADAJ: So again, I want to echo what
11 Mr. Walker said. I've had a similar experience with
12 actually Dubsmash and other similar services that
13 insist on relying on the DMCA and use this as a weapon
14 to not only offer below market ratings but to push off
15 licensing entirely. And Ms. Tushnet questions why we
16 wouldn't just sue when we disagree with the service
17 about whether or not safe harbors apply.
18 Our goal for music publishers at least is
19 to license and generate revenue for creators, not to
20 get involved in lengthy and expensive lawsuits.
21 And I don't believe that Congress' goal was
22 ever to encourage litigation over, you know, working
23 together and creating a healthy ecosystem.
24 MS. TEMPLE CLAGGETT: Thank you.
25 Ms. Fields?

1 MS. FIELDS: I want to agree with a lot of
2 what Mr. Walker has already said. But I want to add a
3 few points that relate specifically to visual artists,
4 to painters and sculptors primarily. When works are
5 offered through websites and they're infringing,
6 consumers will look to those websites to buy items
7 much cheaper than they can purchase them from
8 legitimate publishers. The whole nature of the
9 publishing industry has changed thanks to the DMCA.
10 Whereas publishers used to license prints
11 in large print runs, they now license on demand
12 because they can't compete with the on- demand
13 merchandise that are offered through sites like Etsy
14 and eBay and other similar situated sites. Those
15 sites offer items on any type of media. You can have
16 your work printed on canvas or paper or on aluminum,
17 if you'd like. You can have it in any size that you
18 wish. And it's shipped directly from Asia or Eastern
19 Europe or other places around the world and the users
20 often cannot be found. And the sites protect the
21 privacy of the users.
22 So if you are lucky enough to be able to
23 search through social media and find a Twitter link to
24 the user's actual address or telephone number or email
25 and you contact them, they are likely to ignore you

1 because they do not have the same insurance as
2 legitimate business owners.
3 They're often hobbyists or career
4 infringers who hide behind Internet service providers
5 because they know that they too will be protected by
6 that safe harbor because their information is being
7 protected.
8 Another comment that I want to make quickly
9 is that in the real world, when a demand letter is
10 sent against -- in pursuit of a copyright
11 infringement, often those demand letters are received
12 and settlements are reached or even licenses are
13 entered into after. And it's a productive discussion.
14 But when it comes to infringing uses in the online
15 world, you almost never reach a settlement and you
16 almost never reach a license after the fact.
17 MS. TEMPLE CLAGGETT: Thank you.
18 Ms. Feingold?
19 MS. FEINGOLD: So I started at Etsy as
20 their first attorney in 2007 and their seventeenth
21 employee. And I have handled DMCA notices as Etsy has
22 scaled. Just to put some of these numbers in
23 perspective, there are approximately 1.6 million
24 active sellers on Etsy. And according to a 2014 Etsy
25 seller survey, 86 percent of Etsy sellers are women,

1 most with home-based businesses.
2 And so, the question about licensing, what
3 I've seen in my perspective handling takedown notices
4 for all these years is sometimes, you know, these
5 sellers are a little and they might not know that they
6 think something is fan art and the other party seems
7 to think that it's infringement and this helps to
8 bring these two parties into contact with each other
9 and it gets the communication started. And then,
10 sometimes there are some licenses that happen.
11 And so, I think just putting everyone into
12 one bucket and saying that just because you're a user
13 and you upload certain content onto a website, that
14 you are automatically some sort of infringer is just
15 not appropriate. And it's also there's licensing that
16 is happening and these small businesses are able to
17 flourish because of the DMCA and Etsy wouldn't be able
18 to exist without it.
19 MS. TEMPLE CLAGGETT: I did have a quick
20 follow-up question because --
21 MS. FEINGOLD: Sure.
22 MS. TEMPLE CLAGGETT: -- because we've been
23 talking a lot in earlier panels about Content ID and
24 the fact that that's allowed licensing and voluntary
25 licensing to take place.

1 Does Etsy have anything or any plans in
2 development on your side in terms of something that
3 allows licensing to take place in the case of things
4 that would otherwise be infringing uses?
5 MS. FEINGOLD: So we see the DMCA as the
6 floor of enforcement. It's not a ceiling. And as
7 Etsy has grown, we have scaled our DMCA processes.
8 Content ID I think costs YouTube over $50
9 million or something like that. Etsy makes our money
10 20 cents at a time.
11 We certainly go above and beyond the DMCA.
12 We use technology. We have a dedicated team that
13 reports to me. We have customer service.
14 And we also work with rightsholders in
15 education.
16 But a Content ID system like YouTube is
17 really expensive, really burdensome. And for a small
18 company like Etsy or even smaller companies that are
19 just coming about, it would be extraordinarily
20 burdensome.
21 MS. TEMPLE CLAGGETT: Thank you.
22 Mr. Dow?
23 MR. DOW: I just wanted to speak quickly to
24 the exchange on Hotfile, given that Disney was a named
25 party in that case. And one of the things that I

1 think is important to recognize is that Hotfile lost
2 that case on a vicarious liability ground and was not
3 shielded by the safe harbor because they failed to
4 have a repeat infringer policy. But they did adopt a
5 repeat infringer policy in the course of the
6 litigation. That litigation ended up being disposed
7 of based on their conduct up until the point that they
8 had adopted their repeat infringer policy.
9 So if you fast-forward that to the point at
10 which somebody actually does adopt a repeat infringer
11 policy and you continue to look at what the court said
12 there, the court went on to discuss a lot of what we
13 were discussing in the last panel about the narrow
14 focus on identifying specific identifiable
15 infringements at a file-based level and talked in
16 terms of it not being declared that Hotfile was not
17 protected by the safe harbor for simply removing links
18 to infringing files without removing the underlying
19 files and without removing the access to that file on
20 its site.
21 Now, we have sites like Hotfile that caused
22 significant trouble for us. We sent 35,000 notices
23 over the course of three months on The Avengers, one
24 single movie to one single cyberlocker site. That did
25 not remove that movie from the site. It was a

1 consistent effort that we had to undertake. And that
2 was a site that was designed to ensure the persistent
3 availability of that content. That persistent
4 availability of the content impacts how much people
5 are willing to pay, whether you're a consumer or
6 whether you're a retailer, for that content and it
7 impacts licensing discussions.
8 Oftentimes we hear the refrain, well,
9 notice-and-takedown is really an ineffective tool to
10 fight piracy and you should just monetize the
11 infringement. That statement alone I think is a
12 condemnation of the DMCA, to say that you have to look
13 at the ways to make money by monetizing infringement
14 because the DMCA is ineffective to stop it.
15 MS. TEMPLE CLAGGETT: Well, just one quick
16 follow-up question based on some of the comments that
17 Ms. Feingold just mentioned. I mean, are you -- do
18 you though attempt to find or have conversations with
19 websites in terms of licensing content if you have a
20 site like an Etsy which might have some infringement
21 on it but that is open to the possibility of doing
22 something in terms of licensing? Is that something
23 that you find the DMCA either dis- incentivizes or
24 incentivizes that kind of communication and
25 conversation?

1 MR. DOW: I think we're always open to
2 discussing licensing. I think the unfortunate thing
3 that we've seen throughout all the litigations that
4 we've been talking to, dating back to Napster, is that
5 people have looked to these unlawful services as a way
6 to get into the licensing negotiation and as a way to
7 put downward pressure on the price that they might
8 have to pay in the licensing discussion. In that
9 sense, I think it operates as a disincentive to a
10 license.
11 But we are always open to having a
12 licensing discussion for somebody who wants to be a
13 legitimate distributor of our content.
14 MS. TEMPLE CLAGGETT: Thank you.
15 Mr. DiMona?
16 MR. DIMONA: Thank you. I think the safe
17 harbors have hurt the market for licensing music
18 performing rights. There is a long list of websites
19 that are aiding and abetting infringement that just
20 say, safe harbor, not going to take a license, and
21 there's really no dialogue whatsoever with them. There
22 are also the legitimate streaming services that the
23 industry is looking to as potentially the future for
24 licensing that Mr.
25 Walker mentioned, the Pandoras and the

1 Rhapsodies and the RDOs and the Spotifys of the world.
2 And they are limited in how much money they
3 can charge or how many ads they can really run on
4 their services because of the availability of free on-
5 demand music on some of these other unlicensed
6 services. The radio and TV industries I think have
7 been impacted to some degree, their growth, by the
8 availability of this free content.
9 And I'll close by saying that an important
10 BMI affiliate said that art is important and rare and
11 rare things have value. And what we see with the safe
12 harbors is they eliminate scarcity by just flooding
13 the market with free music. And so, that can't help
14 but hurt the value proposition for art and music and I
15 think that's across not just music but other sectors.
16 MS. TEMPLE CLAGGETT: Mr. Barblan?
17 MR. BARBLAN: So copyright owners have
18 always had to negotiate against the black market.
19 And negotiating against the black market is
20 going to put downward pressure on the kind of license
21 that you can command. And I think what the broad safe
22 harbor provisions have done is that they've
23 drastically expanded the size of the black market.
24 And right now, the black market doesn't
25 just include the cyberlocker based out of Russia. It

1 includes YouTube the number one streaming service in
2 the world.
3 And I think what Mr. Walker and Mr. DiMona
4 are saying makes perfect sense. When you're
5 negotiating against the black market like that and you
6 go to a service that wants to legitimately license
7 your content to give it to paying customers, they're
8 going to say, listen, the prices that we can pay are
9 going to be based on the amount at which someone's
10 going to say, well, it's not worth paying for this
11 anymore because I can just go get it for free on
12 YouTube.
13 And I think until we resolve that issue,
14 there are going to be serious problems with licensing,
15 especially in the music community.
16 MS. TEMPLE CLAGGETT: Thank you.
17 Ms. Aistars?
18 MS. AISTARS: So I'll just relate two
19 stories that came up as we were interviewing artists
20 for the comments that we filed. One is respect to
21 visual artists, which confirms exactly what Ms. Fields
22 was saying. These are art photographers largely who
23 we were speaking to and their interest is not in
24 making copyright law. Their interest is in shooting
25 images and licensing those images.

1 They've been able to, you know, sustain
2 themselves in their professional careers by licensing.
3 And those licensing markets are now drying up for
4 their works because people who take their images
5 without permission, post them on their website, use
6 them to advertise a business or illustrate an online
7 publication know that there's no effective remedy
8 against them and there is no reason to negotiate a
9 license for that work. So at best, the artist sends a
10 DMCA notice and the image gets taken down. But that's
11 a lost -- that would have been a lost licensing
12 opportunity in previous years.
13 When we were filing the comments, we filed
14 them on behalf of middle class artists was the term
15 that the students identified. And we actually had a
16 conversation with a photographer who said I'm not so
17 sure I can sign on to a middle class artist statement
18 because most photographers I know these days don't
19 quite make it into the middle class in terms of their
20 earnings.
21 The other thing I'll relate is a
22 conversation with a filmmaker, an independent
23 filmmaker. And she -- when her film came out, it was
24 available on every legitimate platform, Netflix,
25 iTunes, you know, in-app purchases, things of that

1 nature. She was really trying to get her work out
2 there. And ironically, you know, as soon as it was
3 out there, as in many cases, it began to be streamed
4 and made available for free on illegitimate sites that
5 served ads against her work. And ironically, the ads
6 that were being served were for things like Netflix.
7 So the very services that she had licensed were also
8 being undercut in their ability to legitimately sell
9 her work. So --
10 MS. TEMPLE CLAGGETT: Thank you. Mr.
11 Weinberg, did you have it still up?
12 MR. WEINBERG: Yeah. Thank you. I want to
13 -- a little bit and think about the perspective of 512
14 in the context of, you know, not YouTube and not
15 Google. There's a lot of conversation about Google
16 and YouTube and I think rightly so.
17 They're obviously the elephants in the
18 room.
19 But there's a whole other universe of
20 services like Shapeways that make use of this space
21 that section 512 creates. And if you look at the
22 Shapeways community, you look at the Shapeways users,
23 these are -- they're designers.
24 They're professional designers who are
25 selling their goods online. And there really is not a

1 way they could be doing this without a service like
2 Shapeways. If you want to 3D print a giant steel
3 sculpture or a custom, you know, nylon dress, you can
4 either buy a half million dollar 3D printer or you can
5 come to a website that exists that allows to do that
6 and fulfill it for you.
7 And you know, we heard some complaints
8 earlier today about the process you need to go through
9 in order to do a takedown notice on some sites. That
10 would be nothing to the process you'd have to go
11 through to clear rights if you wanted to publish
12 something to a site like Shapeways or another site if
13 we didn't have section 512 protection. The kinds of
14 guarantees you'd have to give us if we were going to
15 be liable for everything that was uploaded would mean
16 that the sites -- they simply wouldn't exist.
17 And this space is really real. And it's
18 easy to get lost in YouTube-land and Google-land.
19 But we really are empowering designers to
20 be professional designers, distributing their goods
21 worldwide. And in that community of designers, this
22 kicked off with the question about licensing and I
23 want to echo what Ms. Feingold was talking about, one
24 of the shocking things that happened when I started at
25 Shapeways was when people -- some of our designers --

1 many of our designers are fantastic.
2 But some of them are using infringing
3 things and when we get a takedown notice, we forward
4 it to those users. And the percentage of those users
5 who reacted with excitement and joy that there was
6 finally someone at the company or the IP owner that
7 they were using and infringing on who they could talk
8 to about a license was shockingly high to me. And so,
9 in that sense, this notice-and-takedown process is
10 really facilitating licensing on our site in a way
11 that I would never have appreciated before I was
12 seeing it from this perspective.
13 MS. TEMPLE CLAGGETT: Thank you.
14 Mr. Petricone?
15 MR. PETRICONE: Yes. I believe Ms.
16 Charlesworth referred to the first two
17 panels today as a tale of two cities and I think that
18 is continuing on the third panel. In terms of
19 licensing and the broad interpretation of the safe
20 harbors, the point of the safe harbors, as well as all
21 copyright law, is to promote the progress of science
22 and the useful arts, right? That's what we're all
23 trying to do here.
24 And if you look at just about any area of
25 the entertainment industry today, it appears that the

1 amount of new content being produced is growing at a
2 tremendous rate. In 2002, less than a quarter million
3 new books were available in the market. Now it's over
4 3 million. In 2001, the Greystone Database had data
5 showing 11 million song works. Now it's well over a
6 hundred [million].
7 According to the UN, there were 1,700 films
8 produced nationwide -- worldwide in 1995. Now, it's
9 close to 7,000. The videogame industry is ballooning
10 massively.
11 So the numbers I'm looking at show that
12 more money is being spent overall. Household spending
13 on entertainment is increasing and more works are
14 being created. And I'm happy to look at other
15 numbers. But I certainly have some questions about
16 the vinyl versus streaming revenue and I suspect the
17 vinyl is gross and the streaming revenue may be net.
18 But we can talk about that.
19 But I think it's important that these
20 discussions be guided by the numbers and the success
21 of the safe harbors be determined on that basis.
22 MS. TEMPLE CLAGGETT: Yeah. And I don't
23 think you'll be able to answer this follow-up
24 question. Just listening to what you had to say but
25 also contrasting that with what Ms. Schneider had to

1 say, I wonder if in terms of the amount of content
2 that is out there, whether there is any distinction in
3 terms of who is actually making the content now. Are
4 there fewer artists or are there fewer individuals now
5 making the content if it hasn't overall been reduced,
6 is the number of artists or authors being reduced by
7 pricing.
8 MR. PETRICONE: Right. Let me take a shot.
9 In 1999, according to the Department of Labor, 53,000
10 Americans were listing their primary occupation as a
11 musician, music director or composer. In 2014, that's
12 60,000. That's a rise of 15 percent compared with
13 overall job market growth during that period of 6
14 percent.
15 During the same period, the number of self-
16 employed musicians grew at a faster rate.
17 There were 45 percent more independent
18 musicians, according to the Department of Labor, in
19 2014 than in 2001. So it looks like we're getting a
20 rise in the absolute numbers as well.
21 MS. TEMPLE CLAGGETT: Thank you.
22 Ms. Schrantz?
23 MS. SCHRANTZ: Thank you. I want to make
24 two quick points and I think one of them builds off of
25 your follow-up to Mr. Petricone.

1 The first is that in having a more complete
2 conversation, I think we do need to acknowledge the
3 opportunities that 512 has provided and lowering
4 barriers to entry for independent individual artists.
5 And to give you just an idea, with our
6 companies that we have, on their platforms, there are
7 millions of creators and artists that otherwise would
8 not have access to national or global or even local
9 markets without platforms that rely on 512, that 20
10 years ago would have had the backing of major players
11 in different various industries but now, through these
12 platforms, are able to legally distribute and gain
13 from their work. And so, again, that number is in the
14 millions just for the companies that the Internet
15 Association has.
16 The second point that I want to make, I
17 think a lot has been said about the incentives to go
18 into DMCA-plus-type voluntary measures. And I think
19 that there's kind of a logical fallacy between those
20 systems not being perfect and a fault of the DMCA.
21 Our companies, just since we filed these
22 comments on March 31st, several of them have
23 introduced new voluntary measures and several have
24 updated them just to make them better. And they're
25 able to do that not in spite of the DMCA but because

1 of it. Because it provides them that certainty,
2 they're able to improve those systems that others have
3 said are not perfect. But I just want to bring back a
4 more fundamental point, would not exist otherwise. And
5 that's a very powerful tool for those that are
6 increasingly able to take advantage of them.
7 MS. TEMPLE CLAGGETT: Thank you.
8 Ms. Schneider?
9 MS. SCHNEIDER: I'd like to just say to Mr.
10 Petricone, you find me 10 musicians that say that
11 they're doing better now under the system than they
12 did 10 years ago, and you know what, I'll give you
13 eight times what I've made from YouTube right here.
14 [The speaker placed a dollar bill on the table.] I
15 will show you 2,000 musicians that have just joined an
16 organization that we started, a campaign called Music
17 Answers, because they feel desperate, desperate to
18 align together to do something and shine a light on
19 what's going on.
20 And the studies that you talked about with
21 jobs, many musicians read that article in The New York
22 Times that cited that and we were like where did they
23 get that study? You know, a lot of musicians are now
24 getting other jobs to accompany.
25 So if you go to their tax form, maybe it

1 shows they're making more money because they're doing
2 other things in addition to music. So believe me, it
3 ain't working.
4 MS. TEMPLE CLAGGETT: Thank you. We only
5 have about four minutes. So I don't know if we're
6 going to be able to get to my last question in a lot
7 of detail. But I did want to ask a question about the
8 counter-notification process and remedies. We talked a
9 little bit in an earlier panel about whether the DMCA
10 system in terms of improper notices was working
11 effectively and whether the counter-notification put-
12 back was an appropriate remedy or a remedy that would
13 protect, for example, free expression and fair uses.
14 And so, I wanted to just ask the question
15 to the panelists. How is the remedy of counter-
16 notification working? Is it working to both help to
17 protect against improper notices? Is the right
18 balance being struck between protecting against
19 improper notice but also allowing rightsholders to
20 ensure that they have the opportunity to file a
21 lawsuit to make sure that the material stays down if
22 it in fact needs to be? I'll start with Mr. Weinberg.
23 MR. WEINBERG: Just very quickly, and I
24 know we addressed this in our comments --
25 MS. TEMPLE CLAGGETT: And just to

1 interrupt, we only have one minute to answer these
2 questions. Sorry.
3 MR. WEINBERG: The counter-notice process
4 only works if you takedown a piece that's only a
5 copyright and we're seeing a huge number of combined
6 requests, which means that many creators don't even
7 have the option to use it because of the nature of the
8 takedown request.
9 MS. TEMPLE CLAGGETT: Thank you.
10 Ms. Tushnet?
11 MS. TUSHNET: So the women and minority
12 figures that we have seen a lot -- creators are often
13 suspicious of how a big system will treat them. They
14 decline to counter notify even when they’re sure of
15 fair use, and I just want to point out that, you know,
16 they are creators too. These are artists making
17 transformative works, sometimes it’s a remix or
18 critical work. Our 600,000 creators are freed to find
19 their audiences.
20 MR. PETRICONE: You need to use a mic.
21 MS. TEMPLE CLAGGETT: Thank you.
22 Mr. Petricone?
23 MR. PETRICONE: Sorry.
24 MS. TEMPLE CLAGGETT: Mr. Schruers?
25 MR. SCHRUERS: Well, I think a number of

1 the comments to the document extensively that the
2 statements that there aren't a lot of people doing
3 counter-notices meaning that it must be working is
4 clearly not the case. There are a number of comments
5 in the record, including ours that reflect that the
6 system -- that takedowns can be abused and users are
7 wary to apply them and often it is the intermediaries
8 that bear the brunt of that frustration.
9 I know there have been suggestions that
10 some sort of remedy for abuse of the process might be
11 warranted. And while I certainly wouldn't suggest
12 that reopening the DMCA is a good idea, I think it's
13 important to recognize that as much as there are
14 complaints on behalf of rightsholders, there are a lot
15 of user constituencies that have very valid concerns
16 about the level of showing that they need to make in
17 making counter- notice and are therefore deterred from
18 doing so, not to mention the sort of cooling -- what I
19 refer to as cooling off process that allows a lawsuit
20 to be filed.
21 MS. TEMPLE CLAGGETT: Thank you.
22 Ms. Schrantz?
23 MS. SCHRANTZ: I think Matt covered most of
24 what I would say. I would just point you all to a
25 study that I think most of us may have looked at which

1 was the recent Jennifer Urban study, which identifies
2 not only the problem of counter- notices but the fact
3 that more than one-third of notices are improper in
4 some way and so -- (inaudible, off mic).
5 MS. TEMPLE CLAGGETT: Thank you. Mr. --
6 MR. FLAHERTY: Flaherty.
7 MS. TEMPLE CLAGGETT: -- Flaherty.
8 Sorry.
9 MR. FLAHERTY: Patrick Flaherty. So we
10 don't get that many counter-notices. But we do feel
11 they are important. They provide balance for between
12 the notice-and-takedown and the counter- notification.
13 The biggest frustration or the response
14 that we see in our follow-up to the counter-
15 notification is the fact that the content has to stay
16 down for 10 days. They feel that in providing
17 counter-notification and swearing under the penalty of
18 perjury that content should be restored as soon as
19 possible by the ISP.
20 MS. TEMPLE CLAGGETT: Thank you. I'm
21 sorry. I can't see your name. Ms. Fields?
22 MS. FIELDS: The counter-notification
23 shifts the burden onto the copyright owner to file a
24 suit in federal court. If the content is to stay
25 down. And that's a very big burden for an artist and

1 the very few counter-notifications that we have
2 received have been improper. So it's a very difficult
3 decision to make.
4 MS. TEMPLE CLAGGETT: Ms. Feingold?
5 MS. FEINGOLD: In 2014, Etsy executed
6 almost 7,000 properly submitted takedown notices.
7 We removed 176,000 listings. We only
8 received 568 DMCA counter-notices and I wondered why.
9 And the reason is a lot of people are absolutely
10 intimidated by the process and they have written to us
11 and said I'm not submitting a takedown notice. I'm
12 like, you know, David versus Goliath situation over
13 here.
14 So but I think the counter-notice procedure
15 is extraordinarily important and I'll echo what Mr.
16 Weinberg said. We're also seeing people that are
17 claiming infringement under other grounds just to
18 avoid counter-notices. And we see that as an abuse.
19 MS. CHARLESWORTH: Can I -- I'm sorry.
20 I've heard this, I've read it in the
21 comments. Now we've heard it. What is intimidating
22 about it specifically? Do you know?
23 MS. FEINGOLD: The contact information,
24 you're providing, you know, consent in jurisdictional
25 situations and they -- you know, the members just feel

1 like they're about to get sued and they don't think
2 that it's fair.
3 MS. CHARLESWORTH: I mean, could the -- in
4 some cases, do you think maybe that's a judgment that
5 they would not win the lawsuit or --
6 MS. FEINGOLD: Not necessarily. I mean,
7 from my perspective, I'm many times seeing takedown
8 notices and just praying that somebody sends a
9 counter-notice because it's clear fair use and we
10 barely ever get it because people are just absolutely
11 intimidated by the entire process. And they don't
12 want to go up against a really big brand.
13 MS. TEMPLE CLAGGETT: Thank you.
14 Mr. Dow?
15 MR. DOW: Just very quickly. Ms. Fields
16 noted the requirement of filing a lawsuit is a
17 substantial burden on a small artist. I just wanted
18 to note that that's no small thing for a large
19 copyright holder and that we very much take into
20 account the possibility that if we send a notice and
21 receive a counter-notice, we may have to bring a
22 lawsuit in order to enforce our notice and it affects
23 the overall strategy of what notice we send and what
24 to notice against and what not.
25 And so, I think perhaps either on the one

1 side copyright owners are reluctant to bring lawsuits.
2 And on the other hand, uploaders are reluctant to file
3 counter- notices. Maybe we actually have a balance in
4 there that's struck in a way that isn't working.
5 MS. TEMPLE CLAGGETT: Thank you.
6 Mr. Barblan?
7 MR. BARBLAN: So just a quick reaction
8 about the point that was made about the Urban study.
9 Apart from a small sample of secret, unverifiable
10 survey data, that study offers no empirical analysis
11 of the counter-notice process.
12 And in terms of that study's conclusion
13 about the amount of notices sent themselves that are
14 questionable, it's extremely narrow in what it looks
15 at and extremely problematic in the way that it makes
16 that determination, which was talked about in session
17 two.
18 So I just want to reemphasize the point
19 that it's important not to draw any policy conclusions
20 from what was looked at in that study because there's
21 a lot more work to be done because you can make policy
22 conclusions about the effectiveness of the counter-
23 notice or notice process.
24 MS. TEMPLE CLAGGETT: Thank you.
25 Ms. Aistars?

1 MS. AISTARS: I'll just use this
2 opportunity to suggest that the small claims process
3 might be something to look to, to address some of
4 these problems, particularly on behalf of individual
5 artists and creators. All of the folks who we
6 interviewed had had counter-notices sent when they had
7 issued a legitimate notice.
8 Oftentimes, there was no way for them to
9 determine why on Earth a person thought a counter-
10 notice was appropriate. It was an entire reposting of
11 a film, for instance. It may be an education issue in
12 some instances. It may be just knowledge that an
13 individual isn't going to be able to take action
14 within 10 days to bring a federal lawsuit.
15 So having a small claims process to address
16 some of these issues might be very useful for all
17 involved and perhaps less intimidating than going to
18 federal court or defending there.
19 MS. TEMPLE CLAGGETT: Great. Thank you.
20 And I know that I said that this was going
21 to be a very lightning round and in fact it was. We
22 had to cut you off. But I can say that we will be
23 giving you an opportunity to file reply comments.
24 We hadn't said that before.
25 And so, just know that you will have an

1 opportunity to file written comments on any of the
2 issues that were raised today if you felt that you
3 didn't have an opportunity to really go into much
4 detail on some of the issues that we discussed.
5 And thank you. And we will see you
6 tomorrow.
7 Thanks a lot.
8 (Whereupon, the foregoing adjourned.)
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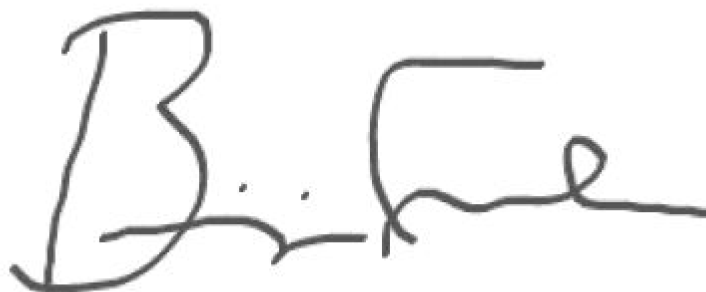

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