

Beyond Whack-a-Mole: Content Protection in the Age of Platform Accountability*

Karyn A. Temple†

INTRODUCTION: DAVID VERSUS GOLIATH—THE REMIX

This is a story about David vs. Goliath.¹ But with a twist. What happens when the main characters change roles before the story is over? The person whom we are rooting for becomes less clear. Are they the villain or the hero? And, because it's a story about copyright, and I now work in the film business, let's put it in those terms: It's realizing halfway through the movie that maybe the supposed villain, Maleficent, wasn't so bad after all, or at least she had a very good reason for her distrust of the humans—they did cut off her wings and stuff them in a box.²

I may be going a bit far with my analogies, and the description of the overall public sentiment towards the protagonists of my story is perhaps a bit hyperbolic. Indeed, many people would probably argue that there are actually *no* heroes in this particular narrative.³ But as I discuss, there has unquestionably been a disparity between the public's perceptions of copyright creators versus technologists throughout the years. This Article assesses how the story of "Copyright and Technology" has progressed over the years and affected related policy making, how

* A modified version of this article was delivered at the 33rd annual Horace S. Manges lecture at Columbia University School of Law on March 15, 2021. I would like to thank the Kernochan Center, and in particular my former law school professor Jane Ginsburg as well as June Besek and Philippa Loengard for the opportunity to present this lecture.

† Karyn A. Temple '97 served as Acting Register and Director of the United States Copyright Office from 2016 to 2019 and was formally appointed Register and Director in 2019. She currently serves as the Senior Executive Vice President and Global General Counsel of the Motion Picture Association (MPA). The views expressed in this article are solely her own and do not reflect the views or opinions of the MPA or of any of its members and affiliates.

1. Cf. David and Goliath, OXFORD ADVANCED AMERICAN DICTIONARY, <https://perma.cc/QBU3-67HX> (last visited Sept. 27, 2021) (defining David and Goliath as "used to describe a situation in which a small or weak person or organization tries to defeat another much larger or stronger opponent . . . [f]rom the Bible story in which Goliath, a giant, is killed by the boy David with a stone.").

2. In the 2014 movie *Maleficent*, the main character was a fairy who fell in love with a human boy only to later be betrayed by him. In the boy's quest for power, he cut off Maleficent's fairy wings to give to the human king. Although she cursed his newborn daughter to die in retaliation, Maleficent later comes to love the child as her own. See *Maleficent (2014)—Synopsis*, IMDB, <https://perma.cc/WRE3-4K44> (last visited Nov. 7, 2021).

3. See *infra* notes 28–31 and accompanying text (discussing negative public views of both the copyright and technology industries).

© 2022 Temple. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction, provided the original author and source are credited.

the narrative has recently shifted, and how that shift might actually provide a basis for *more* cooperative efforts between the two “sides” to address Internet piracy, not fewer.

Part I of this Article explores the early development of the Internet, the regulatory approach to platform responsibility at that time, and the contrasting pre-existing negative views towards copyright. Part II describes the resulting permissive legal regime, including the adoption of the Digital Millennium Copyright Right Act (DMCA), early Internet case law addressing online copyright infringement under that legislation, and the development of the Communications Decency Act (CDA). Part III highlights the ongoing rise in piracy after the DMCA and backlash to congressional attempts to address it. Part IV discusses recent regulatory and public scrutiny of online platforms and the reassessment of their responsibility for addressing illicit conduct occurring through their services.

I. LEGAL BACKDROP

A. ONLINE WORLD: THE RISE OF THE MACHINE

First, as with all stories of the online world—let’s all remember how we got here. The years were 1996–1998: Two major pieces of legislation that would set the stage for the way we treat content on the Internet were being developed. The most popular TV shows were *ER* and *Seinfeld*.⁴ The song “Macarena” topped the charts.⁵ The term “Internet” was not yet ubiquitous. Most consumers were using dial-up service through AOL.⁶ Facebook did not yet exist (Mark Zuckerberg was still in middle school).⁷ iPhones were far off, and even the iPod was five years away.⁸ YouTube had not yet launched. Even Google was just getting started, and still used its motto “Don’t be evil.”⁹

Stepping back even further to 1991, imagine a single web page going online in the United States.¹⁰ The first commercial browser (called Mosaic) was launched by

4. Tim Brooks & Earle Marsh, *The Top 100 Series of All Time*, in *THE COMPLETE DIRECTORY TO PRIME-TIME NETWORK AND CABLE TV SHOWS 1946–PRESENT*, at 1470–71 (8th ed. 2003).

5. The Hot 100: Week of October 5, 1996, *BILLBOARD*, <https://perma.cc/A9ED-4Z9X> (last visited Nov. 3, 2021).

6. See generally, Steven Vaughan-Nichols, *Before the Web: Online Services of Yesteryear*, (Dec. 4, 2015) <https://www.zdnet.com/article/before-the-web-online-services/>.

7. Mark Zuckerberg was born in 1984, making him just twelve years old when the current Internet legislation was being developed. See *Mark Zuckerberg*, *ENCYCLOPEDIA BRITANNICA*, <https://perma.cc/P9YJ-U7TM> (last updated May 10, 2021).

8. Michael L. Rustad & Diane D’Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 10 *DUKE L. & TECH. REV.* 1, 12–13 (2011).

9. Cf. Anthony Cuthbertson, *Google Quietly Removes “Don’t Be Evil” Preface from Code of Conduct*, *INDEPENDENT* (May 21, 2018), <https://perma.cc/8XSE-2MGW> (noting that Google had previously included “Don’t Be Evil” at the beginning of its code of conduct).

10. See Rustad & D’Angelo, *supra* note 8, at 5; see also David Hart, *Mosaic Launches an Internet Revolution*, *NAT’L SCI. FOUND.* (Apr. 8, 2004), <https://perma.cc/8MBY-XW6P>.

Netscape in 1993, when only 150 websites existed worldwide.¹¹ Domain names were initially registered free of charge, sometimes by guys in their basement who sought to pull a fast one on major corporations by registering websites using their trademarks.¹² It was the Internet Wild Wild West.

Yet, the world was rapidly changing; the number of websites world-wide was exploding and by 1995 Google was indexing 8 billion websites and imaging 1.1 billion images.¹³ Courts had no idea what was about to come their way, and the word “Internet” was first mentioned in a court case in 1991.¹⁴ During the three years between 1992 to 1995, it appeared only seven times in state and federal court.¹⁵

In those exhilarating, but dare I say naïve, early days, society was watching and waiting with bated breath to see what this Internet thing could do and what it would bring about—the Wild West and the gold rush all wrapped into one. So the primary, even sole concern for governments, scholars, and the general public was to accelerate the growth of the Internet and ensure that it could flourish. And flourish it did. The Internet was estimated to have doubled itself in size every year since 1998.¹⁶

By comparison, the Internet of today is hardly even in the same Universe. Google’s YouTube is one of the largest online platforms on the globe and now handles two billion consumers every month and 500 hours of uploaded videos every minute.¹⁷ Back in 1998, it was virtually impossible to watch a movie online; downloading a thirty second clip was a thirty-minute exercise in patience.¹⁸ Today, online streaming of films and television has become the norm. The recording industry, although a much earlier focus of copyright law on the Internet, had not yet faced the full scope of the piracy tsunami to come—at that time it would take 80 minutes to download a 4-minute song.¹⁹

Because these early Tech companies and the Internet itself were still growing and not yet a fraction of what they were to become, legislators and others could argue quite persuasively against any regulations that might stifle the potential for this

11. Rustad & D’Angelo, *supra* note 8, at 8; *see also generally* Hart, *supra* note 10.

12. *Cf.* Rustad & D’Angelo, *supra* note 8, at 8; *cf. also* David Hart, *A Brief History of NSF and the Internet*, NAT’L SCI. FOUND. (Aug. 2003), <https://perma.cc/72UM-UJL8>.

13. Rustad & D’Angelo, *supra* note 8, at 12; *see also* Danny Sullivan, *Search Engine Sizes Over Time*, SEARCH ENGINE WATCH (Jan. 28, 2005), <https://perma.cc/E7FH-K2HB>; *cf.* U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 9–10 (May 2020), <https://perma.cc/K4PB-9X7Q> (noting that in 2015, YouTube had nearly 400 hours of video uploaded every minute).

14. *See* Rustad & D’Angelo, *supra* note 8, at 1.

15. *See id.* at 6.

16. Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L.J. 801, 805 (2015).

17. *The Role of Private Agreements and Existing Technology in Curbing Online Piracy: Hearing Before the Subcomm. on Intell. Property of the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Katherine Oyama, Global Director of Business Public Policy, YouTube), <https://perma.cc/ZP66-7EZV>.

18. *See* COPYRIGHT OFFICE, SECTION 512 OF TITLE 17, *supra* note 13, at 29.

19. *See id.* (noting in contrast that the same song can now be downloaded in one second).

proverbial “information superhighway” or the ability of these young coders to “innovate.”²⁰

Therefore, requiring any amount of clear-cut responsibility from online companies for the content that resided on their servers or passed through their pipes, let alone government oversight or regulation, was verboten. Instead, it was suggested that these corporate entities be trusted simply to govern themselves.

They even developed their own Social Contract to do so.

Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise to the conditions of our world, not yours. Our world is different.²¹

That’s really heady stuff; I wish I would have been able to convince my parents to allow me to adopt something similar when I was a teenager. But I digress. The person who wrote that would later go on to found the anti-copyright organization, the Electronic Frontier Foundation (EFF), whose name invokes this supposedly pioneering world view.²² Indeed, EFF has continued to refer to the importance of maintaining the “wildness” of the Internet—²³a term we may now conclude was merely a synonym for “unregulated” and “totally unprotected.”

Nonetheless, the public and government accepted this simplistic view fairly readily as it applied to corporate responsibility on the Internet. And, few questioned the fact that many theorists held a far more cynical view of copyright and creators. To these theorists, the very concept of “ownership” over intellectual property was fundamentally flawed. Instead, certain theorists claimed that creators must “hav[e] less than perfect control.”²⁴ And, they argued vehemently against any equivalency to real property rights with respect to IP, for example, in the context of constitutional takings— if that property happened to involve “creative property.”²⁵

20. Cf. Andrew Rens, *Who Is in Charge Here? The Internet of Things, Governance and the Global Intellectual Property Regime*, 23 UCLA J.L. & TECH. 1, 13–15 (2019) (describing initial views toward Internet governance as espousing theory that “while some regulation might be necessary to enable Internet transactions and to ensure competitive provisions of underlying telecommunications infrastructure, new laws should not be made for the Internet and, where existing law is to be applied, that application should not be permitted to restrain innovation.”).

21. Mary Anne Franks, *Section 230 and the Anti-Social Contract*, LAWFARE: THE DIGITAL SOCIAL CONTRACT, at 2 (Feb. 22, 2021, 10:36 AM), <https://perma.cc/SYSZ-8RQ3>.

22. Rainey Reitman, *5 Years Later, Victory Over SOPA Means More than Ever*, ELEC. FRONTIER FOUND. (Jan 18, 2017), <https://perma.cc/5MVE-6SMB> (“In a few generations, the wildness of the web would have been extinguished. Instead, we fought back.”).

23. *Id.*

24. Stuart Weinstein & Charles Wild, *Lawrence Lessig’s “Bleak House”: A Critique of “Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity” or “How I Learned to Stop Worrying and Love Internet Law.”* 19 INT’L L. REV. 363, 367 (2005).

25. *Id.* But see *id.* at 368 (“In sum, the authors believe that it is a ‘slippery slope’ for scholars to argue that somehow the size, economic strength or resources of a particular copyright infringement claimant should figure into the justness or right of the infringement being alleged.”).

B. GOLIATH ARRIVES: THE LONG HISTORY OF ANTI-COPYRIGHT SENTIMENT

At the same time, while the technology companies were enjoying adulation as *the next best thing*, copyright law was still viewed as, well, copyright law—in other words, completely evil.

Former Register of U.S. Copyrights Barbara Ringer, in her 1974 Lecture, rightly entitled “The Demonology of Copyright,” captured it best nearly two decades *before* the Internet craze. She noted that while it is easy to dismiss or make light of the impact of negative copyright rhetoric, it “naturally prolongs discussions and makes compromise more difficult to achieve, assuming it is compromise that you want.”²⁶

The personal anger, the emotion, the presentation of viewpoints in stark black-and-white terms, are quite different in degree and character from what one might find in disputes over, say, admiralty or insurance law.²⁷

Register Ringer described how criticism of copyright law colored the overall image of copyright: “the demonologists who have attacked copyright as a ‘monopoly’ [. . .] have had a considerable influence upon the development of the law throughout the world[.]”²⁸

To demonstrate the long history of copyright antipathy, Ringer quoted a speech from 1841 in which British historian Thomas Babington Macaulay argued that that “[c]opyright is monopoly . . . [y]et monopoly is an evil.”²⁹ To show the lasting influence of this idea, Ringer then cited a 1970 *Harvard Law Review* article by then-professor and future Supreme Court Justice Stephen Breyer, in which he raised concerns about copyright’s term, noting that he “stops short, just barely, of advocating outright abolition of the copyright law, but puts forward an argument that the results of abolition would not be disastrous and might be beneficial[.]”³⁰ Register Ringer acknowledged her scholarly admiration for Justice Breyer but admitted: “I must say that at this point he scared me.”³¹

II. LAWS REGULATING THE INTERNET: THE DMCA AND THE CDA

Against this historical backdrop, the two primary laws addressing the responsibility of online platforms for the content they disseminated were developed: Section 512 of the Digital Millennium Copyright Act³² and Section 230 of the Communications Decency Act.³³ Both laws, as noted above, developed during an atmosphere decidedly pro-technology and anti-regulation, as a way to ensure that

26. Barbara Ringer, *The Demonology of Copyright*, in SECOND OF THE R.R. BOWKER MEMORIAL LECTURES NEW SERIES 5 (1974).

27. *Id.* at 30.

28. *Id.* at 13.

29. *Id.*

30. *Id.* at 14.

31. *Id.* at 15.

32. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

33. Pub. L. No. 104-104, 110 Stat. 133–43 (1996).

any nascent case law that might have had the potential to require more responsibility and expose online platforms to greater liability was essentially overruled.

A. THE DMCA & ONLINE PIRACY

The mid-1990s saw various attempts to deal with the new legal frontier as it related to copyright content.³⁴ Several cases raised extremely frightening prospects for technologists, such as *Playboy Enterprises, Inc. v. Frena*³⁵; *Religious Technology Center v. Netcom On-line Communication Services, Inc.*³⁶; and *Sega Enterprises Ltd. v. MAPHIA*.³⁷ Each of these cases raised the possibility that online platforms would face some sort of liability for the illegal content of others, *Frena* going so far as to find direct liability against a bulletin board operator, and the latter two cases (*Netcom* and *Sega*) opening up the possibility of secondary copyright liability.³⁸

The law was generally unclear and uncertain, as it often is when confronted with a new development or technology not previously considered.³⁹ The platforms, of course much smaller than they are today, argued that there wasn't even a technological way for them to monitor for illegal content and that "although technological means were in development, they were 'still in their nascent development stage' and 'not likely to be ready for deployment for several years.'"⁴⁰

Creators did raise concerns that legislation granting broad immunity to ISPs would have the perverse result of disincentivizing the ISPs from developing such technological tools in the first place.⁴¹ The MPA itself cautioned that "[t]he more . . . ISPS are insulated from copyright liability . . . the less incentive they will have to cooperate with copyright owners to protect their works."⁴² And the RIAA noted that if the online platforms "got their way and got [the] exemption from liability, then what would be their incentive to deploy the technology [to help fix things]."⁴³

The ISPs, of course, countered with, well, "innovation."⁴⁴

Also coloring the atmosphere around copyright and the Internet was discussion around the copyright term, which was to be extended under the 1998 Sonny Bono Copyright Extension Act, and which led to numerous repeated arguments and scare

34. For a detailed discussion of the history of law in this area, see COPYRIGHT OFFICE, SECTION 512 OF TITLE 17, *supra* note 14, at 15.

35. *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

36. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs. Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

37. *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996).

38. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17, *supra* note 13, at 15–16.

39. See Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 538 (2017).

40. Salil K. Mehra & Marketa Trimble, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. 685, 690 (2014).

41. *Id.* at 691.

42. *Id.*

43. *Id.*

44. *Id.* (citing responses to questions from Senator Patrick Leahy).

tactics that Disney was trying to maintain Mickey Mouse under copyright forever.⁴⁵ So, despite a formal recommendation by the Clinton Administration to hold platforms to a higher standard of accountability and therefore possible liability for illegal content on their platforms,⁴⁶ Congress chose a different approach, and along came the much lauded, but not quite ever achieved, DMCA “balancing” of the interests of content owners and online platforms.⁴⁷ Of course, the only reason that the compromise looked balanced at the time was the different standing of the industries at play, both in terms of relative size at the time and how they were viewed in the public consciousness.

In the years following the enactment of the DMCA, the dynamics surrounding the views of “Big Content” (as it was already commonly known), and technology (not yet labeled “Big Tech”) continued to deepen. Despite calls to action on the growing threat of online piracy, and the record industry for one being the proverbial “canary in the digital coal mine,” copyright law continued to be seen as a tool for corporate greed while the growing technology companies were the innovators for the “little guy.”⁴⁸ (Of course, the canaries don’t usually turn around and try to go after the coal miners, so it’s probably understandable why the public rejected the very legitimate concerns and arguments being made by the RIAA.)

It is, however, worth looking more deeply behind the litigation choices facing content creators in light of the state of the law at the time. There weren’t many avenues for large copyright owners to pursue to protect their content online. Napster debuted with a bang in 1999, starting the peer-to-peer gold rush, where online theft and infringement were benignly labeled file “sharing.”⁴⁹

In 2001, Napster had 70 million users worldwide and was facilitating the unauthorized use of 300 billion songs a year.⁵⁰ By 2004, the real scope of the problem was beginning to take shape, with even the more technologically-complex movie piracy becoming easier and more obtainable.⁵¹ The MPA reported in 2003 that movie piracy was reaching epidemic levels and causing the growth of yearly losses.⁵² The lawsuits against the initial peer-to-peer services, however, were met

45. Cf. Derek Khanna, *Guarding Against Abuse: The Cost of Excessively Long Copyright Terms*, 23 *COMMLAW CONSPECTUS* 52, 56–66 (2014).

46. See COPYRIGHT OFFICE, SECTION 512 OF TITLE 17, *supra* note 13, at 16–17.

47. *Id.* at 19.

48. *The Music Modernization Act: Hearing on S. 2823 Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Mitch Glazier, President, Recording Industry Association of America).

49. Gustav Guldberg & Johannes Sundén, *Pirates & Merchants—An Ongoing Struggle on the High-Tech Seas 14* (2004) (MA thesis, University of Växjö) (CiteSeerX) (“The event that really got the ball moving was the release of Napster, a program written by a student named Shawn Fanning that allows users to share music with each other.”).

50. BRIA, *Digital Piracy in the 21st Century*, 23 *CONST. RIGHTS FOUND.* 2 (Winter 2008), <https://perma.cc/4UVN-3MSN>.

51. Guldberg & Sundén, *supra* note 49, at 14.

52. *Id.* at 18.

with public backlash, as there was a true and sincerely held belief that file “sharing” wasn’t morally wrong or akin in any way to theft.⁵³ Academics piled on.⁵⁴

Remember, also, that this was a time when the liability of even the peer-to-peer services themselves was still very much in flux. The major case that would later establish the standard of liability for services that actively promoted piracy had been decided against the record companies at the district level. The district had ruled that under the Sony decision, although the illegal services Grokster, Morpheus, and KaZaA “intentionally structured their business to avoid secondary liability for copyright infringement, while benefiting from the illicit draw of their wares,” they were nonetheless safe from lawsuit because they were “capable of substantial non-infringing use”⁵⁵—even if none of those uses were actually made. The Ninth Circuit later followed suit. The court noted that “we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. . . . The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms.”⁵⁶

Internet gurus of the day such as Fred von Lohmann, who was at EFF at the time and represented the file-sharing service Morpheus in the case that would later generate Grokster,⁵⁷ posited that “content owners ‘[were] hunting the wrong target and in the course of doing so are going to cause enormous collateral damage’ by chilling technology innovators.”⁵⁸ Rather than suing what he likened to a car dealership for people who are speeding, he asked the “harder question” of “whether content owners should ‘be going after end users.’”⁵⁹ In his view, “a few targeted suits would certainly clarify the message” that file-sharing was illegal.⁶⁰

So, the record companies (and also movie studios to a lesser extent) took the bait, and, left with not much alternative, launched a series of suits targeting the actual end users’ illegal copying and distributing rather than the services that received the most financial benefit from the distribution. Within four months of the lower-court decision in *Grokster*, which prevented copyright owners from obtaining liability against the infringing service itself, the first end-user suit was filed.⁶¹

53. Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC’Y U.S. 235, 18–19 (2014).

54. *Id.* at 273.

55. *Id.* at 220.

56. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1167 (9th Cir. 2004).

57. Mr. von Lohmann subsequently went to work at Google for many years.

58. Menell, *supra* note 53, at 223.

59. *Id.*

60. *Id.* at 224. Also, Sarah Deutch at Verizon noted that “[e]ven just a few targeted suits, not that I would like to see this, but I think that it would at least send the message [to 40 million people that it’s illegal].” *Id.*

61. *Id.* The district court decision in *Grokster* was released in April 2003. The first RIAA lawsuits against individuals came in September 2003 and did not end until sometime after the final Supreme Court decision in the case.

At the time, the number of online peer-to-peer music infringers was thought to be around 60 million.⁶² As noted by Professor Menell, these “lawsuits managed to scare the beejesus out of the recipients, friends, and acquaintances of the many recipients.”⁶³ And, they didn’t do much to shore up the reputation of copyright law or of Big Content either.

By 2004, a year after the first lawsuit was filed, more than 4,000 had been filed and RIAA announced approximately 500 new end users suits every month.⁶⁴ This resulted in negative press and a few John Doe lawsuits against ISP account holders who were later revealed to be a 12-year-old, a grandfather, or even dead.⁶⁵ As Professor Menell noted in his article, “the record industry became a pariah among its prime consumer demographic in the most important court—the court of public opinion.”⁶⁶

In effect:

The lawsuits ‘reinforced the perception that copyright law disserves the public... deprives consumers of easy access to broad catalogs of music, imposes grossly disproportional penalties on those caught file-sharing, and does little to support the artists.’⁶⁷

Copyright lawyers around the globe still remember the harrowing saga of the Jammie Thomas case in 2005 and the Joel Tenenbaum case in 2009 in which juries awarded damages of more than a million dollars against individual defendants.⁶⁸ Rather than the “demonology” of the 1970s, content became Lucifer the Prince of Hell himself. Suffice it to say, however, that we hadn’t yet hit rock bottom – that was still a couple of years away.

In the public’s mind, we just couldn’t shake the view that technology companies were different than the rest of us corporate shells. Whereas record companies or “Big Content” as folks like to call it, were all that was evil, the post-marriage honeymoon period between tech and the public was continuing on quite nicely.

Technology companies seemingly got a complete pass. Case after case came out in their favor. Court after court interpreted the DMCA in the narrowest possible way, benefiting the technology platforms while excusing them from any responsibility

62. Fred von Lohmann, *Is Suing Your Customers a Good Idea*, Law.com (September 29, 2004), <https://www.law.com/almID/900005540575/>.

63. Menell, *supra* note 53, at 25.

64. von Lohmann, *supra* note 62.

65. See *Music Firms Target 12-Year-Old*, BBC NEWS (Sept. 10, 2003), <https://perma.cc/77M5-C2DH> (woman sued for file-sharing on the Internet more than a month after she died); *RIAA Sues Dead Woman*, BUS. NEWS (Feb. 4, 2005), <https://perma.cc/4KBM-4Z8Q>; Lorena Mongelli, *Music Pirate: N.Y. Girl, 12, Sued for Web Songs Theft*, N.Y. Post (Sept. 9, 2003), <https://perma.cc/HJ6N-9TNE>; *Grandfather Caught in Music Fight*, BBC NEWS (Sept. 9, 2003), <https://perma.cc/AYQ5-DGCR> (grandfather sued by RIAA for illegally downloading music).

66. Menell, *supra* note 53, at 27.

67. *Id.*

68. *Capital Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010) (There were three trials involving Thomas (later Thomas-Rasset). The first verdict was for \$ 222,000, the second, \$ 1.92 million, and the third, \$ 1.5 million.).

whatsoever to police content and providing no actual incentive for them to really do so.⁶⁹

Over the decades, the shift in the balance of the benefits and obligations for copyright owners and OSPs under Section 512 has resulted in an increasing burden on rightsholders to adequately monitor and enforce their rights online, while providing enhanced protection for OSPs in circumstances beyond those originally anticipated by Congress.⁷⁰

The Copyright Office's recent DMCA report does a tremendous job of cataloguing the many internet cases that slowly destroyed even the perception (by content owners) of a balanced system: whether in the handling of how the knowledge standard was being interpreted;⁷¹ including the application of willful blindness;⁷² vicarious liability standards;⁷³ which ISPs were subject to DMCA subpoenas; the reading out of the representative list accommodation; or an "overly lenient" application of the repeat infringer requirement.⁷⁴

The balance became "askew," or, in other words, non-existent. Even beyond the DMCA, the imbalance in the treatment of technology companies versus creators was evident in cases involving fair use where the pendulum had swung decidedly in favor of a one-step test of transformation, and case after case found in favor of large technology companies despite the scope, amount, or profit-driven motivations behind their conduct⁷⁵—the Google Books case of course being the most famous of them all.⁷⁶

During the proliferation of these cases and the further entrenchment of this "skewed" balance, creators raised concerns, now more emphatically than ever, that the balance (if there ever was one) was being distorted and, again, presciently, they cautioned that it was being used by big tech to simply solidify its market position.⁷⁷

69. See, e.g., *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013) (concluding that "merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one's services could be used to share infringing material, is insufficient" to prove that a website had actual knowledge of infringing activity); *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) (applying the so-called "server test" and holding that Google's display of the thumbnails at issue was a permitted use of Perfect 10's copyrighted images); *Perfect 10 v. Visa*, 494 F.3d 788 (9th Cir. 2007) (holding that that credit card companies do not materially contribute to the copyright infringement because the credit card payment processing systems have no direct connection to the underlying infringement); *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

70. 17 U.S.C. § 512.

71. *Id.* at 123.

72. *Id.* at 127.

73. *Id.*

74. *Id.*

75. See Michael Landau, *The Astounding Growth of "Big Tech" and the Lack of Enforcement of the Intellectual Property, Antitrust, and Contract Laws*, 30 ALB. L.J. SCI. & TECH. 1, 7–15 (2020).

76. In *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), the Second Circuit blessed Google's unauthorized copying of entire libraries of copyrighted books despite acknowledging Google's clearly commercial motivation for its copying. Instead, the court emphasized the "transformative purpose" of the copying.

77. See Donald Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L.J. 801, 820 (2015).

Counterarguments were and still are steadily made about the need to allow the Internet to flourish despite the fact that it out-flourished us all a decade ago.⁷⁸

B. THE COMMUNICATIONS DECENCY ACT

Section 230 of the Communications Decency Act actually passed in 1996, two years before the DMCA.⁷⁹ Like the DMCA, the provision was adopted in light of the uncertainty of the law with respect to platform responsibility for online content, and the fear that any type of regulation or liability exposure could harm the burgeoning Internet.⁸⁰ Therefore, Congress determined that it must work affirmatively to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive services, *unfettered* by Federal or state regulation.”⁸¹

One case in particular, *Stratton Oakmont, Inc. v. Prodigy Services*, sent chills down the proverbial web, when a court found that an internet service could be treated as a publisher, just like a newspaper—and not a mere distributor—and therefore could be subject to liability for defamatory content posted by its users.⁸² The result was the CDA, specifically Section 230 of that law, which conferred near-total immunity to online platforms for any content generated by their users, removing the “heightened liability” *Stratton Oakmont* placed on ISPs.⁸³

Although not initially Congress’ intent, subsequent case law such as *Zeran v. America Online Inc.* and *Blumenthal v. Drudge* also interpreted Section 230 as broadly, and favorably towards online platforms, as possible,⁸⁴ even where those platforms had “an active, even aggressive role in making available content [and] where the self-policing is unsuccessfully attempted.”⁸⁵ The court noted:

78. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17, *supra* note 13, at 116.

79. Section 230 was enacted as part of a larger suite of legislation under the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 133–43 (1996). *See also* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021).

80. *See* Haochen Sun, *Corporate Fundamental Responsibility: What Do Technology Companies Owe the World?*, 74 U. MIA. L. REV. 898, 911 (2020) (“Many scholars and policy-makers have forcefully argued that technology companies—in particular, online intermediaries—should bear as few responsibilities as possible. Otherwise, technology companies would be financially over-burdened, and their *innovation* would be stifled[.]”).

81. Michael Cheah, *Section 230 and the Twitter Presidency*, 115 NW. U. L. REV. ONLINE 192, 197–198 (2020); *see also* Lucy Holmes, *Making Waves in Statutory Safe Harbors: Reevaluating Internet Service Providers’ Liability for Third-Party Content and Copyright Infringement*, 7 ROGER WILLIAMS U. L. REV. 215, 220 (2001).

82. *See* Cheah, *supra* note 81, at 197.

83. *See* Holmes, *supra* note 81, at 220; Mehra & Trimble, *supra* note 40, at 689; *see also* BRANNON & HOLMES, *supra* note 79, at 5.

84. *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *see* Mehra & Trimble, *supra* note 40, at 700–01; *see also* Holmes, *supra* note 81, at 222; BRANNON & HOLMES, *supra* note 79, at 10.

85. Holmes, *supra* note 81, at 223.

It would only seem fair to hold [an interactive service provider to] liability standards applied to a publisher or at least, like a book-store owner, to the liability applied to a distributor. But Congress has made a different policy choice. . . .⁸⁶

So, courts were, like with the DMCA, interpreting an already unbalanced provision in an even more unbalanced way.⁸⁷

III. EFFORTS TO STOP THE PIRACY FLOODGATES

A. SOPA/PIPA

At the same time these two laws and court decisions favoring the online platforms flourished, so did piracy. The online platforms came to love the CDA and DMCA. Meanwhile, copyright holders continued to raise alarm bells about the ever-rising tide of online piracy.

But the mood had steadily soured against content, and the apex of the enmity was just on the horizon: the SOPA/PIPA saga. Pointing to the increasing impact of foreign piracy on American consumers because of the Internet's global reach, Congress had the temerity to suggest that maybe those "rogue" wholly-illegal foreign websites shouldn't be taking advantage—and often the personal information and credit cards—of American consumers.⁸⁸

Accordingly, in 2011, the Stop Online Piracy Act (SOPA) was introduced in the House of Representatives and the Protect IP Act (PIPA) was introduced in the Senate. There were some differences between them but in short, they were designed to give the government and copyright owners the tools to curb access to rogue websites dedicated to the sale of infringing work—including injunctions preventing third parties like advertisers, payment processors, and ISPs from doing business with these rogue sites.

The blowback was swift. Scholars referenced the "disastrous consequences for the stability and security of the internet," and the "potential catastrophic consequences" that court-ordered DNS filtering would have on DNS stability and security.⁸⁹ Members of Congress claimed that the House bill "would mean the end of the internet as we know it."⁹⁰ Sites that so much as "discussed" piracy would be

86. *Blumenthal v. Drudge*, 992 F. Supp. 44, 51–52 (D.D.C. 1998).

87. Cf. Landau, *supra* note 75, 6 (2020) ("The courts in the United States have become some of the largest protectors of big tech and big data through recent court decisions and legislation. Much of the legislation was passed in the 1990s in order to bolster and protect the Internet's growth."); see also BRANNON & HOLMES, *supra* note 79, at 1 ("While the law does have a number of defenders, others have argued that courts have interpreted Section 230 immunity too broadly. In the 116th Congress, 26 bills would have amended the scope of Section 230 immunity.")

88. Lamar Smith, Letter, *Rep. Smith Defends SOPA*, POLITICO (Dec. 29, 2011), <https://perma.cc/WL5W-GSXP>.

89. Mark Lemley, David S. Levine & David G. Post, *Don't Break the Internet*, 64 STAN L. REV. ONLINE 34, 34–35 (2011).

90. David Kravets, *Analysis: Internet Blacklist Bill Is Roadmap To "the End" of the Internet*, WIRED (Nov. 17, 2011), <https://perma.cc/L62B-YCEG>.

targeted.⁹¹ The internet platforms themselves decided to teach the world a lesson of what was going to happen if site blocking was ever contemplated so they decided to do exactly what they claimed they feared—shut down the Internet for a day. Google, Wikipedia, Mozilla, Craigslist, Reddit, and more than 115,000 other websites went black on January 18, 2012.⁹²

The general public agreed with the online platforms that SOPA/PIPA would be the end of the world as we know it (or at least, the end of the Internet world). They rejected any counterarguments pointing out the tech companies' self-interest in the debate. Instead, many in society argued that the issue was just too important to worry about potential conflicts of interest between the public good and corporate interests.⁹³ Some suggested content creators should focus on the foreign government themselves (but I just have one word for that: ACTA).

Let's just say the content industry was, well, "surprised" by the intensity of the reaction.⁹⁴ Despite a Managers Amendment fully rewriting provisions of the bills to take out the most concerning aspects, SOPA/PIPA died in a fairly merciless fashion.⁹⁵ And the approval ratings for creators and content remained at their lowest point while online platforms remained free of much scrutiny.

Balance wasn't even really a thought. Some came right out and said, essentially, "Hey, starving artists are already, well, starving, right?":

Oh sure, I worry about the income of artists too, but that's a secondary concern. After all, practically everyone who ever set out to earn a living from the arts has failed. . .⁹⁶

In 2014, Professor Peter Menell thoroughly and persuasively described the dismal perception of copyright that the public had, and the way this contributed to the failure of SOPA/PIPA.⁹⁷ Copyright was at its nadir and for several years after SOPA/PIPA any efforts to update, reform, or reinforce copyright law to more aggressively tackle online piracy were simply doomed to fail. Therefore, no one really tried.

91. *SOPA/PIPA: Internet Blacklist Legislation*, ELEC. FRONTIER FOUND. (July 16, 2021), <https://perma.cc/2BXN-PEMA>.

92. Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass Roots Grumbling*, N.Y. TIMES (Jan. 19, 2012), <https://perma.cc/ZDC2-6979>.

93. *Internet Blacklist Legislation*, *supra* note 91, at 2.

94. Michael Cieply & Edward Wyatt, *Dodd Calls for Hollywood and Silicon Valley To Meet*, N.Y. TIMES (Jan. 19, 2012), <https://perma.cc/LG75-DDHL>.

95. Jen Chung, *Good Work, Internet: SOPA, PIPA Postponed (Dead) For Now*, GOTHAMIST (Jan. 20, 2012), <https://perma.cc/347Y-5U5G>.

96. See Cory Doctorow, *Copyright Wars are Damaging the Health of the Internet*, GUARDIAN (Mar. 28, 2013), <https://perma.cc/LCV7-CPDQ>.

97. Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y OF THE U.S.A 235 (2014). Professor Menell's piece is a wonderful article cataloguing the views of copyright during this time period, which I've cited from generously and encourage you to read as more context and background.

B. PIRACY TODAY—WELL YEAH, THAT HASN'T CHANGED EITHER

Fast forward to the last couple of years and online piracy (without a true commitment from the Courts, Congress, and the private players to seriously combat it) has only increased. In 2017, there were an estimated 47 billion online instances of piracy of movies and nearly 184 billion instances of piracy of television programming.⁹⁸ Others have noted the growing visits to piracy sites, according to one estimate more than 106 billion visits to television piracy sites and more than 53 billion visits to film piracy sites globally in 2017.⁹⁹ Online piracy has also now fully reached the publishing industry, with more than 300 billion dollars of stolen books downloaded in a single year.¹⁰⁰

In the United States alone, an estimated 9 million subscribers use an illegal subscription IPTV service, and there are over 3500 websites and online marketplaces that sell these services to U.S. consumers.¹⁰¹ The RIAA noted that in a 10-month period it had sent 9,000 DMCA infringement notes for the same sound recording.¹⁰² And, it sent 175 million notices over a three-year.¹⁰³ In a three-month period, Disney alone sent 35,000 notices for a single movie on a single site.¹⁰⁴ Individual artists didn't stand a chance.¹⁰⁵

Streaming piracy is now a billion-dollar industry in the United States. In fact, research shows that illegal streaming is now 80% of all internet piracy, with global online piracy costing the U.S. economy nearly \$30 billion in lost revenue each year.¹⁰⁶ And illegal streaming is big business for those who peddle it with huge profit margins, according to some statistics ranging from 56% to 85%.¹⁰⁷

In addition to direct subscriptions, these illegal services make money from ads, and they also often partner with hackers to install malware and other hostile apps that can expose consumers to even greater financial harm.

98. DAVID BLACKBURN ET AL., *IMPACT OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY* (2019).

99. *Id.* at 3.

100. Christina M. Rau, *How to Help Combat Piracy in Publishing*, BOOK RIOT (Jul. 25, 2019), <https://perma.cc/Q2FH-G7UB>.

101. DIGIT. CITIZENS ALLIANCE, *MONEY FOR NOTHING: THE BILLION DOLLAR PIRATE SUBSCRIPTION IPTV BUSINESS* (2020).

102. *The Role of Private Agreements and Existing Technology in Curbing Online Piracy*, *Before the Subcomm. on Intell. Prop. of the S. Comm on Judiciary*, 116th Cong. 4 (2020) (statement of Mitch Glazier, Chairman and CEO, Recording Industry Association of America).

103. *Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C § 512 After Two Decades*, *Before the H. Comm on the Judiciary*, 116th Cong. 4–5 (2020) (statement of Terrica Carrington, Vice President, Legal Policy & Copyright Counsel, Copyright Alliance).

104. *Id.* at 5.

105. See, e.g., *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?*, *Before the Subcomm. on Intell. Prop. of the S. Comm on the Judiciary*, 116th Cong. 4 (2020) (statement of Don Henley, Musician and Songwriter).

106. David Hirschmann, *Foreword*, in DAVID BLACKBURN, JEFFREY A. EISENACH & DAVID HARRISON JR., *IMPACTS OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY* (2019).

107. DIGIT. CITIZENS ALLIANCE, *MONEY FOR NOTHING*, *supra* note 101, at 2.

IV. A RECKONING: THE TECHLASH ARRIVES

A. WITH GREAT POWER COMES GREAT RESPONSIBILITY (RECOGNITION OF PLATFORM ACCOUNTABILITY): CHANGE HAS FINALLY COME

Things looked pretty bleak for copyright in this atmosphere. Courts often found in favor of expansive (free) use of copyrighted works and against compensation for creators.¹⁰⁸ Study after study and report after report were introduced suggesting that the copyright law might need to be revised or updated since, well, it had been twenty years since the DMCA. Despite numerous proposals, discussions, and pieces of legislation being introduced, no major copyright legislation was passed.¹⁰⁹ In 2013, former Copyright Register Maria Pallante campaigned for the next great copyright act. The House Judiciary Committee took up the call and, over the course of the next two years, held twenty hearings, calling nearly one hundred witnesses to testify and explored every aspect of the Title 17 and where it might need updating.¹¹⁰ But not one single bill passed Congress in the five years after these hearings.

The tide turned, however, in 2016, with the Cambridge Analytica scandal that many say precipitated the current quest for greater online accountability or, as others call it, the “tech lash.”¹¹¹ Apparently, Facebook, entrusted with the power to solely self-regulate, chose an “easier” route, and was found to have actually sold private user data, without informing said users—a bit contrary to that self-policing social contract I discussed previously, and more akin to simple corporate interest.

The public began to wake up to the fact that technology companies were actually not billion-dollar global not-for profits only out for the greater social good, but, just like every other capitalistic entity, they were corporations out for their own corporate growth and sustenance.

Terms usually reserved for the MPA, RIAA, and other content were being used for technology companies like Facebook, which was actually criticized in court by a judge as “a tool for evil.”¹¹² Headlines mirrored some of the worst language used against “Big Content” during the SOPA/PIPA era.

Suddenly people started finally realizing that the Internet was no longer an infant but had completed graduate school, gotten a job, and was worth far more than its

108. See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015); *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013) *cert. denied* 134 S. Ct. 618 (2013); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003); *UMG Recordings, Inc. v. Shelter Cap. Partners*, 718 F.3d 1006, 1036 (9th Cir. 2013); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012); *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 140 (2d Cir. 2008).

109. See, e.g., Fairness for American Small Creators Act, H.R. 6496, 114th Cong. (2016); CASE Act of 2016, H.R. 5757 114th Cong. (2016); Fair Play Fair Pay Act of 2015, H.R. 1733 114th Cong. (2016); RESPECT Act, H.R. 4772 113th Cong. (2014); Songwriter Equity Act of 2014, H.R. 4079 113th Cong. (2014).

110. For a list of hearings, see H. Comm on the Judiciary, *US Copyright Law Review*, <https://perma.cc/3JKY-TJH8> (last visited Nov. 12, 2021).

111. See Jim Isaak & Minna Hanna, *User Data Privacy: Facebook, Cambridge Analytica, and Privacy Protection*, 51 *COMPUTER* 56, 56–59 (2018).

112. See Sun, *supra* note 80, at 900.

parents. The young innovators in their garages were now worth billions individually and their companies worth billions more. And they were no longer mere companies but global conglomerates that had, unfettered by regulation and unmoored from any responsibility or liability, gobbled up many more companies and now had the ability to impact nearly every aspect of American life.¹¹³ “Monopoly” and “tax” were thrown out not just at the content industry but at Big Tech as well.¹¹⁴

Gone were the days (at least for all but the most stringent tech exceptionalists), where any form of online accountability was termed hostile, an abuse of free speech.¹¹⁵ There became a growing realization that allowing online platforms to solely police themselves, no matter how greatly intentioned, is not the best idea. And, that allowing online platforms to be the judge and jury of what was considered right or wrong and how to address it¹¹⁶ might not necessarily be to the benefit of anyone other than those companies themselves.

One scholar recently captured the sentiment perfectly:

The social contract between individuals and tech companies is completely subject to the whims of private entities that have no inherent incentives or obligations to hold up their end of the bargain. The mandate of the state—however imperfectly realized—is to do what is best for its citizens; the mandate of a private company is to do what is best for the company. Tech companies, especially those that provide ‘free’ services, are not beholden in any way to individual welfare or to the public interest.¹¹⁷

That sentiment seems to me not an earth-shattering conclusion but pretty self-evident, and I’m not here to argue that these statements are any less true for large content corporations—they too are focused on the bottom line. But I am pointing out that this relatively benign sentiment that should apply to all corporate entities, was for a very long time and for a very large number of people simply thought *not* to apply to the Internet companies. They were given the benefit of the doubt solely so that they could innovate. And we now know that while a lot of innovation did occur, it did so in favor of those larger companies.¹¹⁸ Startups are now at a historic forty-year low, and “the world of technology innovation and product development ... is becom[ing] ‘a playground for giants.’”¹¹⁹ The mid-nineteenth-century British admonishment about “power corrupt[ing] and absolute power corrupt[ing] absolutely” again shows its timelessness. And Google’s “don’t be evil”? Well, that got demoted (pun intended).¹²⁰

113. *Id.* (noting that the “irony of our age is that the responsibilities that technology companies have assumed are far disproportionate to the power they have gained.”)

114. Tyler Fabbri, Note, *The Best Laid Plans: How DMCA § 1201 Went Awry, Smothering Competition and Creating Giants, and Where We Go Now*, 28 J. INTELL. PROP. L. 153, 164 (2020).

115. See Mary Anne Franks, *Section 230 and the Anti-Social Contract*, LAWFARE (Feb. 22, 2021), <https://perma.cc/A3BU-SX3M>

116. See *id.* at 2.

117. *Id.* at 9.

118. Fabbri, *supra* note 114, at 164.

119. *Id.*

120. See *supra* note 12.

Many sheepishly admitted that their so-called “trust” in Internet technology companies to just “do the right thing” had been misplaced.¹²¹ The enhanced scrutiny of big Tech that had started overseas, (a place much less accepting of foreign Goliaths prancing around unchecked), had arrived in America.¹²² Corporate mergers and other business decisions of technology companies that previously would have been barely glanced at were now facing actual investigation and review.¹²³ Hearings sprang up in congressional committee after congressional committee—eight alone in 2019.¹²⁴

The skepticism also made its way to the mainstream media.¹²⁵ There was a recognition that these companies actually employed lobbyists (the horror!) just like Big Content to influence Congress and advocate for their corporate good.¹²⁶ Even a new acronym was coined, BAADD—“big, anticompetitive, addictive, and destructive to democracy.”¹²⁷

A public opinion poll saw a sharp dip with increasingly negative views and a belief that big tech divided society, had too much power, couldn’t be trusted to make the right decisions about content, and wasn’t being properly scrutinized by the government.¹²⁸

A Gallup poll in 2019 starkly showed the nosedive in public opinion, where large technology companies went from having a 60% favorable view to barely breaking the forties.¹²⁹ Another poll from Pew Research in the same year showed ratings dropping from 71% to 50%.¹³⁰ Even college kids—college kids! those Napster-creating garage innovators—started to rebel.¹³¹

121. See Sun, *supra* note 80.

122. See Kari Paul, *A Brutal Year: How the “Techlash” Caught Up with Facebook, Google, and Amazon*, *GUARDIAN* (Dec. 28, 2019), <https://perma.cc/U7PT-CMG3>.

123. *Id.*

124. The eight hearings resulted in a majority staff report and recommendations titled, “Investigation of Competition in Digital Markets.” MAJORITY STAFF OF THE SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE H. COMM ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Comm. Print 2020), <https://perma.cc/CD7G-4LUW>

125. See Ryan Mrazik & Natasha Amlani, *Section 230: A Law on the Cusp of Change?*, 31 *ANTITRUST* 26 (2020).

126. See, e.g., Priscilla M. Regan, *Three Arenas of Congressional Oversight of Online Platforms: Competition, Privacy, and Content*, 67 *WAYNE L. REV.* 193, 220 (2020).

127. Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.–Europe Divide*, 98 *NEB. L. REV.* 297 (2019). *A Memo To Big Tech: The Techlash Against Amazon, Facebook and Google—and What They Can Do*, *ECONOMIST: BRIEFING* (Jan. 20, 2018), <https://perma.cc/W7WD-K2KG/>

128. See KNIGHT FOUND., *TECHLASH? AMERICA’S GROWING CONCERN WITH MAJOR TECHNOLOGY COMPANIES 1* (2020), <https://perma.cc/AMH9-HAE6>.

129. *Id.*

130. Emma Goldberg, “Techlash” Hits College Campuses, *N.Y. TIMES* (Jan. 11, 2020), <https://perma.cc/QN6Y-XVC8>.

131. *Id.*

Facebook was hauled to Congress, and Mark Zuckerberg gave his mea culpa for the predicament.¹³² He noted, “We did not take a broad enough view of our responsibility and that was a big mistake. It was my mistake and I’m sorry.” Apologies weren’t enough, and lawsuit after lawsuit took aim at Big Tech.¹³³ We’re talking suits by thirty states against Google and suits by the Federal Trade Commission and forty-eight states against Facebook.¹³⁴ Even established “friends of tech” admitted that maybe, just maybe, they had an “overly rosy view” of the tech sector. One such supporter who worked at the Justice Department under Obama and now is back in the Administration admitted that “[we] did trust Facebook, and they have not proven worthy of the trust.” He acknowledged that the Justice Department essentially gave these conglomerates a pass, despite repeated violations, and even complete disregard.¹³⁵ Apparently, according to this official, it was a many year-long¹³⁶ and, Mark Zuckerberg was a “young man” at the time and promised not to do it again.¹³⁷

Supporters who had gleefully (but untruthfully) written about so-called agency capture over copyright agencies, now had to admit that tech companies with their own billions, might have been in the position to do the same.¹³⁸ Content moderation and the expectation of some responsibility by Big Tech was no longer anathema.

As a result, some companies, to borrow a phrase, even decided to “lean in.” Facebook’s Mark Zuckerberg stated explicitly that “[p]eople want to know that companies are taking responsibility for combatting harmful content—especially illegal activity—on their platforms” and he recommended updating Section 230.¹³⁹ The debate over minor CDA reform in SESTA/FOSTA demonstrated this trend with Facebook backing the laws while some internet companies opposed.

B. BUT WHAT ABOUT COPYRIGHT?

I noted earlier that my discussion is not focused on the CDA, at least on the substance of calls for reform and rebalancing. But I believe this backdrop is very relevant to the general acceptance of or opposition to what should be required by

132. Camila Domonoske, *Mark Zuckerberg Tells Senate: Election Security is an “Arms Race,”* NPR (Apr. 10, 2018), <https://perma.cc/B2XH-WTBH>.

133. See, e.g., Kari Paul, “*This is Big*”: *US Lawmakers Take Aim at Once-Untouchable Big Tech*, GUARDIAN (Dec. 19, 2020), <https://www.theguardian.com/technology/2020/dec/18/google-facebook-antitrust-lawsuits-big-tech>.

134. *Id.* at 1–2.

135. Nicholas Thompson, *Tim Wu Explains Why He Thinks Facebook Should Be Broken Up*, WIRED (July 5, 2019), <https://perma.cc/WH65-KPPL>.

136. *Id.*

137. *Id.*

138. Cf. *Proposals to Address Gatekeeper Power and Lower Barriers To Entry Online: Hearing on Reviving Competition Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary*, 117th Cong. 9 (2021) (statement of Charlotte Slaiman, Competition Policy Director, Public Knowledge).

139. Adi Robertson, *Mark Zuckerberg Just Told Congress To Upend the Internet*, VERGE (Oct. 29, 2020), <https://perma.cc/34UG-3TPN>.

technology companies in terms of accountability to help make the Internet a safer and more legal place. While most of the distrust, scrutiny, and second-guessing of Big Tech took place solely in the realms of privacy and general monopolistic concerns, I would argue that this did have an impact in the realm of copyright.

In the United States, we've seen a number of different changes in how the law on the Internet is shaped, and specifically how copyright is now being discussed and handled. With the backdrop of numerous discussions on how platforms have grown and proliferated without commensurate responsibility, Congress is doing more in this area. The Senate Judiciary IP Subcommittee was restarted in 2019 and has been extremely active on copyright in the last two years, holding seven hearings on the DMCA and numerous roundtable discussions on Copyright Office Modernization and a large number of working sessions with stakeholders to draft the Felony Streaming Bill.¹⁴⁰ The House Judiciary Committee has joined in, holding one full hearing and twelve briefing sessions on the DMCA.¹⁴¹ Members of Congress have sent letters to the tech industry to encourage voluntary cooperation with rightsholders and greater access to rights management tools.¹⁴²

Many will point out that voluntary initiatives had taken place during previous years, and it was not as if Big Tech had made no innovations in the piracy space. They can point to, quite legitimately, strides in the development of Content ID, Rights Manager, and voluntary best practice codes and other agreements. But, if you review the history, some of these developments were preceded by lawsuits or threats of lawsuits, and there was a reluctance unless pressured to get them to come to the table and make actual concrete and effective change.¹⁴³ One example of this is the attempt at development voluntary best practices, backed by the PTO, which while very informative, did not result in concrete change. Another glaring example is the complete inutility of the standard technical provisions of the DMCA. Despite many technical measures being developed over the years to address piracy, and the provision being intended to spur the collaboration and cooperation that the DMCA balance supposedly called for, not a single STM has been agreed to by the technology companies in the twenty-plus years since the DMCA's enactment.

So, there was progress, but it was slow, spotty, and reflected the imbalanced nature of the parties.

140. See *How the DMCA Contemplates Limitations and Exceptions Like Fair Use?: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. (2020); *An Oversight Hearing to Examine Modernization of the United States Copyright Office: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. (2020).

141. See *Copyright and the Internet in 2020: Reactions To the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2020).

142. See, e.g., Letter from Senator Thom Tillis To Mr. Jack Dorsey, CEO Twitter (Nov. 23, 2020) (on file with S. Comm. on the Judiciary), <https://perma.cc/45GT-KN6H>.

143. See *Copyright and the Internet in 2020: Reactions To the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Terrica Carrington, Vice President and Legal Policy & Copyright Counsel, Copyright Alliance).

Now, Congress has been able to actually get something done in the area of copyright legislation, and more specifically, and surprisingly, in the area of content protection. Even with the same old tropes of the “Internet will Die,” “SOPA 2.0” are trotted out. Congress is more willing to stand up against unfair criticism and the technology companies have more skin in the game. We saw the grand compromise of the Music Modernization Act, and then two bills focusing on content protection matters passed the last Congress, felony streaming legislation and the Small Claims Act.¹⁴⁴ Both are issues that we’ve been pushing for and discussing for years.

Indeed, everyone recalls what happened the first-time felony streaming was introduced. Hysteria about Justin Bieber going to jail and then the provision being attached to the PIPA bill made it dead on arrival.¹⁴⁵

Some did try that same hysteria with felony streaming this time around. *Sludge* posted the normal anticopyright hyperbole “Tillis Pushes Prison Time for Online Streamers.” American Prospect, an organization that had also criticized SOPA/PIPA, piled on, and gamers argued that the new provision would be particularly damaging to gamers and Twitch.¹⁴⁶ A gamer even posted a Twitch upload to his 6.3 million followers and a subsequent tweet **#StopDMCA** he pushed became the third trending topic in the United States.¹⁴⁷ Even progressive Representative Alexandria Ocasio-Cortez weighed in by tweeting an article against the proposal.¹⁴⁸ One opponent tweeted out Senator Tillis’ phone number. And Fight for the Future, of course, created a petition.¹⁴⁹

This time, though, the major platforms were either neutral or silent. The platforms came to the table and actually negotiated with content industry on effective compromise. PK stated affirmatively that “the bill is narrowly tailored and avoids criminalize users . . . it also does not criminalize streamers who may include unlicensed works as part of their streams.”¹⁵⁰ And, although the voices that were going to oppose any type of copyright protection that continued to scream loudly, not many people really listened.

144. Music Modernization Act, H.R. 4706, 115th Cong. (2017); CLASSICS Act, H.R. 3301, 115th Cong. (2017); Allocation for Music Producers Act, H.R. 881, 115th Cong. (2017).

145. Mike Masnick, *Free Justin Bieber: Do We Really Want Congress To Make Bieber A Felon?*, TECHDIRT (Oct. 19, 2011), <https://perma.cc/YG7H-H9WD>; Mark Guarino, *What Justin Bieber has To Do with Online Streaming Bill*, CS MONITOR (Oct. 25, 2011), <https://perma.cc/U7JE-6L4X>; *Could This Really Happen?*, FREEBIEBER.ORG, <https://perma.cc/ZD73-VUHB> (last visited Nov. 14, 2021).

146. Donald Shaw, *Tillis Pushes Prison Time for Online Streamers*, SLUDGE (Dec. 7, 2020), <https://perma.cc/7UDZ-HBNF>.

147. Joey Carr, *TimTheTatman Is Ready To Take on the DMCA Twitch Bans*, DAILY ESPORTS (Dec. 8, 2020), <https://perma.cc/4R83-UVF4>.

148. Alexandria Ocasio-Cortez (@AOC), TWITTER (Dec. 21, 2020, 5:15 PM), <https://perma.cc/DC2H-XTSL> (tweeting Hollywood Reporter article about felony streaming and arguing that the manner the bill was introduced was “not governance. It’s hostage taking.”).

149. *Tell Congress: Don’t Ram Through Dangerous Copyright Provisions in a Must-Pass Spending Bill*, FIGHT FOR THE FUTURE, <https://actionnetwork.org/petitions/tell-congress-dont-threaten-streamers-with-prison-time-keep-sopapipa-like-copyright-provisions-out-of-the-must-pass-spending-bill/> (last visited Nov. 14, 2021).

150. Makena Kelly, *New “Felony Streaming” Measure Is Aimed at Piracy Services, Not Twitch Streamers*, VERGE (Dec. 22, 2020), <https://perma.cc/J3SW-664>.

The same goes for the CASE Act—a law that creates a copyright small claims court under the auspices of the Copyright Office and is completely voluntary for both plaintiffs and defendants.¹⁵¹ Initially, despite the voluntary nature of the proposals, online platforms decried it as an overreach that might kill the Internet—again. While several voices had previously raised the specter of “life-altering copyright lawsuits”¹⁵²—even the ACLU weighed in—it passed with the omnibus this past fall.

Meanwhile, foreign jurisdictions were going much further than these very limited proposals in the United States. Dreaded no-fault injunctive relief—site blocking, you know, that thing that was going to kill the entire Internet—well, it was adopted in some fashion in more than forty countries, including huge Internet users like Australia, the UK, Canada, and India.¹⁵³ And, surprisingly, I am still able to email my friends in the UK. Of course, SOPA-type arguments were made against those developments as well. But again, it didn’t stick. And many of these developments were actually accomplished with the active participation or cooperation of the ISPs in those countries.¹⁵⁴

A key aspect of the cooperation was, of course, the no-fault injunction. There was no push for legislation based on a finding of liability or fault on the part of online platform—just an acknowledgement that we are in this fight against illegal content together and it is actually better for everyone that we cooperatively do so.¹⁵⁵

C. WHAT’S NEXT FOR COPYRIGHT?

Notably, few content industries, if any, have affirmatively pushed for or demanded legislative change to the DMCA despite recognizing its shortcomings and the willingness of Congress to review it. Legislation is costly, takes years to complete, and often ends up not turning out quite the way either side imagined. The Next Great Copyright Act may still be a long way away.

So, what does that leave? I discussed voluntary initiatives but noted that over the years they’ve only been able to go so far—which is to say not far enough. But Voluntary Initiative 2.0 may be a bit different. Backed by a real and present threat of legislation and an atmosphere where the so-called honeymoon and love affair with tech has subsided, tech is more willing to compromise and collaborate on voluntary initiatives that might bring about real change. In recent testimony before the Senate,

151. CASE Act, H.R. 2426, 116th Cong. (2019).

152. Ernesto Falcon, *Life-Altering Copyright Lawsuits Could Come To Regular Internet Users Under a New Law Moving in the Senate*, ELECTRONIC FRONTIER FOUND. (July 10, 2019), <https://perma.cc/CHE6-T8LA>.

153. *See Approaches of Foreign Jurisdictions to Copyright Law and Internet Piracy: Hearing Before the Subcomm. On Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Stanford K. McCoy, President and Managing Director, Motion Picture Association EMEA).

154. *Cf. id.* at 5 (noting that “[m]any ISPs elsewhere in the world have even grown to recognize the benefits of no-fault injunctive relief . . . in some instances voluntarily agreeing to be subject to past [site-blocking] orders, or even seeking the orders themselves.”) (citing blocking action filed by division of Spanish ISP Telefonica).

155. *See id.* at 2.

Copyright Alliance head Keith Kupferschmid discussed this nuance, describing how a few years ago Microsoft had attempted to broker discussions between content and tech to work cooperatively together to solve infringement issues, but after one meeting the Internet Association pulled out from the process.¹⁵⁶ Maybe now there will be more commitment to see things through on both sides.¹⁵⁷ There may also be an opportunity for real progress with STMs.¹⁵⁸ That might actually come to fruition twenty-plus years later. And I think it was no accident that recent witnesses before the Senate testifying for both sides used terms such as “partnership,” “collaboration,” and “true commitment.”

Both sides may have learned a few important lessons here and neither is going to be quite so arrogantly confident as they have been in the past. Content isn’t using the tech lash to push for massive changes to the DMCA and the CDA and tech is more willing to come to the table to discuss even the most controversial of issues, and whether there are ways to resolve them collaboratively. As noted, this has already shown results even in the legislative arena itself, as real and effective partnership and collaboration have allowed sweeping legislation such as MMA to pass and more recent effective voluntary programs to take place.

How do we ensure that this era of compromise and collaboration remains for a while? Well, the level set must be long-standing to provide the greatest framework for real collaboration. Courts, which are now more recently interpreting internet copyright cases in a more balanced way, whether under the DMCA¹⁵⁹ or fair use,¹⁶⁰

156. *The Role of Private Agreements and Existing Technology in Curbing Online Piracy: Hearing before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary.*, 116th Cong., 12–14 (2020) (testimony of Keith Kupferschmid, Chief Executive Officer, Copyright Alliance).

157. One only has to view the recent ads by Facebook touting the need for legislative revisions to address changes in the online landscape over the past twenty-five years to realize how much the narrative has shifted. *See generally About Facebook | It’s Time*, FACEBOOK (Dec. 18, 2020), <https://www.facebook.com/Meta/videos/1011470149344244/> (supporting the need for updated Internet regulations because the Internet has changed significantly since 1996).

158. *Cf., e.g., Copyright and the Internet in 2020*, *supra* note 143, at 19 (noting that failure to adopt STMS “is one of the most significant drawbacks to the effective application of the notice-and-takedown process” and recognizing the “enormous potential for the STM provision to incentivize new technologies and encourage stakeholder collaboration”); *The Role of Private Agreements and Existing Technology in Curbing Online Piracy*, *supra* note 156, at 12–14.

159. *See, e.g.,* BMG Rights Mgmt. LLC v. Cox Commc’ns., Inc. 881 F.3d 293 (4th Cir. 2018); Warner Recs. Inc. v. Charter Commc’ns, Inc., 454 F. Supp. 3d 1069 (D. Colo. 2020); Sony Music Ent. v. Cox Commc’ns, Inc., 464 F. Supp. 3d 795, 806 (E.D. Va. 2020).

160. *Compare* Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021) (finding against fair use) *with* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (finding fair use). *See* Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (finding against fair use in copying of Dr. Seuss books); Fox News Network, LLC v. TVeyes, Inc., 883 F.3d 169 (2d Cir. 2018) (rejecting fair use defense to justify the copying of television broadcasts to create searchable database of TV clips); TCA Television Corp. v. McCollum, 839 F.3d 168, 182–83, 186 (2d Cir. 2016) (rejecting fair use defense because there is “nothing transformative” about using an original work “in the manner it was made to be.”); Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014) (questioning courts’ overreliance on transformative use, stating that “asking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works We think it best to stick with the statutory list, of which the most important usually is the fourth (market

must continue to do so. Congress and the new administration must continue real oversight and be prepared to act proactively if either side is disincentivized to make real and lasting change through partnership and collaboration. You know: “Speak softly but carry a big stick.”¹⁶¹

V. CONCLUSION

Some scholars have noted that the David versus Goliath story isn’t really one about the little guy beating the big guy, as historically, sling shots were like the guns of that day—essentially Goliath showed up for a gun fight with a knife.¹⁶² So the presumed outcome of that fight was actually pretty clear. But perhaps, we don’t need to really identify a David or a Goliath in this story or the hero or the villain but use it as a cautionary tale for everyone. No one should be above the law or excused of all responsibility to help fight against illegal activities from which they may benefit. And no one should be vilified for wanting to be paid within the law for the content that they create. The Internet is not a David, or so fragile as to be breakable at the slightest amount of regulation, and no, creators aren’t Goliaths, demons or Princes of Hell. Facts matter. Maybe, just maybe then, content protection in the age of platform accountability will finally break the whack-a-mole cycle that has been frustrating creators for so long.

effect”); *see also* Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, SING. J. LEGAL STUD. 265; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-639 (2019) (“Lately, however, the fair use pendulum’s outward swing may have arrested, as courts express greater skepticism concerning what uses actually “transform” content copied into new works or repurposed into copyright-voracious systems. As a result, in both new work and new purpose cases, courts may be reforming “transformative use” to reinvigorate the other statutory factors, particularly the inquiry into the impact of the use on the potential markets for or value of the copied work.”).

161. *Cf. Big Stick Policy*, ENCYCLOPAEDIA BRITANNICA (updated Nov. 8, 2021) (quoting a 1914 *Outlook* magazine article by Theodore Roosevelt) (“Persistently the effort has been made to insist that those who advocate keeping our country able to defend its rights are merely adopting ‘the policy of the big stick.’ In reality, we lay equal emphasis on the fact that it is necessary to speak softly; in other words, that it is necessary to be respectful toward all people and scrupulously to refrain from wronging them, while at the same time keeping ourselves in condition to prevent wrong being done to us.”).

162. *See generally* MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* (2013); Kate Torgovnick May, *David, Goliath and the Appeal of the Underdog: A Q&A with Malcolm on This Often-Misunderstood Story*, TEDBlog, (Sept. 30, 2013, 12:22pm), <https://perma.cc/4WK2-MSCF> (noting that David’s weapon of a sling shot was a very sophisticated weapon and that “the minute he decided to use a sling against Goliath, the tables were turned. He’s not the underdog anymore.”).