SIIA Accelerating Innovation in Technology, Data & Media

SIIA's Response to Questions for the Record Following a Hearing on How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?

Questions for Christopher Mohr from Chairman Tillis

1. **I understand that fair use is a judge-made doctrine that Congress codified in section 107 of title 17 while leaving discretion to courts. What are some of the benefits to leaving fair use's development to courts rather than having us define it here in Congress? What are some of the downsides?**

Fair use has been described as copyright's "equitable rule of reason,"[1] and the analysis turns on evaluation of four statutory factors: (1) the purpose and character of the use; (2) the nature of the work; (3) the amount of the work used, and (4) the effect of the use on the actual or potential market for the work. Summarized, the analysis can be boiled down to answering the question whether the defendant's use is likely to act as a substitute for the plaintiff's work. Analysis of the four statutory factors in section 107 is fact-intensive, is sometimes nuanced, and will vary from case to case. Given the pace of technological change, some of those fact patterns will no doubt be complex, and reasonable jurists will disagree on individual outcomes. On the whole, however, fair use is neither a black box nor is it unpredictable.[2] Fair use cases are generally reversed at the same rate as decisions from other areas of law.

Fair use allows a context-specific analysis informed by hundreds of years of accrued judicial experience. The flexibility of the doctrine allows courts in each case to balance the incentives of the copyright owner against the statutory factors on a case-by-case basis. If Congress does not like a particular result, it can amend the statute to cover particular, specified uses without undercutting the doctrine as a whole.

2. **In *Lenz v. Universal Music Corp.*, the Ninth Circuit held that a copyright owner must affirmatively consider the existence of a fair use defense before sending a takedown notice or else risk liability under section 512(f). What does it mean to consider fair use? What are some practices that copyright owners are using to do that? I'm concerned with making sure that section 512 scales in today's digital world. Under *Lenz*, can copyright owners still do automated notice-sending to keep up with the volume of infringement?**

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[1] Sony Corp. of America v. Universal Studios, 464 U.S. 417, 448 (1984).

[2] E.g., Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. Pa. L. Rev. 549, 575 (2008);
Michael C. Donaldson, Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works, 59 J. Copyright Soc'y U.S.A. 477, 482 (2012).

Fair use is a defense to infringement, not part of the prima facie case, and it is one for the user (not the rightsholder) to claim. In our view, the *Lenz* decision is incorrect. In cases where the users have a fair use claim, section 512 permits them have material placed back on a service provider's network through the use of a counter-notification procedure.

This is the only way that the notification system can colorably work. Many notices are automated, and automation is the only way to remove infringing works at scale. That automation requires cooperation between both copyright owners and platforms.

3. Is the counter-notification process sufficient to protect fair use's role in section 512? Are service providers able to counsel users or encourage them to file a counter-notice? If so, do you know how frequently they ever do that?

Our members' experience with the notice system in general is that the overwhelming number of section 512 notices concern acts of infringement. While all piracy is infringement, not infringement is piracy. For example, people of good faith may disagree on whether fair use permits creation of a particular derivative work. In such cases, the counter-notification system sufficiently addresses fair use concerns.

In our members' collective experience, use of the counter-notice is extremely rare. To the extent that this is due to a lack of user education—either about the scope of fair use or the counter-notice system itself, the Copyright Office has played a valuable role in helping educate users, for example through its fair use index[3] and it could help educate the public about the notice and takedown system. The Copyright Office is uniquely situated to perform this important educational function, as its only goal is the successful administration of the copyright system, and it has no stake in the outcome of particular disputes. Service providers, however, are uniquely poorly suited to making such determinations, and should not be required to do so.

4. As Professor Ginsburg noted in her testimony, fair use is not a defense to an act of circumvention in violation of section 1201. This was a conscious decision that Congress made in 1998, instead enacting some permanent exemptions and a rulemaking process to establish temporary exemptions every three years. Do you think that the rulemaking process is doing the necessary work for fair use?

In a word, yes. The triennial rulemaking in section 1201(a)(1)(A) is designed to address situations where the use of an access control measure has had an adverse effect on noninfringing uses, and the Copyright Office's streamlining of that rulemaking procedure has made it more efficient. That proceeding enables petitioners to demonstrate that the statute has actually

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3 https://www.copyright.gov/fair-use/ (visited 17 August 2020).

affected their ability to engage in non-infringing uses, and the Copyright Office has readily given exemptions for classes of works where a proper showing has been made.

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SIIA's Response to Questions for the Record Following a Hearing Entitled How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?

Questions for Christopher Mohr from Ranking Member Coons

1. **Mr. Siy testified that, at least in some cases, the fair use analysis can be too complex for automated tools. Could automated technological measures nonetheless serve to filter the worst digital piracy offenders and alleviate the burden of processing large numbers of takedown notices while leaving the tricky cases to humans?**

SIIA wishes to emphasize that "Service providers," as defined in section 512 are not homogenous either in their needs or their businesses. The business models of our membership, which consists of business to business media companies as well as journal publishers, database providers, and educational technology companies have evolved from consisting of content producers, To the extent the statute has been successful, it is because of the certainty that the safe harbor approach has given to responsible service providers by taking those providers *out* of individual disputes between copyright owners and their user base. The removal of service providers from the determination of fair use or the applicability of other defenses and limitations forms the core premise of section 512, and enables our education technology members to take one approach and our larger platform companies to take another.[1]

Reference files combined with applied AI can identify large number of infringements for those providers that face large-scale piracy problems and have the resources necessary to develop and implement them. In those circumstances, automatically disabling access to pirated content does not harm the user and the lack of human review causes no harm. In others, it might involve a failing grade on a student's final term paper or art project and human review would be appropriate. The statute permits that flexibility in approach.[2]

With that said, the current state of technology does not allow for picking "tricky" cases, and development of such a line would very likely chill the kind of uses that the Committee ostensibly favors. Human review of every notice at the scale of the larger platforms is simply impossible, and making even smaller platforms the arbiters of which cases are "tricky" will result in risk avoidance.

One of the benefits of current law is that it provides flexibility to both kinds of approaches, and several in between. SIIA would be greatly concerned about an approach that threatened that flexibility.

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1 *See* S. Rep. 105-190, at 19-20 (1998).

2 *E.g.*, 512 U.S.C. § (m).

2. **Fair use is a particularly thorny legal doctrine. Is it reasonable to expect typical creators and internet users to understand and apply the fair use factors as part of the notice-and-takedown process?**
    a. **What liability – if any – should they face if they get it wrong?**
    b. **Are online service providers better situated to evaluate fair use?**

Fair use has been described as copyright's "equitable rule of reason,"[3] and the analysis turns on evaluation of four statutory factors: (1) the purpose and character of the use; (2) the nature of the work; (3) the amount of the work used, and (4) the effect of the use on the actual or potential market for the work. Summarized, the analysis can be boiled down to answering the question whether the defendant's use is likely to act as a substitute for the plaintiff's work. Analysis of the four statutory factors in section 107 is fact-intensive, is sometimes nuanced, and will vary from case to case. Given the pace of technological change, some of those fact patterns will no doubt be complex, and reasonable jurists will disagree on individual outcomes.

With that said, however, fair use is neither a black box nor is it unpredictable. Fair use cases are generally reversed at the same rate as decisions from other areas of law.[4]

The overwhelming majority of our members' notice and takedown cases involve classic piratical activity: entire works made available without permission or payment. That copyright piracy is illegal is well-known, and it is reasonable to expect individuals who are destroying property rights and threatening the livelihoods of creators to face the consequences for their actions.

While all piracy is infringement, not infringement is piracy. For example, people of good faith may disagree on the scope of permissible use when creating a derivative work. In such cases, SIIA believes it is incumbent upon those who would use another's property to educate themselves about its borders.

Certainly, there ought to be--and are--educational tools available to help, such as the U.S. Copyright Office's fair use index[5] and other tools that explain the general rules of the road. On this front, the Copyright Office is uniquely situated to perform an important educational function, as its only goal is the successful administration of the copyright system, and it has no stake in the outcome of particular disputes. Service providers, however, are uniquely poorly suited to making such determinations, and should not be required to do so.

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[3] Sony Corp. of America v. Universal Studios, 464 U.S. 417, 448 (1984).

[4] *E.g.*, Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. Pa. L. Rev. 549, 575 (2008); Michael C. Donaldson, Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works, 59 J. Copyright Soc'y U.S.A. 477, 482 (2012).

[5] https://www.copyright.gov/fair-use/ (visited 17 August 2020).

3. **The Copyright Office has recommended that we reject a one-size-fits-all approach to modern internet policy. How should the differences among stakeholders influence our evaluation of fair use in the context of the DMCA?**

SIIA agrees with the Copyright Office's recommendation. As we stated in our written testimony, the strength of both sections 512 and 1201 is that they consciously avoided fair use determinations. Both provisions have provided certainty and stability to copyright owners and service providers.

4. **I hear stories from rights holders who file millions of takedown notices every year. To what extent should we expect them to perform a fair use analysis for each such notice?**

Fair use is a defense to infringement, not part of the prima facie case, and it is one for the user (not the rightsholder) to claim. We note that in cases where the user has such a claim, section 512 does permit the user to have his or her work placed back on a service provider's network through the use of the counter-notification procedure.

5. **Critics claim that Section 1201 is often used for improper purposes unrelated to protecting copyrighted works from infringement. What is your perspective?**

The triennial rulemaking in section 1201(a)(1)(A) is designed to address situations where the use of an access control measure has had an adverse effect on noninfringing uses, and the Copyright Office's streamlining of that rulemaking procedure has made it more efficient. That proceeding enables petitioners to demonstrate that the statute has actually affected their ability to engage in non-infringing uses, and the copyright office has readily given exemptions for classes of works where a proper showing has been made.