

**Ms. Jacqueline Charlesworth –
How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?
Questions for the Record**

Responses Submitted August 19, 2020

QUESTIONS FROM SENATOR 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?**

Because fair use is a highly fact-dependent inquiry, it would be difficult and most likely counterproductive to set forth specific rules in this area. Section 107, which sets forth a four-factor test for fair use, codified a doctrinal approach that had percolated in the courts for over a century. It is a flexible test that allows courts to consider the particular use in light of the overall goals of copyright. The benefit of allowing courts discretion to decide cases in accordance with the broad principles set forth in section 107 is that the doctrine provides “breathing room” to address new art forms and technologies.

In terms of “downsides,” one area that has been somewhat troublesome is the concept of “transformative use,” which is not mentioned in section 107, but was invoked by the Supreme Court in the *Campbell* case in an effort to describe the type of use that might qualify as fair because it adds new insight or meaning to a copyrighted work through comment or criticism, such as in the case of a parody. As I suggested in my initial testimony, courts sometimes interpret “transformative” to mean mere alteration or change without requiring meaningful commentary on the underlying work, even though that is not what the Supreme Court intended. Such misinterpretations of “transformative use” have led to questionable outcomes in some cases, including rulings that impinge upon a creator’s right to control the preparation of derivatives works based on his or her original, as the Copyright Act provides. That said, some recent cases have taken a more careful approach in this area, adhering more closely to the approach Congress laid out in section 107, a positive development.

- 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?**

Practically speaking, there is no plausible way to protect copyrighted works against online infringement without the use of automated tools. No copyright owner, no matter how large, can deploy sufficient human labor to manually identify infringements and send takedown notices across the vastness of internet. In employing automated technologies, copyright owners can and do consider fair use by establishing parameters for the identification of presumed infringing uses of their works, such as the amount of the work used, and engage in human review when a use might be a fair use. But as suggested by the question, the *Lenz* decision, which focused on a single video that had been manually reviewed before the takedown notice was sent, did not grapple with the implications of its decision in relation to the need to employ automated tools to combat online piracy at scale.

It is simply unrealistic to expect that copyright owners have the ability to conduct individualized human review of every piece of content that is flagged for takedown, rather than relying to some degree on automated technologies. Such technologies can be expected to improve with advances in artificial intelligence, and will be all the more valuable in sorting fair from infringing uses.

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?

In enacting the DMCA, Congress foresaw that in some cases, copyright owners might mistakenly request removal of material that constituted a fair or other lawful use, and included a mechanism whereby the posting party could submit a counter notification to restore the material. The option of serving a counter notification is a powerful remedy, because the online service provider (“OSP”) is obligated to repost the material within 10 to 14 business days unless the copyright owner files a federal lawsuit seeking injunctive relief during that period. Significantly, very few such lawsuits have been filed in the history of the DMCA, as there are few copyright owners who have the ability or means to institute federal litigation within the allotted time frame.

OSPs often include instructions on how to file counter notifications on their websites. I am not personally familiar with statistics on counter notifications, but anecdotally speaking, copyright owners certainly receive them, and they often include a claim of fair use. In the case of YouTube, as an alternative to the statutory counter notification process, posting parties with access to ContentID can also dispute—or “block”—takedown requests through that system.

In sum, the counter notification process is an effective means for posting parties to challenge questionable takedown notices. To supplement the process, Congress may wish to consider creating an alternative dispute resolution mechanism—such as that contemplated by the Copyright Small-Claims Enforcement Act (“CASE Act”), currently pending before the Senate—so that copyright owners and internet users have a more accessible and affordable means to adjudicate the validity of counter notifications that are not resolved during the

takedown process. An alternative dispute mechanism could also include an expedited process to rule on material that is time-sensitive.

4. Section 512(m) says that service providers have no duty to monitor for infringement – does that play into whether service providers are willing to actively evaluate alleged infringements for fair use?

Section 512(m), captioned “Protection of Privacy,” has been broadly interpreted by courts to relieve OSPs of responsibility to engage in affirmative efforts to curtail infringement. It is often cited by services to emphasize the view that an OSP has no duty under the DMCA to investigate potential infringements.

Despite the view that they are not required to police for infringement, some platforms nonetheless take it upon themselves to go beyond simple review of individual DMCA takedown requests to ensure they satisfy the statutory formalities to impose their own judgments concerning fair use. This practice is problematic in that OSPs are not disinterested parties, but typically derive revenue or other value from the presence of copyrighted content. If the platform chooses not to honor the notice, then the copyright owner is deprived of the benefit of the DMCA system. The decision to oppose a takedown notice should come from the posting party, who is entitled to file a counter notification, as Congress intended. Self-interested OSPs are private actors who should not be substituting their opinion for that of a court of law.

5. Who do you think should decide close questions of fair use online? As Professor Ginsburg noted, the burden could be on service providers rather than copyright owners.

As suggested in my response to Question 4, I believe it would be an inappropriate delegation of government authority to have OSPs adjudicate the rights of copyright owners and internet users with respect to questions of infringement. To the extent an assertion of fair use remains unresolved beyond the takedown and counter notification process, it should be decided by a federal court or through an independent, congressionally created alternative dispute resolution mechanism, such as that envisioned by the CASE Act. I note that Professor Ginsburg also suggested the possibility of an alternative dispute resolution process in her testimony.

QUESTIONS FROM SENATOR COONS

1. **Mr. Gratz 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?**

Given the enormous volume of infringing activity on the internet, we should be working toward widespread deployment of automated tools to identify and filter out unlawful uses. Such tools are capable of sorting full or extensive uses of copyrighted works from abbreviated ones that may qualify as fair use, and will likely become more sophisticated in separating infringing from potential fair uses due to advances in artificial intelligence. For content that does not fall into the category of possible fair use, the material should be automatically blocked from posting, with the subscriber notified of the block and provided an opportunity to object. For potential fair uses, the copyright owner should be notified of the use and provided an opportunity to review it. Indeed, Google's ContentID system provides this sort of functionality today.

Mr. Gratz seemed to be suggesting that a technological solution such as what you describe in your question should never be adopted because of fair use concerns. But when hundreds of millions of notices of infringement are sent to large platforms each year, the perfect must not be the enemy of the good. Manual notices, too, can be based upon a mistaken assessment of fair use. The possibility of mistake is the reason why the DMCA includes a counter notification process.

Especially in the case of full-length or longer uses of copyrighted works, the concern of occasional erroneous takedowns must be fairly weighed against the unmanageable burden of trying to address online infringement under the current "whack-a-mole" regime. As explained above, in the case of a mistaken block or takedown, the posting party can be notified and allowed the opportunity to assert a claim of fair (or other lawful) use. And if that does not resolve the issue, the posting party can avail themselves of the counter notification process.

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?**

In terms of copyright liability, the Copyright Act defines rights and remedies when there is a finding of infringement, as well as the criteria for a defense of fair use. In addition to damages, section 505 of the Act allows a court to award attorneys' fees and costs to the prevailing party—including a defendant who has prevailed on a fair use or other defense—in the discretion of the court.

The Copyright Small-Claims Enforcement Act (“CASE Act”), passed by the House of Representatives and currently pending before the Senate, would establish an alternative tribunal with the power to resolve smaller copyright claims, including DMCA takedown matters. Under the CASE Act, damages would be capped below the amount permitted under the Copyright Act. This voluntary alternative to federal court litigation would allow parties to resolve questions of fair use in a less formal, less expensive setting.

Relatedly, section 512(f) of the DMCA provides for remedies in the case of a knowing material misrepresentation by a copyright owner that a use is infringing, or a knowing material misrepresentation by an internet user that a use is a fair use (or otherwise lawful). Although some stakeholders have suggested that section 512(f) may merit further consideration to ensure that the provision is functioning as Congress intended, it is important to preserve Congress’ focus on “knowing” (or subjective) misrepresentations, as opposed to an ultimate finding of infringement (or not). Otherwise creators and internet users who are not well equipped to evaluate questions of fair use could be subjected to potential liability for exercising their takedown and counter notification rights under section 512, which would undermine the basic framework adopted by Congress.

b. Are online service providers better situated to evaluate fair use?

Online service providers (“OSPs”) are private companies. OSPs have a vested interest in hosting copyrighted content to attract users and ad revenues. Apart from the fact that they are not disinterested parties, they are not a substitute for courts of law—or a government-established alternative dispute resolution process—for purposes of determining questions of fair use. Indeed, as illustrated by my initial testimony, it is troubling that some platforms take it upon themselves to review DMCA notices beyond insuring that the formal requirements are met.

Due to their size and pervasiveness, internet providers already exercise extraordinary influence over the use of copyrighted works and public discourse in general. It would be extremely troubling, and in my view threatening to our democratic institutions, to delegate adjudicatory powers to OSPs that would allow them to determine the respective intellectual property interests of creators and internet users.

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?

I agree with the Copyright Office that in considering technological measures and other possible approaches to address online infringement, the size and resources of OSPs should be taken into account, with larger platforms charged with greater responsibility than smaller ones. While larger platforms could be required to adopt technology along the lines outlined in my response to Question 1, the takedown responsibilities of small or startup platforms can be appropriately calibrated to reflect their lesser resources.

Whether content subject to a takedown notice is a fair use is a question that would turn on an evaluation of the four factors set forth section 107; the size of the platform would not itself be determinative.

4. How can the notice-and-takedown process be improved, particularly for small creators? Would you recommend standardizing the process across service providers? If so, who should be responsible for establishing and enforcing those standards?

Smaller creators typically do not have access to automated takedown tools and therefore must search for and submit takedown notices on a manual basis, or hire an outside administrator to monitor the internet and handle takedowns. This takes time away from their creative activities and is simply an added burden that does not generate income. When the content is taken down, it frequently reappears, so the process is essentially unending. The problem is exacerbated by the fact that many individual creators and small entities do not have access to robust takedown tools, such as Google’s ContentID.

It seems there will be little progress on the whack-a-mole issue for smaller creators—or anyone else—until there is wide deployment of technologies that identify and prevent reposting of copyrighted material after a platform has received a takedown notice for that content. In enacting the DMCA, Congress anticipated that copyright owners and OSPs would work together to agree to and adopt standard technical measures (“STMs”) to protect against infringement. Unfortunately, in the twenty-plus years since the enactment of the DMCA, this has not happened. As suggested by the Copyright Office in its recent report on Section 512 (“Report”), Congress should empower the Office to convene stakeholders and adopt STMs as envisioned by section 512(i). As noted in my response to Question 3, in so doing, Office should take the relative sizes and resources of OSPs into consideration.

In addition, to the extent OSPs offer technological solutions such as ContentID, such tools should be made available to all creators—not just bigger players—on a nondiscriminatory basis.

Turning to the present system, a creator seeking to submit a DMCA takedown notice should be able readily to locate a simple, standardized fill-in form to submit to an OSP that is hosting or linking to infringing material. In some cases, OSPs force copyright owners to answer questions and/or click through a series of screens as a prerequisite to submitting a DMCA notice. In addition to requiring that the standardized DMCA form be prominently located on the OSP website, it could also be made available in conjunction with the DMCA registered agent directory maintained by the Copyright Office, which includes a DMCA notice address for each registered OSP. *See* <https://dmca.copyright.gov/osp/>. In case the creator had difficulty locating the form on the OSP site itself, the registered agent directory would offer a readily available alternative to submit a DMCA notice.

The Copyright Office is the logical and correct agency to establish standardized rules for submission of DMCA notices, and could do so as well for counter notifications.

5. To what extent should artists be allowed to control the use of their works by political campaigns, and does the current DMCA framework permit them to exercise that level of control?

Unless the use qualifies as a fair use under section 107 of the Copyright Act, a political campaign should obtain permission to use a copyrighted work. A fundamental purpose of copyright is to grant creators the ability to control the exploitation of their works. As I explained in my initial testimony, that principle does not disappear when a work is used by a political campaign. In some sense, it is perhaps magnified, as a creator should not be forced to participate in speech with which he or she disagrees, or have his or her work used or altered for that purpose.

As the Copyright Office concluded in its Report, the DMCA notice and takedown system is out of balance—not just for creators whose works are used without permission by political campaigns, but for all creators. In part this is because Congress could not have anticipated the tremendous breadth of today’s internet, and in part it is because courts have interpreted key aspects of the section 512 safe harbor system—such as the knowledge standards—as less protective of copyrighted works than it seems Congress intended.

In addition to these factors, an overarching concern with the DMCA system is the lack of an accessible and efficient dispute resolution mechanism when a takedown request is simply ignored or there is disagreement over fair use or some other issue. Even if the hosting platform removes the content, the posting party may submit a counter notification. In such a case, the copyright owner must file a federal lawsuit within ten business days to avoid having infringing material reposted. Very few creators have the resources to do so. And the posting party may similarly lack the substantial resources required to litigate in federal court. The DMCA system would be more balanced and reliable if Congress were to provide for an alternative forum to resolve takedown disputes, such as that envisioned by the CASE Act.