

To Jason_Covey@judiciary-rep.senate.gov
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17 August 2020

Ref: Replies to Questions posed by Subcommittee Chair and Ranking Member

Dear Mr. Covey,

Please find my replies below, interpolated after each question, first in response to the questions of the Subcommittee Chair, and then in response to the questions of the Ranking Member.

Questions [from Sen. Tillis] for Jane Ginsburg

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?

Reply: In general, I believe Congress in 1976 was wise to leave the development of fair use doctrine to the courts, where it originated. The four statutory factors synthesize and codify over 100 years of caselaw; they continue, on the whole, usefully to guide judicial analysis. I believe courts are institutionally better-equipped than Congress to respond to the inherently fact-based and often quickly-evolving creative, technological and economic developments that inevitably test the application of copyright law. Fair use serves as a safety valve to temper the exclusivity of rights under copyright when, in individual cases, rejecting the infringement claim would further copyright's larger goal, "to promote the progress of science [learning]." But fair use operates "on the retail level" suited to adjudication (which could take place in administrative as well as Article III tribunals). By contrast, legislation offers "wholesale" solutions which, other than providing a general framework such as the four factors, may be insufficiently tailored to respond to the facts and the need as they arise. And, as we have seen in other respects in the DMCA, when technology continually upends expectations, legislative solutions risk rapid obsolescence. The House Report to the 1976 Copyright Act recounted the determination not to "freeze" fair use, "especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." That counsel remains persuasive.

That said, over time, the factors have revealed some shortcomings, though ultimately any legislative fix may introduce more problems than it solves. Section 107 does not ascribe comparative weight to the 4 factors; courts have favored some factors over others, with the first (nature and purpose of the use) and fourth (effect on potential market for or value of the copyrighted work) sometimes individually, sometimes together, bearing the load. Most courts merely recite the second factor (nature of the copyrighted work), and then move on. The third factor often disappears into the first or fourth. At the high point of “transformative use” analysis, it seemed as if fair use had shrunk to a one-factor test in which the characterization of a use as “transformative” under the first factor determined the outcome under all the other factors. (Even though, as the Seventh Circuit pointedly observed,¹ the term “transformative use” does not appear in the text of section 107.) More recently, courts seem to have retreated from the excesses of their prior analyses, and appear to be weighing the factors more even-handedly, or at least according the fourth factor more weight to counterbalance the first.² It probably is not worth Congressional correction of missteps that the courts themselves appear to be remedying.

Section 107, however, is not untouchable. In response to a series of decisions that some feared insulated unpublished works against any fair use defense, Congress added the last sentence to section 107 in 1992 to clarify that “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”³ I personally believe the addition states the obvious, but it seems to have provided valuable reassurance that publication status is not all-determinative. Nonetheless, I would not draw from the 1992 amendment a lesson that every time “stakeholders” (including those representing non-economic interests) lament a line of decisions, Congress should right the course. Publication status may be a special case, because until the 1976 Copyright Act, federal copyright did not cover unpublished works (including works that had been publicly disclosed and made available through public performance). Pre-1976 Act fair use cases thus concerned only formally published works. Without 100 years of caselaw to furnish a baseline, additional guidance from Congress may have been appropriate.

There is one respect in which further amendment to section 107 may not only be desirable, but also needed for compliance with the US’ international obligations. Article 10 of the Berne Convention, to which the US adhered effective 1989, and reinforced by the 1994 TRIPS Agreement, contains a “quotation right” that obliges member States to permit uses of foreign Berne works under the following conditions:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

...

Where use is made of works in accordance with the preceding paragraphs of this Article, *mention shall be made of the source, and of the name of the author if it appears thereon.*

¹ *Kienitz v. Sconnie Nation*, 766 F.3d 756, 758 (7th Cir. 2014).

² For an overview and analysis, see generally Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?* 2020 SINGAPORE JOURNAL OF LEGAL STUDIES 265 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484949

³ Pub. L. No. 102-492, 106 Stat. 3145.

(Emphasis supplied.) While the criteria for a permissible quotation echo the second, third and fourth fair use factors, article 10 incorporates a mandate missing from section 107: the user *must* credit the source and the author when her name appears on the source. Section 107 does not require source and author attribution. Although I have argued that courts should take attribution into account in assessing the nature of the use (factor 1)⁴ and the effect of the use upon the value of the copyrighted work (factor 4),⁵ a clear Congressional direction to credit the source and the author⁶ would improve US compliance with the obligations it undertook in 1989 and 2004. Moreover, crediting the source would assist users who seek the original of the fairly-used work. And crediting the author has become crucial, particularly when authors' livelihoods depend on public recognition. Authorship attribution has not typically featured in the fair use inquiry, perhaps because in many cases, the copied work's author either is generally known (as is usually the case in parodies), or has been credited (as in book reviews, scholarly commentary and other educational uses). But increasingly, digital online uses sever the work from its author's name. When the currency in which the author trades is not only monetary but also (and especially) reputational, unattributed uses impede the author's ability to build an audience.

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?

Reply: *Lenz* is ambiguous about the use of automated means. I don't think *Lenz* calls into question the use of automation to *locate* potential infringements; the uncertainty comes thereafter. When the "bot" (used as shorthand for automated means generally) finds a match between a copyright owner's content and an unlicensed posting, must a human review the match to form a good faith belief that the inclusion of copyrighted content is not a fair use? Or is it possible to automate that assessment? Given fair use's resistance to easy prediction, one might conclude that "automated fair use assessment" is an oxymoron. But privately-generated fair use guidelines such as the joint copyright owner-service provider agreements on *Principles for User Generated Content Services*, or more user-oriented guides such as the Electronic Frontier Foundation's *Fair Use Principles for User Generated Video Content*, propose match-identity thresholds that effectively give a fair use free pass to posted content whose matchup with copyright owner content falls within the agreed level of tolerance. The Subcommittee might endorse "stakeholder dialogs" to promote private adoption of fair use automated match levels.⁷ Any guidelines that emerge need not be one-size-fits all, but might depend on the nature of the copyrighted work. Of course, such guidelines would not preclude human review; but they might appropriately substitute for it, particularly where the matchups are extensive. The Subcommittee might also wish to look to the ongoing EU member state implementation of article 17 of the 2019 Digital Single Market Directive, which calls

⁴ *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON J. OF INT'L. COMMERCIAL L. 44 (2016) <http://www.georgemasonijcl.org/wp-content/uploads/2016/08/Summer-Issue-2016.pdf>

⁵ *Essay – Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work,"* forthcoming, J COPYR. SOC. USA (2020), <http://ssrn.com/abstract=3537703>

⁶ See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007) (recommending the addition of a fifth fair use factor focusing on attribution).

⁷ Cf. the USPTO *Final Multistakeholder Document on DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices* (April 2015), https://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf

for “stakeholder dialogues” to discuss the “best practices” to implement copyright exceptions and limitations in the context of the automated filtering of user posts to Online Content Sharing Service sites.

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?

Reply: Section 512(g)(2)(A) requires a service provider who receives a takedown notice to “take[] reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material.” The statute does not further specify that the service provider must advise users of the availability of a counter notice procedure (though this may be implicit), nor does it say anything about counseling or encouraging the sending of counter notices. By contrast, art. 17(9) of the EU DSM Directive, on expeditious redress of user complaints, provides that an Online Content Sharing Service Provider’s terms and conditions must inform users that they can avail themselves of copyright exceptions, and the OCSSPs must “put in place” (and implicitly, inform users of) an “effective and expeditious complaint and review mechanism” so that users may challenge the blocking or disabling of their postings. I do not know what US host service providers’ actual practices are under sec. 512(g).⁸

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?

Reply: I do not know whether service providers might be concerned that were they to engage in any review of posted content, they would lose the statutory immunity they enjoy when they abstain from monitoring altogether. I do not believe there is a statutory basis for such a concern. As the Copyright Office’s Section 512 Report observes: “section 512(m) does not prohibit an OSP from either monitoring its system or acting upon evidence of infringement that it gains on its own; instead, it simply provides that an OSP cannot lose its safe harbor for failing to engage in such monitoring . . .”⁹ If service providers are unwilling “to actively evaluate alleged infringements for fair use,” I suspect the costs of undertaking that evaluation may prove more of a deterrent than any interpretation of section 512(m) as an all-or-nothing escape clause.

⁸ The Copyright Office’s Section 512 Report, at 172 n. 919 references Copyright Alliance Initial Comments at 21 (“A number of OSPs have developed educational material to make the counter notice process easier for their users to understand.”). *But see* Section 512 Report at 155 n. 830, referencing “Tr. at 69:13–71:13 (May 3, 2016) (Lisa Willmer, Getty Images) (noting that, while rightsholders submitting takedown notices are provided prompts and educational links during the process, similar prompts are not instituted by OSPs prior to a user uploading potentially copyrighted content).” The Section 512 Report recommended “the creation of clear and balanced educational materials that explain the purpose and benefits of copyright protection, including the policy reasons supporting the mechanisms through which the DMCA operates, would be beneficial to support efforts to reduce the number of inappropriate notices and counter-claims that arise from a lack of awareness and understanding of the law.”

⁹ *Id.* at 111, n. 591.

5. You mentioned several amendments to section 1201 that would help improve the functioning of fair use in the DMCA. Which provision, or provisions, do you think would deliver the most meaningful improvement?

Reply: As elaborated in my testimony, I believe that giving the Copyright Office authority in the triennial rulemakings not only to suspend the prohibition on the *act* of circumvention, but also, in appropriate circumstances, to permit the rendering of circumvention *services* when the beneficiary of the triennial exemption cannot itself engage in circumvention would significantly further the purpose of the rulemaking: to make it possible for the beneficiary “to make noninfringing uses of that particular class of works under this title.” Section 1201(a)(1)(D) currently states:

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

This text does not lift the prohibition contained in subsection 1201(a)(2), which bars trafficking in circumvention devices or services. Indeed, Section 1201(a)(1)(E) establishes that suspension of the prohibition on the act of circumvention does not afford a defense to an anti-trafficking violation:

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

As a result, statutory amendment to section 1201(a) would be required fully to effectuate the goals of the triennial rulemaking. Rather than comprehensively lifting the anti-trafficking ban for listed classes, the amendment could give the Copyright Office discretion to determine when it is appropriate, in connection with particular listed classes, to suspend not only the ban on the act of circumvention but also the ban on the rendering of circumvention services. Lifting the ban on circumvention should not only be done in appropriate circumstances, but also under certain conditions or with limitations. The service provider could be a hole in protection. I’m not suggesting we set out the conditions but we should make clear that limitations should be imposed or clarified, under the Copyright Office’s order, regs, etc.

**Prof. Jane Ginsburg –
How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?**

**Questions for the Record
Submitted August 4, 2020**

QUESTIONS FROM SENATOR COONS

1. 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?

Reply: (a) The Copyright Office’s Section 512 Report emphasizes the importance of education for copyright owners (particularly individual authors and small businesses) and for users to help them understand both the notice and counter notification process, and how to assess whether a posting is a fair use.¹⁰ If users send counter notices in a mistaken, but good faith, belief that the posting was a fair use, they face the prospect that the copyright owner will go to court to maintain the takedown. In filing a counter notice, the user “consents to the jurisdiction of Federal District Court for the judicial district in which the [subscriber’s] address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service provider may be found . . .” sec. 512(g)(3)(D). While the user might in theory be liable for actual or, potentially, statutory damages, a copyright owner’s seeking monetary relief against good faith individual actors seems in most instances a game not worth the candle.¹¹ On the other hand, if the copyright owner must go to court to maintain the takedown, the user will incur litigation costs even if the copyright owner seeks only injunctive relief. This scenario illustrates why alternative dispute resolution of fair use-based objections to takedowns might afford a better outcome for both users and copyright owners.

(b) While host providers might vigorously dispute the proposition, the large platforms enjoy the technological and legal services resources that individual authors and small business copyright owners and users lack. Large platforms therefore are “better situated” than those other actors to undertake a fair use inquiry – that the statute does not currently impose on host providers. By contrast, the EU DSM Directive art. 17 does place the burden on the Online Content Sharing Service Providers (a defined class that primarily targets large for-profit social media platforms, see DSM Directive, art. 2(6)) to assess users’ claims that the content the service blocked qualified for a copyright exception. If the hosts do not wish to undertake an assessment that the statute does not compel, perhaps Congress could give the Copyright Office regulatory authority to create an alternative dispute mechanism to assess fair use

¹⁰ See supra, note 8. See also Section 512 Report, part VI.B.1 (Non-Statutory Approaches to Mitigating Section 512 Limitations: Education) 171-73.

¹¹ The Copyright Office Section 512 Report does not recount any such cases.

objections to takedown notices, and could direct that platforms, together with large copyright owners, fund the ADR operation.

2. 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?

Reply: Differences among stakeholders might influence far more than fair use in the context of the DMCA. Differences in resources might influence the allocation of burdens of notice and counter notice under sec. 512, as well as the articulation of classes of works triennially exempted from the prohibition on circumvention under sec. 1201(a)(1). Given the fact-intensive and technology-sensitive nature of the fair use inquiry, the Copyright Office's position makes sense. But I lack the industry-specific knowledge to be able to elaborate on how stakeholder difference should influence the evaluation of fair use in the context of the DMCA.

3. 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?

Reply: Both the Copyright Office in its Section 512 Report (at 158-59), and the USPTO in its *Final Multistakeholder Document on DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices* (April 2015) offer useful suggestions for standardizing the notice and takedown process. Standardization and simplification are especially important for individual creators and small businesses who lack the knowledge and resources to fill out notices that differ in form and even in substance, for example, when service providers add to the "elements of notification" set out in section 512(c)(3).¹² Unfortunately, as detailed in the Section 512 Report, at 156-58, the standardization imposed by several OSPs has made the notice process even more daunting for individual authors and small businesses. This experience indicates that standardization of the notice process should not be left to the private sector. Congress could instead empower the Copyright Office to enact the suggestions in its Report.

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?

Reply: This question evokes the conundrum created by the 9th Circuit's *Lenz* decision (see my reply to the Chair's question 2). The vast scale of potential infringements hosted by OSPs may well make human review of each posting for fair use exceedingly costly. Moreover, time lost to *ex-ante* review might compromise the economic value of the material if the rights holder must wait for human review to send the notice. But the statute requires that the copyright owner assert a good faith belief that the material is infringing; how can a copyright owner form such a belief without human review? In my reply to the

¹² See Section 512 Report at 154-55.

Chair's question 2, I endeavored to identify ways to reconcile automation with fair use. But the fundamental problem remains: section 512(c) is based on no-longer-valid assumptions about the communication of works over online platforms. It probably does not suffice to address the allocation of burdens of assessing fair use without first considering whether it is time to restructure section 512 to cease dispensing host providers from any *ex-ante* duty to clear rights in user-posted content.

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

Reply: It may be desirable first to clarify that a purpose other than “protecting copyrighted works from infringement,” is not necessarily an “improper purpose.” As discussed in the caselaw, especially *MDY Indus. v. Blizzard Entertainment*,¹³ and detailed in the Copyright Office's section 1201 Report, at 42-47, section 1201 creates a new claim for circumvention of an access protection. Access circumvention does not necessarily result in copyright infringement, for example because breaking an access code might enable the user to enjoy an uncompensated private performance of an audiovisual or musical work or private display of an ebook. Unauthorized private performances do not infringe copyright because the author's exclusive rights are limited to public performances and displays (sec. 106(4)(5)(6)). But enabling copyright owners to control access through technological protection measures creates many new digital markets for works, that Congress sought to foster through section 1201. Congress did not require a “nexus” between access circumvention and copyright infringement, and the Copyright Office has explicitly rejected interpretations of section 1201 interpolating such a nexus; accordingly, using TPMs “for purposes unrelated to copyright infringement” is not “improper.” Rather, it reflects Congress' recognition that in the digital environment, the exploitation of works of authorship may occur by means that fall outside the scope of the exclusive rights under section 106.

From the question, I do not know what other “improper purposes,” the “critics” have in mind. Perhaps they are concerned that entrepreneurs would seek to lock public domain material behind technological protection measures. But section 1201(a) prevents circumvention of “a technological measure that effectively controls access to a *work protected under this title*.” Thus, it is not unlawful to circumvent a TPM that controls access to a copyright-expired work, or to non-copyright subject matter. I will be happy to elaborate further on alleged misuse of TPMs, but it would help to know what misuse is being charged.

Sincerely,



Jane C. Ginsburg

¹³ 629 F.3d 928 (9th Cir. 2010).