BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?

Responses of Joseph C. Gratz to Chairman Tillis's Questions for the Record

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?

The development of fair use in the courts has had a number of benefits, and I expect those benefits to continue as the courts serve their traditional role in applying the fair use doctrine. Developing fair use on a case-by-case basis has led to a flexible analysis that considers all of the equities in each particular situation and is, for that reason, better able to keep up with new situations presented by new types of works and new technologies for disseminating works. That has meant that some considerations that are not expressly among the four factors listed in the statue are sometimes considered by courts, where those additional factors would help to provide a full picture of the situation. By remaining flexible to consider each case on its own merits, fair use is less prone to being "gamed" by users or by copyright holders. A rigid system of ratios or formulas could lead to results that would disserve the purpose of copyright: promoting the progress of science and useful arts by encouraging the creation and dissemination of expressive works. Flexibility for courts is particularly important because fair use is closely bound to, and indeed is required by, the First Amendment. Just as courts do not apply rigid or one-size-fits-all analyses to First Amendment questions, because they are necessarily context-dependent,

Congress should not instruct courts to apply rigid or one-size-fits-all analyses to fair use questions, because they too are necessarily context-dependent.

One significant downside to leaving fair use's development to the courts rather than setting forth a rigid definition is that there is less certainty and predictability in the application of fair use. This can lead users to be too cautious in their use of copyrighted materials for clear fair-use purposes, because they are concerned that a lawsuit, even if they win, would be costly and difficult. As the Supreme Court recently recognized in an opinion by Chief Justice Roberts, to assert a fair use defense is "to roll the dice" because "that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020).

However, on balance, the case-by-case determination by courts is worth the downside, because flexibility is so important to ensuring that fair use serves its purpose in our copyright system.

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?

Considering fair use means examining the use and its context, and considering whether the use is fair use, or instead is infringement. This does not need to be a lengthy or involved analysis in most cases; most uses are clearly fair use or clearly infringement upon a quick look by a person with a basic understanding of copyright law. But other cases require more in-depth

analysis. Computers can play an important role in finding potential infringement, and in helping copyright owners send notices quickly and efficiently. But there still must be a human in the loop, because machines can't consider context. It is not unduly burdensome to require that a person review the materials before using a legal process to request that they be wiped off the Internet. We cannot allow fair use to be "collateral damage" in a war against online copyright infringement.

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?

No, for a number of reasons.

First, for noncommercial fair use, it's frequently just not "worth it" for the creator of the secondary work that is targeted; the person engaging in fair use does not have the means to defend litigation, and is resigned to having their speech improperly removed because there is no meaningful remedy even if the copyright holder turns out to be wrong.

Second, the current counter notification procedure effectively requires the subscriber to provide his or her home address to the copyright holder. That means anonymous critics can never send counter notifications safely. *See, e.g.*, Electronic Frontier Foundation, *Self-Described Twitter Troll Ryan Hintze Discovers New Way to Troll Twitter: the DMCA* (June 24, 2020), *at* https://www.eff.org/takedowns/self-described-twitter-troll-ryan-hintze-discovers-new-way-troll-twitter-dmca (describing a situation in which sending a counter notification would require a user to disclose personal information to a person he feels is harassing him).

Third, the counter notification process is often difficult to navigate and requires the sender to include often-unnecessary and intimidating language about federal court jurisdiction.

Service providers do not frequently counsel users, because service providers are not in a position to provide legal advice to their users. And while service providers sometimes encourage users to submit counter notifications where the use is clearly fair use, users seldom do so, for the reasons noted above.

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?

No. Section 512(m) says that nothing in Section 512 should be construed to condition the safe harbors on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity." Evaluating whether a particular piece of content identified by a copyright holder is infringing, or is instead fair use, is not monitoring or affirmatively seeking out infringement.

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.

The federal courts should ultimately decide close questions of fair use online. The courts are the institution, within our system, tasked with making final decisions about close legal questions.

This is not to say that copyright holders should not have an obligation to consider fair use before sending a takedown notice; they do, as an initial filter to ensure that baseless claims do not make their way to the courts.

And this is also not to say that service providers could not be incentivized to give greater consideration to fair use. As I suggested in my written testimony, one way to achieve this would be to reduce or eliminate the risk that a service provider who chooses to consider fair use, and

declines to remove material on the basis that it is believed to be fair use, could be held liable for damages.

BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?

Responses of Joseph C. Gratz to Ranking Member Coons' Questions for the Record

1. You 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?

In some isolated cases, perhaps. It is certainly hard to imagine a persuasive fair-use argument for posting an entire recent Hollywood blockbuster by itself in unaltered form for public consumption. But posting clips from the same movie—for example, in the context of a movie review—might well be fair use. And posting the *entirety* of many other kinds of works—for example, a photograph used to criticize a media outlet, or an entire song used in the context of a parody video—is frequently fair use.

So while automated measures to identify infringing material have their place as part of voluntary arrangements between copyright holders and intermediaries, or as tools for copyright holders to identify material they may wish to send notices about, they should not be mandated because they cannot reliably tell infringement from fair use. Automated analysis can be a useful input to human review, but it does not render human review unnecessary.

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?

Yes. Internet users posting others' copyrighted materials online should not do so without

a basic understanding of the law that governs that use. And copyright holders seeking to take down others' speech online should not do so without having the same basic understanding. Those who post materials online or who ask for materials online to be removed may not always get fair-use questions right. But they have the responsibility to act reasonably when they try to apply the law to their postings or to other people's postings.

Asking for someone else's speech to be wiped off the Internet is a serious matter. It's not something that should be done without understanding whether it's justified. If copyright holders can "shoot first and ask questions later," they will have every incentive to remove every use of their works, even when it is fair use.

a. What liability – if any – should they face if they get it wrong?

If creators and other Internet users act objectively reasonably, they should not face any liability. If they act unreasonably, they should be required to cure the harm that they caused, and in appropriate circumstances to pay statutory damages and attorney's fees.

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

In some ways, but not in others. While some service providers employ lawyers who specialize in copyright law, the vast majority of service providers are small entities whose role as service provider is incidental to their main business, and likely don't know any more about fair use than typical creators and internet users. And those service providers who are large enough to have lawyers who specialize in copyright law frequently have large-scale services where individual, in-depth attention to particular takedown notices may not be practical.

3. To what extent does the risk of losing safe harbor protection deter online platforms from performing their own fair use analysis when evaluating takedown notices or counter notices?

Service providers who leave material up following a takedown notice put themselves at risk to defend their users' rights to speak. In applying Section 512, courts should not permit service providers to lose any safe harbor protection because they did not take down material they reasonably believed to be fair use. But there is uncertainty around that issue, and platforms should be encouraged to evaluate fair use when deciding whether to remove their users' speech. For that reason, the safe harbor should be preserved where the service provider declines to remove material that the service provider reasonably believes is fair use.

4. 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?

The differences among stakeholders weigh in favor of a flexible approach that can be applied by courts and that can take into account particular circumstances. Congress should not try to define now the various categories of users, or service providers, or copyright holders, or to identify the axes of differentiation among different stakeholders (such as revenue or number of employees or number of copyright registrations). The way to avoid a one-size-fits-all approach is to include standards of reasonableness, as the current statute does, to govern the aspects of the law that may change from situation to situation.

5. 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?

A rightsholder who sends millions of takedown notices in a year, like a service provider who receives millions of takedown notices in a year, is likely to be a large and well-resourced corporation with lawyers who can ensure that fair use is taken into account when takedown

notices are sent. Smaller creators who send fewer notices are likely to have fewer resources to analyze fair use at scale, but they will also have many fewer takedown notices to send. Determining whether a particular use is a potential fair use does not need to be an involved or difficult process, though it requires considering the copied material in context. Where there is a high volume of notices to send, only a small percentage are likely to require in-depth analysis to determine whether they are fair use.