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VIA EMAIL

August 25, 2020

Chairman Thom Tillis
U.S. Senate Judiciary Subcommittee on Intellectual Property
113 Dirksen Senate Office Building
Washington, DC 20510

Re: Senate Judiciary Subcommittee on Intellectual Property
DMCA Hearing: How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?
Answers to Chairman Tillis' Questions for the Record

Chairman Tillis:

On behalf of the NPPA, I thank you for the opportunity to provide testimony during the July 28, 2020 hearing regarding how the Digital Millennium Copyright Act (DMCA) contemplates the limitations and exceptions in the Copyright Act, such as fair use as well as the chance to respond to your follow-up questions as follows:

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?

I believe that fair use is meant to be a flexible doctrine that can be applied to a variety of unforeseen circumstances. Constant technological advancements continue to change the way works are created, reproduced, displayed and distributed. Fair use is designed so that courts focus on fundamental questions that transcend sometimes complex technological issues. The case-by-case approach allows the doctrine to conform to the times while staying true to the underlying

principles of copyright law. Asking Congress to further define fair use may result in a narrow, rigid doctrine that cannot adapt to developing and future circumstances.

However, relying on courts to shape the fair use doctrine does have downsides, as misguided decisions can result in circuit trends that swing the pendulum too far in one direction. An example is the recent over-reliance by some courts on factor-one, "transformative purpose," analyses that often swallows the remaining three factors. Allowing the unauthorized mass scanning of literary works or the wholesale reproduction of photographs for clear commercial purposes to qualify as fair uses has skewed the intended fair use balance and made it more difficult for creators and copyright owners to protect their works. These court decisions then influence and enable other appropriators who do not truly understand that fair use is a four-factor analysis, leading to a culture of unwarranted fair use assumptions.

Moreover, courts and public opinion are often influenced by organizations and companies that have an interest in blurring the lines between the fair use factors and ensuring cases are decided in ways that do not threaten their business models. Many online service providers and platforms that rely on user generated content understand that an expansive fair use doctrine is better for their bottom line, as it allows more content to remain online—content that attracts visitors and pageviews leading to monetization through data collection and advertising revenue.

The platforms and services that have come to dominate the online experience fund groups, foundations and alliances that continuously advocate for expansive fair use and support defendants when they recognize an opportunity to tilt the fair use balance. It is this susceptibility of adjudicators or juries to be swayed by special interest groups that represents one of the downsides of leaving fair use to the courts, but increased education on the foundational goals and considerations of the fair use doctrine would help to alleviate these concerns.

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?

It is currently unclear what it means for a copyright owner to consider fair use before sending a notice, and the *Lenz* decision has not changed the fact that the DMCA does not require a copyright owner to do so. While in a perfect world both copyright owners and appropriators of copyright protected works would be educated and informed enough to conduct robust fair use analyses before sending takedowns or counter notices, it's simply too much to ask—especially considering that lawyers and judges often struggle with fair use determinations.

Also difficult to say, is what practices copyright owners are using to consider fair use before sending a takedown, as it inevitably varies from individuals sending a takedown here and there to large companies that are faced with the rampant infringement of hundreds and thousands of creative works. Unfortunately, the only way for many copyright owners to keep up with the realities of infringement on the internet in the digital age is to deploy automated takedowns. But it must be recognized that recipients of takedowns have the opportunity to make broad fair use assertions and have their content put back online without any review of whether the fair use claim is valid. Additionally, copyright owners should not be penalized for making an incorrect but good-fath fair use analysis. That penalty should only be as a result of knowingly providing false information in a takedown.

Placing that requirment on the copyright owner and no one else shifts the burden of proof and undermines the goals of copyright law and the fair use doctrine, which permits unauthorized appropriation if the appropriator can prove that the use is fair. Ultimately, a functioning fair use system begins with the person who wishes to appropriate the work of another. An example of a

notice and takedown system that may actually be working came during my panel, when Sherwin Siy, Lead Public Policy Manager for the Wikimedia Foundation, testified that the organization receives only a small number of takedowns every year. He explained that the users/editors of Wikipedia and Wikimedia Commons are educated on fair use and must undertake a 10-factor analysis before uploading content. Initiatives that educate both content creators and users on the fair use doctrine may go a long way towards eliminating erroneous claims on both sides of the notice and takedown process.

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?

Given that a counter-notification must only make a broad fair use claim in order to have content put back online and shift the burden back to the copyright owner, I would posit that the process is more than sufficient to protect fair use's role in section 512. Currently, service providers are not be able to counsel users or encourage them to file counter-notices, because to do so would raise them above the status of a mere conduit and thereby put them at risk of losing safe harbor protection. I cannot say whether it ever happens or with what frequency it occurs, but I would think that most OSPs understand that their liability would and should be at risk if they were to play an active role in the assessment of takedown notices or fair use determinations.

It is in the interest of service providers to facilitate the notice and takedown process but ultimately turn a blind eye to the details of claims in counter-notices. As long as a counter-notice complies with the requirements of the DMCA, an OSP will happily restore the content, as it shifts the burden back to the copyright owner and results in more content on their platform.

4. Given the "whac-a-mole" problem that you described where infringing material reappears shortly after it's removed, do you think it is practical for copyright owners to evaluate every possible infringement for fair use before sending a takedown notice?

No, I do not believe it is practical or appropriate for a copyright owner to always undertake a full fair use analysis before sending a takedown. It would simply be impossible to keep up with the constant flow of rampant infringements. But there are revisions to the DMCA that would stem the tide in a way that may make fair use considerations more realistic. For instance, many of the suggestions by the Copyright Office 512 report that would impose more accountability on service providers would help make copyright owners' jobs easier and result in fewer takedowns needing to be sent. Clarifying the red flag knowledge standard would require OSPs to make more of an effort to identify and remove infringing content when they are made generally aware of infringement and thereby stem the amount of unauthorized content that copyright owners target with takedown notices. Allowing for representative lists that do not have to list every specific URL in a takedown would also help to reduce the number of takedowns required and thereby make for a more streamlined and effective system.

5. What do photojournalists generally think about fair use and how it is used online? Are there types of online uses that are in the preamble to section 107 – whether that is reporting or education or political speech or something like – that you think are less likely to be fair use?

Visual journalists both rely on fair use in their work and are often victims of misguided fair use assumption. Because of the newsworthy nature of the work, many appropriators believe that any use of visual journalism is fair, and they sometimes point to the non-exclusive lists of uses listed in Section 107. But many do not realize that the uses enumerated in 107 are not definitive categories that always equal fair use. As the Copyright Office makes clear, Section 107 identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and

research—as examples of activities that *may* qualify as fair use.[1] These uses will usually weigh towards a finding of fair use, but they are still subject to the complete four-factor analysis applied to any other uses and even a slight change in a fact pattern may alter a fair use determination.

The problem is that works of visual journalism are almost always time sensitive and therefor have only a short window in which the creator can license or otherwise economically benefit from the work. When works are misappropriated, the takedown process (and subsequent counter-notices claiming fair use) leave a visual journalist with no effective way to protect their work before its value has diminished and the market demand shifted to images from the next big story. Increased educational efforts by the Copyright Office and OSPs on the parameters of fair use may help to stem the tide of damaging infringement, and the aforementioned clarifications and revisions to the DMCA should be considered by Congress.

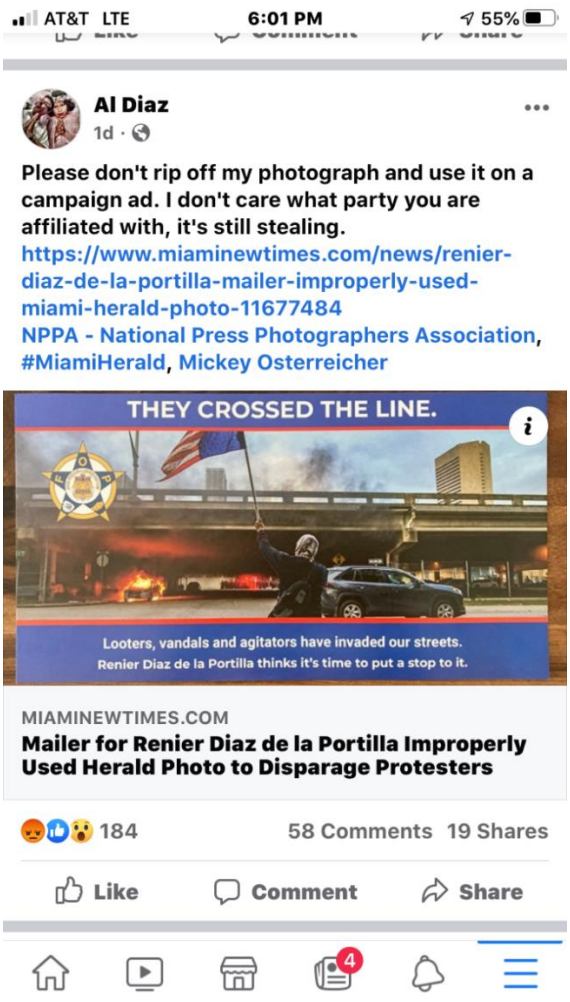
6. Unanswered hearing question.

In his opening remarks, Chairman Tillis mentioned that he was particularly interested in hearing how fair use relates to political speech and campaign activity. He noted that campaigns often use photos, videos, and music in materials they share online and those may be targeted ligitimately or not for DMCA takedowns. He asked our thoughts about copyright law treating political speech as a *per se* fair use and not just possibly fair use, but we never got back to that subject.

[1] https://www.copyright.gov/fair-use/more-info.html

I would like to take this opportunity to address those questions by stating that the use of images by political campaigns should never be considered a *per se* fair use but rather should be subject to the same four-factor fair use analysis as any other user appropriating such work.

In the first of two recent cases, a staff photographer for the Miami Herald noticed that a local politician had used one of his photographs as part of his political campaign. In addition to the cease and desist sent by the Herald, the photographer also posted the photo on his Facebook page with the comment "Please don't rip off my photograph and use it on a campaign ad. I don't care what party you are affiliated with, it's still stealing" (see below).



Shortly after the above post, the politician posted the comment below, incorrectly noting "'Stealing' would be taking credit for your stunning photo, which we are not. This photo is in the 'public domain.'"

In another case, it was reported that the Trump campaign used an unauthorized and altered Iowa City Gazette photo, taken in 2019 (in Iowa) as part of a political ad to depict Biden hiding in his Delaware basement. Another report calls out the same ad for misappropriating and altering two other photos in the same political ad without permission. A Gazette Editor's note reads: "Facebook removed the Trump campaign's ad on Thursday after The Gazette filed a copyright violation report. The Gazette made a similar request of Twitter on Wednesday; the ad still is available on that platform."

As part of a year-long legal case[2] in which a Colorado political organization claimed fair use in defense of its misappropriation of a same-sex engagement photo taken in New York City for for use in anti-gay political attack mailers.

After a careful four-factor fair use analysis, the court found that the infringement was not protected by fair use. As part of that determination the court noted:

> A use is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." Campbell, 510 U.S. at 579. The Defendants did nothing to the lifted portion of the photo, save removing the bottom portion of Edwards and Privitere's legs. The Defendants merely took the lifted portion and superimposed it on a mailer. While the Defendants placed the lifted portion in a different background and placed a caption on the mailer, such actions cannot be characterized as "highly transformative." Further, *the mere fact that the photo was used for political purposes does not bolster the Defendants' argument. Thus, this factor does not favor application of the fair use doctrine*.[3]

These are but a few examples of why a *per se* fair use of images by political campaigns is misplaced and would gravely undermine copyright protection for these works. For visual journalists and other creators, copyright is not just about receiving compensation for use but, in conjunction with the First Amendment, protects a creator from compelled speech and the right to *not* publish.

For those journalists whose work must be seen as true and accurate depictions of the event and when it took place, copyright law (and the DMCA) may be the only viable protection against

[2] *Hill v. Pub. Advocate of U.S.*, Civil Action No. 12-cv-02550-WYD-KMT (D. Colo. Dec. 11, 2012)
[3] *Id.* at 15 (emphasis added)

a work being used in unapproved, unintended or misleading way. Not only may the subjects depicted in a photograph object to it being used for certain purposes or by certain people or groups, but publications also wish to protect their reputations and intellectual property rights against the inappropriate, offensive and intentional misuse of their journalistic work.

Thank you once again for the opportunity to respond to your questions. Please let me know if you have any additional follow-up.

Yours truly,

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218 Russell Senate Office Building
Washington, DC 20510

Re: Senate Judiciary Subcommittee on Intellectual Property
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Answers to Chairman Tillis' Follow-up Questions

Ranking Member Coons:

On behalf of the NPPA, I thank you for the opportunity to provide testimony during the July 28, 2020 hearing regarding how the Digital Millennium Copyright Act (DMCA) contemplates the limitations and exceptions in the Copyright Act, such as Fair Use as well as the chance to respond to your follow-up questions as follows:

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?**

Yes, automated technologies could be used to filter for more clear instances of infringements that do not qualify as fair use. For example, time signatures for copyright protected videos or musical works could be entered into search algorithms that could then identify when the complete work is appropriated. Matching technologies could also be employed to search for wholesale, non-transformative use of copyright protected photographs. Requiring the largest

online service providers to implement some kind of filtering technology would help to alleviate the burden on both copyright owners and service providers to send and process a high amount of notices. As Professor Ginsburg noted in her testimony, close attention should be paid to developments in the European Union related to the implementation of filtering measures that could provide a blueprint for similar implementation in the United States.

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?

It is not practical to expect all creators and users to undertake exhaustive fair use analyses. While some appropriations may be easily discernible as fair use or not, many unauthorized uses require more focused legal analysis. Even lawyers, judges, and copyright experts often have difficulty making fair determinations, and disagreements on the appropriate parameters of the fair use doctrine are commonplace. While educating creators and users on fair use and encouraging them to consider the four factors before sending notices or claiming fair use in a counter-notice could help the situation, it's not realistic to expect millions of people to master the fair use doctrine and apply it accordingly.

a. Imposing liability for a misguided fair use determination is not something that should be seriously considered. Again, it is asking too much for all creators and users to familiarize themselves with the fair use doctrine to the point where they could be held legally accountable for making a mistake. If copyright owners and users faced liability for getting a fair use analysis wrong, it would deter good-faith efforts to take down infringing content, as well as good-faith efforts to have content reposted via a counter-

notice. Liability should only attach when there is evidence of knowingly providing false information or knowingly making a false claim.

b. While most OSPs employ copyright experts who would be better situated to make a fair use evaluation than the average user or creator, under the current DMCA framework it would make little sense for an OSP to take an active role in determining fair use because once a service provider becomes involved and makes a fair use determination, it may be considered as being more than a mere conduit of information, thereby putting it at risk of losing its safe harbor protection. OSPs understand that their liability would be jeopardizied were they to play an active role in the assessment of takedown notices or fair use determinations, and so while they may be in a position to better evaluate fair use, the current system disincentivizes services from engaging in that role.

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?

While it's true that one size does not fit all, that does not mean that adjustments to the DMCA should not be considered. It's a familiar refrain heard from advocacy groups representing some of the most wealthy and powerful OSPs that because small startup services cannot afford to implement measures to more effectively identify and block infringement, that those measures should be rejected across the board. The Copyright Office recognizes that small startups platforms and services may lack the resources to implement effective infringement monitoring services, but larger, established OSPs already have the technology to better identify and remove unauthorized content, and they should be required to more effectively implement the technology and share it with copyright owners.

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?

Small creators must be provided the tools necessary to effectively combat infringement and be given a fair chance to respond to counter-notices. Shifting the burden of proof to the copyright owner undermines the goals of copyright law and the fair use doctrine. Yet that is currently what occurs when a counter-notice is issued, with the copyright owner only having a short window of time to file a claim in federal court, tThe prospect of which can be daunting due to the costly and lengthy nature of the proceedings.

One way to alleviate the pressure on copyright owners (and also on users subject to short windows in which to file a counter-notice) is to develop an AlternativeDdispute Resolution (ADR) system that could offer all parties more of an opportunity to resolve infringement claims without having to commence cases at the federal court level. It should be noted that such an ADR, the Copyright Alternative in Small Claims Enforcement (CASE) Act, is currently being considered by Congress and would give copyright owners and alleged infringers a venue to resolve claims in a streamlined and inexpensive fashion. The opportunity for copyright owners to bring claims (and for users to defend against them) without having to resort to federal court could ease the burdens imposed by the notice and takedown process.

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?

It’s unrealistic to expect a fair use analysis for that number of notices, but the fact that some copyright owners file millions of takedown notices a year is testament to the greater problems of

rampant appropriation of images as well as with notice, takedown, stay down and the DMCA. Large scale infringements that require millions of takedown notices reveals a system in which not all parties are making good-faith efforts to stem unauthorized uses. If some of the suggested revisions to the DMCA—such as clarification of the red flag knowledge standard, a renewed commitment to standard technical measures, and the acknowledgement of incorporating representative lists as appropriate takedown notice information, copyright owners may not be faced with the same tsunami of apparent infringements and might then be able to undertake fair use analysis when the encounter unauthorized use.

But ultimately, it takes both sides working together to fix a broken system, and copyright owners should not be the sole bearers of the burden of making fair use determinations. Appropriators should be educated by the platforms they use on fair use and the factors to consider before uploading content that makes use of copyright protected works. Additionally, more public facing education efforts by the Copyright Office would ensure that users and creators get an unbiased instruction on the application of the fair use doctrine.

Thank you once again for the opportunity to respond to your questions. Please let me know if you have any additional follow-up.

Yours truly,

Mickey H. Osterreicher

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