



**Before the United States Senate
Committee on the Judiciary
Subcommittee on Intellectual Property**

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

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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

Thank you for inviting me to speak today about the intersection of fair use and the Digital Millennium Copyright Act. Both of these provisions work together to allow the Wikimedia Foundation to host and support Wikipedia and other free online resources. We rely upon the safe harbors of the DMCA in order to host our free, user-created resources like Wikipedia and Wikimedia Commons, and rely in many cases on fair use to make certain information and knowledge available to the world at no charge.

Fair use is a critical part of copyright law in the United States, and increasingly in the rest of the world. Without it, ordinary communication in our media-saturated society would end up being illegal more often than not. Fair use not only allows this communication, it also fuels the growth of the cultural environment, by promoting education, commentary, criticism, journalism, and cultural dialogue through new art and new works.

However, the promise of fair use is often muted online because fair use is a flexible, context-specific doctrine: one that requires careful, human consideration of important values like freedom of speech, educational value, and even the sort of forms that commentary and criticism can take, including subtle shadings like humor and sarcasm. All of these nuances are in tension

with efforts to apply the law through rigid rules more amenable to automated or mechanized systems. The current balance of these incentives—not just in US law, but around the world—provides a necessary level of certainty to our operations, but can leave many beneficial, non-infringing uses of copyrighted works offline. Adjusting this balance, however, would require far more than adjustments to Section 512, and we would not recommend those at this time.

Background on the Wikimedia Foundation and the Wikimedia Editor Community

The Wikimedia Foundation is the non-profit that hosts the free online encyclopedia Wikipedia in 310 different languages. The Foundation also hosts other free knowledge projects like Wikimedia Commons, an online repository of freely-licensed and public domain images, documents, and other resources. All of these projects are available anywhere in the world where we are not being actively censored. Our vision is to have a world in which every human being can freely share in the sum of all knowledge.

While we at the Foundation provide the servers and much of the software that lets Wikipedia and Wikimedia Commons operate, the contents of these projects—including the 6 million articles on English-language Wikipedia and the 62 million files on Wikimedia Commons—are contributed by thousands of volunteers around the globe, not by staff or employees of the Foundation. These volunteers not only write the articles on Wikipedia and upload files to Wikimedia Commons; they also edit each others' work constantly: expanding topics, adding details and annotations, correcting errors, and removing vandalism and inappropriate content.

Fair Use Requires Case-by-Case Evaluation, in Tension with Mechanized Copyright Enforcement

Although fair use and the notice-and-takedown provisions of Section 512 coexist and complement each other, there is still a potential tension between certain motivations behind the DMCA and fair use. Conversations about both the notice-and-takedown provisions and the anticircumvention provisions of the DMCA will often focus on automated or mechanized

processes: in the context of section 512, this is in the form of copyright rules implemented through automated filtering or screening; in the context of section 1201, this is in the form of copyright rules implemented in the form of technological protection measures.

In both of these cases, someone has pre-programmed a computer system or software to apply a certain set of rules based on a desired copyright policy. Usually, these rules approximate the contours of copyright law, plus the restrictions and caveats that the rightsholder would want to include in a licensing agreement or in contractual restrictions. The pre-programmed rules, however, cannot anticipate the context-sensitive nature of fair use.

There are some types of fair uses that might be anticipated, and ways to roughly account for them in software ahead of time—educational uses might be approximated by seeing if a user is accessing a service from a email account or an IP address associated with an educational institution; a programmer might guess that portions of works shorter than a certain length are likely to be part of a commentary or criticism. But fair use is more than just these enumerated types of uses, and one essential function of fair use is to account for fair reproductions, preparations of derivative works, distributions, displays, and public performances of copyrighted works whose contexts were not anticipated by the 94th Congress, and are unlikely to be anticipated by a software developer trying to account for the most common expected scenarios in a high-volume setting.

In a way, this disconnect between automated systems and fair use is an extension of a particular perspective on how fair use and other exceptions and limitations work with the exclusive right in copyright law. Often, people discuss fair use as being in opposition to the rights granted by Section 106,¹ or presume that those exclusive rights are the default nature of copyright law, with specific exceptions carved out in special cases when that baseline of universal protection might not quite seem just. But that conception of fair use and other limitations and exceptions unnaturally separates specific acts (like showing a friend an image on your phone, or singing a

¹ Section 106 defines the exclusive rights of a copyright holder to make or authorize reproductions, preparations of derivative works, distributions, public performances, and displays of copyrighted works. 17 U.S.C. § 106.

song in public) from the intent behind those acts. The intent of a person using a copyrighted work matters immensely, but Section 106 does not capture that essential part of how we think about creative works and what's legal and ethical about how we use them. Fair use remains the most prominent part of our copyright laws that accounts for this basic fact; it's therefore much more fundamental to copyright law than just being a category of special cases; it captures so many of the uses of copyrighted works that we accept as normal, even if there is no specific exemption for them.

The tendency to look at the physical, mechanical aspects of a use, and to only later consider the intent, often leads to copyright analysis looking only at what the technology does, and not how it impacts people. If a person is authorized to make one copy of a book, makes ten copies, and then immediately shreds nine of them, they have infringed the reproduction right, but in the end not harmed the copyright holder. However, too often, the initial focus is on the making of the ten copies, and not on the initial intent and the ultimate effects of the behavior. Fair use incorporates both intent and ultimate effect on the market, bringing the law in line with ethical norms around copying and re-use.

Doing this, however, requires accounting for many contextual factors that are not easy to standardize. While practitioners within specific, narrower fields can develop professional guidelines for fair use,² those facing a much broader range of contexts often hedge their risk by discounting fair uses. This uncertainty helps fuel the very large margin of caution built into existing notice-and-takedown systems, excluding many fair uses from seeing the light of day, and an increased emphasis on calcifying the results of those automated decisions will likely limit access to fair content further.

² See, e.g., American University's guidelines for best practices in fair use for journalists, academic and research libraries, documentary filmmakers, and even poets. *Best Practices in Fair Use*, Program on Information Justice and Intellectual Property, American University Washington College of Law, <https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/best-practices-in-fair-use/>.

How the Wikimedia Foundation Responds to DMCA Notices

This caution plays a large role in the number and type of DMCA notices that the Wikimedia Foundation receives, and how we respond to them. Despite the fact that roughly a thousand files are uploaded to Wikimedia Commons every hour,³ and the fact that Wikipedia is edited roughly four times every second,⁴ the Foundation only receives about thirty DMCA notices per year.⁵ We are thus able to take the time to evaluate those notices carefully. About a third of the time, we find that the notice has identified a likely infringement and take the material down. However, we also find that many notices that claim infringement ask for the removal of non-infringing material, including fair uses.

For instance, we have received takedown notices for images depicting the logos of companies and political campaigns, where the images were used on Wikipedia articles to identify the entities in question. We have also received takedown notices for allegedly infringement of the copyrights in earlier takedown notices. In these cases, our legal team will inform the notice-sender of our determination not to remove the material and explain why we believe the use is non-infringing.

These determinations take time, because there is often a lot of uncertainty regarding what constitutes fair use. While there are clear-cut cases at either end of the spectrum, some of the most important questions are ones that are not explicitly discussed in the statute, or in case law. Sometimes this is because the technologies aren't contemplated in existing law, but more often, it is the particular social or business practices that have not been extensively discussed—there are few cases dealing with whether providing a free, constantly updated online encyclopedia fits within an educational, critical, or even a journalistic role. In any case, making a fair use analysis

³ See *June 2020 Wikimedia Movement Metrics* 10, Wikimedia Foundation, https://www.mediawiki.org/w/index.php?title=File:June_2020_Wikimedia_movement_metrics.pdf&page=10.

⁴ Wikimedia Statistics, All Wikipedias, Content-page edits, https://stats.wikimedia.org/#/all-wikipedia-projects/contributing/edits/normal|bar|2-year|page_type~content|monthly

⁵ Requests for Content Alteration, Wikimedia Foundation Transparency Report Archive, <https://wikimediafoundation.org/about/transparency/2019-1/content/>; <https://transparency-archive.wikimedia.org/content.html>.

consists not just of applying the four statutory factors, but accounting for the other objectives of fair use that are specified in Section 107⁶ as well as in case law.

When our legal team conducts this analysis, we are not only spending scarce legal resources to address the concerns of the notice-sender; we are consciously accepting the risk that we might be found secondarily liable for copyright infringement. While we could easily and quickly avoid that risk by removing the content, regardless of our views of the merits of the notice, we believe that we owe our community of editors and readers access to knowledge represented by fair uses of copyrighted works. We have the privilege of tolerating more risk, in large part because our community editors are so risk-averse.

Community Editors Frequently Remove Fair Uses from Wikimedia Projects (by design)

The Foundation is able to devote staff time to analyzing notices because of the massive amount of initial screening that the community performs daily. This is not just because a large number of people do a large amount of work; it's also because the community rules around copyrighted works are far less permissive than the law.

While Section 107 tells us that fair uses are not infringements of copyright at all, the volunteer-created standards for Wikimedia Commons and for each language version of Wikipedia still prohibit many instances of non-infringing content, often including fair use.

In fact, Wikimedia Commons specifically prohibits files from being uploaded on the basis of fair use.⁷ There are two main rationales for this. The first is that Wikimedia Commons strives to be a source of files that anyone can use, anytime, anywhere. Since fair use is context-specific, a file uploaded to the site as a fair use could still lead to a later user inadvertently infringing the

⁶ Section 107 describes fair use not only in respect to the famous four-factor test, but also in broader terms of various types of use.

⁷ *Commons: Fair Use*, Wikimedia Commons project page, https://commons.wikimedia.org/wiki/Commons:Fair_use.

copyrights of the file's author if they downloaded the file from the website and used it for a different purpose.

The second reason is that Wikimedia Commons, like all of the Wikimedia projects, is intended to be used all over the world. While fair uses are specifically permitted in the laws of the United States and several other countries, the majority of the world has less flexible enumerations of their limitations and exceptions to copyright law.

English-language Wikipedia, with a much larger audience in the United States, and with the explicit purpose of being a reference guide and educational resource, will allow certain fair uses of images, but even these are more restrictive than the broad scope of section 107, applying a community-developed 10-factor test to decide whether a fair use also meets the higher standards of the project to be shared.⁸

Taken together, these rationales mean that many legal images, sounds, text, and video remain unavailable in the context of our open knowledge projects. Because of the caution required under existing copyright laws, including the interactions between the DMCA and statutory damages in the US, and the uncertain nature of copyright standards across borders, only a small subset of fair uses can be seen on Wikipedia.

This has real effects, not just on the completeness of the knowledge available, but on the overall story that the presence or absence of that knowledge tells. For example, South Africa has been considering adding fair use and other limitations and exceptions to its existing copyright law.⁹ In the absence of these expanded limitations and exceptions, the Wiki Loves Monuments¹⁰ project—an effort to photograph, document, and describe public monuments all over the world—can only take pictures of non-copyright-protected monuments in South Africa—which prevents most post-apartheid-era monuments from being photographed and pictured online,

⁸ *Non-free content*, Wikipedia project page, https://en.wikipedia.org/wiki/Wikipedia:Non-free_content#Policy

⁹ Laura Kayali, “How the US and European Union pressured South Africa to delay copyright reform,” *Politico*, June 28, 2020, <https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101>.

¹⁰ Wiki Loves Monuments, <https://www.wikilovesmonuments.org/>

presenting a very different picture of South Africa to the world than the reality for South Africans on the ground in their home country.¹¹ A world that followed the example of the United States more closely in terms of fair use could help open the door to a broader global sharing of works and ideas.

Rare Cases are Vitally Important, and Occur Regularly in the High-Volume Online Environment

Fair use is sometimes treated as a rare exception to the rule of copyright, when it is not. Fair use is completely pervasive. It operates not only specific instances of parody or educational uses, but also in everyday use: we can see fair use at work when a tourist posts a vacation video of animated billboards in Times Square, or when a citizen journalist begins recording an altercation on their phone as music blares from a nearby car. Especially now that so much of our lives are conducted via electronic reproductions, public performances, and displays of the world around us, fair use has to operate constantly in the background to ensure that artwork visible behind us or children's television playing in the background of our work calls don't render us liable for copyright infringement.¹²

The world has always been awash in copyrighted works and we have always been exposed constantly to them. Even the prevalence of cameras isn't particularly new; Louis Brandeis anticipated substantial changes in the law upon the development and popularization of consumer photography in 1890.¹³ What's changed is not just the amount of information being captured, but also the fact that those captured images are visible online and are being scrutinized for infringement in a way that vacation slides were not 30 years ago.

Thirty years ago, fair use may have operated in theory to protect the returned traveler proudly publicly displaying her photos of Las Vegas or Times Square billboards; it may have

¹¹ See *Open Letter to President Cyril Ramaphosa*, Wikimedia ZA, January 29, 2020, http://wikimedia.org.za/wiki/Main_Page

¹² See John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 Utah L. Rev. 537 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029151.

¹³ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harvard L.R. 193 (Dec. 15, 1890).

theoretically protected the camcorder-equipped dad who made a home video of a street busker singing a famous pop song. In reality, it was a lack of enforcement, not a fair use evaluation, that kept ordinary users from having to deal with copyright litigation. Today, recorded on cell phone cameras and uploaded to social media accounts, these putative infringements are easily visible and subject to enforcement actions with a very low marginal cost—a DMCA takedown notice.

Some of those notices will cause takedowns of harmless fair uses, doing no more than annoying the original uploader, who may decide whether or not to issue a counter-notice and risk litigation. But other fair uses may be far more consequential, and their removal can have substantial effects on speech. Still other fair uses will remain, “tolerated” by the copyright holder. But the ability to remove those works quickly and easily still rests in the notice-sender’s hands in a way that it did not before section 512 existed. And the discretionary power that that gives is one ripe for abuse.

Instead of a tourist attraction or a street performer, imagine a cell phone video of a political rally at which music is being played, or of a protest on a downtown street. These are the sorts of videos and images that necessarily contain copyrighted works, and are also incredibly important for documenting and reporting on our civil society. They are also likely to be focal points for controversy, and targeted by would-be citizen censors.

Ubiquitous but discretionary power of this sort is precisely the type that is often abused to further the agenda of those who hold that power. A copyright holder who disagreed with the political viewpoint of the uploader could cheaply selectively enforce their copyrights to suppress evidence of events they would rather not have publicized; commercial copyright holders could selectively enforce against certain competitors but not others with whom they had a business arrangement.

Instances like these may be relatively rare compared to the large number of notices being issued for more mundane instances of alleged infringement, but their numeric rarity does not mean they are not vitally important. Wikipedia and Wikimedia Commons are often, accurately, described as

special cases in the digital sphere, outliers in how online communities self-organize. And yet, this collection of exceptions to the rule has generated one of the most visited websites in the world. In a digital environment where millions of potential works are created daily, a one-in-a-million chance is a certainty. And those odds are increased when political speech and the heightened scrutiny that comes with it is involved.

Conclusion

While fair use is a vital part of copyright law, and an important factor in many of the copyright decisions facing the Wikimedia Foundation and the projects we support, the structure of laws and incentives today mean it plays a much smaller role online than it could. Addressing this problem requires more than a comprehensive approach to the DMCA; it may require a comprehensive evaluation of how courts, companies, and online communities perceive and interpret the structure and practical implementation of the Copyright Act. Thank you for the opportunity to testify, and I look forward to any questions you may have.