

The Scope of Fair Use
*Testimony of the Newspaper
Association of America*



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Committee on the Judiciary
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and the Internet
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**The Register's Call for Updates to U.S. Copyright Law:
The Scope of Fair Use**

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Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and members of the Subcommittee, good afternoon and thank you for the opportunity to appear before you to discuss the scope of “fair use” under the Copyright Act. My name is Kurt Wimmer. I am privileged to serve as general counsel of the Newspaper Association of America, which represents the publishers of more than 2,000 newspapers in the United States and Canada, and I have practiced law in the technology and media industries for more than 25 years.

The news publishing industry recognizes that the professional reporting and writing that newspapers publish start important conversations in the communities we serve, and that this conversation often continues online —both on our digital platforms and those owned by others. Because newspaper content serves as a central catalyst for these crucial digital conversations, the “fair use” defense, which draws a distinction between infringing and non-infringing uses of copyrighted material, is a critically important issue for the news industry in the digital age.

As I will describe in this testimony, the newspaper industry believes that the current formulation of fair use in the Copyright Act need not and should not be changed by Congress as part of any effort to update the Act. Court decisions interpreting fair use have not always been perfect, but overall we have faith that the long arc of the common law will, over time, result in workable fair use decisions for all members of the digital ecosystem and for the public we serve.

I.

The Crucial Role of Newspapers in the Digital Ecosystem

As primary sources of credible information and forums for debate, newspapers are essential components of a well-informed citizenry and a free and democratic society. Newspapers have undertaken tremendous efforts to uphold these values in the digital age. The newspaper industry continues to spend upwards of \$5 billion a year to inform citizens about everything from the high-profile investigative reports that win Pulitzer Prizes to the day-to-day information that brings communities together.

In doing so, newspapers have become innovators and drivers of new business models and sources of digital revenue. As a result of these innovative efforts to publish online, on mobile platforms, and in print, newspapers have a larger audience than ever. Newspaper circulation revenue grew 5 percent in 2012. Digital-only circulation grew by 275 percent in the same year. The vast majority of United States adults, nearly 65 percent, read newspaper content in a typical week or access newspaper content on a mobile device in a typical month. In addition, consumers clearly are embracing digital subscriptions in support of the high-quality content they receive from local newspapers. Some 500 newspapers —35 percent of all daily newspapers —have successfully implemented digital subscription models, which provide a valuable source of revenue to support journalism going forward.

The digital future, then, is bright. But there is much ground to make up because of the unprecedented disruption caused by the digital transition. Newspaper advertising revenue, which of course supports our newsgathering efforts, was \$49 billion in 2006 and dropped by more than half, to \$22 billion, in 2012, the most recent year for which figures are available. Digital ad revenue is growing but is not yet close to making up the difference in lost print advertising. Even now, print produces far more revenue for newspapers than digital. In 2012, print advertising revenue for the industry was \$19 billion, and digital advertising

revenue was \$3 billion. In other words, for every \$15 in print advertising dollars lost, newspapers have gained only \$1 in digital advertising revenue.

As newspaper publishers reinvent their platforms for the digital future, they find themselves competing not only with companies that create original content, but also with companies that build businesses on the backs of the very news content that our members produce. Newspaper content makes up 66 percent of the content on news aggregation platforms such as Google News. Newspaper content also makes up more than half of the content on many popular digital platforms. Although these re-uses of newspaper content do result in some limited traffic to newspaper sites, most do not produce marketable click-throughs resulting in impressions that would generate meaningful revenue.¹ The platforms using our content, however, certainly benefit by using news content to build and monetize readership on their sites without paying a dime for the significant costs our industry bears to produce that content.

II.

The Importance of Copyright Protection In Supporting Essential Journalism

Effective copyright protection is essential to funding the professional newsgathering and reporting that permits the newspaper industry to continue to serve the American public. When other digital players build their platforms and generate significant profits using newspaper content that they do not pay to produce or support, it undermines the ability of journalists to undertake high-quality reporting and contribute to a well-informed citizenry.

¹ Social media uses of news content, particularly in partnership with news sites, can provide an interesting contrast to other digital uses that appropriate and monetize news content without consent. News appears to drive about 30 percent of the content on Twitter, for example, but this type of use appears to be generating useful traffic to news sites. News publishers continue to innovate on these platforms, which hold promise for the future.

These other players in the digital ecosystem, such as news aggregators, search engines, and advertising networks, impact newspaper revenues by diminishing the number of users that visit the online and mobile newspaper platforms that actually pay to produce the content at issue and by siphoning off the advertising revenue that content creators might otherwise gain from serving those audiences. Some of the uses of newspaper content certainly qualify as “fair use” under the Copyright Act, while others quite clearly do not. And NAA’s members also benefit from both strong copyright protection and the “fair use” defense. Many online platforms, including those operated by newspaper companies, curate the content of others, which, if done with respect for the rights of copyright owners and in compliance with fair use, can be a benefit to readers.

III.

The Careful Balancing of Factors in the Copyright Act’s “Fair Use” Defense Should Not Be Altered.

The NAA believes that the current state of the Copyright Act, including the current formulation of fair use, strikes the right balance and should not be changed despite the unquestionably significant technological advances since passage of the 1976 Act. The careful balance embodied in the statute’s current fair use factors should be maintained. In particular, any weakening of copyright protection or broadening of fair use would be unacceptable and would undermine the Constitution’s encouragement of compensation to creators to generate creativity and productivity.

Significant content industry practices and understandings have built up over decades of experience around the concept of fair use in the Copyright Act. Indeed, the general concept of fair use far predates the Act itself. The judicially created concept of fair use dates back to 1741, when the English Chancery Court decision *Gyles v. Wilcox* created the “Fairness Abridgement” doctrine—a rule allowing abridgements displaying significant labor, originality, and judgment to be found non-infringing. The notion that some uses of an otherwise protected work may be non-infringing was carried to America by the founders and became part of early

American law. And, over time, the fairness abridgment doctrine evolved through United States common law into what we know today as the fair use doctrine.

The modern formulation of fair use and its four-factor test has a long and established history in American society in its own right, tracing back to Justice Story's articulation of the four fair use factors in 1841. Over the following 135 years, the doctrine was clarified and sculpted prior to its codification in Section 107 of the Copyright Act of 1976. The codification respected the common law nature of the doctrine in providing little to no guidance on the factors themselves, appropriately allowing courts to continue to rely on common law sources in this particularly delicate realm of copyright law.

This common law approach to development of the doctrine has been entirely appropriate and should continue. The case-by-case analysis unique to this method of adjudication allows courts to balance the competing individual interests at hand and to capture both the needs and welfare of society as a whole. What has resulted over time is a careful calibration of fair use, designed to maximize social welfare by providing incentives for the creation of original works, but tempering such rights when the exercise would interfere with the rights of others or otherwise burden important social goals such as education and the dissemination of certain factual information. Crucially, this case-by-case adjudication has permitted the courts to take into account a myriad of technological developments in communications and media in assessing fair use. Given the rate of technological change in the digital marketplace, the fundamental wisdom of a common-law fair use doctrine that can adapt to these changes has never been more apparent.

The common law approach also ensures fair use's continued viability as a safety valve to relieve the tensions inherent in both protecting the copyrights of some and the First Amendment rights of others. Absent fair use, there exists a potential conflict between copyrights—which grant to authors an exclusive right to the reproduction, distribution, public performance, public display, and preparation of derivative works of their creations—and First Amendment rights—which grant

to each individual a right to expression free from government interference. The judicial system is the appropriate forum for resolving, developing and balancing these important principles, particularly given the continuously increasing and novel means for expression. In conducting a case-by-case analysis, courts can appropriately consider all relevant interests, changing norms, and other relevant factors when setting the limits of fair use.

IV.

Although Judicial Fair Use Decisions Are Far from Perfect, Congress Should Permit the Common Law to Evolve.

All bodies of common law decisions contain uneven results. Even though NAA does not agree with all fair use decisions and the weight given to specific factors by individual courts, we believe that the courts, rather than Congress, should continue to be the appropriate forum for resolving issues surrounding fair use.

A recent example of a court deftly analyzing and applying the fair use doctrine in novel settings is the Southern District of New York's decision in *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. Mar. 21, 2013). *Meltwater* involved a for-profit subscription news reporting service, which used automated computer algorithms to scrape Associated Press articles from online news sources. Meltwater indexed the articles and then delivered verbatim excerpts of the articles to its customers in response to pre-established parameters. The click-through rate—that is, the number of users who would click on a link associated with the snippet provided by Meltwater—was miniscule, indicating that Meltwater's customers viewed its service as a substitute for reading the Associated Press story (and viewing associated advertising that funded that story) on an AP member's website. In conducting its fair use analysis, the court properly determined that Meltwater acted as a substitute news service. Therefore, the court held that Meltwater's automatic capture and republication of segments of news articles, without additional commentary or insight, was not transformative in purpose nor use and did not constitute a fair use. *Id.* at 552. Importantly, the court

also found that AP members did not grant an “implied license” for content to be scraped, copied and reused indiscriminately by merely publishing content on a free website without the use of blocking technology, an essential finding to support content creation of all kinds in the digital ecosystem.

It is not the NAA’s position that judicial fair use analysis is always as correct as the result in *Meltwater*, of course. In particular, some courts’ recent willingness to give undue weight to the concept of “transformative use” in connection with the first fair-use factor risks eroding fundamental copyright protections.² Courts’ rapid expansion of and overreliance on the transformative use factor has resulted in its becoming the touchstone of recent fair use cases involving digital technology. The relative weight some courts have been giving to “transformative use,” and the surprising types of rather pedestrian uses that have been found to be “transformative,” risks allowing that element to subsume the other, equally important, factors, particularly the essential fourth factor requiring an analysis of the second use on the market for the primary use. We hope and expect that this imbalance in applying the fair use factors will be corrected over time.

Although reaching the appropriate fair use balance through common law adjudication takes time, at the end of the day, the NAA believes that the courts will reach the right conclusion and should remain the appropriate forum for developing the fair use doctrine. Fair use involves the balancing of a multitude of considerations recognized as relevant over time in order to best ensure society’s progress of the useful arts. Because of the many factors at play and the industry investments and expectations that have built up around them, altering the fair use

² See, e.g., *Sofa Entm’t, Inc. v. Dodger Prods.*, 709 F.3d 1273 (9th Cir. 2013) (holding that the display, during a live musical, of a seven-second clip from the Ed Sullivan Show was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (concluding that the republication of Grateful Dead concert posters in a coffee table book was transformative merely because the publisher placed them in chronological order); *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402 (E.D. Pa. 2009) (concluding that a book’s republication of twenty-four pieces of artwork from magazine covers was transformative).

formulation, or removing control of the doctrine from the judicial sphere, undoubtedly would have unintended consequences that are not readily apparent. The complexity and sensitivity involved in balancing the fundamental interests and rights at issue in fair use copyright determinations counsels in favor of retaining the factors as they are currently codified, and in favor of maintaining reliance on the wisdom and experience of common law interpretations of those factors.

V.

The Way Forward

News publishers recognize that the digital ecosystem contains a wide array of participants. Legal solutions, such as copyright infringement actions, may be required in certain cases where companies are appropriating and monetizing copyrighted or otherwise proprietary content, thus free-riding on newspapers' journalistic efforts without supporting those efforts with appropriate funding. But enforcement is only one part of the long-term future for digital news distribution.

We believe that many participants in the ecosystem—particularly innovative mobile apps and start-up ventures in Silicon Valley and elsewhere—often would prefer to deploy solutions that rely on licensed content rather than rely on questionable business models, scraping in violation of terms of use, or other business behaviors that are neither appropriate nor scalable. Some market leaders, such as Yahoo!, now are building news solutions that rely primarily on licensing models that pay for content and support its continued creation. This focus on properly licensed content provides many benefits for the public, as well as for companies that license content. Licensing news content permits the funding of high-quality original journalism and content production, which is in the long-term interests of all members of the digital marketplace and society at large.

Moreover, the value added by partnerships with news organizations is significant. Licensees and their audiences can be assured that they are obtaining original content, that it has not been modified by some anonymous and unreliable scraper, and that all updates in a fast-breaking area can be delivered to the licensee

and its customers in real time. News publishers are working diligently to make content broadly available for licensing to digital platforms so that these platforms can obtain these benefits for their audiences, and take the responsible step of supporting the journalistic and informational content they distribute. Licensing content supports the continued high-quality local, national and global journalism and professional content on which our democracy depends.

So even if enforcement actions, particularly against companies that appropriate broad swaths of news content to resell it for profit, will be an essential part of correcting marketplace imbalances and inequities, the news industry sees a bright path forward through its own digital platforms, through industry and cross-industry partnerships, and through licensing to other innovative digital platforms.

In all, our mission in the digital world remains consistent with our longstanding mission to audiences around the world. We seek to inform audiences as broadly as possible about the communities in which they live, their nation, and the world. In the digital environment, we will seek the appropriate balance of enforcement, licensing, and deploying our own new platforms to achieve this goal. And continued reliance on steadfast areas of law, such as fair use, will be essential as we continue to move forward into new digital challenges. As the digital sands continue to shift, the content industries need the assurance that legal protections and principles underlying their production of content will be steady and dependable rather than mercurial and unreliable, and that these principles will develop on an organic and rational basis. We urge that the careful balance embodied in copyright law, and in particular, fair use, be maintained.

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We look forward to working with this Subcommittee and the full Judiciary Committee as you move forward with your review of the Copyright Act.

Thank you for the opportunity to testify. I look forward to your questions.