

“LET’S GO CRAZY” WITH FAIR USE: AMENDING THE DIGITAL
MILLENNIUM COPYRIGHT ACT

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ABSTRACT

In Lenz v. Universal, the United States District Court for the Northern District of California ruled that copyright holders must consider fair use before filing takedown notices for infringing content posted on the internet. In the case, Stephanie Lenz uploaded a home video to YouTube of her children dancing to Prince's song "Let's Go Crazy." In response, Universal Music Corporation submitted a takedown notice to YouTube pursuant to the Digital Millennium Copyright Act ("DMCA"), claiming that Lenz's home video violated its copyright in the song. Lenz claimed fair use of the copyrighted material and sued Universal for misrepresentation of a DMCA claim. In a decision rejecting a motion to dismiss the claim, the District Court held that Universal must consider fair use before filing a takedown notice, but noted that in order to prevail on a misrepresentation claim, a claimant would need to show bad faith by the copyright holder who filed the takedown notice. On September 14, 2015, the Ninth Circuit affirmed the District Court. The Ninth Circuit's opinion could have long-lasting effects on fair use and how copyright holders submit DMCA takedown notices.

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INTRODUCTION

Websites consisting of user-generated content allow users to upload material that they create. Sometimes user-generated content can contain elements of copyrighted works.¹ Common examples include copyrighted music playing in the background of a blog or used as a soundtrack in a home video.² In situations like these, it is not uncommon that user-generated content creators are unaware that they may be violating copyright law. Thus, these creators might be

¹ See Scott Karp, *A Lot of User-Generated Content is Really User-Appropriated Content*, PUBLISHING 2.0, Nov. 18, 2006, <http://publishing2.com/2006/11/18/a-lot-of-user-generated-content-is-really-user-appropriated-content/>.

² See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008).

surprised that under the Digital Millennium Copyright Act (“DMCA”), copyright owners may request that websites, like YouTube, remove copyright infringing material through issuance of a takedown notice.³ In some instances, however, user-generated content creators’ use of a third-party work may constitute fair use, and therefore a takedown notice would be inappropriate. The Ninth Circuit’s decision in *Lenz v. Universal*⁴ now requires copyright holders to engage in a fair use analysis before submitting a takedown notice. In light of this ruling, user-generated content websites may notice a decrease in the volume of takedown notice requests they receive from alleged copyright holders.

This Article proposes that clear, objective standards be put in place that a copyright holder must satisfy to file a takedown notice. Part I provides background on user-generated content websites, the DMCA, and the fair use doctrine. Part II summarizes case law in this area and the Ninth Circuit’s ruling in *Lenz v. Universal*. Finally, Part III analyzes the ruling’s potential impact and proposes an amendment to the DMCA, namely a standard form that would ensure copyright holders adequately assess fair use before filing for a takedown notice.

I. BACKGROUND

A. *User-Generated Content*

User-generated content is any type of content that has been created and made available by unpaid contributors.⁵ It can refer to pictures, videos, testimonials, tweets, blog posts, and everything in between. Commonly used user-generated content websites include YouTube, Facebook, and Wikipedia.⁶ Over the last decade, individuals and businesses have increasingly moved their personal and professional activity to the virtual realm. This has led to a largely unmonitored exchange of information, products, and other

³ 17 U.S.C. § 512 (2006).

⁴ *Lenz*, *supra* note 2.

⁵ Rachel Lebeaux, *User-Generated Content (UGC)*, TECHTARGET (March, 2013), <http://searchcio.techtarget.com/definition/user-generated-content-UGC>.

⁶ *Id.*

communications. As individuals and businesses seek avenues to share their personal and professional endeavors on the internet, particularly on user-generated blogs, forums, and websites, the risks and responsibilities associated with these activities must be well understood in order to avoid potential copyright infringements. Unfortunately, the informal practices associated with creating, uploading, and sharing user-generated content may leave both copyright holders and potentially infringing content creators wondering what exactly their rights are.

B. Digital Millennium Copyright Act

The DMCA was a congressional effort attempting to balance “the interests of content owners, service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the internet.”⁷ Congress designed the DMCA to “enlist the cooperation of internet and other online service providers to combat ongoing copyright infringement.”⁸ As a result, the Act provides various injunctive and monetary remedies for copyright holders who claim infringement.⁹ When considering injunctive relief, courts look at factors such as the magnitude of harm the copyright holder is likely to suffer if the material is not removed and whether an injunction is feasible, effective, and less burdensome than other available remedies.¹⁰ In order to seek injunctive relief under the DMCA, copyright owners must first follow the notice and takedown provisions.¹¹ Perhaps most importantly, the DMCA requires a “statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”¹²

⁷ H.R. REP. NO. 105-551, pt. 2, at 21 (1998).

⁸ *Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004).

⁹ 17 U.S.C. § 512 (2006).

¹⁰ 17 U.S.C. § 512(j)(2)(A)–(D).

¹¹ 17 U.S.C. § 512(c)(3).

¹² 17 U.S.C. § 512(c)(3)(A)(v).

1. Safe Harbor Provisions

To elicit compliance from service providers, the DMCA offers a “safe harbor” provision insulating these parties from monetary liability associated with copyright infringement activities by third-parties.¹³ The DMCA safe harbor provisions define “service provider” as “a provider of online services or network access, or the operator of facilities therefor,” including “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”¹⁴ As one pair of commentators has noted, this definition “would seem to encompass virtually every internet or intranet provider or intermediary, including portal sites, search engines, universities, and intranet providers.”¹⁵ Within this broad definition, the DMCA safe harbor provisions distinguish among different types of service providers based on the function they are performing.¹⁶

Understanding the role and function of every possible entity that could be classified as a service provider is not necessary for this Article. However, it is important to recognize that the DMCA safe harbor provisions cover a wide range of entities that have different types of relationships with alleged copyright infringers. For example, service providers responsible for hosting websites will generally have a direct subscription relationship with alleged infringers. Search engines, however, often lack any direct relationship with parties responsible for posting allegedly infringing materials. Recognizing these distinctions is essential to properly analyzing the application of the DMCA safe harbor provisions.

In order to claim protection under the DMCA’s safe harbor

¹³ 17 U.S.C. § 512(c)(1).

¹⁴ 17 U.S.C. § 512(k)(1).

¹⁵ Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 303–04 (2002).

¹⁶ 17 U.S.C. § 512(a)–(d).

provision, content hosts must meet at least three requirements.¹⁷ First, the service provider must have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.”¹⁸ Second, the service provider must have informed “subscribers and account holders of the service provider's system or network” of such policy.¹⁹ Third, such policy must accommodate and not interfere with “standard technical measures.”²⁰ Once these initial eligibility requirements are fulfilled, service providers must then look to the subsections applicable to their particular functions for additional requirements.

2. Counter Notification Procedures

The DMCA safe harbor provisions also contain a detailed set of counter-notification procedures.²¹ Section 512(g)(1) limits liability to any party based on the service providers' “good faith” removal of “material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.”²² Section 512(g)(2) provides an exception to this general limitation by requiring service providers to follow counter-notification procedures in order to benefit from a limitation of their liability resulting from removal of materials. Under this section, a service provider can still be held liable for removal of “material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider” unless the service provider fulfills three requirements.²³ First, the service provider must take “reasonable steps promptly to notify the subscriber that it has removed or disabled access to the

¹⁷ 17 U.S.C. § 512(c)(1)(A)–(C).

¹⁸ 17 U.S.C. § 512(i)(1)(A).

¹⁹ *Id.*

²⁰ 17 U.S.C. § 512(i)(1)(B).

²¹ *See* 17 U.S.C. § 512(g)(2).

²² 17 U.S.C. § 512(g)(1).

²³ 17 U.S.C. § 512(g)(2).

material.”²⁴ Second, upon receipt of a counter-notification from the subscriber, the service provider must provide the original complainant with a copy of the counter-notification and a warning that it will replace the material in ten business days.²⁵ Finally, the service provider must replace the material, within ten to fourteen days after receipt of the counter-notification, unless the original complainant notifies the service provider that it has filed “an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.”²⁶

Unfortunately, the DMCA provides few explicit protections for content creators or users. The only key provision protecting users is 17 U.S.C. § 512(f), which holds a copyright owner liable for knowingly misrepresenting an infringement claim. Accordingly, the DMCA states that “[a]ny person who knowingly materially misrepresents under this section—that that material or activity is infringing... shall be liable for any damages.”²⁷

C. Fair Use Doctrine

“Fair use” is a flexible doctrine that allows for the use of copyrighted works without permission or payment in certain, socially beneficial instances. The Copyright Act of 1976 (“Copyright Act”) does not list types of works that qualify as fair use; rather, it provides a framework which courts apply to the facts of a particular case.²⁸ First, a court will consider whether the work at issue falls within one of the specified uses, such as criticism, comment, news reporting, or teaching; however, this consideration is not determinative.²⁹ Essentially, a favored use may not qualify as fair use and a use outside the aforementioned categories may nevertheless be fair use. Next, courts are required to consider four factors: (1) the purpose and character of the use, (2) the nature of the

²⁴ 17 U.S.C. § 512(g)(2)(A).

²⁵ 17 U.S.C. § 512(g)(2)(B).

²⁶ 17 U.S.C. § 512(g)(2)(C).

²⁷ 17 U.S.C. § 512(f)(1).

²⁸ 17 U.S.C. § 107

²⁹ 17 U.S.C. § 107(a).

copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁰

Fair use is a notoriously challenging doctrine to apply because the Copyright Act provides little guidance on what weight to give the various factors. A leading case, *Campbell v. Acuff-Rose Music*, shows how fact-specific the analysis can be while determining whether 2Live Crew's rap parody version of Roy Orbison's song "Pretty Woman" constituted fair use.³¹ The U.S. District Court for the Middle District of Tennessee granted summary judgment for the rap group based on the unique comedic character of the work and the quantity taken from the original song.³² On appeal, however, the Court of Appeals for the Sixth Circuit rejected the rap group's fair use defense based on the parody's commercial nature and the quantity taken from the original song.³³ Ultimately, the Supreme Court of the United States reversed and remanded for a more nuanced analysis.³⁴ The Court found that a parody must borrow from an original work in order to provide commentary and that the amount borrowed in this case was no more than necessary.³⁵ Because fair use is so fact-specific, it can be difficult for parties to decide whether a potential use is considered fair use without litigation.

II. CASE LAW

A. *Leading up to Lenz*

Several cases illustrate how courts have subsequently treated §512 of the DMCA. These cases help elucidate the holding in *Lenz v. Universal*.

³⁰ *Id.*

³¹ *See Campbell v. Acuff-Rose Music*, 510 US 569 (1994).

³² *See Campbell v. Acuff-Rose Music*, 754 F. Supp. 1150 (M.D. Tenn 1991).

³³ *See Campbell v. Acuff-Rose Music*, 972 F.2d 1429 (6th Cir. 1992).

³⁴ *See Campbell v. Acuff-Rose Music*, 510 US 569 (1994).

³⁵ *Id.*

1. *Online Policy Group v. Diebold*

In *Online Policy Group v. Diebold*,³⁶ the U.S. District Court of the Northern District of California held that the copyright holder, Diebold, Inc., had violated the DMCA by sending a false takedown notification.³⁷ Diebold manufactured electronic voting machines. Prior to this suit, internal company emails expressing concerns about security issues with the voting machines were leaked and posted on the internet.³⁸ Subsequently, an online newspaper used the emails in an article criticizing Diebold.³⁹ Diebold issued a takedown notice to the online newspaper’s ISP, Online Policy Group (“OPG”). In response, OPG sued Diebold for knowingly misrepresenting a copyright infringement claim.⁴⁰ Diebold never produced specific emails that contained copyrighted content and even admitted that some emails were publishable under fair use.⁴¹ Accordingly, the court held that Diebold had knowingly misrepresented infringing activity by sending the takedown notification. In its holding, the court examined the meaning of a “knowing misrepresentation” under §512(f): “‘knowing means that a party actually knew [or] should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations.’”⁴² Since some emails were “clearly subject to the fair use exception,” and Diebold had admitted this, it was simple for the court to conclude that Diebold knew it was misrepresenting their infringement claim.⁴³

³⁶ *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal 2004).

³⁷ *Id.* at 1203.

³⁸ *Id.* at 1197.

³⁹ *Id.* at 1197–98.

⁴⁰ *Id.* at 1198.

⁴¹ *Online*, 337 F. Supp. 2d at 1203.

⁴² *Id.* at 1204.

⁴³ *Id.*

2. *Rossi v. Motion Picture Association of America*

*Rossi v. Motion Picture Association of America*⁴⁴ was the first case that directly addressed the nebulous “good faith belief” language in the DMCA. In affirming the U.S. District Court for the District of Hawaii’s grant of summary judgment for the copyright owner, the Ninth Circuit held that only a subjective standard, not an objective reasonableness standard, is required to determine whether an alleged copyright owner sufficiently examined whether issuing a takedown notice is appropriate.⁴⁵ In this case, Michael Rossi’s ISP, responding to a takedown notification from the Motion Picture Association of America (“MPAA”), shut down Rossi’s website.⁴⁶ The MPAA believed that the site was distributing copyrighted movies illegally because the site provided links that teased viewers into thinking that they could view copyrighted material.⁴⁷ However, no movies were actually available to view. Rossi argued that the MPAA “did not have sufficient information to form a good faith belief.”⁴⁸ More specifically, he asserted that the MPAA could not have formed a good faith belief that his website was infringing copyrighted works without clicking on and accessing the suspicious links.⁴⁹ Good faith belief, Rossi argued, should include a reasonable investigation of the website.⁵⁰

The court held that the MPAA only needed to meet a subjective standard before sending its takedown notification for several reasons.⁵¹ First, it determined, federal statutes use subjective good faith and objective reasonableness as distinct standards. Congress would not have written “good faith” in the statute if it had meant “reasonable belief.”⁵² Second, the liability section of the DMCA, §512(f), states that damages may be imposed only if the copyright holder knowingly and materially misrepresents activities

⁴⁴ *Rossi v. Motion Picture of Ass’n of Am., Inc.*, 391 F. 3d 1000 (9th Cir. 2004).

⁴⁵ *Id.* at 1007.

⁴⁶ *Id.* at 1001–02.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1002.

⁴⁹ *Rossi*, 391 F. 3d at 1003.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1004.

cited in the takedown notification.⁵³ Knowing misrepresentation was incompatible with Rossi’s suggested reasonableness standard; a belief could be unreasonable without being a knowing misrepresentation that triggered liability under §512(f).⁵⁴ Such a result would render the good faith belief requirement in §512(c) meaningless. Third, the court held that it would be unfair to make copyright owners liable simply because an unknowing mistake is made.⁵⁵ Applying the subjective good faith standard, the Ninth Circuit examined information on Rossi’s website and the MPAA’s subsequent actions. Ultimately, the court ruled that Rossi failed to raise a genuine issue of material fact regarding MPAA’s violation of the DMCA.⁵⁶ The *Rossi* opinion concludes with a reminder that Congress intended to protect internet users accused of infringement from “subjectively improper actions by copyright holders.”⁵⁷

3. *Dudnikov v. MGA Entertainment*

In *Dudnikov v. MGA Entertainment*, the U.S. District Court of Colorado granted summary judgement for the copyright holder MGA Entertainment (“MGA”) on the plaintiff’s knowing misrepresentation claim.⁵⁸ The plaintiffs, Karen Dudnikov and Michael Meadors, were selling fleece hats on eBay bearing a copyright-protected applique of a ‘Bratz’ character.⁵⁹ MGA held copyright and trademark rights in the Bratz characters and, on discovering the plaintiff’s eBay auction, sent a notification to eBay to have the sale stopped.⁶⁰ The plaintiffs sued, claiming MGA ignored “copyright law in an attempt to control the on-line auction

⁵³ 17 U.S.C. § 512(f) (2006) (“Any person who knowingly materially misrepresents under this section that materiality or activity is infringing...shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider.”).

⁵⁴ *Rossi*, 391 F.3d at 1004–05.

⁵⁵ *Id.* at 1005.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Dudnikov v. MGA Entm’t, Inc.*, 410 F. Supp. 2d 1010 (D. Colo. 2005).

⁵⁹ *Id.* at 1010.

⁶⁰ *Id.*

market.”⁶¹ They further asserted that they were entitled by fair use and the first-sale-doctrine to sell the fleece hats.⁶²

The court applied the subjective good-faith standard established in *Rossi*,⁶³ holding that “the Rossi decision [is] on point with regard to the salient issue in this case: whether MGA was entitled, based on its good-faith belief that infringement was occurring, to terminate the eBay auction of plaintiff’s fleece hat.”⁶⁴ The court ultimately found that MGA acted with good faith and was entitled to have the sale stopped.⁶⁵ Upon, the plaintiffs’ allegation of perjury, the court imposed the burden of proof on the plaintiffs to support their claim with “substantial evidence”⁶⁶ Subsequently, the plaintiffs were unable to raise a genuine issue of fact and lost on summary judgment.⁶⁷

B. *Lenz v. Universal*

In *Lenz v. Universal*, plaintiff Stephanie Lenz contended that her use of Prince’s song “Let’s Go Crazy” constituted fair use and that copyright holders cannot make a good faith infringement claim, as required by the DMCA, “without considering all authorized uses of the material, including fair use.”⁶⁸ *Lenz* further declared that copyright holders should make a fact-specific determination before filing takedown notices.⁶⁹ In opposition, Universal argued that it should not have to evaluate fair use before submitting a takedown notice because it would “lose the ability to respond rapidly to potential infringements.”⁷⁰ Universal additionally claimed that “fair use is merely an excused infringement to a copyright rather than a use authorized by a copyright owner or by law.”⁷¹

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Dudnikov*, 410 F. Supp. 2d at 1012.

⁶⁴ *Id.* at 1017.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1012.

⁶⁷ *Dudnikov*, 410 F. Supp. 2d at 1013.

⁶⁸ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008).

⁶⁹ *Id.* at 1154–55.

⁷⁰ *Id.* at 1155.

⁷¹ *Id.* at 1154.

1. Case Facts

In 2007, Stephanie Lenz posted a twenty-nine second clip of her children dancing to Prince’s song on YouTube.⁷² In response, Universal, the copyright holder for “Let’s Go Crazy”, sent YouTube a takedown notice, allegedly in compliance with the DMCA requirements.⁷³ Shortly thereafter, Lenz sent YouTube a counter-notification, claiming fair use of the original work and requesting the video be reposted.⁷⁴ Six weeks later, YouTube reposted Lenz’s video.⁷⁵ Still dissatisfied with the takedown of her home video, Lenz sued Universal for misrepresentation under the DMCA and sought a declaration from the U.S. District Court for the Northern District of California that her use of the copyrighted song was non-infringing.⁷⁶ According to the DMCA, the copyright holder must consider whether use of the material was allowed by the copyright owner or the law.⁷⁷ Before YouTube removed Lenz’s video, Universal released a statement regarding their intention to remove all user-generated content involving Prince from the internet as a matter of principle.⁷⁸ Based on Universal’s statements, Lenz argued that Universal was issuing takedown notices in bad faith, as they were attempting to remove all Prince-related content rather than considering whether each posting violated copyright law. Had Universal truly considered whether Lenz’s video infringed on its copyright, Lenz contended that Universal would have clearly noted that her video was a fair use. Universal expressed concerns over conducting an intensive investigation when determining whether a potentially infringing use falls under the general “fair use” doctrine.

2. *Lenz* Court’s Reasoning

⁷² *Id.* at 1152.

⁷³ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 17 U.S.C. § 512(c)(3)(A)(v).

⁷⁸ *Lenz*, 572 F. Supp. 2d at 1153.

Both parties' main arguments can be summarized neatly. Universal contended that copyright owners cannot be required to evaluate the question of fair use prior to sending a takedown notice because fair use is merely an excused infringement of a copyright rather than a use authorized by the owner or by law. In opposition, Lenz argued that fair use is an authorized use of copyrighted material, noting that the fair use doctrine itself is an express component of copyright law. In essence, Lenz asserted that copyright owners cannot represent in good faith that material infringes a copyright without considering all authorized uses of the material, including fair use.

The parties did not dispute that Lenz used copyrighted material in her video or whether Universal is the true owner of Prince's music. Rather, the question in this case was whether the DMCA requires a copyright owner to consider the fair use doctrine in formulating a good faith belief that use of the material in the manner complained of is not "authorized" by the copyright owner, its agent, or the law.⁷⁹ If so, copyright holders are required to weigh the four fair use factors, or else they are liable for misrepresentation.

On appeal, the Ninth Circuit affirmed the District Court's ruling that copyright owners must consider fair use before submitting DMCA takedown notices.⁸⁰ In formulating their ruling, the court used statutory interpretation to determine the scope of what is considered "authorized." The Copyright Act itself does not define the term "authorize" or "unauthorized." However, Black's Law Dictionary defines "authorize" as "empowers; to formally approve."⁸¹ As such, the court determined that "[b]ecause [the Copyright Act] both 'empowers' and 'formally approves' the use of copyrighted material if the use constitutes fair use, fair use is considered to be 'authorized by law' within the meaning of §512(c)" of the DMCA.⁸² The court held that the DMCA already required copyright holders to make an initial review of the potentially infringing material prior to sending a takedown notice, and that it would be impossible to meet any of the requirements of §512(c)

⁷⁹ 17 U.S.C.A. § 512(c)(3)(A)(v).

⁸⁰ *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1129 (9th Cir. 2015).

⁸¹ *Authorize*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁸² *Lenz*, 801 F.3d at 1132.

without doing so.⁸³ Considering the applicability of the fair use doctrine is a part of that initial review.⁸⁴ In order to comply with the DMCA, a copyright holder's consideration of fair use need not be searching or intensive.⁸⁵ The court stated that it was mindful of the work this presents, but that work "does not excuse a failure to comply with the procedures outlined by Congress."⁸⁶ Moreover, the court noted that the implementation of computer algorithms to notify copyright owners of potential infringements online appears to be a valid and good-faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use.⁸⁷ Computer programs may be relied upon when they sufficiently meet the following standards: "(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matched the audio track of that same copyrighted work; or (3) nearly the entirety....is comprised of a single copyrighted work."⁸⁸

III. LENZ'S IMPACT AND AMENDING THE DMCA

A. A Step in the Right Direction

The DMCA's safe harbor provisions arguably incentivizes overzealous removal of user-generated content by service providers. Under the notice and takedown procedures, if a service provider receives notification from a copyright owner alleging copyright infringement, it can initially take one of two actions. The provider can elect to remove or disable access to the allegedly infringing content. If it does so, it is *protected* from contributory liability by the safe harbor provisions.⁸⁹ Alternatively, a service provider can

⁸³ *Id.* at 1135.

⁸⁴ *Id.*

⁸⁵ *See* Rossi v. Motion Picture Ass'n of Am. Inc., 391 F.3d 1000, 1004 (9th Cir. 2004).

⁸⁶ Lenz v. Universal Music Corp., 801 F.3d 1126, 1135 (9th Cir. 2015).

⁸⁷ *Id.*

⁸⁸ *Id.* (citing *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/fr/pages/fair-use-principles-user-generated-video-content> (last visited April 28, 2017)).

⁸⁹ 17 U.S.C. § 512(g)(1).

refuse to remove or disable access, in which case it is *unprotected* by the safe harbor provisions and opens itself up to potential secondary liability. In weighing the merits of a takedown notice complaint and determining whether to provide an alleged copyright holder with relief, the service provider acts in a similar capacity to that of a judiciary; however, unlike the courts, service providers have a direct financial incentive tilting them in favor of removing the allegedly infringing content.

The *Lenz* opinion does not change the safe harbor procedures for service providers or host websites that receive takedown notices; however, it may affect the quality and volume of notices received, depending on how copyright holders and their agents adjust. *Lenz v. Universal* effectively put copyright holders on notice to exert a good faith effort in examining whether a potentially infringing work legally uses the original work, and this good faith effort must include a fair use analysis.

The fair use doctrine gives little guidance about what weight to give the four factors laid out in the Copyright Act. Because the doctrine is so fact-specific, it is understandably difficult for copyright owners with little to no legal background to meet this expectation. Limited understanding of case law may impact the volume of notices ISPs and host websites receive. For instance, the penalties associated with misrepresentation may cause copyright owners to err on the side of caution and refrain from filing for takedown notices with host websites.⁹⁰ While it is too early to have a clear picture of the impact, *Lenz v. Universal* will likely dissuade frivolous takedown notices for the time being.

B. Standard-Form Proposal

In retrospect, it is easy to see how Universal could believe that Lenz had infringed their copyrighted work. The title of Lenz's video, "'Let's Go Crazy' #1", is nearly identical to the title of Prince's song. However, large corporations, like Universal, have extensive resources that should afford them at least a cursory investigation into potential infringement of their copyright portfolio. If Universal was compelled to use an objective good faith standard,

⁹⁰ See 17 U.S.C. § 512(f).

it would have quickly realized that a short video clip of a toddler dancing to faint background music of Prince's song does not constitute copyright infringement. A subjective good faith standard would make it easier for Universal and other large media-producing corporations to issue takedown notices without pausing to consider the content at issue.

When a copyright holder alleges infringement, courts have applied the fair use doctrine as a guideline to decide permissible uses.⁹¹ Likewise, Congress can integrate into the DMCA a standard form for use by all internet service providers and user-generated content websites, which details the fair use doctrine factors and explicitly requires those who allege copyright infringement to establish sufficient grounds based on the facts of their individual case for filing a takedown notice. A standard form has the potential to assist copyright owners in separating fair use of copyrighted works from obvious copyright violations. Moreover, such a framework would further curb the number of frivolous takedown notices, protect content creators from having their work taken down, and protect parties ranging from independent copyright owners who lack legal aid to large corporations from being sued for misrepresentation when filing for a DMCA takedown notice. A sample form is provided on the following page.

⁹¹ See generally *Sony Corp. of Am. v. Universal City Studios*, 464 US 417 (1984); see also *Harper & Row Publishers v. Nation Ent.*, 471 US 539 (1983).

Contact Information

Name:
Title:
Company (If applicable):

Address:
City, State, Zip Code:
Phone/ Email:

Copyrighted Work:

Relation to Copyrighted Work:
Description of Copyrighted Work:

Upload Attachment(s)

Infringing Content:

Description of Infringing Content:

Upload Attachment(s)

Fair Use Analysis

Pursuant to 17 U.S. Code § 107, the following factors must be considered when determining whether use of a copyrighted work constitutes a fair use. Please address these factors in the space provided.

(1) The purpose and character of the use

(i.e. whether the infringing use is of a commercial nature or is for nonprofit purposes)

(2) The nature of the copyrighted work

(i.e. whether the infringing use is informational or entertaining)

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole

(4) The effect of the use upon the potential market for or value of the copyrighted work

Certification

✓ Under penalty of perjury I certify that the information contained in this notification is accurate, and I have the authority to act on behalf of the owner of the copyright(s) involved.

(Signature/ Date)

CONCLUSION

Lenz v. Universal built upon precedent by effectively putting copyright holders on notice that in order to exert a good faith effort in examining whether a potentially infringing work legally uses the original work, a fair use analysis must be conducted. While *Lenz* represents a step in the right direction, opportunities for clarification exist that have the potential to benefit copyright holders as well as user-generated content creators who make use of copyrighted material. One such opportunity is to amend the DMCA to include a standard form that would be adopted by all ISPs and host websites. This simple amendment would provide clarity to all parties and help further curb the number of frivolous takedown notices.

PRACTICE POINTERS

- Copyright owners and their agents must engage in a fair use analysis before submitting a takedown notice.
- Computer algorithms used to notify copyright owners of potential infringements online are a valid and good-faith mechanism for meeting the DMCA’s requirements. Such programs may be relied upon when they sufficiently meet the following standards: “(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matched the audio track of that same copyrighted work; or (3) nearly the entirety....is comprised of a single copyrighted work.”⁹²
- *Lenz. v. Universal* does not change the safe harbor procedures for service providers or host websites that receive takedown notices.

⁹² *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1129 (9th Cir. 2015) (citing *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/fr/pages/fair-use-principles-user-generated-video-content> (last visited April 28, 2017)).