

## DMCA's § 512(f) Remains Toothless in Light of *Lenz* Decision



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WE LIVE IN A TIME WHEN ANYONE with a smartphone and a social media app can become a content creator. Frequently, these content creators (such as video artists, animators, and musicians who post their content on the Internet) utilize pre-existing copyrighted works of corporate content rightsholders (such as record labels and movie studios), invoking the doctrine of fair use to justify what would otherwise be misappropriation in violation of copyright law.<sup>1</sup> For example, a video artist may edit together existing footage owned by a film studio in order to create a parody that is protected by the fair use doctrine. Or an appropriation artist may use Photoshop to combine elements of images owned by a company to create a work of criticism that is protected by the fair use doctrine.

These content creators often complain that corporate content rightsholders misuse and abuse the takedown provisions of the Digital Millennium Copyright Act (DMCA) by issuing meritless takedowns in order to remove content that they don't like from the Internet, effectively silencing the content creators. These kinds of takedowns have become increasingly problematic in recent years. Moreover, many sites like YouTube now offer content creators opportunities to monetize content, but the DMCA takedown process provides corporate content rightsholders a quick and easy way to shut off monetization (or, alternatively, to divert the proceeds from monetized content to themselves). As a result, there has been an increasing need for clarity regarding 17 U.S.C. Section 512(f), the part of the statute that prohibits abuse of the DMCA takedown process.<sup>2</sup>

The 2004 Ninth Circuit case, *Rossi v. Motion Picture Association of America*, touched on this matter, providing a rough framework for

how courts approach Section 512(f) claims, but many were hoping that a subsequent Ninth Circuit case, *Lenz v. Universal Music Corp. et al.*, would provide some real clarity on the matter.<sup>3</sup> Unfortunately, the recent decision in *Lenz* had little to offer by way of clarity, and in some ways, may have made it even more difficult for content creators who have had their content wrongly removed from the Internet to prevail in Section 512(f) claims.

### DMCA TAKEDOWN PROCEDURES

The DMCA provides a simple mechanism for a copyright holder to request that a website remove content that makes use of the copyright holder's work without authorization.<sup>4</sup> In such instances, the copyright holder may submit to the website a takedown notification that includes a statement that the copyright holder has a "good faith belief" that the allegedly infringing use is "not authorized by the copyright owner, its agent, or the law," and the website will then take down the allegedly infringing content.<sup>5</sup> If a person or entity abuses this DMCA takedown process, such conduct may constitute a violation of Section 512(f), which prohibits knowingly materially misrepresenting that the material or activity is infringing.<sup>6</sup>

While in theory, Section 512(f) provides a tool to stop people and entities from issuing frivolous DMCA takedowns (and even provides for costs and attorneys' fees to wronged parties), in reality, the language of the statute is too vague to be practical. What constitutes a "good faith belief" that something is infringing? What does it mean to "knowingly materially misrepresent" something, and how can it be proven?

### ROSSI PROVIDED MINIMAL GUIDANCE

In *Rossi*, the Ninth Circuit attempted to answer the question of what constitutes a "good faith belief" that something is infringing. In that case, the Motion Picture Association of America (MPAA) came across Rossi's website, which appeared to offer full-length, downloadable versions of the MPAA's copyrighted movies; accordingly, it issued a DMCA takedown notification to Rossi's ISP to have the website taken down.<sup>7</sup> In actuality, Rossi's website did not allow users to download movies.<sup>8</sup> Rossi contended that the MPAA did not even attempt to download any movies from his website, so the MPAA did not have sufficient information to form a "good faith belief" that Rossi's website was illegally infringing the MPAA's copyrights.<sup>9</sup>

The court held that the MPAA did have a "good faith belief" that the website was infringing, and therefore its DMCA takedown notification was not unreasonable.<sup>10</sup> The court stated "the 'good faith belief' requirement [of a DMCA takedown notification] encompasses a subjective, rather than an objective, standard."<sup>11</sup> A copyright owner

could subjectively but mistakenly form a "good faith belief" that infringement was occurring, and that would be sufficient to support a DMCA takedown, even if the copyright owner acted unreasonably in making the mistake.<sup>12</sup>

In effect, *Rossi* made it more difficult and confusing for content creators to pursue claims under Section 512(f); it established that the standard to be applied is a *subjective* standard. In order for a copyright owner to be in violation of Section 512(f), there needs to exist "a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner"—a difficult task, as it seems to require an examination and understanding of the copyright owner's thought process.<sup>13</sup>

### THE LONG-AWAITED LENZ OPINION

The facts in *Lenz* were straightforward: Stephanie Lenz posted to YouTube a 29-second video of her children dancing to the Prince song "Let's Go Crazy."<sup>14</sup> Universal, which was responsible for enforcing Prince's copyright in the song, came across Lenz's video on YouTube and applied to it Universal's general guidelines of review—guidelines that *did not* explicitly include consideration of the fair use doctrine.<sup>15</sup> Based on the determination that Prince's composition was "very much the focus of the video," Universal issued a DMCA takedown notification and had the video removed from YouTube.<sup>16</sup> Lenz filed suit against Universal, alleging that Universal knowingly materially misrepresented that her video was infringing, in violation of Section 512(f).<sup>17</sup> She claimed that because Universal had not even considered the doctrine of fair use in its review of her video, it could not have possibly formed a "good faith belief" that the video was infringing, and thus its issuance of the takedown was an abuse of the DMCA.<sup>18</sup>

In its recent decision, the Ninth Circuit held "a copyright holder must consider the existence of fair use before sending a [DMCA] takedown notification."<sup>19</sup> As a preliminary matter, the court found that fair use is more than just an affirmative defense: "fair use is not just excused by the law, it is wholly authorized by the law."<sup>20</sup> So if a copyright owner is claiming in a DMCA takedown notification that it has a good faith belief that an allegedly infringing use is not authorized by the copyright owner, its agent, or the law, considering whether or not the allegedly infringing use is a fair use is a critical aspect of forming that requisite good faith belief.<sup>21</sup>

Although the *Lenz* opinion scolds copyright holders who "shirk" their duties to consider fair use before issuing takedown notices, *Lenz* doesn't provide much more guidance regarding Section 512(f) liability than *Rossi* did.<sup>22</sup> In fact, the *Lenz* opinion ultimately mostly emphasizes *Rossi*: "[a] copyright holder's consideration of fair use need not be searching or intensive. We follow *Rossi*'s guidance that formation of a subjective good faith belief does not require investigation of the allegedly infringing content."<sup>23</sup> The *Lenz* opinion says that if a copyright holder "forms a subjective *good faith* belief the allegedly infringing material does not constitute fair use, we are in no position

to dispute the copyright holder's belief even if we would have reached the opposite conclusion."<sup>24</sup>

### THE DIFFICULTY WITH LENZ

The difficulty with *Lenz* is that the court unequivocally states that a copyright holder must "consider" the doctrine of fair use before issuing a DMCA takedown, but then doesn't set a minimum threshold for what constitutes "consideration."<sup>25</sup> In fact, in *Lenz*, it was *undisputed* that a consideration of fair use was not part of Universal's video review guidelines, and the Universal employee who reviewed the video stated that he caused the DMCA takedown notice to be issued simply because the Prince song at issue "was very much the focus of the video."<sup>26</sup> In the face of these seemingly problematic facts, Universal nonetheless contended that "its procedures, while not formally labeled consideration of fair use, were tantamount to such consideration."<sup>27</sup> And, somewhat surprisingly, the court accepted that argument, concluding that a jury would need to "determine whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof."<sup>28</sup>

Notably, the partially dissenting opinion by Judge Milan D. Smith highlights this problem, pointing out that there is no material dispute about whether or not Universal considered fair use—it didn't consider fair use.<sup>29</sup> So it may be held liable for knowingly misrepresenting that the video was infringing if it should be determined that the video is a non-infringing fair use.<sup>30</sup> In Judge Smith's view, the sole disputed issue in this case boils down to a question of whether or not the video was a fair use.<sup>31</sup>

### CONCLUSION

Ultimately, rather than providing further clarity regarding the standards for Section 512(f) liability, *Lenz* mostly underscores the low bar set by the court in *Rossi* for corporate content rightsholders intent on silencing content creators via meritless DMCA takedowns; under both *Rossi* and *Lenz*, it's far too easy for corporate content rightsholders to simply claim that they considered fair use before issuing a takedown, but then claim that they came to the good faith conclusion (no matter how far-fetched or incorrect) that fair use was not applicable. Moreover, under both *Rossi* and *Lenz*, there appears to be no minimum standard for what constitutes "consideration" of fair use.

Under such circumstances, it could be nearly impossible for content creators who have had their content wrongfully taken down to prevail in Section 512(f) claims. It seems that the only way to prevail would be to somehow magically get inside the heads of corporate content rightsholders to prove actual knowledge of misrepresentations. Even if this could be achieved using depositions and interrogatories, such extensive discovery may be prohibitively expensive for most content creator plaintiffs.<sup>32</sup>

In the face of these obstacles, Section 512(f) continues to be a rather feeble prohibition of DMCA abuse. Content creators may just

need to cross their fingers and hope that a future court decision (or statutory revision) will give Section 512(f) some teeth. \*\*

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#### Endnotes

1. See 17 U.S.C. §§ 107, 501 (2013). The fair use doctrine calls for a distinct four-factor analysis that looks at (i) the purpose and character of the secondary use; (ii) the nature of the original copyrighted work; (iii) the amount of the original work used in relation to the original copyrighted work as a whole; and (iv) the effect of the secondary use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.
2. 17 U.S.C. § 512(f).
3. See *Rossi v. Motion Picture Association of America*, 391 F.3d 1000, 1002 (9th Cir. 2004).
4. 17 U.S.C. § 512(c).
5. *Id.* § 512(c)(3)(A)(v).
6. *Id.* § 512(f).
7. *Rossi* at 1002.
8. *Id.* at 1003.
9. *Id.*
10. *Id.* at 1001.
11. *Id.* at 1004 (“When enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement”).
12. *Id.* at 1005.
13. *Id.*
14. *Lenz v. Universal Music Corp. et al.*, Nos. 13-16106, 13-16107, WLS315388, at \*1 (9th Cir. 2015).
15. *Id.* at \*1.
16. *Id.* at \*2.
17. *Id.*
18. *Id.* at \*7.
19. *Id.* at \*6.
20. *Id.* at \*4. Note that this discussion of the nature and characterization of fair use is one of the more interesting aspects of the *Lenz* opinion, as it discusses the “misnomer” of fair use being categorized as a mere affirmative defense. See *id.* at \*5. “Even if, as Universal urges, fair use is classified as an ‘affirmative defense,’ we hold—for the purposes of the DMCA—fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses.” *Id.*
21. See *id.* at \*11.
22. *Id.* at \*11.
23. *Id.* at \*7.
24. *Id.*
25. *Id.*
26. *Id.* at \*2.
27. *Id.* at \*7.
28. *Id.*
29. See *id.* at \*11.
30. *Id.*
31. See *id.* at \*14.
32. In fact, presumably, one of the main reasons the *Lenz* litigation was able to go on for as long as it did was that Stephanie Lenz was able to obtain pro bono counsel invested in the outcome of the case for policy reasons. *Id.* at \*2. Most content creator plaintiffs aren't so lucky, and wouldn't be able to afford the costs and legal fees associated with such a lawsuit.