

No. 16-

IN THE
Supreme Court of the United States

STEPHANIE LENZ,

Petitioner,

v.

UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC
PUBLISHING, INC. AND UNIVERSAL MUSIC
PUBLISHING GROUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the affirmation of good faith belief that a given use of material use is not authorized “by the copyright owner, its agent, or the law,” required under Section 512(c) of the Digital Millennium Copyright Act (“DMCA”), may be purely subjective and, therefore, that an unreasonable belief—such as a belief formed without consideration of the statutory fair use factors—will not subject the sender of a takedown notice to liability under Section 512(f) of the DMCA?

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PETITION FOR WRIT OF CERTIORARI

The digital age has fostered an explosion of speech and creativity, much of it from people that never before had access to a megaphone, let alone a digital megaphone that can reach millions. The holding below renders that creativity uniquely vulnerable to extra-judicial censorship.

The crux of the problem is this: most online expression—political commentary, artistic works, scientific research, music, even gossip—depends on intermediaries (like YouTube or Facebook) to reach an audience. Those service providers rely, in turn, on the Digital Millennium Copyright Act (“DMCA”) safe harbors, 17 U.S.C. § 512(a)-(d), which grant those intermediaries immunity from secondary copyright liability if they expeditiously remove material that a private party asserts infringes copyright (via a “takedown” notice) and terminate the accounts of “repeat infringers.” That immunity is a powerful incentive to take offline any content alleged to be infringing, without further investigation, and to shut down the accounts of users who are repeatedly accused of infringement.

Recognizing the risks this “notice and takedown” regime could pose for lawful speech, Congress required copyright holders to allege infringement by specifically attesting that they have formed a “good faith belief” that the use in question is not authorized “by the owner, its agent or the law.” 17 U.S.C. § 512(c). And Congress created a cause of action, Section 512(f), which allows those injured by false allegations to hold their accusers accountable.

The Ninth Circuit has rendered those safeguards all but meaningless. It held that a copyright holder cannot be held liable for causing the takedown of lawful content as long as it subjectively believes the material is infringing—no matter how unreasonable that belief may be.

Left undisturbed, the ruling in this case gives a free pass to the censorship of online speech, particularly fair uses. An author could cause a hosting service to take a critical review offline, without fear of consequence, if she held the mistaken view that the reviewer's use of a quote was unlawful. A political candidate who thought using an excerpt of her speech in a series of videos was necessarily infringing could flood her opponent's YouTube channel with takedown notices and cause it to be taken offline altogether in the middle of an election season, again without consequence. As the dissent put it:

The majority's unfortunate interpretation . . . eviscerates § 512(f) and leaves it toothless against frivolous takedown notices. And, in an era when a significant proportion of media distribution and consumption takes place on third-party safe harbors such as YouTube, if a creative work can be taken down without meaningfully considering fair use, *then the viability of the concept of fair use itself is in jeopardy*. Such a construction of § 512(f) cannot comport with the intention of Congress.

Pet. App. 30-31. (footnote omitted) (emphasis added). Indeed, under this reading, even the most specious and bizarre belief—e.g., a belief that copyright has been infringed based on information provided by a fortune

teller—could pass muster, as long as that belief is sincerely held.

Abuse of the notice and takedown system is well-documented. The decision below effectively eliminates the best means of deterring such abuse and deprives victims of their only meaningful recourse. What is worse, the decision puts the DMCA in conflict with the First Amendment. As the Court has held, fair use is essential to maintaining the balance between copyright and free speech. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (fair use is a “built-in First Amendment accommodation[.]”). The decision below undermines that balance by allowing private parties to do what no court could: Silence lawful expression, temporarily or permanently, based on nothing more than a legally baseless allegation. Online fair uses become second-class speech that, unlike offline fair uses, can be easily restrained without meaningful remedy.

This is not what Congress intended. Given the importance of the safe harbors to Internet speech, it is equally important that courts correctly interpret the statutory protections Congress put in place to protect that speech. Petitioner asks the Court to grant certiorari to determine, once and for all, whether or not the DMCA includes meaningful protections for online fair uses—a vast and growing area of creativity and expression.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-31) is published at 815 F.3d 1145. The opinion of the United States District Court for the Northern District of California (Pet. App. 32-54) is published at 2013 WL 271673.

JURISDICTION

The amended judgment of the court of appeals was entered on March 17, 2016. On May 20, 2016 Justice Anthony Kennedy extended the time to file this Petition until August 12, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

“Any person who knowingly materially misrepresents” under Section 512 of the Digital Millennium Copyright Act “that material or activity is infringing” can be sued for damages. 17 U.S.C. § 512(f). To represent infringement under Section 512, a person must make “[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.” *Id* § 512(c)(3)(A)(v).

These and other relevant portions of the Copyright Act, 17 U.S.C. §§ 106, 107 and 512, are reproduced at Pet. App. 55-63.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In 2007, Stephanie Lenz posted a 29-second home video of her two young children dancing in her kitchen to the Prince song *Let's Go Crazy*. Pet. App. 3-4. Universal, acting on Prince's behalf, sent YouTube a notice claiming that hundreds of videos posted on YouTube, including the video posted by Ms. Lenz, infringed copyrights in

Prince's musical compositions. In that notice, Universal stated that it had a good faith belief that the videos were not authorized by Prince, his agent, or the law. Pet. App. 5.

Universal included these videos in its notice based on its general guidelines: “[W]hen a writer is upset or requests that particular videos be removed from YouTube” Universal would “review the video to ensure that the composition was the focus of the video and if it was we then notify YouTube that the video should be removed.” Pet. App. 43. Those guidelines did not mention the doctrine of fair use. 17 U.S.C. § 107; Pet. App. 43.

Consistent with those guidelines, Sean Johnson, the Universal employee tasked with reviewing the videos, “put a video on the list [of videos that Universal would demand that YouTube remove] that embodied a Prince composition in some way if the—there was a significant use of it, of the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video.” Pet. App. 42. Johnson would not include a video on the takedown list if it had only “a second or less of a Prince song, literally a one line, half line of a Prince song,” or if it was shot in a noisy environment like a bar where the song was playing “deep in the background.” Pet. App. 42-43. Johnson made no mention of fair use during his testimony. And Universal admitted that it had not instructed Johnson to consider fair use. Pet. App. 43.

In response, YouTube took down Ms. Lenz's video, thereby retaining the protection of the DMCA safe harbor for Internet hosts, 17 U.S.C. § 512(c). Pet. App. 34; *cf.* *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012). Six weeks later, YouTube restored the video

after Ms. Lenz submitted a counter-notice, following the procedures set forth in the DMCA. Pet. App. 34; 17 U.S.C. § 512(g).

II. PROCEDURAL BACKGROUND

Ms. Lenz sued Universal for falsely representing that her video infringed a Prince copyright. Pet. App. 6; 17 U.S.C. § 512(f). Lenz moved for summary judgment of liability, arguing that Universal’s representation to YouTube that it had a good faith belief that her video was not authorized by the law was necessarily false, because Universal did not consider whether her video was a fair use under 17 U.S.C. § 107. Pet. App. 45. Universal opposed, arguing that it was not required to consider fair use at all. Pet. App. 12. In the alternative, it argued that its consideration of whether *Let’s Go Crazy* was the “focus” of Ms. Lenz’s video was sufficient to form a subjective belief that the video was not a fair use. Pet. App. 16.

The court of appeals agreed with Ms. Lenz that a fair use is a use that is authorized by the law, that the sender of a DMCA takedown notice must consider whether the use in question is a fair use, and that Universal’s representation that Ms. Lenz’s video was not authorized by the law was a representation that Universal had a good faith belief that the video was not a fair use. Pet. App. 14. Nonetheless, the majority held that a jury could find—as a factual matter—that Universal’s procedures were “tantamount” to a consideration of fair use that was “sufficient to form a subjective good faith belief about the video’s fair use or lack thereof.” Pet. App. 16.

The majority rejected Ms. Lenz’s argument that an *unreasonably held* belief cannot be a *good faith* belief, relying on its prior decision in *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004). Pet. App. 15-16. In *Rossi*, the court of appeals had held that “the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard.” *Rossi*, 391 F.3d at 1004.

Judge Milan Smith dissented, concluding that *Rossi* “did not abrogate the statutory requirement that the belief [that a use is not authorized by law] be held in good faith.” Pet. App. 30. The dissent would have held that “a belief in infringement formed consciously without considering fair use is no good-faith belief at all.” *Id.* (citing *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884)). “And to assert in good faith that a use is not fair, a party must consider the statutory elements of fair use set forth in § 107. Merely evaluating whether a use is ‘significant’ is not enough.” *Id.* Accordingly, the dissent would have found Universal liable as a matter of law.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because (I) the proper interpretation of the DMCA’s takedown provisions is a matter of national importance; (II) the decision below contravenes Congress’s intent to prevent abuse of the DMCA notice and takedown system and disturbs the traditional contours of copyright law by rendering online fair use uniquely vulnerable to private censorship; and (III) this case presents an ideal vehicle to consider this matter of national importance.

I. PROPER INTERPRETATION OF THE DMCA NOTICE AND TAKEDOWN PROVISIONS IS AN ISSUE OF NATIONAL IMPORTANCE

Section 512 of the DMCA has been central to the emergence of the Internet as a platform for speech and commerce. Congress realized that establishing clear rules regarding intermediary liability was essential to the development of the Internet as a vehicle for free expression, innovation, and commerce. Accordingly, Congress designed Section 512 “to clarify the liability for copyright infringement of online and Internet service providers . . . [by setting] forth ‘safe harbors’ from liability for ISP’s and OSP’s under clearly defined circumstances, which both encourage responsible behavior and protect important intellectual property rights.” S. Rep. No. 105-190, at 67 (1998) (additional views of Sen. Patrick Leahy, Member, S. Comm. on the Judiciary).

In a nutshell, the statute replaced the murky, judge-made standards that characterize copyright’s secondary liability doctrines with detailed, relatively predictable rules. So long as their activities fall within one of the four safe harbors, service providers may “opt in” to this alternate, more definite, set of rules by meeting specific statutory prerequisites. Copyright owners, for their part, were given an expedited, extra-judicial “notice-and-takedown” procedure for obtaining redress against alleged infringement.

Congress also knew that online intellectual property enforcement should not come at the expense of stifling lawful speech. 144 Cong. Rec. H10618 (daily ed. Oct. 12, 1998) (Rep. Barney Frank stating, “[W]e want to

protect intellectual property rights but not interfere with freedom of expression.”). Service providers have powerful incentives to comply with takedown notices because, as the Internet Association put it: “The cost of failure to comply is too great a risk for Internet companies; it would threaten the very existence of Internet platforms.”¹

Thus, Congress put in place a series of safeguards to help limit and deter abuse of the DMCA’s extrajudicial takedown process. The first was the requirement that a Section 512 takedown notice must include “[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.” 17 U.S.C. § 512(c)(3)(A)(v).

That requirement works in tandem with a second safeguard: Section 512(f), which creates a cause of action for those damaged by false takedown notices:

- (f) Misrepresentations.—Any person who knowingly materially misrepresents under this section—
 - (1) that material or activity is infringing, or
 - (2) that material or activity was removed or disabled by mistake or misidentification,

1. Comments of the Internet Association at 5, In re: Section 512 Study: Notice and Request for Public Comment Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C., <https://internetassociation.org/wp-content/uploads/2016/03/Internet-Association-Comments-on-Section-512-Study-4-1-16.pdf>.

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, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

17 U.S.C. § 512(f). The phrase "misrepresents under this section" includes a misrepresentation that one has formed the good faith belief required under Section 512(c).

Section 512 thus embodies a carefully crafted system that, when properly deployed, gives service providers protection from liability, copyright owners tools to police infringement, and users the ability to challenge the improper use of those tools. Thanks to that system, the Internet has become the most revolutionary platform for the creation and dissemination of speech that the world has ever known. Thousands of companies, big and small, rely on it every day, including interactive platforms like video hosting services and social networking sites that have become vital not only to democratic participation but also to the ability of ordinary users to forge communities, access information instantly, and discuss issues of public and private concern. Political candidates, their supporters, and the journalists who cover them, take full advantage of these platforms to communicate with voters and spread their political message. Citizens themselves join in, able to speak out to more people, in more ways, than ever before.

Indeed, with the help of online service providers like Wikipedia, the Internet Archive, WordPress, Tumblr, Google, YouTube, Twitter, Facebook, and many others, individuals with little technical knowledge or money can today find, create, reproduce, disseminate, and respond to content, interacting with a global audience. In 2015, WordPress.com alone hosted 70 million individual blogs, Tumblr was home to 260 million blogs, and Twitter had 320 million monthly active users.² Many of those individuals use those platforms simply to share their ideas and creative works, while others take advantage of these new platforms to grow new businesses. The result has been an explosion of new economic growth.³ And the service providers that enable (and benefit from) that growth agree: the DMCA safe harbors are essential to their very existence.⁴

2. See Brief of *Amici Curiae* Automattic, Inc. *et al.* Supporting Appellee/Cross-Appellant’s Petition for Rehearing *En Banc* or Panel Rehearing at 1-2, *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (No. 13-16106).

3. See generally Michael Masnick, *et al.*, *The Sky is Rising 2014 ed.*, Computer & Communications Industry Association (Oct. 23, 2014), <https://www.cciainet.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf>.

4. See, *e.g.*, Comments of the Internet Association at 1-2, In re: Section 512 Study: Notice and Request for Public Comment Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C. (“Internet Association member companies depend on the certainty and clarity in Section 512 to provide users and creators access to a broad diversity of content available on a variety of platforms.”), at <https://internetassociation.org/wp-content/uploads/2016/03/Internet-Association-Comments-on-Section-512-Study-4-1-16.pdf>.

It is not too much to say that the DMCA safe harbors unleashed the modern Internet—precisely as Congress intended. But it is also clear that Congress intended to balance “the need for rapid response to potential infringement with the end-users['] legitimate interests in not having material removed without recourse.” S. Rep. 105-190, at 21 (1998). Given the extraordinary reach of the DMCA, it is crucial to get that balance right.

II. BY UNDERMINING LEGAL PROTECTIONS FOR ONLINE FAIR USES, THE DECISION BELOW THWARTS CONGRESSIONAL INTENT AND RESHAPES THE CONTOURS OF COPYRIGHT LAW

As explained above, a copyright holder that sends a DMCA takedown notice must affirm in that notice that it has a good faith belief that the material it is targeting infringes copyright, and faces liability if that affirmation is false. In the case at bar, Universal contends that its subjective belief that Ms. Lenz’s use of *Let’s Go Crazy* was not authorized by the law because its employee formed the opinion that the Prince composition was “the focus” of Ms. Lenz’s video. Ms. Lenz contends that her use was a fair use, and that a belief to the contrary—and certainly a belief formed without consideration of the actual statutory fair use factors—is unreasonable, and therefore cannot be a belief held *in good faith*.

The court of appeals majority held, instead, that *any* belief in infringement that is subjectively held is a “good faith” belief. Pet. App. 15-16. That conclusion cannot be squared with the language, spirit, or legislative intent of the DMCA. Worse still, it puts the DMCA in conflict with

the First Amendment by undermining fair use protections for online speech.

A. The Decision Undermines Crucial Protections for Online Speech.

Certiorari should be granted so that the Court can consider whether Congress intended to allow private parties to cause the removal of online speech based even on unreasonable beliefs.

1. DMCA Abuse Is Common.

Given the incentives of the DMCA safe harbors, intermediaries will usually respond to a DMCA takedown notice by quickly removing the challenged content. Thus, by simply sending an email or filling out a webform, a copyright owner, or indeed anyone who wishes to remove speech from the Internet, for whatever reason, can do so.

Copyright owners take full advantage of this extraordinary power, sending millions of takedown notices each month.⁵ Most of these notices are legitimate. Many, however, are not. Study after study has found that a significant percentage of takedown notices have fundamental flaws.⁶ A recent study by researchers at the

5. See, e.g., *Copyright Removal Requests – Google Transparency Report*, Google.com, <http://www.google.com/transparencyreport/removals/copyright/> (last visited Aug. 9, 2016).

6. See e.g., Jennifer Urban & Laura Quilter, *Efficient Process or “Chilling Effects?” Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Computer & High Tech L.J. 621, 668 (2006) (31% of notices raised “significant

University of California at Berkeley, for example, found that 28.4% of takedown demands “had characteristics that raised clear questions about their validity, based solely on a facial review.”⁷

These improper takedowns cause significant harm to lawful speech. For example, a group of so-called “AIDS denialists” (people who do not believe HIV causes AIDS) used the DMCA to cause YouTube to take down a series of videos debunking their claims, simply because the videos used short clips of the denialists’ own public commentary.⁸ As a result, the videos were taken offline even though no person could reasonably have concluded that the videos were unlawful.

questions related to the underlying copyright claim, including fair use defenses, other substantive defenses, very thin copyright, or non-copyrightable subject matter.”); Daniel Seng, ‘*Who Watches the Watchmen?*’ *An Empirical Analysis of Errors in DMCA Takedown Notices*, 45 (Jan. 23, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563202 (8.3% of takedown demands didn’t comply with statutory requirements and 1.3%, or about 800,000 notices, were substantively improper).

7. Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, 88 (March 29, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (analyzing over 100 million takedown notices).

8. See Myles Power, *The DMCA Situation*, Myles Power – Fun With SCIENCE! (Feb. 9, 2014), <https://mylespower.co.uk/2014/02/09/the-dmca-situation/>; see also Myles Power, *Fourth DMCA Filed Against Me*, Myles Power – Fun With SCIENCE! (February 26, 2014), <https://mylespower.co.uk/2014/02/14/fourth-dmca-filed-against-me/>.

Further examples abound:

- An oil industry group used the DMCA to prevent traders from sharing price data on Twitter.⁹
- In the first few days of the 2008 Winter Olympics in China, the International Olympic Committee sent a DMCA takedown notification targeting a video of a demonstration by Students for a Free Tibet, because the video included an image of the famous Olympic rings.¹⁰
- Takedowns in the midst of political campaigns have become common. For example, news organizations have repeatedly used the DMCA takedown process to target political ads that contain clips of news broadcasts as part of their commentary.¹¹

9. Geogi Kantchev, *Twitter Deletes Oil-Data Tweets Following Industry Complaints*, Wall St. J. (May 9, 2016), <http://www.wsj.com/articles/twitter-deletes-oil-data-tweets-following-industry-complaints-1457566322>.

10. Kevin Donovan, *The IOC Joins the DMCA Censorship Club*, Techdirt, (Aug. 14, 2008) <https://www.techdirt.com/articles/20080812/1245391959.shtml>, Stephanie Condon, *Olympic Committee Rethinks Copyright Infringement Claim on YouTube*, CNET (Aug. 15, 2008), <http://www.cnet.com/news/olympic-committee-rethinks-copyright-infringement-claim-on-youtube/>.

11. See Ctr. for Democracy & Tech., *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), https://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

- Journalists uncovered a well-funded and sustained campaign by the government of Ecuador to abuse the DMCA to silence criticism of President Rafael Correa.¹²
- The Kentucky *Courier-Journal's* editorial board interviewed a Democratic candidate for Senate, Alison Lundergan Grimes, and streamed the interview live. That stream included 40 uncomfortable seconds of the candidate apparently trying to avoid admitting she voted for President Obama. A critic posted a video clip of those 40 seconds online. The newspaper's parent company promptly sent a takedown notice that forced the video offline.¹³
- Artist Jonathan McIntosh found his remix video *Buffy vs. Edward: Twilight Remixed*—which was mentioned *by name* in official recommendations from the U.S. Copyright Office regarding DMCA exemptions for transformative noncommercial video works—subject to a DMCA takedown notice.¹⁴ It

12. James Ball & Paul Hamilos, *Ecuador's President Used Millions of Dollars of Public Funds to Censor Critical Online Videos*, BuzzFeedNews (Sept. 24, 2015), www.buzzfeed.com/jamesball/ecuadors-president-used-millions-of-dollars-of-public-funds.

13. Corynne McSherry, *For Shame: Gannett Abuses DMCA to Take Down Political Speech*, EFF DeepLinks Blog (Oct. 10, 2014), <https://www.eff.org/deeplinks/2014/10/shame-gannett-abuses-dmca-take-down-political-speech>.

14. See Jonathan McIntosh, *Buffy vs. Edward Remix Unfairly Removed by Lionsgate*, Pop Culture Detective Agency

took three months of intense legal wrangling before Lionsgate finally relinquished its claim.

- An Australian music publisher sent a takedown notice targeting an entire lecture delivered and posted by Professor Lawrence Lessig because it included illustrative clips of a number of videos set to a piece of music in which the company held copyright. When Professor Lessig counter-noticed pursuant to Section 512(g), the publisher, Liberation Music, threatened to take legal action within 72 hours if Professor Lessig did not withdraw his counter-notice.¹⁵
- BMG Rights Management sent a takedown targeting an official Romney campaign ad that showed President Obama singing a line from the Al Green song “Let’s Stay Together.”¹⁶

(Jan. 9, 2013), <http://popculturedetective.agency/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

15. See Michael B. Farrell, *Online Lecture Prompts Legal Fight on Copyright*, Boston Globe (Aug. 26, 2013), <http://www.bostonglobe.com/business/2013/08/26/harvard-law-professor-sues-record-company-over-phoenix-lisztomania/jqYkgFaXSgGpd2hL2zsXsK/story.html>; see also Mike Masnick, *Larry Lessig Threatened With Copyright Infringement Over Clear Fair Use; Decides To Fight Back*, Techdirt (Aug. 23, 2013), <https://www.techdirt.com/articles/20130822/22593124287/larry-lessig-threatened-with-copyright-infringement-over-clear-fair-use-decides-to-fight-back.shtml>.

16. Timothy B. Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, Ars Technica (July 16, 2012), <http://arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/>.

- Radio host Rush Limbaugh sent a DMCA notice to YouTube demanding it take down a seven-minute montage of Limbaugh’s “most vile smears.”¹⁷
- The Alberta tourism bureau, Travel Alberta, sent a takedown notice targeting a satirical video that used four seconds of a Travel Alberta advertisement.¹⁸ The video was tied to a fundraising campaign by Andy Cobb and Mike Damanskis, Los Angeles-based satirists who have authored over 100 political comedy videos.
- Film critic Kevin B. Lee found his entire account removed from YouTube in response to takedown notices complaining of clips Lee used in the criticism he posted there.¹⁹

Service providers have also confirmed that unfounded DMCA notices are both common and burdensome. For example, Automattic, Inc. which owns WordPress, has reported that about 10% of the takedown notices it

17. See *Rush Limbaugh Demands YouTube Remove Daily Kos Video . . . Watch It Here*, Daily Kos (Apr. 23, 2012), <https://www.dailykos.com/story/2012/4/23/1085791/-Rush-Limbaugh-demands-YouTube-remove-Daily-Kos-video-watch-it-here>.

18. See Mitch Stoltz, *Using Copyright to Silence Oil Sands Satire? How Crude.*, EFF DeepLinks Blog (Aug. 20, 2013), <https://www.eff.org/deeplinks/2013/08/using-copyright-silence-oil-company-satire-how-crude>.

19. See Nate Anderson, *What Fair Use? Three Strikes and You’re Out . . . of YouTube*, Ars Technica (Jan. 15, 2009), <http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars>.

received in 2014 and 2015, “were directed at clear fair uses, clearly uncopyrightable content, or contained clear misrepresentations regarding copyright ownership.”²⁰ A group of platforms for online commerce, including Etsy, reports that they regularly receive DMCA takedown notices that concern trademark issues, not copyright.²¹

These improper notices hurt copyright holders, service providers and users alike. As the Computer & Communications Industry Association recently stated, “Incorrect, incompetent, or incomplete notices, not to mention willful abuse of the system, occupy a disproportionate share of DMCA compliance resources that might otherwise be directed to providing expeditious service to responsible submitters.”²²

20. Comments of the Automattic, Inc. at 6, In the Matter of Section 512 Study, Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C., <https://assets.documentcloud.org/documents/2781753/2016-03-31-Automattic-Inc-512-NOI-Comments.pdf>.

21. Comments of Etsy, Foursquare, Kickstarter, Meetup and Shapeways at 3-5, In the Matter of Section 512 Study, Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C., <https://extfiles.etsy.com/advocacy/Comment%20of%20Etsy,%20et%20al%20in%20512%20Study.pdf>.

22. Comments of the Computer & Communications Industry Association at 11, 512 Study, Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C., <http://www.ccianet.org/wp-content/uploads/2016/03/CCIA-Section-512-NoI-Comments-2016.pdf>.

2. Congress Intended Section 512(f) To Be a Meaningful Check on Such Abuse.

As the examples above illustrate, Section 512 can result in lawful material being taken down from the Internet, without prior judicial scrutiny or other due process. But Congress sought to do something very different: to “carefully balance the First Amendment rights of users with the rights of a potentially injured copyright holder.” *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003).

First, as noted above, Congress required that all representations of infringement under Section 512 include a series of specific items. 17 U.S.C. § 512(c)(3)(A). Admonishing one copyright owner for its failure to send a compliant notice, for example, the Ninth Circuit noted:

The DMCA requires a complainant to declare, under penalty of perjury, that he is authorized to represent the copyright holder, and that he has a good-faith belief that the use is infringing. This requirement is not superfluous. Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. *But if it does not, speech protected under the First Amendment could be removed.*

Perfect 10 v. CCBill, 488 F.3d 1102, 1112 (9th Cir. 2007) (emphasis added).

Second, Congress outlined a process for the relatively speedy restoration of non-infringing content targeted for takedown, which allows a user to send a counter-notification challenging the infringement allegations. 17 U.S.C. § 512(g). The complaining party then has 10-14 days to bring an infringement lawsuit; if it does not, the service provider can restore the content without fear of liability.

However, Section 512(g) by itself is not enough to protect lawful uses. No matter how preposterous the claim that led to the initial takedown, it can serve as a temporary restraint on speech, as service providers are discouraged from restoring targeted speech for a minimum of ten business days, lest they lose the protection of the safe harbors. *Id.* § 512(g)(2)(B). In addition, many speakers are reluctant to risk the possibility of costly and time-consuming litigation, even where the challenged speech is a protected fair use. Further, the counter-notice procedure offers little protection for anonymous speech, as it requires the respondent to provide her name and location. *Id.* § 512(g)(3)(D). Speakers engaged in critical political speech or whistleblowing may fear retaliation. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“Anonymity . . . exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation.”). Victims of harassment may fear disclosing their personal details to their harasser.²³

23. See Becca Mills, *Independent Publishing and DMCA Abuse, or “How a Scammer Got My Book Blocked with Very Little Effort,”* The Active Voice (March 1, 2015), <https://the-active-voice.com/2015/03/01/nolander-blocked-at-amazon-and-smashwords/>.

So, *third*, Congress sought to *deter* improper claims by also crafting Section 512(f), to allow lawful users of copyrighted works to hold copyright owners accountable if they send a takedown notice without properly considering whether the use was in fact authorized by the copyright owner or the law. As the Senate Report on Section 512(f) explained:

The Committee was acutely concerned that it provide all end-users . . . with appropriate procedural protections to ensure that material *is not disabled without proper justification*.

S. Rep. No. 105-190, at 21 (1998) (emphasis added).

3. The Decision Below Undermines the Fair Use Protections Congress Intended.

Taken together, the requirements of Sections 512(c), (f) and (g) were supposed to serve as safeguards for online fair use—but the decision below effectively thwarts that goal. The Ninth Circuit correctly held that the sender of a takedown notice must come to *some* conclusion as to whether the use in question actually violated the law. But if, as the Ninth Circuit held, any belief to that effect that is subjectively held can qualify as a “good faith belief,” no matter how unreasonable it might be, then that requirement has little meaning.

The origin of this mistaken conclusion can be found in a prior decision, *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004). In *Rossi*, the Ninth Circuit held that the “good faith belief” that the DMCA requires need only be a subjectively held state of mind. *See id.* at

1004. But § 512(c)(3)(A)(v) does not use the bare phrase “good faith”—it requires a good faith *belief*. The word “belief,” on its own, already requires a subjective state of mind; if any subjectively held viewpoint is a “good faith belief,” the words “good faith” are superfluous.

The Court should grant certiorari to consider whether the phrase “good faith belief” in Section 512 instead connotes a subjectively held viewpoint that is also *reasonably* held. This interpretation would give meaning both to “good faith” (meaning “reasonably held, even if wrong”) and “belief” (meaning “subjectively held state of mind”). See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986) (construing prior version of Rule 11 of the Federal Rules of Civil Procedure, and concluding that “[a] good faith belief in the merit of a legal argument is an objective condition” that “need not be correct” but that must “be defensible”). This would mean that a representation of a good faith belief is false if it is either not subjectively held (there is no “belief”) or unreasonably held (the belief is not held in “good faith”).

Blessing *unreasonable* beliefs as a basis for extra-judicial takedowns of online speech contravenes the long-standing principle that a “mistake of law does not constitute excusable neglect.” *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 932 (9th Cir. 1994). Exceptions to this rule are rare; when Congress intends such exceptions, it must do so explicitly. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 583-84 (2010).

By contrast, requiring reasonable legal conclusions, based on a familiarity with the statutory fair use factors or other objective indicia of infringement, is consistent

with both this longstanding principle and other principles of copyright law. For example, whether it was *reasonable* to sue for copyright infringement bears on deciding whether a copyright lawsuit was brought in good faith. See *Religious Technology Center v. Lerma*, 908 F. Supp. 1362, 1368 (E.D. Va. 1995) (awarding fees because “no reasonable copyright holder could have in good faith brought a copyright infringement action”).

As one commentator has noted, “[r]equiring that a plaintiff may only prove a misrepresentation was made ‘knowingly’ by demonstrating the subjective belief of the copyright owner not only is inconsistent with the statutory language, but application of such a standard also would thwart the purpose of including the misrepresentation claim within the statutory scheme.” Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 Wake Forest L. Rev. 745, 774 (2011). By contrast, requiring reasonable legal determinations puts Section 512(f)’s protections within practical reach of ordinary users and helps limit litigation by sensibly reducing the Section 512(f) inquiry in most cases to: (1) what the defendant reviewed prior to sending a takedown notification; and (2) whether the defendant’s assertions, based on that review, were reasonable. It makes sense, as a matter of law, legislative intent, and good policy.

B. The Decision Undermines Online Fair Use, Thereby Disturbing the Traditional Contours of Copyright.

As a cause of action designed to protect users’ speech, Section 512(f) should be construed to ensure that it actually provides users with the recourse Congress

intended. Instead, the decision below will have opposite effect.

Indeed, the decision below places the burden on the person whose speech was taken down to prove to a jury the subjective belief of the censor. That standard will be all but impossible for most to satisfy. Discovery becomes a nightmare, fraught with investigations into subjective beliefs about the law that likely will draw privilege objections. Small wonder that commenters who have noted the lack of judgments against copyright owners under Section 512(f), and the paucity even of monetary settlements, have concluded that “[t]he problem seems to be the subjective bad faith standard.” Frederick W. Mostert & Martin B. Schwimmer, *Notice and Takedown for Trademarks*, 101 Trademark Rep. 249, 278-79 (2011).

It gets worse: If the sender of an improper takedown cannot suffer liability under Section 512(f), no matter how unreasonable its belief, the Ninth Circuit’s interpretations effectively eliminates Section 512(f) protections for even classic fair uses. Many copyright owners unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to ensure such unreasonable beliefs do not thwart new creativity. In particular, it protects uses, such as parody and criticism, that copyright owners are unlikely to license. Allowing a copyright owner to hide behind unreasonable beliefs undermines this crucial protection. As a recent commentator noted, “[s]avvy copyright holders will be incentivized to implement slipshod, cursory fair use procedures to avoid liability under § 512(f), thereby promoting the very kind of abuse the court seeks to stem.” Recent Case, *Lenz v. Universal Music Corp.*, 129 Harv. L. Rev. 2289, 2293 (June 10, 2016).

As a result, the decision below, while purporting to defend fair use, in practice concludes that Congress could, and did, quietly eviscerate the fair use doctrine for online speech. As this Court has held, Congress has substantial discretion with respect to copyright, so long as it does not disturb copyright law’s “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). If the Ninth Circuit is correct, that is precisely what Congress did when it enacted Section 512. If someone publishes a book review that quotes from a book, the book’s author cannot use copyright law to get it pulled from the magazine racks because those quotes would be lawful fair uses. But if the same review is published on a blog, the author can force the webhost to take it down within a day, and keep it down for two weeks. Moreover, the author can do so even if she is no longer the copyright holder—so long as she subjectively believes herself to hold a copyright interest.

If Congress had intended that outcome, it is unlikely that the DMCA would have withstood First Amendment scrutiny. As the statutory scheme discussed above shows, however, Congress did not intend such an outcome. This Court should grant *certiorari* to consider whether the Ninth Circuit’s holding is consistent with the traditional contours of copyright.

III. THIS IS THE RIGHT CASE TO ADDRESS A QUESTION OF NATIONAL IMPORTANCE.

Because the DMCA impacts a staggering range of speech, the balance it strikes between the rights and responsibilities of speakers and copyright holders is a question of major importance. This case is likely to be

the Court’s only meaningful opportunity to address that question, because the *Rossi* rule, especially as applied by the Ninth Circuit in this case, renders Section 512(f) effectively unavailable to the public.

In addition to setting an improperly high bar for liability, as discussed above the subjective standard essentially guarantees that the target of an abusive takedown notice will be required to litigate through discovery and trial. Only the rarest case will proceed so far. Indeed, *Rossi* is widely credited with rendering Section 512(f) a dead letter. See Adam Eakman, Note, *The Future of the Digital Millennium Copyright Act*, 48 Ind. L. Rev. 631, 649 (2015); Derek Khanna, *Reflection on the House Republican Study Committee Copyright Report*, 32 Cardozo Arts & Ent. L.J. 11, 48-49 (2013) (subjective standard “effectively impossible” to satisfy); Ian Rubenstrunk, *The Throw Down over Takedowns: An Analysis of the Lenz Interpretation of 17 U.S.C. S 512(f)*, 10 J. Marshall Rev. Intell. Prop. L. 792, 809 (2011) (subjective standard means Section 512(f) provides “minimal deterrence”); Loren, *supra*, 46 Wake Forest L. Rev. at 774.

The Court denied *certiorari* in *Rossi*,²⁴ but the present case is a far better vehicle for considering what “good faith belief” means in the DMCA. Michael Rossi ran a website that promised “Full Length Downloadable Movies” to anyone who paid a monthly subscription fee. 391 F.3d at 1002. Seeing this claim, the MPAA concluded Rossi was infringing its members’ copyrights and sent

24. *Rossi v. Motion Picture Ass’n of Am., Inc.*, 544 U.S. 1018 (2005), see also *Rossi v. Motion Picture Ass’n of America, Inc.*, Pet. for Writ of Cert., 2005 WL 510720 at *I (Feb. 28, 2005).

a DMCA takedown notice. *Id.* at 1002-03. But Rossi was lying—subscribers to his site were not able to download movies at all. *Id.* at 1003. As the Rossi panel recognized, “[t]he unequivocal language used by Rossi not only suggest[ed]” infringement, it “virtually compel[led]” that conclusion. *Id.* at 1005. Thus, on the facts of that case, it made *no difference* whether an unreasonable belief could be a “good faith” belief, because there was nothing unreasonable about the MPAA taking Rossi’s words at face value, instead of continuing to investigate.

This case, in contrast, provides an excellent vehicle for considering whether the “good faith belief” standard is an objective or subjective test. It presents the question squarely, based on a detailed factual record. As the dissent below noted, the facts regarding the takedown are essentially undisputed. *See* Pet. App. at 28-29. Given the importance of this case for online speech, and the likelihood that the questions it raises will not reach this Court again unless *Rossi*’s error is corrected, the Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 12, 2016

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APPENDIX

1a

**APPENDIX A — ORDER AND AMENDED
OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT, FILED
MARCH 17, 2016**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 13-16106, 13-16107

D.C. No. 5:07-cv-03783-JF

STEPHANIE LENZ,

Plaintiff-Appellee/Cross-Appellant,

v.

UNIVERSAL MUSIC CORP.; UNIVERSAL
MUSIC PUBLISHING INC.; UNIVERSAL MUSIC
PUBLISHING GROUP INC.,

Defendants-Appellants/Cross-Appellees.

Appeal from the United States District Court for the
Northern District of California.
Jeremy D. Fogel, District Judge, Presiding.

Argued and Submitted
July 7, 2015—San Francisco, California

Filed September 14, 2015
Amended March 17, 2016

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Appendix A

ORDER AND AMENDED OPINION

Before: Richard C. Tallman, Milan D. Smith, Jr.,
and Mary H. Murguia, Circuit Judges.

Order;
Opinion by Judge Tallman;
Partial Concurrence and Partial Dissent by Judge
Milan D. Smith, Jr.

ORDER

The opinion and dissent filed on September 14, 2015 and published at 801 F.3d 1126 are hereby amended. The amended opinion and dissent are filed concurrently with this order.

With these amendments, the panel has voted to deny Universal's petition for panel rehearing and Lenz's petition for panel rehearing. Judge Tallman and Judge Murguia have voted to deny Lenz's petition for rehearing *en banc*, and Judge M. Smith has voted to grant Lenz's petition for rehearing *en banc*.

The full court has been advised of the petition for rehearing *en banc*. No judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35(b).

Universal's petition for panel rehearing is **DENIED**. Lenz's petition for panel rehearing or rehearing *en banc* is **DENIED**. No future petitions for panel rehearing or petitions for rehearing *en banc* will be entertained.

Appendix A

TALLMAN, Circuit Judge:

Stephanie Lenz filed suit under 17 U.S.C. § 512(f)—part of the Digital Millennium Copyright Act (“DMCA”)—against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively “Universal”). She alleges Universal misrepresented in a takedown notification that her 29-second home video (the “video”) constituted an infringing use of a portion of a composition by the Artist known as Prince, which Universal insists was unauthorized by the law. Her claim boils down to a question of whether copyright holders have been abusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use. We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law. We affirm the denial of the parties’ cross-motions for summary judgment.

I

Founded in May 2005, YouTube (now owned by Google) operates a website that hosts user-generated content. *About YouTube*, YouTube.com, <https://www.youtube.com/yt/about/> (last visited September 4, 2015). Users upload videos directly to the website. *Id.* On February 7, 2007, Lenz uploaded to YouTube a 29-second home video of her two young children in the family kitchen dancing to

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the song *Let's Go Crazy* by Prince.¹ Available at <https://www.youtube.com/watch?v=N1KfJHFWlhQ> (last visited September 4, 2015). She titled the video “Let’s Go Crazy’ #1.” About four seconds into the video, Lenz asks her thirteen month-old son “what do you think of the music?” after which he bobs up and down while holding a push toy.

At the time Lenz posted the video, Universal was Prince’s publishing administrator responsible for enforcing his copyrights. To accomplish this objective with respect to YouTube, Robert Allen, Universal’s head of business affairs, assigned Sean Johnson, an assistant in the legal department, to monitor YouTube on a daily basis. Johnson searched YouTube for Prince’s songs and reviewed the video postings returned by his online search query. When reviewing such videos, he evaluated whether they “embodied a Prince composition” by making “significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video.” According to Allen, “[t]he general guidelines are that . . . we review the video to ensure that the composition was the focus and if it was we then notify YouTube that the video should be removed.”

Johnson contrasted videos that met this criteria to those “that may have had a second or less of a Prince song, literally a one line, half line of Prince song” or

1. YouTube is a for-profit company that generates revenues by selling advertising. If users choose to become “content partners” with YouTube, they share in a portion of the advertising revenue generated. Lenz is not a content partner and no advertisements appear next to the video.

Appendix A

“were shot in incredibly noisy environments, such as bars, where there could be a Prince song playing deep in the background . . . to the point where if there was any Prince composition embodied . . . in those videos that it was distorted beyond reasonable recognition.” None of the video evaluation guidelines explicitly include consideration of the fair use doctrine.

When Johnson reviewed Lenz’s video, he recognized *Let’s Go Crazy* immediately. He noted that it played loudly in the background throughout the entire video. Based on these details, the video’s title, and Lenz’s query during the video asking if her son liked the song, he concluded that Prince’s song “was very much the focus of the video.” As a result, Johnson decided the video should be included in a takedown notification sent to YouTube that listed more than 200 YouTube videos Universal believed to be making unauthorized use of Prince’s songs.² The notice included a “good faith belief” statement as required by 17 U.S.C. § 512(c)(3)(A)(v): “We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law.”

After receiving the takedown notification, YouTube removed the video and sent Lenz an email on June 5, 2007, notifying her of the removal. On June 7, 2007, Lenz attempted to restore the video by sending a counter-notification to YouTube pursuant to § 512(g) (3).

2. “[T]he parties do not dispute that Lenz used copyrighted material in her video or that Universal is the true owner of Prince’s copyrighted music.” *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153-54 (N.D. Cal. 2008).

Appendix A

After YouTube provided this counter-notification to Universal per § 512(g)(2)(B), Universal protested the video's reinstatement because Lenz failed to properly acknowledge that her statement was made under penalty of perjury, as required by § 512(g)(3)(C). Universal's protest reiterated that the video constituted infringement because there was no record that "either she or YouTube were ever granted licenses to reproduce, distribute, publicly perform or otherwise exploit the Composition." The protest made no mention of fair use. After obtaining *pro bono* counsel, Lenz sent a second counter-notification on June 27, 2007, which resulted in YouTube's reinstatement of the video in mid-July.

II

Lenz filed the instant action on July 24, 2007, and her Amended Complaint on August 15, 2007. After the district court dismissed her tortious interference claim and request for declaratory relief, Lenz filed her Second Amended Complaint on April 18, 2008, alleging only a claim for misrepresentation under § 512(f). The district court denied Universal's motion to dismiss the action.

On February 25, 2010, the district court granted Lenz's partial motion for summary judgment on Universal's six affirmative defenses, including the third affirmative defense that Lenz suffered no damages. Both parties subsequently moved for summary judgment on Lenz's § 512(f) misrepresentation claim. On January 24, 2013, the district court denied both motions in an order that is now before us.

Appendix A

The district court certified its summary judgment order for interlocutory appeal under 28 U.S.C. § 1292(b), and stayed proceedings in district court pending resolution of the appeal. We granted the parties permission to bring an interlocutory appeal.

III

We review *de novo* the district court's denial of summary judgment. When doing so, we "must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On cross-motions for summary judgment, we evaluate each motion independently, "giving the nonmoving party in each instance the benefit of all reasonable inferences." *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

When evaluating an interlocutory appeal, we "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) (emphasis in original) (quotation omitted). We may therefore "address those issues *material* to the order from which appeal has been taken." *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990) (emphasis in original) (permitting appellate review of a ruling issued prior to the order certified for interlocutory appeal).

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IV

Effective on October 28, 1998, the DMCA added new sections to existing copyright law by enacting five Titles, only one of which is relevant here: Title II—Online Copyright Infringement Liability Limitation Act—now codified in 17 U.S.C. § 512. Sections 512(c), (f), and (g) are at the heart of the parties’ dispute.

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Section 512(c) permits service providers, e.g., YouTube or Google, to avoid copyright infringement liability for storing users’ content if—among other requirements—the service provider “expeditiously” removes or disables access to the content after receiving notification from a copyright holder that the content is infringing. 17 U.S.C. § 512(c). Section 512(c)(3)(A) sets forth the elements that such a “takedown notification” must contain. These elements include identification of the copyrighted work, identification of the allegedly infringing material, and, critically, a statement that the copyright holder believes in good faith the infringing material “is not authorized by the copyright owner, its agent, or the law.” *Id.* § 512(c)(3)(A). The procedures outlined in § 512(c) are referred to as the DMCA’s “takedown procedures.”

To avoid liability for disabling or removing content, the service provider must notify the user of the takedown. *Id.* § 512(g)(1)-(2). The user then has the option of restoring the content by sending a counter-notification, which must include a statement of “good faith belief that the

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material was removed or disabled as a result of mistake or misidentification . . .” *Id.* § 512(g)(3)(C). Upon receipt of a valid counter-notification, the service provider must inform the copyright holder of the counter-notification and restore the content within “not less than 10, nor more than 14, business days,” unless the service provider receives notice that the copyright holder has filed a lawsuit against the user seeking to restrain the user’s infringing behavior. *Id.* § 512(g)(2)(B)—(C). The procedures outlined in § 512(g) are referred to as the DMCA’s “put-back procedures.”

If an entity abuses the DMCA, it may be subject to liability under § 512(f). That section provides: “Any person who knowingly materially misrepresents under this section—(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages . . .” *Id.* § 512(f). Subsection (1) generally applies to copyright holders and subsection (2) generally applies to users. Only subsection (1) is at issue here.

B

We must first determine whether 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown notification. Section 512(c)(3)(A)(v) requires a takedown notification to include a “statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” The parties

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dispute whether fair use is an authorization under the law as contemplated by the statute—which is so far as we know an issue of first impression in any circuit across the nation. “Canons of statutory construction dictate that if the language of a statute is clear, we look no further than that language in determining the statute’s meaning. . . . A court looks to legislative history only if the statute is unclear.” *United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir. 1995) (citations omitted). We agree with the district court and hold that the statute unambiguously contemplates fair use as a use authorized by the law.

Fair use is not just excused by the law, it is wholly authorized by the law. In 1976, Congress codified the application of a four-step test for determining the fair use of copyrighted works:

Notwithstanding the provisions of sections 106 and 106A, *the fair use of a copyrighted work*, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright*. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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- (2) the nature of the 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (emphasis added). The statute explains that the fair use of a copyrighted work is permissible because it is a non-infringing use.

While Title 17 of the United States Code (“Copyrights”) does not define the term “authorize” or “authorized,” “[w]hen there is no indication that Congress intended a specific legal meaning for the term, the court may look to sources such as dictionaries for a definition.” *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999). Black’s Law Dictionary defines “authorize” as “1. To give legal authority; to empower” and “2. To formally approve; to sanction.” *Authorize*, Black’s Law Dictionary (10th ed. 2014). Because 17 U.S.C. § 107 both “empowers” and “formally approves” the use of copyrighted material if the use constitutes fair use, fair use is “authorized by the law” within the meaning of § 512(c). *See also* 17 U.S.C.

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§ 108(f) (4) (“Nothing in this section in any way affects the *right* of fair use as provided by section 107” (emphasis added)).

Universal’s sole textual argument is that fair use is not “authorized by the law” because it is an affirmative defense that excuses otherwise infringing conduct. Universal’s interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that fair use does not fall into the latter camp: “[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).

Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer:

Although the traditional approach is to view “fair use” as an affirmative defense, . . . it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be

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considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.

Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996); cf. Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 Wash. L. Rev. 685, 688 (2015) (“Congress did not intend fair use to be an affirmative defense—a defense, yes, but not an affirmative defense.”). Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright, *Practice Management Information Corp. v. American Medical Ass’n*, 121 F.3d 516, 520 (9th Cir. 1997), and laches, *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950-51 (9th Cir. 2001).

Universal concedes it must give due consideration to other uses authorized by law such as compulsory licenses. The introductory language in 17 U.S.C. § 112 for compulsory licenses closely mirrors that in the fair use statute. Compare 17 U.S.C. § 112(a)(1) (“Notwithstanding the provisions of section 106, . . . it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work . . . to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display . . .”), with *id.* § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”). That fair use may be

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labeled as an affirmative defense due to the procedural posture of the case is no different than labeling a license an affirmative defense for the same reason. *Compare Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573, 114 S. Ct. 1164, 127 L. Ed. 2d 500 & n.3, 590 (1994) (stating that “fair use is an affirmative defense” where the district court converted a motion to dismiss based on fair use into a motion for summary judgment), *with A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1025-26 (9th Cir. 2001) (“Napster contends that . . . the district court improperly rejected valid affirmative defenses of . . . implied license . . .”). Thus, Universal’s argument that it need not consider fair use in addition to compulsory licenses rings hollow.

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. We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is “authorized by the law” and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).

C

We must next determine if a genuine issue of material fact exists as to whether Universal knowingly misrepresented that it had formed a good faith belief the video did not constitute fair use. This inquiry lies not in whether a court would adjudge the video as a fair use, but whether Universal formed a good faith belief that it was not. Contrary to the district court’s holding, Lenz may

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proceed under an actual knowledge theory, but not under a willful blindness theory.

1

Though Lenz argues Universal should have known the video qualifies for fair use as a matter of law, our court has already decided a copyright holder need only form a subjective good faith belief that a use is not authorized. *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004). In *Rossi*, we explicitly held that “the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard.” *Id.* at 1004. We further held:

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. . . .

In § 512(f), Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner’s notification is a knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.

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Id. at 1004-05 (citations omitted). Neither of these holdings are dictum. See *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (“[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.”). We therefore judge Universal’s actions by the subjective beliefs it formed about the video.

2

Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use. Here, Lenz presented evidence that Universal did not form any subjective belief about the video’s fair use—one way or another— because it failed to consider fair use at all, and knew that it failed to do so. Universal nevertheless contends that its procedures, while not formally labeled consideration of fair use, were tantamount to such consideration. Because the DMCA requires consideration of fair use prior to sending a takedown notification, a jury must determine whether Universal’s actions were sufficient to form a subjective good faith belief about the video’s fair use or lack thereof.³

3. Although the panel agrees on the legal principles we discuss herein, we part company with our dissenting colleague over the propriety of resolving on summary judgment Universal’s claim to subjective belief that the copyright was infringed. The dissent would find that no triable issue of fact exists because Universal did not specifically and expressly consider the fair-use elements of 17

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To be clear, if a copyright holder ignores or neglects our unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under § 512(f). If, however, 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. A copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability. *Cf. Disney Enters., Inc. v. Hotfile Corp.*, No. 11-cv-20427, 2013 U.S. Dist. LEXIS 172339, 2013 WL 6336286, at *48 (S.D. Fla. Sept. 20, 2013) (denying summary judgment of § 512(f) counterclaim due to “sufficient evidence in the record to suggest that [Plaintiff] Warner intentionally targeted files it knew it had no right to remove”); *Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219, 1223 (C.D. Cal. 2010) (denying summary judgment of § 512(f) counterclaim where the takedown notification listed four URL links that did not contain content matching the description of the purportedly infringed material); *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (“[T]here is no genuine issue of fact that Diebold knew—and indeed that it specifically intended—that its letters to OPG and Swarthmore would result in prevention

U.S.C. § 107. But the question is whether the analysis Universal did conduct of the video was sufficient, not to conclusively establish as a matter of law that the video’s use of *Let’s Go Crazy* was fair, but to form a subjective good faith belief that the video was infringing on Prince’s copyright. And under the circumstances of this case, that question is for the jury, not this court, to decide.

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of publication of that content. . . . The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA’s safe harbor provisions—which were designed to protect ISPs, not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”).

3

We hold the willful blindness doctrine may be used to determine whether a copyright holder “knowingly materially misrepresent[ed]” that it held a “good faith belief” the offending activity was not a fair use. *See* 17 U.S.C. § 512(c)(3)(A)(v), (f). “[T]he willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) (interpreting how a party can establish the “actual knowledge”—a subjective belief—required by § 512(c)(1)(A)(I)); *see also UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1023 (9th Cir. 2013) (“Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge.” (citing *Viacom*, 676 F.3d at 31)). But, based on the specific facts presented during summary judgment, we reject the district court’s conclusion that Lenz may proceed to trial under a willful blindness theory.

To demonstrate willful blindness a plaintiff must establish two factors: “(1) the defendant must subjectively

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believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060, 2070, 179 L. Ed. 2d 1167 (2011). “Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.” *Id.* at 2070-71. To meet the *Global-Tech* test, Lenz must demonstrate a genuine issue as to whether—before sending the takedown notification—Universal (1) subjectively believed there was a high probability that the video constituted fair use, and (2) took deliberate actions to avoid learning of this fair use.

On summary judgment Lenz failed to meet a threshold showing of the first factor. To make such a showing, Lenz must provide evidence from which a juror could infer that Universal was aware of a high probability the video constituted fair use. *See United States v. Yi*, 704 F.3d 800, 805 (9th Cir. 2013). But she failed to provide any such evidence. The district court therefore correctly found that “Lenz does not present evidence suggesting Universal subjectively believed either that there was a high probability any given video might make fair use of a Prince composition or her video in particular made fair use of Prince’s song ‘Let’s Go Crazy.’” Yet the district court improperly denied Universal’s motion for summary judgment on the willful blindness theory because Universal “has not shown that it *lacked* a subjective belief.” By finding blame with Universal’s inability to show that it “*lacked* a subjective belief,” the district court improperly required Universal to meet its burden of

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persuasion, even though Lenz had failed to counter the initial burden of production that Universal successfully carried. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Lenz may not therefore proceed to trial on a willful blindness theory.

V

Section 512(f) provides for the recovery of “any damages, including costs and attorneys['] fees, incurred by the alleged infringer . . . who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing . . .” 17 U.S.C. § 512(f). We hold a plaintiff may seek recovery of nominal damages for an injury incurred as a result of a § 512(f) misrepresentation.

Universal incorrectly asserts that Lenz must demonstrate she incurred “actual monetary loss.” Section 512(k) provides a definition for “monetary relief” as “damages, costs, attorneys['] fees, and any other form of monetary payment.” The term “monetary relief” appears in § 512(a), (b)(1), (c)(1), and (d), but is notably absent from § 512(f). As a result, the damages an alleged infringer may recover under § 512(f) from “any person” are broader than monetary relief.⁴ *Cf. United States v. James*, 478 U.S. 597,

4. Title I of the DMCA specifies recovery for “actual damages.” 17 U.S.C. § 1203(c)(1)(A). If Congress intended to similarly limit the recovery of § 512(f) damages to pecuniary losses, it could have chosen to do so.

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605, 106 S. Ct. 3116, 92 L. Ed. 2d 483 (1986) (“Congress’ choice of the language ‘*any damage*’ . . . undercuts a narrow construction.”), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 121 S. Ct. 1005, 148 L. Ed. 2d 919 (2001). Because Congress specified the recovery of “any damages,” we reject Universal’s contention that Congress did not indicate its intent to depart from the common law presumption that a misrepresentation plaintiff must have suffered a monetary loss. *See Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993) (“Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quotation omitted)).

Lenz may seek recovery of nominal damages due to an unquantifiable harm suffered as a result of Universal’s actions.⁵ The DMCA is akin to a statutorily created intentional tort whereby an individual may recover nominal damages for a “knowingly material misrepresent[ation] under this section [512].” 17 U.S.C. § 512(f); *cf. Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (“We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Accordingly, when § 1983 plaintiffs seek

5. Lenz may not recover nominal damages for “impairment of free speech rights.” No authority supports the recovery of nominal damages caused by a private actor’s chilling of free speech rights. All of the cases Lenz cites address challenges to governmental action.

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damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.” (quotation and citations omitted).

“In a number of common law actions associated with intentional torts, the violation of the plaintiff’s right has generally been regarded as a kind of legal damage in itself. The plaintiff who proves an intentional physical tort to the person or to property can always recover nominal damages.” 3 Dan B. Dobbs et al., *The Law of Torts* § 480 (2d ed. 2011). The tort need not be physical in order to recover nominal damages. Defamation, for example, permits the recovery of nominal damages:

A nominal damage award can be justified in a tort action only if there is some reason for awarding a judgment in favor of a claimant who has not proved or does not claim a compensable loss with sufficient certainty to justify a recovery of compensatory or actual damages. There may be such a reason in an action for defamation, since a nominal damage award serves the purpose of vindicating the plaintiff’s character by a verdict of the jury that establishes the falsity of the defamatory matter.

W. Page Keeton et al., *Prosser and Keeton on Torts* § 116A, at 845 (5th ed. 1984). Also, individuals may recover nominal damages for trespass to land, even though the trespasser’s “presence on the land causes no harm to the land [or] its possessor” Restatement (Second) of Torts § 163 & cmts. d, e (1965).

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The district court therefore properly concluded in its 2010 order:

The use of “any damages” suggests strongly Congressional intent that recovery be available for damages even if they do not amount to . . . substantial economic damages Requiring a plaintiff who can [show that the copyright holder knowingly misrepresented its subjective good faith] to demonstrate in addition not only that she suffered damages but also that those damages were economic and substantial would vitiate the deterrent effect of the statute.

Lenz v. Universal Music Corp., No. C 07-3783 JF, 2010 U.S. Dist. LEXIS 16899, 2010 WL 702466, at *10 (N.D. Cal. Feb. 25, 2010). Relying on this opinion, the Southern District of Florida held the same. *Hotfile*, 2013 U.S. Dist. LEXIS 172339, 2013 WL 6336286, at *48 (“[T]he Court observes that the quantity of economic damages to Hotfile’s system is necessarily difficult to measure with precision and has led to much disagreement between the parties and their experts. Notwithstanding this difficulty, the fact of injury has been shown, and Hotfile’s expert can provide the jury with a non-speculative basis to assess damages.”).

We agree that Lenz may vindicate her statutorily created rights by seeking nominal damages. Because a jury has not yet determined whether Lenz will prevail at trial, we need not decide the scope of recoverable damages, i.e., whether she may recover expenses following

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the initiation of her § 512(f) suit or *pro bono* costs and attorneys' fees, both of which arose as a result of the injury incurred.

VI

Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law. That this step imposes responsibility on copyright holders is not a reason for us to reject it. *Cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123-24, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) (“[A]ny increased burdens imposed on the Commission as a result of its compliance with [the Consumer Product Safety Act] were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission. Thus, petitioners’ claim that the Commission’s compliance with the requirements of [the Act] will impose undue burdens on the Commission is properly addressed to Congress, not to this Court.”). We affirm the district court’s order denying the parties’ cross-motions for summary judgment.

AFFIRMED. Each party shall bear its own costs.

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M. SMITH, Circuit Judge, concurring in part and dissenting in part:

I concur in all but Part IV.C of the majority opinion. However, I disagree with the majority's conclusion that "whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof" presents a triable issue of fact. Universal admittedly did not consider fair use before notifying YouTube to take down Lenz's video. It therefore could not have formed a good faith belief that Lenz's video was infringing, and its notification to the contrary was a knowing material misrepresentation. Accordingly, I would hold that Lenz is entitled to summary judgment.

I agree with the majority's conclusion that § 512(c)(3)(A)(v) requires copyright holders to consider whether potentially infringing material is a fair use before issuing a takedown notice. As the majority explains, a takedown notice must contain "[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." 17 U.S.C. § 512(c)(3)(A)(v). Because fair use of copyrighted material is not an infringement of copyright, such use is "authorized by . . . the law." *See id.* § 107. Therefore, in order to form "a good faith belief that use of the material in the manner § 512(c)(3)(A)(v), a party must consider the doctrine of fair use. I also agree with the majority that § 512(f) provides a party injured by a violation of § 512(c)(3)(A)(v) with a right of action for damages, including nominal damages.

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However, I part ways with the majority on two issues. First, I would clarify that § 512(f)'s requirement that a misrepresentation be "knowing[]" is satisfied when the party knows that it is ignorant of the truth or falsity of its representation. Second, I would hold that Universal's actions were insufficient as a matter of law to form a subjective good-faith belief that Lenz's video was not a fair use.

I

Section 512(f) requires that a misrepresentation be "knowing[]" to incur liability. In my view, when the misrepresentation concerns § 512(c)(3)(A)(v), the knowledge requirement is satisfied when the party knows that it has not considered fair use. That is, Universal need not have known that the video was a fair use, or that its actions were insufficient to form a good-faith belief about fair use. It need only have known that it had not considered fair use as such.⁶

As the majority explains, we have previously held in *Rossi v. Motion Picture Ass'n of Am. Inc.* that "the 'good faith belief' requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard." 391 F.3d 1000, 1004 (9th Cir. 2004). *Rossi* reasoned that a subjective standard comported with

6. I do not believe that, in this regard, my construction conflicts with that of the majority. Although the majority does not squarely address § 512(f)'s scienter requirement, it leaves for the jury only the question "whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof."

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§ 512(f)'s requirement that actionable misrepresentations be “knowing[.]”, and ultimately held that liability under § 512(f) requires “a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.” 391 F.3d at 1005.

Universal urges us to construe *Rossi* to mean that liability attaches under § 512(f) only if a party subjectively believes that its assertion is false. But under long-settled principles of deceit and fraudulent misrepresentation, a party need only know that it is ignorant of the truth or falsity of its representation for its misrepresentation to be knowing. For example, in *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884), the Supreme Court explained that “a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule.”¹ Similarly, under the common law, “[a] misrepresentation is fraudulent if the maker . . . knows or believes that the matter is not as he represents it to be, . . . [or] *knows that he does not have the basis for his representation that he states or implies.*” Restatement (Second) of Torts § 526 (emphasis added).²

1. See also *Sovereign Pocahontas Co. v. Bond*, 120 F.2d 39, 39–40 (D.C. Cir. 1941); *Knickerbocker Merch. Co. v. United States*, 13 F.2d 544, 546 (2d Cir. 1926); *L J Mueller Furnace Co. v. Cascade Foundry Co.*, 145 F. 596, 600 (3d Cir. 1906); *Hindman v. First Nat'l Bank*, 112 F. 931, 944 (6th Cir. 1902).

2. The Second Restatement refers to “fraudulent misrepresentation,” rather than “knowing” misrepresentation. See Restatement (Second) of Torts § 526. However, as the Restatement clarifies, the requirement that a misrepresentation be “fraudulent” refers “solely” to the party’s *knowledge* of misrepresentation. See

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One who asserts a belief that a work is infringing without considering fair use lacks a basis for that belief. It follows that one who *knows* that he has not considered fair use *knows* that he lacks a basis for that belief. That is sufficient “actual knowledge of misrepresentation” to meet the scienter requirement of § 512(f). *See Rossi*, 391 F.3d at 1005. Thus, to be held liable under § 512(f), Universal need only have failed to consider fair use, and known that it had failed to consider fair use.

II

It is undisputed that Universal’s policy was to issue a takedown notice where a copyrighted work was used as “the focus of the video” or “prominently featured in the video.” By Universal’s own admission, its agents were not instructed to consider whether the use was fair. Instead, Universal directed its agents to spare videos that had “a second or less of a Prince song” or where the song was “distorted beyond reasonable recognition.” And yet, from this, the majority concludes that “whether Universal’s actions were sufficient to form a subjective good faith belief about the video’s fair use or lack thereof” presents a triable issue of fact.

I respectfully disagree. The Copyright Act explicitly enumerates the factors to be considered in assessing whether use of copyrighted material is fair. 17 U.S.C. § 107. Universal’s policy was expressly to determine

id. cmt. a. The Restatement’s definition of “fraudulent” is therefore persuasive authority for construing the meaning of “knowingly.”

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whether a video made “significant use”—not *fair* use—of the work. Nothing in Universal’s methodology considered the purpose and character of the use, the commercial or noncommercial nature of the use, or whether the use would have a significant impact on the market for the copyrighted work.³ *See* § 107. There is therefore no disputed issue of fact: Universal did *not* consider fair use before issuing a takedown notice.

Moreover, Universal *knew* it had not considered fair use, because § 107 explicitly supplies the factors that “shall” be considered in determining whether a use is fair. *Id.* I see no reason in law or logic to excuse copyright holders from the general principle that knowledge of the law is presumed. *See United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 562–63 (1971) (holding that the use of the word knowingly” did not evince a legislative intent to “carv[e] out an exception to the general rule that ignorance of the law is no excuse”). As explained above,

3. Had Universal properly considered the statutory elements of fair use, there is no doubt that it would have concluded that Lenz’s use of *Let’s Go Crazy* was fair. *See, e.g., TCA Television Corp. v. McCollum*, 2015 WL 9255341 (S.D.N.Y. Dec. 17, 2015) (finding on a motion to dismiss that the use in a Broadway show of one minute and seven seconds of the Abbott and Costello routine *Who’s On First?* was fair because the use was “highly transformative” and unlikely to usurp the market for the original); *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013) (affirming summary judgment that use of a seven-second clip of *The Ed Sullivan Show* was fair for similar reasons). Universal’s “significant use” analysis, by contrast, is more like determining whether a use is *de minimis*, a much more stringent test than fair use. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998).

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that is sufficient in my view to conclude that Universal’s takedown notice was a knowing misrepresentation.

Based on *Rossi*’s holding that a subjective good-faith belief in infringement is sufficient to satisfy § 512(c)(3) (A)(v), 391 F.3d at 1005, the majority disagrees. But the majority’s reading of *Rossi* would insulate from liability *any* subjective belief in infringement, no matter how poorly formed. *Rossi* did not abrogate the statutory requirement that the belief be held in good faith. I would therefore hold that a belief in infringement formed consciously without considering fair use is no good-faith belief at all. *See Cooper*, 111 U.S. at 155 (holding that such a belief is a knowing misrepresentation). And to assert in good faith that a use is not fair, a party must consider the statutory elements of fair use set forth in § 107. Merely evaluating whether a use is “significant” is not enough.

The majority’s unfortunate interpretation of § 512(f) would permit a party to avoid liability with only the most perfunctory attention to fair use. Such a construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices. And, in an era when a significant proportion of media distribution and consumption takes place on third-party safe harbors such as YouTube,⁴ if a creative work can be taken down without meaningfully considering fair use, then the viability of the concept of

4. *See Statistics, YouTube*, <https://www.youtube.com/yt/press/statistics.html> (last visited Feb. 2, 2016) (reporting that “every day people watch hundreds of millions of hours on YouTube” and that YouTube “reaches more 18–34 and 18–49 year-olds than any cable network in the U.S.”).

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fair use itself is in jeopardy. Such a construction of § 512(f) cannot comport with the intention of Congress.

* * *

In sum: Universal represented that it had formed a goodfaith belief that Lenz’s video was an infringement of copyright—that is, that the video was not fair use. Because Universal did not actually consider the factors constituting fair use, its representation was false—a misrepresentation. Because those factors are set forth in § 107 (and § 107 expressly states that a fair use “is not an infringement of copyright”), Universal’s misrepresentation was knowing. And because there is no further disputed issue of fact concerning liability, I respectfully dissent.

**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SAN JOSE DIVISION,
FILED JANUARY 24, 2013**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SAN JOSE DIVISION

Case No. 5:07-cv-03783-JF

STEPHANIE LENZ,

Plaintiff,

v.

UNIVERSAL MUSIC CORPORATION,
UNIVERSAL MUSIC PUBLISHING, INC. AND
UNIVERSAL MUSIC PUBLISHING GROUP,

Defendants.

January 24, 2013, Decided; January 24, 2013, Filed

**ORDER DENYING CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Plaintiff Stephanie Lenz (“Lenz”) and Defendants Universal Music Corporation, Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively, “Universal”) each move for summary judgment. The Court has considered the briefing, the admissible evidence, and

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the oral argument presented at the hearing on October 16, 2012. For the reasons discussed below, the motions will be denied.

I. BACKGROUND

The facts giving rise to this action are undisputed except as noted otherwise. On February 7, 2007, Lenz videotaped her young children in her family's kitchen. The song "Let's Go Crazy" by the artist known as "Prince" played in the background. During the video, Lenz's son is shown walking with the aid of a push-toy and "dancing" to the song. Lenz can be heard asking, "what do you think of the music?" On February 8, 2007, Lenz uploaded the twenty-nine second video to YouTube.com ("YouTube"), a popular Internet video hosting site. She titled the video "Let's Go Crazy #1."

Universal is a music publishing company that administers composition copyrights for hundreds of songwriters. In 2007, Universal administered copyrights for Prince. Universal monitored YouTube regularly for unauthorized use of Prince's works. Universal's head of business affairs, Robert Allen ("Allen"), assigned the task of monitoring YouTube to Sean Johnson ("Johnson"). Johnson entered the titles of the most popular Prince songs into the YouTube search field, reviewing each returned video to determine whether it used one or more of the songs in an unauthorized or infringing manner. If it did, Johnson included the video on a removal list. The removal lists subsequently were sent to YouTube with a request that the identified videos be removed from the YouTube site.

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After reviewing Lenz's video, Johnson included it on the then-current removal list. Allen instructed another Universal employee, Alina Moffat ("Moffat"), to transmit the list to YouTube via email. On June 4, 2007, Moffat incorporated the list into a standard email format that Universal used when requesting that YouTube remove videos that Universal considered infringing. She sent the email (hereinafter "Takedown Notice") to `copyright@youtube.com`, an email address identified in YouTube's Terms of Service as intended solely for the purpose of receiving notifications of claimed infringement under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512.

On June 4, 2007, YouTube sent Lenz an email notifying her that it had removed her "Let's Go Crazy #1" video in response to Universal's accusation of copyright infringement. YouTube advised Lenz of the DMCA counter-notification procedures and warned her that repeated incidents of copyright infringement could lead to the deletion of her account and all of her posted videos. On June 7, 2007, Lenz sent YouTube a DMCA counter-notice. Because that counter-notice did not contain all of the elements required under 17 U.S.C. § 512(g), YouTube did not restore the video to its website at that time. Lenz then retained counsel, who helped her send YouTube a second DMCA counter-notice on June 27, 2007. That counter-notice asserted that the video constituted fair use of "Let's Go Crazy." YouTube restored the video to its site in mid-July 2007. The video was down for approximately six weeks. As of the date of this order, the video has been viewed on YouTube more than 1.2 million times.

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Lenz filed the present action against Universal in July 2007. Her operative second amended complaint asserts a single claim for misrepresentation pursuant to 17 U.S.C. § 512(f). Both she and Universal seek summary judgment with respect to that claim.

II. LEGAL STANDARD

A motion for summary judgment should be granted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of “depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” that demonstrate the absence of a triable issue of material fact. Fed. R. Civ. P. 56(c)(1)(A); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

*Appendix B***III. DISCUSSION**

The DMCA limits service providers' liability "for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." 17 U.S.C. § 512(c)(1). This "safe harbor" provision applies if the service provider meets certain requirements and, upon receiving a "notification of claimed infringement," "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity." 17 U.S.C. § 512(c)(1)(C). To be effective, a notification of claimed infringement sent to the service provider must include *inter alia* "[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." 17 U.S.C. § 512(c)(3)(A)(v) (emphasis added). "Any person who knowingly materially misrepresents under this section . . . that material or activity is infringing" may be liable for resulting damages incurred by the alleged infringer. 17 U.S.C. § 512(f). To be recoverable, the damages must be "incurred by the alleged infringer . . . who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing." *Id.* Lenz claims that Universal's Takedown Notice was a "notification of claimed infringement" pursuant to the DMCA, that it constituted a knowing, material misrepresentation that her video infringed Prince's copyright, and that she incurred damages as a result of YouTube's removal of her video from its site.

*Appendix B***A. Applicability of the DMCA**

As an initial matter, the parties dispute whether the DMCA applies at all in this case. As noted above, the DMCA imposes liability upon “[a]ny person who knowingly materially misrepresents *under this section* . . . that material or activity is infringing.” 17 U.S.C. § 512(f) (emphasis added). Lenz asserts that Universal’s Takedown Notice was a “notification of claimed infringement” under § 512 and thus that any material misrepresentations contained therein were made “under this section,” that is, under the DMCA. Universal contends that its Takedown Notice did not constitute a “notification of claimed infringement” under § 512 and thus that any misrepresentations contained therein cannot give rise to DMCA liability.

As relevant here, YouTube’s Terms of Use required that DMCA procedures be used to request removal of videos from YouTube.¹ Dkt. Entry 398, Miksch Decl., Ex. N (Terms of Use), § 8. The Terms of Use summarized the DMCA’s provisions governing notification of copyright infringement and stated that such notifications should be sent to YouTube’s designated Copyright Agent. *Id.* The Copyright Agent’s email address was given as: copyright@youtube.com. *Id.* Notably, the Terms of Use

1. Although Universal later entered into a contract with YouTube that granted Universal contractual rights with respect to removal of videos, Universal did not have any such contractual rights at the time that it sent the Takedown Notice. Dkt. Entry 456, Miksch Decl., Ex. FF (Universal-YouTube contract effective June 28, 2007); Ex. Q2 (Allen Depo) at 72:4-13.

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stated that only DMCA notices should be sent to the Copyright Agent, and that any other communications should be directed to YouTube customer service through <http://www.google.com/support/youtube>. *Id.*

Universal does not dispute that its Takedown Notice complied with these provisions and was sent to the email address designated for receipt of DMCA notifications of copyright infringement. However, it asserts that its Takedown Notice complied with YouTube's Terms of Use – and thus with the DMCA – *only* because YouTube required such compliance. Universal points out that the Takedown Notice also contained the following language:

This email does not constitute a waiver of any right to recover damages incurred by virtue of any such unauthorized activities, and such rights as well as claims for other relief are expressly retained. In addition, *our use of YouTube's required notice form does not indicate we believe that the above referenced copyright infringement is within the scope of the Digital Millennium Copyright Act ("DMCA")*. Our use of this form, as required by YouTube, is meant to facilitate YouTube's removal of the infringing material listed above and *is not meant to suggest or imply that YouTube's activities and services are within the scope of the DMCA safe harbor*.

Dkt. Entry 398, Miksch Decl., Ex. P. (Takedown Notice of June 4, 2007) (emphasis added). Allen, who ultimately was

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responsible for Universal's notices to YouTube, testified that he did not believe that the Takedown Notice was sent pursuant to the DMCA. Dkt. Entry 449, Klaus Decl., Ex. 3 (Allen Depo.) at 78:2-15.

Universal appears to be arguing that it invoked the DMCA process only because YouTube's Terms of Use required that the process be utilized to request removal of allegedly infringing content, and that because it expressly reserved its rights, the request was not made "pursuant" to the DMCA. Universal does not explain why it could not have addressed its concerns with YouTube's Terms of Use directly with YouTube as provided in the Terms of Use themselves, nor does it point to any authority suggesting that its subjective intent is relevant to the legal adequacy of the Takedown Notice for purposes of the statute.

Universal also argues that YouTube is ineligible for the protection of the DMCA's safe harbor provision. Specifically, Universal contends that YouTube's activities in uploading, hosting, and transmitting videos do not constitute "storage at the direction of the user" as specified in § 512(c)(1). Universal acknowledges that the Second Circuit has held to the contrary in *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012). In *Viacom*, the court concluded that YouTube's conversion of videos into a standard display format, playback of videos on "watch" pages, and "related videos" function are encompassed within the term "storage at the direction of the user" as used in § 512(c)(1). *Id.* at 38-39. Universal also acknowledges that the Ninth Circuit has rejected a similar § 512(c)(1) challenge asserted by Universal in

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UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011). *See id.* at 1031-35. However, Universal notes that a petition for rehearing *en banc* in *UMG Recording* remains pending and that the parties have been directed to submit briefing on the impact of *Viacom* in connection with that petition. Universal suggests that this Court delay resolution of the present cross-motions pending further action by the Ninth Circuit.

Lenz contends that *UMG Recordings* has no bearing on the present dispute because YouTube was not a defendant in that case and that this Court simply should apply *Viacom*. While it is not clear that *UMG Recordings* is irrelevant to the present litigation, the Court is not inclined to stay resolution of the present motions, particularly given the lengthy pendency of this litigation, based upon the mere possibility that Universal's petition for rehearing *en banc* might be granted. In light of the record evidence and the current state of the law, the Court concludes that YouTube qualifies for protection under the DMCA safe harbor and that Universal's Takedown Notice constituted a "notification of claimed infringement" under the DMCA.

B. Material Misrepresentation

As discussed above, a notification of claimed infringement sent to a service provider under § 512(c) must include *inter alia* "[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." 17 U.S.C. § 512(c)(3)(A)(v). Universal's Takedown Notice stated as follows:

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We believe your service is hosting the above-referenced files on its network. These files are offering video recordings in an interactive streaming format that embody musical compositions written by the artist known as Prince. *We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law.*

Dkt. Entry 398, Miksch Decl., Ex. P. (Takedown Notice of June 4, 2007) (emphasis added). Lenz asserts that this statement was a knowing, material misrepresentation under § 512(f) because, given its procedures for reviewing videos before requesting that they be removed, Universal could not have formed a good faith belief that Lenz’s video did not constitute fair use.

1. Fair Use Doctrine

This Court held early in the present litigation that a copyright owner must consider fair use before proceeding with a takedown notice under the DMCA:

[I]n order for a copyright owner to proceed under the DMCA with “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,” the owner must evaluate whether the material makes fair use of the copyright. 17 U.S.C. § 512(c)(3)(A)(v). An allegation that a copyright owner acted in bad faith by issuing a takedown notice without

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proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.

Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154-55 (N.D. Cal. 2008).²

Lenz presents substantial evidence that Universal did not consider explicitly whether her video made fair use of Prince's song before it sent the Takedown Notice. Johnson, the only person at Universal who reviewed YouTube videos for violations of Prince's copyrights, described his practice as follows: "I put a video on the list that embodied a Prince composition in some way if the – there was a significant use of it, of the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video. Dkt. Entry 452, Miksch Decl., Ex. R (Johnson Depo.) 60:17-22. He did not put a video on the list if it had only "a second or less of a Prince song,

2. Universal claims that in light of the Ninth Circuit's recent discussion of fair use in *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012), the question of whether a particular use is "authorized by law" does not involve consideration of the fair use doctrine. Addressing fair use in a case in which the doctrine was asserted as an affirmative defense, *Monge* held that, "This affirmative defense presumes that unauthorized copying has occurred, and is instead aimed at whether the defendant's use was fair." *Id.* at 1170. Universal argues that if the fair use doctrine does not come into play unless a use is "unauthorized," then by definition fair use cannot be an "authorized" use for purposes of the DMCA. However, while it does provide some support for Universal's position, *Monge* is not a DMCA case, and it does not address the unique statutory language at issue here.

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literally a one line, half line of a Prince song,” or if it was shot in a noisy environment like a bar where the song was playing “deep in the background.” *Id.* at 62:4-10, 63:3-15. Johnson’s decision to put Lenz’s video on the removal list was based upon the facts that: it was titled “Let’s Go Crazy #1”; he recognized the song in the background “right off the bat”; the song was loud and played through the entire video; and the audio track included a voice asking the children whether they liked the music. *Id.* at 75:16-76:7, 79:7-20. Johnson made no mention of fair use during his testimony and gave no indication that he considered fair use before deciding whether to place Lenz’s video on the removal list. *Id.*

The guidelines that Allen described when testifying on behalf of Universal likewise make no mention of fair use:

The general guidelines are that when a writer is upset or requests that particular videos be removed from YouTube that we review the video to ensure that the composition was the focus of the video and if it was we then notify YouTube that the video should be removed.

Dkt. Entry 452, Miksch Decl., Ex. Q (Allen Depo.) at 61:1-6. In its supplemental response to Lenz’s requests for admission, Universal admitted that as of June 4, 2007 – the date of the Takedown Notice – it had not instructed Johnson to consider fair use during his review of YouTube videos. Dkt. Entry 398, Miksch Decl., Ex. H (Supp. Resp. to RFAs) at 18.

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This evidence is sufficient to establish that Universal issued its Takedown Notice without considering fair use. Universal nonetheless contends that although Johnson was not instructed to and did not consider fair use *per se*, he did consider a number of factors that would be relevant to a fair use determination. In general, such factors include: (1) whether there was a transformative noncommercial purpose; (2) the nature of the copyrighted work; (3) the amount and substantiality of the use of the copyrighted work; and (4) the effect on the market for the copyrighted work. 17 U.S.C. § 107. Johnson testified that he considered whether Lenz’s video made “significant use” of Prince’s song and whether the song was the “focus” of the video. *See* Dkt. Entry 452, Miksch Decl., Ex. R (Johnson Depo.) 60:17-22. Universal argues that Johnson’s consideration of these and other factors relevant to a fair use analysis is sufficient to meet a requirement that a copyright owner consider fair use before proceeding under the DMCA. Citing the Ninth Circuit’s recent statement that “[t]he fair use doctrine has been called the most troublesome in the whole law of copyright,” *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012), Universal argues that requiring anything more would be inconsistent with the relatively uncomplicated review process envisioned by this Court, *see Lenz*, 572 F. Supp. 2d at 1155.

While it agrees that requiring a copyright holder to engage in a full-blown fair use analysis prior to sending a DMCA takedown notice would be inconsistent with the remedial purposes of the statute, the Court disagrees that it is sufficient for a copyright holder to consider facts that might be relevant to a fair use analysis without making

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any effort to evaluate the significance of such facts in the context of the doctrine itself. Because the question of whether something constitutes fair use is a “legal judgment,” *Monge*, 688 F.3d at 1183, proper consideration of the doctrine must include at least some analysis of the legal import of the facts. The Court concludes that at minimum, for the reasons discussed at length in its prior order, *see Lenz*, 572 F. Supp. 2d at 1154-56, a copyright owner must make at least an initial assessment as to whether the fair use doctrine applies to the use in question in order to make a good faith representation that the use is not “authorized by law.”

2. Effect Of Universal’s Failure To Consider Fair Use Doctrine

Lenz asserts that under the law of the case, Universal’s admitted failure to consider fair use before sending its Takedown Notice is sufficient to establish liability under § 512(f). Universal disputes this assertion, relying upon the Ninth Circuit’s holding in *Rossi v. Motion Picture Assoc. of America, Inc.*, 391 F.3d 1000 (9th Cir. 2004). In *Rossi*, the court held that “the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard.” *Id.* at 1004. The plaintiff in that case asserted that had the defendant conducted a reasonable investigation into the plaintiff’s allegedly offending website, the defendant necessarily would have realized that there was no copyright infringement. *Id.* at 1003. The Court of Appeals concluded that “[a] copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted

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unreasonably in making the mistake.” *Id.* at 1005. “Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.” *Id.* In light of *Rossi*, it appears that Universal’s mere failure to consider fair use would be insufficient to give rise to liability under § 512(f). Lenz thus must demonstrate that Universal had some actual knowledge that its Takedown Notice contained a material misrepresentation.

This Court’s prior order contemplated imposition of § 512(f) liability upon a showing that the copyright owner “acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine.” *Lenz*, 572 F. Supp. 2d at 1155. A bad faith requirement would be consistent with *Rossi*’s subjective standard. However, Lenz points out that neither the DMCA nor the applicable case law uses the term “bad faith.” Instead, both frame the inquiry in terms of whether the party that issued the takedown notice had a “good faith belief” that use of the copyrighted work was unauthorized. *See* 17 U.S.C. § 512(c)(3)(A)(v) (providing that a notification of claimed infringement sent to the service provider must include “[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.”) (emphasis added); *Rossi*, 391 F.3d at 1004 (discussing the “good faith belief” requirement of § 512(c)(3)(A)(v)). Lenz contends that Universal could not have formed a good faith belief that her use of Prince’s song was not fair use because Universal’s takedown procedures ignored the question of fair use entirely.

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Essentially, Lenz asserts that Universal's procedures for evaluating copyright infringement were so deficient that Universal willfully blinded itself as to whether any given video might constitute fair use. "Willful blindness is tantamount to knowledge." *Viacom*, 676 F.3d at 34; *see also Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) ("Willful blindness is knowledge, in copyright law . . . as it is in the law generally."). She argues that a showing of willful blindness would be sufficient to show an absence of good faith under *Rossi*'s subjective standard.³

In order to establish willful blindness on the part of a defendant, a plaintiff must establish two factors: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global Tech. Appliances, Inc. v. SEB SA*, 131 S.Ct. 2060, 2070, 179 L. Ed. 2d 1167 (2011). "Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability

3. At the hearing, Lenz's counsel suggested that something less than willful blindness might be sufficient, arguing that the *Rossi* standard could be met simply by showing that on this record Universal could not have formed a good faith belief that fair use did not apply, because Universal did not consider fair use at all. However, as noted above, an inadvertent failure to consider fair use would be insufficient to impose § 512 liability in light of *Rossi*. Lenz must demonstrate "some actual knowledge of misrepresentation" on the part of Universal. Since the record is devoid of evidence that Universal subjectively believed that fair use might apply to Lenz's video, the Court concludes that the only other avenue available to Lenz is to show that Universal willfully blinded itself to the potential application of the fair use doctrine.

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of wrongdoing and who can almost be said to have actually known the critical facts.” *Id.* at 2070-71.

Addressing the second factor first, Lenz presents evidence, discussed above, that Universal assigned the task of reviewing YouTube postings for infringing uses of Prince’s songs to a single person who was not given any information or training about fair use. A trier of fact could conclude based on this evidence that Universal took deliberate actions to avoid learning whether any particular use of one of Prince’s works was protected by the fair use doctrine.

However, Lenz does not present evidence suggesting that Universal subjectively believed either that there was a high probability that any given video might make fair use of a Prince composition or that her video in particular made fair use of Prince’s song “Let’s Go Crazy.” Lenz argues that her video was “self-evident” fair use and that Universal must have known it constituted fair use when it sent the Takedown Notice. However, as the Ninth Circuit recently has observed, the process of making a fair use determination “is neither a mechanistic exercise nor a gestalt undertaking, but a considered legal judgment.” *Monge*, 688 F.3d at 1183. A legal conclusion that fair use was “self-evident” necessarily would rest upon an objective measure rather than the subjective standard required by *Rossi*. Indeed, Universal presents evidence that Lenz herself initially did not view her claim as involving fair use. *See* Dkt. Entry 400, Klaus Decl., Ex. 1 (Lenz’s Blog).⁴

4. Plaintiff objects to Universal’s citation to this evidence, asserting that the relevant inquiry is what *Universal* believed, not

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Accordingly, the Court concludes that Lenz is not entitled to summary judgment based on the theory that Universal willfully blinded itself to the possibility that her video constituted fair use of Prince’s song. Nor is Universal entitled to summary judgment, as it has not shown that it *lacked* a subjective belief that there was a high probability that any given video might make fair use of a Prince composition. Lenz is free to argue that a reasonable actor in Universal’s position would have understood that fair use was “self-evident,” and that this circumstance is evidence of Universal’s alleged willful blindness. Universal likewise is free to argue that whatever the alleged shortcomings of its review process might have been, it did not act with the subjective intent required by §512(f).

C. Damages

Universal contends that even if its Takedown Notice did contain a material misrepresentation sufficient to give rise to liability under the DMCA, it nonetheless is entitled to summary judgment because Lenz cannot demonstrate that she suffered any damages. Lenz asserts that this Court already has held that she was damaged by YouTube’s removal of her video. In its order dated February 25, 2010, the Court granted partial summary judgment with respect to a number of Universal’s affirmative defenses, including Universal’s third affirmative defense asserting that Lenz had not suffered any damages. The Court reasoned as follows:

what Lenz or anyone else believed. This objection is overruled. Plaintiff’s initial impression that fair use did not apply in this case is relevant to her assertion that fair use is so “self-evident” that Universal must have known that the doctrine does apply.

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Universal has challenged Lenz's claim that her pre-suit activities, which included "time spent reviewing counternotice procedures, seeking the assistance of counsel, and responding to the takedown notice," (Pl.'s MSJ), involved actual expense or economic loss.

Universal does not claim that Lenz did not take these actions or incur any damages in doing so. As discussed above, the Court concludes that actual expenses or economic losses of some minimum value are not necessary under the statute. Accordingly, because there is no genuine issue of material fact as to whether Lenz incurred *some* damages as defined under the statute, Lenz's motion will be granted as to Universal's affirmative defense of no damages.

Lenz v. Universal Music Corp., 2010 U.S. Dist. LEXIS 16899, 2010 WL 702466, at *11-13 (N.D. Cal. Feb. 25, 2010).

Universal correctly points out that the record is more developed now than it was at the time the Court issued its prior order, and that Lenz's damages theory has evolved over time. Universal argues that on the current record the Court may conclude as a matter of law that Lenz did not incur *any* damages recoverable under § 512.

Lenz asserts three categories of damages: loss of YouTube's hosting services and chilling of her free speech, lost time and resources, and attorneys' fees and costs. With respect to the first category, Universal submits

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evidence that YouTube services were available to Lenz at no cost and that Lenz did not care that YouTube declined to host her video. *See* Dkt. Entry 400, Klaus Decl., Ex. 3 (email) (“I don’t care that YouTube doesn’t want to host it. Not like I’m paying them.”). Lenz states in her declaration that as a result of the takedown of her video, she recorded videos of her children less frequently, and felt that her freedom to express herself through video had been restricted. Dkt. Entry 392, Lenz Decl., ¶ 10. She seeks nominal damages for the chilling of her free speech rights. However, the cases upon which she relies raised challenges to *government* action. For example, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated on other grounds*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997), involved a suit by a state employee against the state. The plaintiff was awarded nominal damages.⁵ Lenz invites this Court to extend the reach of such cases to the conduct of private actors in the DMCA context. However, absent some authority supporting such an extension, the Court declines the invitation. Accordingly, the Court concludes that Lenz cannot demonstrate damages based upon the loss of YouTube’s hosting services and the chilling of her free speech.

Lenz claims that, “In total, I spent at least ten hours before filing this lawsuit on obtaining counsel, figuring out how to send – and sending – the first counternotice to

5. The holding in another case relied upon by Lenz, *Phelps-Roper v. City of Manchester*, 738 F. Supp. 2d 947 (E.D. Mo. Sept. 8, 2010), was reversed and vacated after briefing on the present motions was completed, *see* 697 F.3d 678 (8th Cir. 2012).

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YouTube, sending the second counternotice to YouTube, and ensuring that my video was restored to YouTube.” Dkt. Entry 392, Lenz Decl., ¶ 9. She requests that she be compensated for that time at minimum wage, although she admittedly did not lose any actual wages. She goes on to state that, “Most, if not all, of this work was completed on my personal computer.”

Apparently there is no reported case that indicates definitively whether Lenz may recover for the time and resources that she herself expended in attempting to have her video reinstated under the DMCA’s counter-notice procedures. Universal argues that Lenz may not recover damages for her expenditure of her own time and resources, citing the Restatement (Second) of Torts, §§ 525, 549 (1977), for the proposition that pecuniary loss is an element of a claim for misrepresentation. However, it is not clear that the pecuniary loss requirement applies to a statutory claim brought under the DMCA. Lenz must have incurred at least minimal expenses for electricity to power her computer, internet and telephone bills, and the like, that potentially could be recoverable under § 512(f). Permitting recovery of such damages would be consistent with this Court’s earlier conclusion that “[t]he use of ‘any damages’ [in the statute] suggests strongly Congressional intent that recovery be available for damages even if they do not amount to . . . substantial economic damages.” *Lenz*, 2010 U.S. Dist. LEXIS 16899, 2010 WL 702466, at *10. As the Court has noted, requiring a plaintiff who has demonstrated a misrepresentation actionable under the DMCA “to demonstrate in addition not only that she suffered damages but also that those damages were

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economic and substantial would vitiate the deterrent effect of the statute.” *Id.*

Finally, Lenz claims that she incurred attorneys’ fees for pre-litigation work done in responding to the Takedown Notice. Attorney Marcia Hoffman states in her declaration that she works for the Electronic Frontier Foundation (“EFF”), that she spent 4.25 hours helping Lenz respond to the Takedown Notice prior to commencement of litigation, and that at her normal billing rate the fees incurred total \$1,275. Dkt. Entry 393, Hoffman Decl., ¶¶ 1-7. While those fees were *pro bono*, it is not clear that they cannot form the basis of a damages claim here. Lenz points to language in her retainer agreement with EFF requiring her to assign any recovery up to the full amount of the EFF’s fees and expenses. Dkt. Entry 446, Klaus Decl., Ex. 34 (Retainer Agreement). It may be that Lenz may recover the *pro bono* fees as an element of damages if she prevails on her DMCA claim. The cases cited by the parties are not dispositive on this issue.⁶

In summary, the Court concludes that Universal has not established that Lenz is precluded from recovering

6. Universal argues that counsel’s prelitigation work was so intertwined with the litigation that the fees are not recoverable under the Court’s prior ruling that fees incurred for litigation are not recoverable. *See Lenz*, 2010 U.S. Dist. LEXIS 16899, 2010 WL 702466, at *11. Universal does not cite authority holding that “intertwined” fees are not recoverable, and the Court is not prepared to conclude on this record that in fact the prelitigation and post litigation fees are so intertwined that the former would be unrecoverable under the Court’s prior ruling.

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any damages for her DMCA claim. This ruling is without prejudice to a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, if and when such motion is appropriate.

IV. ORDER

For the foregoing reasons, the cross-motions for summary judgment are DENIED.

DATED: 1/24/2013

/s/ JEREMY FOGEL
United States District Judge

**APPENDIX C — RELEVANT STATUTORY
PROVISIONS**

17 U.S.C.A. § 106

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

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17 U.S.C.A. § 107

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

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17 U.S.C.A. § 512

§ 512. Limitations on liability relating to material online

* * *

(c) Information residing on systems or networks at direction of users.--

(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

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(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.--The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.--

(A) To be effective under this subsection, a notification of claimed infringement must be a

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written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) 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.

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(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

* * *

(f) Misrepresentations.--Any person who knowingly materially misrepresents under this section--

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(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

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, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) Replacement of removed or disabled material and limitation on other liability.--

(1) No liability for taking down generally.--Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or 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.

(2) Exception.--Paragraph (1) shall not apply with respect to 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 that is removed, or to which access is disabled

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by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider--

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person 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.

(3) Contents of counter notification.--To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

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- (A) A physical or electronic signature of the subscriber.
 - (B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.
 - (C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.
 - (D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.
- (4) Limitation on other liability.--**A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).