

In the Supreme Court of the United States

STEPHANIE LENZ,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE ORGANIZATION FOR
TRANSFORMATIVE WORKS AND PUBLIC
KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF
THE PETITION**

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<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	10
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<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007)	8

(iii)

Reno v. ACLU,
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Rossi v. Motion Picture Ass'n,
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—— § 512(f) 2, 4, 8–10, 13, 15–16, 20

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Other Sources

Andy, *Reddit Working on a Copyright Takedown Transparency Report*, TorrentFreak (Apr. 1, 2016), <https://torrentfreak.com/reddit-working-on-a-copyright-takedown-transparency-report-160401/> 19

Comments of the Organization for Transformative Works, *Section 512 Study*, 80 Fed. Reg. 81862 (Copyright Office Apr. 1, 2016), *available at* <https://www.regulations.gov/document?D=COLC-2015-0013-86027> 16

Ctr. for Democracy & Tech., *Campaign Take-down Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (2010), *available at* https://www.cdt.org/files/pdfs/copyright_takedowns.pdf 22

Tim Cushing, *Total Wipes Decides the Word ‘Download’ Means Infringement, Issues DMCA Takedown Loaded with Non-Infringing URLs*, Techdirt (Feb. 23, 2015), <https://www.techdirt.com/articles/20150222/12492130106/total-wipes-decides-word-download-means-infringement-issues-dmca-takedown-loaded-with-non-infringing-urls.shtml> 19

Peter Kafka, *Veoh Finally Calls It Quits: Layoffs Yesterday, Bankruptcy Filing Soon*, CNet (Feb. 11, 2010), <http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/> 6

Lumen Database (last accessed Sept. 13, 2016), <https://lumendatabase.org/> 18

Elizabeth Martin, *Using Copyright to Remove Content: An Analysis of Garcia v. Google*, 26 *Fordham Intell. Prop. Media & Ent. L.* 463 (2016) . . . 21

Alex Pasternak, *NASA's Mars Rover Crashed Into a DMCA Takedown*, *Motherboard* (Aug. 6, 2012), <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown> 20

Adam Rosenberg, *'Pixels' Copyright Notices Took Down the Studio's Own Trailer*, *Mashable* (Aug. 9, 2015), <http://mashable.com/2015/08/09/pixels-dmca/> 20

Matt Schruers, *Observations on DMCA Reform and Notice & Takedown Abuse*, *Project Disco* (May 23, 2013), <http://www.project-disco.org/intellectual-property/052313observations-on-dmca-reform-and-notice-takedown-abuse/> 21

Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 113th Cong. (2014) 21–22

Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 *Va. J.L. & Tech.* 369 (2014) 19

Daniel Seng, *'Who Watches the Watchmen?' An Empirical Analysis of Errors in DMCA Takedown Notices* (Jan. 23, 2015) (unpublished manuscript), *available at* <http://ssrn.com/abstract=2563202> 19

Joey-Elijah Sneddon, *Ubuntu Torrent Removed from Google for 'Infringing' Transformers Movie*, *OMG! Ubuntu!* (Sept. 12, 2016), [http://www.omgubuntu.co.uk / 2016 / 09 / ubuntu - torrent - removed-google-infringing-transformers-movie](http://www.omgubuntu.co.uk/2016/09/ubuntu-torrent-removed-google-infringing-transformers-movie) . . . 18

S. Rep. No. 105-190 (1998) 5

Transparency Report: Frequently Asked Questions, Google (last accessed Sept. 13, 2016), [http: / / www.google.com / transparencyreport / removals / copyright / faq /#abusive _ copyright _ requests](http://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests) 20

Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* (2016), available at <http://ssrn.com/abstract=2755628> 7, 9, 19–20

Warner Brothers Reports Own Site as Illegal, BBC News (Sept. 5, 2016), <http://www.bbc.com/news/technology-37275603> 20

INTEREST OF *AMICI CURIAE*

The Organization for Transformative Works¹ is a nonprofit organization dedicated to protecting and preserving noncommercial works created by fans based on existing works, including popular television shows, books, and movies. OTW's "Archive of Our Own" also functions as a platform hosting transformative non-commercial works, supporting over 900,000 registered users and receiving upwards of 130 million page views per week.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

Amici curiae are collectively organizations that share the concern that review by this Court is necessary to keep speech and creativity from being chilled.

¹Pursuant to Supreme Court Rule 37.2(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The petition here may come wrapped as a copyright case, but it is a case as much about free speech as any of the seminal free speech cases that have reached this Court before. Because the Ninth Circuit's decision leads to a result inconsistent with this Court's prior First Amendment holdings, review here is warranted.

Copyright law must always be drawn within the bounds that the First Amendment permits. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012). In enacting § 512 of the Digital Millennium Copyright Act ("DMCA"), Congress sought to comply with these limitations through several speech-protecting provisions, including § 512(c) which requires that the sender of a takedown demand have a "good faith belief" that the targeted speech is not authorized "by the owner, its agent or the law," and § 512(f), which allows those injured by illegitimate takedown demands of their speech to hold the senders of those demands accountable. These provisions mitigate the powerful effects of the DMCA, which essentially grant copyright owners an immediate injunction removing challenged content without any need for independent judicial review.

But the First Amendment requires more than abstract safeguards for free speech; it requires those safeguards to have practical effect. Yet, as the dissent in the appellate decision explained, by requiring only a subjective, rather than objective, "good faith belief" the majority decision "eviscerates § 512(f) and leaves it toothless" against the frivolous speech-suppressing demands the DMCA's notice-and-takedown system structurally invites.

This case illustrates how lawful speech is now vulnerable to the unchecked censorship that system enables, allowing a form of prior restraint that ordinarily would be anathema to the First Amendment. There are countless other examples, and there will yet be countless more if this Court does not grant review on certiorari.

Only by doing so can this Court vindicate Congress's intent to encourage online speech, the First Amendment interests of online speakers and the public, and the underlying purposes underpinning copyright law to "promote the progress of science and useful arts." *Amici* urge this Court to grant certiorari and restore the balance the DMCA constitutionally requires.

ARGUMENT

I. Certiorari Is Necessary to Correct Ninth Circuit Precedent that Puts the DMCA at Odds with Congress’s Intent to Encourage Online Speech, the First Amendment, and the Purposes of Copyright Law

The decision of the Court of Appeals raises significant structural issues with how online expression interacts with the copyright statute. The specific issue is that court relied on its earlier holding in *Rossi v. Motion Picture Ass’n*, 391 F.3d 1000 (9th Cir. 2004), which held that a mere subjective good faith belief that targeted content was unauthorized “by the owner, its agent or the law,” was sufficient to support a takedown demand sent pursuant to § 512(c).

By permitting a subjective good faith belief rather than requiring an objectively reasonable one, the Ninth Circuit effectively excised § 512(f) from the statute, making it all but impossible for people whose legitimate, non-infringing speech has been affected by invalid takedown demands to obtain a remedy for the harm this extra-judicial censorship inevitably and unjustifiably causes. Furthermore, by removing § 512(f)’s ability to provide a remedy to wronged speakers, the Ninth Circuit also removed its ability to deter those who would misuse the DMCA’s extraordinary power to cause others’ content to be wrongfully deleted.

The functional effects of this lax standard are inconsistent with congressional intent, the First Amendment, and the purposes of copyright law. Certiorari should be granted to ensure that the DMCA can remain consistent with all three.

A. The Lax Standard Frustrates Congress's Intent for the DMCA to Serve as a Tool to Protect Speech

In the late 1990s Congress saw the potential of the Internet to unite people and ideas. It also recognized the critical role of Internet platforms in delivering this promise. Users rely upon platforms to access and use the Internet: they are what carry, store, and serve each speck of information online. Everything people communicate on the Internet exists on the Internet only because some site, server, or system has intermediated their communications so that the world can have access to them. Congress understood that if it wanted these intermediaries to remain available to facilitate users' expression, it needed to craft a law that ensured they had sufficient protection from litigation and liability with respect to that expression. S. Rep. No. 105-190, at 8 (1998) (“[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”).

Congress offered intermediaries this shield to allow them to continue to be ready and available facilitators for the rich world of online content they enable. *Id.* at 1–2 (“The [DMCA] is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”). The survival of intermediaries is irrelevant, however, if all the content they would facilitate is vulnerable to deletion demands by others.

The trouble arises because the DMCA makes platform protection conditional on platforms meeting certain requirements, including the requirement that they “respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity” upon receiving notification of such claimed infringement. § 512(c)(1)(C). Thus platforms find themselves in a paradoxical situation: in order to mitigate their legal risk so that they can exist as intermediaries, they must suppress some of that very speech they exist to intermediate.

As a practical matter, platforms can, and sometimes do, resist taking down content targeted by takedown notices that appear invalid, but there are several reasons why platforms should not be left to be the final arbiters of takedown notices. For one, platforms are disincentivized from rejecting takedown notices because doing so would risk waiving the critical “safe harbor” that protects them from ruinous legal costs, if not also crippling damages.² The decision not to honor a notice is therefore not one a platform can make lightly.

Platforms also generally lack the necessary information to know whether any particular content they host at the direction of users is authorized “by the owner, its agent or the law.” In questions of copyright, context matters: a literal copy is not inherently infringing. It is only infringing when made without authoriza-

²In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, the platform was ultimately vindicated, but not before having been driven into bankruptcy and extinguished as a platform for users to share their content. See 718 F.3d 1006, 1024 (9th Cir. 2013); Peter Kafka, *Veoh Finally Calls It Quits: Layoff's Yesterday, Bankruptcy Filing Soon*, CNet (Feb. 11, 2010), URL *supra* p. iv.

tion “by the owner, its agent or the law.” But this is information known only to takedown notice senders—not platforms. Thus the obligation to evaluate whether a takedown demand is warranted should rest entirely with the former.

Furthermore, it can be unfeasible for platforms, particularly those that are smaller or individually run, to individually review takedown notices in any significant quantity. In addition to the resources such a review demands, smaller platforms may also lack the legal sophistication to even begin to evaluate a takedown notice’s legitimacy.³ But even for larger platforms,⁴ which are subject to an even greater tidal wave of automatic takedown notices, the burden of individual review can be equally unmanageable. *See, e.g.,* Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* 10 (2016), available at URL *supra* p. vi (describing a dataset of over 108 million takedown notices sent over a six-month period directed only to Google image search).

Congress understood that requiring platforms to proactively police for infringing content would be tremendously burdensome. 17 U.S.C. § 512(m); *see also Shelter Capital Partners*, 718 F.3d at 1022 (citing

³While Petitioner’s video was hosted on a large-scale commercial platform, platforms come in all shapes and sizes, hosting all sorts of material (text, video, pictures, sound), for all sorts of users hoping to reach all sorts of audiences. The DMCA applies to any and all platforms who comply with its requirements, regardless of whether they are run by public companies like Google, non-profit, volunteer-run organizations like OTW, or individuals who have coded their own websites.

⁴Note also that “large” platforms in terms of usage, visitors, or prominence can also come with “small” back-end operations staff.

Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) (“Congress made a considered policy determination that the ‘DMCA . . . [would] place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.’”). But it is no less burdensome to require them to proactively police for fair use or other defenses of legitimate speech. When presented with a takedown demand they are likely to obey it in order to be able to survive as a host for any user content at all.

This pressure for platforms to yield to every takedown demand they receive, no matter how invalid, puts them at odds with their users and undermines their ability to host the speech users look to them to intermediate and that the DMCA was intended to foster. For the DMCA to achieve its purpose of stimulating speech rather than suppressing it, there has to be a statutory check upon takedown notice senders. Congress intended that check to be § 512(f), but that check must have teeth to allow the DMCA to be the sort of speech-facilitating statute Congress intended it to be. Certiorari should therefore be granted to restore this critical deterrent.

B. The Lax Standard Is Inconsistent with the First Amendment

Congress could not have passed a law that would have undermined the First Amendment. The reach of any law must always be measured by standards that satisfy it. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (describing how no law can claim “talismanic immunity” from constitutional limitations).

Copyright law is no exception: the doctrine of fair use importantly ensures in part that copyright law remains consistent with those First Amendment principles. *Golan*, 132 S. Ct. at 890.

In creating the DMCA’s notice-and-takedown system, Congress did not intend to do violence to fair use and the critical speech interests it protects. In fact, Congress wrote into the statute several key provisions to guard against such a result. These provisions included § 512(c), which requires senders of takedown demands to have a “good faith belief” that the targeted material represented a use not authorized “by the copyright owner, its agent, or the law,” and § 512(f), which then provides those injured by illegitimate takedown demands of their speech access to a remedy.⁵ But when courts do not enforce the sanction prescribed by § 512(f) to stop improper takedown demands directed at fair uses, then the law as a whole effectively ceases to comport with constitutional mandates.

The issue here is not that courts are refusing to entertain claims brought under § 512(f), but that by judging the takedown notice sender’s “good faith belief” under a subjective, rather than objective, standard, it effectively “eviscerates § 512(f) and leaves it toothless”

⁵There is also a third provision, at § 512(g), which allows for deleted content to be “put back” online upon counter-notification by the affected speaker. However, in practice this provision provides very little recourse for a speaker whose speech has been removed, and data suggests that it is little used. Urban et al., *supra*, at 44–46. Furthermore, forcing anonymous speakers to rely on § 512(g), thereby unmasking themselves, puts the DMCA in serious tension, if not outright conflict, with the First Amendment, which explicitly includes a right to anonymous speech. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

against the frivolous censorship demands the DMCA's notice-and-takedown system invites. Pet. Cert. 30–31 (citing dissent).

The trouble arises because by its very design the DMCA essentially functions as a system of extra-judicial injunctions on speech, deliberately sparing aggrieved copyright holders from the cost and delay of having to seek content-removing injunctions from the courts. Such a system is truly extraordinary: in no other circumstance would we allow any law to enable, and indeed encourage, speech to be suppressed without judicial oversight. On the contrary, First Amendment jurisprudence ardently protects speech, particularly against injunctions on untested claims. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (“Only after judgment has become final, correct or otherwise, does the law’s sanction become fully operative.”). Because an injunction against speech constitutes a prior restraint if the court later finds the claim against it unmeritorious, such injunctions are greatly disfavored. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints . . . bear[s] a heavy presumption against its constitutional validity. We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.”) (internal citations omitted).

In crafting the DMCA, Congress did not attempt to remove the courts from their position of oversight; rather, it switched the role of judicial review from *ex ante* to *post hoc*. Section 512(f) invites the review and § 512(c) articulates the standard the review checks for. Yet without requiring anything more than a subjective

good faith belief nearly every specious belief can clear that hurdle.

By not enforcing an objectively reasonable standard, the DMCA's notice-and-takedown system ends up empowering would-be censors to target content with an ease and efficiency they never would be permitted without it. If takedown notice senders were to sue for an injunction, they would ordinarily need to plead enough "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Something more than a subjective belief in the validity of the claim would necessarily be required, *see id.*, even in the copyright context. *See, e.g., Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) (dismissing copyright infringement claim on a motion to dismiss, finding an "obvious case of fair use").

But the same is not true for a takedown notice so long as courts permit them to be predicated on a mere subjective good faith belief. As this Court has found, where liability lies on the line between unlawful and protected speech, an "[e]rror in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). Yet that is the error that the lesser standard invites. By not holding the infringement claims underpinning takedown notices to an objective standard, unmeritorious claims that would never survive judicial scrutiny nevertheless have injunctive effect on fair uses, with little risk of consequence to the party issuing even a baseless demand. Now relieved of both their procedural and

pleading burdens, as well as the cost, legal risk, and delay of a lawsuit, takedown notice senders instead have a clear path to censor others' speech at will.

Such a statutory interpretation puts the DMCA at odds with several constitutional tenets. “[A] noncriminal process of prior restraints upon expression ‘avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.’” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 181 (1968). Certiorari should therefore be granted to restore the effective protections for online speech the Constitution requires.

C. The Lax Standard Undermines the Purposes of Copyright Law

As this Court recently observed in *Kirtsaeng v. John Wiley & Sons* when interpreting the meaning of a provision in the copyright statute, “[w]e must consider if [that interpretation] well advances the Copyright Act’s goals.” 136 S. Ct. 1979, 1986 (2016).

Those objectives are well settled. “Copyright law ultimately serves the purpose of enriching the general public through access to creative works.” *Kirtsaeng*, 136 S. Ct. at 1986 (internal cites omitted). “The statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work.” *Id.* Certiorari should be granted here because of the degree to which the subjective good faith standard distorts this critical balance.

As discussed above, there should be no inherent tension between copyright and the First Amendment. They exist in parallel with the shared purpose of en-

couraging expression. *Golan*, 132 S. Ct. at 889–90. The DMCA, part of the Copyright Act, was similarly intended to create an environment where further speech could be fostered and made available online. Yet as long as the DMCA remains a tool of expedient censorship it will remain at odds with the purposes of copyright law as much as it is at odds with the First Amendment.

It is at odds because of how, rather than protecting more speech, it makes online speech even more vulnerable than it would have been offline, a result that flouts this Court's prior precedent. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). In the offline context, where there is no DMCA, no one could so easily and costlessly cause speech to be censored by merely pointing at it and claiming an infringement. To enjoin infringing expression they would need to draft a well-pleaded complaint sufficient to overcome the strong deference to speech protection that fair use and the First Amendment require.⁶ Yet for speech that exists only online, there are no such hurdles obstructing would-be censors. In fact, not only are there no hurdles, but so long as the subjective good faith standard is permitted to render § 512(f) ineffective at providing a remedy for unjust takedown demands, the statute effectively greases the wheels to make this sort of injunction unprecedentedly quicker, easier, and cheaper to achieve than it ever would have been in the offline world.

The result of this grant of extraordinary power to copyright holders⁷ absent an effective check is to ren-

⁶See Section I.B *supra* p. 8.

⁷The DMCA grants the power to copyright holders, but it is a power that can be wielded equally by those who own no valid

der the notice-and-takedown regime of the DMCA in direct conflict with copyright's purposes. Though it is often said that copyright remedies are necessary in order to incentivize speech, these remedies now can squelch the very speech copyright law seeks to incentivize. Online speech *is* expression that promotes the progress of the arts and sciences. Many online fair uses reflect the originality and authorship necessary to qualify for copyright protection itself. There is no principled reason why this expression should have less protection than the expression copyright owners claim as theirs.

The vibrancy of online speech, and how it, by its very existence, in turn inspires yet more speech, illustrates why the doctrine of fair use exists. By allowing downstream speakers to consider and comment on what has come before, we enable even more to come after. Yet with the subjective standard effectively giving carte blanche to private parties to cause any amount of online speech to be censored on a whim, the DMCA ends up destroying the very thing copyright law is intended to foster.

Certiorari should be granted to ensure that this damage to speech that a healthy democratic society depends on cannot continue to accrue.

II. Certiorari Is Necessary to Finally Cure the Injury to Speech and Fair Uses the Lack of an Objective Good Faith Standard Inflicts

The harm caused by a lax standard is real and being realized at an ever-increasing rate to speakers and the public that benefits from having access to this speech.

copyright in any of the targeted speech. See Section II.B *infra* p. 18 for examples of this takedown notice abuse.

As with any censorship it is a harm that accrues as soon as deletion is forced, regardless of whether it was later restored or any specific pecuniary harm was realized. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). Any unjustified censorship for any length of time represents a serious affront to the First Amendment and the parallel values reflected in copyright law. *Carroll*, 393 U.S. at 181 n.5 (“The elimination of prior restraints was a ‘leading purpose’ in the adoption of the First Amendment.”).

Yet this form of prior restraint is a particularly pernicious injury that all too many speakers have had to endure and all too many will have to endure if balance is not restored to the DMCA. Certiorari should be granted in order to put an end to this constitutionally-intolerable harm.

A. Certiorari Should Be Granted in This Particular Case

This case represents just one of the countless examples of legitimate speech succumbing to illegitimate censorship without any effective means of addressing that injury. See Section II.B *infra* p. 18 (noting other such cases). But the egregiousness of the injury here, and the lengthy, thus far fruitless quest to seek relief under the law, present a rare opportunity to stem the tide of wrongful censorship of speakers like Petitioner.

Although instances of illegitimate takedown demands are rapidly accruing, opportunities for judicial intervention are still seldom. The Ninth Circuit’s *Rossi* holding renders remedies under § 512(f) all but illu-

sory, thus deterring those whose speech has been removed from seeking redress. As the history of Petitioner’s case attests, pursuing a § 512(f) claim is a difficult and costly process. It is rare to find a speaker with both the risk tolerance⁸ and resources⁹ willing and able to attempt to swim upstream against a precedent so overly protective of their censors.

Certiorari in *Rossi* was denied, but there are several reasons why certiorari should be granted here. First, that case was the first to interpret the “good faith” standard as a subjective one, and the full scope of the decision’s deleterious effect on speech was not as apparent then as it is now. Second, its facts did not

⁸Pursuing any remediation through the DMCA—whether through § 512(f) or 512(g)—is a risky proposition that puts wronged speakers in the crosshairs of their challengers. See note 5 *supra* p. 9; see also Comments of the Organization for Transformative Works 17, *Section 512 Study*, 80 Fed. Reg. 81862 (Copyright Office Apr. 1, 2016), available at URL *supra* p. iv (“Speakers who lack a sense of personal political efficacy (including women, racial minorities, and so on) are often those whose transformative speech is most likely to face challenge from established rightsholders; they are disproportionately likely to be afraid to counternotify.”); *id.* at 18 (“[W]e have found that individuals (particularly young women) are generally intimidated by the prospect of counternotifying even when they believe, correctly, that their use is fair.”). At best § 512(g) is a mere Band-Aid that cannot restore the speaker to the position they were in before their content was removed. That job falls to § 512(f), but if the likelihood of succeeding with it is too remote then the risk-reward balance will discourage § 512(f) claims to be filed. If few claims are filed, then takedown notice senders will not be deterred from sending improper ones, since they run little risk of being sanctioned.

⁹Petitioner here was able to obtain counsel from a non-profit organization dedicated to vindicating online free speech. There are not nearly enough other such organizations available to help or subsidize all other similarly affected speakers.

squarely present the legal issue before this Court now. Because the content at issue there was not so clearly legitimate, it may not have been the best vehicle for addressing the injustice that wrongful takedowns of speech represent.

Petitioner's case, on the other hand, is. Neither she nor her toddler were bad actors pushing on the bounds of the exclusive rights of the copyright holder; instead they were simply normal human beings swept up by the joy of the moment—his in being animated by music, and hers for the love of her son—and then wanting to share that moment with their friends and family online. Their video conveying this joy was a quintessential example of fair use, exactly the type of free expression the fair use doctrine exists to ensure, and yet it was expression the public was denied thanks to Universal's deletion demand. There is nothing subtle about the injury to her speech rights and to the rights of the public to benefit from having speech like this out in the world. Rather, her case exemplifies the problem with the subjective standard as perfectly as any case could. There is no better one to wait for.

While the wait for another case like this one may be long, the wait for another case of wrongful censorship will not be. There has been an increasing trend of illegitimate takedown demands targeting legitimate content. Now that would-be censors have learned that they can issue a takedown demand without consequence, they have increasingly availed themselves of this censorship tool. And all too often they are targeting speech even more consequential than a dancing baby.

Certiorari should be granted to end this trend before it has had more opportunity to inflict further damage.

B. Certiorari Should Be Granted to Stem the Tide of Illegitimate Takedown Notices Targeting Free Speech and Fair Uses

The issue in this case is not that a copyright holder was mistaken in sending a takedown notice. The issue is that they had no incentive not to be mistaken, and that this liberty to be free from all consequence for their error is a liberty that others, both copyright holders and not, have now seized upon to target fair uses and other forms of legitimate speech they had no right to cause to disappear. This has impoverished the marketplace of ideas in tangible ways.

The petition chronicles just a few of the most egregious examples. Pet. Cert. 14–19. Since its docketing there have been many more.¹⁰ It would however be impossible to put together an exhaustive list of all the instances where legitimate content has been removed due to illegitimate takedown requests. Even aside from the difficulty in accounting for the volume, myriad content has simply been lost to history, with no record that it ever existed. Still, sites like the Lumen Database (formerly known as “Chilling Effects”) serve as repositories collecting millions of examples of takedown notices,¹¹ and many platforms themselves

¹⁰See, e.g., Joey-Elijah Sneddon, *Ubuntu Torrent Removed from Google for ‘Infringing’ Transformers Movie*, OMG! Ubuntu! (Sept. 12, 2016), URL *supra* p. vi.

¹¹See *Lumen Database* (last accessed Sept. 13, 2016), URL *supra* p. v.

now publish “transparency reports” to give the public a general sense of how the speech they intermeditate has been challenged.¹² Scholarship has also begun to document the toll. *See, e.g.*, Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 Va. J.L. & Tech. 369 (2014); Daniel Seng, ‘Who Watches the Watchmen?’ An Empirical Analysis of Errors in DMCA Takedown Notices (Jan. 23, 2015) (unpublished manuscript), *available at URL supra* p. v (observing that of 50 million takedown notices sent to Google nearly 10% had significant errors); *see also* Urban et al., *supra*, at 2 (estimating that up to 4.5 million requests sent to Google over six months were fundamentally flawed). The breathtaking scale of DMCA-caused censorship is readily apparent, and certiorari should be granted so this Court can take its proper measure.

What the Court will find is several damage patterns caused by illegitimate takedown notices. One damage cluster is the byproduct of automatically-generated takedown notices, where although the sender may have a legitimate copyright interest to protect, the software generating the takedown notices targets more than just literal, infringing copies of that work, instead capturing unrelated works with related titles,¹³ works

¹²*See, e.g.*, Andy, *Reddit Working on a Copyright Takedown Transparency Report*, TorrentFreak (Apr. 1, 2016), *URL supra* p. iv.

¹³*See, e.g.*, Tim Cushing, *Total Wipes Decides the Word ‘Download’ Means Infringement, Issues DMCA Takedown Loaded with Non-Infringing URLs*, Techdirt (Feb. 23, 2015), *URL supra* p. iv.

that merely report on the claimed work,¹⁴ and even authorized works.¹⁵

The Court will also find other infirmities with many takedown notices, regardless of whether they were generated automatically or manually, including those directed at public domain works,¹⁶ completely independent works,¹⁷ and content making fair uses of copyrighted works. *See* Urban et al., *supra*, at 12 (“[O]ne in fourteen (7.3%) of takedown requests raised questions of potential fair use defenses,” mostly having to do with remixes and other potentially transformative works.).¹⁸

¹⁴*See, e.g., Transparency Report: Frequently Asked Questions*, Google (last accessed Sept. 13, 2016), URL *supra* p. vi.

¹⁵*See, e.g., Warner Brothers Reports Own Site as Illegal*, BBC News (Sept. 5, 2016), URL *supra* p. vi. While not a direct attack on anyone else’s speech, these takedowns are not costless: burying platforms with superfluous demands makes it harder for them to respond expediently to legitimate ones or to serve their users.

¹⁶*See, e.g., Alex Pasternak, NASA’s Mars Rover Crashed Into a DMCA Takedown*, Motherboard (Aug. 6, 2012), URL *supra* p. v.

¹⁷*See, e.g., Adam Rosenberg, ‘Pixels’ Copyright Notices Took Down the Studio’s Own Trailer*, Mashable (Aug. 9, 2015), URL *supra* p. v.

¹⁸Along with expressive fair uses the lax standard is particularly destructive to educational fair uses, which may be further chilled by other requirements of the DMCA. For instance, because Section 512(e)(1) specifies that educational institutions will lose their limitation on liability if they get three or more § 512(c) takedown notices against an employee, they may become reluctant to make fair uses, lest they risk expensive liability exposure. § 512(e)(1). The only way a takedown notice does not count for this provision is if it is actionable under § 512(f). This statutory rule thus supports finding that § 512(f) requires an objective good faith standard, because it is the only way an innocent, fair-using, educational institution can avoid an unjust penalty for its non-infringing use.

All of the above examples evince a lack of care on the part of the takedown notice sender, which the lax standard invites. But in many other instances of wrongful takedowns it is not carelessness but the deliberate intent to censor content that results in legitimate speech being taken offline due to a takedown demand. While in the above examples the takedown notice sender at least had a putative copyright interest, the lack of an effective statutory deterrent to sending illegitimate takedown notices has led to people treating the DMCA as an all-purpose eraser of online content, even where they could have no plausible copyright claim.

In some of these instances takedown notices are being used in place of claims against content that should be rooted in other law, such as contract or tort, solely to get access to the DMCA's extrajudicial injunction mechanism, which would not otherwise be available. See Elizabeth Martin, *Using Copyright to Remove Content: An Analysis of Garcia v. Google*, 26 Fordham Intell. Prop. Media & Ent. L. 463, 483 (2016) (citations omitted). But all too often takedown notice senders are deploying them against non-actionable content that they simply dislike.¹⁹ Examples include businesses suppressing discussion of their products or those of their competitors,²⁰ medical professionals suppressing

¹⁹See, e.g., *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Paul Sieminski, General Counsel, Automattic Inc.) (describing numerous abuses of takedowns based on disagreement with the posted content).

²⁰See, e.g., Matt Schruers, *Observations on DMCA Reform and Notice & Takedown Abuse*, Project Disco (May 23, 2013), URL *supra* p. v.

criticism of their care and qualifications,²¹ and, perhaps most alarmingly, people who object to others' political speech.²²

The suppression of political speech in particular highlights the incompatibility of the subjective good faith standard and the First Amendment. Political speech is exactly the sort of speech the First Amendment exists to protect, yet thanks to the Ninth Circuit's interpretation of the DMCA, it is the most vulnerable.²³

Certiorari should therefore be granted to ensure that online speech gets the protection it is due.

²¹See, e.g., *Section 512 of Title 17, supra* (statement of Katherine Oyama, Sr. Copyright Policy Counsel, Google Inc.).

²²See Ctr. for Democracy & Tech., *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (2010), available at URL *supra* p. iv.

²³It is also the speech for which its timeliness is most critical. Even if a censored speaker is able to restore their content via a § 512(g) "putback" notice, the damage will have already been done, having erased it from view for at least the statutorily required 10 days. See *Neb. Press Ass'n*, 427 U.S. at 606 ("[E]ven a brief delay in reporting that information shortly before an election may have a decisive impact on the outcome of the democratic process.") (citing *Carroll*, 393 U.S. at 182).

CONCLUSION

Certiorari should be granted in this case to finally cure the injury to speech and fair uses the lack of an objective good faith standard inflicts.

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