No. 16-217

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 AMICI CURIAE AUTOMATTIC INC.; GOOGLE INC.; TWITTER INC.; AND TUMBLR, INC. IN SUPPORT OF PETITIONER

MARK A. LEMLEY
JOSEPH C. GRATZ*
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
415-362-6666
jgratz@durietangri.com
**Counsel of Record*

Attorneys for Amici Curiae Automattic Inc.; Google Inc.; Twitter Inc.; and Tumblr, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF AMICI CURIAE[1]

Automattic Inc. operates WordPress.com, a web-based publishing platform. WordPress.com hosts sites for some of the largest media companies in the world, including the New York Post, CNN, and Time. It also hosts more than 80 million individual blogs operated by small businesses, individuals, and citizen journalists who publish on a wide range of topics. Alongside journalists who use WordPress.com, Automattic has recently brought two misrepresentation suits under the DMCA against parties who submitted abusive DMCA notices.[2]

Google Inc. is one of the world's most popular and best-known online service providers. In addition to its eponymous search engine, Google provides a wide range of other products and services – including online video hosting through YouTube.com, blog hosting through Blogger, and a social-networking platform through Google+ – that empower people around the world to create, find, organize, and share information.

Tumblr, Inc. provides a platform for users to share their artwork, writing, photos, audio, and video with a

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[1] Parties' counsel were given timely notice of amici's intent to file this brief pursuant to the requirements of Rule 37.2(a) and indicated that they consent. No counsel for either party has had any role in authoring this brief, and no persons other than amici have made any monetary contribution to the preparation or submission of this brief. *See* Rule 37.6.

[2] *See Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011 (N.D. Cal. 2015); Complaint for Violation of 17 U.S.C. § 512(f), *Automattic Inc. v. Chatwal*, No. 13-cv-5411 (N.D. Cal. Nov. 21, 2013).

worldwide audience. Tumblr is home to more than 313 million blogs and 139 billion posts. The platform allows users to connect with others who share their interests to explore new ideas and creative expressions, and form communities spanning culture, age and geography.

Twitter is a global platform for public self-expression and conversation in real time. Twitter has more than 230 million monthly active users, spanning nearly every country, and creating approximately 500 million Tweets every day.

Amici are all online service providers ("OSPs") within the meaning of the Digital Millennium Copyright Act ("DMCA") and rely on the DMCA's safe-harbor framework, including the "notice-and-takedown" system set out in Section 512 of the Copyright Act. Abusive and unfounded takedown notices interfere with amici's businesses, can silence valuable free expression, and can constitute harassment of an OSP's users. Therefore, amici have a significant business interest in the statutory features of the DMCA intended to deter unfounded takedown notices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted Section 512(f) to deter abuses of the notice-and-takedown system that it created in the DMCA. That provision entitles both users and OSPs to

bring claims against those who send abusive notices.[3] A reading of that provision that hinges liability solely on the subjective knowledge of the notice sender – the reading embraced by the Ninth Circuit in this case and in *Rossi v. Motion Picture Association of America Inc*., 391 F.3d 1000 (9th Cir. 2004) – will not achieve that goal. That interpretation leads to the illogical result that the more unreasonable a copyright holder is, the more legal leeway it has to send unfounded notices. This result jeopardizes not just the kinds of commentary, criticism, and parody that fall within the bounds of fair use, but also expressive conduct that is non-infringing for other reasons. This cannot have been, and was not, what Congress had in mind when enacting Section 512(f).

Unfounded and abusive takedown notices inflict real harms on OSPs, Internet users, and copyright holders. Every time an unfounded takedown notice results in the removal of legitimate, non-infringing content posted by a user, it constitutes unjustified censorship of the user's speech and interferes with the OSP's business of hosting and disseminating that speech. If, in an effort to protect users from abusive notices, an OSP diverts resources to screen the notices it receives, those are resources diverted from more productive uses. And to the extent preventative screening measures create delays for valid notices sent by other

[3] Amicus Automattic has brought two such actions against those who sent abusive takedown notices to its WordPress.com service. *See* cases cited *supra* n.2.

copyright holders, the abusive notices harm the copyright holders whose notices are delayed in the queue behind them. These are not speculative harms; amici collectively have extensive experience with abusive and unfounded takedown notices.

In amici's experience, most DMCA notices are valid, well-founded, and sent in good faith. But some DMCA notices are obviously and facially indefensible, sent not to protect valid copyright interests, but instead to silence lawful speech. This includes, but is not limited to, situations where the speech targeted plainly constitutes a fair use.[4]

The Ninth Circuit's view – that a copyright holder need only form a purely *subjective* good-faith belief that a given use is not authorized by law before sending a takedown notice – is untenable. In fact, a purely subjective standard establishes a perverse incentive: the more misinformed or unreasonable the copyright owner, the broader the immunity it would have from liability under Section 512(f). This reading of Section 512(f) would effectively encourage copyright owners to remain ignorant about the limitations on their exclusive rights under the Copyright Act, *see* 17 U.S.C. §§ 107-123, because the less they know, the more leeway they would have to send takedown notices. As a consequence, Section 512(f) would fail as a deterrent

[4] It is true that fair-use cases can present difficult questions. But that is not true of all fair-use scenarios. *See*, *e.g.*, *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) (dismissing copyright infringement claim before discovery, finding an "obvious case of fair use").

in precisely those circumstances where it is most needed. Because the proper application of Section 512(f) constitutes a matter of national importance, potentially affecting the free speech interests of millions of Internet users, amici urge the Court to grant the petition.

ARGUMENT

I. Unfounded DMCA Takedown Notices are Common and Impose a Burden on Both Online Service Providers and the Free Exchange of Ideas.

In enacting the DMCA, Congress created a safe-harbor framework that provides copyright holders with a streamlined process for removing content, provides online service providers with safe harbors against certain remedies, and provides aggrieved persons with a cause of action to deter abuse of the framework. According to U.S. Copyright Office records, more than 23,000 OSPs rely on the notice-and-takedown framework established in Section 512, including not only each of the amici, but also a diverse array of businesses united only by their operation of websites where some users might post infringing materials or links to infringing materials. U.S. Library of Congress, *Designation of Agent to Receive Notification of Claimed Infringement*, 81 Fed. Reg. 33154 (May 25, 2016) (to be codified at 37 C.F.R. pt. 201) (noting 23,300 statutorily designated copyright agents have been registered by online service providers with the Copyright Office).

In most respects, the DMCA's notice-and-takedown framework has been a success, creating sufficient legal certainty to support an incredible diversity of online platforms where citizens can publish and share information of all types, while also affording copyright owners a quick, extra-judicial mechanism to remove infringing material. However, unfounded or abusive DMCA takedown notices remain a problem, imposing costs on OSPs (including amici), their users, and other copyright holders.

For example, many times each week, amicus Automattic receives a takedown notice that appears motivated not by an interest in protecting copyright but a desire to improperly silence critics. A common example is where a copyright holder who wants to remove unflattering criticism about its business or products on a WordPress.com blog sends a takedown notice to Automattic alleging infringing use of its business name or logo. The use of names or logos, however, is obviously a fair use in the context of the criticism. *See*, *e.g.*, *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1098 (9th Cir. 2008). Employers also commonly send takedown notices to unmask employee critics and stifle criticism. Other specific examples include:

- An individual sent a takedown request to remove an interview he had in fact authorized, because the interview included his own embarrassing words revealing homophobia.
- A medical transcription training service using forged customer testimonials on their website submitted a takedown for screenshots of the

fake testimonials in a blog post exposing the scam.

- An animal rights activist, after trying and failing to get a critical blog taken down that used screenshots of conversations with her, submitted a DMCA for all the images on the site, which would have rendered the criticism and commentary meaningless.
- A major game development company submitted a takedown request for 81 images on a rival company's blog, where the images were used in the context of highlighting what the latter company saw as the former's questionable business practices.
- A company in India posted a back-dated duplicate of a WordPress.com blog, then submitted a DMCA takedown notice for the original blog with the claim that it infringed the duplicate.

Amicus Google similarly receives abusive and unfounded DMCA takedown notices on at least a weekly basis. Here are just a few examples:

- A poet sent repeated takedown notices targeting criticism and commentary relating to the poet's online copyright enforcement efforts.
- A well-known publisher of children's books sent a DMCA takedown notice targeting the use of excerpts by a critic discussing the use of gun imagery in children's literature.
- A major investment bank sent a takedown notice targeting documents showing that the

bank had been analyzing the effect of political unrest on oil markets.

- A physician claiming a copyright in his signature sent a takedown notice aimed at a document related to the suspension of his license to practice medicine.
- Major broadcast news networks sent takedown notices targeting McCain-Palin campaign videos that included brief excerpts from news footage just weeks before the 2008 presidential election.
- A major soft drink company sent a takedown notice targeting a YouTube news channel for including excerpts from a commercial in its critical coverage of that commercial.

These are only a sample of takedown notices where obvious fair uses are implicated. Google receives hundreds of notices that suffer from similar defects, often repeatedly from the same vexatious submitters, and devotes substantial human and machine resources in an attempt to identify these abusive notices among the tens of millions of DMCA notices that Google processes each month.[5]

Amicus Tumblr has received in the past, and regularly receives, DMCA takedown notifications that are baseless and intended to silence lawful speech. For example:

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[5] *See* Copyright Removal Requests – Google Transparency Report, https://perma.cc/7T85-KFDH.

- An internet celebrity submitted a DMCA notice to remove a police incident report regarding an altercation at the celebrity's residence.
- A physician demanded removal of newspaper excerpts posted to a blog critical of the physician, by submitting a DMCA notice in which he falsely claimed to be a representative of the newspaper.
- A model involved in a contract dispute with a photographer submitted a series of DMCA notices seeking removal of images of the model, for which the photographer (not the model) was the rights-holder.
- A famous actor submitted a DMCA notice seeking removal of a photograph of his residence in Google Earth, falsely claiming to be the rights-holder for the Google Earth photograph.
- A prominent state governor submitted a DMCA notice seeking removal of photographs of the governor posted on a political parody site, and taken in public by third-party rights-holders.
- A major music publisher filed DMCA notices over song lyrics that a blogger inserted in the speaking bubbles of a well-known comic strip.

Amicus Twitter similarly receives notices that suffer from similar defects, including repeated reports from the same vexatious submitters. For example:

- An office equipment manufacturer submitted a DMCA notice seeking removal of a video

showing teenagers engaged in good-humored misuse of the company's product.

- An international corporation submitted DMCA notices seeking removal of images of company documents posted by a whistleblower.
- A frequent submitter of DMCA notices submitted a DMCA notice seeking removal of a screenshot of an online discussion criticizing him for submitting overreaching DMCA notices.

For all amici, processing these abusive takedowns diverts resources from the OSPs' more productive activities and can result in delays in processing for legitimate, good-faith takedown notices.

The problem of abusive DMCA takedown notices does not affect only amici. Over the past years, the news media have covered numerous similar situations involving different OSPs. These examples include a manufacturer of electronic voting machines sending takedown notices, just prior to an election, to suppress criticism of the machines' integrity and security;[6] a religious organization's attempt to silence its critics by sending out takedown notices;[7] a well-known fashion company's attempt to silence a blogger for criticizing

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[6] *Online Policy Grp. v. Diebold, Inc*., 337 F. Supp. 2d 1195, 1198 (N.D. Cal. 2004).

[7] *See* Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 Wake Forest L. Rev. 745, 747 (2011).

the company for digitally altering an image in its advertisement to portray a model as unnaturally skinny;[8] efforts by AIDS/HIV denialists to silence a critic criticizing scientific claims in a documentary film;[9] and additional examples posted on EFF's "Takedown Hall of Shame."[10] But the examples that garner the attention of the media amount to only the tip of a much larger iceberg that OSPs must deal with on a daily basis.

As these examples illustrate, the DMCA's counter-notice-and-put-back procedures, while important and valuable, have not been enough to remedy the harms to users, nor to deter abuse. The lack of a sanctions regime under Section 512(g) can embolden vexatious copyright owners to send repeated takedown notices for the same material, resulting in a "yo-yo" of notices and counter-notices (each notice triggering a new 10-day statutorily mandated waiting period during which the material remains inaccessible). Moreover, in the experience of amici, the vast majority of users who have content improperly taken down do not counter-notify, perhaps intimidated by the statutory requirements or the threat of litigation. To counter-notify, the user must consent to the jurisdiction of the local

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[8] Cory Doctorow, *The Criticism That Ralph Lauren Doesn't Want You To See!*, BoingBoing (Oct. 6, 2009, 10:32 AM), https://perma.cc/93D5-F3BY.

[9] Timothy Geigner, *AIDS Denial Crazies Go All DMCA On Videos Educating People Of Their Craziness*, TechDirt (Feb. 14, 2014 1:44 p.m.), https://perma.cc/9KQC-XHCD.

[10] Electronic Frontier Foundation, *Takedown Hall of Shame: Music Publisher Tries to Muzzle Podcast Criticizing Akon*, https://perma.cc/B5YZ-FRB7.

federal court and risk the possibility of litigation, which can be costly and time-consuming, regardless of the eventual outcome. Moreover, a counter-notice also requires a user to provide her real name, address, and telephone number, which can be problematic for anonymous bloggers and commenters engaged in critical political speech or whistleblowing. 17 U.S.C. § 512(g)(3). Not only can false takedown notices censor lawful speech, they can also lead to self-censorship in the future, discouraging critics who have already received such notices. For all of these reasons, it remains important that Section 512(f) play its intended role as a deterrent to those who would send abusive takedown notices.

II. The Court Should Grant the Petition to Establish that a Copyright Owner Who Sends a Takedown Notice Must Form an Objectively Reasonable Good-Faith Belief that a Given Use is Not Authorized by Law or Risk Liability Under Section 512(f).

Those issuing a DMCA takedown notice must attest to having a "good faith belief that use of material in the manner complained of is not authorized by . . . the law." 17 U.S.C. § 512(c)(3)(A)(v). In its ruling below, however, the Ninth Circuit held that "our court has already decided a copyright holder need only form a subjective good faith belief that a use is not authorized." Pet. at 15a (citing *Rossi v. Motion Picture Ass'n of Am.*, 391 F.3d 1000 (9th Cir. 2004)). Amici respectfully ask that the Court grant the petition to

reject that misreading of Section 512(f), which violates the letter and spirit of the statute and creates a perverse incentive that favors unreasonable copyright holders over those who reasonably understand the law.

Consider the difference between the subjective and objective test in particular examples. Amicus Automattic receives notices from businesses asserting the use of unauthorized copyrighted logos in posts criticizing or parodying the copyright holder. It is not objectively reasonable for the business to believe that such uses are not authorized by law (by fair use, in particular). *See*, *e.g.*, *E.S.S. Entm't 2000*, 547 F.3d at 1098. Yet, under the purely subjective Ninth Circuit standard, the business could maintain that it held a subjective (but mistaken) good-faith belief, forcing the critic to engage in discovery to find a "smoking gun" email demonstrating subjective knowledge that the use was most likely fair use.

The impact of the Ninth Circuit's interpretation sweeps beyond just fair uses. For example, amicus Automattic recently brought a Section 512(f) suit against an individual who filed a takedown notice claiming that an interview infringed his copyright. The individual had granted the interview and authorized its publication, but had second thoughts and wanted the interview removed from WordPress.com after the interview was posted. *Steiner*, 82 F. Supp. 3d at 1019-20. If "good faith" encompassed a purely subjective standard, then it may be possible for a copyright holder to escape liability even while admitting an objectively

unreasonable view of the law. In other words, the more misinformed or unreasonable the copyright owner, the broader the immunity he would have from liability under Section 512(f). This reading of Section 512(f) would effectively encourage copyright owners to remain ignorant about the limitations on their exclusive rights under the Copyright Act, *see* 17 U.S.C. §§ 107-123, because the less they know, the more leeway they would have to send takedown notices. This cannot be what Congress had in mind when it enacted Section 512(f) to deter abusive notices.

Requiring copyright holders to form an *objectively reasonable* good-faith belief prior to sending a DMCA takedown notice would not only better serve Congress' purpose in enacting Section 512(f), but also would not impose an undue burden on copyright holders. Nothing about Section 512(c)'s "good faith" standard should impose liability on a copyright owner who "guesses wrong" regarding a difficult fair use case. An objective standard would only require that the "good faith belief" regarding a potential fair use be a reasonable one. Just as the courts have held under Section 512(i) that OSPs have considerable leeway in "reasonably implementing" a policy of terminating subscribers who repeatedly infringe copyrights, *see Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 514 (S.D.N.Y. 2013), *aff'd in part on other grounds and rev'd in part on other grounds*, 826 F.3d 78 (2d Cir. 2016), so too would

copyright holders retain leeway in reaching reasonable conclusions about fair use in particular cases.[11]

For the foregoing reasons, and the reasons stated by the petitioner, this case presents an ideal vehicle for this Court to address a matter of national importance. Accordingly, the petition should be granted in order to establish that the good faith requirement in Section 512(c)(3)(A)(v) encompasses an objective standard with respect to whether use of a copyrighted work is "authorized by law."

[11] To the extent that the Ninth Circuit panel in *Rossi v. Motion Picture Association of America* was troubled that, without a purely subjective standard, copyright owners would be required to engage in extensive investigations before sending takedown notices, this was a misapprehension. In *Rossi*, the copyright holder's belief was clearly objectively reasonable. Indeed, the *Rossi* panel found that the belief was "virtually compel[led]" based on the "unequivocal" language on the relevant website promising "Full Length Downloadable Movies" in conjunction with movie graphics from MPAA-member companies. *Rossi*, 391 F.3d at 1005.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

MARK A. LEMLEY
JOSEPH C. GRATZ
DURIE TANGRI LLP
Attorneys for Amici Curiae Automattic Inc.; Google Inc.; Twitter Inc.; and Tumblr, Inc.