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

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

SUPPLEMENTAL BRIEF FOR PETITIONER

The Internet has become the most powerful technology for communication and commerce since the printing press. But it would look profoundly different without the safe harbors created by the Digital Millennium Copyright Act—and the notice and takedown regime upon which those safe harbors depend. The DMCA sets out the parameters within which platforms, users, and creators can engage in lawful activity without fear of crippling liability or practical censorship. The Court can and should grant review to ensure that those parameters are properly construed.

The government does not disagree that the proper interpretation of the DMCA's notice and takedown provisions is an issue of national importance. Instead, the government suggests that the Court should not grant certiorari because, in the government's view, the courts below and the parties have focused on the wrong part of the DMCA, and because the circuit court's decision is interlocutory.

To the contrary, the government's own brief demonstrates the need to grant certiorari in this case. The government's concern that the parties and the courts below have misunderstood the structure of the statute is not grounds for denying the petition. First, the government's position is incorrect, and thus this supposed issue does not render this case an inappropriate vehicle for considering how section 512 protects online fair uses. Second, the fact that there are now five competing interpretations of 17 U.S.C. § 512(f)—those of Petitioner, Respondents, the circuit court majority, the dissent, and

now the government—illustrates the need for a definitive and final ruling on the question. The DMCA safe harbors are too important to be left in this state of confusion.

Neither should the interlocutory posture of this case should dissuade the Court from granting certiorari. The facts of the case are simple and well-established, the parties agreed that interlocutory appeal would advance the case, and the district and circuit courts each concluded that interlocutory appeal would raise controlling questions of law for which there were substantial grounds for difference of opinion and that immediate appeal could materially advance the litigation. The proper interpretation of 17 U.S.C. § 512(f) is ripe for review.

That review cannot wait for some other time or case. Judge Smith put it plainly: the decision below puts the viability of the concept of fair use in jeopardy. Pet. App. 30a–31a. Moreover, this harmful decision did not come from just any circuit. As one of its leading jurists observed, "For better or worse [the Ninth Circuit is] the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood—and much of the vibrancy of our culture—also depends on the existence of other intangible rights." *White v. Samsung Electronics Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J.) (dissenting from order denying rehearing en banc).

Those rights include fair use and Congress knew it. The DMCA embodies a grand bargain that was designed to protect the rights of copyright owners, service providers *and* users, spurring new expression and creativity. The

Court should grant review to make sure that courts do not undermine that compact.

I. The proper interpretation of 17 U.S.C. § 512(f) is an issue of exceptional national importance that the Court should address now.

1. The government takes the position that certiorari should not be granted because the parties and the courts below have focused on the meaning of "good faith belief" in 17 U.S.C. § 512(c)(3)(A)(v). According to the government, that provision plays no role in determining whether a defendant is liable under 17 U.S.C. § 512(f). That position, which has not been adopted by any court, is wrong.

Section 512(f) imposes liability for knowing, material misrepresentations of infringement "under this section." 17 U.S.C. § 512(f). In order for a "notification of claimed infringement" under section 512 to "be effective," it must include several elements. *Id.* § 512(c)(3)(A). Each of those elements therefore is a material part of making a representation of infringement "under this section." *See Perfect 10, Inc. v. CCBill LLC,* 488 F.3d 1102, 1112 (9th Cir. 2007) (notice that lacks "one or more of the required elements" does not substantially comply with section 512(c)(3)(A)).

One of the required elements of a notification of claimed infringement under section 512 is a statement that the complainant has a "good faith belief" that the manner in which the material at issue is being used is not authorized "by the copyright owner, its agent, or the law." 17 U.S.C. § 512(c)(3)(A)(v). Therefore, if the complainant misrepresents that it has a good faith belief that the

use is not authorized by the law, the complainant has misrepresented "under this section . . . that material or activity is infringing." *Id.* § 512(f).

This is the structural path the Ninth Circuit followed over a dozen years ago to determine the standard for liability under section 512(f). In *Rossi v. Motion Picture Ass'n of Am.*, the circuit court "[j]uxtapos[ed] the 'good faith' proviso of the DMCA with the 'knowing misrepresentation'" of section 512(f) to determine the standard for liability for claims under the latter provision. 391 F.3d 1000, 1004–05 (9th Cir. 2004). Although Ms. Lenz disagrees with the circuit court's conclusion that subjective good faith is a defense to liability (Pet. 22–26; Reply 2–4), she agrees that section 512(f) should be read in tandem with section 512(c)(3)(A), to which the former subsection refers when it describes misrepresentations "under this section."

The government argues that falsely stating that one has a good faith belief is not a misrepresentation of infringement under section 512, because a takedown notice has "separate assertions that particular material infringes the copyright on a particular copyrighted work, and that the copyright owner has a good-faith belief that the user's conduct is unauthorized." Gov't Br. 18. That misreads the statute. A representation of infringement can be stated as "*x* infringes *y*," where *x* is the accused material, and *y* is the copyrighted work. Section 512(c)(3)(A)(ii) requires that the complainant identify the copyrighted work—*y*. Section 512(c)(3)(A)(iii) requires identification of the accused material—*x*. Section 512(c)(3)(A)(v), however, is the actual accusation—"infringes." All three of these elements are material to a representation of infringement under section 512.

Congress could have made a different choice with respect to that accusation, and simply required notice senders to assert that the accused material "infringes copyright"—but it did not. It could have left "under this section" out of section 512(f)—but it did not. Instead, it required a statement of good faith belief that the use was not authorized by the owner or the law, and made sure that there were consequences for making that statement falsely. Those choices make sense in light of Congress's express intent to ensure that section 512 did not unduly intrude on free speech. Pet. 22; S. Rep. No. 105-190, at 21 (1998) ("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.").

Finally, the government's suggestion that any other reading could create liability under section 512(f) even where the material in question actually *was* infringing is a red herring. An actual infringer would have no right to post the material in the first place, so could not fairly claim to have been *damaged* by a takedown notice, even if it included misrepresentations. 17 U.S.C. § 512(f) (creating liability for damages caused by the misrepresentations).

2. The government's assumption that section 512(c)(3)(A)(v) is not relevant to section 512(f) liability is wrong, but the stark difference between the government's analysis and the approach adopted by courts below and the parties demonstrates why, even absent a circuit split, this issue is now ripe for review. Congress adopted the DMCA nearly twenty years ago, and it has become one of the central legal pillars of the Internet. At the same time, its notice-and-takedown regime has been the subject of billion dollar

cases involving titans of the entertainment and technology sectors. *See, e.g., Viacom Int'l, Inc. v. YouTube, Inc.,* 676 F.3d 19 (2d Cir. 2012). That regime has also been subject to widespread and well-documented abuse, to the detriment of lawful speech. *See* Pet. 13–20. An authoritative reading of section 512(f) will allow copyright owners, Internet intermediaries and users to better understand their respective rights and responsibilities, and facilitate the continued cultural and economic vitality of the Internet.

Moreover, while Ms. Lenz disagrees with the government's analysis, this case presents an appropriate vehicle for the Court to consider it. Ms. Lenz's question is simple and purely legal: whether the circuit court erred in concluding that a subjective good faith belief of infringement suffices to avoid section 512(f) liability. If it did, for any reason, the Court can correct that error.

At the same time, the lack of any decision adopting the government's analytic approach[1] counsels against waiting for some hypothetical future case that might even more directly raise the government's idiosyncratic view of the framework for interpreting section 512(f).

3. Read in the context of section 512, the phrase "good faith belief" should be read to exclude unreasonable beliefs. Congress's use of "knowingly" in section 512(f) does not compel a contrary result. Courts have found

1. District courts in circuits other than the Ninth Circuit have likewise not adopted the government's approach. *See, e.g., TD Bank, NA v. Hill,* No. 12-7188 (RBK/JS), 2015 WL 4523570 at *21 (D.N.J. July 27, 2015) (relying on section 512(c)(3)(A) to interpret section 512(f)); *Dudnikov v. MGA Entm't, Inc.,* 410 F. Supp. 2d 1010, 1012 (D. Colo. 2005) (same).

"knowingly" to extend beyond actual knowledge in many contexts, particularly where, as here, a statutory provision has a remedial purpose. *See, e.g., Freeman United Coal Min. Co. v. Fed. Mine Safety & Health Review Comm'n,* 108 F.3d 358, 360 (D.C. Cir. 1997) (adopting agency's interpretation of "knowingly" to include not just actual knowledge, but also "'reason to know' of a violative condition" which "aggravated conduct," rather than mere negligence); *JCC, Inc. v. Commodity Futures Trading Comm'n,* 63 F.3d 1557, 1567–68 (11th Cir. 1995) (construing "knowingly" to include "actual or constructive knowledge"). These decisions reflect that "[k]nowledge is a concept, not an absolute. In the law, as in life, 'knowledge' means different things in different contexts." *United States v. Spinney,* 65 F.3d 231, 236 (1st Cir. 1995). As the First Circuit explained, "knowledge" lies on a continuum, with "constructive knowledge" on one end, and "actual knowledge" at the other. *Id.* at 236–37.

For example, when considering the meaning of "knowingly" in the context of the False Claims Act, the D.C. Circuit noted that "the Act's broad, remedial purpose and civil as opposed to criminal nature" counseled in favor of interpreting "knowledge" to "encompass[] more than 'actual knowledge.'" *United States v. TDC Mgmt. Corp.,* 24 F.3d 292, 297 (D.C. Cir. 1994). "To construe the Act more narrowly would readily permit parties to evade liability through deliberate ignorance or careless disregard of the accuracy and veracity of their claims." *Id.* Precisely the same concern applies here, and counsels against the circuit court's interpretation.

Similarly, courts have interpreted the knowledge requirement for a breach of fiduciary duty under the

Employee Retirement Income Security Act to include constructive knowledge. As the Second Circuit observed, "constructive knowledge suffices" to satisfy the knowledge element of a cause of action for participation in a breach of fiduciary duty. *Diduck v. Kaszycki & Sons Contractors, Inc.,* 974 F.2d 270, 283 (2d Cir. 1992), *abrogated on other grounds by Gerosa v. Savasta & Co.,* 329 F.3d 317 (2d Cir. 2003). The defendant has constructive knowledge if "a reasonably diligent investigation would have revealed the breach." *Id.; see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 251 (2000) (breach of fiduciary duty required "a showing that the plan fiduciary, with actual *or constructive knowledge* of the facts satisfying the elements of an [improper] transaction") (emphasis added).

Comparable holdings can be found in a variety of contexts. *See, e.g., Freeman United Coal Min. Co.,* 108 F.3d at 363–64 (defining knowledge to include both actual and constructive knowledge "falls well within the range of interpretations given to the term 'knowingly' in other contexts"); *Suzuki of Orange Park, Inc. v. Shubert,* 86 F.3d 1060, 1064 (11th Cir. 1996) (recognizing, for purposes of the Limitation of Vessel Owner's Liability Act, "the courts have broadened privity or knowledge to include constructive knowledge—what the vessel owner could have discovered through reasonable inquiry"); *Satnam Distributors LLC v. Commonwealth-Altadis, Inc.*, 140 F. Supp. 3d 405, 415 (E.D. Pa. 2015) (allegations of constructive knowledge may suffice to show knowledge of prohibited discriminatory pricing under the Clayton Act).

Consistent with this context-specific approach to interpreting the word "knowingly," a pre-*Rossi* decision

interpreted section 512(f) to mean that a party "knowingly" misrepresents if it "actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations." *Online Policy Group v. Diebold, Inc.,* 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004). Given section 512(f)'s status as a civil statute and its remedial goal, the Court should conclude that Congress intended to allow victims of takedown abuse to satisfy the knowledge requirement via a showing of constructive knowledge. *See Moyo v. Gomez,* 40 F.3d 982, 985 (9th Cir. 1994) (remedial statutes should be construed broadly).

The fact that section 512(f) also allows claims against misrepresentations made in counter-notifications does not support a different approach. If someone posts infringing material on the Internet, but then falsely and unreasonably claims that it does not infringe, that person already could be sued for copyright infringement. A section 512(f) claim would not measurably increase the liability to which that person would be exposed.

II. The interlocutory posture of the case has no bearing on certiorari.

The Petition arises at an interlocutory posture in the case because the parties *agreed* that interlocutory review would advance the case. *Stipulation and [Proposed] Order,* (N.D. Cal. Dkt. 460, Feb. 25, 2013). The parties stipulated that there were controlling questions of law, that the factual record merited interlocutory appeal, and that resolution of the legal issues raised could materially advance the litigation. *Id.* at 2–3. The district court

agreed. *Order* (N.D. Cal. Dkt. 461, Mar. 1, 2013). The circuit court granted Ms. Lenz's petition for permission to appeal, thereby confirming that the appeal raised controlling questions of law that, once answered, could materially advance the litigation. *Order* (9th Cir. Dkt. 1, May 31, 2013).

The parties and the courts below agreed that interlocutory appeal was appropriate because resolution of factual issues was immaterial to the *legal* questions raised by the interlocutory appeal. Those legal issues do not require a more fully developed record in order for the Court to address them. The meaning of the statute does not turn on any disputed issues of fact that a jury could resolve.

CONCLUSION

Ms. Lenz's petition for a writ of certiorari should be granted.

Respectfully submitted,

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