Lenz v. Universal: A Call to Reform Section 512(f) of the DMCA and to Strengthen Fair Use

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ABSTRACT

Under 17 U.S.C. § 512(f) of the Digital Millennium Copyright Act (DMCA), those who issue materially false takedown notices are liable for damages. However, Section 512(f) has not effectively protected fair use. Currently, the DMCA issuer only has to prove he considered fair use before issuing a takedown notice, but faces no liability for actually taking action against fair use.

The outcome of the recent Ninth Circuit Court of Appeals case Lenz v. Universal *shows the flaws in the language of the DMCA. This Article calls for a mild adjustment to Section 512(f) for the purpose of protecting fair use and free expression rights.*

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I. INTRODUCTION

In 2007, Stephanie Lenz made a jerky and out-of-focus video of her children running around her kitchen while they pushed toy baby strollers. A few seconds of Prince's "Let's Go Crazy" incidentally played in the background.[1] Ms. Lenz posted the video to YouTube.com to very little fanfare or concern, presumably assuming that her family, friends, and fans of cute kids would want to view it. If she lived under a sane copyright regime, that would have been the end of the story. However, an assistant from Universal Music Corporation's (UMC) legal department found the video, decided that it infringed on UMC's copyright in the song, and sent YouTube a takedown notice pursuant to the Digital Millennium Copyright Act (DMCA).[2]

Prince Roger Nelson ("Prince"), known for zealously protecting his works, publicly proclaimed that this was part of his efforts "to reclaim his art on the internet."[3] His melodrama was not so ludicrous in context. Perhaps a short video with a few bars from one song is no

1. The video can be found at Stephanie Lenz, *"Let's Go Crazy" #1*, YOUTUBE (Feb. 7, 2007), https://www.youtube.com/watch?v=N1KfJHFWlhQ [https://perma.cc/ES55-NRUT].

2. Decl. in Supp. of Def.'s Mot. to Dismiss at Ex. C, Lenz v. Universal Music Corp., 573 F.Supp.2d 1150 (N.D. Cal., 2008) (No. 5:07-cv-03783-JF). 17 U.S.C. § 512 (2012) is part of the codification of the Digital Millennium Copyright Act (DMCA). Pub. L. No. 105-304, § 203, 112 Stat. 2860, 2877–86 (1998).

3. *See* Order Den. Mot. to Dismiss, Lenz v. Universal Music Corp., 573 F.Supp.2d 1150 (N.D. Cal., 2008) (No. 5:07-cv-03783-JF); M. Collet-White, *Prince to Sue YouTube, eBay Over Music Use*, REUTERS (Sept. 13, 2007, 9:15 PM), http://www.reuters.com/article/2007/09/14/us-prince-youtube-idUSL1364328420070914 [https://perma.cc/3DA3-9MSM] (citing a statement released on Prince's behalf regarding the *Lenz* case in 2007). For more on the intellectual property antics of "Prince"/"The Artist Formerly Known as Prince"/"The Artist Formerly known as 'The Artist Formerly Known As Prince,'" see Andre Carter, *The People Formerly Known as Fans*, CITYPAGES (Minneapolis) (June 23, 1999), http://www.citypages.com/news/the-people-formerly-known-as-fans-6710648 [https://perma.cc/K3E7-HVU9] (describing Prince's lawsuit of multiple fansites for use of his unpronounceable symbol).

real threat to Prince's fortune, but the aggregate effect of true online piracy certainly has an impact on his ability to convert his creativity into money. Prince might have gone a bit far with his statement, but he would hardly be the first artist to aggressively pursue legal protection against the unauthorized use of his works.[4]

UMC's takedown notice led to a federal lawsuit. Lenz sued under a rarely employed portion of the DMCA, 17 U.S.C. Section 512(f),[5] which provides for a cause of action against issuers of improper takedown requests.[6] The basis of the claim was that UMC knew, or should have known, that her use of a short clip of the song constituted "fair use."[7] Ultimately, the Ninth Circuit Court of Appeals ruled that copyright owners need not make the right call on fair use, but they must at least take fair use into account before they use the power of the DMCA takedown provision.[8]

When we consider that the DMCA notice-and-takedown provision can be used as a tool for censorship and that fair use is free expression's safety valve in the copyright regime, this decision is hardly a confidence-building holding. Copyright owners must *consider* fair use, but if they do not make the right call, is there no consequence? The *Lenz* decision demonstrates that the 1990s-era DMCA might not be suited to today's Internet. Perhaps it is time to update the statute—and strengthen fair use protections.[9]

To fully understand the story and its implications, this Article will briefly explain the DMCA takedown scheme, fair use protection, and the history of the *Lenz* case. This Article will explain the practical implications of *Lenz* for users, service providers, and copyright owners

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4. *See e.g.* KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 62–113 (2005) (discussing lawsuits for sampling brought by artist including the Turtles, Roy Orbison, and the Clash and overzealous companies like Sony and Time Warner when it had "rights" to "Happy Birthday"). Also, many artists show their tight grip on copyright through exceedingly high rates for sample licensing. *Id.*

5. Am. Compl., Lenz v. Universal Music Corp., 573 F. Supp. 2d 1150 (N.D. Cal., 2008) (No. C 07-03783-MEJ).

6. 17 U.S.C. § 512(f) (2012). A DMCA takedown notice is a notification to a company, usually a web host or a search engine, that they are either hosting or linking to copyright-infringing material. It provides them notice to remove the copyrighted works.

7. Am. Compl., *supra* note 5.

8. Lenz v. Universal Music Corp., No. 5:07-cv-03783-JF, 2016 WL 1056082, at *4–5 (9th Cir. Sept. 14, 2015).

9. In past years, many critics of the DMCA have made this assertion concerning each of its provisions. For example, Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 697 (2011); Martin B. Robins, *A Good Idea at the Time: Recent Digital Millennium Copyright Act § 512(c) Safe Harbor Jurisprudence Analysis and Critique of Current Applications and Implications,* 15 TUL. J. TECH. & INTELL. PROP. 1 (2012); and Marketa Trimble & Salil Mehra, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. 685 (2014) critique the DMCA's inability to meet requirements of a rapidly evolving Internet, thus hindering users, ISPs, owners, and others attempting to enter the field.

seeking to enforce their rights. Finally, this Article suggests updates to the DMCA and 17 U.S.C. Section 107 (fair use) that could remedy some of the DMCA's shortcomings for both copyright owners and online service providers, and provide greater breathing room for freedom of expression.

Specifically, this Article will focus on the legitimacy and number of takedown notices under DMCA Section 512. Part II will briefly discuss abuse of the DMCA, as well as DMCA counter-notifications and problems facing copyright owners. Part III will analyze fair use as a right or as an affirmative defense. Part IV will give a brief history of Section 512(f), and Part V will discuss the recent *Lenz v. Universal* case, otherwise known as the "Dancing Baby" case. Finally, Part VI suggests a mild reform of Section 512(f) in light of the *Lenz* case and proposes treating fair use as an affirmative right, rather than an affirmative defense.

II. THE DMCA SECTION 512 NOTICE AND TAKEDOWN

In 1998, Congress passed the DMCA in an attempt to balance intellectual property rights with the desire to promote the growth of electronic commerce and new technology.[10] The DMCA includes a provision, codified at 17 U.S.C. Section 512(c), that allows copyright owners to demand the removal of content from the Internet, as long as those owners give formal notice to the online service provider (OSP) where the content is hosted.[11] Once the service provider receives a DMCA notice (commonly referred to as a "takedown notice"), the OSP must remove or disable access to the material "expeditiously,"[12] or face liability.[13] Upon complying with the notice, OSPs maintain their immunity from liability for infringement themselves.[14]

If the individual who posted the content believes the content is lawfully published, they can file a counter-notification, thus giving a green light to restoring the content. Nevertheless, there is a question as to whether the notice-and-takedown provisions infringe on free expression by acting as a prior restraint on speech, as there is no

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10. S. REP. NO. 105-190, at 2 (1998).

11. *See* 17 U.S.C. § 512(c) (2012); U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (1998), http://www.copyright.gov/legislation/dmca.pdf [https://perma.cc/XXB6-VY4D]. An OSP is a website that hosts content, provides email, e-shopping, e-banking, news, or online search capability.

12. The statute does not define "expeditiously," and the meaning of "expeditious" in the context of the DMCA has not yet been determined by the courts. However, *Black's Law Dictionary* defines "expeditious" as "performed with, or acting with, expedition; quick; speedy." *Expeditious*, BLACK'S LAW DICTIONARY (10th ed. 2014).

13. 17 U.S.C. §§ 512(c)(1)(C)–(3).

14. 17 U.S.C. § 512(a)–(d).

incentive for service providers to actually evaluate the legitimacy of the takedown notices.[15] In many cases, OSPs have little reason to even make users aware of the takedown or to inform them that a counter-notice is an option.[16] The content simply comes down, which, as discussed below, causes significant issues.

Under the notice-and-takedown procedure, copyright owners only need to swear both that their content has been posted and that its use is not authorized. This notice alone imposes a duty on the OSP to remove the content from public view. It will then be removed (at least in theory). At the time the DMCA passed, movie studios and record companies endorsed the provision, as it allowed them to remedy online piracy with little more than a form letter.[17] At the time, the DMCA appeared beneficial and necessary to copyright owners attempting to enforce their rights on a new platform.[18] However, some commentators saw it as an overreach that favored copyright owners over freedom of expression, stating, for example, "The takedowns resulting from DMCA notifications . . . are imposed to limit speech before any adjudication on the merits of the copyright claims."[19] The idea that a law could so easily be used to shut down commentary and criticism without any judicial oversight is what concerns these DMCA critics.

At the advent of the DMCA, some alarmists said that enforcement of the DMCA would mean the end of free speech on the

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15. Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 175 (2010).

16. *See, e.g., Statement of Rights and Responsibilities*, FACEBOOK, http://www.facebook.com/legal/terms ("We can remove any content or information you post."); *Terms of Service*, YOUTUBE, http://www.youtube.com/t/terms [https://perma.cc/QCA3-8FVX] ("YouTube reserves the right to remove Content without prior notice" and "YouTube may at any time, without prior notice and in its sole discretion, remove such Content . . . in violation of these Terms of Service."); *Terms of Use*, INSTAGRAM, https://help.instagram.com/478745558852511 [https://perma.cc/D54A-QHJF] ("Instagram reserves the right to remove any Content from the Service for any reason, without prior notice."); *see also* Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 773 (2011).

17. *See* Derek J. Schaffner, Note, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J. L. & PUB. POL. 145, 147 (2004). The ease of writing a short DMCA notice and takedown letter is evidenced at *Example DMCA Notice of Copyright Infringement Letter,* FUTUREQUEST, http://www.futurequest.net/Services/TOS/DMCA/DMCANotice.php [https://perma.cc/3AEG-RDY9].

18. *See* Bridy, *supra* note 9, at 697 (discussing that the DMCA is able to remain relevant with Internet growth in some aspects, but its failures require alternatives or amendment to meet the changing online world); *see also* Robins*, supra* note 9.

19. Seltzer*, supra* note 15, at 190 (2010).

Internet.[20] Some continue to do so.[21] *Amici curiae* in the *Lenz* case noted that Google, Twitter, and other OSPs receive hundreds of unfounded takedown claims per day and illustrated the harsh realities of what they consider to be the DMCA's ineffective system.[22] Before the *Lenz* decision, copyright owners were "free to send a takedown notice for cases of questionable infringement, *de minimis* infringement, or in clear cases of fair use."[23] Pre-*Lenz*, consequences for copyright owners were largely nonexistent.

A. Legitimacy and Number of Takedown Notices

Despite the existence of some outlier cases, the majority of DMCA notices appear legitimate. Improper reports are often caught before the content provider initiates the takedown.[24] One study reports that Google's notices increased by 304 percent from 2010 to 2011 and reached more than sixty thousand notices each month in 2012.[25] Each notice may include between one and ten thousand takedown requests.[26] "Pundits point to the high takedown rates achieved by reporters, assert that takedown notices are highly accurate, and conclude that most takedowns are legitimate."[27] Nevertheless, when the takedown notices are not legitimate, users often fear lawsuits or are merely ignorant about how to respond, thus complying anyway.[28]

B. DMCA Abuse

Though most DMCA notices may be legitimate, no reasonable person could say that the process is not subject to abuse. However, some "abuse"—or misuse—is at least understandable. While the DMCA provides robust protection for copyright infringement, it

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20. *See generally* Jacqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability*, 62 WASH. & LEE L. REV. 487 (2005).

21. *See e.g.,* Lenz v. Universal*, Brief of Amici Curiae Automattic Inc. et al.*, No. 13-16106, 6–14 (Dec. 13, 2013) (hereinafter Automattic Brief); Lital Helman & Gideon Parchomovsky, *Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1209 (2011) ("An additional concern emanating from the present regime, which places enforcement in the hands of copyright owners, is that too much speech will be curtailed.").

22. See Automattic Brief, *supra* note 21.

23. *See* Charles W. Hazelwood, *Fair Use and the Takedown/Put Back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307, 307 (2010).

24. *See* Automattic Brief, *supra* note 21.

25. Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L & TECH. 369, 390 (2014).

26. *Id.* at 408.

27. *Id.* at 430.

28. *Id.*

provides little to no protection for other forms of intellectual property, privacy, or anything other than copyrights. Where copyright seems elevated above all other rights, this privileged position provides a powerful incentive to utilize its remedy beyond its boundaries.

"A number of notices . . . appear to include claims in addition to, or instead of, copyright infringement—such as unfair competition, trademark-type claims, or privacy concerns."[29] An accounting of improper DMCA notices found that 55 percent of improper Google search takedown notices were related to claims of unfair competition.[30] Meanwhile, 21 percent of the takedown notices targeted "hobbyists, critics, and educational users," whose use we would typically classify as *fair use*.[31] Moreover, "[a] total of 37 [out of 876] notices include[d] claims for noncopyrightable subject matter."[32] Notices also included flaws like questions of ownership, fair use, descriptions of products, and claims of infringement upon a "look-and-feel" claim.[33] On the darkest side of the DMCA, would-be censors improperly use the procedure to attempt an end-run around the prohibition on prior restraints in defamation actions.[34] These alternative DMCA uses can be fairly characterized as being counter to freedom of expression interests.[35]

DMCA notices may also be used as a cheap form of prior restraint. In *Automattic Inc. v. Steiner*,[36] an organization attempted to use the DMCA to remove criticism with no underlying claim

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29. Jennifer M. 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 (2006).

30. *Id.* at 651. Note that it is difficult to accurately record data on DMCA notices, because it involves private parties and procedures with no main recording source. *Id.*

31. *Id*. at 655.

32. *Id*. at 668.

33. *Id.*

34. As a few examples: In 2007, Powermark Homes issued a takedown against the owners of Powermarkhomessuck.com, a site formerly used to criticize the Ohio homebuilding company that now sells products, which is confusing. Powermark Homes Inc. v. John Doe, *Complaint*, No. CV-07-625465 at Exhibit A (D. Ohio May 25, 2007); POWERMARK HOMES SUCKS, Powermarkhomessucks.com [https://perma.cc/REF3-X5S6]. In a 2008 complaint, Brave New Films asserted claims against Michael Savage, a talk radio host, for improperly using the Section 512 takedown procedures to remove a video that criticized Savage's anti-Muslim "tirade." Compl., Brave New Films 501(C)(4) v. Weiner, 626 F.Supp.2d 1013 (N.D. Cal. 2008) (No. 3:2008-cv-04703). Also, in 2014, the Law Offices of Bornstein and Bornstein sent a DMCA takedown request to YouTube to remove a video of an anti-eviction protest occurring outside of their Eviction Boot Camp seminar. Chris Roberts, *SF Eviction Attorneys Use Copyright Law to Get Protest Removed*, NBC BAY AREA (July 21, 2014), http://www.nbcbayarea.com/news/local/Noted-SF-Eviction-Attorneys-Use-Copyright-Law-To-Get-Protest-Removed-268036501.html [https://perma.cc/B6QA-W8JE]. For more details on DMCA takedowns, see Seng, *supra* note 25.

35. Urban & Quilter, *supra* note 29, at 668.

36. 82 F. Supp. 3d 1011 (N.D. Cal. 2015).

whatsoever. In that case, a blogger, Oliver Hotham, contacted Straight Pride UK and inquired about its stance on gay rights. Hotham subsequently posted articles about the interview on his WordPress blog, revealing Straight Pride's homophobic views. In response, Straight Pride UK issued multiple takedown notices for any post concerning that interview. Automattic operates the WordPress blogging platform and brought a claim, along with Hotham, under Section 512(f)[37] to thwart Straight Pride's inappropriate DMCA use and claim damages for lost time, resources, and interference with Hotham's free speech rights.[38] The Section 512(f) claim succeeded when Straight Pride defaulted, but it likely would have prevailed even on a contested claim, as there was no copyright infringement because the takedown notice did not identify any copyrightable subject matter.[39]

Another example of DMCA abusive use is *Tuteur v. Crosley-Corcoran*.[40] In 2012, Amy Tuteur, an obstetrician gynecologist, posted multiple articles on her blog questioning "the merits of home births," including one specifically about the safety of Gina Crosley-Corcoran's home birth practice.[41] Crosley-Corcoran responded with a post aimed at Tuteur and an image of Crosley-Corcoran extending her middle finger.[42] The Section 512(f) claim came after Crosley-Corcoran sent Tuteur a takedown notice for reposting the photograph on Tuteur's blog. In the most recent decision in the case, the District Court of Massachusetts held that the takedown notice complied with DMCA requirements,[43] thus showing that the DMCA can be used as a tool in disputes that are largely *not* copyright infringement cases. However, in this case, since there was at least marginally a copyright claim, use of the DMCA is proper.

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37. Automattic argued it had suffered damages in the form of employee time responding to notices and media inquiries and harm to its reputation when it removed the non-infringing content. The court awarded Automattic damages for employee time expense only. *See Steiner*, 82 F. Supp. 3d at 1030–31. In light of Automattic's arguments, one may assume they joined in the case for reputational purpose, in hopes of gaining some extra notoriety, or to make a statement to copyright owners.

38. *See Steiner*, 82 F. Supp. 3d at 1019.

39. *See id.*

40. Tuteur v. Crosley-Corcoran, 961 F. Supp. 2d 333 (D. Mass. 2013).

41. *See* Compl. ¶ 11–19, *Tuteur*, 961 F. Supp. 2d, (No. 1:13-cv-10159-MBB).

42. *Id.* ¶ 19–25.

43. *See Tuteur*, 961 F.Supp.2d at 333. Note that in this case, at least one of Corcoran's attorneys did consider fair use. *Id.* at 342.

C. Simply Erroneous DMCA Takedowns

Hanlon's Razor commands that we not attribute to malice that which can be adequately explained by stupidity or incompetence.[44] The DMCA seems to have dumped a pile of blades from Hanlon's Razor across the country. Further, a significant number of takedowns are not even *that* culpable, but often the result of mere clumsiness.

For instance, in 2003, the simple combination of "Usher" and ".mp3" triggered a takedown notice for a song posted online, performed by Pennsylvania State University staff member *Peter* Usher—not the popular recording artist, Usher Raymond.[45] The song was, in fact, about a gamma ray satellite designed by the school and had no relationship at all to the recording artist.[46] Indeed, the Recording Industry Association of America, which issued the notice, "confirmed that its policy does not require its Internet copyright enforcers to listen to the complete song."[47] Certainly no one meant any harm in issuing the takedown notice, but it resulted in a takedown, nonetheless.

More recently, Harvard Professor Lawrence Lessig brought a claim against Liberation Music ("Liberation") over a DMCA takedown notice for a lecture posted on YouTube.[48] Lessig's lecture, about culture and the Internet, included video clips from the "Lisztomania copycat video phenomenon" to illustrate tools used in Internet communication.[49] In response to his counter-notice, Liberation sent an email directly to Lessig threatening suit if he failed to retract the counter-notice within seventy-two hours.[50] When Lessig responded by filing for declaratory judgment and damages under Section 512(f),

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44. *See, e.g., Liberty Life Assur. Co. of Bos. v. Devillalvilla*, No. 6:12–cv–1320–Orl–37TBS, 2014 WL 309084, at *5 (M.D. Fla. Nov. 12, 2013) ("Wielding Hanlon's Razor, the Court declines to infer malice from conduct that can be adequately attributed to incompetence.").

45. *The Artist*, USHERWORLD, http://usherworld.com/the-artist/ [https://perma.cc/B992-M5DR].

46. Seltzer, *supra* note 15, at 210.

47. Declan McCullagh, *RIAA Apologizes for Threatening Letter*, CNET NEWS (May 12, 2003, 6:12 PM), http://www.cnet.com/news/riaa-apologizes-for-threatening-letter/ [https://perma.cc/N738-E9WU].

48. *See* Compl., Lessig v. Liberation Music Pty Ltd., No. 1:13-cv-12028 (D. Mass. Aug 22, 2013) (hereinafter Lessig Complaint).

49. *Id.* at 4. A video featuring "Lisztomania" by the band Phoenix mashed up dance scenes from different 1980s movies including *The Breakfast Club* and *Pretty in Pink*. After the YouTube video was subject to a DMCA takedown, fans from around the world re-created the scenes and posted their own versions. You can see a compilation of them at ReVid, *Lisztomania Brat Pack Mash Up Compilation ReVid . . . and It Continues*, YOUTUBE (Sep. 19, 2013), https://www.youtube.com/watch?v=reyJfePIbDA [https://perma.cc/7T6ZBQ38]. A repost of the original can be found at Avoidantconsumer3, *phoenix-lisztomania-brat pack remix (original)*, YOUTUBE, https://www.youtube.com/watch?v=YlLKG_8sHF [https://perma.cc/V8EA-N59V].

50. *See* Lessig Compl., *supra* note 48, at 8.

Liberation immediately settled for an undisclosed amount.[51] Liberation blamed the actions on an untrained employee, who failed to watch the video before issuing the notice.[52] What these clumsy or incompetent errors tell us is that if there is likely little consequence for negligent use of the DMCA, there is little incentive to wield its power with care.

D. Problems Facing Copyright Owners

These examples show how DMCA takedown notices can be tools of censorship—intentional or unintentional. But it is not just users who have found that the DMCA is a poor fit for today's reality. The DMCA was written for an Internet with dial-up speeds that made widespread online piracy a technological impracticality.[53] Copyright owners who were initially pleased with the DMCA have found that the proliferation of online piracy at broadband speeds leaves them playing "Whack-a-Mole."[54] They often send hundreds of thousands of notices, just to find that the content wind up online again seconds later.[55] The "digital movement has turned everybody into potential distributors and, in the eyes of copyright holders, into potentially dangerous copyright infringers."[56] But, ultimately, it leaves authors and artists

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51. Stipulation of Dismissal, Lessig v. Liberation Music Pty Ltd., No. 1:13-cv-12028 (D. Mass. Feb. 28, 2014); Mike Masnick, *Label Threatening Larry Lessig With Insane Infringement Claim Over Fair Use Video Caves In, Pays Up*, TECHDIRT (Feb. 28, 2014), https://www.techdirt.com/articles/20140227/15302526383/label-threatening-larry-lessig-with-insane-infringement-claim-over-fair-use-video-caves-pays-up.shtml [https://perma.cc/PZ95-SP85].

52. *See id.*

53. The DMCA went into effect in October 1998. A high-end Internet user enjoyed a connection speed of around 100 Kbps (Kilobits per second) at this time. *See* Jakob Nielsen, *Nielsen's Law of Internet Bandwidth*, NIELSEN NORMAN GRP. (April 5, 1998), https://www.nngroup.com/articles/law-of-bandwidth/ [https://perma.cc/V9PT-G7EQ]. Similar users in 2014 enjoyed a connection speed over one thousand times higher than this. *See id.*

54. Appellant's Br. at 55, UMG Recordings v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013) (No. 09-56777) ("Veoh's site, like others' is dynamic and changes day-to-day or hour-to-hour as users upload more material, the task of identifying and sending notifications requesting the removal of copyrighted works would amount to an unending version of the children's game of 'Whack-A-Mole'"); *see also* Automattic Inc. v. Steiner, 82 F.Supp.3d 1011, 1019 (N.D. Cal. 2015) (showing that even though the content was eventually found non-infringing during the dispute, plaintiff replaced the content multiple times on multiple platforms); Kevin C. Hormann, *The Death of the DMCA? How Viacom v. YouTube May Define the Future of Digital Content*, 46 HOUS. L. REV. 1345 (2009) (discussing OSP liability in user reposting of infringing content).

55. Appellant's Br., *supra* note 54; *see also Steiner.*, 82 F.Supp.3d at 1019; Hormann, *supra* note 54.

56. Michael P. Murtagh, *The FCC, the DMCA, and Why Takedown Notices are Not Enough*, 61 HASTINGS L.J. 233 (2009).

overwhelmed, as the DMCA places a burden upon them to police countless infringements.

Owners looked to Internet Service Providers (ISPs) for help, but ISPs are reluctant to get involved, either out of an inability or an unwillingness to do so.[57] For instance, after reviewing Comcast's policies regarding peer-to-peer sharing websites, the Federal Communications Commission (FCC) concluded that providers, such as Comcast, may not arbitrarily discriminate against peer-to-peer websites that frequently produce infringing content.[58] Essentially, when a provider blocks all peer-to-peer sharing, its prohibition also scoops up non-infringing content, thus chilling expression.[59] When "Americans . . . refuse to follow traditional copyright law"[60] and ISPs do not have much leeway to help, copyright owners find it necessary to issue floods of takedown notices.

On the other hand, at least one author has argued that "ISPs should not be liable for copyright infringement in the first place"; that author believes ISPs are not the problem—the problem remains with Section 512.[61] "Section 512 ignores [that ISPs should not be liable] in the interests of helping copyright owners protect their rights, but it provides an insufficient check on overreaching, and creates an unacceptable shortcut around the procedures that are needed to decide whether speech is actually infringing."[62] Furthermore, copyright infringement is often unclear, and ISPs are not always equipped to adjudicate fact-specific cases that even courts sometimes have trouble deciding.

There is room for debate as to whether ISPs or the law are to blame, but a recent case seems to illustrate that some ISPs have an incentive to promote piracy.[63] For example, large-scale "conduit" ISPs have a perverse financial incentive to impede copyright enforcement or to at least turn a blind eye. 17 U.S.C. Section 512(i) requires ISPs to create and reasonably implement a repeat infringer policy by which the ISP will terminate access to services for repeat copyright

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57. Trimble & Mehra, *supra* note 9, at 687 ("ISP satisfaction with the [DMCA] might also suggest that the law does not adequately incentivize ISPs to innovate in particular aspects of technology, and in the worst case scenario, the law could actually incentivize ISPs to slow their innovation in technology.").

58. Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 FCC Rcd 13028, 6 (2008) (memorandum opinion & order).

59. Murtagh, *supra* note 56, at 238.

60. *Id.* at 244.

61. MARJORIE HEINS & TRICIA BECKLES, NYU BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 5 (2005).

62. *Id.*

63. BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc., 2015 WL 7756130 (E.D. Va. Dec. 1, 2015).

infringers. The DMCA thus requires conduit ISPs—which profit by having as many paying subscribers as possible—to comply with the statute by cutting into their own profits.

This is precisely what caused the dispute in *BMG Rights Management (US) LLC v. Cox Communications, Inc.*[64] Cox Communications ("Cox") nominally had a repeat infringer policy but for years did not actually apply it, instead allowing repeat infringers to reactivate their accounts with Cox as soon as they were terminated.[65] The District Court of Eastern District of Virginia found that this practice amounted to Cox deliberately flouting the purpose of the DMCA.[66] Even when Cox did implement an actual repeat infringer policy, it did so in such a lukewarm manner that it once again violated the DMCA by not terminating access of repeat infringers under appropriate circumstances and using an unreasonable "hard limit" on the number of infringement notices it would receive in a twenty-four-hour period.[67] Discovery revealed that the main reason Cox was so unwilling to comply with the DMCA was because it did not want to lose the monthly subscription fees from users they should have terminated.[68] This strategy did not play out well for Cox; a jury entered a $25 million damages award against the ISP for contributory copyright infringement.[69] However, this result does not seem to signal a trend, as *BMG Rights Management* is distinct from the many cases in which courts do not find that ISPs are to blame for copyright infringement.

With ISPs largely short on incentives to be helpful and copyright owners vastly outnumbered by infringers, the war of attrition seems to be one that copyright owners cannot win under the current legal regime. Accordingly, it is not surprising that copyright owners might be overly zealous or clumsy with their persistent game of "Whack-A-Mole" with infringers. Unfortunately, this state of affairs seems to leave fair use as collateral damage.

E. Counter-Notifications—The DMCA's Safety Valve?

Despite the perceived imbalances of power in the DMCA regime, there are safety nets for users subjected to DMCA takedowns.

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64. *See id.*

65. *See id.* at *48–49.

66. *See id.* at *48–57.

67. *See id.* at *46.

68. *See id.*

69. Jimmy Hoover, *Cox Must Pay BMG $25M For User Piracy, Jury Finds*, LAW 360 (Dec. 17, 2015, 12:38 PM), http://www.law360.com/articles/739353/cox-must-pay-bmg-25m-for-user-piracy-jury-finds [https://perma.cc/Y553-PK8E].

The DMCA permits users to submit counter-notices to content providers and encourage them to re-upload the content.[70] Critics of the DMCA emphasize that, even with counter-notification, the "DMCA requires the service provider to keep the material offline for more than a week"—thus effectively quelling non-infringing speech.[71] The counter-notice process requires a speaker to affirmatively "reassert the lawfulness of his speech" in order to counter-act its suppression, even before any court determination that it should be suppressed.[72] While courts claim that fair use and the "idea/expression dichotomy" adequately accommodate speech in the copyright context,[73] this is commonly used to "explain away First Amendment concerns," rather than address them.[74] Thus, fair use certainly provides little comfort under the DMCA.

Additionally, some OSPs make their counter-notice process virtually useless.[75] Some websites have programs outside of Section 512 to determine infringement, often including a three-strikes or "graduated response" action whereby users' accounts can be suspended or terminated with minimal notice.[76] To issue a counter-notice, a user must reveal her identity and consent to a jurisdiction wherein she may be sued for copyright infringement.[77] Considering the average YouTube user's degree of legal knowledge and financial ability to afford representation, the possibility of a lawsuit is an understandable fear.[78] Furthermore, when a user succumbs to the disincentives built into the DMCA process, such as the effort required to file a counter-notification or the mere desire to fully avoid any legal entanglements, the marketplace of ideas can find its wares subject to intellectual confiscation without any real due process. The response to this argument, however, is that a counter-notification requires very little effort, and thus complaints about it as a disincentive are perhaps overblown.

Nevertheless, some might argue that once one expresses oneself, any requirement of effort to keep that expression online is an infringement upon the speaker's rights. A counter-notification

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70. *See* 17 U.S.C. § 512(g); Lessig Complaint, *supra* note 48, and accompanying discussion.

71. Seltzer, *supra* note 15, at 176.

72. *Id.* at 177.

73. Golan v. Holder, 565 U.S. 1270 (2012) (quoting Eldred v. Ashcroft, 537 U.S. 186 (2003)); *see also* Seltzer, *supra* note 15, at 187.

74. Seltzer, *supra* note 15, at 187.

75. Pallas Loren, *supra* note 16, at 752.

76. *Id.* at 780.

77. *Id.*; 17 U.S.C. § 512(g)(3)(D) (2012).

78. *See* Hazelwood, *supra* note 23, at 330.

requires all but thirty seconds worth of work—which is hardly too laborious. Although, this perspective may be simply a matter of a generational divide. After all, cereal sales are crashing, because cereal is considered to be too much work for millennials.[79] Expecting them to fill out a counter-notification template form may truly be asking way too much.

III. FAIR USE

American copyright law rests on the "incentive theory,"[80] under which copyright owners are incentivized to create new works due to gaining a temporary monopoly over using their works for commercial purposes. These owners create music, movies, books, and other creative works.[81] This framework is intended to benefit everyone, because those works expand learning and the arts and ultimately fall into the public domain so that they can be used for further creative and beneficial use.

Fair use is an exception to the copyright monopoly, designed to further the utilitarian objective underlying the incentive theory.[82] Without fair use, copyright would block the creation of new creative endeavors that build on old ones by utilizing some parts of copyrighted works. For example, if someone wants to review a movie, she may need a short clip from the film.[83] Or, if one wants to criticize a book, she might not be able to do that without quoting that book. Parodies, compilations, news reports, and educational uses all depend on fair use.

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79. Roberto Ferdman, *The Baffling Reason Many Millennials Don't Eat Cereal*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/23/this-is-the-height-of-laziness/ [https://perma.cc/XE94-3ZTS].

80. *See* Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 241 (2013) (discussing the market failure theory of fair use).

81. *See* Dan Hunter & F. Gregory Lastowka, *Amateur-To-Amateur*, 46 WM. & MARY L. REV. 951 (2004).

82. *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1671 (1988); Ryan T. Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 U. FLA. J.L. & PUB. POL'Y NO. 1, 32–34 (2008); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 38–39 (1997); Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 393–94 (2005).

83. Copyright owners have been known to haphazardly attack their own legitimate trailer websites; think of the trouble for users posting a clip of the film. *See, e.g.,* Chris Morran, *Universal Studios Copyright Bot Stupidly Asks Google to Delist IMDB Page for "Furious 7,"* CONSUMERIST (July 22, 2015), https://consumerist.com/2015/07/22/universal-studios-copyright-bot-stupidly-asks-google-to-delist-imdb-page-for-furious-7/ [https://perma.cc/G5SF-MEXF]; *see also* Tara M. Warrington, *Harry Potter and the Doctrine of Fair Use: Conjuring a New Copyright Complaint*, 10 FLA. COASTAL L. REV. 622, 625.

Although the DMCA is intended to protect copyright and perhaps regards some free speech as collateral damage in the protection process, it has especially poor eyesight when it comes to fair use—the universal right to use someone else's copyrighted works, with or without permission, as long as the users are creating a "transformative" work in the process.[84]

A. A History and Development of Fair Use

Fair use is not a new construct. The legal basis of the US fair use framework presently comes from Section 107 of the Copyright Act, and it is rooted in the First Amendment.[85] However, it has a much longer tradition than its statutory, or even constitutional underpinnings. Indeed, early cases under the Statute of Anne[86] in the 1700s held that some uses of others' works did not constitute unlawful acts.[87] Long before First Amendment jurisprudence began to develop, Justice Story penned his opinion on "fair abridgement" in *Folsom v. Marsh*.[88] This is regarded as the beginning of the theory in American jurisprudence.[89]

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84. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) ("Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

85. *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 21 (2001) ("Further undermining fair use's First Amendment potency, the [Supreme] Court also defined the privilege as an 'affirmative defense,' ruling in effect that the burden of proof is on the party claiming fair use." (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985))).

86. 8 Ann. c. 21 (1709) (Eng.).

87. *See Campbell*, 510 U.S. at 576 (citing WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–17 (1985) and Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

88. 9 F. Cas. 342 (C.C.D. Mass. 1841). Although Justice Story's opinion in *Folsom* is considered the first American expression on the doctrine of fair use, Justice Story raised many of the same points two years earlier, in Gray v. Russell, 10 F. Cas. 1035, No. 5728 (C.C.D. Mass. 1839), a case involving the scope of protection to be accorded compilations of public domain materials. In Justice Story's dicta, he discussed the issues presented by bona fide abridgments:

> [I]f large extracts are made . . . in a review, it might be a question, whether those extracts were designed bona fide for the mere purpose of criticism, or were designed to supersede the original work under the pretense of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question, in such a case, must be compounded of various considerations; whether it be a bona fide abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort . . . In many cases, the question may naturally turn upon the point, not so much of the quantity, as of the value of the selected materials. As was significantly said on another occasion—"Non numerantur,

Fair use began to take a stronger hold in the early 1900s, beginning with *Bloom & Hamlin v. Nixon*.[90] In that case, the alleged infringer used excerpts from an original work in a parody.[91] Without the benefit of the term "fair use," the court rejected an application for a preliminary injunction, holding that invoking the right to parody was not an infringement of any rights under the Copyright Act.

For the majority of the twentieth century, fair use remained a common law doctrine that was not codified until the 1976 Copyright Act.[92] Unfortunately, even upon codification, the law of fair use remains muddy at best, and the judiciary seems disinclined to clarify it.[93] Fair use permits the use of copyrighted work if the work is used "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research"[94] and is evaluated on a case-by-case basis.[95] Four major factors considered today include: (1) the type of use, (2) the nature of the work, (3) the portion of the work used, and (4) the effects on the market for the work.[96] This test has given us unpredictable results.[97] In a study of fair use cases, copyright expert David Nimmer found that there is "virtually no correlation between the four-factor inquiry and the courts' ultimate rulings."[98] Instead, courts appear to make a decision on the matter and manipulate the factors to fit that decision.[99]

Even in the absence of such judicial arbitrariness, there would be a tension between "fair use" and copyright ownership.[100] Copyright

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> ponderantur." The quintessence of a work may be piratically extracted, so as to leave a mere caput mortuum, by a selection of all the most important passages in a comparatively moderate space.

10 F. Cas. At 1038–39.

89. *See* Alan Latman, *Fair Use of Copyrighted Works*, *in* SENATE COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION, STUDY NO. 14, 2 (Comm. Print 1960).

90. *See* Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903).

91. *See id.*

92. 17 U.S.C. § 107.

93. *See* Righthaven LLC v. Hoehn, 716 F.3d 1166 (9th Cir. 2013) (showing that at the district court level, Judge Pro engaged in a deep analysis of fair use; however, the Ninth Circuit vacated the decision, while upholding the result).

94. 17 U.S.C. § 107.

95. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

96. *See* 17 U.S.C. § 107(1)–(4). Though these are not the only factors considered, each type of fair use listed in the statute, criticism, comment, news, reporting, etc. "provide[s] important indications by showing which activities receive protection." *See* Patel, *supra* note 80, at 240.

97. *See* Hein & Beckles, *supra* note 61, at 11 (citing David Nimmer, *Fairest of Them All and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 264, 280–82 (2000)).

98. *Id.*

99. *Id.*

100. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1096 (2007) ("Even when a creator is satisfied that a contemplated use is legally fair, many media gatekeepers, such as

owners understandably want to control or profit from every aspect of their works. This incentive leads to a creative chilling effect. For example, fair use protects "parody," but not "satire." Where is the line? The First Amendment requires that we have some fair use provisions; otherwise, copyright acts too much like a tool of censorship and strangles creativity and the marketplace of ideas.[101]

B. A Right or an Affirmative Defense?

One major difficulty with fair use in the DMCA context is whether fair use is a right or merely an affirmative defense.[102] At the genesis of the fair use doctrine, copyright holders were required "to prove that a use was unfair to prevail on a claim of infringement."[103] Today, case law has transformed fair use "from a right of speech to an excuse for infringement."[104] Also, courts that formerly presumed use was non-infringing now require that fair use be clearly shown.[105] This shift makes the fair use defense somewhat of a paper tiger. Mark Lemley wrote, "Because fair use relies upon a vague, multi-factor test, it is often impossible to know ex ante whether any particular use will qualify as fair."[106] Similarly, Lawrence Lessig calls fair use "the right to hire a lawyer."[107] This burden shift itself creates a strong disincentive to asserting fair use rights.

Early fair use jurisprudence "implied that the user held a presumptive right to use the copyrighted expression absent a showing otherwise."[108] For example, in *Gray v. Russell*, the defendant was found liable for infringement where he published an "improved" version of the plaintiff's book; however, Justice Story also surveyed

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television broadcasters, film distributors, and book publishers, will not accept such fair use determinations, nor will they rely on their own fair use analysis.")

101. Tyler T. Ochoa, *Dr. Seuss, The Juice, and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 581–83 (1998). To illustrate, in Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997), the courts refused to engage in a parody analysis for a satire about the O.J. Simpson trial, *The Cat NOT in the Hat!*. Ochoa, *supra*, at 585–99.

102. *See* Tara M. Warrington, *Harry Potter and the Doctrine of Fair Use: Conjuring a New Copyright Complaint*, 10 FLA. COASTAL L. REV. 622, 624.

103. Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 136 (2011).

104. *Id*. at 137.

105. *Id*. at 136–37.

106. Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 185–86.

107. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004).

108. Snow, *supra* note 103, at 144.

the possibilities of lawful use,[109] providing reasoning whose echoes would be heard in 17 U.S.C. Section 107.[110] Story noted that, in some cases, the court must consider certain factors in determining whether there was "piracy" at all—specifically the type of work, the audience, and the quantity copied.[111]

Copyright scholar Richard DeWolf remarked in 1925 that fair use was a defense to infringement, but he lacked legal support for the assertion.[112] Somehow this interpretation—that "fair use is technically an infringement of copyright"—gained traction in copyright treatises after 1944.[113] Essentially, this view of copyright is based on the consent of the copyright owner to the "reasonable use" of others. To the contrary, fair use had previously been characterized as a *privilege*: "None of these rules of decision are inconsistent with the privilege of a subsequent writer to make what is called a fair use of a prior publication."[114] Even if fair use is interpreted as a lawful infringement, this interpretation does not require that fair use *always* be a defense after the fact.

Courts continued to ignore early fair use jurisprudence until the 1955 *Loew's Inc. v. Columbia Broadcasting System* decision became the first case to tip the scales by stating outright that fair use is an affirmative defense. [115] Those litigants who would invoke its privilege would bear the burden of proving their non-infringing use.[116] However, the language of the 1976 Copyright Act and the fair use provision, Section 107, support the idea that fair use is meant to be a right or privilege.[117] The US House Judiciary Committee has reported that "any special statutory provision placing the burden of proving fair

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109. *See* Gray v. Russell, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728). The opinion thoroughly discusses the possible circumstances where the use would be permissible. At times throughout the opinion, the reader is unsure of the outcome because of the emphasis on assumption of lawful use.

110. Leval, *supra* note 87, at 1105 (1990).

111. *See Gray*, 10 F. Cas. 1035.

112. Snow, *supra* note 103, at 155 (citing RICHARD C. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925) ("'[F]air use' strictly speaking . . . is a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have foreseen it and tacitly consented to it.")).

113. Snow, *supra* note 103, at 157.

114. *See* Lawrence v. Dana, 15 F. Cas. 26 (C.C.D. Mass. 1869).

115. 131 F. Supp. 165 (S.D. Cal. 1955) ("[D]efendants set forth three affirmative defenses. 1. That the use made by defendants of 'Gaslight' was a fair use.").

116. Snow, *supra* note 103, at 160.

117. Justice Stanley Birch has also expressed concern with the characterization of fair use. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 1996) ("Although the traditional approach is to view 'fair use' as an affirmative defense, [I] . . . [am] of the opinion that it is better viewed as a right granted by the Copyright Act of 1976.")

use on one side or the other would be unfair and undesirable,"[118] and Section 107 specifically states that "fair use of a copyrighted work is not an infringement of copyright."[119] But labeling fair use as an affirmative defense places the burden on the defendant and causes fair use to become an excuse to infringement, and thus is inconsistent with both the Judiciary Committee report and Section 107.[120] The Supreme Court, though, ultimately appeared to slam the door shut for that argument in *Harper & Row Publishers Inc. v. Nation Enterprises,* where the Court finally declared fair use to be an affirmative defense.[121]

Despite the burden shift, fair use is meant to adequately consider both the interests of the copyright owner and the user of the work.[122] Fair use is rooted in the First Amendment in the US context.[123] However, it is also an international concept.[124] For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires signatories to enforce copyrights across borders, but it provides for limitations on copyright protection under the "three-step test."[125] Under the test, exceptions to exclusive rights are proper in certain special cases, which do not conflict with a

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118. Snow, *supra* note 103, at 160 (citing H.R. REP. NO. 90-83 (1967)).

119. H.R. REP. NO. 90-83.

120. In the legislative history of the 1992 amendment to the Copyright Act, the Judiciary Committee pronounced that "fair use is an affirmative defense" and "the burden of proving fair use is always on the party asserting the defense." H.R. REP. NO. 102-836, at 3, n.3 (1992).

121. 471 U.S. 539 (1985).

122. *See* Pamela Samuelson, *Possible Future of Fair Use*, 90 WASH. L. REV. 815 (2015); *see also* Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 590 (1994) (upholding a balance of interests in fair use analysis).

123. *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 21 (2001) ("Further undermining fair use's First Amendment potency, the [Supreme] Court also defined the privilege as an 'affirmative defense,' ruling in effect that the burden of proof is on the party claiming fair use." (citing *Harper & Row, Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 561 (1985))).

124. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 77 (2000).

125. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization [WTO], Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS], http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm [https://perma.cc/AW4G-PU8F]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9 1886, 1186 U.N.T.S. 3, http://www.wipo.int/treaties/en/text.jsp?file_id=283693 [https://perma.cc/5FCV-BX9X]; WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65, http://www.wipo.int/treaties/en/text.jsp?file_id=295157 [https://perma.cc/375P-WFPX]; WIPO Performances and Phonograph Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76, http://www.wipo.int/treaties/en/text.jsp?file_id=295578 [https://perma.cc/NCJ8-BZPB].

normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[126]

The Berne Convention, through the TRIPS Agreement,[127] preserves certain fair use rights through the "three-step test." Per article 9(2) of the Berne Convention, signatories are permitted to allow use of copyrighted works "(1) in certain special cases, provided that (2) such reproduction does not conflict with a normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author."[128] This test is intended to be flexible, allowing for signatory states to provide for local custom and local differences in enforcement.[129]

More recently, the Trans-Pacific Partnership Agreement appears to give at least lukewarm support for fair use.[130] A 2002 Canadian case[131] also fleshed out the great importance of fair use or "fair dealing" limitations on the broad reach of copyright. Remarking that the overprotected copyright can be just as harmful as under-protected rights, the Court stated:

> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors

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126. TRIPS, *supra* note 125, at art. 13.

127. The TRIPS Agreement requires member states to comply with sections 1-21 of the Berne Convention for the Protection of Literary and Artistic Works. TRIPS, *supra* note 89. Article 10(2) of Berne states:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

Berne Convention, *supra* note 125, at art. 10(2).

128. Berne Convention, *supra* note 89, at art. 9(2).

129. *See* Christophe Geiger et al., *Declaration: A Balanced Interpretation of the Three-Step Test in Copyright Law*, 1 J. INT'L PROP. INFO. TECH. & E-COMMERCE L. 119 (2010). However, this Section 9(2) limitation was interpreted narrowly by a 2000 WTO Panel, which held that any exception relying upon Sectopm 9(2) must "be limited in its field of application or exceptional in its scope" and not "[cause or have] the potential to cause an unreasonable loss of income to the copyright owner." Panel Report, *United States—Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (adopted June 15, 2000), at 6.109, 6.229.

130. The Trans-Pacific Partnership Agreement [TPP]: Intellectual Property Rights Chapter states:

> Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, *inter alia* by means of limitations or exceptions that are consistent with Article QQ.G.16, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.

Trans-Pacific Partnership, art. QQ.G.17 (Oct. 5, 2015), https://ustr.gov/tpp/.

131. Théberge v. Galerie d'Art du Petit Champlain Inc. [2002] 2 S.C.R. 336 (Can.).

> for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.[132]

Fair use is, at its core, a freedom of expression right that is recognized globally and has grown up with copyright. It is where the First Amendment and intellectual property form an inelegant dovetail. Fair use has such pervasive acceptance that it even finds protection in some international agreements that were signed entirely to promote trade, with no free expression advocates at the table.[133] Therefore, wielding the DMCA, which has both state-side and international free expression consequences, should be done with care rather than with allowances for recklessness. The Ninth Circuit has correctly found that copyright owners should make a fair consideration of their rights versus the protected rights (and maybe even defenses) of the user before haphazardly issuing takedown notices.[134] But, it does not go far enough in recognizing the right to fair use.

IV. A BRIEF HISTORY OF SECTION 512(F)

The DMCA "bite back" provision, otherwise known as Section 512(f), was intended to disincentivize sloppiness or censorious intent in using the DMCA. However, this provision has largely failed. Realizing that counter-notification under Section 512(g) is not sufficient "where time-sensitive or controversial subjects are involved,"[135] Congress placed a price on unsupported infringement claims.[136] Subsection 512(f) provides liability for bogus takedown requests, including "any damages, including costs and attorneys' fees . . . incurred by the alleged infringer . . . or by a service provider."[137] However, copyright owners and others have operated with relative impunity, realizing that Section 512(f) lacked any teeth at all.[138] Post-*Lenz*, its teeth are still hardly venomous fangs.

The provision states:

> (f)Misrepresentations.—Any person who **knowingly materially** misrepresents under this section—

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132. *Id.* ¶ 31.

133. *The Imaginary Conflict Between Fair Use and International Copyright Law*, MATTHEW SAG (Feb. 27, 2013), http://matthewsag.com/?p=370 [https://perma.cc/N5YS-5XNK].

134. *See* discussion of the Ninth Circuit holding in *Lenz*, *supra* notes 2–8.

135. Pallas Loren, *supra* note 16, at 768 (quoting S. REP. NO. 105-190, at 2 (1998)).

136. 17 U.S.C. § 512(f) (2014).

137. *Id.*

138. Jordan Koss, Note, *Protecting Free Speech for Unequivocal Fair Users: Rethinking Our Interpretation of the S 512(f) Misrepresentation Clause*, 28 CARDOZO ARTS & ENT. L.J. 149, 169 (2010).

> (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.[139]

Before *Lenz,* the Northern District of California set the precedent for Section 512(f) cases in *Online Policy Group v. Diebold, Inc.*,[140] as this was the first time Section 512(f) had ever been enforced in court. Diebold manufactured voting machines that were subject to significant criticism.[141] Student journalists found an email archive where Diebold employees acknowledged problems with the machines.[142] The journalists subsequently posted the archive online. To attempt to contain its employee's statements, Diebold invoked the DMCA despite the fact that there was clearly no copyright infringement.[143]

The plaintiffs argued that Diebold "knowingly materially misrepresented" that publication of the email archive constituted copyright infringement.[144] The key dispute in the case was the meaning of "knowingly materially misrepresented." The plaintiffs sought to impose a standard similar to that required under a motion for a preliminary injunction[145]—that if Diebold lacked a likelihood of success on the merits of a copyright infringement claim, it should not

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139. 17 U.S.C. § 512(f).

140. 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

141. *Id*. at 1197. In 2003, the Election Assistance Commission was facing problems implementing the Help America Vote Act meant to be under way by the 2004 elections. During this incident, Diebold became the leading supplier of electronic voting machines to individual states. Hackers accessed Diebold's system in March 2003 and leaked thousands of internal emails discussing flaws in the Diebold system. Doris Estelle Long*, Electronic Voting Rights and the DMCA: Another Blast From the Digital Pirates or a Final Wake Up Call for Reform?*, 23 J. MARSHALL J. COMPUTER & INFO. L. 533 (2006); *see also* Paul R. La Monica, *The Trouble With E-Voting*, CNN MONEY (Aug. 30, 2004), http://money.cnn.com/2004/08/30/technology/election_diebold [https://perma.cc/L53T-V4NJ]; Melanie Warner, *Machine Politics in the Digital Age*, N.Y. TIMES (Nov. 9, 2003), http://www.nytimes.com/2003/11/09/business/machine-politics-in-the-digital-age.html [https://perma.cc/S8UL-RF2S].

142. *Diebold*, 337 F. Supp. 2d at 1197.

143. *Id*. at 1198.

144. *Id*. at 1204.

145. A preliminary injunction may be granted under the Copyright Act if a plaintiff establishes: a substantial likelihood that plaintiff will succeed on the merits; a substantial threat that denial of the injunction will result in irreparable harm to the plaintiff; threatened injury to plaintiff outweighs any damage that injunction may cause opposing parties; and injunction will not disserve the public interest. Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1462 (5th Cir. 1990).

have sent a DMCA notice.[146] Diebold argued instead for a much higher standard: in order to impose liability under Section 512(f), the DMCA notice must be frivolous.[147] This threshold is similar to the required standard to impose sanctions under Federal Rule of Civil Procedure 11.[148]

The court rejected both proposed standards, instead holding that "knowingly" means that the party had actual knowledge of the misrepresentation or that it should have known had it acted with reasonable care or diligence.[149] Under this standard, Diebold still was held liable, as it knowingly misused the DMCA procedure to remove content that would not have been copyright protected.

The next major Section 512(f) case further weakened the Section's deterrent effect. In *Rossi v. Motion Picture Association of America Inc.*, Michael Rossi ran a website that purported to provide downloads of Hollywood movies,[150] which would clearly be infringing conduct.[151] The Motion Picture Association of America (MPAA) sent a number of DMCA takedown notices, knocking his website offline for a period of time. However, "if MPAA had reasonably investigated the website by attempting to download movies, it would have been apparent that no movies could actually be downloaded from his website or related links."[152] Therefore, Rossi believed that the MPAA could not have formed the requisite good faith belief that the website actually had any infringing materials—since the very simple action of trying to download the movies would have shown that not to be the case.

The Ninth Circuit read Section 512(f)'s provision that a DMCA takedown notice, to be considered improper, must "knowingly materially misrepresent . . . that material or activity is infringing" to require subjective bad faith by the takedown notice's sender.[153] Rossi's own boasting about his full-length feature films caught him in

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146. *Diebold*, 337 F. Supp. 2d at 1204.

147. *Id.*

148. FED. R. CIV. P. 11(b).

149. 337 F. Supp. 2d at 1204.

150. 391 F.3d 1000 (9th Cir. 2004).

151. *Compare* Rossi v. Motion Picture Ass'n of America, Inc., 391 F.3d 1000 (9th Cir. 2004) *with* Columbia Picture Indus. v. Fung., 710 F.3d 1020 (9th Cir. 2009) (holding that isoHunt, a BitTorrent search engine used for third-party downloading, was not protected under the DMCA "safe harbor" because it induced users to participate in illegal file sharing of music, movies, and television shows) *and* Disney Enters., Inc. v. Hotfile Corp., 798 F.Supp.2d 1303 (S.D. Fla. 2013) (holding Hotfile, an online file storage service, vicariously liable for copyright infringement where its users shared licensed material belonging to a number of well-known film studios).

152. *Rossi*, 391 F.3d at 1003.

153. *Id.* at 1007.

the trap of the DMCA.[154] Nonetheless, the court took the opportunity to state, "A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owners acted unreasonably in making the mistake," and a subjective standard must be used when discussing the good faith requirement, not the objective "knowingly" standard.[155] While Rossi might not have been the most sympathetic party, the decision eroded the deterrent effect of Section 512(f)—creating a safe zone for transmission of DMCA notices on this subjective, rather than objective, good faith standard.

V. *LENZ V. UNIVERSAL* AND THE "DANCING BABY" VIDEO

In *Lenz v. Universal*, the Ninth Circuit was confronted with the aforementioned subjective-versus-objective question when it came to the determination of whether the DMCA notice unfairly targeted fair use. As noted above, Ms. Lenz posted a mere twenty-nine-second video, with Prince's "Let's Go Crazy" playing in the background.[156] The video was not posted for commercial reasons; it did not use the whole song; and, in fact, the song was, at times, barely audible.[157] Although fair use is sometimes difficult to ascertain because it requires an exacting analysis at times, it hardly takes a fair use expert to understand that this production was clearly fair use of the song. Of course, it would have taken even less analysis to determine that Mr. Rossi was not committing copyright infringement (the mere click of a mouse would have shown that the movies in question could not actually be downloaded from his website), so the question presented to the court was whether Universal Music knew, or should have known, that Lenz's use of the song was non-infringing fair use.

The key question in a Section 512(f) analysis is whether the copyright owner can swear under 17 U.S.C. Section 512(c) that the "use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."[158] By definition, the law authorizes fair use—but should a copyright owner have to make a preliminary fair use decision before sending out the notice? Upon receiving word from YouTube that Universal Music Group's DMCA notice led to her video being taken down by the website, Lenz sent YouTube a DMCA counter-notification under Section 512(g) claiming

154. *Id.* at 1002 ("A subsequent examination of Rossi's website revealed the following contents: 'Join to download full length movies online now! new movies every month'; 'Full Length Downloadable Movies'; and 'NOW DOWNLOADABLE.'").

155. *Id.* at 1005.

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

157. *Id.* at 1152.

158. *Id.* at 1154; *see* 17 U.S.C. § 512(c)(3)(A)(v).

that she had a right to post the video.[159] YouTube reposted the video on its website about six weeks later.[160] Lenz then filed a claim under the underutilized Section 512(f), arguing that Universal failed to meet the requisite good-faith belief that the material in question is an infringement of the copyright owner's rights.[161] Lenz did so with the backing of the Electronic Frontier Foundation, an advocacy organization that was willing to litigate against a multibillion-dollar company.[162]

A. District Court Motion to Dismiss

As in the Rossi case, the two parties disagreed on the standard that the court should apply. Universal moved to dismiss the Section 512(f) claim on the grounds that the company had no obligation to consider fair use when sending a DMCA notice, because fair use is only an affirmative defense.[163] At the trial court, Lenz defeated Universal's motion to dismiss with a new interpretation—"An allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine . . . is sufficient to state a misrepresentation claim pursuant to Section 512(f)."[164] The court took the position on Section 107 and Section 512(f) that "[e]ven if Universal is correct that fair use only *excuses* infringement, the fact remains that fair use is a *lawful* use of a copyright."[165]

After rejecting the claim that taking the time to consider fair use would heavily burden copyright holders, the *Lenz* court casually mentioned in its Order Denying the Motion to Dismiss that copyright holders must already *consider* the infringing nature of the use before sending a takedown notice.[166] But this is not often the case in practice. Copyright enforcers often use one employee, or even a computer program, to determine whether the material merely

159. *Lenz*, 572 F. Supp. 2d at 1152.

160. *Id*.

161. Lenz v. Universal Music Corp., F. Supp. 2d. 1150, 1153 (N.D. Cal. 2008).

162. *Important Win for Fair Use in 'Dancing Baby' Lawsuit*, ELECTRONIC FRONTIER FOUND. (Sept. 14, 2015), https://www.eff.org/press/releases/important-win-fair-use-dancing-baby-lawsuit [https://perma.cc/YX85-373S].

163. *Lenz*, 572 F. Supp. 2d at 1154.

164. *Id*. at 1155.

165. *Id.* at 1154 (emphasis in original).

166. *Id*. ("The DMCA already requires copyright owners to make an initial review of the potentially infringing material . . . [a] consideration of the applicability of the fair use doctrine simply is part of that initial review.").

contains a copyrighted work,[167] not necessarily whether that work is actually infringing. This results in a dragnet that sweeps up a significant amount of non-infringing expressive content—including fair use.

One critic wrote that "[r]equiring copyright holders to engage in a fair use analysis prior to issuing a takedown notice, pursuant to 17 U.S.C. Section 512, creates an improper burden on copyright owners to discharge what would be an affirmative defense in a potential infringement action."[168] Mareasa Fortunado claims that the fair use analysis requirement would impose a "chilling effect" on copyright holders for "fear of exposing themselves to liability."[169] She ultimately concluded that the *Lenz* decision is "inconsistent with and subverts the structure and purpose of the DMCA."[170] The *Lenz* district court and the Ninth Circuit disagreed.

B. District Court Summary Judgment

The US District Court for the Northern District of California handed down an order denying both Lenz and Universal's cross-motions for summary judgment, which ultimately appeared to take some of the teeth off of Section 512(f). At this stage, Lenz argued for her fair use rights, but the parties additionally battled over whether the Section 512(f) claim was appropriate in the absence of substantial damages.

Lenz asserted losses under the theories that the takedown interfered with her free speech, she lost time and resources pursuing the lawsuit to defend her free speech rights, and legal action imposed upon her attorneys' fees and costs.[171] Further, Lenz expressed clear objections to the effects on her free expression, noting that she filmed her children less frequently and sought at least nominal damages for the restraint on her expression.[172] Universal argued, "YouTube

167. Ed Oswald, *Out of Control Copyright Bots Are Making a Mockery of the DMCA*, EXTREMETECH (Sept. 6, 2012, 10:37 AM), http://www.extremetech.com/internet/135529-out-of-control-copyright-bots-are-making-a-mockery-of-the-dmca [https://perma.cc/9574-GG6N].

168. Mareasa M. Fortunato, *Let's Not Go Crazy: Why* Lenz v. Universal Music Corp. *Undermines the Notice and Takedown Process of the Digital Millennium Copyright Act*, 17 J. INTELL. PROP. L. 147, 150 (2009).

169. *Id.*

170. *Id.* at 167.

171. Lenz v. Universal Music Corp., No. 5:07-cv-03783-JF, 2013 WL 271673, at 8 (N.D. Cal. Jan. 24, 2013).

172. *Id.*

services were available to Lenz at no cost and that Lenz did not care that YouTube declined to host her video."[173]

The court sided with Lenz and the Section 512(f) damages language, holding that pre-suit attorneys' fees may be the basis for a claim, but the loss of one's time amounts to, at best, a nominal damage.[174] These are sufficient damages to assert a Section 512(f) claim because requiring a plaintiff to demonstrate "those damages were economic and substantial would vitiate the deterrent effect of the statute."[175] This reasoning is consistent with the wording of Section 512(f), which provides for any and all damages. However, there would have been no economic sense to Lenz's claim absent the provision in Section 512(f) for the recovery of attorneys' fees.

Again addressing fair use, Lenz provided evidence that Universal did not analyze fair use at all before filing its takedown notice. One of Universal's employees reviewed all Prince-related videos on YouTube and only examined whether a video "embodied a Prince composition in some way if there was a significant use of it . . . specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video."[176] Though the court upheld its previous order that consideration of fair use is required, it explained that "full-blown fair use analysis prior to sending a DMCA takedown notice would be inconsistent with the remedial purposes of the statute."[177] Thus, so long as there is some "initial assessment" of fair use, a copyright owner can still easily satisfy the Section 512(c)(5) requirement of good faith. The cross-motions for summary judgment on the issue were denied[178] because Lenz did not prove Universal subjectively believed in a high probability of fair use, and Universal did not prove it lacked such a belief.[179] The case would need to be tried to a jury to determine both the subjective bad faith of the copyright owner[180] and for Lenz to receive any compensation.

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173. *Id.*; Klaus Decl. at Ex. 3, *Lenz*, No. 5:07-cv-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013) (citing to an email, "I don't care that YouTube doesn't want to host it. Not like I'm paying them.").

174. *Lenz,* 2013 WL 271673, at 8–9.

175. *Id.* at 9.

176. *Id.* at 5.

177. *Id.*

178. *Id.* at 10.

179. Lenz v. Universal Music Corp., No. 5:07-cv-03783-JF, 2013 WL 271673, at 7 (N.D. Cal. Jan. 24, 2013).

180. *See* Rossi v. Motion Picture Ass'n of America, Inc., 391 F.3d 1000, 1004 (9th Cir. 2004).

C. The Ninth Circuit Ruling

In the interlocutory appeal to the Ninth Circuit, Universal gave the court a blanket opportunity to address whether fair use was indeed merely an affirmative defense or could still be considered a right or privilege.[181] The Ninth Circuit disagreed with Universal, holding, "Anyone who makes a fair use of the work is not an infringer of the copyright with respect to such use."[182] The court distinguished between two types of affirmative defenses—those "labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct."[183] The court thus held that even though the Supreme Court and other precedent held fair use to be an "affirmative defense," this designation does not remove the status of fair use as a *right*.[184] Therefore, to prevail, Universal would have to show that it appropriately considered fair use before taking DMCA action. Although this holding would ostensibly seem to clarify things, it actually muddies the waters even more.

In an unusual move, the Ninth Circuit issued an amended opinion in *Lenz*, in which it made this fair use consideration requirement even clearer.[185] The court held that "fair use is . . . distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse."[186] The court further made it clear that "fair use is a unique situation in Copyright law, and it is thus treated differently from traditional affirmative defenses."[187] The court "conclude[d] that because 17 U.S.C. Section 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 Section 512(c)."[188]

Accordingly, the long quest for an answer to the question as to whether fair use is an affirmative defense or an actual right seems to have been resolved, at least in the Ninth Circuit. This seems to have adopted the view espoused by one scholar, Tara M. Warrington, who

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181. *Compare* Lenz v. Universal, 801 F.3d 1126, 1133 (9th Cir. 2015) *with* Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass 1869).

182. *Lenz*, 801 F.3d at 1132–33 (internal citation omitted).

183. *Id.* at 1132.

184. *Id.* at 1133.

185. *Lenz v. Universal Music Corp.*, Nos. 13-16106, 13-16107 U.S. App. LEXIS 5026 (9th Cir. Mar. 17, 2016).

186. *Id.* at *15.

187. *Id.* at *16.

188. *Id.*

argued this point as far back as 2009 in the Florida Coastal Law Review.[189]

Under the *Lenz* decision, fair use is a *right*. However, when a copyright owner uses the DMCA process, it acts almost like an unreviewed preliminary injunction—the content comes down without any determination of fair use—unless the online service provider is willing to step into the fray and stick up for the uploader's rights, as Automattic, operator of Wordpress.com, did in *Automattic v. Steiner*. Therefore, the user's fair use right is only subject to the review process at the copyright owner's end, and that review process need not be correct—or even adequate.[190] The Ninth Circuit held that it was satisfactory for the copyright owner to simply *consider* fair use,[191] no matter how wrong the owner's determination might be. This analysis is not weakened by the *Lenz* amended opinion from the Ninth Circuit, in which the court made it clear that "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."[192] Therefore, anyone who abuses the DMCA may be pursued only under actual knowledge theory, but not under willful blindness.[193] "[A] copyright holder need only form a subjective good faith belief that the use is not authorized."[194]

VI. REFORM SECTION 512(F) AND SECTION 107 IN LIGHT OF LENZ

As noted above, despite the fact that Congress codified fair use in 17 U.S.C. Section 107, its four factors provide little clarity or guidance. David Nimmer studied the issue and came to the unfortunate conclusion that judges largely pre-determine a result and then force the facts into the factors.[195] He found that "had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same. . . . It is largely a fairy tale to think that the four factors determine resolution of concrete fair use cases."[196] Further, Section

189. *See* Tara M. Warrington, *Harry Potter and the Doctrine of Fair Use: Conjuring a New Copyright Complaint*, 10 FLA. COASTAL L. REV. 622, 622-625.

190. *See Lenz*, 801 F.3d at 1134–36 (9th Cir. 2015). The court even discusses that fair use may be appropriately be "considered" by automatic computer programs commonly utilized by copyright enforcers. *Id.* at 1135.

191. *Id.* at 1138.

192. *Lenz*, Nos. 13-16106, 13-16107, at *16.

193. *Id.*

194. *Id.* at *17 (citing *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004)).

195. Nimmer, *supra* note 97, at 280–82.

196. *Id.*

512(f) is largely toothless—after all, Stephanie Lenz was only able to bring her case because an advocacy organization took up the cause.[197] Changes to Section 512(f) could strengthen fair use by providing stronger penalties for issuing DMCA notices in contravention of the fair use right. Meanwhile, these penalties will likely increase the number of people willing to litigate over transgressions against fair use, providing a richer body of case law to rely upon.

A. Fair Use as a Right

With copyright law already acknowledging free expression as an important right, the *Lenz* decision should stand as an example of the need to also treat fair use as a *right*, rather than just a defense. Treating fair use as merely an "affirmative defense" or "privilege" makes Section 512 more of a prior restraint tool.[198] Furthermore, the specific language of 17 U.S.C. Section 107 supports the idea that fair use is more than just a mere privilege.[199]

With the clear mandate from the *Lenz* amended opinion, there should be little further argument on the point. Furthermore, when a copyright claim is filed against an otherwise fair user, the fair user is presented with the potential to recover attorney's fees if he wins. For example, in *Righthaven v. Hoehn*,[200] when a copyright plaintiff was found to have filed suit over fair use, the copyright defendant received not only summary judgment, but also an award of attorney's fees.[201] Although the attorney's fees order was not overturned, the fair use decision was vacated on other grounds.[202] Ultimately, the only reason Mr. Hoehn was able to fight for his rights was because the author,

197. This proposition could further be generalized to conclude that Section 512(f) does not practically protect individual actors who are not legally savvy.

198. For the reader's information, the Supreme Court has roundly rejected prior restraint. *See* Kinney v. Barnes, 443 S.W.3d 87, 90–91 at n.7 (Tex. 2014) (citing THE BIG LEBOWSKI (PolyGram Filmed Entertainment & Working Title Films, 1998)). There is a "heavy presumption" against prior restraints. *See* Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). "Although prior restraints are not unconstitutional per se, there is a heavy presumption against their constitutional validity. This is because 'prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.'" State *ex rel*. Toledo Blade Co. v. Henry Cty. Court of Common Pleas, 926 N.E.2d 634, 639 (Ohio 2010) (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990); Tory v. Cochran, 544 U.S. 734, 738 (2005)).

199. "The fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (2015).

200. *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138 (D. Nev. 2011).

201. *Id.*

202. *Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013).

Hoehn's attorney, was willing to take his case on contingency. But, more times than not, those who receive a takedown notice or those who receive a copyright complaint must set aside their fair use and First Amendment rights as a matter of pragmatism. This makes the "right" of fair use illusory at best for the vast majority of market participants.

Without the fair use exception to copyright, free speech would be greatly inhibited. *Harper & Row Publishing v. Nation Enterprises*—the Supreme Court case labeling fair use as an affirmative defense—asserted that "the Framers intended copyright itself to be the engine of free expression."[203] The Court also acknowledged the important ties between the First Amendment and copyright law: "[C]opyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."[204]

Indeed, the Eleventh Circuit Court of Appeals more recently held: "First Amendment privileges are [also] preserved through the doctrine of fair use. Until codification of the fair-use doctrine in the 1976 Act, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values."[205]

The fair use doctrine provides specific support for the stated constitutional goals of the copyright clause.[206] Fair use supports the principle that "access to information forms the basis for free speech and participatory government" and denying access to information would hinder society's ability to progress.[207] Therefore, the interdependent nature of fair use and free speech makes strong fair use protections necessary for a healthy First Amendment.

The DMCA takedown scheme virtually ensures censorship of fair use before there is even adjudication as to whether the use is actually fair. This takedown scheme has a chilling effect upon what should be a constitutional—and even an international—right. One way to shore up this right is to amend Section 107 to call for attorney's

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203. 471 U.S. 539, 558 (1985).

204. *Id*. at 556, 560 (citation omitted) (identifying a link between First Amendment value and copyrightable expression permitting scholarship and commentary, but limiting the right of first publication to copyright owners).

205. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001).

206. U.S. CONST. art. 1, § 8, cl. 8 ("The Congress shall have power . . . to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

207. L. Ray Patterson & Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights*, 90 MICH. L. REV. 1624 (1991).

fees for a prevailing fair user. The right would be further shored up by amending Section 512 to specifically address issues of fair use and free expression in its language. This action will deter the use of DMCA takedown notices as prior restraints by placing a price tag on their extrajudicial effects of removing stalls from the marketplace of ideas.

B. Statutory Damages

First, Section 512(f) and Section 107 should be strengthened with statutory damages provisions. After all, the Copyright Act provides for statutory damages of between $200 and $150,000 for even the slightest infringement of copyright.[208] The DMCA's legislative history calls for consequences against those entities that abuse the intellectual property rights of others. Indeed, "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access."[209] Why should there be no similar disincentive to engage in extrajudicial prior restraint on fair use? Why should we exalt the rights of a copyright owner so much higher than the rights of a fair user, the rights of the marketplace of ideas, and the rights of those who wish to truly advance the progress of science and the useful arts?

The proposed statutory damages provisions for 17 U.S.C. Section 107 and 17 U.S.C. Section 512(f) should use the same legal DNA as 17 U.S.C. Section 504, wherein statutory damages are reduced for certain good faith consideration resulting in an error in judgment. However, they are increased for bad-faith restraint on fair

208. For example, in 2012, Prenda Law was in the business of identifying IP addresses that downloaded copyrighted pornography and filed suit against thousands of individuals and received millions of dollars in damages. *See* Af Holdings LLC v. Does 1–135, No. 5:11-cv-03336 (N.D. Cal. Feb. 24, 2012); CP Prods. Inc. v. Gerald L Glover, No. 1:12-cv-00808-JMS, 2013 WL 7098626 (S.D. Ind. Mar. 26, 2013) (awarding Prenda affiliates the $150,000 maximum in statutory damages for an individual who defaulted). Prenda Law acted as a "porno-trolling collective" by monitoring the IP addresses downloading their copyrighted pornography—sometimes made available by them—and sending cease-and-desist letter demanding settlement. Many of these threats resulted in settlement granting Prenda attorneys involved around $2 million. In a 2013 decision, California District Judge Wright scolded and severely sanctioned Prenda Law for using their copyrights to "plunder the citizenry." Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333, 2013 WL 1898633 (C.D. Cal. May 6, 2013). Though Prenda was eventually punished for their actions, individuals may still be sued for minor copyright infringements, such as a single BitTorrent download. Often in these cases individuals do not know how to respond and end up paying the price for minimal infringement they committed under statutory damages provisions. *See also* Achte v. Adrienne Neal, No. 1:10-cv-00453-RMC (D.D.C. Mar. 1, 2011) (granting full damages and fees upon default of individual who failed to respond to copyright infringement complaint).

209. H.R. REP. NO. 105-551(II), at 61 (1998).

use and free expression. The amounts could reflect the same or similar sums up to $150,000 if a suit was filed or a takedown notice was issued in bad faith. On the other hand, the amount could be reduced to a minimum of $200 where the takedown notice was an "innocent misrepresentation" or the fair use question in a lawsuit was far from clear. This proposal would make the test an objective one, replacing the current and inefficient subjective standard courts use to evaluate whether a rights holder possessed a good faith belief. The damage amounts should be both sufficient to deter weak copyright claims when a fair user is a defendant and to further deter the unfettered issuance of DMCA notices. Damages would further incentivize those affected by bogus DMCA takedowns to bring claims. Additionally, just as copyright infringement comes with prevailing party fees, so should Section 512(f) claims, and Section 107 should make them mandatory. Why should copyright be so sacred that we hold it above free expression? At the very least, let them both stand on equal ground.

C. Copyright Cancellation

If she has not yet said it, Stephanie Lenz is certain to one day tell her children "that's why we can't have nice things." Perhaps copyright owners should be scolded as well if they use the "nice thing" of their copyright registration in order to damage someone else's free expression rights.

There should be additional penalties for bad-faith copyright lawsuits or takedown notices restricting fair use or otherwise protected speech. This would include cases such as *Automattic v. Steiner* and *Online Policy Group v. Diebold*, where the takedown notices were meant to silence lawful criticism.[210] In such cases, copyright owners should face cancellation of their copyright registration.[211] This suggestion may appear harsh to copyright owners and enforcers, but it should only be implemented in cases where takedown notices should *absolutely not* be issued—cases of clear Section 512 "abuse"—and in cases where the copyright claim was anemic from its inception in a lawsuit. Such a penalty would be similar to the penalty provision in the Japan Trademark Law, Articles

210. *See* Automattic Inc. v. Steiner, 82 F. Supp.3d 1011 (N.D. Cal. 2015); *see also* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004).

211. *See* Joseph M. Miller, *Fair Use Through the Lenz of § 512(c) of the DMCA: A Preemptive Defense to a Premature Remedy*, 95 IOWA L. REV. 1697, 1726 (2010).

51 and 53, where abuse of the mark that causes confusion extinguishes that mark and prohibits re-registration for five years.[212]

This Author does not suggest that the work should immediately pass into the public domain. Instead, this Article merely suggests that the registration should be cancelled, as a valid copyright registration (or at least a pending application) is required to confer standing on a copyright owner to file suit.[213] Thus, the copyright owner would be kept out of federal court for a period of time. This penalty would impact lawsuits, takedown tactics, and incentives by making copyright owner's aware of the serious implemented consequences of issuing bad-faith takedown notices.

D. Incentive for OSPs

A stronger damages provision in Section 512(f) could entice OSPs to participate in Section 512(f) claims more frequently. As discussed previously, they have little motivation to resist copyright holders. OSPs act as middlemen, enjoying immunity by accepting each party's notices and counter-notices, but they usually refrain from being active participants in the tug of war. OSPs should be as encouraged to bring Section 512(f) claims as users of their website, especially because they usually have a greater capacity to do so. For

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212. *See generally* JAPAN PATENT ATTORNEYS ASSOCIATION, JPO TRADEMARK PRACTICE, http://www.jpaa.or.jp/english/trademark/pdf/TRADEMARK_PRACTICE.pdf [https://perma.cc/8B2W-CEFQ].

213. In Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010), the Supreme Court determined that federal courts have discretion to consider copyright cases where complete copyright registration is not satisfied. Thus, some circuits require registration (or a denial decision from the Copyright Office) for standing and others only require copyright application. The Tenth and Eleventh Circuits require that a work be actually registered. La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195 (10th Cir. 2005); M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486 (11th Cir. 1990). The Fifth and Ninth Circuits permit standing with only a submitted copyright application. Cosmetic Ideas Inc. v. IAC/InteractiveCorp, 606 F.3d 612 (9th Cir. 2010); Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357 (5th Cir. 2004). Eighth Circuit precedent supports the application approach. Action Tapes v. Mattson, 462 F.3d 1010 (8th Cir. 2006) (requiring the owner to have paid an application fee for registration); *see also* Thomas M. Landrigan, *Application or Registration?: Confusion Regarding the Copyright Act's Prerequisite to Copyright Infringement Lawsuits*, 44 INDIANA L. REV. 581, 579–99 (2011) (discussing the Eighth Circuit approach). The Third Circuit also appears to follow the application approach. Dawes-Lloyd v. Publish Am., LLLP, 441 F. App'x 956 (3d Cir. 2011) (citing court decisions using the registration approach but finding that the application approach was adequate). The Seventh and Fourth Circuit cases have not provided a definitive determination either way. The First Circuit has refused to make a final decision on the matter. *See* Alicea v. Machete Music, 744 F.3d 773 (1st Cir. 2014) (refusing to decide on an application or registration approach where summary judgment would have been granted in either case). The Second Circuit has also not decided. A Star Group, LLC v. Manitoba Hydro, 621 F.App'x. 681 (2d Cir. 2015); Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120 (2d Cir. 2014).

example, they often maintain internal legal departments and can afford up-front legal expenses.[214]

Lenz holds that the plaintiff need show only nominal damages and such damages need not even be monetary.[215] The statute requires amendment to promote OSP participation and address cases where takedown notices are issued in bad faith, yet the OSP does not comply with the takedown. Articulable and calculable monetary damages should not be a prerequisite to a Section 512(f) claim, as the real damage is in the suppression of a Constitutional right. The statutory damages discussed above, in addition to attorneys' fees and costs, should be available to OSPs as well as users.

E. Proposed Amendments to Section 107 and Section 512

As previously mentioned, the most logical way to sharpen the teeth of fair use and Section 512(f) is to amend the Section to include a "material misrepresentation in bad faith" clause, as well as requiring takedown notices under Section 512(c)(3) to include a statement of reasonable fair use and protected speech consideration prior to issuing the notice. To truly fulfill the promise of fair use as a right, Section 107 can be modified as well. The Author therefore proposes the following amendments to Section 107 (additions in italics, deletions stricken through):

> 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.
>
> A. 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.

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214. For example, YouTube's legal department can be easily contacted through its "Contact Us" page, which also gives directions on how to submit copyright infringement notices through the website. *Contact Us,* YOUTUBE, https://www.youtube.com/t/contact_us [https://perma.cc/8GY2-NWJQ].

215. *See supra* part VI.B. and related discussion of damages; *see also* 17 U.S.C. § 512(f) (2015) ("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").

B. A defendant in a copyright infringement suit shall have the right to raise Fair Use in a special motion to dismiss under this section,

(1) This motion may be filed at any time in the proceedings

(2) If a motion to dismiss is brought under this section, the court shall

a. Stay all other action in the case until the motion is resolved, unless there is a clear showing:

i. of urgency or clear prejudice to either party; or,

ii. of clearly articulated need for discovery with the precise discovery required articulated by the party seeking it, and the court finds that the case can not possibly be decided without the discovery

iii. that the plaintiff has posted a bond for the amount of fees expected to be incurred in the discovery process, with this requirement to be waived if there is a clear showing that it would subject the plaintiff to financial hardship

b. Determine whether the defendant has established by a preponderance of the evidence that the use of the otherwise infringing material constitutes "fair use."

(3) If the court denies the motion, the defendant shall have an immediate right to an interlocutory appeal.

(4) If the court finds that the motion was brought frivolously or vexatiously, the court the moving party shall pay the non moving party's costs and attorney's fees incurred in defending the frivolous or vexatious motion.

(5) If the court grants the motion, then the court shall issue an order:

a. Granting reasonable costs and attorneys fees to the moving party; and,

b. Cancelling the copyright registration relied upon by the plaintiff in the action; and,

c. Statutory damages,

i. which shall be the same amount of statutory damages sought by the plaintiff in the complaint.

ii. If the plaintiff sought an indefinite amount of statutory damages, then the amount awarded to the moving party shall be the maximum that could have been sought by the plaintiff.

iii. If the plaintiff sought only actual damages, then the damages granted to the movant shall be no less than $10,000 but no greater than $100,000.

iv. In the event that the Court finds that the fair use question was novel, or that the plaintiff could not likely have known that the defendant's use was "fair use," then the Court may exercise its discretion to reduce the amount of statutory damages to as little as $5,000.

The author further proposes the following amendments to Section 512 (additions in italics, deletions stricken through):

17 U.S. Code § 512 – Limitation on Liability Relating to Material Online

. . .

(c)(3) Elements of notification.—

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

(vi) A statement that the complaining party has reasonably considered all rights of the use of the material in the manner complained of, including, but not limited to, the fair use of the material and protected speech.

~~(vi)~~(vii) 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.

. . .

(f) Misrepresentations.—

(1) Any person who knowingly materially misrepresents under this section—

(A) that material or activity is infringing;~~, or~~

(B) that material or activity was removed or disabled by mistake or misidentification; *or*

(C) *that material or activity is not lawful fair use or otherwise protected by the First Amendment* shall be liable *for statutory damages sum of not less than $750 or more than $30,000 per each item of material that is misrepresented to be infringing. In a case where the court finds that such person did not reasonably believe his or her act in issuing a notice under subsection (c) was improper, the court, in its discretion, may reduce the award of statutory damages to a sum of not less than $200. Such person shall be additionally 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.

(2) Any person who, in bad faith, materially misrepresents under this Section—

> *(A) that the material or activity is infringing; or*
>
> *(B) that the material or activity is not lawful fair use or otherwise protected by the First Amendment shall be liable for statutory damages sum of not less than $750 or more than $150,000, per each item of material that is misrepresented to be infringing, as the court considers just. Such person shall be additionally 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. In any case where such bad faith, material misrepresentation occurs, registration under Section 410 of this chapter shall be canceled for a period of no less than five years, and such person shall not cause the work or a substantially similar work to be registered during the cancellation period.*

These modest changes to the statute will provide additional cover for fair use and properly elevate it to the same importance as infringement. After all, if mere misuse of a photograph, for example, can subject the user to thousands of dollars in damages, even if they are an innocent infringer, why not someone who unlawfully infringes upon fair use? These changes would require a party to engage in a serious evaluation of fair use before wielding the DMCA knife and would incentivize a thorough analysis of the alleged infringer's rights. This modest and incremental change would start moving us toward a regime where fair use is a "right" not to be infringed lightly, rather than a mere "right to hire a lawyer."

VII. CONCLUSION

Given the strong incentive for an OSP to remove content under the DMCA, it is helpful to have a decision that breathes any additional vigor into the protections of Section 512(f). *Lenz* acknowledges that a DMCA notice is a powerful tool and one must demonstrate a modicum of responsibility before wielding its authority. But how much responsibility will copyright holders really exercise? Currently, even if a "moron in a hurry"[216] would know that something is fair use, all the DMCA issuer must be able to prove is that they considered it, and plaintiffs in bogus claims often have little to fear.

Perhaps the best outcome from the *Lenz* case is for legislators, users, and copyright holders to recognize the flaws in the DMCA and push for an update to the DMCA that protects fair use and free expression. This Article is not intended to suggest the DMCA could not use more wholesale reform. Instead, this Article presents a rather

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216. Morning Star Cooperative Society v. Express Newspapers Ltd, [1978] F.S.R. 113 (UK) ("If one puts the two papers side by side I for myself would find that the two papers are so different in every way that only a moron in a hurry would be misled.").

limited suggestion to reform Section 512(f) and Section 107 for the purpose of protecting free expression and fair use. The DMCA requires other fixes to its other problems, including a possible remedy for legitimate alternative uses and a way to prevent copyright owners from playing "Whack-a-Mole" with large-scale infringement.

This Author leaves other minds to suggest how the DMCA's other infirmities may be addressed. But this Article's suggested fixes to the dull teeth currently in Section 107 and 17 U.S.C. Section 512(f) would be a step toward protecting fair use and free expression from DMCA abuse.