

BEYOND THE LENS OF *LENZ*: LOOKING TO PROTECT
FAIR USE DURING THE SAFE HARBOR PROCESS
UNDER THE DMCA

*Cattleya M. Concepcion**

INTRODUCTION

A mother follows her toddler around the family's kitchen with a video camera. She records as her son, who recently learned to walk, dances animatedly to a song playing in the background. Just as she has done several times before, she uploads the video of her son to YouTube to share the moment with her family and friends. The home video, however, attracts more attention than she plans. The music company that owns the copyright to the song playing in the background also sees the video. Claiming that the video infringes its copyright, the music company sends YouTube a take-down notice pursuant to the Digital Millennium Copyright Act¹ ("DMCA") and demands that it be removed from the Internet. YouTube disables the video the following day.²

The recent case of *Lenz v. Universal Music Corp.*³ took an important step toward protecting everyday YouTube users, including mothers like Stephanie Lenz, from having their home videos removed at the mere will of copyright owners. *Lenz* held that copyright owners are required to evaluate whether allegedly infringing videos make fair use of their copyrighted works—and thereby are not infringing—before they can send DMCA take-down notices to online service providers ("OSPs") like YouTube.⁴

The ruling in *Lenz* affects millions of YouTube users⁵ who create videos that incorporate copyrighted works. As the top video-sharing site⁶ with a

* George Mason University School of Law, Juris Doctor Candidate, May 2011; Senior Research Editor, *GEORGE MASON LAW REVIEW*, 2010-2011; New York University, B.A. Politics, *summa cum laude*, Jan. 2005. I would like to thank my mentor Rod Dixon and Professor Christopher Newman for their comments and guidance.

¹ Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 and 28 U.S.C.).

² These are the facts of *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), the principal case of this Note. See discussion *infra* Part II.B.

³ 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

⁴ *Id.* at 1154.

⁵ According to Nielsen/NetRatings, YouTube reached 51 million users in June 2007, which was more than the combined users of MySpace, AOL, and Yahoo. Miguel Helft, *Google Aims to Make YouTube Profitable with Ads*, N.Y. TIMES, Aug. 22, 2007, <http://www.nytimes.com/2007/08/22/technology/22google.html>.

billion-dollar market value,⁷ YouTube receives twenty hours of video uploads per minute.⁸ *Lenz* is a sign for YouTube users that their fair use content will have a place on the Internet without unwarranted interference from copyright owners.

This Note argues that while the Ninth Circuit in *Lenz* correctly decided that the DMCA must be read to protect fair use content as part of the notice-and-takedown system, more needs to be done to protect fair use content on the Internet. In practice, the application of the DMCA's safe harbors incentivizes OSPs to accept takedown notices even when copyright owners have not engaged in the fair use inquiry required by *Lenz*. So although copyright owners must check whether allegedly infringing content constitutes fair use, the DMCA lacks an enforceable mechanism to ensure that they do.

Part I of this Note provides a brief overview of the exclusive rights of copyright owners, the three types of copyright liability, and the fair use doctrine. It also describes the purpose and relevant provisions of the DMCA. Part II explains the need to prevent copyright owners from abusing takedown notices by targeting fair use content. Additionally, it demonstrates that *Lenz* is not enough to protect fair use content. Part III proposes a solution through a heightened responsibility for OSPs in the DMCA's notice-and-takedown system. More specifically, this Note argues that the courts or Congress should require OSPs to refuse to remove a user's content when a copyright owner's takedown notice fails to include a good faith statement that the content is unauthorized.

I. BACKGROUND

A. *The Exclusive Rights of Copyright Owners and the Three Types of Copyright Liability*

The U.S. Constitution charges Congress with the duty “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries.”⁹ In the Copyright Act of 1976¹⁰ (“Copyright Act”), Congress

⁶ News Release, Nielsen Online, YouTube Maintains Top Ranking by Total Streams and Hulu Grows 490 Percent Year-Over-Year, According to Nielsen Online (May 14, 2009), http://www.nielsen-online.com/pr/090514_2.pdf.

⁷ Google bought YouTube for \$1.65 billion in 2006. Andrew Ross Sorkin, *Dot-Com Boom Echoed in Deal to Buy YouTube*, N.Y. TIMES, Oct. 10, 2006, <http://www.nytimes.com/2006/10/10/technology/10deal.html>.

⁸ Ryan June, *Zoinks! 20 Hours of Video Uploaded Every Minute!*, YOUTUBE BLOG (May 20, 2009), http://youtube-global.blogspot.com/2009/05/zoinks-20-hours-of-video-uploaded-every_20.html.

⁹ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

guaranteed six exclusive rights to copyright owners. Copyright owners have the rights to (1) reproduce their copyrighted works, (2) prepare derivative works based on their copyrighted works, (3) distribute their copyrighted works, (4) publicly perform their copyrighted works, (5) publicly display their copyrighted works, and (6) publicly perform their copyrighted works by digital audio transmission.¹¹ A single use on the Internet usually implicates several of these exclusive rights.¹² For example, a single use can simultaneously violate the copyright owner's reproduction and public performance rights.¹³ If a digital transmission of a copyrighted work is buffered, this may infringe the copyright owner's reproduction right.¹⁴ If the same copyrighted work is streamed in real-time, this may also infringe the copyright owner's public performance right.¹⁵

The Copyright Act provides that when a party violates "any of the exclusive rights of the copyright owner," direct infringement occurs.¹⁶ To prove direct infringement, the copyright owner must show that (1) he owned a valid copyright and (2) the alleged direct infringer violated an exclusive right.¹⁷ Direct infringement is a strict liability tort, as it does not require a scienter element.¹⁸

Unlike direct infringement, the Copyright Act does not explicitly create secondary liability for infringement.¹⁹ Rather, courts created two doctrines of secondary liability.²⁰ If an alleged infringer is not directly liable, he may be contributorily or vicariously liable, even though he was not involved in the infringing act.²¹ As a baseline, secondary liability requires direct infringement by a third party.²²

¹⁰ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17, 18, and 44 U.S.C.). For a detailed discussion of the Copyright Act of 1976, see Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 865-84 (1978).

¹¹ 17 U.S.C. § 106 (2006). The Digital Performance Right in Sound Recordings Act of 1995 added the sixth exclusive right. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

¹² Jeffrey W. Natke, Comment, *Collapsing Copyright Divisibility: A Proposal for Situational or Medium Specific Indivisibility*, 2007 MICH. ST. L. REV. 483, 486.

¹³ 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 8:23 (2010).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 17 U.S.C. § 501(a).

¹⁷ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

¹⁸ *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

¹⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

²⁰ Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1872 (2000).

²¹ *Sony*, 464 U.S. at 435.

²² *Netcom*, 907 F. Supp. at 1371.

Contributory liability is based on enterprise liability.²³ To prove contributory liability, the copyright owner must show (1) direct infringement by a third party, (2) the alleged contributory infringer's actual or constructive knowledge of the direct infringement, and (3) the alleged contributory infringer's intentional inducement of, causation of, or material contribution to the direct infringement.²⁴

Vicarious liability arose from the agency doctrine of respondeat superior,²⁵ the principle that an employer is responsible for the actions of its employee. Vicarious liability, however, extends beyond the employer-employee relationship.²⁶ To prove vicarious liability, the copyright owner must show (1) direct infringement by a third party, (2) the alleged vicarious infringer's right and ability to supervise the direct infringement, and (3) the alleged vicarious infringer's direct financial benefit from the direct infringement.²⁷ Unlike contributory liability, vicarious liability does not require knowledge of the direct infringement.²⁸

B. *The Fair Use Doctrine*

Fair use is a limitation on the exclusive rights of copyright owners.²⁹ The doctrine recognizes that “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout.”³⁰ Consequently, courts have found that copyright owners impliedly consent to the use of their works “in a rea-

²³ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

²⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

²⁵ *Fonovisa*, 76 F.3d at 261-62; *Gershwin*, 443 F.2d at 1162.

²⁶ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001); *Gershwin*, 443 F.2d at 1162.

²⁷ *Ellison*, 357 F.3d at 1076; *Gershwin*, 443 F.2d at 1162. At least one commentator has concluded that YouTube would most likely be vicariously liable to copyright owners. See Jason C. Breen, *YouTube or YouLose: Can YouTube Survive a Copyright Infringement Lawsuit?*, 16 TEX. INTELL. PROP. L.J. 151, 175 (2007) (“YouTube is most in danger of being found liable for vicarious infringement of copyright.”). For more information on the three types of copyright liability, see generally Eugene C. Kim, Note, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139, 147-53 (2007).

²⁸ *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

²⁹ H.R. REP. NO. 94-1476, at 65 (1976) (describing fair use as “one of the most important and well-established limitations on the exclusive right of copyright owners”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (“The doctrine of fair use limits the scope of the copyright monopoly . . .”).

³⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (alteration in original) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)) (internal quotation marks omitted).

sonable manner.”³¹ As the Supreme Court has explained, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”³² Furthermore, fair use is a First Amendment safeguard that is built directly into copyright law.³³ Courts have viewed fair use as “a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment.”³⁴

Because it stems from an understanding of implied consent rather than statutory authority, fair use is a judge-made doctrine.³⁵ In 1841, Justice Story explained that in determining whether the use of a copyrighted work was infringement, courts needed to “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supercede the objects, of the original work.”³⁶

When Congress recognized fair use in the Copyright Act,³⁷ Congress intended “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”³⁸ Section 107 of the Copyright Act, therefore, reflects Justice Story’s formulation of fair use.³⁹ Accordingly, § 107 includes four factors to consider in determining whether an alleged infringer makes fair use of a copyrighted work.⁴⁰ The four factors are:

³¹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* §125, at 260 (1944)) (internal quotation marks omitted).

³² *Campbell*, 510 U.S. at 575 (second alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

³³ *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

³⁴ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322, *amended by* 111 F. Supp. 2d 346 (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). Commentators have questioned whether fair use sufficiently protects First Amendment rights. *See, e.g.*, Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 429 (2007) (“[B]uilt-in free speech safeguards’ [like fair use] are among the most uncertain and ill-defined doctrines in all of copyright law.”); Yen, *supra* note 20, at 1867-68 (stating that doctrines like fair use “oversell the ability of copyright’s internal limitations to resolve conflicts with the First Amendment”).

³⁵ *Campbell*, 510 U.S. at 576.

³⁶ *Id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)) (internal quotation marks omitted).

³⁷ William F. Patry explains that Congress “recognized,” not “codified,” fair use. 4 PATRY, *supra* note 13, § 10:8. This is because § 107 is not the “authoritative embodiment” of fair use, and courts may make fair use determinations independently of § 107. *Id.*

³⁸ *Id.* (quoting H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975)) (internal quotation marks omitted).

³⁹ *Campbell*, 510 U.S. at 576.

⁴⁰ 17 U.S.C. § 107 (2006).

- (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.⁴¹

Courts must explore these factors together, not in isolation, and on a case-by-case basis.⁴² This calls for courts to apply a “sensitive balancing of interests” rather than a “rigid, bright-line approach.”⁴³

The first factor draws from Justice Story’s inquiry into “the nature and objects of the selections made” and asks about the purpose and character of the use of the copyrighted work.⁴⁴ The question to be answered is whether the alleged infringer’s work is “transformative” and does not merely supersede the copyrighted work.⁴⁵ In other words, does it “add[] something new, with a further purpose or different character, altering the [copyrighted work] with new expression, meaning, or message”?⁴⁶

The second factor parallels Justice Story’s inquiry into the “value of the materials used” by examining the nature of the copyrighted work.⁴⁷ This factor recognizes that “some works are closer to the core of intended copyright protection than others.”⁴⁸ For example, creative works—as opposed to factual works—are within the core of intended copyright protection.⁴⁹

The third factor, which mirrors Justice Story’s inquiry into “the quantity and value of the materials used,” considers the amount and substantiality of the copyrighted work used.⁵⁰ This factor is related to the first factor because the extent of copying allowed depends on the purpose and character of the use.⁵¹

The fourth factor is rooted in Justice Story’s inquiry into “the degree in which the use may prejudice the sale, or diminish the profits, or super-

⁴¹ *Id.*

⁴² *Campbell*, 510 U.S. at 577-78. The four factors are not exclusive, and courts may consider others. *See, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 236-37 (1990).

⁴³ *Campbell*, 510 U.S. at 584-85 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 n.31, 455 n.40 (1984)) (internal quotation marks omitted).

⁴⁴ 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 578 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)) (internal quotation marks omitted).

⁴⁵ *Campbell*, 510 U.S. at 579 (quoting *Leval, supra* note 29, at 1111) (internal quotation marks omitted).

⁴⁶ *Id.*

⁴⁷ 17 U.S.C. § 107(2); *Campbell*, 510 U.S. at 586 (quoting *Folsom*, 9 F. Cas. at 348) (internal quotation marks omitted).

⁴⁸ *Campbell*, 510 U.S. at 586.

⁴⁹ *Id.*; *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (“In general, fair use is more likely to be found in factual works than in fictional works.”).

⁵⁰ 17 U.S.C. § 107(3); *Campbell*, 510 U.S. at 586 (quoting *Folsom*, 9 F. Cas. at 348) (internal quotation marks omitted).

⁵¹ *Campbell*, 510 U.S. at 586-87.

sede the objects, of the original work.”⁵² This factor looks into the effect of the use on the potential market for the copyrighted work.⁵³ When examining this factor, courts must consider the impact on the potential market not only for the copyrighted work, but also for any authorized derivative works.⁵⁴ This final factor is the most important consideration in the fair use analysis, as it evaluates the copyright owner’s “expectation of gain” and the infringer’s “usurpation of the demand” of the copyrighted work.⁵⁵

Fair use includes purposes such as criticism, comment, news reporting, teaching, scholarship, and research.⁵⁶ These purposes, however, are only general guidelines about the common types of fair use; they are “illustrative and not limitative.”⁵⁷ In general, fair use “serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”⁵⁸

Although § 107 states unequivocally that fair use “is not an infringement of copyright,”⁵⁹ courts have traditionally applied fair use as a defense that can be raised only after an allegation of infringement.⁶⁰

C. *Purpose and Relevant Provisions of the DMCA*

In 1998, Congress enacted Title II of the DMCA, the On-Line Copyright Infringement Liability Limitation Act, to update copyright law to account for infringement on the Internet.⁶¹ The DMCA is Congress’s attempt

⁵² *Id.* at 576, 590 (quoting *Folsom*, 9 F. Cas. at 348) (internal quotation marks omitted); *see also* Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 655-56 (2006) (explaining that Congress codified Justice Story’s principle in the fourth fair use factor).

⁵³ 17 U.S.C. § 107(4).

⁵⁴ *Campbell*, 510 U.S. at 590. Copyright owners have the exclusive right to authorize the preparation of derivative works based on their copyrighted works. 17 U.S.C. § 106(2). A derivative work recasts, transforms, or adapts the copyrighted work. *Id.* § 101.

⁵⁵ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (2010).

⁵⁶ 17 U.S.C. § 107.

⁵⁷ *Campbell*, 510 U.S. at 577-78 (quoting 17 U.S.C. § 101) (internal quotation marks omitted) (explaining that the term “such as” in § 107 is illustrative and not limitative (internal quotation marks omitted)).

⁵⁸ Leval, *supra* note 29, at 1110.

⁵⁹ 17 U.S.C. § 107; *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (“[A]nyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use.”).

⁶⁰ *Campbell*, 510 U.S. at 590 (stating that “fair use is an affirmative defense”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (“The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine.”); H.R. REP. NO. 94-1476, at 65 (1976) (“The claim that a defendant’s acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years . . .”). However, if fair use is not an infringement of copyright, then the copyright owner should consider fair use before—not after—making an infringement claim. *See infra* Part II.B.

⁶¹ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

to balance two sets of competing interests: copyright owners versus OSPs, and copyright owners versus Internet users.⁶²

1. Copyright Owners Versus OSPs

Congress balanced the interests of copyright owners and OSPs in two ways. To begin with, it limited the liability of OSPs in order to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁶³ The DMCA provides four safe harbors that limit the liability of OSPs for copyright infringement.⁶⁴ The DMCA’s safe harbors are for (1) transitory digital network communications, (2) system caching, (3) information residing on systems or networks at the direction of users, and (4) information locations tools, such as directories, indexes, and hypertext links.⁶⁵ These safe harbors shield OSPs from all monetary and most equitable relief for direct, contributory, and vicarious liability.⁶⁶ Despite these safe harbors, OSPs still usually face claims of contributory and vicarious liability.⁶⁷

To be clear, the DMCA is not a “wholly new standard[] to evaluate claims of copyright infringement against [OSPs].”⁶⁸ Congress intended that the DMCA’s “limitations of liability apply if the [service] provider is found to be liable *under existing principles of law*.”⁶⁹ Thus, the DMCA does not alter the traditional theories of copyright liability.⁷⁰ Additionally, the fair use doctrine still applies under the DMCA.⁷¹ The DMCA explicitly provides that its provisions do not affect the applicability of other defenses.⁷²

⁶² *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098 (W.D. Wash. 2004).

⁶³ S. REP. NO. 105-190, at 8 (1998).

⁶⁴ 17 U.S.C. § 512(a)-(d). OSPs are not required to comply with the DMCA. However, if an OSP wants to qualify for safe harbor protection, then the OSP must meet the requirements of § 512. *See, e.g.*, Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J.L. & TECH. 1, 9 (2004) (“The DMCA safe harbor provisions provide a set of statutory procedures offering service providers the opportunity to avoid monetary liability for copyright-infringing activities by third parties.”).

⁶⁵ 17 U.S.C. § 512(a)-(d). This Note focuses on the third safe harbor under § 512(c).

⁶⁶ *See Corbis*, 351 F. Supp. 2d at 1098-99; S. REP. NO. 105-190, at 20; *see also* 17 U.S.C. § 512(c)(1) (explaining that the third safe harbor provides protection against liability for “infringement of copyright”).

⁶⁷ S. REP. NO. 105-190, at 19.

⁶⁸ *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004).

⁶⁹ *Id.* (quoting S. REP. NO. 105-190, at 19) (internal quotation marks omitted).

⁷⁰ S. REP. NO. 105-190, at 19.

⁷¹ *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004) (“[N]othing in the language of § 512 indicates that the limitation on liability described therein is exclusive.”); *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1142 (N.D. Cal. 2008) (“[T]he safe harbor provisions are not exclusive of any other defense an accused infringer might have.”).

⁷² *CoStar*, 373 F.3d at 552 (citing 17 U.S.C. § 512(l) (2006)).

Section 512(l) states that if an OSP does not qualify for safe harbor, the OSP may argue as “a defense . . . that the service provider’s conduct is not infringing . . . or any other defense.”⁷³

As an initial matter, to be eligible for safe harbor protection, an OSP must be a “service provider” within the meaning of the DMCA.⁷⁴ The DMCA defines a service provider as “a provider of online services or network access, or the operator of facilities therefor.”⁷⁵ The OSP must then meet certain threshold requirements.⁷⁶ The OSP must adopt, reasonably implement, and inform users of a policy to terminate the accounts of users who repeatedly infringe copyrights.⁷⁷ The OSP must also accommodate and not interfere with standard technical measures.⁷⁸ “[S]tandard technical measures” are means used by copyright owners to identify or protect their copyrighted works.⁷⁹

To benefit from the third safe harbor provision and avoid liability for storing material at the direction of a user, an OSP must satisfy additional conditions.⁸⁰ First, the OSP must not have actual or apparent knowledge that the material is infringing, or if the OSP obtains knowledge, it must expeditiously remove the material.⁸¹ Additionally, if the OSP has the right and ability to control the user’s infringing act, the OSP must not receive a direct financial benefit from the infringing act.⁸² Lastly, the OSP must expeditiously remove the material if a copyright owner notifies the OSP that the material is infringing.⁸³

⁷³ 17 U.S.C. § 512(l). Although the DMCA specifically refers to OSPs, Internet users are also entitled to all defenses under copyright law, including fair use. *See, e.g.*, *Brave New Films 501(C)(4) v. Weiner*, 626 F. Supp. 2d 1013, 1014 (N.D. Cal. 2009) (describing how a civil rights group’s criticism incorporating a copyrighted television broadcast, which was posted on a website, was found to be fair use).

⁷⁴ 17 U.S.C. § 512(i)(1).

⁷⁵ *Id.* § 512(k)(1)(B).

⁷⁶ *Id.* § 512(i)(1)(A)-(B).

⁷⁷ *Id.* § 512(i)(1)(A).

⁷⁸ *Id.* § 512(i)(1)(B).

⁷⁹ *Id.* § 512(i)(2) (internal quotation marks omitted).

⁸⁰ 17 U.S.C. § 512(c)(1)(A)-(C).

⁸¹ *Id.* § 512(c)(1)(A). This condition incorporates the knowledge element of contributory liability. Joshua A.T. Fairfield, *The God Paradox*, 89 B.U. L. REV. 1017, 1032-33 (2009).

⁸² 17 U.S.C. § 512(c)(1)(B). This condition echoes the requirements for vicarious liability. Fairfield, *supra* note 81, at 1032. However, courts interpret “the right and ability to control” under § 512(c)(1)(B) differently than under vicarious liability. Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 600-01 (2008); Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 247 (2009).

⁸³ 17 U.S.C. § 512(c)(1)(C). An OSP need not receive notice from a copyright owner of a potential infringement; an OSP can gain knowledge of a potential infringement through means other than a copyright owner’s formal notice. *See id.* § 512(c)(1)(A).

The second way that Congress balanced the interests of copyright owners and OSPs was by “creating a mechanism for [copyright owners] to inform [OSP]s of potentially infringing conduct.”⁸⁴ If a copyright owner notifies an OSP that material residing on its network is infringing, then the OSP must remove the material.⁸⁵ The copyright owner’s notification, commonly called a “takedown notice,”⁸⁶ is subject to specific requirements.⁸⁷ The takedown notice must be in writing and must substantially include 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 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.⁸⁸

A takedown notice that fails to substantially comply with these requirements does not give an OSP knowledge of infringement; therefore, the OSP need not take any action.⁸⁹ However, if the takedown notice at least identifies the copyrighted and infringing works and provides the copyright owner’s contact information, then the OSP must contact the copyright owner so that the copyright owner may make the takedown notice statutorily compliant.⁹⁰

2. Copyright Owners Versus Internet Users

Next, Congress turned to the conflicting interests of copyright owners and Internet users. Congress sought to balance “the need for rapid response

⁸⁴ Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1098 (W.D. Wash. 2004).

⁸⁵ 17 U.S.C. § 512(c)(1)(C).

⁸⁶ See, e.g., Joshua Urist, Note, *Who’s Feeling Lucky? Skewed Incentives, Lack of Transparency, and Manipulation of Google Search Results Under the DMCA*, 1 BROOK. J. CORP. FIN. & COM. L. 209, 210 n.18 (2006).

⁸⁷ 17 U.S.C. § 512(c)(3)(A)(i)-(vi).

⁸⁸ *Id.*

⁸⁹ *Id.* § 512(c)(3)(B)(i).

⁹⁰ *Id.* § 512(c)(3)(B)(ii).

to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse.⁹¹ In order to avoid liability, the OSP must promptly notify a user if the OSP removes the user's material after receiving a takedown notice from a copyright owner.⁹² The user then has the option to file a counter notification to have the material restored.⁹³ The user's counter notification must be in writing and include: (1) a signature; (2) identification of the removed material; (3) a statement of a good faith belief that the material was removed as a result of mistake or misidentification; and (4) the user's contact information.⁹⁴ After receiving the counter notification, the OSP can avoid liability for removing the user's material if the OSP provides the copyright owner with a copy of the user's counter notification and informs the copyright owner that it will replace the material.⁹⁵ The OSP must then replace the user's material, unless the copyright owner files an action seeking a court order to restrain the user from engaging in infringing activity.⁹⁶

The user has an additional remedy. The user can bring suit against the copyright owner for misrepresentation.⁹⁷ If the copyright owner knowingly and materially misrepresents that the user's material is infringing, the copyright owner is liable to the user for any damages, including costs and attorneys' fees, resulting from the OSP's removal of the user's material.⁹⁸

D. *YouTube and the DMCA*

YouTube qualifies as a service provider under the DMCA⁹⁹ and uses its Terms of Service to qualify for protection under the third safe harbor for storing material at the direction of a user.¹⁰⁰ YouTube's Account Termina-

⁹¹ S. REP. NO. 105-190, at 21 (1998).

⁹² 17 U.S.C. § 512(g)(2)(A).

⁹³ *See id.* § 512(g)(2).

⁹⁴ *Id.* § 512(g)(3)(A)-(D).

⁹⁵ *Id.* § 512(g)(2)(B).

⁹⁶ *Id.* § 512(g)(2)(C).

⁹⁷ *Id.* § 512(f). Section 512(f) also allows a copyright owner to bring an action against a user for knowingly and materially misrepresenting that an OSP removed the user's material by mistake or misidentification. *Id.*

⁹⁸ *Id.*

⁹⁹ *See Tur v. YouTube, Inc.*, No. CV064436 FMC AJWX, 2007 WL 1893635, at *2-3 (C.D. Cal. June 20, 2007) (apparently accepting that YouTube is a service provider by not requiring YouTube to prove it as a threshold requirement for safe harbor protection); Breen, *supra* note 27, at 163-64 (stating that YouTube would likely qualify as a service provider under the DMCA).

¹⁰⁰ *See* 17 U.S.C. § 512(c); *Terms of Service*, YOUTUBE (June 9, 2010), <http://www.youtube.com/t/terms>; *see also* UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1118 (C.D. Cal. 2009) (finding that a video-sharing service like YouTube was entitled to safe harbor under § 512(c)); Trevor Cloak, Note, *The Digital Titanic: The Sinking of YouTube.com in the*

tion Policy states that “YouTube will terminate a user’s access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer.”¹⁰¹ This policy comports with the DMCA’s threshold requirement that an OSP establish a policy to terminate the accounts of repeat infringers and inform its users of that policy.¹⁰² Furthermore, YouTube’s Terms of Service require that copyright owners who wish to complain about any allegedly infringing content notify YouTube in writing.¹⁰³ YouTube tells copyright owners that a notification must include:

- A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- 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;
- 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;
- Information reasonably sufficient to permit the service provider to contact you, such as an address, telephone number, and, if available, an electronic mail;
- A statement that you have 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; and
- A statement that the information in the notification is accurate, and under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.¹⁰⁴

The six requirements—and indeed the language—adopted in YouTube’s policy are nearly identical to the DMCA’s provisions for a proper takedown notice.¹⁰⁵ The same is true with YouTube’s requirements for a user’s counter notification.¹⁰⁶ YouTube instructs users who believe that their content is not infringing to send a counter notification containing (1) a signature, (2) identification of the removed content, (3) a statement of a good faith belief that the content was removed as a result of mistake or misidentification, and (4) the user’s contact information.¹⁰⁷ Clearly, YouTube has crafted its Terms of Service with the DMCA’s safe harbor protection in mind.¹⁰⁸

DMCA’s Safe Harbor, 60 VAND. L. REV. 1559, 1584 (2007) (explaining that YouTube would fall under the safe harbor of § 512(c)).

¹⁰¹ *Terms of Service*, *supra* note 100.

¹⁰² See 17 U.S.C. § 512(i)(1)(A); see also Cloak, *supra* note 100, at 1581-84 (concluding that YouTube meets all of the threshold requirements for safe harbor under the DMCA).

¹⁰³ *Terms of Service*, *supra* note 100.

¹⁰⁴ *Id.*

¹⁰⁵ Compare *id.*, with 17 U.S.C. § 512(c)(3)(A)(i)-(vi).

¹⁰⁶ Compare *Terms of Service*, *supra* note 100, with 17 U.S.C. § 512(g)(3)(A)-(D).

¹⁰⁷ *Terms of Service*, *supra* note 100.

¹⁰⁸ Whether YouTube can successfully limit its liability under the DMCA’s safe harbor protection is beyond the scope of this Note. For an analysis on the topic, see Breen, *supra* note 27, at 160-73, and Cloak, *supra* note 100, at 1581-90.

II. ANALYSIS

First, this Part describes how copyright owners can use takedown notices to suppress fair use content and explains that the DMCA's misrepresentation remedy does not effectively deter these abusive takedown notices. Next, it examines the *Lenz* decision requiring copyright owners to consider fair use before issuing takedown notices. Finally, this Part concludes that the *Lenz* rule alone is not enough because OSPs have an incentive to remove users' content even if copyright owners have failed to consider fair use.

A. *The Problem of Abusive Takedown Notices*

On its face, the DMCA appears to include a provision that protects fair use content.¹⁰⁹ By providing a remedy against copyright owners who knowingly and materially misrepresent that content is infringing, § 512(f) seems to disincentivize copyright owners from targeting fair use content in DMCA takedown notices.¹¹⁰ In practice, however, § 512(f) does little to prevent copyright owners from using the DMCA's notice-and-takedown system to remove fair use content from the Internet.

This is best revealed by *Online Policy Group v. Diebold, Inc.*¹¹¹ The content in dispute consisted of internal e-mails exchanged among employees of Diebold, a company that produced voting machines.¹¹² The e-mails showed that some employees knew that Diebold's voting machines were unreliable.¹¹³ After the e-mails were leaked on the Internet, two college students posted the e-mails on various websites, and an online newspaper provided a link to the e-mails in an article on the voting machines' problems.¹¹⁴ Diebold demanded that the Internet service providers ("ISPs") of the college students and online newspaper disable access to the e-mails, or else waive the DMCA's safe harbors and face claims of copyright infringement.¹¹⁵ The college students and the online newspaper's ISP filed an action against Diebold, alleging that Diebold's copyright infringement claims constituted knowing material misrepresentation under § 512(f).¹¹⁶

¹⁰⁹ See 17 U.S.C. § 512(f).

¹¹⁰ See *id.*

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

¹¹² *Id.* at 1197.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1197-98.

¹¹⁵ *Id.* at 1198. Section 512(c) offered safe harbor to the college students' ISP for storing allegedly infringing material. See 17 U.S.C. § 512(c). Section 512(d) offered safe harbor to the online newspaper's ISP for the use of an information location tool. See *id.* § 512(d).

¹¹⁶ *Diebold*, 337 F. Supp. 2d at 1198.

The court found that Diebold knowingly and materially misrepresented that its copyrights were infringed.¹¹⁷ First, Diebold's misrepresentation was "knowing" because the use of the e-mails to inform the public about problems with Diebold's voting machines was clearly fair use.¹¹⁸ The court went so far as to say that "[n]o reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright."¹¹⁹ Second, Diebold's misrepresentation was "material" because it resulted in the removal of the e-mails.¹²⁰ Since Diebold never actually brought suit for copyright infringement, it strongly appeared that Diebold "sought to use the DMCA's safe harbor provisions . . . as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property."¹²¹

Diebold illustrates two important points. First, copyright owners can abuse the DMCA's notice-and-takedown system by using it to suppress fair use content. The content in *Diebold* clearly qualified as fair use—and the copyright owner knew it. Nevertheless, the DMCA provided the copyright owner with a mechanism to remove lawful content from the Internet. The second point is even more alarming: section 512(f) does not adequately discourage copyright owners from using the DMCA's notice-and-takedown system to remove fair use content. Despite the threat of liability under § 512(f), Diebold targeted content that did not infringe its copyright.

While Diebold was ultimately found liable under § 512(f), the case is an outlier because a copyright owner usually will not know with legal certainty that content is fair use.¹²² In most cases, it will be much more difficult for a user to prove "knowing material misrepresentation" by a copyright owner.¹²³ Compared with the copyright owner's ease in sending a takedown notice, § 512(f)'s "knowing material misrepresentation" requirement imposes a high bar to recovery for the user.¹²⁴ A takedown notice based on the copyright owner's mere suspicion may not even trigger a claim under

¹¹⁷ *Id.* at 1204.

¹¹⁸ *Id.* at 1203-04. The court explained that "'[k]nowingly' means that a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations." *Id.* at 1204.

¹¹⁹ *Id.*

¹²⁰ *Id.* The court explained that "'[m]aterial' means that the misrepresentation affected the [service provider's] response to a DMCA letter." *Id.* The college students' ISP instructed them to remove the e-mails, but the online newspaper's ISP did not take any action pending the court's decision. *Id.* at 1198.

¹²¹ *Id.* at 1204-05.

¹²² 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, 629-30 (2006).

¹²³ *Id.*

¹²⁴ *Id.* at 689-90.

§ 512(f).¹²⁵ To be subject to § 512(f), the copyright owner's takedown notice must be in subjective bad faith.¹²⁶

Furthermore, § 512(f) fails to protect fair use content because it imposes too small a cost on copyright owners and too big a cost on users. First, a user who creates noncommercial content will have difficulty proving actual damages incurred from the removal of the content. Second, costs and attorneys' fees, which are available as damages under § 512(f), are insufficient to disincentivize abuse by copyright owners.¹²⁷ This is especially true when a copyright owner does not file an infringement suit against a user, because in that case the damages would be zero.¹²⁸ Meanwhile, users may not have the resources to pursue § 512(f) claims.¹²⁹ Users may also be too fearful of potential liability to even risk challenging copyright owners under § 512(f).¹³⁰ Thus, with § 512(f) as the only remedy, copyright owners can continue to abuse the DMCA's notice-and-takedown system to suppress fair use content.

B. *Lenz's Solution in Favor of Fair Use*

The move towards a fair use analysis that could proactively protect content as part of the DMCA's safe harbor process came in *Lenz*. Stephanie Lenz made a home video of her young son dancing to the song "Let's Go Crazy" by the artist Prince and uploaded it to YouTube.¹³¹ Universal, which owned the song, sent YouTube a takedown notice and demanded that YouTube remove Lenz's video.¹³² In response, YouTube immediately removed the video.¹³³ Lenz sent YouTube a counter notification, claiming that her video constituted fair use of Universal's copyrighted song and demanded that YouTube restore her video.¹³⁴ YouTube then re-posted Lenz's video.¹³⁵

¹²⁵ *Id.* at 629.

¹²⁶ Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 662 (2005) (stating that a user does not have legal recourse if the copyright owner has a good faith belief that the user's content is infringing). The principal case of *Lenz* stresses the difficulty a user faces in proving that a copyright owner acted in subjective bad faith. *See infra* Part II.B.

¹²⁷ Alice Kao, Note, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405, 424 (2004).

¹²⁸ *Id.*

¹²⁹ *See* Diane M. Barker, Note, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47, 62 (2005).

¹³⁰ *Id.*

¹³¹ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008).

¹³² *Id.* at 1152. It has been suggested that Universal detected Lenz's video by using an automated process. *See, e.g.*, Michael S. Sawyer, Note, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 378 (2009).

¹³³ *Lenz*, 572 F. Supp. 2d at 1152.

¹³⁴ *Id.*

¹³⁵ *Id.*

Lenz filed suit against Universal under § 512(f), alleging that Universal knowingly materially misrepresented that her video was infringing.¹³⁶ Lenz asserted that Universal's takedown notice was not based on a good faith belief that her video was infringing, thereby violating the requirement in § 512(c)(3)(A)(v) that a takedown notice include the copyright owner's statement of "a good faith belief that use of the material in the manner complained of is not authorized by . . . the law."¹³⁷ Universal filed a motion to dismiss.¹³⁸

The issue before the court was whether the DMCA required a copyright owner to consider fair use to form a good faith belief that an alleged infringer's use was unlawful.¹³⁹ Universal argued that fair use was a defense that excused infringement, so any duty to evaluate fair use "would arise only *after* a copyright owner receive[d] a counter-notice and consider[ed] filing suit."¹⁴⁰ Lenz argued that fair use was an authorized use of copyrighted material, so copyright owners were required to consider fair use to allege infringement in good faith.¹⁴¹

The question of whether fair use was authorized by law within the meaning of § 512(c)(3)(A)(v) was an issue of first impression.¹⁴² To resolve the question, the court turned to the language of the DMCA, explaining that the court's role was to give effect to Congress's intent.¹⁴³ The court found that the meaning of "authorized by law," as used in § 512(c)(3)(A)(v), was unambiguous and reflected a use that was permitted by law.¹⁴⁴ Fair use was authorized by law because "[t]hough Congress did not expressly mention . . . fair use . . . in the DMCA, the Copyright Act provides explicitly that 'the fair use of a copyrighted work . . . is not an infringement of copyright.'"¹⁴⁵ In reaching this conclusion, the court avoided the question of whether fair use was only a defense to copyright infringement, as Universal had argued.¹⁴⁶ The court stated that its analysis would remain unchanged "[e]ven if Universal [was] correct that fair use only *excuse[d]* infringement."¹⁴⁷

Since fair use was a lawful use, the court held that a copyright owner had to check whether a user's content made fair use of copyrighted material

¹³⁶ *Id.* at 1153.

¹³⁷ 17 U.S.C. § 512(c)(3)(a)(v) (2006); *Lenz*, 572 F. Supp. 2d at 1153.

¹³⁸ *Lenz*, 572 F. Supp. 2d at 1153.

¹³⁹ *Id.* at 1154.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Lenz*, 572 F. Supp. 2d at 1154 (internal quotation marks omitted).

¹⁴⁵ *Id.* (fourth alteration in original) (quoting 17 U.S.C. § 107 (2006)).

¹⁴⁶ *Id.*; *see also* Sawyer, *supra* note 132, at 378 ("Judge Fogel [in *Lenz*] avoided the thorny issue of whether fair use is a right or defense . . .").

¹⁴⁷ *Lenz*, 572 F. Supp. 2d at 1154.

in order to form a good faith belief under § 512(c)(3)(A)(v) that the content was not authorized by law.¹⁴⁸ The court rejected Universal's argument that an evaluation of fair use would burden copyright owners by limiting their ability to respond quickly to potential infringement, given that fair use was a fact-intensive inquiry.¹⁴⁹ First, "in the majority of cases, a consideration of fair use prior to issuing a takedown notice [would] not be so complicated as to jeopardize a copyright owner's ability to respond rapidly to potential infringements."¹⁵⁰ Second, the DMCA already required copyright owners to conduct initial reviews of potential infringement before sending takedown notices, and "the applicability of the fair use doctrine simply [was] part of that initial review."¹⁵¹ The court stressed, however, that a full investigation of fair use was not required.¹⁵² Finally, requiring copyright owners to consider fair use before they issued takedown notices was consistent with the purpose of the DMCA in light of the fact that "the unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved and the counter-notification remedy does not sufficiently address these harms."¹⁵³

The court's analysis made clear that any copyright owner who failed to consider fair use could be subject to a misrepresentation claim under § 512(f)¹⁵⁴ because the purpose of § 512(f) was to prevent copyright owners from abusing takedown notices.¹⁵⁵ However, the court found that "there [were] likely to be few [cases] in which a copyright owner's determination that a particular use [was] not fair use [would] meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation."¹⁵⁶ In fact, the court doubted that Lenz would be able to prove that Universal acted with subjective bad faith.¹⁵⁷

Lenz provided more protection for fair use content on the Internet by holding that the DMCA required copyright owners to evaluate fair use to make a good faith statement pursuant to § 512(c)(3)(A)(v) that a user's content was not authorized by law. Copyright owners, therefore, now need to consider fair use before, not after, sending DMCA takedown notices to OSPs. No longer can copyright owners use the DMCA's safe harbors to pressure OSPs to remove content that clearly qualifies as fair use. If a copy-

¹⁴⁸ *Id.* "Good faith" is a subjective standard. *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004) (finding that the good faith belief requirement of § 512(c) is a subjective, not objective, standard).

¹⁴⁹ *Lenz*, 572 F. Supp. 2d at 1155.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1156.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1154-55.

¹⁵⁵ *Lenz*, 572 F. Supp. 2d at 1156.

¹⁵⁶ *Id.* at 1155.

¹⁵⁷ *Id.* at 1156.

right owner uses the DMCA's notice-and-takedown system to remove content that is obviously fair use, or if the copyright owner fails to consider fair use entirely, then the copyright owner exposes himself to a misrepresentation claim under § 512(f).

However, the protection that § 512(f) provides against abusive copyright owners remains limited.¹⁵⁸ *Lenz* emphasized the difficulty a user faces in proving that a copyright owner acted with the subjective bad faith required for liability under § 512(f). While a user's allegation that a copyright owner did not properly consider fair use before sending a takedown notice is sufficient to state a misrepresentation claim, a user will ultimately succeed only in the rare case that no reasonable copyright owner could have believed that the allegedly infringing content was not fair use. Because § 512(f) is limited in its ability to prevent abuse to cases involving obvious fair uses, Internet users cannot rely on § 512(f) to protect most fair use content.

Instead, users must rely on copyright owners to make good faith evaluations of fair use under § 512(c)(3)(A)(v) before sending DMCA takedown notices. This may seem—and in fact may be—a small safeguard for fair use content, but it is greater protection than users had before *Lenz*.¹⁵⁹

C. *Lenz Is Not Enough to Protect Fair Use Content on the Internet*

Although *Lenz* laid down a clear rule protecting fair use content as part of the DMCA's notice-and-takedown system, the question of whether it can be enforced remains. Two potential problems stand in the way. First, though a copyright owner must consider fair use to make a good faith statement under § 512(c)(3)(A)(v) that a user's content is infringing, a copyright owner may not actually be required to include a good faith statement in a takedown notice. Second, to avoid jeopardizing its safe harbor protection, an OSP may choose to remove a user's content even if a copyright owner's takedown notice does not include a good faith statement. Both possibilities would effectively obliterate *Lenz*'s protection for fair use content by removing a copyright owner's need to consider fair use at all.

1. Is a Copyright Owner Required to Make a Good Faith Statement?

The first problem stems from the DMCA itself, as the statute appears to provide a textual loophole for copyright owners to get around the *Lenz* rule. Section 512(c)(3) states that a copyright owner's takedown notice

¹⁵⁸ See *supra* Part II.A.

¹⁵⁹ See *infra* Part II.C.

need only “substantially” include six different elements.¹⁶⁰ Section 512(c)(3)(A)(v), requiring a copyright owner’s statement of a good faith belief that allegedly infringing content is not authorized by law, is the fifth of the six elements.¹⁶¹ The statute’s language requiring a takedown notice to *substantially* comply with the six elements, rather than comply with *all* of the six elements, raises an important question: Does a copyright owner even have to include a good faith statement under § 512(c)(3)(A)(v) to substantially comply with the requirements of a DMCA takedown notice?

If a takedown notice must include the copyright owner’s good faith statement, then fair use content can be protected by the *Lenz* rule. However, if a takedown notice that excludes the copyright owner’s good faith statement is nevertheless considered valid under the DMCA, then the *Lenz* rule loses all practical effect. A user’s fair use content might be removed even though the copyright owner’s takedown notice failed to include a good faith statement that the content was infringing.

District court decisions on this issue are inconsistent. In *Hendrickson v. eBay Inc.*,¹⁶² the court found that the copyright owner’s good faith statement was a required element of a DMCA takedown notice.¹⁶³ The court explained that the copyright owner’s complete failure to include a good faith statement rendered his takedown notice deficient under the DMCA.¹⁶⁴ However, the court in *Brave New Films 501(C)(4) v. Weiner*¹⁶⁵ made way for the opposite conclusion. In *Weiner*, the copyright owner’s notice stated that the information contained therein was accurate under penalty of perjury and that “YouTube had posted the [alleged infringer’s content] without authorization.”¹⁶⁶ There was no question that the copyright owner satisfied the requirement of a statement that the information in the notice was accurate, but the court faced the question of whether the notice satisfied the requirement of a good faith statement that the alleged infringer’s use was unauthorized.¹⁶⁷ On a motion to dismiss, the court denied the motion and found that the moving party had failed to establish that the copyright owner’s statements did not substantially comply with the DMCA.¹⁶⁸ Although the copyright owner’s notice to YouTube completely failed to include a good faith statement that the alleged infringer’s content—rather than the OSP’s posting of that content—was unauthorized, the notice was sufficiently alleged to be a valid DMCA takedown notice.¹⁶⁹

¹⁶⁰ 17 U.S.C. § 512(c)(3) (2006).

¹⁶¹ *Id.* § 512(c)(3)(A)(v).

¹⁶² 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

¹⁶³ *Id.* at 1089-90.

¹⁶⁴ *Id.*

¹⁶⁵ 626 F. Supp. 2d 1013 (N.D. Cal. 2009).

¹⁶⁶ *Id.* at 1018.

¹⁶⁷ *Id.* at 1017-18.

¹⁶⁸ *Id.* at 1018.

¹⁶⁹ *See id.* at 1017-18.

Fortunately, the Ninth Circuit has clarified whether a DMCA takedown notice must include the copyright owner's good faith statement that allegedly infringing content is not authorized by law. In *Perfect 10, Inc. v. CCBill LLC*,¹⁷⁰ the court found that a valid takedown notice was one that substantially complied with "all of Section 512(c)(3)'s clauses, not just some of them."¹⁷¹ To substantially comply with § 512(c)(3), a copyright owner had to state that he believed in good faith that a user's content was infringing.¹⁷² The court made the following observation:

Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.¹⁷³

Recognizing the possible First Amendment consequences of removing content from the Internet, the court concluded that a service provider did not have to start "potentially invasive proceedings" if the copyright owner refused to make a good faith statement.¹⁷⁴ Furthermore, if a service provider did not receive a statutorily compliant takedown notice, then knowledge of infringement could not be imputed to the service provider.¹⁷⁵

Perfect 10 supplements *Lenz* to more fully protect fair use content under the DMCA's notice-and-takedown system. Together, they explain that a statutorily compliant takedown notice must include the copyright owner's good faith statement that the user's content is unauthorized by law and that the copyright owner must consider fair use to make this requisite good faith statement.¹⁷⁶ Under *Lenz*, a statement by the copyright owner that the "use of the material [claimed to be infringing] is not authorized by . . . the law" would satisfy the requisite good faith statement of § 512(c)(3)(A)(v).¹⁷⁷ *Lenz* would not require the copyright owner to specifically mention fair use; the statement would already reflect the copyright owner's belief that the user's content was not fair use because *Lenz* requires the copyright owner to consider fair use when making the statement.¹⁷⁸ Under *Perfect 10*, the copyright owner's takedown notice would need to include this statement, along with the other elements of § 512(c)(3).¹⁷⁹

¹⁷⁰ 488 F.3d 1102 (9th Cir. 2007).

¹⁷¹ *Id.* at 1112.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1113.

¹⁷⁶ *Perfect 10*, 488 F.3d at 1112; *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008).

¹⁷⁷ 17 U.S.C. § 512(c)(3)(A)(v) (2006).

¹⁷⁸ *Lenz*, 572 F. Supp. 2d at 1155.

¹⁷⁹ *Perfect 10*, 488 F.3d at 1112.

The provisions of the DMCA kick in where *Lenz* and *Perfect 10* leave off to perfect the protection of fair use content. If the copyright owner excludes a good faith statement that allegedly infringing content is not fair use, then the OSP must contact the copyright owner so that the copyright owner may include a good faith statement.¹⁸⁰ If the copyright owner refuses to make a good faith statement, then the OSP does not have knowledge of the alleged infringement.¹⁸¹ Without knowledge of the alleged infringement, the OSP is not required to remove possible fair use content to benefit from safe harbor protection.¹⁸²

2. Can an OSP Remove a User's Content When a Copyright Owner Does Not Make a Good Faith Statement?

A second problem could potentially impede the *Lenz* rule. *Weiner* illustrates the concern that an OSP might remove a user's content after receiving a takedown notice that fails to include the copyright owner's good faith statement. In *Weiner*, the copyright owner's takedown notice stated that YouTube had posted the user's content without authorization, but it did not state that the user's content was unauthorized by law.¹⁸³ Yet, YouTube removed the content.¹⁸⁴

YouTube's response is not an unforeseen consequence of the DMCA's notice-and-takedown system. Professor Alfred C. Yen observed:

[T]he DMCA . . . requires [service providers] to promptly contact content providers who send the [service provider's] designated agent nonconforming notices in order to facilitate receipt of a conforming notice. Thus, content providers can put [a service provider] on notice that its safe harbor is in jeopardy by sending even nonconforming notice to the [service provider's] designated agent. The practical consequence is that [service providers] will likely remove material from the Internet whenever a content provider complains to [a service provider's] designated agent.¹⁸⁵

¹⁸⁰ See 17 U.S.C. § 512(c)(3)(B)(ii) (explaining that the service provider must assist in the receipt of a substantially compliant takedown notice if the copyright owner at least identifies the copyrighted work and allegedly infringing content and provides his contact information); see also Urban & Quilter, *supra* note 122, at 674 (explaining that a takedown notice that fails to include a good faith statement “do[es] not exempt an OSP from responding to the notice”).

¹⁸¹ See 17 U.S.C. § 512(c)(3)(B)(i).

¹⁸² See *id.* § 512(c)(1).

¹⁸³ See *Brave New Films 501(C)(4) v. Weiner*, 626 F. Supp. 2d 1013, 1018 (N.D. Cal. 2009); *supra* Part II.C.1.

¹⁸⁴ *Weiner*, 626 F. Supp. 2d at 1015.

¹⁸⁵ Yen, *supra* note 20, at 1884 (footnote omitted); see also Malla Pollack, *Rebalancing Section 512 to Protect Fair Users from Herds of Mice—Trampling Elephants, or a Little Due Process Is Not Such a Dangerous Thing*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 547, 560-61 (2006) (“[Service providers] are incentivized to immediately take down the content without any investigation because such take down provides a safe harbor from [service provider] liability to the copyright holder. [Service

Yen correctly predicted that in practice, OSPs would remove content even upon receiving statutorily deficient takedown notices so as to avoid risking their safe harbor protection.

To benefit from the DMCA's safe harbors, OSPs like YouTube have an incentive to remove content after receiving *any* takedown notice, even those that exclude the copyright owner's good faith statement under § 512(c)(3)(A)(v). It seems especially likely that OSPs will remove content in cases like *Weiner* where it may be unclear to the OSP whether the copyright owner's statement qualifies as a good faith statement.

Perfect 10 made clear that OSPs seeking safe harbor do not have to remove content when they receive statutorily deficient takedown notices from copyright owners who refuse to make good faith statements.¹⁸⁶ However, it remains to be seen whether YouTube and other OSPs will ignore this "out" and continue to remove content in the absence of good faith statements in order to avoid risking their safe harbor protection. Despite *Perfect 10*'s mandate that takedown notices include good faith statements, OSPs are not penalized if they remove content without them. In other words, removing content, even based on statutorily deficient takedown notices, helps OSPs but does not hurt them. If an OSP can remove a user's content—without penalty—based on a takedown notice that lacks the copyright owner's good faith statement, then the *Lenz* rule requiring the copyright owner to consider fair use in making the good faith statement becomes meaningless.

III. RE-INCENTIVIZING OSPs TO PROTECT FAIR USE CONTENT

Copyright owners must consider fair use to form good faith beliefs that allegedly infringing content is unauthorized, and copyright owners must include statements of their good faith beliefs in DMCA takedown notices.¹⁸⁷ Nevertheless, fair use content on the Internet is still not sufficiently protected because these requirements only restrict copyright owners. OSPs are free—and indeed incentivized—to remove potential fair use content even if copyright owners fail to include good faith statements in takedown notices. Furthermore, nothing in the DMCA counters this incentive.

The DMCA balances the interests of copyright owners versus OSPs, as well as copyright owners versus Internet users.¹⁸⁸ The DMCA, however, fails to balance the interests of OSPs versus Internet users. To better protect fair use content on the Internet, the DMCA must balance OSPs' incentive to

providers] have no incentive to investigate or resist the notice because take down creates no potential liability to the subscriber . . .").

¹⁸⁶ See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112 (9th Cir. 2007).

¹⁸⁷ *Id.*; *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008).

¹⁸⁸ See *supra* Part I.C.

avoid jeopardizing their safe harbor protection with the need to protect Internet users' fair use content. In other words, the DMCA needs to give OSPs a reason to respect fair use.

While copyright owners must evaluate fair use before sending DMCA takedown notices or else risk a misrepresentation claim under § 512(f), no similar threat of liability compels OSPs to consider fair use content. In fact, the DMCA provides that:

[A] service provider shall not be liable to any person for any claim based on the service provider's *good faith* disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.¹⁸⁹

Section 512(g)(1) appears to shelter OSPs if they remove potential fair use content based on a takedown notice that fails to include the copyright owner's good faith statement that the content is unauthorized.

However, the same provision that shields OSPs from liability can be used to subject OSPs to liability. Courts have not yet answered the question of whether an OSP acts in good faith under § 512(g)(1) when it removes a user's content after receiving a takedown notice that does not include the copyright owner's good faith statement that the content is infringing. Courts should adopt the interpretation that an OSP removes content in good faith only when it receives a statutorily compliant takedown notice,¹⁹⁰ which includes the copyright owner's good faith statement. Under this interpretation, an OSP would be liable to an Internet user whose content was removed in the absence of a copyright owner's good faith statement. The risk of liability would provide a check on OSPs' incentive to secure their safe harbor protection by removing potential fair use content with or without the required good faith statement.

Alternatively, instead of a judicial interpretation, the same result can be achieved through a statutory change. Congress can amend the DMCA to explicitly make OSPs liable to Internet users when OSPs remove content based on takedown notices that lack copyright owners' good faith statements that content is unauthorized by law.

The remedies for a new cause of action against OSPs could model the misrepresentation action of § 512(f). This includes any damages, including costs and attorneys' fees.¹⁹¹ Similar to § 512(f) claims, damages may be

¹⁸⁹ 17 U.S.C. § 512(g)(1) (2006) (emphasis added).

¹⁹⁰ The Electronic Frontier Foundation recommends that statutorily compliant takedown notices be required before service providers can remove content. *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUNDATION, 3, http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf (last visited Sept. 23, 2010).

¹⁹¹ 17 U.S.C. § 512(f) (providing remedies in the form of damages, including costs and attorneys' fees); *see supra* Part I.C.

difficult to prove, especially if a user's content is noncommercial.¹⁹² However, this new cause of action would be more robust in protecting fair use content than § 512(f).¹⁹³ Unlike the "knowing material misrepresentation" standard of § 512(f), a user could more easily prove that an OSP removed content based on a takedown notice that failed to substantially comply with § 512(c)(3)(A)(v).

In an easy case, the user would need to demonstrate that the copyright owner's takedown notice completely excluded a good faith statement that the user's content was unauthorized by law. A harder case would be one in which the OSP was unsure whether the statement provided by the copyright owner qualified as a good faith statement that the user's content was unauthorized. However, the DMCA already has provisions in place to handle this situation. If the takedown notice at least identified the copyright owner's work and the user's allegedly infringing work and provided the copyright owner's contact information, then the OSP would have to inform the copyright owner that the takedown notice needed to comply with the requirements of § 512(c)(3).¹⁹⁴ During this process, the OSP could explain to the copyright owner that the takedown notice must include a good faith statement that the user's use of copyrighted material was not authorized by law, which requires a review of fair use.¹⁹⁵ On the other hand, if the copyright owner's takedown notice lacked not only a good faith statement, but also identification of the copyrighted and allegedly infringing works as well as the copyright owner's contact information, then the OSP would be under no obligation to reach out to the copyright owner and the OSP could not be imputed with knowledge of the potential infringement.¹⁹⁶

Of course, for the user to prove that an OSP removed content based on a statutorily deficient takedown notice, the user would need to know whether the copyright owner's takedown notice substantially complied with the provisions of § 512(c)(3). The user, therefore, would need access to the copyright owner's takedown notice. This would require an additional—but easy—amendment to the DMCA. The DMCA already requires an OSP to notify a user when the OSP removes the user's content after receiving a takedown notice from a copyright owner.¹⁹⁷ The new amendment simply would require that the OSP also provide the user with a copy of the copyright owner's takedown notice.¹⁹⁸

¹⁹² See *supra* Part II.A.

¹⁹³ See *supra* Part II.A.

¹⁹⁴ See 17 U.S.C. § 512(c)(3)(B)(ii).

¹⁹⁵ See *supra* Part II.C.1.

¹⁹⁶ See 17 U.S.C. § 512(c)(3)(B)(i)-(ii).

¹⁹⁷ *Id.* § 512(g)(2)(A).

¹⁹⁸ This would mirror the existing requirement that an OSP must give a copy of the user's counter-notification to the copyright owner. See *id.* § 512(g)(2)(B). The Electronic Frontier Foundation has likewise proposed that a service provider should provide a user with "an entire copy of the takedown notice." *Fair Use Principles for User Generated Video Content*, *supra* note 190, at 3.

Either way—under judicial interpretation or statutory change¹⁹⁹—requiring OSPs to refuse to remove users’ content when takedown notices fail to include copyright owners’ good faith statements is consistent with the purpose of the DMCA. In balancing the interests of copyright owners and OSPs, Congress did not want to force OSPs to “make difficult judgments as to whether conduct is or is not infringing.”²⁰⁰ The proposed solution does not ask OSPs to evaluate whether content is infringing; OSPs would only need to check that copyright owners have evaluated whether content is infringing.

Additionally, requiring OSPs to check whether takedown notices include copyright owners’ good faith statements would not unduly interfere with the OSPs’ ability to expeditiously remove content, which they must do to benefit from the DMCA’s safe harbor protection.²⁰¹ The *Lenz* court rejected an argument that evaluating fair use before sending DMCA takedown notices would make it difficult for copyright owners to respond quickly to potential infringements.²⁰² The court’s reasoning can be extended to OSPs which must check whether copyright owners have made good faith statements before removing users’ content. The DMCA already requires OSPs to make sure that takedown notices substantially comply with the provisions of § 512(c)(3).²⁰³ Asking whether copyright owners have included good faith statements is therefore already a part of the OSPs’ review.²⁰⁴ When combined with the fact that OSPs need not investigate the accuracy of copyright owners’ good faith statements,²⁰⁵ it becomes clear that checking for good faith statements in takedown notices does not burden OSPs’ ability to expeditiously remove allegedly infringing content.

¹⁹⁹ The general pros and cons of a judicial interpretation versus a statutory change are beyond the scope of this Note. A common argument for a judicial interpretation is that it is easier to implement. *See, e.g.,* Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. 547, 595 (2009). Additionally, a judicial interpretation has a narrower impact than a statutory change. *See, e.g.,* Stephen R. Barnett, *The Supreme Court of California, 1981-1982—Foreword: The Emerging Court*, 71 CAL. L. REV. 1134, 1191 (1983). Another argument is that a judicial interpretation applies retroactively, not just prospectively. *See, e.g.,* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 666 (1991).

²⁰⁰ H.R. REP. NO. 105-551, pt. 2, at 61 (1998); S. REP. NO. 105-190, at 52 (1998). Accordingly, courts have not required OSPs to determine whether users’ conduct constituted infringement. *See, e.g.,* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1114 (9th Cir. 2007) (finding that an OSP did not have the burden to determine whether allegedly infringing material was actually illegal).

²⁰¹ *See* 17 U.S.C. § 512(c)(1)(C).

²⁰² *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008); *see supra* Part II.B.

²⁰³ *See* 17 U.S.C. § 512(c)(3).

²⁰⁴ *See id.* § 512(c)(3)(A)(v).

²⁰⁵ *See Lenz*, 572 F. Supp. 2d at 1155; *see supra* Part II.B.

CONCLUSION

Lenz took an important step toward protecting fair use content as part of the DMCA's notice-and-takedown system. However, *Lenz* does not sufficiently protect Internet users who create fair use content on websites like YouTube. Even though copyright owners are required to evaluate fair use before demanding that OSPs remove users' content, OSPs can nevertheless disable content after receiving takedown notices that omit copyright owners' good faith statements that content is unauthorized. Furthermore, since OSPs do not want to jeopardize their safe harbor protection under the DMCA, they have an incentive to remove content whether or not copyright owners provide good faith statements. OSPs need a new incentive. By making OSPs liable to users whose content is removed based on DMCA takedown notices that lack copyright owners' good faith statements, fair use content will be better protected against harmful and unnecessary removal from the Internet.