The Baby That Won't Stop Dancing

The Effect of Lenz Case on DMCA

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I. THE CASE

In February 2007, Stephanie Lenz recorded a twenty-nine second video of her two young children dancing to the famous song "Let's Go Crazy" by recording artist Prince. [1] Lenz posted the video titled "Let's Go Crazy #1" to YouTube.com ("YouTube"). [2] At the time of the posting, Universal Music Group ("Universal") was Prince's publishing administrator and was responsible for his copyright enforcement. [3] To enforce their copyrights on YouTube, Universal's head of business affairs assigned the task of monitoring YouTube videos to a single employee. This employee would enter the titles of the most popular Prince songs into the YouTube search field and review the video to determine if it used one or more of Prince's songs. [4] Where a Prince song was used in the video, company policy required the employee to include the video on a removal list if the composition was the "focus of the video," as it was in this case. [5] This removal list was sent to another Universal employee, who emailed the removal list ("Takedown Notice") to YouTube on June 4, 2007. [6] The Takedown Notice was sent to copyright@youtube.com, the email address YouTube identified in its Terms of Service as intended solely for receiving notifications of alleged infringements under the Digital Millennium Copyright Act ("DMCA"). [7]

YouTube removed the video on June 5, 2007 and subsequently sent an email to Lenz notifying her that her video had been removed. [8] On June 7, 2007, Lenz

attempted to restore the video on YouTube by sending a counter-notification to YouTube in accordance with the DMCA. [9] However, this attempt was unsuccessful because YouTube provided Universal with the counter-notification and Universal alleged that Lenz's video constituted infringement because she was never granted a license to use this material and their use was insufficient under other provisions of the DMCA. [10] Lenz then obtained *pro bono* counsel and sent a second counter-notification on June 27, 2007. [11] YouTube reinstated the video in mid-July. [12]

With the help of the Electronic Frontier Foundation and Keker & Van Nest LLP, Lenz's *pro bono* counsel, Lenz sued Universal for damages she incurred from the unlawful takedown of her video, because the Takedown Notice constituted knowing, material misrepresentation under 17 U.S.C. § 512(f). [13]

II. THE DMCA

A. In General

The Digital Millennium Copyright Act is US copyright statute that provides the rights and obligations of copyright owners who believe their rights under the US copyright law have been violated. [14] President Bill Clinton enacted the DMCA on October 28, 1998 for the specific purpose of updating the traditional Copyright Act by regulating digital material. [15]

For those in support of the DMCA takedown process, protecting copyright holders' content is of the utmost importance. [16] Large copyright holders, such as entertainment companies, music studios, and artists, find the DMCA a way to safeguard their lucrative content and facilitate creativity in the field. [17] For those

opposed to the DMCA takedown process, the protection of these rights comes at an increasingly detrimental loss of free speech and users' internet rights. [18] The DMCA takedown provisions could possibly allow for increased takedowns of mildly infringing content or content that is being fairly used. [19]

B. § 512. Limitations on Liability Relating to Material Online

On October 28, 1998, the DMCA was amended to include a safe harbor provision, § 512, to allow service providers to avoid copyright infringement liability if requirements in § 512(a) and (b) are met. [20] Under the DMCA, the copyright owner must send a takedown notification of claimed infringement to the service provider hosting the content in question, sites such as YouTube. [21] Under § 512, the takedown notification sent to the service provider must also state "[Universal] 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." [22] Upon receiving this notification from the copyright holder, the service provider removes or blocks access to the material. [23] If the requirements of § 512 are met, the service provider is not liable for the claim for taking down this material but is required to notify the user of the takedown. [24]

It is important to note, however, that abuse of the safe harbor provision is not condoned. § 512(f) provides that "any person who knowingly materially misrepresents … that material or activity is infringing … shall be liable for any damages" incurred by the alleged infringer, including attorney's fees. [25] More specifically, § 512(c) allows service providers (such as YouTube) to avoid liability if

"upon notification of claimed infringement … responds expeditiously to remove, or disable access to, the material..." [26] To constitute as a notification under this section, however, § 512(c)(3)(A) provides that the notification must include 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*." [27]

To form a good faith belief that the use of the material was unauthorized, the copyright owner must consider what is authorized. [28] Thus, the doctrine of fair use becomes extremely relevant, because fair use permits limited use of copyrighted material under traditional copyright law. [29] If fair use applies to the DMCA, then copyright owners must consider whether fair use authorizes the use of the copyrighted material before issuing a takedown notice. [30] However, whether it applies to the DMCA remained an open question until the *Lenz* case. [31]

III. THE RESULT

In a unanimous decision, a panel of three federal judges of the Ninth Circuit affirmed the district court's ruling that copyright holders must consider the application of fair use before sending a takedown notice under the DMCA. [34] The Court confirmed that fair use is "wholly authorized" by the law and applies to the DMCA. [35] Universal argued that fair use is not "authorized by the law" because it is an affirmative defense that excuses content that would be otherwise infringing. [36] The Court disagreed with Universal by following the dictionary definition of "authorize" and reasoned that fair use is not an infringing conduct excused by the

law, but rather that it is not infringing at all. [37] Therefore, the DMCA requires copyright holders to consider whether the application of fair use before sending a takedown notice because fair use is an authorization under the law within the meaning of § 512(c)(3)(A). [38]

Following the original opinion, both Universal and Lenz petitioned the Ninth Circuit panel to rehear the case *en banc.* [39] On March 17, 2016, the Ninth Circuit declined the requests for a rehearing but amended their opinion. [40]

IV. AMENDED OPINION

The Court still held that the copyright holder must consider whether the potentially infringing material is fair use before issuing a takedown notification under § 512(c). [41] Many copyright holders were pleased that the decision still held that the fair use doctrine is a vital part of the copyright system. [42] Lastly, the opinion still determined that victims of takedown abuse are able to vindicate their rights, even in the absence of a monetary loss. [43]

Most notably, the length of the opinion significantly decreased. [44] The Court amended the opinion by omitting several paragraphs of the original opinion. [45]

The Court's original fair use opinion stated, "A copyright holder's consideration of fair use need not be searching or intensive." [46] Along with omitting this portion, the Court also omitted its comments on the implementation of computer algorithms in the takedown process. [47]

V. WHAT DOES ALL OF THIS MEAN?

For copyright holders, the Ninth Circuit's amended opinion does little but further cloud the process of takedowns with respect to the DMCA. [48] There is little clarity to how much consideration of fair use is required before issuing a takedown. [49]

Also, as a matter of practice, the Court's omission of its discussion of algorithms raises serious questions about this use in current practice. [50] How will large copyright holders, who depend on algorithms to monitor their content on user-generated sites, like YouTube, be able to sift through enormous volumes of content? [51] Is this an end-all to their current practice? Or is the Ninth Circuit's omission irrelevant? [52]

For content generators, such as YouTube users, is there really a deterrent for companies to send wrongful takedown notices? [53] It is not only impractical and expensive to try and litigate these non-infringing takedown requests, it is also extremely unrealistic considering the vastly subjective nature of the fair use doctrine. [54]

VII. CONCLUSION

In conclusion, the *Lenz* case established fair use is authorized by the law, applicable to the DMCA, and thus, copyright holders must consider the application of fair use before sending a takedown notice under the DMCA. While the Ninth Circuit's opinion brings to the forefront this relevant issue in the Internet age, it does little to provide practical uses for those engaging in the takedown practice. It is

hard to say what the future will hold for copyright holders and for those on the other end of takedowns.

SOURCES

[1]. *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783-JF, 2013 WL 271673, at *1 (N.D. Cal. Jan. 24, 2013) (Lenz I).

[2]. *Id.*

[3]. *Id.*

[4]. *Id.*

[5]. *Id.*

[6]. *Id.*

[7]. *Id.*

[8]. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1130 (9th Cir. 2015) (Lenz II).

[9]. *Id.*

[10]. *Id.*

[11]. *Id.*

[12]. *Id.*

[13]. *Id.*

[14]. Digital Millennium Copyright Act, U.S. Copyright Office (May 6, 1998), https://www.copyright.gov/legislation/dmca.pdf.

[15]. *Id.*

[16]. Richard Chapo, *What Are The Pros and Cons of the DMCA?,* Law Office of Richard A. Chapo (June 30, 2012), http://www.socalinternetlawyer.com/pros-cons-dmca/

[17]. *Id.*

[18]. *Id.*

[19]. *Id.*

[20]. Lenz II, 801 F.3d at 1131.

[21]. *Id.*

[22]. 17 U.S.C. § 512(c)(3)(A) provides that:

> (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 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.

17 U.S.C. § 512(c)(3)(A) (2010) (emphasis added).

[23]. Lenz II, 801 F.3d at 1131.

[24]. *Id.*

[25]. 17 U.S.C. § 512(f) provides that:

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

17 U.S.C. § 512(f).

[26]. 17 U.S.C. § 512(c)(1) provides in relevant part that:

> (1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—
>
> (A)
>
> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

17 U.S.C. § 512(c)(1).

[27]. 17 U.S.C. § 512(c)(3)(A)(v) (emphasis added).

[28]. *See id.*

[29]. *See* 17 U.S.C. § 107 provides in relevant part that:

> 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.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

[30]. *See* 17 U.S.C. §§ 107, 512(c)(3)(A)(v).

[31]. *See* 17 U.S.C. §§ 107, 512(c)(3)(A)(v).

[32]. Corynne McSherry, *Dancing Baby Trial Back On? Another Mixed Ruling in Lenz v. Universal*, Electronic Frontier Foundation (Mar. 17, 2016), https://www.eff.org/deeplinks/2016/03/dancing-baby-trial-back-another-mixed-ruling-lenz-v-universal.

[33]. *Id.*

[34]. *Id.*

[35]. *Id.*

[36]. *Id.*

[37]. *Id.*

[38]. *Id.*

[39]. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016) (Lenz III).

[40]. *Id.*

[41]. *Id.*

[42]. McSherry, *supra* note 32.

[43]. *Id.*

[44]. *Id.*

[45]. *Id.*

[46]. Kaveh Waddell, *How a Dancing Baby Video Just Made It Harder To Remove YouTube Content,* The Atlantic (Sep. 14, 2015), http://www.theatlantic.com/politics/archive/2015/09/how-a-dancing-baby-video-just-made-it-harder-to-remove-youtube-content/458355/.

[47]. *Id.*

[48]. *Id.*

[49]. *Id.*

[50]. *Id.*

[51]. Chapo, *supra* note 16.

[52]. *Id.*

[53]. *Id.*

[54]. *Id.*