

**Nos. 13-16106, 13-16107**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**STEPHANIE LENZ,**

*Plaintiff, Appellee, and Cross-Appellant*

v.

**UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC.,  
AND UNIVERSAL MUSIC PUBLISHING GROUP,**

*Defendants, Appellant, and Cross-Appellees.*

On Appeal from the United States District Court  
for the Northern District of California  
Honorable Jeremy Fogel, United States District Judge  
Dist. Case No. 5:07-cv-03783-JF

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**APPELLEE AND CROSS-APPELLANT'S  
REPLY BRIEF ON CROSS-APPEAL  
(PUBLIC REDACTED VERSION)**

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## I. INTRODUCTION

Universal’s bluster in its Reply<sup>1</sup> notwithstanding, the actual facts remain simple and clear. Stephanie Lenz posted online a short family video of her kids dancing and running around her kitchen that, by necessity, includes a brief snippet of the song that helped inspire them. The video lasts just 29 seconds, the song is partially obscured by voices, and there are no indications of a commercial intent. Months later, Universal invoked the Digital Millennium Copyright Act (“DMCA”) to cause YouTube to take it down, and [REDACTED]

[REDACTED]

[REDACTED].

But Ms. Lenz had every right to post her video, because her use is authorized *by law*. Had Universal considered the fair use doctrine, it could not reasonably have come to any other conclusion. But Universal did not give a moment’s thought to whether the video is a fair use. Its process for reviewing videos asked only whether the use [REDACTED]. That does not suffice to meet the requirements of section 512.

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<sup>1</sup> “Reply” refers to the third brief filed in these cross-appeals, “Lenz Br.” to the second, and “Universal Br.” to the first.

Ms. Lenz is entitled to summary judgment for two independent reasons. First, Universal's takedown demand asserted a good faith belief it did not have, and knew it did not have, because it ignored its statutory obligation to consider whether the use was authorized by law. Second, if Universal had considered the question, it could not reasonably have concluded Ms. Lenz's video is not lawful, and, therefore, its assertion to the contrary could not have been held in good faith.

Because undisputed facts are firmly against Universal, its only recourse is to say that those facts do not matter. Universal argues that Congress gave content owners an extraordinary tool against online infringement, without any affirmative obligation to use that tool with a minimum of care. In other words, Congress chose to render one form of lawful online speech—fair uses—uniquely vulnerable to private censorship. The plain language and legislative history of the statute say otherwise, as does the First Amendment. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 582–83 (1994) (fair use guarantees “breathing space” protected by the First Amendment).

*Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000 (9th Cir. 2004), does not save Universal's theory, because *Rossi* does not reach the conduct at issue here. In *Rossi*, the sender of the takedown notification was presented with facts strongly indicating infringement, and this Court was asked to consider whether the sender of the takedown notification could be liable under section 512(f) for failing



to *verify* those facts through an objectively “reasonable” investigation.

This case raises very different questions. Here, the reviewer was presented with facts strongly indicating noninfringement, and this Court is asked to consider whether the sender is liable if (1) it did not give a second’s consideration to whether the use is authorized by 17 U.S.C. § 107 (fair use); (2) its claimed belief is unreasonable; or (3) both.<sup>2</sup>

Finally, Universal’s complaints about burden are baseless. If a use, *on its face*, seems plainly infringing, then a copyright owner need not fear section 512(f) liability. If a use, *on its face*, appears to be fair, then the copyright owner should not claim infringement and should face consequences if it does. And if a content owner is not capable of identifying fair uses at all, *then it should not be given the benefit of an expedited, extra-judicial takedown process*. Allowing expedited takedowns even when a content owner is not equipped to determine whether a use is fair, i.e., authorized by law, would be inconsistent with section 512, and also with the First Amendment protected “breathing space” that fair use represents and that Congress clearly intended to preserve.

Section 512(f) does not require unerring accuracy. It simply requires that

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<sup>2</sup> Because the district court *rejected* Universal’s arguments regarding willful blindness and damages, 1ER 20, 23, those issues are raised only by Universal’s appeal. *See* Lenz Br. 3–5. This brief therefore does not address those issues, Fed. R. App. P. 28.1(c)(4), which Ms. Lenz addressed in her first brief. Lenz Br. 54–68.

one actually form a good faith belief about the unlawfulness of the targeted use, with a reasonable basis for that belief. Universal did not do that, did not try to do that, and knew it did not try to do that. Ms. Lenz is entitled to summary judgment.

## II. ARGUMENT

Ms. Lenz has offered and supported three distinct theories of liability, two of which can be decided on the record before this Court. First, the undisputed facts show that Universal never considered whether her use was a fair use—a use authorized by law—before attesting to a good faith belief to the contrary. That failure alone is enough to hold Universal liable under section 512(f). Second, because the undisputed facts also show that there is no reasonable basis for concluding that her video is *not* a fair use, any assertion of a belief to the contrary, if Universal had considered the matter, would be unreasonable. Finally, Universal rendered itself willfully blind to her fair use by designing a review process that *could not* identify most fair uses.<sup>3</sup>

Universal has not rebutted the facts. Instead, unable seriously to dispute that it did not meet its statutory obligations, Universal attempts to write those obligations out of the statute altogether. It does not succeed.

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<sup>3</sup> Again, the issue of willful blindness is raised only by Universal's appeal, not by Ms. Lenz's cross-appeal. *See, supra*, n.2.

**A. Congress intended, and the First Amendment requires, that section 512(f) protect fair uses.**

Universal's leading argument turns on a cramped reading of section 512 that would upend a carefully crafted legislative balance between the needs of copyright owners, service providers and Internet users. Universal's secondary approach is to continue to insist that fair use is impossible to assess absent a lengthy court record.

Universal's claims cannot be squared with the language and spirit of the DMCA, or the clear congressional intent expressed in the legislative history. Worse still, they put the DMCA in conflict with the First Amendment by effectively reading any protection for fair use out of the statute. *See Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (DMCA procedures "carefully balance the First Amendment rights of users with the rights of a potentially injured copyright holder."). The First Amendment does not protect copyright infringement, but it does protect fair uses. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (fair use is a "built-in First Amendment accommodation[']"). Nonetheless, Universal asks this Court to assume that Congress intended to treat fair uses as second-class speech that can be restrained for two weeks, or more, without recourse. There is no evidence of that intent in either the statute or the legislative history, nor would the Constitution sanction it.

**1. Universal's statutory interpretation does not bear scrutiny.**

*First*, Universal claims only the "ultimate conclusion" of a takedown

notification, and not the sender's affirmation of a good faith belief, matters. Reply at 7. That's not how the statute is written. Section 512(f) creates liability for a knowing misrepresentation "*under this section*" that material is infringing. 17 U.S.C. § 512(f). "[T]his section" means section 512. To represent *under section 512* that material is infringing, one must follow the requirements in section 512(c)(3)(A). Indeed, if one fails substantially to do so, the notification has no force. *Id.* § 512(c)(3)(B).

Thus, in order to assert infringement under section 512 and cause a takedown, the claimant cannot simply say "this material is infringing." The claimant must attest to "a good faith belief" that use of the material "is *not authorized by . . . the law.*" *Id.* § 512(c)(3)(A)(v) (emphasis added). If the claimant has not formed *any* belief, it necessarily follows no "good faith" belief has been formed, and a representation to the contrary is false.

*Second*, Universal complains that under Ms. Lenz's reading, a copyright owner could be liable under section 512(f) even if it turned out that the use was not, in fact, fair. Reply 7. Universal argues that Congress could not have intended this result—i.e., Congress could not have intended to create liability for false assertions so long as the claimant is lucky and the material is in fact infringing. Universal's theory would render the specific requirements for sending a notification of infringement mere boilerplate. For example, there would be no

remedy for forging a signature, or falsely stating that one is authorized to act on behalf of the copyright owner. *See* 17 U.S.C. § 512(c)(3)(A)(i), (vi).

*Third*, Universal continues to place undue weight on the fact that fair use is an affirmative defense. Reply 8–9. Because, procedurally, the question of fair use need not be decided until after the copyright owner has made a *prima facie* case, Universal claims that fair uses are infringing until proven otherwise. The Supreme Court and the Copyright Act disagree. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984); 17 U.S.C. 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . *is not an infringement of copyright.*”) (emphasis added). As this Court has explained, the fair use doctrine “creates a limited *privilege* . . . to use the copyrighted material in a reasonable manner without the owner’s consent.” *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (emphasis added).<sup>4</sup>

*Fourth*, Universal suggests that section 512(g) effectively rendered

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<sup>4</sup> Moreover, Universal contradicts its own previous argument that “authorized by law” *does* include compulsory licenses under 17 U.S.C. § 115. Universal Br. 35–36. License, of course, is also an affirmative defense. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F. 3d 1110, 1114 (9th Cir. 2000). Universal now insists that a compulsory license is a different *type* of affirmative defense. Reply 9 n.1. Under Universal’s reading, then, “authorized by law” includes some affirmative defenses, but not others, depending on how hard it is to form a good faith belief about them. Universal offers no support for such a tortured reading of a simple phrase.

section 512(f) superfluous. Reply 9, 13–15. According to Universal, fair users have only one option when their speech is taken down: the counter-notification process. On this theory, Congress intended to allow the routine silencing of lawful speech for two weeks, without redress, no matter how obvious it is that the use—a snippet of video in a political advertisement, for example, or a critical review—is a fair use.

Examples of such takedowns abound.<sup>5</sup> For example, a group of so-called “AIDS denialists” (people who do not believe HIV causes AIDS) used the DMCA to cause YouTube to take down a series of videos debunking their claims, simply because the videos used short clips of the denialists’ own public commentary.<sup>6</sup> As a result, the videos were taken offline for more than two weeks even though no person could reasonably have concluded that the videos were unlawful. *See also* Lenz Br. 43–45.

The problem of unchecked takedown abuse is even worse where the material

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<sup>5</sup> While Universal downplays the problem of DMCA abuse, it is serious enough to have been a central issue at a recent Congressional hearing on section 512. *See* <http://judiciary.house.gov/index.cfm/2014/3/section-512-of-title-17>; *see also* Edward Black, *Congress Should Review Abuses of Copyright Law*, Huffington Post, Mar. 13, 2013, [http://www.huffingtonpost.com/edward-j-black/abuses-of-copyright-law\\_b\\_4949024.html](http://www.huffingtonpost.com/edward-j-black/abuses-of-copyright-law_b_4949024.html).

<sup>6</sup> *See* Rob Price, *How AIDS Conspiracy Theorists Silence Critics on YouTube*, <http://kernelmag.dailydot.com/features/report/9002/how-aids-conspiracy-theorists-silence-critics-on-youtube/>.

is time-sensitive, such as commentary on an imminent election, congressional vote, or other political controversy. In those situations, a two-week takedown can be a dangerous weapon indeed.<sup>7</sup> If Universal’s view is accepted, however, the only way one can protect time-sensitive speech is to avoid using anyone else’s copyrighted material in a message—no matter how clearly lawful the use would be.

As the legislative history shows, Congress did not intend the DMCA to be a tool for casual censorship.<sup>8</sup> To the contrary, Congress intended that the DMCA foster online expression—as it has done. In fact, the DMCA has been crucial to the emergence of the Internet as a principal tool for political discourse. It defies reason to suggest that Congress simultaneously intended to undermine that goal by

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<sup>7</sup> For example, in the first few days of the 2008 Winter Olympics in China, the International Olympic Committee sent a DMCA takedown notification targeting a video of a demonstration by Students for a Free Tibet, because the video included an image of the famous Olympic rings. Even a prompt counter-notification wouldn’t have restored the video before the Olympics were over. Fortunately, YouTube intervened and the IOC retracted its notice. [http://news.cnet.com/8301-13578\\_3-10018234-38.html](http://news.cnet.com/8301-13578_3-10018234-38.html). Future users won’t always be so lucky. And, of course, takedowns in the midst of political campaigns have become common. See Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, [https://www.cdt.org/files/pdfs/copyright\\_takedowns.pdf](https://www.cdt.org/files/pdfs/copyright_takedowns.pdf).

<sup>8</sup> See S. Rep. No. 105-190 at 21 (1998); see also 144 Cong. Rec. H10618 (daily ed. Oct 12 1998) (statement of Rep. Barney Frank) (Congress sought to protect intellectual property rights but not interfere with freedom of expression); 144 Cong. Rec. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Barney Frank) (DMCA protects creators without giving service providers “an incentive or excuse to censor” to avoid copyright liability).

facilitating consequence-free prior restraint of online speech.

[REDACTED]

Universal claims that the counter-notification process offers an opportunity for the copyright owner to reflect on whether a use is fair or not. Reply 10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

If Congress had intended for section 512 to be an excuse to “shoot first and ask questions later,” it could have said so. It could have eliminated section 512(f) altogether, or drafted the section to say “authorized by license.” It did not. Instead, it created a specific and careful system of checks and balances designed to ensure space for fair uses within an efficient infringement takedown regime. That system begins with a requirement that a claimant form a good faith belief that a use is not authorized by law, and ends with accountability if it fails to do so.

**2. Ignorance of the law is no excuse.**

Universal contends that because it supposedly did not know it had to consider fair use as part of its section 512 analysis, it did not “knowingly” misrepresent that it had a good faith belief that Ms. Lenz’s use was not authorized



by law.

Nonsense. “[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.” *Bryan v. United States*, 524 U.S. 184, 192 (1998) (quotation marks and citation omitted). Thus, even in the criminal context, “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.” *Id.* at 193.<sup>9</sup>

Universal does not and cannot dispute that it knew the contents of Ms. Lenz’s video. It is irrelevant whether Universal mistakenly believed that “authorized by law” did not mean “authorized by 17 U.S.C. § 107.” That is what the statute means and Universal, like all Americans, is charged with knowledge of that part of the law just as it is charged with knowing any other part.

Universal’s reliance on *Liparota v. United States*, 471 U.S. 419 (1985), is misplaced. In *Liparota*, the Supreme Court considered a provision of the federal statute governing food stamp fraud that provides that “whoever knowingly uses,

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<sup>9</sup> In certain limited contexts, to prove a “willful” violation, the Supreme Court has required proof of knowledge of the law. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991). First, those exceptions have been limited to “highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.” *Bryan*, 524 U.S. at 194. Second, section 512(f) uses the term “knowingly,” not the term “willfully.”

transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations” is subject to a fine and imprisonment. 471 U.S. at 420 (quoting 7 U.S.C. § 2024(b)(1)). The Court held that “§ 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations.” *Id.* at 425. Such a showing depends on knowing that one’s acts violate the law, not on knowing the law itself; as the Court further held, “it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal,” only that “one did not know that one’s possession was unauthorized.” *Id.* at 425 n.9.

Moreover, in concluding that a lack of knowledge that possession was unauthorized could be a defense, the Court expressly relied on the principle that *mens rea* is presumptively an element of a criminal statute, and that nothing in the statute clearly “signal[ed] a departure from this background assumption of our criminal law.” *Id.* at 426. The Supreme Court also stressed the absurd results that would obtain if one did not assume proof of *mens rea* is required, such as criminalizing the innocent possession of food stamps that were mistakenly sent to the wrong address due to administrative error. *Id.* at 426–27.

Section 512(f), however, is not a criminal statute. Thus there is no presumption that *mens rea* is a required element of a claim. And there is nothing

absurd about requiring considering, based on the facts one knows, whether a use is fair.

**3. Considering fair use is not a burden, it's a minimum requirement.**

Lacking any actual statutory language supporting its interpretation of section 512, and facing explicit language to the contrary, Universal looks instead to *one* of the overall goals of the DMCA—helping copyright owners to police infringement. That goal, Universal insists, cannot be squared with a requirement to consider fair use. The argument is without merit.

*First*, in enacting the DMCA Congress *did*, in fact, further that goal by giving copyright owners a powerful new weapon against online infringement: the notification and takedown process. Prior to the DMCA, a copyright owner faced the burdens of drafting cease-and-desist letters and possibly litigation to enforce its rights. After 1998, thanks to the strong statutory incentives Congress baked into the DMCA, a simple email became the *de facto* equivalent of a court order. The price Congress asked in exchange for that new power—that copyright owners select appropriate targets—is not high.

*Second*, Universal has not shown that the required consideration actually imposes any undue burden. It complains about the “magnitude of infringing uses” but the evidence in the record shows only that many notifications are sent each year. That is not the same as a showing that content owners cannot build a fair use

consideration into their takedown process.<sup>10</sup> For the vast majority of uses the determination will be easy: the use will be either obviously unlawful or obviously fair. And, if the use in question falls within a grey area, an improper takedown is unlikely to lead to liability so long as the content owner reasonably concludes, based on the facts it knows, that the use is unlawful.

To be clear, contrary to Universal's claim, Reply 15–16, section 512 does not require the sender of a takedown notification to make determinations based on facts it does *not* know. All section 512 requires is that, based *on the facts presented*, the reviewer form a good faith belief whether the law authorizes a given use. Universal was presented with ample facts bearing on that question, and all favored fair use.

*Third*, it is untrue that there are no easy fair uses cases. Authors, producers and courts make rapid fair use calculations all the time. Lenz Br. 26–27; *see also Brownmark Films LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012) (affirming motion to dismiss on fair use grounds); *Dhillon v. Does*, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014) (granting early motion for judgment on the pleadings or summary judgment; finding use of campaign head shot in blog post

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<sup>10</sup> Indeed, one record label has done so publicly, after being sued for violating section 512(f). <http://www.npr.org/blogs/alltechconsidered/2014/02/27/283554774/a-win-for-fair-use-after-a-record-label-picked-wrong-guy-to-sue>.

commenting on the candidate was fair use).

**B. *Rossi* does not protect Universal’s conduct.**

**1. *Rossi* did not address the standard applicable to *legal* determinations.**

Given the lack of statutory or policy support for its position, Universal’s defense ultimately depends whether this Court’s decision, in *Rossi*, authorized Universal’s misconduct. But *Rossi* never reached the issues raised here. The question in *Rossi* was whether the Ninth Circuit should adopt the rule, urged by *Rossi*, that “in order to have ‘a good faith belief’ of infringement, the copyright owner is required to conduct a reasonable investigation into the allegedly offending website.” 391 F.3d at 1003. The Court rejected *Rossi*’s argument, holding that the MPAA could and did form a good faith belief of infringement based on “the information residing on *Rossi*’s website.” *Id.* at 1005.

The Court viewed *Rossi*’s demand—that the MPAA conduct a “reasonable investigation” to determine whether his own statements on his website were in fact true—as seeking to “impose an objective standard of review for gauging the reasonableness of the MPAA’s conduct in notifying *Rossi* and his ISP of the allegedly infringing website.” *Id.* at 1004. And it is *that* “objective standard”—a standard that would have required an affirmative “reasonable investigation” into the *facts*—that *Rossi* rejected.

Nothing in the decision suggests that *Rossi* even argued that, based on the

information of which it actually was aware and without the further “reasonable” investigation into the facts he urged, the MPAA should have concluded that his website did not infringe. Instead, Rossi *conceded* that visitors to his website regularly concluded that movies were available for download. *Id.* at 1005.

Similarly, nothing in the decision suggests that anyone—Rossi, the MPAA, or this Court—believed that allowing customers to download complete, unlicensed copies of MPAA movies might be a fair use.

Thus, *Rossi* did not present the issue of whether the MPAA could escape liability because, based on information known to it, it had a subjective but unreasonable belief about the law. Moreover, to the extent that *Rossi* can be read to conclude that such a defense exists, that conclusion is not binding on the present panel, because that issue was not germane to the resolution of Rossi’s appeal.

In *Garcia v. Holder*, 621 F.3d 906 (9th Cir. 2010) (*en banc*), the Ninth Circuit adopted a two-part standard for whether a prior panel’s determination is binding on future panels. First, the issue must be “germane to the eventual resolution of the case,” and, second, the issue must be “resolve[d] . . . after reasoned consideration in a published opinion.” *Id.* at 911 (quoting *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003)). Applying this standard, the Court held that a legal principle adopted in a prior case was binding on the future panels, where that issue was “the central issue considered” in the prior decision, and the

prior determination was made “after reasoned consideration.” *Id.*

In *Rossi*, the central issue was whether section 512(c) requires an objectively reasonable *investigation into the facts*. 391 F.3d at 1004. Whether a subjective but unreasonable belief about the law based on *facts known to the sender of a notification*—i.e., facts that don’t require the “reasonable investigation” that Rossi advocated—can defeat a section 512(f) claim therefore was not “germane” to the decision. Rossi did not argue that the MPAA should have reached some legal conclusion other than that he infringed, given the information it knew. *See id.* at 1005. Thus, any statements in *Rossi* that might be read to imply that a subjective but unreasonable belief about the law based on information known to the sender of a notification would defeat a section 512(f) claim are non-binding *dicta*.

This distinction also makes practical sense. At issue in this case is what protection section 512(f) offers fair uses, a question of fundamental importance to online expression. Resolution of this issue should be reserved for a case where the issue is germane, and where the parties have thus fully raised and argued it, providing the Court the benefit of zealous advocacy and a complete record. Ms. Lenz’s discussion of *Zaldivar v. City of L.A.*, 780 F.2d 823 (9th Cir. 1986), and other authorities offers this Court precisely the background needed to consider the issue properly. Lenz Br. 39–42.

If Universal is right, by contrast, *Rossi* must be read to suggest that Congress

not only excused ignorance of the law, it encouraged it. After all, the more one considers the law and forms a belief about it, the more one risks liability. Indeed, according to Universal, *Rossi* could be read to hold that section 512(f) only applies to takedowns of fair uses if the use replicates one that has been subject to a court decision and the copyright owner has been informed of that decision. In effect, virtually any belief about infringement, no matter how preposterous, would be insulated from section 512(f) liability so long as the plaintiff is unable to prove that the claim was not sincerely held. That is not what Congress intended, or what this Court endorsed.<sup>11</sup>

**2. Cases following *Rossi* have considered whether the defendant had a reasonable basis for sending a takedown notification.**

Universal looks for support in various decisions that have followed *Rossi*, but its reading of those cases is not persuasive. Over and over, courts have declined to adopt Universal's extreme position, and instead looked closely at the basis for takedown notification—an analysis Universal's theory would render irrelevant.

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<sup>11</sup> Under Universal's theory, section 512(f) also becomes much more expensive to litigate. Discovery becomes a nightmare, fraught with investigations into subjective beliefs about the law that likely will draw privilege objections. An objective standard for legal determinations, by contrast, sensibly reduces the inquiry to (1) what the defendant reviewed prior to sending a takedown notification; and (2) whether the defendant's assertions, based on that review, were reasonable. Thus, rather than inviting "waves of litigation," Reply 3, an objective standard for legal review helps limit litigation by allowing parties and district courts to evaluate, in advance of discovery, the likelihood of success.



In *Dudnikov, v. MGA Entm't, Inc.*, for example, the court held that the defendant was “required to show that it *had a sufficient basis to form the required good faith belief* that the Plaintiffs’ auction infringed on its rights.” 410 F. Supp. 2d 1010, 1013 (D. Colo. 2005) (emphasis added). And in *UMG Recordings, Inc. v. Augusto*, the court granted UMG summary judgment on Augusto’s section 512(f) claims, because “given the uncertainty of the law” surrounding UMG’s copyright infringement claims, Augusto could not prove that UMG made a knowing, material misrepresentation. 558 F. Supp. 2d 1055, 1065 (C.D. Cal. 2008). Although the court framed the issue as one of UMG’s subjective good faith belief, the reference to the “uncertainty of the law” suggests that had the law clearly favored Augusto, UMG’s representation of infringement might not have been made in good faith.<sup>12</sup>

In *Disney Enters. Inc. v. Hotfile Corp.*, the court noted that the issue of whether the use of automated systems for detecting alleged infringement was insufficient to allow formation of a good faith belief, given a lack of human review, was an “engaging question[.]” and an “issue of first impression” in the Eleventh Circuit. 2013 WL 6336286, at \*48 (S.D. Fla. Sep. 20, 2013). But because the court concluded that Warner Brothers’ motion for summary judgment had to be

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<sup>12</sup> The court also noted that the UMG, while legally incorrect in its conclusion of infringement, had “carefully documented [Augusto’s] actions in preparation for this lawsuit” and was aware that Augusto had admitted copyright liability in a similar case. *Id.* at 1056.

denied regardless, based on evidence showing that it had intentionally demanded takedown of files that it “knew it had no right to remove,” the court further concluded that “these issues should be presented to the jury.” *Id.*

Finally, at least two courts have read *Rossi* to apply primarily to misrepresentations of fact, not law. As the *Disney* court observed, “The clear lesson of *Rossi* is that ‘as a prerequisite to liability under section 512(f), a defendant must have actual knowledge that it is making a misrepresentation of fact.’” 2013 WL 6336286, at \*46 n.29 (quoting *Cabell v. Zimmerman*, 2010 WL 996007, at \*4 (S.D.N.Y. Mar. 12, 2010) (citations omitted)) (emphasis added).

*Tuteur v. Crosley-Corcoran*, 2013 WL 4832601 (D. Mass. Sept. 10, 2013), discussed fair use and good faith, but the discussion had no bearing on the outcome. The plaintiff alleged that the defendant *agreed* she did not have a valid copyright claim, and the court held that allegation was sufficient to overcome a motion to dismiss. *Id.* at \*5 n.16 & \*8. In an affidavit, the defendant’s attorney asserted that he *had* considered fair use, and concluded it did not apply. *Id.* at \*5. But the court concluded that it could not credit the affidavit on a motion to dismiss. *Id.* at \*5 n.16. Whether fair use need be considered thus simply was not before the court.

And in *none* of these cases was it proven by undisputed facts that the defendant had failed to form a good faith belief *at all*. The extant district court

cases are at best uncertain about the proper interpretation of *Rossi*. This appeal gives this Court a chance to resolve that uncertainty, and provide clear guidance about the standard for legal determinations in the section 512(f) context.

**C. Universal did not form a good faith belief that Ms. Lenz’s use was not authorized by law.**

**1. Universal did not form a good faith belief that the video is infringing.**

Hedging its bets, Universal finally attempts to manufacture a fair use analysis. Reply 34–42. That attempt fails as well, for two reasons: (1) Universal did not actually consider most of the “facts” it implies that it assessed; and (2) neither Mr. Johnson nor anyone else at Universal put the facts it did consider into any legal context.

**a. Universal never considered most of the facts available to it.**

Universal tries to suggest—without evidence—that it considered a variety of facts that might bear on fair use. Reply 35.<sup>13</sup> Yet Sean Johnson, the only person who watched the video before the takedown, never testified that [REDACTED]

[REDACTED]

7ER 1146:18–1147:10, 1148:4–1154:16. According to Universal’s own evidence, Mr. Johnson considered [REDACTED]

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<sup>13</sup> Universal apparently has, however, abandoned its attempt to claim that it gave any thought to the nature of the work. Reply 40.

[REDACTED] See Reply 35, 40 (and evidence cited therein). And Ms. Moffat, who sent the takedown notification, did not consider anything about the video at all.

1SER 35:16–40:22.

Thus, the only evidence Universal offers to support its claims about what it might have considered with respect to most of the statutory fair use factors is general statements made by Robert Allen. Reply 42. But Mr. Allen [REDACTED]

[REDACTED]

[REDACTED]. 2SER 175:15–19. While Universal makes much of its [REDACTED]

[REDACTED] Reply 35, the testimony shows that [REDACTED]

[REDACTED]. 7ER 1162:1–1164:23.

Finally, Mr. Allen testified that [REDACTED]

[REDACTED]. 7ER 1167:21–

1168:25.

With respect to commerciality, Universal makes much of the fact that *YouTube* is a commercial service. Reply 37. But there is no evidence that Universal drew any conclusion about the nature of *Ms. Lenz*'s use. Universal does not even argue that it thought *Ms. Lenz* had any commercial purpose—for example, there is no evidence that Universal ever saw any advertisements accompanying her video.<sup>14</sup>

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<sup>14</sup> There is good reason for this. First, YouTube did not begin to display ads on any video playback pages until nearly two years later. Associated Press, *YouTube*

And even if YouTube's commercial nature could be imputed to Ms. Lenz, which it cannot, there is no evidence that [REDACTED]

[REDACTED]. 2SER  
224:16–226:22.

With respect to transformation, Universal again offers no evidence that it gave any thought to the question. Instead it argues only that it considered whether the use was incidental, Reply 39, which is a woefully impoverished substitute for considering fair use.

Regarding market harm (as well as the other fair use factors), Universal observes that Prince's desire not to license his works might be relevant to this factor and suggests it *might* have considered whether widespread similar uses might have affected a market. Reply 41. But Universal does not cite any evidence that it *did* consider this point. Reply 39.

Thus, the only facts bearing on fair use Universal can credibly claim to have noted pertain to the amount and substantiality of the use. Taken at its word, Universal considered that the snippet was immediately recognizable, that it played through the posting, and that a voice in the video called attention to the music. That consideration, however, cannot support a good faith belief that Ms. Lenz's use is

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*Videos To Feature 'Overlay' Ads*, CBS News (February 11, 2009), available at <http://www.cbsnews.com/stories/2007/08/22/tech/main3193384.shtml>. Second, even today, there still are no ads next to her video.

not fair.

**b. Universal never considered the *legal significance* of the facts that it knew.**

Even had Universal actually observed of the facts it insinuates it might have observed—a conclusion [REDACTED]—it did not do one key thing: give any thought to whether, given those facts, Ms. Lenz’s use was lawful.

Universal insists that “[n]o more should be required than that the copyright owner (or its agent) followed a policy that took into account those facts that then were available to the copyright owner and that would be relevant to a fair use defense, were one to be raised.” Reply 36. In short, Universal’s theory is that as long as a copyright owner observes some potentially relevant facts, it need not consider the legal import of the facts.

The district court rejected that theory, 6ER 1005, and rightly so. Fair use is a “*legal judgment.*” *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012) (emphasis added). It follows that a consideration of *facts* alone but not the *law* is no consideration of fair use at all. And, of course, section 512(c) requires a good faith belief whether the use is authorized by *law*. Noting facts involves no thinking, no analysis, no assessment of whether, given those facts, a given use might be *authorized by law*.

**2. Based on the facts it knew, Universal could not reasonably have determined that Ms. Lenz’s use is not authorized by law.**

While the outcome of this case will have significant impact on the future of fair use online, the central issue under section 512(f) is not fair use but misrepresentation. To prevail on her first theory of liability, Ms. Lenz had to show that Universal sent its takedown notification without forming the requisite good faith belief that her video infringed copyright, which she has done.

With respect to her second argument—that Universal’s conclusion was objectively unreasonable—a showing of fair use *is* appropriate, and she has done that as well. That showing is made at length in her first brief, Lenz Br. 48–54, and Universal has not overcome it.

**a. The video has a transformative noncommercial purpose.**

The video looks and sounds exactly like the personal, noncommercial home movie that it is. Universal nonetheless claims that using YouTube to share one’s video somehow renders it “commercial” for purposes of a fair use analysis. But the fair use analysis turns on the *alleged infringer’s* purpose. Lenz Br. 48–49; *see also Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (distinguishing defendants use (retransmission) from customer’s use); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007) (distinguishing end-user from alleged infringer; “the end-user’s utilization of the

product is largely irrelevant; instead, the focus is on whether alleged infringer's use is transformative and/or commercial.”). YouTube's purpose is irrelevant.

Indeed, most of the cases upon which Universal relies for the first factor simply examined the context of the use to determine the intent of the user. In *A&M Records, Inc. v. Napster, Inc.*, for example, this Court was concerned with whether Napster's users were fair users, and, in that context, examined whether they stood to profit from unauthorized use by avoiding the expense of purchasing the songs in question. 239 F.3d 1004, 1015 (9th Cir. 2001). That is not the same thing as conflating Napster's commercial purpose with that of its users; quite the contrary.

Ms. Lenz's use is also transformative. Universal tries to suggest that transformation is confined to works that offer commentary or criticism, and that her home video “simply incorporates a song into a new media with the same purpose and minimal additions.” Reply 40. But fair use is not so narrow. The first fair use factor assesses “whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character . . . .” *Campbell*, 510 U.S. at 579 (internal citation and quotation marks omitted). Ms. Lenz's home video has a distinct purpose and character: documenting children playing in the kitchen. That transformative purpose is plain from the video itself, and is substantial.



**b. The second factor is essentially neutral.**

Ms. Lenz explained in her opening brief that the second factor carries little weight here because the work has long since been published and because her use was transformative. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003). Universal’s only response is to accuse her of suggesting that Prince has “already received sufficient compensation.” Reply 40. Ms. Lenz’s true claim, of course, is that where a work has been published and widely circulated for decades, this factor is at worst neutral. *See Swatch Grp. Mgmt. Serv. Ltd. v. Bloomberg L.P.*, 742 F.2d 17, 31 (2d Cir. 2014).

**c. Ms. Lenz used only a small amount of Prince’s work, and only as much as necessary to accomplish her purpose.**

The third factor also favors fair use. Even indulging Universal’s assertion that Prince’s work “played throughout the posting,” Reply 40, Ms. Lenz still used only 29 seconds of a four-and-a-half minute song. *See* 2SER 324:1–9. Thus, she used very little, and only as much as necessary to capture the reality of what was occurring in her kitchen. And, Universal’s vague suggestion notwithstanding, Reply 40, there is no evidence that the snippet in question was, or that Universal thought it was, “the heart” of any work.

**d. Ms. Lenz’s use has no effect on any actual or potential market for the *Let’s Go Crazy* composition.**

Universal does not attempt to suggest Ms. Lenz’s video, in itself, could harm any real market. And rightly so: there *is* no market (actual or potential) for use of

Prince's composition in amateur home videos. *See Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1243 (N.D. Ga. 2012) (“factor four weighs in Defendants’ favor when . . . permissions are not readily available.”)

As for the market for licensing Prince's compositions in general, the relevant question is whether Ms. Lenz's transformative use (even if “widespread”) would serve as a replacement for the composition itself. A brief viewing of her video makes clear that under no circumstance could it be considered a replacement for Prince's composition. Lenz Br. 52–53.

*Cambridge Univ. Press* underscores the point. In that case, the court considered whether repeated uses of 10% of a copyrighted work caused market harm. The answer was no, “because the 10% excerpt would not substitute for the original, no matter how many copies were made.” 863 F. Supp. 2d at 1236; *see also Threshold Media Corp. v. Relativity Media LLC*, Case 2:10-cv-09318 (C.D. Cal. Mar. 19, 2013) (use of music clip in film did not impair market for the work, where clip was 38% of original and audio quality low). Similarly, Ms. Lenz's use, no matter how oft-repeated by others, could not substitute for *Let's Go Crazy* or harm the market for Prince's work.

Prince's right to refuse to license his work, Reply 41, does not change the analysis. Even where the copyright owner chooses not to grant licenses, a “traditional, reasonable or likely to be developed market” must exist. *See* 4

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4] (2005); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 82 (2d Cir. 1997).

In sum, on the facts known to Universal, this was not a complex fair use question. No person familiar with fair use law could reasonably have formed a good faith belief that Ms. Lenz's use was not authorized by law.

### III. CONCLUSION

For the foregoing reasons, Ms. Lenz respectfully requests that the Court reverse the district court, and remand for entry of an order granting her summary judgment.

Respectfully submitted,

DATED: March 20, 2014

By: /s/ Michael S. Kwun  
MICHAEL S. KWUN

*Attorneys for Plaintiff, Appellee, and Cross-Appellant STEPHANIE LENZ*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the attached brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i). It is proportionately spaced using Microsoft Word 2010 in 14-point Times New Roman type, and contains 7,000 words, not including those sections excluded in Federal Rule of Appellate Procedure 32(a)(7)(b)(iii).

DATED: March 20, 2014

By: /s/ Michael S. Kwun  
MICHAEL S. KWUN

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2014, I electronically filed the foregoing *Appellee and Cross-Appellant's Reply Brief on Cross-Appeal (Public Redacted Version)*, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: March 20, 2014

*/s/ Roseann Cirelli*

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ROSEANN CIRELLI