

No. 16-218

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

STEPHANIE LENZ,
Respondent.

**On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit**

**BRIEF FOR THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA AS AMICUS
CURIAE IN SUPPORT OF PETITIONERS**

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4Shared, http://www.4shared.com/?locale=en	9
British Broadcasting Corporation, <i>A glimpse at piracy in the UK and beyond</i> (Sept. 17, 2012), www.bbc.com/news/technology-19601653	10
Counter Notification Basics, YouTube Help, https://support.google.com/youtube/answer/ 2807684?hl=en	19

**TABLE OF AUTHORITIES
(continued)**

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Frontier Economics, <i>Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy</i> (Feb. 2011), www.iccwbo.org/Data/Documents/Bascap/ Global-Impacts-Study-Full-Report/	10
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Statement of Maria Schneider, <i>Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary</i> , 113th Cong. 57 (2014).....	17
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INTEREST OF AMICUS CURIAE

Amicus curiae the Recording Industry Association of America (“RIAA”) respectfully submits this brief in support of the Universal petitioners.¹

The RIAA is the trade organization that promotes the creative and financial vitality of the major recorded music companies. Its members comprise the most commercially successful record industry in the world. RIAA members create, manufacture, and/or distribute approximately 85% of all recorded music legitimately produced and sold in the United States.

In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of music labels and artists; conducts consumer, industry, and technical research; and monitors state and federal laws, regulations, and policies. The RIAA protects the ability of the record industry to invest in new artists and new music and, in the digital arena, to give online services space to prosper.

Despite the best efforts by the RIAA’s members to increase the availability of their works through authorized internet services, unlawful competition from copyright infringers continues to inhibit the optimal growth of legitimate online music services.

¹ The RIAA has complied with Supreme Court Rule 37.2(a), and all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person except for amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

This infringement deprives RIAA members (and other copyright holders) of important sources of revenue, and undermines the value of American intellectual property. The Ninth Circuit’s rule, which allowed an individual who suffered no actual injury to bring suit under the Digital Millennium Copyright Act (“DMCA”) and which then rewrote the substantive requirements of this Act, exacerbates those problems and imposes significant burdens on the RIAA’s members. The RIAA thus has a compelling interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Stephanie Lenz posted a video on YouTube of her children dancing to a Prince song. YouTube temporarily took down the video and subsequently reposted it at Lenz’s request. Lenz has identified no damages she suffered as a result of the temporary takedown. Lenz nevertheless sued, alleging that Universal violated procedural requirements of the DMCA when it sent YouTube a notice of claimed infringement that led to the takedown. The Ninth Circuit allowed Lenz’s lawsuit to proceed even though she suffered no concrete injury and, therefore, lacks Article III standing. At Lenz’s behest, the Ninth Circuit then engaged in a “sweeping reinterpretation” of the DMCA that “significantly undermines the ability of copyright holders to protect intellectual property from infringement online,” thus defeating a “major purpose” of that statute. Universal Pet. 12. The

RIAA writes in support of Universal's petition to underscore how destructive the Ninth Circuit's ruling will be to the protection of American intellectual property, if allowed to stand.

Enacted in 1998, the DMCA embodies a careful balance that Congress struck to foster the growth of the internet while also protecting copyright holders against rampant online infringement and end-users with a legitimate interest in keeping material online. On the one hand, Congress saw that it would be difficult for the internet to grow if online companies were subject to claims of infringement for innocently hosting the infringing content of their users. On the other hand, Congress recognized that the "copyright industries are one of America's largest and fastest growing economic assets," S. Rep. No. 105-190, at 10 (1998), and that the benefits of internet communication could easily be hijacked by infringers "to destroy the value of American intellectual property," H.R. Rep. No. 105-551, pt. 1, at 9 (1998).

Congress thus enacted the "safe harbor" provisions of the DMCA. As drafted, these provisions immunize certain internet providers from copyright liability for hosting infringing content on their sites – so long as they meet specified conditions – and also for removing material that allegedly infringes. At the same time, copyright holders obtained a "notice and takedown" process, which was designed to provide a rapid means of getting allegedly infringing content removed from websites, and end-users got a "put-back" process allowing them to restore that content in certain circumstances.

Lenz availed herself of this “put-back” process, obtained complete relief under it, and suffered no injury from Universal’s takedown notice. The Ninth Circuit nevertheless allowed her to pursue a case in which it imposed an unprecedented new obligation that bars copyright holders from initiating the takedown process unless they first consider, apparently on a case by case basis, the possibility that a given online posting could be a fair use. That ruling distorts the text of the DMCA, eviscerates the careful balance that Congress struck, and contravenes Congress’s intent to provide for a “rapid response” to online infringement. S. Rep. No. 105-190, at 21.

In addition to the Article III concerns raised by Lenz’s lack of standing, the far-reaching nature of the Ninth Circuit’s ruling and its misinterpretation of the DMCA provide a further reason for this Court to grant Universal’s petition. Of course, for the reasons Universal explains, any ruling issued in a case in which the plaintiff lacks standing would be wrong, even if that ruling were correct on the merits and did not change the law. But the harm from such an improper ruling is magnified where, as here, it is substantively erroneous and effectively rewrites a federal statute. Indeed, cases like this one – where a court has issued what is essentially an advisory opinion on a question of first impression – demonstrate the importance of standing in the constitutional scheme. The Ninth Circuit’s ruling opens the door for plaintiffs to push the law in a particular direction even when they have no concrete stake in their litigations. The *only* purpose of Lenz’s suit was to rewrite the DMCA to suit the policy

preferences of the advocacy organization that volunteered to represent her, and that is what the Ninth Circuit's ruling has accomplished. That ruling should be vacated.

ARGUMENT

I. Congress Intended For The DMCA To Provide A Rapid Response To Anticipated Large Scale Online Infringement

A. The DMCA

Congress passed the DMCA in 1998 in an effort to adapt copyright law to emerging digital technologies that could be used to exponentially increase infringing activities online. Title II of the DMCA, titled the "Online Copyright Infringement Liability Limitation Act," added a new Section 512 to the Copyright Act (Title 17 of the U.S. Code), which is the subject of this action. Section 512 seeks to balance the interests of copyright holders, users of internet services, and internet providers. It provides:

1. Copyright holders with a mechanism for the rapid removal of allegedly infringing material posted or shared online;
2. Internet users with their own extra-judicial mechanism to get allegedly non-infringing material restored online; and

3. Internet providers with immunity from liability for the innocent posting of material that infringes copyrights (subject to various qualifications) and for removing non-infringing material from their sites.²

The mechanics are as follows. A copyright holder who believes its work is being infringed on a service provider's site may send a "notice and takedown" letter to the provider. The notice must include a host of detailed information about both the posted content and the claimant's copyrighted material. *See* 17 U.S.C. § 512(c)(3)(A). Among other things, the claimant must state that he "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." *Id.* § 512(c)(3)(A)(v). When listing these requirements, Congress did not include or require consideration of possible fair use.

Service providers who wish to be shielded from liability for hosting infringing content must, among other things, expeditiously "take down," or remove, the allegedly infringing content. *Id.* § 512(d)(3).

² Congress enacted the safe harbor provisions to incentivize providers to minimize infringement on their sites. Thus, the DMCA requires providers to take various precautionary measures to be eligible for the safe harbor, such as adopting and implementing a repeat infringer policy designed to exclude users who repeatedly infringe. 17 U.S.C. § 512(i)(1)(A). The DMCA also requires providers to "expeditiously" remove infringing material once they have "actual knowledge" that the material is infringing or are "aware of facts or circumstances" – so-called "red flag knowledge" – "from which infringing activity is apparent." *Id.* § 512(c)(1)(A).

A service provider who wishes to be shielded from liability for wrongfully removing material must also notify the user that it has removed the material. *Id.* § 512(g)(2)(A). The user may then send a counter-notification contending that his use should be restored. The counter-notification must include “[a] statement under penalty of perjury that the [user] has a good faith belief that the material was removed . . . as a result of mistake or misidentification.” *Id.* § 512(g)(3)(C).

The provider must promptly forward any counter-notification to the copyright owner. The copyright owner then has 10 days to sue the user for infringement. If the owner does not sue, the provider maintains its immunity for any wrongful takedown by restoring the material online. *Id.* § 512(g)(2)(B)-(C).

Section 512(f) provides a remedy for parties injured by any person who “knowingly materially misrepresents” that material should be taken down or put back. The aggrieved party may recover the damages incurred when the provider relies on that misrepresentation in taking down or putting back posted material, and the party is injured as a result.

The 10-day limits and the requirements to move “expeditiously” reflect Congress’s awareness that the notice-and-takedown process must move quickly to be effective, given that copyrighted material may be uploaded, downloaded, and reposted immediately and exponentially. As the legislative history explains, Congress was concerned with “balanc[ing] *the need for rapid response to potential infringement*

with the end-users' legitimate interests in not having material removed without recourse." S. Rep. No. 105-190, at 21 (emphasis added).

B. The Massive Scale Of Online Infringement

The explosion of online infringement since the passage of the DMCA underscores the importance of construing the DMCA consistently with Congress's intent. The scale of online infringement, and the attendant burdens imposed on copyright holders who must police that infringement to protect their rights, is massive.

1. Online infringement is rampant and damaging to the recording industry

When Congress enacted the DMCA in 1998, it understood that the ease with which digital information is spread would "facilitate pirates who aim to destroy the value of American intellectual property." H.R. Rep. No. 105-551, pt. 1, at 9. Congress was right. One year after the DMCA's enactment, Napster launched a peer-to-peer file-sharing program that let users exchange infringing copies of recorded music. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001). That marked the beginning of large-scale online infringement.

Since then, websites that profit from infringement have proliferated in many forms, including (1) storage sites that allow users to upload copyrighted content that is accessible to others, *see*,

e.g., 4Shared, <http://www.4shared.com/?locale=en> (last visited Sept. 14, 2016); (2) peer-to-peer (“P2P”) sharing networks that enable users to download copyrighted content from each other for free, while the service provider profits from advertising, subscriptions or donations, *see, e.g.*, The Pirate Bay, <http://thepiratebay.org> (last visited Sept. 14, 2016); and (3) infringement directories that provide working links to infringing content, *see, e.g.*, Torrentz, <http://torrentz.eu/> (last visited Sept. 14, 2016).³

These uses have led to rampant infringement on a massive scale. For example:

- In 2015, there were four *billion* downloads of music via BitTorrent file-sharing, which is only one of several easily accessible means of obtaining infringing content. *See*

³ New systems are always evolving, often armed with ingenious technologies to thwart copyright enforcement. In 2013, within a year after federal authorities shut down the cyberlocker Megaupload and indicted its executives, Megaupload’s founder created a new site that (1) used encryption technology in an attempt to insulate itself from claims that it knowingly aided infringement and (2) lacked a search function, making it harder for copyright holders to identify infringing content. *See* Jeremy Kirk, *File-sharing site Mega fields 150 copyright infringement warnings*, PC World (Jan. 30, 2013), www.pcworld.com/article/2026678/filesharing-site-mega-fields-150-copyright-infringement-warnings.html. In July 2016, Megaupload’s founder announced plans for an “improved” version of his original site. *See* Michael Kan, *File sharing site Megaupload will return in January, claims Kim Dotcom*, (July 11, 2016), www.pcworld.com/article/3094105/internet/file-sharing-site-megaupload-will-return-in-january-claims-kim-dotcom.html.

International Federation of the Phonographic Industry (“IFPI”), *Digital Music Report 2015* at 38 (2015), www.ifpi.org/downloads/Digital-Music-Report-2015.pdf.

- 20% of internet users worldwide access unauthorized music services on a regular basis. This estimate does not include smartphone and tablet-based mobile piracy, which is rapidly growing. See IFPI, *Tackling Music Piracy*, www.ifpi.org/music-piracy.php (last visited Sept. 14, 2016). The proportion of infringing users approaches 30% in North America. See *Universal Pet.* 23.
- From March to September 2012, there were nearly 100 million illegal downloads of music in the United States. See British Broadcasting Corporation, *A glimpse at piracy in the UK and beyond* (Sept. 17, 2012), www.bbc.com/news/technology-19601653.
- A 2011 study estimated that the United States consumes between \$7 to \$20 billion worth of digitally pirated music per year. See Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* at 56 (Feb. 2011), www.iccwbo.org/Data/Documents/Bascap/Global-Impacts-Study-Full-Report/.

Infringement of music is rampant on user-uploaded content (“UUC”) sites, including YouTube, where Lenz posted her video. These sites host massive amounts of copyrighted material. And their

owners know it. A 2006 study revealed that 63% of YouTube videos contained copyrighted material, or had been removed and taken down. *See* Excerpts of Record, *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir. Oct. 9, 2013), ECF No. 24-5, at ER829-30, ER940-41. And copyright holders' multi-year struggle to hold YouTube liable for knowingly housing infringing content demonstrated that YouTube knew that "75-80% of all YouTube streams contained copyrighted material." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012).

It is easy for users on UUC sites to engage in the unauthorized use or copying of recorded music. They can post wholesale copies of protected audio-only works or music videos, providing unauthorized, free access to anyone who visits the site. Users may utilize any number of free "ripping" technologies to download just the music portion of any music video from YouTube or other sites. *See, e.g.,* ListenToYouTube.Com, www.listentoyoutube.com (last visited Sept. 14, 2016). And users can easily appropriate copyrighted music for their "own" video creations, as Lenz did here. Copyright law requires users to obtain a license to use copyrighted music in their videos, *see, e.g.,* *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 481 n.8 (6th Cir. 2003), but UUC users routinely use music without permission.

Such unauthorized uses of copyrighted music unlawfully deprive the RIAA's members and other copyright holders of significant revenue and allow many websites and their advertisers to profit from infringing conduct. Indeed, this widespread theft of

intellectual property has harmed the entire recording industry. From 1999 to 2011, album sales – in physical and digital form combined – decreased by more than 39 percent, from 755 million to 458 million. *See* Eduardo Porter, *The Perpetual War: Pirates and Creators*, N.Y. Times (Feb. 4, 2012), www.nytimes.com/2012/02/05/opinion/sunday/perpetual-war-digital-pirates-and-creators.html?_r=0. This is unsurprising, as people who access infringing music are less likely to pay for legitimate access to recorded music. *See* IFPI, *Digital Music Report 2012* at 16 (2012), www.ifpi.org/content/library/dmr2012.pdf (only 35 per cent of P2P users in the U.S. in 2010 also paid for music downloads).

2. Policing copyright infringement is a staggering burden

Faced with a tidal wave of online piracy, copyright holders must expend enormous effort to enforce their rights through the notice and takedown process. This procedure is a time-consuming, costly, and incomplete fix as it is, even *before* the addition of an unwarranted requirement to engage in a fair use analysis.

Trying to keep up with the sheer quantity of infringing content on the internet is a never-ending task. As of March 2010, YouTube was adding 24 hours of new content to its site *every minute*. *See Viacom Int'l*, 676 F.3d at 28. By June 2013, that number had jumped to 100 hours. *See* Internet Archive, YouTube Statistics, <http://web.archive.org/web/20130612121627/http://www.youtube.com/yt/press/statistics.html> (last visited Sept. 14, 2016).

And in July 2015, that number had quadrupled to 400 hours. See Mark R. Robertson, *500 Hours of Video Uploaded to YouTube Every Minute [Forecast]*, REELSE (Nov. 13, 2015), www.reelseo.com/hours-minute-uploaded-youtube/. That equals 1,000 days—nearly $2\frac{3}{4}$ years—of new content per hour.

YouTube is just one of the many UUC sites that copyright holders must tirelessly monitor to protect their works. Thus, the copyright holder must search hundreds of websites to locate specific URLs containing or linking to the unauthorized uses of its works. A number of these sites make enforcement even more difficult by, for example, eliminating the ability to search the site. See Jeremy Kirk, *File-sharing site Mega fields 150 copyright infringement warnings*, PC World (Jan. 30, 2013), <http://www.pcworld.com/article/2026678/files-sharing-site-mega-fields-150-copyright-infringement-warnings.html>.

For those works that copyright holders do succeed in locating, they must send a formal takedown notice to the service provider. That is a cumbersome task, given the volume of infringement and number of infringing sites. The statute requires that a notice (1) be “a written communication”; (2) be made to the service provider’s “designated agent”; (3) bear the signature of someone authorized to act for the copyright holder; (4) state that the signer is authorized to act on behalf of that owner; (5) swear, under penalty of perjury, that the information provided is accurate; (6) state that the sender “has a good faith belief that use of the material in the manner complained of is not authorized”; (7) identify

the copyrighted work that is allegedly infringed; (8) identify the material that is claimed to be infringing in a manner “sufficient to permit the service provider to locate the material”; and (9) contain information sufficient to permit the service provider to contact the complaining party. 17 U.S.C. § 512(c)(3)(A)(i)-(vi). Notably, some sites make the service provider’s designated agent difficult to identify, complicating the task of sending notices.

The copyright owner must satisfy all of those requirements for each and every notice it sends. And it must provide notice for each separate instance of infringement. Certain courts have held that it is not enough to send one notice covering a particular sound recording, and that service providers are not obligated to take down all copies appearing on their sites. Rather, the copyright owner must identify every URL (Uniform Resource Locator, or web address) containing or linking to the unauthorized use of its work. *See Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 528-29 (S.D.N.Y. 2010). New notices must be sent for each additional posting and each time a prior infringement is reposted.⁴ Thus, copyright holders

⁴ Even if a site removes the infringing content (and not all do), many sites do nothing to stop the removed content from being reposted. Or the user simply finds a new site on which to continue her infringement. *See, e.g., Biosafe-One, Inc. v. Hawks*, 524 F. Supp. 2d 452, 461 (S.D.N.Y. 2007) (alleged infringer moved its site to new domain after being shut down by hosting company that received a takedown notice); *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 335 (D. Mass. 2013) (alleged infringer moved blog to new site to repost copyrighted photo).

must send notices of repeat infringements of the same copyrighted content to the same providers over and over again.

Trying to keep up with the volume of infringement is a Sisyphean task. Consider the following statistics:

- Since 2012, the RIAA has noticed *over 175 million infringements* of music. *See* Joint Comments of American Association of Independent Music et al. at 4, In the Matter of Section 512 Study, Docket No. USCO-2015-7, Before the United States Copyright Office, Washington D.C. (“Music Community Filing”), <http://www.riaa.com/wp-content/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf>.
- In the short period between the Grammy nominations (December 7, 2015) and the Grammy awards (February 16, 2016), nearly 4,000 infringing links were noticed to digital services for just the five nominated “Record of the Year” tracks. *See id.* at 14.
- In 2014, the RIAA noticed over 278,000 instances of infringement to just one site, 4shared.com. Of these notices, 97% were for repeat infringements of a sound recording covered by a previous notice. And in just the first two months of 2016, the RIAA sent repeat notices to 4shared.com on over 6,500 tracks. *See id.* at 16, 20.

- In the five months before the website Grooveshark was shut down for willful copyright infringement, the RIAA sent it nearly 300,000 infringement notices, 94% of which were for repeat infringements. *See id.* at 16.⁵

The takedown process is costly and time-consuming for all copyright holders, but it is especially so for small entities and individuals. As a representative of the trade association for independent music labels explained to the House Judiciary Committee:

The time and capital investment required for our community of like-minded, but proudly Independent small business people to monitor the web for usage and take

⁵ Lenz concedes that “[m]ost” DMCA notices “are legitimate.” Lenz Pet. 13. The studies she cites are not to the contrary. One allegedly “found that 28.4% of takedown demands had characteristics that raised clear *questions* about their validity.” *Id.* 14 (emphasis added) (quotation marks omitted). That does not mean the notices were actually erroneous. Another allegedly found that “31% of notices raised significant questions” relating to, among other things, “substantive defenses” and “very thin copyright.” *Id.* at 13 n.6. But a “thin copyright” is a valid copyright, and the possibility of a “defense” does not mean the defense exists or would prevail. In the end, Lenz’s studies allegedly show that no more 1.3% of takedown notices are actually “substantively improper,” whatever that means. *Id.* Indeed, out of the *millions* of notices sent under the DMCA since 1998, Lenz identifies only 12 to support her claim of supposed “DMCA abuse” or that notices are sent for malicious or censorial reasons. *Id.* at 14-18. To the extent there are documented abuses in the DMCA process, it is the counter-notification procedure that is being abused. One study by IFPI of a sample of YouTube counter-notices found that over 80% lacked a good-faith basis for asserting that the material should be restored. *See Music Community Filing* at 34.

subsequent legal action simply does not exist. [Our] member music labels do not have the financial means or resources to house a stable of systems people and lawyers to monitor the Internet and bombard users with DMCA takedown notices for seemingly endless illegal links to our musical copyrights.

Statement of Tor Hansen, *Innovation in America: The Role of Copyrights: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2013); see also Statement of Maria Schneider, *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 57 (2014) (“Taking my music down” is “frustrating and depressing As fast as I take my music down, it reappears again on the same site—an endless whac-a-mole game.”).

It is no wonder that some copyright holders have given up. As musicians Eric Hilton and Rob Garza explained to the Copyright Office:

Most of [our] takedown notices were ignored. And if our music was taken down, it would almost immediately return on another site or even the same site. We were spending more and more resources on the takedown notices, and we were consistently getting less and less in return. Eventually, we decided to stop sending the notices altogether. It was

simply an exercise of throwing good money after bad.

Music Community Filing, Appendix E at 3.

II. The DMCA's Counter-Notice and Put-Back Procedure Is The Appropriate Place For Uninjured Parties To Obtain Their Remedy

The DMCA offers a remedy to internet users who believe that their content was improperly taken down, whether because it constitutes a fair use or otherwise: the counter-notice and put-back procedure.

As explained earlier, the user whose material is blocked or removed may send a counter-notice to the service provider, who must then provide it to the copyright owner. At that point, the copyright owner has as few as 10 days to sue for infringement. If it does not, the service provider must restore the user's material online to maintain immunity.

This counter-notice and put-back procedure was added to protect users' interests in ensuring that non-infringing material "not be taken down." H.R. Rep. No. 105-551, pt. 2, at 59 (1998). And together, the "notification and counter-notification requirements . . . balance the duties of service providers, the rights of copyright owners and the rights of other users." *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1179 (C.D. Cal. 2002).

There are ample free resources to assist users who wish to invoke the put-back remedy. YouTube and other sites have mechanisms that facilitate the submission of counter-notices. *See, e.g.*, Counter Notification Basics, YouTube Help, <https://support.google.com/youtube/answer/2807684?hl=en> (last visited Sept. 14, 2016). And other online resources are available, including tutorials and templates of counter-notices. *See, e.g.*, Disputing Copyright Notifications, FairUseTube.org, <http://fairusetube.org/guide-to-youtube-removals/4-disputingcopyright-notifications> (last visited Sept. 14, 2016).

Furthermore, a user who issues a counter-notice gets the removed work rapidly reposted *for good*, unless the copyright holder pursues a lengthy and expensive lawsuit. The whole point of the system is thus to avoid litigation, not to further it. Indeed as demonstrated above, millions of takedown notices are sent to combat the massive scale of online infringement, just as Congress anticipated. In order for the takedown system to work rapidly and effectively, as Congress intended, Congress provided both parties with a rapid system of relief. For users, that relief is found in the “put-back” process. Under that process, users whose material was taken down in error get their material rapidly restored. To grant users like Lenz – whose material is put back as Congress intended, who do “not care” that their material was temporarily taken down (Universal App. 76a), and who suffer no concrete injury – the additional remedy of a federal suit designed solely to advance a policy agenda is contrary to Article III and to the core purpose of the DMCA.

III. The DMCA Does Not Require Copyright Holders To Consider The Affirmative Defense Of Fair Use Before Sending Takedown Notices

The decision below is all the more troubling because Article III's standing requirements ensure that federal courts reach out to interpret federal statutes only when presented with a true case or controversy. Where, as here, the plaintiff has suffered no injury, the only purpose of the suit can be – as this one's purpose is – to prompt a federal court to change the law. That is what happened here. This case is a textbook example of the harm that can result when courts reach out to decide questions of first impression where no actual harm occurred. The Court of Appeals construed the DMCA to impose a new requirement on copyright owners of evaluating fair use before sending takedown notices. That requirement is nowhere to be found in the statute, and imposing it conflicts with the purpose of the DMCA and will itself generate needless litigation.

Given the volume of online infringement that Congress correctly anticipated and the difficulties of combatting it, Congress did not intend to impose on copyright holders the additional burden of considering whether infringing material could constitute fair use before sending a takedown notice.

Section 512 of the DMCA requires takedown notices to 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.” 17 U.S.C. § 512(c)(3)(A)(v). The Ninth Circuit held that “the statute unambiguously contemplates fair use as a use authorized by the law” and therefore requires copyright holders to consider fair use. Universal App. 9a. But the DMCA does not define “authorized by . . . the law” or use that phrase in isolation. Rather, the DMCA requires the takedown notice to state that the infringing material is not “authorized by the copyright holder, its agent, or the law.” 17 U.S.C. § 512(c)(3)(A)(v) (emphasis added).

“Under the familiar interpretive canon *noscitur a sociis*, a word is known by the company it keeps.” *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quotation marks omitted). A use of copyrighted material is “authorized by the copyright holder” or “its agent” if that use is the subject of a direct license. If “authorized” means “licensed” in this context, this suggests that it also means “licensed” in the phrase “authorized by . . . the law.” Indeed, the copyright statute contains “statutory” or “compulsory” licenses that authorize certain uses of copyrighted material without the permission of the copyright holder or its agent. 17 U.S.C. §§ 112(e), 114, 115. In stating that the infringing use identified in the takedown notice is not “authorized by . . . the law,” the copyright holder is attesting to its good faith belief that the use is not covered by a statutory license—*not* that the copyright holder has analyzed fair use.

Indeed, fair use is not “authorized” by law. As this Court has repeatedly held, fair use is an

“affirmative defense” to infringement. *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985). As such, the doctrine excuses unauthorized copying; it doesn’t authorize it in advance. *See, e.g.*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1238 (11th Cir. 2014) (“Fair use is a defense that can excuse what would otherwise be an infringing use of copyrighted material.”); *Wall Data Inc. v. L.A. Cty. Sheriff’s Dep’t*, 447 F.3d 769, 777 (9th Cir. 2006) (“For more than a century, courts have excused certain otherwise infringing uses of copyrighted works under the fair use doctrine.”); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 410 (5th Cir. 2004) (“fair use excuses otherwise actionable infringement”); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978) (asking “whether defendants’ infringement can be excused by the fair use defense”). The Ninth Circuit therefore erred in holding that fair use is “authorized” by law, rather than merely “excused.” *See, e.g.*, *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 343 & n.17 (D. Mass. 2013) (holding that “Congress did not require that a notice-giver verify that he or she had explored an alleged infringer’s possible affirmative defenses” and that “because a fair use analysis is only undertaken after unauthorized copying, by definition fair use cannot be an ‘authorized’ use for purposes of the DMCA” (quotation marks omitted)).

The Ninth Circuit’s rule is akin to requiring the plaintiff in an infringement suit to plead, as part of its affirmative claim, that the alleged infringement is not a fair use. The drafters of the Copyright Act, however, “resisted pressures from special interest

groups to create presumptive categories of fair use” and decided instead to “structure[] the [fair use] provision as an affirmative defense” that the alleged *infringer* has the burden to assert. *Harper & Row Publishers, Inc.*, 471 U.S. at 561; *accord Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). There is nothing in the DMCA to suggest that Congress sought to treat fair use differently in the notice-and-takedown process and to force copyright holders to raise and refute the defense before sending their notices. In holding otherwise, the Ninth Circuit improperly rewrote the DMCA.⁶

Finally, imposing the *additional* obligation of considering whether every instance of unauthorized use might be excused by the affirmative defense of fair use would also thwart Congress’s goal of providing copyright owners with a “*rapid* response to *potential* infringement.” S. Rep. No. 105-190, at 21 (emphasis added).

The fair use doctrine “has been called ‘the most troublesome in the whole law of copyright.’” *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)). It does not lend itself to rapid or simple judgments. Instead, the determination of whether copying is fair use involves a balancing of multiple factors, including the four non-exclusive factors listed in 17 U.S.C. § 107. The

⁶ The Ninth Circuit relied on the text of 17 U.S.C. § 107, which states that a fair use is “not an infringement.” But that does not mean the use was initially “authorized.” To the contrary, the affirmative defense presumes that unauthorized copying has occurred.

fair use analysis does not lend itself to “bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell*, 510 U.S. at 577.

The indeterminacy of the fair use inquiry is legendary. See, e.g., *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (fair use doctrine is “so flexible as virtually to defy definition” (quotation marks omitted)); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.08, at 12B-147 n.16 (Matthew Bender, rev. ed.) (“Usually, fair use determinations are so clouded that one has no sure idea how they will fare until the matter is litigated.”). It is therefore difficult to understand how a copyright holder could be required to rapidly conclude that a use might be fair or not, particularly when the statutory factors point in different directions (as is often the case).

Adding to the complexity, at the time the copyright holder sends its notice, it will almost never have access to the full scope of information necessary to perform a fair use analysis, since a number of relevant facts will lie exclusively with the party *asserting the defense*. For example, one of the statutory factors is the “purpose and character” of the use, including whether the use is for a commercial purpose. 17 U.S.C. § 107(1). A copyright owner viewing a posting on YouTube—a commercial website—cannot discern an individual poster’s purported non-commercial purpose because that purpose would not be obvious from the posting

itself.⁷ And since the statutory factors are non-exclusive, the door is open for even more unknown information.

Copyright holders battling infringement on the massive scale that exists online cannot easily engage in the time-consuming, indeterminate exercise of evaluating fair use before sending a takedown notice. As noted above, the RIAA alone has noticed over 175 *million* infringements since 2012. Requiring copyright holders to engage in this slow exercise on top of the existing burdens of sending takedown notices would eviscerate Congress' intent to provide a "*rapid* response" system to "potential infringement" on the internet. S. Rep. No. 105-190, at 21 (emphasis added). Congress did not intend this anomalous result.

⁷ Lenz's case is emblematic. Lenz claimed that she posted her video only to share it with her family, and because her "mother has difficulty downloading email files but knows how to access the YouTube website." Universal App. 96a. Universal could not have known this when it sent its takedown notice. To the contrary, YouTube is a commercial site that allows its users to monetize their postings through advertising.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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September 15, 2016