

No. 16-217

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IN THE  
**Supreme Court of the United States**

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STEPHANIE LENZ,

*Petitioner,*

*v.*

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

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**REPLY BRIEF OF PETITIONER**

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**REPLY BRIEF**

Every brief filed in this case, including Universal’s own brief, confirms that the Petition raises a question of exceptional national importance. There is no dispute that the Digital Millennium Copyright Act’s safe harbors provide the essential legal underpinnings of the modern Internet, carefully balancing the rights of service providers, copyright owners and users to help the Internet thrive as a space for expression and commerce. Yet the Court has never had occasion to review that balance, much less consider whether Congress intended to give copyright owners a free pass to remove lawful speech from the Internet based solely on an *unreasonable* belief that such speech is infringing.

The core question here – what “good faith belief” means in the affirmation that a sender of a DMCA takedown notice must make – cannot be answered in a vacuum. In the context of the DMCA, and the balance Congress was hoping to strike in that law, a “good faith belief” must be one that is both reasonably *and* subjectively held, or Section 512(f) is rendered practically meaningless.

Given the vast amount of online speech that is vulnerable to DMCA takedowns, the question of whether Congress intended Section 512(f) to play an effective role in curbing abuse is crucial. Thus its proper interpretation raises a question of vital importance to the future of free and vibrant discourse on the Internet.

Nor do any of the points raised by Universal suggest that the Court should await another case to decide this important question. An affirmative answer to the question

presented would moot the factual development Universal suggests is necessary and, Universal's cross-petition notwithstanding, Ms. Lenz plainly has standing.

**I. The Standard for “Good Faith Belief” in Section 512 Is an Issue of Exceptional National Importance that Can and Should Be Answered by the Court.**

The briefs submitted in connection with the Petition – including Universal's own brief – illustrate why *certiorari* is appropriate in this case.

**A. The Phrase “Good Faith Belief” Is Subject to Multiple Interpretations; Only One Serves Congress's Purpose.**

First, as even Universal implicitly concedes, proper interpretation of the phrase “good faith belief” requires an understanding of the context in which the phrase is used. For example, Universal concedes that in some situations, a good faith belief can be an objective condition. Opp. 5–6 (discussing *Zaldivar v. City of L.A.*, 780 F.2d 823 (9th Cir. 1986)).

Here, proper attention to context compels the conclusion that, for purposes of Section 512, a “good faith belief” must be subjectively held (a “belief”) *and* reasonable (held in “good faith”). Pet. 20–26. As the legislative history shows, Congress was concerned that the takedown process could be abused, which is why it required the affirmation of good faith belief that included a factual determination (whether the use is authorized by the copyright owner or its agent) *and* a legal determination (whether the use authorized by law). S. Rep. No. 105-190,



at 21 (“The Committee was acutely concerned that it provide all end-users . . . with appropriate procedural protections to ensure that material is not disabled *without proper justification.*”) (emphasis added).

Nothing suggests that Congress intended to allow takedowns based on nothing more than what the sender thinks *might* be the law. Indeed, the deterrent purpose of Section 512(f) and the fundamental precept that everyone is charged with knowing the law counsel against such an assumption. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 583-84 (2010).

Moreover, contrary to Universal’s claim (Opp. 4–5), the Court’s decision in *Cheek v. United States*, 498 U.S. 192 (1991), does not foreclose a ruling that the good faith belief must be reasonable. The Court did not address the statutory construction of the phrase “good faith belief” in *Cheek*. Instead, the Court granted *certiorari* “[b]ecause the Seventh Circuit’s interpretation of ‘willfully’ as used in [26 U.S.C. §§ 7201 and 7203] conflict[ed] with the decisions of several other Courts of Appeals.” *Id.* at 198; see also *id.* at 194 (“This case turns on the meaning of the word ‘willfully’ as used in §§ 7201 and 7203.”). The phrase “good faith belief” *does not appear* in either of those sections of the Internal Revenue Code, which concern willful failure to pay taxes. 26 U.S.C. §§ 7201, 7203.

In *Cheek*, the Seventh Circuit had held that a “good faith misunderstanding of the law” would negate willfulness, but not if that belief was unreasonable. 882 F.2d 1263, 1268 (7th Cir. 1989). The Court reversed, because to prove willfulness, the prosecution was required to show a “voluntary, intentional violation of a known legal

duty.” 498 U.S. at 201. The use of the word “willfully” in a criminal statute demonstrated Congress’s intent to depart from the ordinary presumption that ignorance of the law is not a defense, and thus even an objectively unreasonable belief would preclude criminal liability. *Id.* at 200, 203.

Section 512(f), however, is a civil provision, and does not require “willful” misconduct. Thus, in contrast to crime of willful failure to pay taxes, nothing in Section 512(f) evidences an intent by Congress to change the presumption that ignorance of the law does not constitute excusable neglect.

**B. Internet Users, Creators and Providers Agree that the Extent of Section 512’s Protections for Lawful Speech Is a Critical Question of National Importance.**

Universal seeks to downplay the importance of correctly interpreting Section 512(f) by insisting takedown abuse is rare and, where it happens, the victims of takedown abuse should content themselves with the counter-notice process. Neither point is correct.

As many examples and studies show, misuse of the DMCA takedown system is common. *See, e.g.*, Brief of Automattic et al. 5–11; Brief of Yes Men et al. 12–25. A recent study found, based on a review of more than 108 million takedown requests over a six-month period, that approximately seven percent of DMCA takedown demands implicated potential fair use defenses. Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and*

*Takedown in Everyday Practice*, 12 (March 29, 2016).<sup>1</sup> That translates to more than seven million instances of potentially lawful speech that were taken offline. Those takedowns amount to extrajudicial prior restraints, without any of the legal protections that would normally attend.

Congress intended Section 512(f) to provide some of that protection by deterring takedown abuse, but the strength of that deterrent effect depends on the interpretation of the phrase “good faith belief.” The circuit court’s erroneous conclusion, more than a decade ago, that for purposes of Section 512 any subjectively held belief – unreasonable or not – is a “good faith belief,” *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000 (9th Cir. 2004), sent a dangerous message to copyright owners: that they need not fear accountability for abusive allegations as long as they believe them to be true.

The decision below reinforced that mistake. Even though Universal *admitted* it never instructed Mr. Johnson to consider fair use, Pet. App. 43a, Ms. Lenz has had to litigate her case for over nine years. If, however, the Court grants *certiorari* and reverses the circuit court’s interpretation of “good faith belief,” copyright owners will be forced to exercise some caution before forcing speech off of the Internet. Moreover, contrary to Universal’s suggestion, Opp. at 15, an objective standard would streamline any litigation that occurs, because whether or not a takedown request was reasonable could often be resolved by a court as a matter of law rather than requiring time-consuming discovery into subjective beliefs.

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1. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628).

Universal’s contention that Congress intended users to rely only on Section 512(g)’s put-back procedure is also incorrect. Opp. 7, 14–16. While some users have been able to have their speech promptly restored and in a very few instances even have obtained monetary recompense (Opp. 10–11), most users lack the resources to pursue such remedies. *See, e.g.*, Brief of Yes Men et al. 17–19. Moreover, that argument suggests that Congress intended to give private parties an easy path to censorship – just a temporary one.<sup>2</sup> There is nothing in the legislative history to support that conclusion; to the contrary, it would render Section 512(f) little more than surplusage. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (statutes should be construed “so as to avoid rendering superfluous” any statutory language).

Finally, Universal misunderstands Ms. Lenz’s First Amendment concerns. Like all congressional powers, the power to legislate copyright is necessarily bounded by the First Amendment. As the Court recognized in *Golan* and *Eldred*, that boundary is drawn at the “built-in First Amendment accommodation” that mark the traditional contours of copyright: fair use and the idea/expression dichotomy. *See Golan v. Holder*, 132 S. Ct. 873, 889–93 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003). If Universal is right, and fair users have no meaningful judicial recourse when their speech is taken down, the DMCA has decimated that accommodation for online speech and requires First Amendment scrutiny.

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2. Universal’s suggestion that the counter-notice process is better than the pre-DMCA preliminary injunction process is exactly backward: prior to the DMCA, a user could count on judicial review *before* her speech was taken offline. The counter-notice process, which necessarily takes place after takedown, is hardly a replacement.

The fact that private actors send takedown notices cannot render the DMCA immune from constitutional review, any more than a statute that created an incentive system for the takedown of allegedly defamatory speech could. Either regime would create an impermissible burden on speech, albeit an indirect one. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) (“The distinction between laws burdening and laws banning speech is but a matter of degree.”); *In re Tam*, 808 F.3d 1321, 1340 (Fed. Cir. 2015) (en banc) (it is possible for the government to impermissibly burden speech “even when it does so indirectly”), *cert. granted sub nom., Lee v. Tam*, No. 15-1293 (Sept. 29, 2016).

Online communication has become an essential part of our culture, commerce, and politics. *U.S. Telecom Ass'n v. Fed. Comm'n Comm'n*, 825 F.3d 674, 698 (D.C. Cir. 2016). The Petition asks the Court to consider whether copyright holders can interfere with that communication with impunity. It therefore raises a question of national importance. Pet. 8–19.

## **II. This Is the Right Case to Decide this Issue of National Importance.**

Not only is the question presented one of national importance, this is the ideal case to decide it. First, no further factual development is necessary. If the Court grants Ms. Lenz’s Petition and agrees that Section 512(f) requires a reasonable good faith belief, the case effectively ends there; Universal’s purported belief that Ms. Lenz’s video was infringing was unreasonable as a matter of law. Second, Ms. Lenz unquestionably has standing, for the reasons given in Ms. Lenz’s brief in

opposition to Universal's petition (No. 16-218). Third, Section 512 unambiguously requires that the sender of a DMCA takedown notice consider whether targeted use is authorized by the law, and fair use is part of the law, as recognized by almost every court to have considered the issue. In short, none of the issues raised by Universal counsel against deciding the question presented now, and in this case.

**A. A Ruling in Ms. Lenz's Favor Will Render any Further Factual Development Unnecessary.**

No further factual development is necessary before the Court considers whether the "good faith belief" in Section 512 must be reasonably held. Universal argues – in a footnote – that although its guidelines make no mention of fair use, and its employee who followed those guidelines likewise never referred to fair use in his testimony, that "Universal's guidelines did instruct employees to consider—and Johnson himself considered—a number of fair use factors." Opp. 19 n.14. Yet in response to Ms. Lenz's Request for Admission, Universal *admitted* that it *had not* instructed Mr. Johnson to consider fair use during his review of YouTube videos. Pet. App. 43a. And Mr. Johnson never testified that he gave a single thought to commerciality, market harm, or the nature of the work. 7ER 1146:18–1147:10, 1148:4–1154:16. Moreover, the Copyright Act requires consideration of *all* statutory fair use factors, 17 U.S.C. § 107, not just "a number" of them. *See* Pet. App. 28a–29a (dissenting circuit court opinion); *see also* Pet. App. 43a–44a (considering facts without the context of the fair use doctrine is insufficient).

But *none of that matters* if Universal was required to represent that it had a *reasonably* held belief that Ms. Lenz’s video was a fair use. Whether Universal considered “a number” of fair use factors or not, because the only *reasonable* conclusion was that Ms. Lenz’s use was a fair use, Pet. App. 29a n.3 (dissenting circuit court opinion), Universal’s contrary representation was false. Pet. 22–24. That is, answering the question presented in the affirmative will *moot* the further factual development Universal highlights. The question presented is thus ripe for resolution now.

### **B. Ms. Lenz Has Standing.**

Universal erroneously argues that the Court should not grant *certiorari* because Ms. Lenz lacks standing. Opp. 16–17. Ms. Lenz has addressed the issue in her brief in opposition to Universal’s petition (No. 16-218), and will not belabor the point here. She has standing.

### **C. The Court Need Not Consider Whether a Fair Use Is Authorized by Law; Congress Has Already Done So.**

Universal’s suggestion that resolving the question presented requires deciding whether fair uses are authorized by law is also incorrect. Opp. 17–19. That decision has already been made by numerous courts, including this one. Every judge who has considered the argument that fair use is *not* authorized by law over the course of this case has firmly rejected it: the district court, Pet. App. 41a–45a, circuit court majority, Pet. App. 9a–14a, and the dissent, Pet. App. 25a. And with good reason: Section 107 of the Copyright Act is “the

law” and it unambiguously states that a fair use is “not an infringement of copyright.” 17 U.S.C. § 107; *see also* Pet. App. 11a. The Court has said the same. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984) (“the definition of exclusive rights in § 106 of the present Act is prefaced by the words ‘subject to sections 107 through 118.’ Those sections describe a variety of uses of copyrighted material that ‘are not infringements of copyright notwithstanding the provisions of § 106.’ The most pertinent in this case is § 107, the legislative endorsement of the doctrine of ‘fair use.’”)

That fair use is raised in litigation procedurally as an affirmative defense does not mean that it is not part of “the law.” For example, Universal concedes that a use pursuant to a compulsory license, 17 U.S.C. § 112, is “authorized by law,” notwithstanding that license, too, is an affirmative defense. Pet. App. 13a.

Universal’s sole basis for distinguishing between Section 112 (which it concedes it must consider before sending a DMCA takedown demand) and Section 107 (which it claims it need not consider) is that fair use determinations can be hard. Opp. 18–19. Yet nothing in the text of Section 512 suggests that “authorized by . . . the law” means “authorized by the law but only if it is easy to determine.”

Moreover, while some fair use determinations might be hard to make, others are not. A “rapid response” remedy such as that afforded by the DMCA takedown process is best suited for situations in which the copyright owner can readily form a good faith belief that the targeted material is not authorized by the law. Although Universal’s *amicus* in support of its own petition asserts that online infringement is “rampant,” the examples to



which it points involve full copies of works accompanied by no commentary or other indicia of fair use. *See* Brief of Recording Industry Ass’n of Am. at 11 (No. 16-218) (describing content as “wholesale copies of protected audio-only works or music videos”). No great effort is necessary to form a reasonable belief that such a use is not a fair use, and thus requiring such a determination cannot hinder legitimate efforts to combat wholesale copyright infringement.

By the same token, no great effort is required to form a reasonable belief that some uses are likely to be fair. Indeed, content creators like Universal itself, and the artists its amicus RIAA represents, make such determinations all the time, as do journalists, scholars, video artists and ordinary people. The study referenced above, *supra* at 4–5, which identified millions of potential fair uses targeted by DMCA notice, came to that conclusion based on a facial review; the researchers did not have special access to the users themselves. *See* Urban et al., at 26–28. They were nonetheless able to identify potential fair uses.

Section 512(f) challenges should be a viable option for fair users. Nothing in Section 512 suggests that Congress intended that copyright owners use the DMCA takedown process for every potential infringement. If a copyright owner insists on sending a takedown demand when infringement is uncertain, it must accept the risk that it has staked out an unreasonable position, and the potential for liability that flows therefrom under Section 512(f).<sup>3</sup>

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3. Strikingly, Universal’s *amicus* continues to insist that uses such as Ms. Lenz’s use must be licensed. Brief of Recording Industry Ass’n of Am. at 11 (No. 16-218).

Finally, a case involving a fair use, such as this case, is an ideal vehicle for answering the question presented by the Petition. Takedown requests targeting fair uses are precisely the kind of actions that are most likely to give rise to a Section 512(f) claim. Fair use protects all kinds of critical and political commentary that a person may want taken offline and, conversely, that a secondary user might wish to defend. By contrast, the vast majority of takedown demands concern clear cases of infringement where the targets are unlikely to seek judicial review.

### CONCLUSION

Ms. Lenz's petition for a writ of *certiorari* should be granted.

Date: October 11, 2016

Respectfully Submitted,

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