

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Channel 781 News,

Plaintiff,

v.

Waltham Community Access Corporation,

Defendant.

Case No.: 1:24-cv-11927-PBS

**MEMORANDUM IN SUPPORT OF PLAINTIFF CHANNEL 781 NEWS'S MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT WALTHAM
COMMUNITY ACCESS CORPORATION'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND..... 2

 I. WCAC WAS CREATED BY THE WALTHAM CITY GOVERNMENT, DEPENDS ON THE CITY FOR ITS FUNDING, AND CONSISTENTLY PORTRAYS CITY OFFICIALS IN A POSITIVE LIGHT. 2

 II. WCAC’S VIDEOS OF CITY GOVERNMENT MEETINGS ARE MINISTERIAL RECORDS CREATED TO SERVE A GOVERNMENT FUNCTION. 4

 III. CHANNEL 781 OFFERS AN ALTERNATIVE, CRITICAL VIEW OF CITY GOVERNMENT. 4

 IV. WCAC’S APRIL 2023 STATEMENT AND MEETING WITH CHANNEL 781..... 6

 V. WCAC TAKES DOWN CHANNEL 781’S VIDEOS, CAUSING ITS CHANNEL TO BE SHUT DOWN. 7

 VI. CHANNEL 781 WAS SILENCED ON THE EVE OF AN IMPORTANT ELECTION..... 8

ARGUMENT 9

 I. SENDING A SECTION 512(C) TAKEDOWN NOTICE REQUIRES AN OBJECTIVELY REASONABLE BELIEF THAT A USE IS INFRINGING..... 9

 A. Section 512(c) Requires a Good Faith Belief. 9

 B. The Statutory Phrase “Good Faith Belief” Embodies An Objective Standard. 10

 II. AT A MINIMUM, AN INFRINGEMENT NOTICE MUST BE BASED ON AN ASSESSMENT OF KNOWN FACTS..... 14

 III. WCAC HAD ALL THE FACTS IT NEEDED TO CONCLUDE THAT CHANNEL 781’S POSTING OF THE STANDALONE MEETING CLIPS WAS A CLEAR FAIR USE..... 15

 A. Channel 781’s Use of the Clips Had a Significantly Different Purpose and Character. 16

 B. The Meeting Videos Are Factual Records of Government Activity Containing Little or No Creative Expression..... 19

- C. The Length of the Clips Was Reasonable in Relation to Channel 781’s Journalistic Purpose.20
- D. Posting the Clips Did Not Meaningfully Impact Any Market for the Meeting Videos, But Advanced a Public Benefit.....21
- IV. WCAC DID NOT HAVE A GOOD FAITH BELIEF THAT CHANNEL 781’S USE OF THE CLIPS WAS INFRINGING.23
 - A. WCAC Improperly Avoided Considering Fair Use Factors 2, 3, and 4.24
 - B. WCAC Ignored Known, Material Facts That Inform Factor 1.....25
 - C. WCAC Distorted Fair Use To Arrive at the Result They Wanted.26
 - D. WCAC’s Characterization of Channel 781 Members’ Discussion Is Incomplete.....27
 - E. WCAC’s Decision Not to Target Other Videos for Takedown Is Immaterial.28
 - F. WCAC’s Conduct Violated Section 512(f) Under Any Standard.29
- V. TAKING DOWN CHANNEL 781’S CLIPS AND ULTIMATELY ITS ENTIRE CHANNEL HARMED CHANNEL 781 AND ITS MEMBERS.....30
- CONCLUSION.....33

TABLE OF AUTHORITIES

Cases

Agric. Rsch. & Tech. Grp., Inc.,
916 F.2d 528 (9th Cir. 1990) 11

Alexander v. Verizon Wireless Servs.,
875 F.3d 243 (5th Cir. 2017) 11

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir.2003) 12

Am. Paper Recycling Corp. v. IHC Corp.,
775 F. Supp. 2d 322, 327 (D. Mass. 2011) 9

Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,
598 U.S. 508 (2023)..... 16, 18

Austin v. McNamara,
979 F.2d 728 (9th Cir. 1992) 12

Authors Guild v. HathiTrust,
755 F.3d 87 (2d. Cir. 2014) 18, 20

Brooks v. Vill. of Ridgefield Park,
185 F.3d 130 (3d Cir. 1999) 12

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994)..... 16, 20, 26

City of Inglewood v. Teixeira,
No. CV–15–01815–MWF (MRWX), 2015 WL 5025839 (C.D. Cal. Aug. 20, 2015)..... 19

Cooper v. Schlesinger,
111 U.S. 148 (1884)..... 15

Coppedge v. United States,
369 U.S. 438 (1962)..... 11

Disney Enters., Inc. v. Hotfile Corp.,
No. 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013)..... 14, 15

Dudnikov v. MGA Ent., Inc.,
410 F. Supp. 2d 1010 (D. Colo. 2005)..... 14

Falls City Indus., Inc. v. Vanco Beverage, Inc.,
460 U.S. 428 (1983)..... 12

Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.,
499 U.S. 340 (1991)..... 19

Google LLC v. Oracle Am., Inc.,
593 U.S. 1, 32 (2021)..... 16, 19, 23

Harper & Row Publishers, Inc. v. Nation Enters.,
471 U.S. 539 (1985)..... 20

Harrell v. Beall,
84 U.S. 590 (1873)..... 11

Hollinger v. Titan Cap. Corp.,
914 F.2d 1564 (9th Cir. 1990) 11

*In the Matter of Amend. of Part 74, Subpart k, of the Commission’s Rules & Reguls. Relative to
Cnty. Antenna Television Systems*,
36 F.C.C.2d 141 (1972) 16

Irobe v. U.S. Dep’t of Agric.,
890 F.3d 371 (1st Cir. 2018)..... 9

Johnson v. New Destiny Christian Ctr. Church, Inc.,
826 F. App’x 766 (11th Cir. 2020)..... 14

Lenz v. Universal Music Corp.,
815 F.3d 1145 (9th Cir. 2016) *passim*

Lenz v. Universal Music Corp.,
No. 5:07-CV-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013)..... 14

McCready v. eBay, Inc.,
453 F.3d 882 (7th Cir. 2006) 11

MFB Fertility, Inc. v. Action Care Mobile Veterinary Clinic, LLC,
730 F. Supp. 3d 740 (N.D. Ill. 2024) 15, 30

Miceli v. JetBlue Airways Corp.,
No. 16-12032-RGS, 2018 WL 1524539 (D. Mass. March 28, 2018) 9

Nunez v. Caribbean Int’l News Corp.,
235 F.3d 18 (1st Cir. 2000)..... 18

Online Pol’y Grp. v. Diebold, Inc.,
337 F. Supp. 2d 1195 (N.D. Cal. 2004) 31, 32

Penobscot Nation v. Frey,
3 F.4th 484 (1st Cir. 2021)..... 15

Perez v. Lorraine Enters.,
769 F.3d 23 (1st Cir. 2014)..... 9

Richards v. Merriam Webster, Inc.,
55 F. Supp. 3d 205 (D. Mass. 2014)..... 25

<i>Rossi v. Motion Picture Ass’n of Am. Inc.</i> , 391 F.3d 1000 (9th Cir. 2004)	12
<i>S.E.C. v. Pinez</i> , 989 F. Supp. 325 (D. Mass. 1997)	15
<i>Shauer v. Alterton</i> , 151 U.S. 607 (1984).....	11
<i>Signal 23 Television v. Anthony</i> , No. 1:17-CV-01452-SDG, 2020 WL 11206863 (N.D. Ga. Sept. 1, 2020)	32
<i>Stern v. Lavender</i> , 319 F. Supp. 3d 650 (S.D.N.Y. 2018)	30
<i>Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.</i> , 756 F.3d 73 (2d Cir. 2014)	18
<i>Tcherepnin v. Knight</i> , 389 U.S. 332 (1967).....	13
<i>Viral DRM LLC v. Navez</i> , No. 3:23-CV-06598-JSC, 2025 WL 8344984 (N.D. Cal. Mar. 17, 2025).....	31
Statutes	
11 U.S.C. § 548.....	11
15 U.S.C. § 13.....	11
15 U.S.C. § 78t.....	11
17 U.S.C. § 107.....	<i>passim</i>
17 U.S.C. § 512.....	<i>passim</i>
18 U.S.C. § 2707.....	11
28 U.S.C. § 1915.....	11
47 U.S.C. § 531.....	16
U.C.C. § 1-201	11
Rules	
Fed. R. Civ. P. 56(a)	9
Legislative Materials	
S. REP. NO. 105-190 (1998).....	10, 13

Other Authorities

Jennifer M. Urban, Joe Karaganis & Brianna I. Schofield, *Notice and Takedown in Everyday Practice* 12 (March 29, 2016)..... 13

Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990)..... 21

INTRODUCTION

The notice-and-takedown regime of the Digital Millennium Copyright Act is a powerful tool for removing content from the internet. Defendant Waltham Community Access Corporation (“WCAC”) knowingly abused that tool to censor a rival group of journalists, Plaintiff Channel 781 News (“Channel 781”), by sending multiple infringement notices to YouTube without considering, in good faith, whether the targeted content was a lawful fair use. As a result, Channel 781’s critical coverage of Waltham city officials, and eventually its entire account, was hidden from public view just days before a consequential city election. Not coincidentally, WCAC is intimately connected to the city government, while Channel 781 is a frequent critic.

To be sure, the media professionals at WCAC were capable of assessing fair use, had they chosen to do so. Instead, irritated that Channel 781 did not seek advance permission for its work, WCAC chose to disregard three of the four fair use factors and ignore facts that would have been central to any good faith inquiry. WCAC knew that its ministerial video recordings of government meetings fulfilled a government function delegated to them by the city, and that the recordings contained vanishingly little creative input by WCAC, if any. WCAC knew that by excerpting carefully selected clips from those recordings and posting them to its YouTube channel for a different audience, Channel 781 was transforming their meaning and message. And perhaps most importantly, WCAC knew that Channel 781’s posts did not and would not harm any licensing market or other financial incentive of WCAC.

Disregarding these and other facts, WCAC staff cherry-picked a single component of the fair use inquiry that they thought supported their goal of taking down Channel 781’s posts—that the clips at issue contained only excerpts of the meeting videos without additional content. A knowingly incomplete fair use inquiry is not enough to create a “good faith belief.” Accordingly, WCAC’s assertions that it had a good faith belief that Channel 781’s videos were not

“authorized by . . . the law” were knowing, material misrepresentations. 17 U.S.C. §§ 512(c)(3)(A)(v); 512(f).

The foundational facts of this case, including the harmful consequences of WCAC’s actions, are not in dispute. Because WCAC’s failure to form a good faith belief is established by undisputed facts, the Court should grant summary judgment to Channel 781. And because simply invoking the term “fair use” before knowingly disregarding it does not establish a good faith belief, the Court should deny WCAC’s motion for summary judgment.

FACTUAL BACKGROUND

I. WCAC WAS CREATED BY THE WALTHAM CITY GOVERNMENT, DEPENDS ON THE CITY FOR ITS FUNDING, AND CONSISTENTLY PORTRAYS CITY OFFICIALS IN A POSITIVE LIGHT.

Defendant WCAC is intimately connected with the government of the City of Waltham, Massachusetts (the City). WCAC operates the only government access channel in the city and owns the only video recording equipment installed in the city council chambers. (Ex. E to the Declaration of Betelhem Gedlu,¹ WCAC’s Answer ¶ 17, ECF No. 37; Ex. B, Wangler Dep. 40:13-42:10). The members of WCAC’s board of directors are appointed by the Mayor of Waltham. (Ex. C, Sheehan Dep. 55:21-56:15; Ex. D, Barrett Dep. 29:7-30:4). The chairman of WCAC’s board of directors, Justin Barrett, who has served in that position for 15 years, is also a member of the City’s Survey and Planning Board as well as the chair of the City’s Community Preservation Committee (CPC). (Ex. D, Barrett Dep. 15:1-16:10). He was appointed to those offices by the city council. (Ex. D, Barrett Dep. 17:17-18:4). City council member Carlos Vidal is an anchor on Waltham Newswatch, WCAC’s news program. (Ex. C, Sheehan Dep. 55:2-18).

¹ Exhibits to the Declaration of Betelhem Gedlu are hereinafter referred to as “Ex.”

WCAC's executive director, Maria Sheehan, speaks regularly with the Mayor and city council members. (Ex. C, Sheehan Dep. 60:17-61:10).

The majority of WCAC's funding comes from payments from the pay-TV services RCN, Verizon, and Comcast, pursuant to franchise agreements between those services and the City. (Ex. C, Sheehan Dep. 22:24-25:14, 43:20-48:13; Ex. D, Barrett Dep. 30:10-16; Ex. P). Under those agreements, the services assign a percentage of subscriber fees to support public, educational, and government (PEG) programming. (Ex. C, Sheehan Dep. 22:24-23:9; 38:23-39:8; 41:4-10). Some of these funds are paid directly to WCAC, while other funds are paid to the City. (Ex. C, Sheehan Dep. 24:2-26:20; 30:13-38:3). The City uses those funds to reimburse WCAC for the purchase of equipment, at the City Council's discretion. (Ex. C, Sheehan Dep. 24:2-26:20; 30:13-38:3). The franchise agreements, including the percentage of subscriber fees earmarked for WCAC, are negotiated by the City's Law Department under the direction of the Mayor. (Ex. C, Sheehan Dep. 29:5-17; 41:4-10).²

WCAC's news reporting on city affairs favors incumbent city officials. For example, reporting on an award given to Middlesex Human Services Agency, a local charity, WCAC's website identified Justin Barrett as the president of the board of that charity, without disclosing his role as WCAC's board chair or his roles on City government commissions. (Ex. B, Wangler Dep. 34:4-35:1; Ex. U). In an August 2022 news article, WCAC News Director Christopher Wangler wrote that Mayor Jeanette McCarthy, in office since 2004, was a "woman of the people" who has "protected the city's interests above all else." (Ex. B, Wangler Dep. 35:3-22; Ex. V). In contrast, Mr. Wangler described her 2023 opponent, city councilor Jonathan Paz, as

² A small percentage of WCAC's income is from other sources. (Ex. C, Sheehan Dep. 23:13-22; 65:9-66:16; Ex. B, Wangler Dep. 43:2-20; Ex. D, Barrett Dep. 33:23-34:9; Exs. L, M, N).

having a “big-city approach” that “doesn’t necessarily resonate in Waltham.” (Ex. B, Wangler Dep. 36:1-20; Ex. W).

II. WCAC’S VIDEOS OF CITY GOVERNMENT MEETINGS ARE MINISTERIAL RECORDS CREATED TO SERVE A GOVERNMENT FUNCTION.

The City designates WCAC as its sole “Government Access” broadcaster. (Ex. C, Sheehan Dep. 39:2-41:3, Ex. B, Wangler Dep. 41:22-42:21, Ex. P, Verizon Agreement at WCAC0000676-81). A central function of a Government Access broadcaster is recording and broadcasting city government meetings. The recordings are broadcast on WCAC’s MAC-TV cable channel and uploaded to the “Government” section of WCAC’s website. (Ex. B, Wangler Dep. 41:22-43:1; Ex. O). WCAC records meetings of the City Council, various city council committees, and many other city commissions and boards. (Ex. B, Wangler Dep. 38:15-39:21). Neither the City government nor any other person or group besides WCAC regularly records most City government meetings, although Channel 781 occasionally records meetings. (Ex. B, Wangler Dep. 50:2-20).

WCAC records entire meetings, gavel-to-gavel. (Ex. B, Wangler Dep. 55:5-56:5; Ex. R, “Waltham Government Television Policies & Guidelines,” at WCAC0000556, WCAC0000558). WCAC camera operators are instructed simply to aim the camera at the person speaking. (Ex. B, Wangler Dep. 52:15-54:18; Ex. R at WCAC0000557). WCAC does not add narration or commentary to the videos, and does not rearrange or otherwise edit them. (Ex. B, Wangler Dep. 54:19-56:5; Ex. R at WCAC0000557).

III. CHANNEL 781 OFFERS AN ALTERNATIVE, CRITICAL VIEW OF CITY GOVERNMENT.

Channel 781 News is an association of citizen journalists in Waltham. Its purpose is to inform Waltham voters about their local government. (Ex. A, Kastorf Dep. 26:3-16). According to WCAC employees, Channel 781’s work frequently “criticized” or “challenged” the City’s

perspective and the “status quo.” (Ex. B, Wangler Dep. 30:3-31:6; Ex. C, Sheehan Dep. 71:18-72:4). Channel 781 produces a scripted “Headlines” show and an unscripted “Debrief” talk show about local affairs. (Ex. A, Kastorf Dep. 41:24-47:3). Additionally, it builds a searchable archive of the statements of Waltham city officials on selected issues as part of its YouTube channel. (Ex. A, Kastorf Dep. 26:3-16). That archive includes excerpts of city council and committee meeting recordings, some of which were taken from WCAC MAC-TV videos. (Ex. C, Sheehan Dep. 107:4-108:3; Ex. B, Wangler Dep. 124:17-21; Ex. A, Kastorf Dep. 44:12-45:5).

When selecting excerpts, Channel 781 members looked for statements by City officials on issues that the members of Channel 781 believed important, such as clips where “someone expressed a certain idea or certain attitude in a way where [the members of Channel 781] thought the audience needed to hear them say it rather than hear us recount.” (Ex. C, Sheehan Dep. 107:4-108:3; Ex. B, Wangler Dep. 124:17-21; Ex. A, Kastorf Dep. 44:12-45:5). They chose clips that were short enough to encourage viewers to discuss issues online and to draw the attention of other news outlets such as the Boston Globe, but long enough to reassure viewers that the clip accurately reflected a speaker’s opinions. (Ex. A, Kastorf Dep. 44:12-49:5; 61:16-62:22; 65:23-66:12; 82:8-21; 86:6-88:11). They gave the clips descriptive titles identifying the speaker, and sometimes including a provocative quotation. (Ex. H). By posting the clips at issue to YouTube, the members of Channel 781 caused them to be captioned for hearing-impaired viewers, and caused YouTube to generate searchable transcripts of the clips. (Ex. A, Kastorf Dep. 48:10-12; 102:17-22).

Channel 781 is non-commercial. (Kastorf Decl. ¶ 4; Ex. B, Wangler Dep. 135:21-136:7). It does not sell advertising or subscriptions nor charge for access to its content. (Kastorf Decl. ¶ 4). Members of Channel 781 contribute their time on a volunteer basis and are not

compensated for their time. *Id.* Its audience consists largely of younger people and people who are relatively new to Waltham, as compared with WCAC's viewers. (Ex. B, Wangler Dep. 96:8-98:14).

IV. WCAC'S APRIL 2023 STATEMENT AND MEETING WITH CHANNEL 781.

On April 6, 2023, WCAC aired a segment on its Waltham Newswatch program in which Ms. Sheehan read a prepared statement:

Our station is a private nonprofit that does not receive taxpayer funding. Over recent years, photographs from our news department, and video from the MAC channel, have been reproduced without our permission. We know this is a reality of the world we live in, but we put copyright disclaimers on our media for a reason. Some have used our content to score political points under the veil of anonymity. Others have used it to encourage residents to hate. This practice can damage reputations and spread misinformation and we do not want to be a part of that. So as we head into a contentious election season, I'm asking the public to respect people who work hard to create our original content. In the interest of transparency, we will entertain requests to reuse our content for free, but misuse is wrong, and it is illegal. Moving forward, the Waltham Channel will take whatever legal steps necessary to protect our content.

(Ex. B, Wangler Dep. 99:23-101:12; Ex. C, Sheehan Dep. 95:10-96:20; Ex. X). The statement was written by Mr. Wangler and edited by Ms. Sheehan. *Id.* Wangler proposed the statement in part because of Channel 781's posting of MAC-TV video clips. (Ex. B, Wangler Dep 104:21-105:20).

Following the broadcast, Joshua Kastorf, a founding member of Channel 781, requested a meeting with Ms. Sheehan. (Ex. A, Kastorf Dep. 107:23-109:24; 114:21-115:7). At the meeting, Kastorf asked why WCAC did not provide captions on its MAC-TV government meeting videos to make them accessible to hearing-impaired viewers. (Ex. A, Kastorf Dep. 115:21-116:4). Sheehan replied that WCAC was not legally required to provide captions and that no one had requested them. (Ex. A, Kastorf Dep. 116:5-8).

The discussion then turned to Channel 781's use of WCAC's government-meeting clips. (Ex. A, Kastorf Dep. 116:17-22). Sheehan told Kastorf that "the problem with what you're doing is that you're not just using these clips to inform people—you're putting your spin on them." (Ex. A, Kastorf Dep. 116:23: 117-2). Sheehan said she would consult WCAC's board about creating a new policy on clip usage, under which Channel 781 would need to request permission for each individual clip. (Ex. A, Kastorf Dep. 117:23-118:9). WCAC subsequently created a draft of such a policy but never published it. (Ex. C, Sheehan Dep. 72:15-75:2; 77:2-9; Ex. Q). Kastorf explained that, while requesting permission might be standard industry courtesy, fair use under copyright law allowed Channel 781 to use short clips for commentary and public-interest reporting. (Ex. A, Kastorf Dep. 119:12-22).

After the meeting, Kastorf sent Sheehan a follow-up email containing links to online resources about fair use, including a "Set of Principles in Fair Use for Journalism" published by American University. (Ex. A, Kastorf Dep. 120:19-121:1; Ex. S, Ex. T). One of the principles laid out in that document is that "[j]ournalists use copyrighted material to illustrate as well as provide proof of a story," which "serves a news function by adding information and context," and that such uses are among those considered fair use by journalists. (Ex. T at 12). Another is that "[I]t is part of the journalist's mission not only to deliver information, but to share, responsibly and appropriately, underlying documentation that can deepen the understanding of news." *Id.* Sheehan and Wangler read Kastorf's email but did not read the sources it linked to. (Ex. C, Sheehan Dep. 126:21-127:1; 137:15-138:5; Ex. B, Wangler Dep. 126:12-127:15).

V. WCAC TAKES DOWN CHANNEL 781'S VIDEOS, CAUSING ITS CHANNEL TO BE SHUT DOWN.

On June 16, 2023, one day after the meeting, Wangler wrote to Sheehan that Channel 781 had posted videos "taken directly from us and reproduced verbatim with zero editing or

commentary.” (Ex. B, Wangler Dep. 130:5- 10; 134:22-135:7; Ex. Y). He asserted that the clips “ ‘merely copy’, a lot of it is used without permission, and the main focus in [sic] the copywritten material.” *Id.* He concluded that “Those will be the ones we should file copyright claims against.” *Id.* Sheehan agreed with Wangler’s recommendation and informed Board President Justin Barrett that WCAC would move forward with takedown notices. (Ex. C, Sheehan Dep. 125:7-126:5). Wangler sent a 512(c) notice to YouTube shortly after, targeting one Channel 781 video post. (Ex. B, Wangler Dep. 123:11-124:5; Ex. C, Sheehan Dep. 123:21-125:23; 127:2-14). YouTube rejected the notice. (Ex. B, Wangler Dep. 123:11-124:5).

On September 1, 2023, several days before the City’s preliminary elections, Ms. Sheehan and Mr. Wangler learned that Channel 781 had posted an unedited video of a campaign speech by Mayor McCarthy that was embarrassing to WCAC. (Ex. A, Kastorf Dep.; 167:20-168:16; Ex. B, Wangler Dep. 140:20-14:17; 144:6-10). Channel 781 posted the video to illustrate that WCAC was giving Mayor McCarthy special treatment compared with other candidates. (Ex. A, Kastorf Dep; 167:20-168:16). Prompted by Channel 781’s posting of the Mayor’s video, WCAC submitted three infringement notices to YouTube on September 1, 6, and 7, 2023 asserting that fifteen of Channel 781’s clips infringed WCAC copyrights. (Ex. B, Wangler Dep. 146:6-148:5; 151:7-154:14). After receiving each of the three notices, YouTube disabled the identified videos. (Ex. B, Wangler Dep. 153:18-154:6; 159:7-160:4).

VI. CHANNEL 781 WAS SILENCED ON THE EVE OF AN IMPORTANT ELECTION.

After receiving the third infringement notice from WCAC, on September 7, 2023, YouTube disabled Channel 781’s YouTube channel pursuant to its three-strikes policy. (Ex. B, Wangler Dep. 159:23-160:4; Ex. A, Kastorf Dep. 158:12-159:16). Mr. Kastorf and other members of Channel 781 spent approximately 6 hours creating a new YouTube channel and

uploading videos to it, so that the videos would be accessible before the September 12, 2023 election. (Ex. A, Kastorf Dep. 161:7-162:6; Ex. G, Channel 781’s Rog Resp. 5).³

ARGUMENT

The Court should grant summary judgment when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).⁴

Undisputed facts establish that posting clips of government meeting recordings was a clear fair use, that WCAC was aware of the facts supporting fair use at the time it sent the takedown notices, and that WCAC did not form a good faith belief that Channel 781’s posts were infringing, under either an objective or a subjective standard.

I. SENDING A SECTION 512(C) TAKEDOWN NOTICE REQUIRES AN OBJECTIVELY REASONABLE BELIEF THAT A USE IS INFRINGING.

A. Section 512(c) Requires a Good Faith Belief.

The Digital Millennium Copyright Act created a powerful extrajudicial enforcement process. Under 17 U.S.C. § 512(c)(3), a copyright holder can send a “notification of claimed infringement” to an online service provider that hosts user-uploaded content. Such notices must include, inter alia, 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

³ YouTube finally restored Channel 781’s original account on November 27, 2023, after the group obtained legal counsel to help them send a counter-notice and follow-up. (Kastorf Decl. ¶ 6).

⁴ A dispute is genuine “if the evidence would enable a reasonable factfinder to decide the issue in favor of either party.” *Irobe v. U.S. Dep’t of Agric.*, 890 F.3d 371, 377 (1st Cir. 2018); see also *Miceli v. JetBlue Airways Corp.*, No. 16-12032-RGS, 2018 WL 1524539, at *3 (D. Mass. March 28, 2018), *aff’d*, 914 F.3d 73 (1st Cir. 2019); *Am. Paper Recycling Corp. v. IHC Corp.*, 775 F. Supp. 2d 322, 327 (D. Mass. 2011). “A fact is ‘material’ if it ‘has the capacity to change the outcome of the [factfinder’s] determination.’” *Irobe*, 890 F.3d at 377 (quoting *Perez v. Lorraine Enters.*, 769 F.3d 23, 29 (1st Cir. 2014)); see also *Miceli*, 2018 WL 1524539, at *3; *Am. Paper*, 775 F. Supp. 2d at 327.

law.” *Id.*, § 512(c)(3)(A)(v) (emphasis added). Service providers have a powerful incentive to take the content down expeditiously—compliance is key to establishing a safe harbor from secondary liability for the alleged infringement. *Id.* § 512(c)(1).

Congress knew this powerful notice-and-takedown process could be abused. As the Senate Report on Section 512(f) explained,

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. The provisions in the bill balance 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 (1998). Accordingly, it attempted to deter such abuse via an equally powerful provision: Section 512(f). If a rightsholder who sends an infringement notice “knowingly materially misrepresents . . . that material or activity was infringing,” it is liable for “any damages, including costs and attorneys’ fees, incurred by the alleged infringer.” *Id.*, § 512(f).

Under Section 512(f), such a misrepresentation can include a notice targeting a lawful use, including a fair use. When the user of an online service posts content that constitutes a fair use of copyrighted material, that use is “wholly authorized by the law.” *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016). Accordingly, before sending a notice of claimed infringement under Section 512(c), a rightsholder must consider whether fair use applies and form a “good faith belief” that it does not. *Id.* at 1154-55.

B. The Statutory Phrase “Good Faith Belief” Embodies An Objective Standard.

Section 512(f)’s text, purpose, and legislative history all suggest that the requisite belief must be objectively reasonable. A representation of a good faith belief is a “knowing misrepresentation” if it is *either* not subjectively held (there is no “belief”) *or* unreasonably held (the belief is not held in “good faith”).

Across a wide array of statutory and common-law contexts, courts have held that the phrase “good faith” modifies a mental state—such as belief, intent, or reliance—by imposing an objective constraint of reasonableness. For example, the Stored Communications Act gives service providers a defense of “good faith reliance” on legal process when disclosing private communications. 18 U.S.C. § 2707(e). Courts have construed that defense to imply an objective test—whether a subpoena would appear valid to a reasonable observer. *Alexander v. Verizon Wireless Servs.*, 875 F.3d 243, 254 (5th Cir. 2017); *McCready v. eBay, Inc.*, 453 F.3d 882, 892 (7th Cir. 2006). Similarly, bankruptcy law provides a defense for “good faith” receipt of assets. 11 U.S.C. § 548(c). Courts “look to what the transferee objectively ‘knew or should have known’ in questions of good faith.” *Agric. Rsch. & Tech. Grp., Inc.*, 916 F.2d 528, 535–36 (9th Cir. 1990) (citing *Shauer v. Alerton*, 151 U.S. 607 (1984) and *Harrell v. Beall*, 84 U.S. 590 (1873)).

Likewise, in criminal law, the “good faith” defense to willful misrepresentation of indigent status under 28 U.S.C. § 1915(a)(3) turns in part on whether the defendant’s belief was objectively reasonable. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962) (interpreting “good faith” to be purely subjective would “deprive the legislation of sensible meaning”). Securities law similarly interprets a supervisor’s “good faith” defense under 15 U.S.C. § 78t(a) by reference to whether the defendant maintained a reasonable system of supervision. *See Hollinger v. Titan Cap. Corp.*, 914 F.2d 1564, 1575-76 (9th Cir. 1990) (en banc). The Uniform Commercial Code defines the term “good faith” to mean “honesty in fact and the observance of reasonable commercial standards of fair dealing.” U.C.C. § 1-201(b)(20). And the Supreme Court has interpreted the Robinson-Patman Act’s “good faith” defense of meeting competition, 15 U.S.C. § 13(b), to mean “the standard of a prudent businessman responding fairly to what he

reasonably believes is a situation of competitive necessity.” *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 429 (1983) (emphasis added).

WCAC would have this Court disregard this body of caselaw, insisting that the test for “good faith belief” must be purely subjective, citing *Lenz*, 815 F.3d at 1154. There are at least two problems with that approach.

First, the *Lenz* holding, which the First Circuit has never adopted, rests on a very shaky foundation. It originated with an earlier Ninth Circuit case, *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004). The facts of *Rossi* were not typical. The website that was subject to a DMCA takedown notice promised “Full Length Downloadable Movies,” but did not actually contain any such movies. Presented with the unusual case where the copyright holder was understandably fooled by the website owner’s active deception, the court held that MPAA was not liable for misrepresentation for taking the website owner at his word. *Id.* at 1005-6. In so doing, the court relied on several cases holding that statutes containing both “good faith” and “reasonable grounds” language create tests that combine subjective and objective elements.⁵ But none of these cases construed the phrase “good faith belief” standing alone, and none contradict the many examples cited above in which “good faith” alone was held to create an objective reasonableness standard.

Second, WCAC’s interpretation of the *Lenz* holding runs contrary to Congress’s intent in crafting Section 512(f). Given the incentives of the DMCA, service providers usually respond to a DMCA takedown notice by quickly removing the challenged content, just as YouTube did in

⁵ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir.2003) (statute that includes “good faith” and “reasonable grounds for believing” includes both subjective and objective elements); *Brooks v. Vill. of Ridgefield Park*, 185 F.3d 130, 137 (3d Cir. 1999) (similar). *Rossi* also cites to *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992), which construed a statute that specified a “reasonable belief,” for which legislative history supported an objective standard.

this case. Thus, by simply sending an email or filling out a webform, a copyright owner, or indeed anyone who wishes to remove speech for whatever reason, can do so easily.

Rightsholders and others abuse this power on a regular basis, deliberately or recklessly. *See, e.g.,* Jennifer M. Urban, Joe Karaganis & Brianna I. Schofield, *Notice and Takedown in Everyday Practice* 12 (March 29, 2016)⁶ (finding that nearly seven percent of DMCA takedowns targeted potential fair uses).

Section 512(f) can do little to deter those abuses if the sender of an improper takedown can escape liability no matter how unreasonable its belief. *Lenz*, 815 F.3d at 1160 (M. Smith, J., concurring in part and dissenting in part) (concluding that the Ninth Circuit’s “construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices”). For example, some rightsholders unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to make sure such beliefs don’t thwart new creativity and commentary.

By contrast, requiring a rightsholder to form a reasonable good faith belief as to whether the use it is targeting is unlawful or not comports perfectly with Congress’s intent to “ensure that material is not disabled without proper justification.” S. REP. NO. 105-190 at 21 (1998). As a cause of action enacted to protect speech, Section 512(f) should be construed to create an objective test to ensure that it provides speakers with the recourse against abuse that Congress intended. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“[R]emedial legislation should be construed broadly to effectuate its purposes.”).

⁶ Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.

II. AT A MINIMUM, AN INFRINGEMENT NOTICE MUST BE BASED ON AN ASSESSMENT OF KNOWN FACTS.

Even if the Court chooses to embrace the “subjective” standard for which *Rossi* and *Lenz* stand, the matter does not end there. Neither case suggests that the sender of a takedown notice need not base its subjective “good faith belief” *on the relevant known facts*. In *Rossi*, the sender concluded that the targeted site hosted infringing material because the site owner insisted it did. *Lenz* concerned a parent’s video, posted to YouTube, of her children dancing, with a song by the artist Prince playing in the background. *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783-JF, 2013 WL 271673, at *1 (N.D. Cal. Jan. 24, 2013). Defendant Universal Music argued that considering (1) whether the video made “significant use” of the song *and* (2) whether the song was the “focus” of the video was tantamount to considering fair use. *Id.* at *6. The district court rejected Universal’s argument

that it is sufficient for a copyright holder to consider facts that might be relevant to a fair use analysis *without making any effort to evaluate the significance of such facts in the context of the doctrine itself*. Because the question of whether something constitutes fair use is a “legal judgment” . . . , proper consideration of the doctrine must include *at least some analysis of the legal import of the facts*.

Id. (citation omitted) (emphasis added). The Ninth Circuit affirmed. 815 F.3d at 1154.

Subsequent decisions relying on *Rossi* and *Lenz* confirm that a notice sender must have a factual basis for its accusation of infringement. *Johnson v. New Destiny Christian Ctr. Church, Inc.*, 826 F. App’x 766, 772 (11th Cir. 2020) (Section 512 requires a “reasonable good faith belief”; counsel’s investigation sufficed given lack of any contrary evidence); *Dudnikov v. MGA Ent., Inc.*, 410 F. Supp. 2d 1010, 1013 (D. Colo. 2005) (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); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV, 2013 WL 6336286, at

*47 (S.D. Fla. Sept. 20, 2013) (noting that an unreliable review process before sending takedown notices could make a rightsholder “vulnerable to suit”).

Moreover, having knowledge of facts that are significant to fair use and failing to apply them is a form of willful blindness, which is tantamount to a knowing misrepresentation. *MFB Fertility, Inc. v. Action Care Mobile Veterinary Clinic, LLC*, 730 F. Supp. 3d 740, 752 (N.D. Ill. 2024) (“ostrich-like business practices” or a failure to inquire into relevant circumstances can give rise to § 512(f) liability); *see Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884) (“a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule”); *S.E.C. v. Pinez*, 989 F. Supp. 325, 344 (D. Mass. 1997) (“actual knowledge of facts, which upon reasonable inquiry, would have clearly revealed” a conclusion is equivalent to knowledge of that conclusion).

Requiring that a “good faith belief” have a factual basis also gives meaning to the statutory text. All beliefs are *subjective*, but not all beliefs are asserted in *good faith*. Construing Section 512(f) to mean that any “subjective” belief—no matter how divorced from reality as known to the rightsholder—is sufficient to avoid liability, would render the phrase “good faith” superfluous. *Penobscot Nation v. Frey*, 3 F.4th 484, 496-97 (1st Cir. 2021) (statutory construction should not render part of the text “surplusage”).

III. WCAC HAD ALL THE FACTS IT NEEDED TO CONCLUDE THAT CHANNEL 781’S POSTING OF THE STANDALONE MEETING CLIPS WAS A CLEAR FAIR USE.

Channel 781’s posting of short clips of government meetings sourced from the MAC-TV recordings was a clear fair use. Each of the four statutory factors of 17 U.S.C. § 107 favored Channel 781’s use. All of the facts underlying this conclusion were known to WCAC when it sent the takedown notices.

A. Channel 781’s Use of the Clips Had a Significantly Different Purpose and Character.

The first factor looks at “the purpose and character of the use,” including whether the use is commercial. 17 U.S.C. § 107(1). Channel 781’s lack of commercial purpose, of which WCAC was well aware, favors fair use. (Ex. B, Wangler Dep. 135:21-136:7; Kastorf Decl. ¶ 4); *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 32 (2021).

This factor also looks at whether the use “has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism.” *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 525 (2023). This is often called “transformative” use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

The purpose of WCAC’s MAC-TV recordings is to fulfill a quintessential government function: documenting city council and other meetings for public reference. WCAC makes the recordings to fulfill its role as operator of Waltham’s sole “government access” channel. (Ex. C, Sheehan Dep. 39:2-41:3; Ex. B, Wangler Dep. 38:15-39:21; 41:22-42:21; Ex. P at WCAC0000676-81). This role was delegated to WCAC by the City. *Id.*, see 47 U.S.C. § 531(b) (authorizing local governments to require cable companies to carry channels for governmental use); *In the Matter of Amend. of Part 74, Subpart k, of the Commission’s Rules & Reguls. Relative to Cmty. Antenna Television Systems*, 36 F.C.C.2d 141, 191 (1972) (“The government access channel is designed to give maximum latitude for use by local governments.”). The recordings are posted to the “Government” section of WCAC’s website, as opposed to the “News” section. (Ex. B, Wangler Dep. 42:11-43:1; Ex. O). The character of the recordings is ministerial, not journalistic: they document entire meetings gavel-to-gavel. (Ex. B, Wangler Dep.

55:5-20). They are not edited, and WCAC adds no commentary or opinion. (Ex. B, Wangler Dep. 54:19-56:5; Ex. R at WCAC0000557-58).

In contrast, Channel 781's curated clips are a form of opinion journalism. The members of Channel 781 excerpted moments from meetings to highlight developments on the issues they thought important. (Ex. A, Kastorf Dep. 46:17-49:5; 58:3-60:2; 64:16-65:22; Ex. B, Wangler Dep. 124:17-21). Many of the clips have titles that identify the speakers and issues, and some include a provocative quote, such as a city council member asking "why can't we have nice things?" (Ex. H, Clip No. 4). Posted to the YouTube page of a news organization, these clips tell viewers 'here's what we think you ought to pay attention to'—a message that is entirely absent from the original MAC-TV recordings.

For example, one of the clips highlights a quote by one of the Waltham city councilors that evinces an "attitude about environmental issues" that Channel 781 member Joshua Kastorf believed was "very out of touch with a lot of our audience." (Ex. A, Kastorf Dep. 80:3-81:10; Ex. H, Clip No. 5). The clip was taken from a meeting about "building codes" and posting it highlighted a broader issue. *Id.* (Ex. A, Kastorf Dep. 81:11-82:4) ("There's no reason you would think that this is the meeting where you get to find out his overall attitude about the environment.").

WCAC's own executive director understood that Channel 781's selection and presentation of the clips gave them a new meaning and message—indeed, that's why she didn't approve of them. She understood that the clips put a new "spin" on the source material. (Ex. C, Sheehan Dep. 91:3-17; Ex. A, Kastorf Dep. 116:23-117:2). She knew that Channel 781 was "using this footage to promote political candidates in the city," something the original MAC-TV videos are forbidden from doing as a matter of WCAC policy. (Ex. C, Sheehan Dep. 129:22-

130:6); Ex. B, Wangler Dep. 54:19-56:5; Ex. R, MAC-TV Policies & Guidelines at WCAC0000557-58).

Displaying material, even without alteration, in a context that changes the “messages and purposes” of the material is transformative and favors fair use. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d Cir. 2014). This is particularly true when the new context causes a “transformation of the works into news.” *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).⁷

In addition, posting the clips to YouTube made them more accessible. *Authors Guild v. HathiTrust*, 755 F.3d 87, 102 (2d Cir. 2014) (enhancing accessibility favors fair use). WCAC had no interest in doing so; Ms. Sheehan believed that posts on YouTube would be seen by “anybody from anywhere in the world,” and she questioned whether Waltham city officials wanted their meetings to be seen by a wider audience. (Ex. C, Sheehan Dep. 51:12-53:3; Ex. J, video at time 6:10). Posting to YouTube caused the platform to generate closed captions and a transcript of each clip, which enables text searching. (Ex. A, Kastorf Dep. 48:10-12; 102:17-22). WCAC does not caption its videos, nor does it provide any way to search the videos for discussions of particular topics. (Ex. C, Sheehan Dep. 111:19-23). WCAC knew that its failure to caption the MAC-TV videos was one reason Channel 781 posted clips to YouTube. (Ex. B, Wangler Dep. 128:4-14).

⁷ WCAC’s argument that both it and Channel 781 had a purpose of “informing viewers about public affairs in Waltham,” WCAC Br. 19-20 n.10, ignores the criticism and news reporting purposes of Channel 781’s posts and WCAC’s own opinion that the clips put a “spin” on the source material. Anything posted to the internet can be described as “informing viewers.” The “purpose” inquiry must be more specific. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 536 n.11 (2023) (“This Court goes somewhat further and examines the copying’s more specifically described purposes in the context of the particular use at issue.”) (cleaned up).

B. The Meeting Videos Are Factual Records of Government Activity Containing Little or No Creative Expression.

The second fair use factor looks at the nature of the copyrighted work, including “the extent to which it is a creative work enjoying broader copyright protection as opposed to a factual work requiring broader dissemination.” *Nuñez*, 235 F.3d at 23.

It is hard to imagine a work that lies closer to the factual end of this spectrum than ministerial recordings of government meetings. WCAC cannot assert any copyright in the words spoken by the participants in a government meeting. WCAC’s creative contribution to the MAC-TV videos is vanishingly small. The only ostensible creative contributions WCAC identifies in its videos are “the choice of camera angles, inclusion of graphics, and sound engineering.” (Ex. F, WCAC’s Rog Resp. 3). None of these is significant. As a matter of policy, WCAC points its camera at whoever is speaking. (Ex. B, Wangler Dep. 52:15-54:18; Ex. R at WCAC0000557). WCAC makes no further edits to the videos. (Ex. B, Wangler Dep. 54:19-56:5; Ex. R at WCAC0000557-58). The only “graphics” that appear in the clips are the name and date of the meeting and the “MAC-TV” logo. (Gedlu Decl. ¶ 13). And no “sound engineering” beyond a verbatim reproduction of each speaker’s words is evident in the clips. (Gedlu Decl. ¶ 14). These unoriginal, default choices are not creative contributions protected by copyright. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991). And even if these choices clear the low bar of copyright eligibility, “where copyrightable material is bound up with uncopyrightable material, copyright protection is ‘thin’” and the second factor favors fair use. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 21 (2021); *City of Inglewood v. Teixeira*, No. CV–15–01815–MWF (MRWX), 2015 WL 5025839, at *10 (C.D. Cal. Aug. 20, 2015) (“informational” city council meeting videos that were “barely creative . . . enjoy very narrow copyright protection”).

The second factor also considers whether the original work is published or unpublished, to help ensure that the secondary use does not unduly impinge on the copyright owner's "right to control the first public appearance of his expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985). Here, WCAC was well aware, if it had bothered to consider it, that the recordings are already disseminated publicly.

C. The Length of the Clips Was Reasonable in Relation to Channel 781's Journalistic Purpose.

The third fair use factor looks at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). This factor favors fair use when the amount used is "reasonable in relation to the purpose of the copying." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994). In other words, it asks whether the challenged use "employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the first factor." *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014).

Of the fifteen clips at issue in this lawsuit, eleven are less than 3 minutes. Ten of the clips use less than 3% of the source recording and all but one use less than 9%. (Ex. H). Each clip captures a statement by a specific city official (or in one clip, two officials) on a specific issue. *Id.* Each clip includes enough context to help the viewer make sense of the point being highlighted while assuring viewers that the clip does not misrepresent the speaker. (Ex. A, Kastorf Dep. 82:8-21; 86:6-88:11). All of the clip lengths are reasonable in relation to the purpose of the clips, which is to highlight the statements of City officials. *HathiTrust*, 755 F.3d at 96.

The longest clip, which was 20 minutes, 46 seconds and constituted 22.2% of the source video, illustrates two city councilors using repeated procedural wrangling to waste time and

avoid discussing the substance of another councilor's proposal. (Ex. A, Kastorf Dep. 66:22-68:16; Ex. H, Clip No. 2). The length of the clip was thus integral to the "spin" that Channel 781 was putting on the source material.

D. Posting the Clips Did Not Meaningfully Impact Any Market for the Meeting Videos, But Advanced a Public Benefit.

The fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), examines whether and how the secondary use might undermine copyright's economic incentives. Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1124 (1990) (market effect factor is important because "the utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create. A secondary use that interferes excessively with an author's incentives subverts the aims of copyright").

WCAC knew that Channel 781 had no effect on WCAC's licensing market for MAC-TV recordings because there is no such market, nor does WCAC's incentive to record the meetings depend on any such market. Instead, WCAC is funded primarily through a percentage of pay-TV subscription fees from local providers paid pursuant to contracts between those providers and the City, in return for the right to operate there. (Ex. C, Sheehan Dep. 22:24-23:9; 38:23-41:10). That income does not even depend on how often subscribers view WCAC's channel and website. (Ex. C, Sheehan Dep. 104:17-19). Small wonder WCAC does not attempt to measure the number of people who view its cable channels or its website. (Ex. C, Sheehan Dep. 104:10-16). WCAC does not charge fees for the use of video clips by journalists, city employees, or political candidates. (Ex. B, Wangler Dep. 78:20-82:15).

Channel 781 and WCAC's MAC-TV also target different audiences. The audience for the MAC-TV videos tends to be "older Waltham residents" who "have likely lived in the city for

many years” and frequently “know who their elected officials are very well, through personal relationships and other ways.” (Ex. B, Wangler Dep. 96:15-97:17). They are “more traditional consumers of news,” *Id.* Channel 781’s audience, in contrast, “is a younger audience and not necessarily originally from Waltham and having different political beliefs.” (Ex. B, Wangler Dep. 96:8-98:14).

Channel 781’s YouTube channel is a searchable archive about specific city issues, officials, and controversies that the members of Channel 781 deem important and newsworthy, and the clips at issue were part of that archive. (Ex. A, Kastorf Dep. 26:3-29:4). Channel 781’s audience finds short, searchable clips more accessible than long recordings, and is more likely to discuss clips. (Ex. A, Kastorf Dep. 48:2-9). WCAC was aware that Channel 781 had a different audience than the full MAC-TV recordings do. (Ex. B, Wangler Dep. 96:8-97:6). Indeed, WCAC’s executive director believed that City officials might object to their deliberations appearing on YouTube because that platform reached a broader audience than WCAC’s channel and website. (Ex. C, Sheehan Dep. 51:12-53:3; Ex. J, video at time 6:10).

WCAC knew all of this, and in fact admits that it sent the infringement notices not out of any concern about monetary harm or loss of viewership, but simply because they wanted Channel 781 to ask permission for each use. (Ex. B, Wangler Dep. 118:21-122:4). Thwarting a copyright owner’s desire for control is not cognizable copyright harm: if a use is fair, no permission is required.

Against the distinct lack of any actual or even perceived impact on any market for the MAC-TV meeting videos stands the public interest in being able to learn about and engage with local government. The fourth factor takes into account the “public benefits the copying will likely produce” and whether they are “comparatively important, or unimportant, when compared

with dollar amounts likely lost.” *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 35–36 (2021). Channel 781’s curated clips educate a new audience—younger City voters who watch less traditional television—about local politics, and encourage broader political participation. They elevate statements and issues that would otherwise remain buried within hours of meeting video posted each month with no signposts, index, or search functionality. They expose the audience not only to the words of their elected officials but their tone and body language in ways that cannot be fully captured in print. *See* Ex. T, American University’s Center for Media & Social Impact, “Set of Principles in Fair Use for Journalism” 12-13 (“Illustration in reporting is not merely decorative. It serves a news function by adding information and context otherwise either not available or provided in a much less efficient or effective way.”). To obtain these benefits without using the MAC-TV recordings as source material would require having redundant camera and audio equipment and personnel to operate it throughout those many of hours of meetings each month, which is not feasible for citizen journalists who volunteer their time. Thus, “to allow enforcement of [WCAC’s] copyright here would risk harm to the public” that would outweigh the nonexistent harm to WCAC. *Oracle*, 593 U.S. at 39.

IV. WCAC DID NOT HAVE A GOOD FAITH BELIEF THAT CHANNEL 781’S USE OF THE CLIPS WAS INFRINGING.

So how did WCAC conclude that it had the right to take down Channel 781’s videos? By knowingly avoiding consideration of the second, third, and fourth fair use factors, as well as significant, known facts material to the first factor. Accordingly, applying an objective standard, any belief they may have formed about fair use was not reasonable. Nor did WCAC form a subjective good faith belief regarding fair use.

A. WCAC Improperly Avoided Considering Fair Use Factors 2, 3, and 4.

WCAC dismissed the second fair use factor—the nature of the copyrighted work. WCAC is, of course, aware that it records government meetings to fulfill the “government access” role assigned to it by the City. *See* III.A, *supra*. And it is aware that the videos are ministerial records of government proceedings with no editorial content and no meaningful creative contributions by WCAC. *See* III.B, *supra*. Yet, when WCAC News Director Christopher Wangler shared his proposal for takedowns with Executive Director Maria Sheehan, he did not refer to the factual nature of the videos at all. (Ex. B, Wangler Dep. 130:5-10, 134:22-135:7; Exs. Y, Z). Mr. Wangler testified in deposition that when choosing which videos to include in a takedown notice, he did not recall considering the factual nature of the MAC-TV videos. And while he “possibly” considered it with respect to a single video, it had no impact on his conclusion. (Ex. B, Wangler Dep. 132:22-133:1, 155:1-20).

WCAC also avoided considering the third factor, which looks at the amount and substantiality of the portion used. The first time Mr. Wangler sent a takedown notice, he observed that the clip was “1 to 2 minutes” of a 2 hour and 24 minute recording but made no attempt to determine whether the third factor supported fair use, deciding instead that it was “complicated” and he could omit consideration of that factor. (Ex. B, Wangler Dep. 133:2-16). Later, when preparing an additional takedown notice referencing five more videos, Wangler observed that the videos varied in length. However, he made no distinction among the videos on the basis of their length. Instead, he selected the five videos simply because they were “stand-alone videos.” (Ex. B, Wangler Dep. 152:9-153:2). In describing his conclusions to Ms. Sheehan, Mr. Wangler said only that Channel 781 used “a lot of our video,” again making no distinctions as to their length. Ex. Y.

WCAC also dismissed the fourth fair use factor, the “effect of the use on the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). WCAC does not sell advertisements or charge fees to journalists for using video clips. (Ex. B, Wangler Dep. 78:20-82:15). Its income is not based on the number of people who view the recordings (or any other WCAC programming). (Ex. C, Sheehan Dep. 104:17-19). When it reviewed the clips prior to sending the takedown notices, WCAC did not form any “particularized belief” about whether Channel 781’s posting of the clips had any effect on the market value of the recordings. Ex. G, Channel 781’s Rog Resp. 5.

The only harm WCAC identified was the simple fact that Channel 781 used the clips without permission. (Ex. B, Wangler Dep. 118:21-122:4). This is not a harm that copyright law recognizes. Fair uses, by definition, are uses that don’t require permission. *Richards v. Merriam Webster, Inc.*, 55 F. Supp. 3d 205, 207-08 (D. Mass. 2014).

Additionally, Mr. Wangler testified that the market harm factor was not important because both WCAC and Channel 781 are nonprofits. Ex. B, Wangler Dep. 134:6-10. Notably, Mr. Wangler reached a different conclusion when deciding whether WCAC itself could make fair use of clips from the commercial TV show “Top Chef” to showcase the participation of a Waltham resident. In that instance, he considered it significant that WCAC “was not monetarily benefiting from the use of this footage.” Ex. B, Wangler Dep. 67:8-17. This disparity shows that Mr. Wangler and WCAC were not considering the market harm factor in good faith with respect to Channel 781.

B. WCAC Ignored Known, Material Facts That Inform Factor 1.

Regarding the first fair use factor, the “purpose and character of the use,” WCAC was aware that Channel 781’s posting of the clips was transformative. WCAC believed that the way Channel 781 excerpted the clips changed their meaning and message, giving them a political

valence that WCAC found concerning. (Ex. C, Sheehan Dep. 91:3-17, 129:22-130:6). WCAC was also aware that the clips had a different audience than the MAC-TV meeting recordings. (Ex. B, Wangler Dep. 96:8-98:14). And WCAC was aware that Channel 781 gave some of the clips provocative titles. (Ex. B, Wangler Dep. 124:17-21).

Further, WCAC understood that a use that gives material a new meaning and message is a transformative use even if the material is not physically altered. When WCAC used unaltered video clips from “Top Chef,” for example, Mr. Wangler believed that they were transformative because they were limited to showing a Waltham resident contestant and thus portrayed a “Waltham angle” that was absent from the original show. (Ex. B, Wangler Dep. 67:8-17). But with regard to Channel 781’s clips, WCAC insisted that clips used without internal alteration could not be fair use. (Ex. B, Wangler Dep. 134:6-10; Ex. Y).

While fair use is flexible, it is not infinitely malleable. A consideration of fair use under any standard must include a consideration of all of its factors. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“All are to be explored, and the results weighed together, in light of the purposes of copyright.”). Because WCAC avoided consideration of the second and fourth factors, dismissed the third as too “complicated” to address, and ignored salient facts informing the first factor, WCAC did not consider fair use in good faith.

C. WCAC Distorted Fair Use To Arrive at the Result They Wanted.

WCAC had powerful incentives to tailor their purported fair use consideration to achieve the result they wanted, which was to chastise Channel 781 by causing its videos to be taken down. WCAC is intimately connected with the Waltham city government, which shares key officials with WCAC, exercises final authority over WCAC’s leadership, and controls WCAC’s funding levels through the City’s pay-TV franchise agreements. WCAC was deeply concerned about Channel 781’s criticism of incumbent city officials and what WCAC perceived as

promotion of political challengers. (Ex. C, Sheehan Dep. 88:2-89:3; 129:22-132:6; Ex. B, Wangler Dep. 108:22-110:2). WCAC was also motivated to send the takedown notices by its own embarrassment when Channel 781 posted and highlighted Mayor McCarthy's unedited campaign video, which illustrated WCAC's favoritism towards incumbents. (Ex. B, Wangler Dep. 140:20-144:10; Ex. C, Sheehan Dep. 132:20-134:5; Ex. A, Kastorf Dep. 167:20-168:12).

In addition, uncontested facts show that WCAC stubbornly clung to the notion that *every* use of its video required its express permission. WCAC shared that position publicly in Maria Sheehan's April 2023 on-air statement, (Ex. X; Ex. B, Wangler Dep. 99:23-101:12), privately to Mr. Kastorf, (Ex. A, Kastorf Dep. 117:23-118:21), and internally in its draft policy on the use of clips, written around the same time as it sent the takedown notices at issue. (Ex. Q; Ex. C, Sheehan Dep. 72:15-73:17). WCAC asserted the same view in the internal process that led to those notices. Mr. Wangler wrote to Ms. Sheehan that the clips were not fair use because Channel 781 used a lot of material "without permission," affirming his and Sheehan's unsubstantiated belief that the mere use of clips without permission was a form of harm. (Ex. B, Wangler Dep. 134:22-135:7; Ex. Y). Notably, this assertion contradicted the instructional video on fair use that Mr. Wangler had just watched, which said that "fair use allows you to reuse copyright protected material in certain circumstances *without getting permission from the copyright owner.*" (Ex K, video at time 0:09) (emphasis added).

These facts are additional evidence that whatever belief WCAC personnel had about the fair use status of Channel 781's clips, that belief was not held in good faith.

D. WCAC's Characterization of Channel 781 Members' Discussion Is Incomplete.

WCAC's claim that Channel 781 members' internal deliberations about the risk of WCAC issuing more takedowns justified WCAC's own flawed process ignores undisputed facts

that show otherwise. WCAC Br. 18. After WCAC sent its first successful 512(c) takedown notice on September 1, 2023, Tom Benavides, a member of Channel 781, observed that the clip taken down was a city council meeting excerpt that was not incorporated into Channel 781's Debrief show, and he expressed concern about the risk of WCAC targeting similar clips. (Ex. ZA, at C781_00000729-30). Mr. Benavides acknowledged that his view was only an assumption and not the product of a complete fair use inquiry. (*Id.* at C781_00000730). He also questioned whether anyone involved had attended "copyright school," underscoring that his assumption was not based on a consideration of all four fair use factors and was therefore insufficient. *Id.* Mr. Kastorf acknowledged that clips incorporated into a larger program would be more "transformational" than clips posted alone, but he concluded that the stand-alone clips were transformative because "taking something and putting it in a new context with a new label," "making it more shareable," and "making it captioned" was sufficient transformation because these changes added "value to the public conversation." (Ex. A, Kastorf Dep. 147:9-148:6; Ex. ZA, at C781_00000730). Mr. Kastorf also understood that using clips from "verbatim" recordings of government meetings was highly likely to be fair use on account of the second factor—a fact that WCAC ignored. (Ex. A, Kastorf Dep. 170:24-171:10).

These facts show that far from "reach[ing] the same conclusion" as WCAC regarding fair use, the members of Channel 781 considered the actual transformation involved in the standalone clips, and the factual nature of the recordings. Having considered all of the factors in good faith—which WCAC did not—the members of Channel 781 correctly concluded that the clips were fair use. (Ex. A, Kastorf Dep. 147:9-148:6).

E. WCAC's Decision Not to Target Other Videos for Takedown Is Immaterial.

It is immaterial that WCAC did not send takedown notices targeting Channel 781's Debrief videos that contained MAC-TV meeting clips, contra WCAC Br. 17. Merely drawing

some distinction between uses that will be targeted for takedown and those that won't is not a good faith consideration of fair use. In *Lenz*, for example, the defendant considered whether a video made "significant use" of the copyrighted song at issue and whether the song was "the focus of the video," but the Ninth Circuit found that this consideration did not establish that the defendant considered fair use in good faith. In other words, considering *part* of the fair use test is not enough. *Lenz*, 815 F.3d at 1149. One member of the three-judge panel would have gone further and held that such an analysis was, as a matter of law, *not* a good faith consideration of fair use:

Universal's policy was expressly to determine whether a video made "significant use"—not *fair* use—of the work. Nothing in Universal's methodology considered the purpose and character of the use, the commercial or noncommercial nature of the use, or whether the use would have a significant impact on the market for the copyrighted work.

Id. at 1159 (M. Smith, J., concurring in part and dissenting in part). WCAC's decision to target only stand-alone clips, while ignoring fair use factors and known facts, does not become a good faith consideration simply because WCAC chose not to target videos which had an even stronger fair use rationale.

F. WCAC's Conduct Violated Section 512(f) Under Any Standard.

The Court should grant summary judgment to Channel 781 because WCAC's takedown notices were objectively unreasonable. The MAC-TV meeting videos fulfill a government function, delegated to WCAC by the City, and were entirely factual. Channel 781 posted excerpts of those videos in a way that contributed to Waltham residents' understanding of their city government, giving them new meaning that even WCAC personnel recognized. That use caused WCAC no financial or other harm. Under these circumstances, no reasonable person could have concluded that Channel 781's clips were infringing.

Alternatively, the Court can grant summary judgment to Channel 781 because a knowingly incomplete fair use analysis is not enough to establish a subjective good faith belief that posted material is not “authorized by . . . the law.” At best, WCAC staff’s “ostrich-like” disregard for known facts shows that they willfully blinded themselves to a strong possibility of fair use, which is equivalent to a knowing misrepresentation. *MFB Fertility*, 730 F. Supp. 3d at 752.

Not surprisingly, Section 512(f) jurisprudence does not support WCAC’s claim of subjective good faith. WCAC attempts to reply on *Stern v. Lavender*, 319 F. Supp. 3d 650, 673 (S.D.N.Y. 2018), for example, but in that case the accuracy of the takedown notices depended on whether the circumstances surrounding the creation of 50-year-old photographs made them a work for hire, and there was no competent evidence of those circumstances. A misrepresentation based on incomplete facts is a far cry from a misrepresentation based on ignoring actually known facts.

In a nutshell, WCAC wants this Court to find that an entity tasked by a government to record its meetings for the public has the power to decide when and how members of the public can use those recordings to further public discussion of local affairs, according to that entity’s own self-interested criteria. Neither the DMCA nor the Copyright Act support that conclusion, under any standard.

V. TAKING DOWN CHANNEL 781’S CLIPS AND ULTIMATELY ITS ENTIRE CHANNEL HARMED CHANNEL 781 AND ITS MEMBERS.

Under Section 512(f), any person who makes a misrepresentation is liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing. 17 U.S.C. §

512(f); *Viral DRM LLC v. Navez*, No. 3:23-CV-06598-JSC, 2025 WL 834498, at *4 (N.D. Cal. Mar. 17, 2025) (citing *Lenz*, 815 F.3d at 1156). The court in *Viral DRM* also held that the damages an alleged infringer may recover under Section 512(f) from any person are broader than monetary relief, and that a plaintiff may seek recovery of nominal damages due to an unquantifiable harm suffered as a result of defendant's actions. *Id.* That holding reinforces that any injury caused by a misrepresentation, including interference with speech, diversion of labor, and the need to retain counsel, is cognizable under the statute.

The undisputed record establishes that WCAC's takedown notices caused Channel 781 both immediate and ongoing harm, including the disabling of its channel, the silencing of its election-related reporting, the diversion of members' time and resources, and the incurrence and continued incurrence of attorneys' fees necessary to address WCAC's misuse of the DMCA. (Kastorf Decl. ¶6, Ex. A, Kastorf Dep. 161:7-162:6; Ex. G, Response 5).

WCAC's three takedown notices in September 2023 triggered YouTube's three-strikes policy, causing YouTube to disable Channel 781's entire channel and making all of its videos unavailable to the public. This removal on the eve of the municipal preliminary election, precisely when Channel 781's coverage of city officials, policy debates, and candidate positions was most needed. The timing of the takedowns struck at Channel 781's core mission, which was to inform Waltham voters with an accessible, searchable body of news and opinion. (Ex. A, Kastorf Dep. 26:3-29:4). Because of the takedowns and the disabling of their channel that resulted, Channel 781 was abruptly prevented from posting new content, maintaining access to the body of journalism it had spent months creating, and communicating with voters during a critical period of civic participation. (Ex. A, Kastorf Dep. 191:23-192:16). This silencing impaired members' First Amendment interests. *Online Pol'y Grp. v. Diebold, Inc.*, 337 F. Supp.

2d 1195, 1204-05 (N.D. Cal. 2004) (misrepresentations were material in that they resulted in removal of the content from websites where copyright holders use the DMCA “as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property”).

WCAC’s misrepresentations also forced Channel 781 to expend time and resources responding to the wrongful takedowns. The members of Channel 781 had to submit an appeal to YouTube, create a new YouTube channel, and reupload materials—tasks requiring approximately six hours of labor. (Ex. A, Kastorf Dep. 153:4-14; 161:7-162:6; Ex. G, Response 5); *see Lenz v. Univ. Music Corp.*, 572 F. Supp. 2d 1150, 1156-57 (N.D. Cal. 2008) (recognizing damages incurred in reviewing counter-notice procedures, seeking the assistance of an attorney, and responding to the takedown notice as cognizable injury under the DMCA). Channel 781 also incurred attorneys’ fees to restore access to the disabled channel, and those fees are recoverable because they were necessitated by WCAC’s improper assertions of infringement. (Ex. A, Kastorf Dep. 198:4-11; Ex. G, Response 5); *see Signal 23 Television v. Anthony*, No. 1:17-CV-01452-SDG, 2020 WL 11206863, at *4 (N.D. Ga. Sept. 1, 2020) (plaintiff was entitled to costs and attorneys’ fees under 17 U.S.C. § 512(f)). In addition, as this litigation proceeds, Channel 781 continues to incur attorneys’ fees caused by WCAC’s misrepresentations, which are likewise compensable under § 512(f).

WCAC’s conduct exerts an ongoing chilling effect. Because WCAC has refused to disavow sending future takedowns targeting fair uses, and because its prior misrepresentations successfully shut down the channel, Channel 781 members now refrain from posting stand-alone meeting excerpts despite their clear fair use status. (Ex. A, Kastorf Dep. 162:7-20). This continuing suppression of lawful speech is a direct harm that Section 512(f) exists to prevent.

Taken together, the loss of the entire channel just before an election, the interruption of reporting, the diversion of time and resources, the attorneys' fees already incurred and continuing to accrue, and the ongoing chill on Channel 781's lawful speech all constitute recoverable damages under the statute and underscore the seriousness of WCAC's misuse of the DMCA.

CONCLUSION

For all of these reasons, Plaintiff Channel 781 requests that the Court grant its summary judgment motion and deny Defendant WCAC's motion.

Dated: December 15, 2025

Respectfully submitted,

/s/Rebecca MacDowell Lecaroz

Rebecca MacDowell Lecaroz
Marcus Strong (*admitted pro hac vice*)
Brown Rudnick LLP
One Financial Center
Boston, MA 02111
Tel: (617) 856-8200
rlecaroz@brownrudnick.com

Mitchell L. Stoltz (*admitted pro hac vice*)
Betelhem Z. Gedlu (*admitted pro hac vice*)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Plaintiff Channel 781 News

CERTIFICATE OF SERVICE

I hereby certify that the within document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and by first-class mail to any non-registered participants.

Dated: December 15, 2025

/s/ Rebecca MacDowell Lecaroz
Rebecca MacDowell Lecaroz