

Computer Blown: How an Objective Standard of Good Faith Could Transform the Internet

Ryan Noormohamed*

I.	INTRODUCTION	167
II.	GENERAL OVERVIEW OF FAIR USE AND THE DMCA	171
	A. <i>Fair Use</i>	171
	B. <i>The Digital Millennium Copyright Act</i>	173
III.	THE BEST PRACTICES FOR DMCA TAKEDOWNS	175
	A. <i>Best Practices for ISPs</i>	176
	B. <i>Best Practices for Copyright Holders and Internet Users</i>	178
IV.	LET’S GO ©RAZY	179
	A. <i>The Prince of Paisley Park</i>	179
	B. <i>Lenz v. Universal Music Corp</i>	180
V.	THE OBJECTIVE GOOD FAITH STANDARD	183
	A. <i>ISPs Endorse an Objective Standard</i>	184
	B. <i>Wealthy Copyright Holders Endorse the Objective Standard</i>	186
	C. <i>The Objective Standard Is Unfair to the Majority of Copyright Owners</i>	187
	D. <i>Internet Users: Free Speech and Misrepresentation Under § 512(f)</i>	188
VI.	CONCLUSION AND SPECULATION ON FUTURE DEVELOPMENTS	189

I. INTRODUCTION

Consider for a moment a future of an Internet in which computer algorithms, without human oversight or review, evaluate whether a use of

* © 2016 Ryan P. Noormohamed. Senior Symposium Editor, Volume 19, *Tulane Journal of Technology and Intellectual Property*. J.D. candidate 2017, Tulane University Law School; B.S. 2013, Texas A&M University. The author thanks his family and friends for their love and support. The author also thanks Professor Elizabeth Townsend Gard, Professor Ashlye Keaton, and all of the members of Volume 19 for their hard work and dedication.

a copyrighted work constitutes a fair use. Though Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998,¹ the Internet has evolved into a very different place in 2016 because of the widespread use of social media. Of course, each photograph, sound recording, and video shared across the Internet is protected to some degree by copyright law.² In some respects, Congress can take credit for the evolution of the Internet. Congress fundamentally designed the DMCA to encourage the growth of the Internet by creating safe-harbors, which limit Internet service providers' (ISPs)³ liability for monetary relief when hosting infringing works on their servers.⁴ To reap the benefits of the safe-harbor provisions, ISPs must comply with the provisions set forth in § 512 of the Copyright Act,⁵ including its notice-and-takedown procedures.⁶ The notice-and-takedown procedures are designed to give copyright holders a quick and easy way to disable access to allegedly infringing content.⁷ An ISP will not be liable for disabling access to allegedly infringing content in response to a takedown request.⁸

In spite of the implementation of this notice-and-takedown system, the courts are still dealing with Internet copyright-related litigation.⁹ In *Lenz v. Universal Music Corp.*, the United States Court of Appeals for the Ninth Circuit considered the case involving a takedown notification that targeted a video taken by Stephanie Lenz of her young child dancing to a song by the pop recording artist known as Prince.¹⁰ In *Lenz*, the court held that the good faith requirement in the DMCA required copyright holders to consider whether the use of the copyrighted material constituted a fair use under a subjective standard of good faith before

1. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, 2-8 (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf> [hereinafter, DMCA COPYRIGHT OFFICE SUMMARY].

2. See 17 U.S.C. 102(a)(2012); Navin Katyal, *The Unauthorized Dissemination of Celebrity Images on the Internet, In the Flesh*, 2 TUL. J. TECH & INTELL. PROP. 1, 4 (Spring 2000).

3. See *Online Service Providers*, COPYRIGHT.GOV, <http://www.copyright.gov/onlinesp/> (last visited Sept. 22, 2016) (stating the U.S. Copyright Office's official definition of an Online Service Provider/Internet Service Provider).

4. LEE A. HOLLAAR, LEGAL PROTECTION OF DIGITAL INFORMATION 166-71 (2002).

5. 17 U.S.C. § 512 (2012).

6. 17 U.S.C. § 512 (c)(3), 512 (f), 512 (g); see generally HOLLAAR, *supra* note 4, at 171-77 (providing an overview of the DMCA's notice-and-takedown procedures).

7. HOLLAAR, *supra* note 4, at 172 (arguing that the increased rate of copyright litigation can be attributed to lawsuits filed against anonymous Internet filesharers).

8. 17 U.S.C. § 512 (g).

9. Cf. Matthew Sag, *IP Litigation in U.S. District Courts: 1994-2014*, 101 IOWA L. REV. 1065, 1068 (Mar. 2016).

10. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148-49 (9th Cir. 2016).

submitting a takedown request.¹¹ The court's holding was met with heavy criticism from practitioners in the Internet and entertainment industries alike.¹² Practitioners have argued that the *Lenz* case served to litigate an issue that had already been rendered moot, and that the *DMCA Notice-and-Takedown Process: List of Good, Bad, and Situational Practices (Best Practices Document)* jointly authored by the U.S. Department of Commerce and select ISPs,¹³ has already resolved many of the issues considered by the Ninth Circuit in *Lenz*.¹⁴ Some professionals are calling for a complete overhaul of the DMCA itself, citing the burden it places upon copyright holders to effectively police the use of their works online.¹⁵

In the weeks following the Ninth Circuit's announcement of the *Lenz* decision, Stephanie Lenz and the Electronic Frontier Foundation (EFF) submitted a petition for a rehearing en banc in an attempt to convince the court to reconsider its subjective good faith standard.¹⁶ An amicus brief was later submitted on behalf of the ISPs, Automattic Inc., Google Inc., Twitter, Inc., and Tumblr (a subsidiary of Yahoo! Inc.), to persuade the court to impose a switch from a subjective standard of good faith to an objective standard.¹⁷ An objective standard would make it easier for ISPs to adjust their submission protocols.¹⁸ It would also encourage the use of computerized review of takedown notices, which

11. *Id.* at 1157.

12. See Jordan Gimbel, Sen. Dir., Legal, Yahoo! Inc., Panelist for the Copyright Society of America's Mid-Winter Meeting's panel, *A Lenz into the Future: The State of Takedowns for 2016* (Feb. 13, 2016) [hereinafter Gimbel, Lenz Seminar].

13. DEP'T OF COMMERCE DMCA MULTISTAKEHOLDER FORUM, *DMCA NOTICE-AND-TAKEDOWN PROCESSES: LIST OF GOOD, BAD, AND SITUATIONAL PRACTICES (2015)* [hereinafter BEST PRACTICES DOCUMENT].

14. See Gimbel, Lenz Seminar, *supra* note 12.

15. See Vicky Sheckler, Sen. Vice Pres. and Dep. Gen. Counsel, Recording Industry Ass'n of Am., Panelist for the Copyright Society of America's Mid-Winter Meeting's panel, *A Lenz into the Future: The State of Takedowns for 2016* (Feb. 13, 2016) [hereinafter Sheckler, Lenz Seminar].

16. Appellee/Cross-Appellant's Petition for Reh'g en banc or Panel Reh'g at 1, *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (Nos. 13-16106, 13-16107) [hereinafter Appellee Petition for Reh'g].

17. Brief of Amici Curiae Automattic Inc. et al. Supporting Appellee/Cross-Appellant's Petition for Reh'g en banc or Panel Reh'g at 5, *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (Nos. 13-16106, 13-16107) [hereinafter Brief of Amici Curiae, Automattic Inc.].

18. See Fred Von Lohmann, Leg. Dir., Copyright, Google, Panelist for the Copyright Society of America's Mid-Winter Meeting's panel, *A Lenz into the Future: The State of Takedowns for 2016* (Feb. 13, 2016) [hereinafter Von Lohmann, Lenz Seminar].

better accommodate fair use on a scale that is more uniform and potentially more standardized throughout the industry.¹⁹

In its original opinion, the Ninth Circuit in *Lenz* endorsed, to a degree, the use of computerized submission and review of DMCA takedown notices.²⁰ However, on March 17, 2016, the Ninth Circuit denied the appellant's petition for a rehearing en banc and amended its original opinion.²¹ The amended opinion removed all traces of language that could be interpreted to support computer-driven algorithms as a good faith consideration of fair use.²²

The purpose of this Comment is to attempt to gauge the effect of the Ninth Circuit's holding in *Lenz* and to consider the implications of a future governed by a hypothetical objective standard of good faith. First, this Comment will provide a brief review of the history of the fair use doctrine and its function within the Digital Millennium Copyright Act. Second, this Comment will review the *Best Practices Document* to determine whether the suggestions it provides are sufficient to meet the subjective good faith standard. Third, this Comment will analyze the Ninth Circuit's decision in *Lenz*, focusing specifically on the portions of the court's opinion regarding the subjective good faith standard. Last, this Comment will discuss the potential ramifications of an objective good faith standard. This discussion will review the opinions of practitioners in the entertainment and Internet industries as well as briefs supporting of the implementation of an objective good faith standard. Ultimately, the goal of this discussion is to gauge the effect an objective standard would have on the future rights and actions of ISPs, copyright owners, and Internet users alike.

19. *Id.*

20. See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1135 (9th Cir. 2015), *opinion amended and superseded on denial of reh'g*, 815 F.3d 1145 (9th Cir. 2016) (noting that "the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use").

21. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148 (9th Cir. 2015).

22. See Corynne McSherry, *Dancing Baby Trial Back On? Another Mixed Ruling in Lenz v. Universal*, ELEC. FRONTIER FOUND. (Mar. 17, 2016), <https://www.eff.org/deeplinks/2016/03/dancing-baby-trial-back-another-mixed-ruling-lenz-v-universal> (last accessed Mar. 23, 2016).

II. GENERAL OVERVIEW OF FAIR USE AND THE DMCA

A. *Fair Use*

Under U.S. copyright law, an author of a creative work is entitled to a number of exclusive rights including the rights to publish, copy, and distribute a work of authorship.²³ As the rights are exclusive to the holder of the copyright, the law is designed to protect against infringements upon those rights by persons other than the author.²⁴ Of course, there are permissible manners in which one may attempt to make use of a copyrighted work in a manner normally reserved for authors.²⁵ The common law of copyright fashioned the fair use doctrine as a defense to an otherwise unauthorized use of the work by one other than the author.²⁶ As U.S. Supreme Court Justice Joseph Story once articulated in the seminal copyright case, *Harper & Row Publishers v. Nation Enterprise*, fair use is “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”²⁷

Through the first half of the twentieth century, there became a need to standardize U.S. copyright law with that of other nations.²⁸ In light of technological advances including the inventions of sound recordings, motion pictures, and television, Congress authored and passed the Copyright Act of 1976.²⁹ This new piece of legislation brought significant changes to the subject matter of copyright, the exclusive rights granted to copyright holders, and the duration of copyright protection,³⁰ as well as represented the codification of the doctrine of fair use.³¹

The doctrine of fair use was a purely common law principle, derived from factors set forth by Justice Story in *Folsom v. Marsh*, until

23. 17 U.S.C. § 106 (2012); Gregory Scott Nortman, *Indirect Liability of ISPs for Peer-to-Peer Copyright Infringement After the Verizon Decision*, 7 TUL. J. TECH. & INTELL. PROP. 249, 250 (Spring 2005).

24. 17 U.S.C. § 107 (2012); Elizabeth Troup Timkovich, *The New Significance of the Four Fair Use Factors as Applied to Parody: Interpreting the Court's Analysis in Campbell v. Acuff-Rose Music, Inc.*, 5 TUL. J. TECH. & INTELL. PROP. 62, 65 (Spring 2003).

25. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

26. *Id.*

27. *Harper & Row Publishers, Inc. v. Nation Enter.* 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT 260 (1944)).

28. *Copyright Timeline: A History of Copyright in the United States*, ASS'N RESEARCH LIBRARIES (Mar. 1, 2016), http://www.arl.org/focus-areas/copyright-ip/2486-copyright-time-line#.V.ss0x_lrLIU [hereinafter *Copyright Timeline*].

29. *Id.*

30. *Id.*

31. *Id.*

Congress codified the fair use factors in its 1976 amendments to the Copyright Act.³² First, courts are to consider the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”³³ Second, courts are to contemplate “the nature of the copyrighted work.”³⁴ Third, courts are to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”³⁵ Last, courts are to consider “the effect of the use upon the potential market for or value of the copyrighted work.”³⁶ Notably, Congress did not intend to change, narrow, or enlarge the existing doctrine in any way.³⁷ The Supreme Court has further clarified that fair use is intended to balance the rights of a copyright owner with the public’s interest in the dissemination of information by allowing some reasonable uses of another’s copyrighted material.³⁸

Fair use is considered an affirmative defense.³⁹ It is, therefore, intended to serve as a justification for a defendant’s otherwise unauthorized use of a work and need not be raised unless the plaintiff first shows a prima facie case of copyright infringement.⁴⁰ Consequently, a party claiming that its use of a copyrighted work constitutes fair use typically carries the burden of proof.⁴¹ However, the affirmative defense presupposes that the defendant asserting the defense has acted with “good faith” and “fair dealing.”⁴²

Prior to 1990, the Supreme Court emphasized the particular importance of the fourth factor—the effect of the infringing use on the marketplace.⁴³ Recognizing that the future of fair use analysis called for a set of articulated guiding principles, then U.S. District Court Justice

32. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (“[f]air use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story’s summary is discernible”).

33. 17 U.S.C. § 107(1)(2012).

34. 17 U.S.C. § 107(2).

35. 17 U.S.C. § 107(3).

36. 17 U.S.C. § 107(4).

37. H.R. REP. NO. 94-1476 at 66 (1976).

38. *See Harper & Row Publishers, Inc. v. Nation Enter.* 471 U.S. 539, 549 (1985); *see also County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179 (“the fair use doctrine . . . strikes a balance between the rights of a copyright holder and the interest of the public in disseminating information.”).

39. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 590 (1994); *see also Harper*, 471 U.S. at 561.

40. 4-13 Nimmer On Copyright § 1305.

41. *See Campbell*, 510 U.S. at 590 (stating that a fair use is an affirmative defense).

42. *Harper*, 471 U.S. at 562-63 (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp 130, 146 (SDNY 1968)).

43. Leval, *supra* note 25, at 1124.

Pierre Leval authored an article in the *Harvard Law Review* entitled *Toward a Fair Use Standard*.⁴⁴ In that article, he advocated that fair use analysis needs to be centered on the statute's first factor—the transformative effect of the use.⁴⁵ In particular, he emphasized “[f]actor one is the soul of fair use” and that “[a] finding of justification under this factor seems indispensable to a fair use defense.”⁴⁶ According to Leval, the first factor inherently favors the user while the remaining three factors focus on the elements of harm inflicted upon the copyright owner.⁴⁷ Importantly, he also criticized the use of good faith as a justification for a user's infringement, articulating that “[t]he inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits.”⁴⁸

B. *The Digital Millennium Copyright Act*

In 1996, delegates from 160 countries met at the World Intellectual Property Organization (WIPO) conference in Geneva, Switzerland, to consider the adoption of two treaties, the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty, which sought to more globally unify intellectual property law amongst participating countries.⁴⁹ At this conference, an agreement was reached ensuring that the two treaties would “permit application of fair use in the digital environment.”⁵⁰ In October of 1998, President Clinton signed the DMCA into law, which implemented the two treaties that were negotiated for at the WIPO conference.⁵¹ The DMCA was also designed in part to bring the law of copyright into the digital age.⁵² Title II of the DMCA, the “Online Copyright Infringement Liability Limitation Act,” added § 512 to the Copyright Act.⁵³

44. *See id.* at 1104.

45. *Id.* at 1116.

46. *Id.*

47. *See id.*

48. *Id.* at 1126.

49. *Copyright Timeline*, *supra* note 28.

50. Press Release, World Intellectual Property Org., U.S. Calls for Application of “Fair Use” Doctrine in Dig. Env't (Dec. 11, 1996), <http://www.USPTO.gov/web/offices/com/speeches/96-26.txt>.

51. *See* DMCA COPYRIGHT OFFICE SUMMARY, *supra* note 1, at 2-8 (explaining how the DMCA implemented the WIPO treaty obligations).

52. *See generally id.* (summarizing the various ways in which the DMCA addresses and incorporates provisions about digital technologies).

53. *See id.* at 8.

In essence, § 512 permits ISPs—such as Yahoo!, Google, or Facebook—to evade liability for monetary relief in a copyright infringement suit for storing or hosting the infringed materials if the service provider “‘expeditiously’ removes or disables access to the content after receiving notification from a copyright holder that the content is infringing.”⁵⁴ Codified in § 512(c)(3)(a), the elements of a DMCA takedown notification are “identification of the copyrighted work, identification of the allegedly infringing material, and . . . a statement that the copyright holder believes in good faith the infringing material ‘is not authorized by the copyright owner, its agent, or the law.’”⁵⁵

After receiving a takedown notification and before removing or disabling access to the allegedly infringing content, the ISP is obligated to notify the user of the takedown to avoid liability.⁵⁶ If the user feels that his or her content was removed unfairly, the user then has an option to send a counter-notification under the “put-back procedures”⁵⁷ of § 512(g) to restore the content.⁵⁸ The counter-notification states the user’s “good faith belief that the material was removed or disabled as a result of mistake or misidentification.”⁵⁹ The ISP is then obligated to inform the copyright holder of the counter-notification and restore the material within ten to fourteen business days, unless the ISP receives notice that the copyright holder has chosen to file a lawsuit against the user.⁶⁰ Regarding abuse of the takedown and put-back procedures, the DMCA subjects copyright holders to liability under § 512(f)(1) and users to liability under § 512(f)(2) for material misrepresentations of their positions in submitting each party’s respective notice.⁶¹ In *Rossi v. Motion Picture Ass’n of America Inc.*, the Ninth Circuit Court of Appeals held that a misrepresentation claim against a copyright holder can only succeed when the plaintiff shows “a demonstration of some

54. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016) (discussing 17 U.S.C. § 512 (c)).

55. *Id.* (summarizing the requirements of 17 U.S.C. § 512 (c)(3)(a)). The requirements of § 512 heavily contrast with Justice Leval’s position that good faith should be irrelevant to an application of fair use. *See* Leval, *supra* note 25, at 1126.

56. 17 U.S.C. § 512 (g)(1)-(2) (2012).

57. *Lenz*, 815 F.3d at 1151 (“the procedures outlined in § 512 (g) are referred to as the DMCA’s ‘put-back procedures’”).

58. 17 U.S.C. § 512 (g)(3)(c).

59. *Id.*

60. 17 U.S.C. § 512 (g)(2)(b)-(c).

61. *Lenz*, 815 F.3d at 1151 (discussing the requirements of § 512(f)).

actual knowledge of misrepresentation on the part of the copyright owner.”⁶²

In practice, the DMCA accomplishes a few essential policy goals. First, if the safe harbor conditions of § 512(a)-(d) are met, the ISP will not be held liable for monetary relief for an infringement (if they comply with the DMCA takedown procedures in § 512(c)).⁶³ The resulting liability and monetary relief for an infringement falls upon the infringing user of the copyrighted work.⁶⁴

Second, the “actual knowledge” provisions in § 512(A) signify that in most cases, the ISP is exempt from any duty to actively attempt to identify and remove copyrighted works on its own.⁶⁵ This is because Congress found it impractical to require each ISP to self-police their own services for infringements, in part because infringements are so common that self-policing would require resources that even the likes of Google would be incapable of acquiring.⁶⁶ Through the § 512(A) “actual knowledge” condition, Congress effectively required the copyright holder to perform the task of identifying the supposed infringement, thus creating a system whereby copyright holders are required to effectively police the Internet for their works.⁶⁷

III. THE BEST PRACTICES FOR DMCA TAKEDOWNS

In April 2015 the U.S. Department of Commerce’s Internet Policy Task Force promulgated a guidance document containing a list of best practices used by both ISPs and copyright holders alike in properly executing the DMCA Takedown procedures.⁶⁸ The document was developed as part of a forum held between copyright holders, ISPs, and consumer advocates, and sought to aid in the creation of an effective

62. *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004)).

63. 17 U.S.C. § 512 (a)-(d); *see also Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the Comm. on the Judiciary H.R.*, 113th Cong. 2-3 (2014) (testimony of Katharine Oyama, Senior Copyright Policy Counsel, Google) [hereinafter Oyama Testimony].

64. Oyama Testimony, *supra* note 63, at 2-3.

65. Brett White, *Viacom v. YouTube: A Proving Ground for DMCA Safe Harbors Against Secondary Liability*, 24 ST. JOHN’S J. LEGAL COMMENT 811, 811-14 (Summer 2010).

66. *Id.*

67. *See Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (“The DMCA notification procedures place the burden of policing copyright infringement . . . squarely on the owners of copyright.”).

68. *See generally*, BEST PRACTICES DOCUMENT, *supra* note 13 (discussing Best Practices for DMCA takedown notifications).

takedown system that balances each of their interests.⁶⁹ The guidance document contains a list of best practices, notable bad practices, and “situational practices” that vary based upon the situation or context and include security measures.⁷⁰

A. *Best Practices for ISPs*

The document proposes that ISPs make DMCA takedown and counter-notice tools easy to locate and to comprehend and suggests that these mechanisms should appear readily in search results and be described in the terms of service or contact pages.⁷¹ Furthermore, the ISPs should be able to provide an explanation of the DMCA takedown procedures “in plain English,” as required by the relevant portions of the DMCA.⁷² The document also suggests making the removal procedure for multiple infringing works as simple as possible by either allowing multiple URLs to be submitted at the same time via email or web form, or by offering alternative methods of submitting notices through the use of a computer program or an automated service.⁷³ When a web form is the submission mechanism made available by the ISP, the document suggests that ISPs provide sample forms and text, as well as a comprehensive submission system that incorporates help buttons, instructions, and an error message upon rejection of a notice submission that includes suggestions for how to correct the submission.⁷⁴ Curiously, the document does not discuss large-scale computer processes, other than briefly mentioning that it is a good practice to offer such a service if it is within the ISPs’ capabilities.⁷⁵

So-called bad practices for ISPs include intentionally obscuring or complicating the procedure for submitting DMCA takedown

69. Jeffrey Neuburger, *U.S. Dept. of Commerce Releases Multistakeholder Guidance on DMCA Notice and Takedown Best Practices*, PROSKAUER ROSE LLP: NEW MEDIA & TECH. L. BLOG (Apr. 9, 2015), <http://newmedialaw.proskauer.com/2015/04/09/u-s-dept-of-commerce-releases-multistakeholder-guidance-on-dmca-notice-and-takedown-best-practices/>.

70. BEST PRACTICES DOCUMENT, *supra* note 13, at 1. Security measures include incorporating CAPTCHA codes into forms. *Id.* CAPTCHA is a program that generates tests that humans can pass but current codes cannot, thus protecting websites from bots. *CAPTCHA: Telling Humans and Computers Apart Automatically*, THE OFFICIAL CAPTCHA SITE (2010), <http://captcha.net/>.

71. BEST PRACTICES DOCUMENT, *supra* note 13, at 1.

72. *Id.*

73. *Id.*

74. *Id.* at 2.

75. *Id.* at 1.

notifications;⁷⁶ for example, hiding the submission forms or placing the DMCA agent's email address behind an array of click-through web pages or advertisements.⁷⁷ The document also brings special attention to an ISP that attempts to use "stigmatizing or intimidating language in connection with any DMCA notice mechanism that is intended to chill submission of legitimate notices or counter-notices."⁷⁸ Thus, the ISP is heavily encouraged to avoid the use of advertisements or other means to discourage the use of the DMCA takedown procedures.⁷⁹

An analysis of Google's takedown statistics shows that Copyright owners and reporting organizations submit DMCA takedowns to Google for the purpose of removing specific URLs and specific domain names from being displayed in Google's search results.⁸⁰ In March 2015 roughly 6800 copyright owners submitted DMCA takedown requests for over 78 million URLs.⁸¹ Copyright owners can submit such a large number of requests only by using specialized computer software.⁸² In fact, when submitting a DMCA takedown request to Google, two forms are available to the takedown-sender. The vast majority of copyright holders will use a web form designed for low volume requests.⁸³ However, high-volume users submitting over 1000 DMCA takedown requests per day use an automated web form designed for their specialized computer programs to interact directly with Google's own database.⁸⁴ Roughly 90% of the notices Google receive come from this high-volume specialized computer program, which is not concerned with detecting transformative works but rather identifying prima facie cases of copyright infringement.⁸⁵

76. *Id.* at 4.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Requests To Remove Content due to Copyright*, GOOGLE, <https://www.google.com/transparencyreport/removals/copyright/> (last visited Mar. 16, 2016) [hereinafter *Requests To Remove*].

81. *Id.*

82. Von Lohmann, Lenz Seminar, *supra* note 18.

83. *See Removing Content from Google*, GOOGLE, <https://support.google.com/legal/troubleshooter/1114905?hl=en> (last visited Sept. 30, 2016).

84. Von Lohmann, Lenz Seminar, *supra* note 18.

85. *Id.*

B. Best Practices for Copyright Holders and Internet Users

Regarding notice senders or copyright holders, the document centrally focuses on the good faith requirement of § 512(c).⁸⁶ The document leads by insisting that all takedown notifications be submitted with good faith and that the takedown requests are used specifically to remedy copyright infringement, not to address issues such as trademark infringement, defamation, or privacy.⁸⁷ Furthermore, where automated takedown notices are sent to sites based on identification via the use of metadata (keywords, titles, document size, etc.), the document suggests taking human review of that data to ensure that the good faith requirement is adhered to.⁸⁸ Further provisions along these lines include establishing “search parameters the copyright owner or its agent believe will efficiently identify the unauthorized material while minimizing the inadvertent inclusion of authorized material” and appropriately communicating with the ISP to ensure that the systems for generating and sending notices are working efficiently.⁸⁹

Bad practices for copyright holders follow from the premise that the DMCA takedown notification was sent by a party that did not submit the notice in good faith.⁹⁰ These include sending notices to an ISP when the copyright holder “knows that the allegedly infringing material or activity . . . does not reside on a system or network being controlled or operated by or for the provider within the meaning of DMCA 512(c), . . . [or] is not referred or linked to by the service provider within the meaning of DMCA Section 512(d).”⁹¹ Additionally, the document scrutinizes false assertions that the notice sender is authorized to act on a copyright owner’s behalf and the submission of takedown requests with the goal of silencing criticism or stifling discussion.⁹²

Of particular note is that it is considered a bad practice to “repeatedly submit . . . DMCA notices with regard to a URL where the rights holder knows the allegedly infringing material . . . has been reposted by the service provider in response to a counter-notice.”⁹³ Thus,

86. BEST PRACTICES DOCUMENT, *supra* note 13, at 3.

87. *Id.*

88. *See id.*

89. *See id.* at 3.

90. *See id.* at 4.

91. *Id.*

92. *See id.*

93. *Id.*

it is considered a bad practice to repeatedly challenge a lawful “put-back” as outlined in § 512(g).⁹⁴

IV. LET’S GO ©RAZY

A. *The Prince of Paisley Park*

The subject of the *Lenz* case is a song that was recorded and published in 1984, when the recording artist known as Prince released the album “Purple Rain” featuring the album’s leadoff track “Let’s Go Crazy.”⁹⁵ Pioneering his signature “Minneapolis Sound,” Prince experienced tremendous success throughout the 1980s with songs like “Raspberry Beret,” “1999,” and “When Doves Cry,” and became a household name.⁹⁶ With lyrics rife with sexual overtones and a vaguely androgynous public persona, Prince was no stranger to controversy.⁹⁷

In recent years, as evidenced by his continuous commitment to quality performances and recordings and the frequency at which they were issued, Prince came to be viewed as one of the more prolific and free-thinking artists of his era.⁹⁸ It thus remains unsurprising to discover that Prince was equally known for his ability and willingness to protect the copyrights that he owned in his works, as well as his ability to monetize them.⁹⁹

Though Prince began his career before the Internet existed, in the mid-1990s he appeared to embrace the possibilities it offered.¹⁰⁰ In 1997, he became the first major artist to release an entire album exclusively on the web.¹⁰¹ However, the failed launch of his Internet subscription service in 2001, and his subsequent inability to create and maintain a high-quality website, soured his relationship with the Internet.¹⁰² In 2007 alone, Prince filed suits against three websites run by his fans.¹⁰³ In 2010,

94. *See id.*

95. Evan Serpick & Kori Grow, *Prince Bio*, ROLLING STONE MAG., <http://www.rollingstone.com/music/artists/prince/biography> (last visited Oct. 2, 2016).

96. *Id.*

97. *Id.*

98. *Id.*

99. *See* Hasit Shah, *Poor Lonely Computer: Prince’s Misunderstood Relationship with the Internet*, NPR (Mar. 8, 2016), <http://www.npr.org/sections/therecord/2016/03/08/469627962/poor-lonely-computer-princes-misunderstood-relationship-with-the-internet>.

100. *See id.*

101. *Id.*

102. *See id.* (“[H]is issues with the Internet . . . are more a result of disappointment of the ways in which its potential has not been realized than in lack of vision.”).

103. *Id.*

he declared “the Internet’s completely over . . . I don’t see why I should give my new music to iTunes or anyone else.”¹⁰⁴

In the following years, he removed the bulk of his recorded work from iTunes and other Internet-based digital music platforms, as well as instituted a ban on the use of cellular smartphones at his live performances.¹⁰⁵ A Prince became one of the most infamous users of the DMCA’s takedown procedures, prompting the EFF to create the “Raspberry Beret Lifetime Aggrievement Award” to commemorate his “extraordinary abuses of the takedown process in the name of silencing speech.”¹⁰⁶

In his use of the DMCA’s takedown procedures to identify and remove potential cases of infringement, Prince was rather prolific.¹⁰⁷ Following his untimely death in April 2016, the Internet was flooded with videos featuring his live performances and his promotional clips for hit songs.¹⁰⁸ It appears that Prince’s estate opposes the presence of these uploaded videos since his team has continued to submit takedown requests.¹⁰⁹ Even so, it is likely that they are unable to keep up with the amount of infringing material uploaded in the months following his death.¹¹⁰

B. *Lenz v. Universal Music Corp.*

On February 7, 2007, Stephanie Lenz uploaded a twenty-nine-second home video to YouTube.¹¹¹ The video featured her two young children dancing in their home kitchen to a recording of “Let’s Go Crazy,” a song authored and recorded by Prince.¹¹² In the video entitled “Let’s Go Crazy #1,” Lenz asks her year-old son what he thinks of the music, after which he appears to bob up and down while playing with a toy.¹¹³

104. *Id.*

105. *See id.*

106. Parker Higgins, *Prince Inducted into Takedown Hall of Shame with New Lifetime Aggrievement Award*, ELE. FRONT. FOUND. (May 7, 2013), <https://www.eff.org/deeplinks/2013/05/prince-inducted-takedown-hall-shame-new-lifetime-aggrievement-award>.

107. *Cf.* Hannah Karp & Mike Ayers, *Unauthorized Prince Videos Pour onto Youtube, a Practice He Opposed*, WALL ST. J. (May 5, 2016), <http://www.wsj.com/articles/unauthorized-prince-videos-pour-onto-youtube-a-practice-he-opposed-1462465215>.

108. *Id.*

109. *See id.*

110. *See id.*

111. *Id.*

112. *Id.*

113. *Id.*

At the time, Universal Publishing was Prince's publishing administrator and was responsible for enforcing his copyrights.¹¹⁴ Universal's employee in charge of monitoring YouTube was Sean Johnson, an assistant in the legal department.¹¹⁵ Johnson's task was to comb through YouTube looking for Prince songs to conduct a review of the videos by evaluating whether they "embodied a Prince composition" by "making significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video, or was the focus of the video."¹¹⁶ According to Robert Allen, Universal's head of Business Affairs, "the general guidelines are that . . . we review the video to ensure that the composition was the focus and if it was then we notify YouTube that the video should be removed."¹¹⁷ None of the video evaluation guidelines explicitly included consideration of the fair use doctrine, though videos that were shot in noisy environments or included only small portions of a Prince song were often not flagged for removal.¹¹⁸

In 2007, Prince's record label, Universal Music Corporation, came across a video containing an unlicensed use of his smash hit "Let's Go Crazy."¹¹⁹ Johnson reviewed Lenz's video and flagged it for removal, citing the video's title, Stephanie Lenz's reference to the song, and the fact that "[the song] played loudly in the background throughout the entire video."¹²⁰ Lenz's video, along with over 200 other videos featuring potentially unlawful uses of Prince songs, was included in a takedown notification sent to YouTube by Universal.¹²¹ This notification followed the DMCA takedown notification requirements, including § 512(c)(3)(A)(V)'s statement of good faith requirement.¹²²

YouTube complied with the takedown notification and sent Lenz an email notifying her of the video's removal on June 5, 2007.¹²³ Two days later, Lenz made an attempt to restore the video by sending a § 512(g)(3) counter-notification to YouTube, who provided it to Universal.¹²⁴ Universal promptly protested YouTube's reinstatement of the video

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149 (9th Cir. 2016).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1149-50.

124. *Id.* at 1150.

because the video “constituted infringement because there was no record that ‘either she or YouTube were ever granted licenses to reproduce, distribute, publicly perform or otherwise exploit the Composition.’”¹²⁵ As in their initial takedown notice, their protests made no mention of the fair use doctrine.¹²⁶ On June 27, 2007, Lenz sent a second counter-notification, and the video was reinstated by YouTube in mid-July.¹²⁷ Lenz filed suit shortly thereafter, alleging that Universal had misrepresented themselves under § 512(f).¹²⁸

Upon appeal, the United States Court of Appeals for the Ninth Circuit first considered whether the DMCA required copyright holders to consider whether the potentially infringing material is a fair use of a copyrighted work before they could issue a takedown notification.¹²⁹ This, according to the court, was the implication of the requirement that a takedown notification must include a “statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”¹³⁰ To arrive at this conclusion, the court relied on the canons of statutory construction to determine that, when read simply, the “statute unambiguously contemplates fair use as an use authorized by the law.”¹³¹

Universal’s counterargument stated that fair use could not be considered “authorized by the law” as applied to § 512 because it is an affirmative defense: its purpose is to excuse otherwise infringing conduct.¹³² The court dealt with this by articulating that Universal has conflated two different concepts: “an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct.”¹³³ Citing *Sony Corp. of America v. Universal Studios, Inc.*, the court argued that the Supreme Court has already held fair use to be an example of the former rather than the latter.¹³⁴ Furthermore, even if fair use was classified as an affirmative defense in regards to a conduct-excusing provision, the court

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1151.

130. *Id.* (quoting 17 U.S.C. § 512 (c)(3)(A)(V) (2012)).

131. *Id.*

132. *Id.* at 1152.

133. *Id.*

134. *Id.* (“[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use”) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984)).

unambiguously proclaimed that for copyright purposes involving the DMCA, fair use is to be treated differently than traditional affirmative defenses.¹³⁵

Having determined that the good faith requirement in the statute encompassed and entirely contemplated the doctrine of fair use, the court was then tasked with determining whether Universal had acted in good faith when it sent its initial takedown notification.¹³⁶ Relying on *Rossi*, the court explicitly held that good faith encompassed a subjective standard of evaluation.¹³⁷ Stating that the subjective good faith standard of *Rossi* applied to *Lenz*,¹³⁸ the court held that whether Universal's actions met the standard was a question for a jury.¹³⁹ As a result, the court affirmed the district court's order denying the parties' motion for summary judgement.¹⁴⁰

V. THE OBJECTIVE GOOD FAITH STANDARD

In October 2015, just under one month following the court's decision, *Lenz* filed a petition for a rehearing en banc.¹⁴¹ The petition sought to overrule *Rossi* or "hold that its subjective good faith standard does not countenance ignorance of the law, and applies only to factual determinations."¹⁴² A few weeks after the petition was registered, ISPs Automattic Inc., Google Inc., Twitter, and Tumblr (a subsidiary of Yahoo! Inc.) submitted an amicus brief asking the court to hold that the "good faith requirement in Section 512(3)(A)(V) encompasses not just a subjective standard of good faith, but also an objective one."¹⁴³

This objective standard would shift the analysis to the use of concrete rules that can be applied in every situation to ascertain what the notice sender should always know before submitting a DMCA takedown request.¹⁴⁴ According to some scholars, an objective standard of good

135. *Id.* at 1153.

136. *Id.*

137. *Id.* at 1153-54.

138. *Id.* at 1153-55 (citing *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004)).

139. *Id.* at 1154.

140. *Id.* at 1158.

141. Appellee Petition for Reh'g, *supra* note 16, at 1.

142. *Id.* at 3.

143. Brief of Amici Curiae, Automattic Inc., *supra* note 17, at 8.

144. *Compare* *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1003-04 (9th Cir. 2004) (stating the facts of *Rossi* indicating that the defendant used an objective standard of reasonableness before submitting a takedown request) *with* Brief of Amici Curiae, Automattic

faith would result in a substantial increase in the likelihood that copyright holders are found liable for misrepresentation under § 512(g).¹⁴⁵ However, due to the widespread use of computer algorithms that can submit high volumes of DMCA takedown requests to ISPs, some of the better funded copyright holders disagree.¹⁴⁶

This Part will attempt to present the arguments surrounding the implementation of an objective good faith standard from the perspectives of ISPs, copyright holders, and Internet users. The objective in doing so is to determine both whether an objective standard would continue the DMCA's stated goal to balance the rights of ISPs, copyright holders, and Internet users in the interests of promoting economic growth, and whether doing so may provoke a fundamental change in the application of the fair use doctrine itself.

A. *ISPs Endorse an Objective Standard*

According to Fred Von Lohmann, legal director for Google Inc., many of Google's DMCA takedown requests are directed towards removing infringing URLs from search results, with the bulk of these targeting websites which are direct infringers.¹⁴⁷ Therefore, Google does not subject its DMCA takedown requests to human review,¹⁴⁸ in large part because of the sheer number of applications it receives on a monthly basis.¹⁴⁹ Unless the takedown request was submitted incorrectly, or the sender failed to properly complete Google's web form, most of the requests will be processed and takedowns issued without ever being reviewed by a human employee of Google.¹⁵⁰ The lack of human review has drawn criticism from many Internet users because, while the ISP is not required to self-police its services, many users may still fall prey to a takedown notification sent by a copyright holder without good faith.¹⁵¹

Inc., *supra* note 17, at 14 (“An objective standard would only require that the ‘good faith belief’ regarding a potential use be a reasonable one”).

145. See Noah J. Wald, *Painting Independent Artists into a Corner with Broad Strokes of 512(f) Liability: The Potential Harm of an Overreaching Objective Standard*, 4 BERKELEY J. ENT. & SPORTS L. (2015) (arguing that independent artists would become further disenfranchised under an objective good faith standard).

146. See Sheckler, Lenz Seminar, *supra* note 15; accord Von Lohmann, Lenz Seminar, *supra* note 18.

147. Von Lohmann, *Lenz Seminar*, *supra* note 18.

148. See *Requests To Remove*, *supra* note 80; accord Von Lohmann, Lenz Seminar, *supra* note 18.

149. *Requests To Remove*, *supra* note 80.

150. Von Lohmann, Lenz Seminar, *supra* note 18.

151. *Id.*

In the brief written by the ISPs, Google, Tumblr, Twitter, and Automattic (representing its subsidiary WordPress), argue that “[u]nfounded and abusive takedown notices inflict real harms on OSPs, Internet users, and copyright holders.”¹⁵² Additionally, though most DMCA notices are “valid, well-founded, and sent in good faith,” some are sent specifically to target instances that could be defended by fair use.¹⁵³ For ISPs, an objective standard would promote a modification of their DMCA takedown submission protocol and encourage the use of computerized review of takedown notices.¹⁵⁴ This is ideal for them because, if the ISPs are unable to adapt to the increasing demands for efficient DMCA review and takedown procedures, it is possible that they may lose the protections of the safe harbor provisions of the DMCA.¹⁵⁵

Consequently, Google developed its Content ID system for YouTube, which allows copyright holders to identify videos uploaded by other users that “are entirely or partially their content, and choose, in advance, what they want to happen when those videos are found.”¹⁵⁶ These options include the ability to track their content, monetize a video through the placement of advertisements, as well as the ability to block the video from being seen by other users.¹⁵⁷ However, no similar program is currently in use to control infringing content identified by Google’s search engine.¹⁵⁸

To some, the imposition of both Content ID and the *Best Practices Document* has served to negate the substantive impact of *Lenz*.¹⁵⁹ For Jordan Gimbel, representing Yahoo! Inc., *Lenz* serves primarily as an exploration of good and bad practices in the DMCA takedown system.¹⁶⁰ In 2007, when *Lenz* initially submitted her complaint, identification and removal services such as Content ID were not yet in widespread use.¹⁶¹ Furthermore, it was not common practice to include a statement of fair

152. Brief of Amici Curiae, Automatic Inc., *supra* note 17, at 3.

153. *Id.* at 4.

154. Von Lohmann, *Lenz* Seminar, *supra* note 18.

155. *Id.*

156. Oyama Testimony, *supra* note 63, at 6.

157. *Id.*

158. *Cf. id.* at 6-7 (stating that Google developed Content ID on YouTube, but there is still more work to be done for identifying infringing works called up by Google Search).

159. Gimbel, *Lenz* Seminar, *supra* note 12.

160. *Id.*

161. Compare David King, *Latest Content ID Tool for YouTube*, GOOGLE, OFFICIAL BLOG (Oct. 15, 2007), <https://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html> (announcing the launch of the beta form of Content ID) with Amend. Compl. and Demand for Jury Trial, *Lenz v. Universal Music Corp.*, No. C07-03783 (N.D. Cal 2007).

use consideration in an initial takedown request.¹⁶² Because the subjective good faith standard only requires that the copyright holder include a statement noting that there was a consideration of fair use, which Universal notably did not include in the takedown notification it sent to Lenz,¹⁶³ the standard is almost always met, and the threat of litigation is negated.¹⁶⁴

B. Wealthy Copyright Holders Endorse the Objective Standard

The court's initial endorsement of computer algorithms to meet the subjective fair use requirement corresponded directly with the entertainment industry's shift towards favoring the use of these systems.¹⁶⁵ For example, it is unlikely that Universal used such technology at the time it sent its takedown notification to Lenz.¹⁶⁶ However, for attorneys such as Vicky Sheckler, an attorney at the Recording Industry Association of America (RIAA), and Sophia Castillo, an attorney at the Association of American Publishers, the use of computer algorithms still fails to adequately address their concerns.¹⁶⁷ Many copyright holders do not have the resources or capability to submit thousands of DMCA removal requests per day with a computer algorithm, and are forced to focus instead on targeting cases of prima facie infringement.¹⁶⁸ Targeting direct infringers still requires a human review of the potentially infringing work to ensure that the entirety of the infringed work was contained on the website in question.¹⁶⁹

According to Sheckler, RIAA sends approximately 71 million DMCA takedown notifications per year, the majority of which are targeted towards removal of search results from search engines for the purpose of negating direct infringement.¹⁷⁰ Both Sheckler and Castillo argued that the *Lenz* decision proves that while the *Best Practices Document* represents a step in the right direction, the current system of DMCA removal prevents their clients from properly considering whether

162. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149-50 (9th Cir. 2015).

163. *Id.* at 1154-55.

164. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1135-36 (9th Cir. 2015).

165. *Id.* at 1136.

166. *Id.*

167. Sofia Castillo, Staff Attorney, Ass'n of Am. Publishers, Panelist for the Copyright Society of America's Mid-Winter Meeting's panel, *A Lenz into the Future: The State of Takedowns for 2016* (Feb. 13, 2016) [hereinafter Castillo, Lenz Seminar]; *accord* Sheckler, Lenz Seminar, *supra* note 15.

168. Castillo, Lenz Seminar, *supra* note 167; Sheckler, Lenz Seminar, *supra* note 15.

169. Castillo, Lenz Seminar, *supra* note 167; Sheckler, Lenz Seminar, *supra* note 15.

170. Sheckler, Lenz Seminar, *supra* note 15.

the work in question is transformative.¹⁷¹ Accordingly, they argued that until the use of computer-guided takedown programs is both a legal and an industry standard, copyright holders will not be able to properly protect their exclusive rights on the Internet.¹⁷²

Though many copyright holders are developing the means to detect infringements themselves, other firms such as MarkMonitor, Marketly, and Degban are viable third party detection services who have recently come into use by copyright holders.¹⁷³ Indeed, Prince was one of the first artists to resort to using a third party service when he hired the United Kingdom based firm, Web Sherriff, to help him enforce his copyrights on the Internet.¹⁷⁴ Though one can already observe the effectiveness of his efforts, given that even Prince's estate is having trouble keeping up with the sheer number of videos of Prince uploaded to the Internet after his death,¹⁷⁵ it is difficult to argue that the addition of an objective standard would make it easier for artists to evaluate potentially transformative instances of infringement.¹⁷⁶

C. The Objective Standard Is Unfair to the Majority of Copyright Owners

Unfortunately, the majority of copyright owners do not have the financial means that Prince had in the later stages of his career. The imposition of an objective standard would amount to a substantial burden on independent artists¹⁷⁷ who might not have the financial resources of artists like Prince. Fair use is designed to be a fact intensive inquiry,¹⁷⁸ and thus by its very nature is difficult to predict with any certainty. Requiring a copyright holder to objectively consider fair use prior to sending a takedown notification would, therefore, require every copyright holder to either retain an attorney or obtain a significant body of

171. *Id.*; accord Castillo, Lenz Seminar, *supra* note 167.

172. Sheckler, Lenz Seminar, *supra* note 15; accord Castillo, Lenz Seminar, *supra* note 167.

173. See Oyama Testimony, *supra* note 63, at 4.

174. Shah, *supra* note 99.

175. *Id.*

176. *Id.*

177. Wald, *supra* note 145, at 136.

178. 17 U.S.C. § 107 (2012); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright line rules, for the statute . . . calls for a case-by-case analysis.”).

knowledge regarding one of the law's most difficult doctrines in order to avoid liability for misrepresentation.¹⁷⁹

This goal may be achievable for those with the financial resources of Prince and the RIAA, but for the millions of content creators worldwide who have authored and shared photographs, videos, and sound recordings, and who cannot afford an attorney or who do not know the intricacies of copyright law, an objective good faith requirement would result in a substantial injustice.

D. Internet Users: Free Speech and Misrepresentation Under § 512(f)

This concern over the effect on the “everyman” is echoed to a certain extent by Lenz in her brief requesting a rehearing of her case. However, for Lenz, the greatest threats to the “everyman” are the abuses of the DMCA takedown system and its effect on free speech on the Internet.¹⁸⁰ Though she does not explicitly argue in favor of an objective standard, she attacks the subjective good faith standard as too lenient on copyright holders, who may still suppress speech about their copyrighted works without the threat of liability under the DMCA's misrepresentation standards.¹⁸¹ For Lenz, § 512 provides copyright holders with “a streamlined, extra-judicial means of silencing speech.”¹⁸² Under a purely subjective standard, a copyright owner that sends an improper takedown notice with an unreasonable belief that the work violates fair use will not be liable under § 512(f).¹⁸³ A stricter standard is necessary to prevent the abuse of a system that rewards lip-service over an actual fair use consideration.¹⁸⁴

Lenz's worries are not entirely unfounded, as both the amicus brief submitted by Automattic et al. and Google's testimony to the Senate have detailed censorious abuses of the DMCA takedown system.¹⁸⁵ These sentiments have been echoed by others who detail that DMCA takedown notices have been used to silence negative reviews of businesses and

179. Wald, *supra* note 145, at 133 (“[I]mposing liability based on an objective standard would also result in liability for the allegedly infringing party who incorrectly predicts the outcome of a fair use determination.”).

180. Appellee Petition for Reh'g, *supra* note 16, 6-8.

181. *Id.* at 8-11.

182. *Id.* at 7.

183. *Id.* at 11-13.

184. *Id.* at 12-13.

185. See Brief of Amici Curiae, Automattic Inc., *supra* note 17, 7-11; see also Oyama Testimony, *supra* note 63, at 5.

suppress political speech.¹⁸⁶ Certainly, the imposition of an objective standard would service each of these goals by increasing the likelihood of finding copyright holders guilty of misrepresentation for the submission of inappropriate takedown notices.

VI. CONCLUSION AND SPECULATION ON FUTURE DEVELOPMENTS

Following the promulgation of the Ninth Circuit's revised opinion in *Lenz* and subsequent denial of their rehearing petition, the EFF released a statement that amounted to a mixture of praise and disappointment with the court.¹⁸⁷ On one hand, the EFF was disappointed that their rehearing petition was denied but praised the court for removing language that copyright owners may misinterpret as implying that computer-automated takedown notices would meet the subjective good faith standard.¹⁸⁸

Indeed, the court's holding amounts to a significant blow to the ISPs and their dreams of an Internet that regulates itself through the use of computer-automated DMCA takedown notices, as well as the copyright holders with the resources to obtain and use such a system. On the other hand, the EFF did not obtain its stated goal of a tougher standard that can aid in detecting and punishing notice senders for misrepresentation under § 512(f). In its statement, the EFF claimed that it will "continue to fight for fair use in this case and others," thus implying that the *Lenz* controversy is not yet over.¹⁸⁹

In conclusion, the court's revised opinion negates the issues raised in the rehearing briefs and returns us to the initial post-*Lenz* status quo. When adhered to, the best practices for DMCA takedowns wholly and explicitly satisfies the subjective good faith standard. By removing any language pertaining to the use of computer-automated takedown notifications, the court all but killed any immediate hope of an objective standard for the ISPs and copyright holders who would prefer its imposition. Likewise, the EFF and other Internet free speech advocates failed in their goal of obtaining a stricter standard for notice senders who use the DMCA takedown system to suppress free speech.

However, the imposition of an objective standard may continue to be debated in the future. Though many ISPs, copyright owners, and Internet users may appreciate the benefits of an objective standard of

186. John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245, 260-62 (2015).

187. McSherry, *supra* note 22.

188. *Id.*

189. *Id.*

good faith, there remain significant obstacles to overcome for the independent and relatively unfinanced copyright owners who are unable to afford or understand an objective standard.

These questions and more may be answered in the near future, as Lenz filed a petition for writ of certiorari on August 12, 2016.¹⁹⁰ Whatever the result, the key concern of both the judiciary and the legislature should be to balance the law of copyright to serve the interests of each party doing business on the Internet. After all, a law written for all content creators in mind, but which benefits only those wealthy enough to use it, begins to resemble not a right, but a privilege.

190. *Lenz v. Universal*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/lenz-v-universal-music-corp/> (last visited Sept. 26, 2016).