NOS. 13-16106, 13-16107

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANIE LENZ,

PLAINTIFF-APPELLEE/CROSS-APPELLANT,

v.

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

DEFENDANTS-APPELLANTS/CROSS-APPELLEES,

On Appeal From The United States District Court
for the Northern District of California
D.C. No. 5:07-cv-03783-JF

The Honorable Jeremy Fogel, District Court Judge

***BRIEF OF AMICI CURIAE* PUBLIC KNOWLEDGE AND ORGANIZATION FOR TRANSFORMATIVE WORKS IN SUPPORT OF STEPHANIE LENZ'S PETITION FOR REHEARING *EN BANC* OR PANEL REHEARING**

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, both *amicus curiae* Public Knowledge and *amicus curiae* Organization for Transformative Works state that they do not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of either *amicus*.

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STATEMENT OF INTEREST

Amicus Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

Amicus Organization for Transformative Works ("OTW") is a 501(c)(3) nonprofit organization dedicated to protecting and preserving noncommercial fanworks: works created by fans based on existing works, including popular television shows, books, and movies. OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own ("AO3"), has over 600,000 registered users and receives upwards of 90 million page views per week. The OTW submits this brief to make the Court aware of the impact of its decision upon transformative speech.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

INTRODUCTION

Although the Panel decision correctly recognized that a failure to consider fair use prior to sending a takedown notice could be actionable under the Digital Millennium Copyright Act ("DMCA"), amici support plaintiff Lenz's petition for rehearing so that this Court can provide necessary clarity to the operation of the DMCA in order to prevent parties from abusing it in the future to wrongfully cause online speech to be removed.

Because the DMCA essentially functions as a system of extra-judicial injunctions on speech, designed to save legitimately aggrieved copyright holders from the cost and delay of having to seek content-removing injunctions from the courts, it is crucial that these savings do not come at the expense of non-infringing speech being easily suppressed. It is clear from both the plain text and statutory history of the DMCA that Congress, in creating the DMCA's notice-and-takedown system, did not intend to make this legitimate speech so vulnerable. And yet, without courts' willingness to enforce the penalty built into the DMCA to deter improper takedown demands, myriad legitimate speech has succumbed, and will continue to succumb, to unwarranted, illegitimate removal from the online marketplace of ideas with no effective recourse for anyone affected.[1]

[1] It is not just the speaker who is affected by a wrongful takedown: the intermediary hosting it is affected, as is the public who no longer has access to it.

Because this casual elimination of legitimate speech is not what Congress intended, this Court should clarify the good faith requirements for a valid takedown notice and make clear that improper notices will be subject to the full remedy the DMCA sets forth at 17 U.S.C. § 512(f).

ARGUMENT

I. WITHOUT AN OBJECTIVE GOOD FAITH STANDARD THE DMCA BECOMES A TOOL FOR CENSORSHIP.

A. The lack of an objective good faith standard has led to a proliferation of illegitimate takedown notices.

Takedown notices on the whole are increasing. *See generally* Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J. L. & TECH 369 (2014). If even a small percentage of these takedown notices are invalid, they represent a substantial incursion on freedom of speech. Such a concern is not academic, as evidence of the effect of wrongful takedowns is mounting.[2]

[2] See, for example, the testimony of Paul Sieminski, general counsel of Automattic, Inc., the company behind the WordPress blogging platform, at recent hearings on the effectiveness of the DMCA. *Section 512 of Title 17*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Statement of Paul Sieminski, General Counsel, Automattic Inc.), *available at* http://judiciary.house.gov/?a=Files.Serve&File_id=B343EABE-0BF1-44E9-8C85-B3478892B8E1. See also an analysis of 50 million takedown notices submitted to Google, which determined that, at a lower bound using the most forgiving measures, 8.4% had serious technical errors, and an additional 1.4% had serious substantive errors. These percentages amounted to nearly 5 million erroneous takedown demands. Daniel Seng, *'Who Watches the Watchmen?' An Empirical*

These invalid takedown demands occur in all sorts of circumstances. At times even content owners demand the removal of content they themselves have authorized.[3] In other cases, content owners send takedown notices based on fragmentary phrases or common words that happen to match the titles of their—and many other—works.[4] Overbroad matching algorithms also lead copyright

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Analysis of Errors in DMCA Takedown Notices (January 23, 2015), http://ssrn.com/abstract=2563202.

[3] *See, e.g.*, Jordan Pearson, *NBC's Bogus Copyright Claim Got Canada's 'Mr. Robot' Premiere Yanked from Google*, VICE (Sept. 4, 2015), http://motherboard.vice.com/read/nbcs-bogus-copyright-claim-got-canadas-mr-robot-premiere-yanked-from-google; Adam Rosenberg, *'Pixels' copyright notices took down the studio's own trailer*, MASHABLE (Aug. 9, 2015), http://mashable.com/2015/08/09/pixels-dmca/; Clicky Steve, When Bots go Bad: Automated DMCA Takedown Problems (April 9, 2015), https://transparency.automattic.com/2015/04/09/automated-dmca-fail-when-bots-go-bad/ (discussing widely used rights enforcement agency Attributor.com's takedown of copyright owner's own website). *See also* Annalee Newitz, *How Copyright Enforcement Robots Killed the Hugo Awards*, IO9 (Sept. 3, 2012), http://io9.com/5940036/how-copyright-enforcementrobots-killed-the-hugo-awards (discussing automated takedown of licensed footage that suppressed a larger broadcast); Emil Protalinski, *Why automated DMCA takedown requests are asinine: HBO asked Google to censor links to HBO.com*, THE NEXT WEB (Feb. 13, 2013), http://thenextweb.com/media/2013/02/03/why-automated-dmca-takedown-requests-are-asinine-hbo-asked-google-to-censor-links-to-hbo-com (HBO provided takedown notices about 8 HBO links, as well as links to pages on Perez Hilton's blog, Pinterest, MTV.com, and IGN.com that carried stories about the HBO content at issue); Emil Protalinski, *Automated DMCA takedown requests are awful: Microsoft asked Google to delete Bing links, and it did*, THE NEXT WEB (Oct. 8, 2012), http://thenextweb.com/microsoft/2012/10/08/automated-dmca-takedown-requests-are-awful-microsoft-asked-google-to-delete-bing-links-and-it-did (similar).

[4] *See, e.g.*, Mike Masnick, *A Glimpse Of The Future Under SOPA: Warner Bros. Admits It Filed Many False Takedown Notices*, TECHDIRT (Nov. 10, 2011),

owners to send takedown notices targeting mere reporting on their works.[5] While in many of these instances a little bit of due care would have prevented content from wrongfully being removed, a lax good faith standard in the DMCA removes any incentive for anyone to take any of that care. *See* Seng, *Watchmen*, *supra* note 2, at 36-37 ("If it costs almost next to nothing for a [sender of a takedown notice] to fire off a million arrows to hit a target, he will fire off a million arrows to do so, regardless of accuracy or precision, as it improves his chances of hitting his target. And he can do so with impunity, because he is largely protected from any collateral damage which he may cause.").

Worse, the lack of an incentive to ensure that a takedown notice vindicates a legitimate copyright infringement claim has opened the door to non-copyright

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https://www.techdirt.com/articles/20111110/10135116708/glimpse-future-under-sopa-warner-bros-admits-it-filed-many-false-takedown-notices.shtml.

[5] Google Transparency Report, FAQ (visited Mar. 10, 2014) http://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests ("A major U.S. motion picture studio requested removal of the IMDb page for a movie released by the studio, as well as the official trailer posted on a major authorized online media service. A U.S. reporting organization working on behalf of a major movie studio requested removal of a movie review on a major newspaper website twice."); Emil Protalinski, *Microsoft accidentally asked Google to censor BBC, CBS, CNN, Wikipedia, and even the US government*, THE NEXT WEB (Oct. 7, 2012), http://thenextweb.com/microsoft/2012/10/07/microsoft-accidentally-asked-google-to-censor-bbc-cbs-cnn-wikipedia-and-even-the-us-government/ (similar); Protalinski, *Why automated DMCA takedown requests*, *supra* note 4; Matt Schruers, *Observations on DMCA Reform and Notice & Takedown Abuse*, PROJECT-DISCO (May 23, 2013), http://www.project-disco.org/intellectual-property/052313observations-on-dmca-reform-and-notice-takedown-abuse/ (discussing multiple attempts to censor unwanted information about notice senders).

holders using these notices as weapons against content they do not like. Businesses, for example, frequently submit improper takedowns in order to suppress discussion of their products or those of their competitors.[6] Often medical professionals try to use the takedown system to suppress criticism of their care and qualifications.[7]

Political speech is also frequently targeted. For instance, critics of the Argentinian and Ecuadorian governments have received DMCA takedown notices, and so have reporters on the controversy over this abuse of the takedown system itself.[8] The WordPress blogging platform alone has documented numerous

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[6] An analysis of takedown notices sent to Google found that "over half—57%—of [DMCA takedown] notices sent to Google to demand removal of links in the index were sent by businesses targeting apparent competitors." Schruers, *supra* note 5. *See also Online Policy Gp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004); Paul Alan Levy, *A Bogus DMCA Takedown from Apple*, PUBLIC CITIZEN CONSUMER LAW & POLICY BLOG (Nov. 21, 2013), http://pubcit.typepad.com/clpblog/2013/11/a-bogus-dmca-takedown-from-apple.html.

[7] In one such case a physician claiming a copyright in his signature sent a takedown notice aimed at a document related to the suspension of his license to practice medicine. *Section 512 of Title 17*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Statement of Katherine Oyama, Sr. Copyright Policy Counsel, Google Inc., at 5) *available at* http://judiciary.house.gov/_cache/files/be93d452-945a-4fff-83ec-b3f51de782b3/031314-testimony---oyama.pdf. *See also* Jeff Roberts, *Bad dentist must pay $4,677 in case over Yelp threats*, GIGAOM (Mar. 3, 2015), https://gigaom.com/2015/03/03/bad-dentist-must-pay-4677-for-threats-over-yelp-review/.

[8] Adam Steinbaugh, *Ares Rights Adopts Matroyshka Doll Approach To Censorious DMCA Takedown Notices* (Sept. 2, 2014),

instances of politically motivated takedowns.[9] This problem of politically-motivated takedown abuse is worst during campaign seasons, when takedown requests can suppress the most effective and cheapest means of communicating political messages.[10] In this way radio personality Michael Savage was thus able to suppress material criticizing his statements about Muslims, because his takedown notice sabotaged an entire media campaign that had pointed to the now DMCA-suppressed video.[11]

In short, as more people become aware of the DMCA's takedown system, and more people become aware that there is no real cost to sending a wrongful takedown notice, more and more are being sent, and more and more non-infringing content is being removed wrongfully. For this reason this Court should clarify that, per the DMCA, there is indeed a very real consequence to sending invalid takedown notices in order to stem the tide of takedown abuse.

B. The lack of an objective good faith standard frustrates Congressional intent for the DMCA to serve as a tool to *protect* speech.

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http://adamsteinbaugh.com/2014/09/02/ares-rights-adopts-matroyshka-doll-approach-to-censorious-dmca-takedown-notices/.

[9] Simienski, *supra* note 2.

[10] *See* Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), https://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

[11] *See* John Tehranian, *The New ©ensorship*, IOWA L. REV. (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514224.

Users rely upon intermediaries to access and use the Internet: they are what carry, store, and serve each speck of information online. Everything people communicate on the Internet exists on the Internet only because some site, server, or system has intermediated their communications so that the world can have access to them. So when it came to amending the copyright statute with the DMCA, Congress understood that if it wanted intermediaries to remain available to facilitate users' expression, it needed to craft a law that ensured intermediaries had sufficient protection from litigation and liability with respect to that expression. S. Rep. No. 105-190, at 8 (1998) ("[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.").

Shielding the intermediaries was not something Congress did for simply for the sake of shielding them. The point of shielding them was so that they could continue to be ready and available facilitators for the rich world on online content they enable. *Id.* at 1-2 ("The 'Digital Millennium Copyright Act of 1998' is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."). The survival of intermediaries is irrelevant, however, if all the content they were to have facilitated is so vulnerable to deletion demands by others. Only by putting teeth back into the DMCA and giving meaning to the

sanction at § 512(f) that Congress wrote into the statute to punish invalid takedown notices can the DMCA begin to be the sort of speech-enhancing statute Congress intended it to be.

II. § 512(F) MUST BE AVAILABLE TO ENFORCE THE "GOOD FAITH" STANDARD BECAUSE IT PROVIDES THE MOST EFFECTIVE REMEDY FOR THE LEGITIMATE SPEECH INTERESTS AFFECTED BY WRONGFUL TAKEDOWNS.

In addition to § 512(f) the DMCA also includes a "put back" procedure for content removed in response to a takedown notice, which is codified at 17 U.S.C. § 512(g). But this counternotification mechanism does not and cannot adequately vindicate the speech interests damaged by wrongful takedown notices. The examples cited in Section I.A, *supra*, regarding politically-motivated censorship illustrate the problem: when timeliness is key to speech's value (as it often is, particularly when it is relevant to the current news cycle), the takedown notice can be crippling to the speaker's ability to effectively convey her message, because even if she is ultimately able to get the content restored, it may be too late to matter. In fact, because the § 512(g) mechanism requires a delay of at least ten business days before the counternotification becomes effective and the challenged material is restored, the damage will have already been done.[12]

[12] Schruers, *supra* note 6; *see also* Center for Democracy & Technology, *supra* note 10 (documenting numerous cases); Tehranian, *supra* note 11.

Furthermore, many users whose content has been taken down either don't know they can fight the takedown notice or can't afford to fight it. They also cannot be assured that fighting back against the notice will not put them in the crosshairs of the party who took down their content, or otherwise expose their personal information as may be required if they submit their counternotification online.[13] This hesitation may be especially warranted when the content removed has related to politically or culturally critical messaging. *See* Sieminski, *supra* note 2 ("This tradeoff doesn't work for the many anonymous bloggers that we host on WordPress.com, who speak out on sensitive issues like corporate or government corruption."). Forcing anonymous speakers to rely on § 512(g) puts the DMCA in serious tension, if not outright conflict, with the First Amendment, which explicitly includes a right to anonymous speech. *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995). This right should not have to be forfeited in order to resist censorship, but in order to use the put-back procedure, it is.

In addition, as a practical matter, most takedown notices target search engines under 17 U.S.C. § 512(d), a mechanism by which there is no obvious way to provide the original sources with any notice of the removal of their link. Even if they should somehow learn that their content has been de-indexed, there is also no

[13] Note that the DMCA also includes its own mechanism for copyright claimants to subpoena intermediaries for the identifying information of users who posted the content in question. 17 U.S.C. § 512(h).

obvious way for them to counternotify, nor any right to do so. The DMCA does not establish a counternotification process for link removals under § 512(d); the § 512(g) put-back process applies only to content removed under 17 U.S.C. § 512(c). *See* Seng, *Discordant Union*, *supra* (noting that this absence of procedural protection contributes to the infrequency of counternotices).

For all these reasons § 512(f) is the constraint intended by Congress and best suited to control abusive takedowns. Thus the courts need to enable it to operate effectively, which it can only do when it can meaningfully enforce the good faith standard.

III. A LAX § 512(F) STANDARD EFFECTIVELY CREATES A RIGHT FOR OTHERS TO SILENCE LEGITIMATE CONTENT.

A. Because the DMCA creates a de facto system of extra-judicial injunctions compelling the removal of speech, § 512(f) is necessary to ensure that no more content is removed than a court would ordinarily permit.

The DMCA should not enable anyone to compel the removal more non-infringing content than he could otherwise. Although Congress recognized copyright holders' interest in being able to have infringing content removed more quickly and expeditiously than if a court had to consider each and every injunction request, the DMCA did not grant copyright holders the right to remove non-infringing content. Nor did the DMCA obviate the need for court oversight over

these removal demands, or in any way forbid it. In fact, when it created the § 512(f) remedy, it explicitly invited the courts back into the system.

The DMCA essentially switched the role of judicial review from *ex ante* to *post hoc*. Without the DMCA a copyright owner would have had to demonstrate to the court that it indeed owned a valid copyright and that the use of content in question infringed it before a court would compel its removal. Nothing in the DMCA text alleviates a copyright claimant of these burdens. In fact, because the courts will not review the copyright claim until after the content has been removed it is particularly important that senders of takedown notices be held to at least the same standards as they would be if they had sought injunctive relief from the court at the outset. The easier it is to cause speech to be silenced, the harder it should be to justify having done so.

Yet without courts enforcing the "good faith" standard in any meaningful way, would-be censors are now in the happy position where the DMCA not only relieves them of their procedural burdens but also their pleading burdens. Because content removal is predicated on the intermediary "choosing" to remove it, a sender of a takedown notice essentially only needs to convey enough information to convince an intermediary that it would be worth its while to delete it as asked. Given that refusal could expose an intermediary to potentially ruinous litigation costs and even damages, this burden on the notice sender is not particularly high.

But functionally, takedown demands are operating just like a content-removal injunction would, compelling an intermediary to delete a user's content. They are simply a procedural shortcut for achieving this end. They should not also be a substantive shortcut, affording the takedown sender any more ability to compel content removal than their statutory rights otherwise afford. Yet it is only through § 512(f) enforcing an objective "good faith" standard that there is a functional limit on what a takedown sender can target for deletion this way.

B. The lax § 512(f) standard threatens fair uses of copyrighted works.

Without the DMCA, a copyright holder targeting content for deletion would need to demonstrate to a court that the content in question is infringing. Content cannot be infringing if it is fair use, and, as the Panel correctly ruled, the limitation of fair use is as much a part of the definition of a copyright as the exclusive rights it encompasses as well. *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015). But without *ex ante* court oversight of a content deletion demand, the system depends on the senders of the takedowns themselves considering whether that limitation applies. Intermediaries cannot be counted on to filter out invalid takedown requests: given the enormous risks in refusing one, it is not in their interest to do so; and given the sheer volume it may not even be possible for even the most user-supportive intermediaries to review each one individually.

Furthermore, unlike in a judicial proceeding seeking an injunction, within the notice-and-takedown system there is no place for the user to assert his fair use rights until after the content has already been deleted. With the DMCA, the only party who can effectively decide, *ex ante*, whether content should be removed is the content owner making the removal demand. Content owners have argued that they cannot be expected to necessarily get the fair use analysis correct, and this concern justifies leeway for reasonable attempts to comply with the law. Appellants' 3d Br. on Cross-Appeal 35. But, as Lenz correctly argues, they should have to at least try. Appellee's Pet. for Reh'g *en banc* 14. Unfortunately, without an enforceable objective good faith standard, they have no incentive to.[14]

The effect of takedown notice senders not doing so is devastating to fair uses. Not only does it result in content being deleted that should have been defensible under fair use, but certain fair uses, such as those made for educational purposes, may be further chilled by other requirements of the DMCA. For instance, because 17 U.S.C. § 512(e)(1) specifies that educational institutions will

[14] In fact they may even have an incentive to avoid hewing closely to the objective legal standard, if increased knowledge of current law would constrain a subjective belief in an overly-limited scope of fair use. A purely subjective standard suggests that delegating the decision to a poorly trained or untrained notice sender can escape liability. *See generally* Ann M. Lipton, *Slouching Towards Monell: The Disappearance of Vicarious Liability Under Section 10(b)*, WASH. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2640334 (discussing the general principles of corporate liability for acts of agents, and methods for determining a nonhuman entity's "knowledge").

lose their limitation on liability if they get three or more § 512(c) takedown notices against an employee, they may become reluctant to make fair uses, lest they risk expensive liability exposure. The only way a takedown notice does not count for § 512(e)(1) purposes is if it is actionable under § 512(f). This statutory rule thus supports finding that § 512(f) requires an objective good faith standard, because it is the only way an innocent, fair-using, educational institution can avoid an unjust penalty for its non-infringing use.

It also demonstrates why this finding that § 512(f) requires an objective good faith standard is so important. As the Panel correctly ruled, fair use is part of the copyright statute as much as any of the holder's exclusive rights, but without requiring copyright owners to meaningfully consider it in order to avoid penalty under § 512(f), few people will feel free to avail themselves of their fair use rights.

CONCLUSION

Lenz's case illustrates the harm that can occur to non-infringing speech when courts are reluctant to provide effective remedies to wrongfully-removed speech. For the reasons articulated above, this Court should grant the Lenz's petition for rehearing to clarify that the DMCA requires an objective good faith standard to prevent it from being a vehicle to unjustly silence non-infringing speech and that § 512(f) is available to enforce that standard.

Dated: October 30, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 3716 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 30, 2015

By: /s/ Catherine R. Gellis

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 30, 2015

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