Let's Not Go Crazy: Why Lenz v. Universal Music Corp. Undermines the Notice and Takedown Process of the Digital Millennium Copyright Act

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LET'S NOT GO CRAZY: WHY LENZ V. UNIVERSAL MUSIC CORP. UNDERMINES THE NOTICE AND TAKEDOWN PROCESS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

Mareasa M. Fortunato

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 149

II. BACKGROUND ............................................. 151
A. FEDERAL PLEADING AND COPYRIGHT INFRINGEMENT ACTIONS .................................................. 151
  1. Rule 8 of the Federal Rules of Civil Procedure ................... 152
  2. Pleading Copyright Infringement ............................ 152
B. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 153
  1. The Purpose of the DMCA and Section 512 .................... 153
  2. Components of Section 512 ................................ 154
    a. The Notification and Counter Notification Procedure ...... 155
    b. Section 512(c)(3)(A)'s “Good Faith” Certification ........ 156
    c. Material Misrepresentations ................................ 156
C. FAIR USE ............................................... 157
  1. The Doctrine's Codification ................................ 158
  2. Fair Use as an Affirmative Defense .......................... 158
  3. The Inherent Subjectivity of Fair Use Determinations ......... 159
D. SECTION 512(F) CASES BEFORE LENZ ........................ 160
  1. Rossi v. Motion Picture Ass'n of America .................... 161
    a. Rossi's Facts ........................................ 161
    b. Rossi's Holding ..................................... 161
    c. Rossi's Implications ................................ 162
  2. Dudnikov v. MGA Entertainment, Inc ....................... 162
    a. Dudnikov's Facts .................................... 163
    b. Dudnikov's Holding .................................. 163
E. THE LENZ HOLDING ..................................... 164

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III. ANALYSIS ...................................................................................... 166
   A. Lenz is inconsistent with and subverts the structure and purpose of the DMCA 167
   B. Lenz departs from established precedent ............................................ 168
   C. Lenz disregards federal pleading requirements .............................. 169
   D. Lenz disrupts the DMCA's balance between free speech and copyright protection 169

IV. CONCLUSION ...................................................................................... 171
I. INTRODUCTION

Stephanie Lenz, mother and YouTube user, wanted to share her thirteen-month-old toddler’s nascent dance moves with friends and family by posting a YouTube video of the child dancing to the song “Let’s Go Crazy” by Prince Rogers Nelson, the artist professionally known as Prince. The twenty-nine second video is of poor quality, and the song is audible for only twenty seconds. Regardless, Prince, who notoriously attempts to control the use of his material on the internet, sought to remove the video through his label, Universal Music Corporation. Using the notice and takedown provision of the Digital Millennium Copyright Act of 1998 (DMCA), Universal demanded that YouTube remove Lenz’s video from the site due to copyright infringement. YouTube complied and notified Lenz of its actions in response to Universal’s request. Insisting the video constituted fair use and was not an infringement, Lenz demanded that YouTube repost her video. Approximately six weeks later, YouTube reposted “Let’s Go Crazy #1.” Shortly thereafter, Lenz filed suit in the Northern District of California alleging Universal had misrepresented that there was infringement in its takedown notice in violation of 17 U.S.C. § 512(f).

On the surface, it would seem that the facts of the Lenz case are commonplace and reminiscent of many other cases in which copyright owners attempt to curtail infringement in user-generated content on the internet. There have even been
a few instances in which the recipients of a takedown notice have responded by suing for misrepresentation under section 512(f). But for the first time, the Lenz court held that copyright owners must evaluate whether the allegedly infringing material is a fair use of the copyright prior to sending a takedown notice to an internet service provider. In other words, according to the Lenz court, an allegation that a copyright owner issued a takedown notice without considering whether the fair use doctrine applies properly states a claim of misrepresentation under section 512(f) of the DMCA.

This Note argues that requiring copyright holders to engage in a fair use analysis prior to issuing a takedown notice, pursuant to 17 U.S.C. § 512, creates an improper burden on copyright owners to discharge what would be an affirmative defense in a potential infringement action. Such a requirement is inconsistent with the overall structure and purpose of the DMCA and in direct conflict with the rules of federal pleading. Given the difficulty in ascertaining whether a potentially infringing use is a fair use of a copyrighted work, requiring copyright holders to make such a determination under penalty of perjury will have a chilling effect on copyright holders asserting their rights for fear of exposing themselves to liability. Such a chilling effect is potentially damaging to the creation of original works and their dissemination via the internet. In mandating that a fair use analysis be undertaken prior to asserting one's right as a copyright holder, Lenz shifts the balance too far in favor of internet users at the expense of copyright protection. Therefore, the Lenz decision should be overruled.

The relevance of this topic cannot be overstated. The attempt to balance the individual right to free speech against the preservation of copyright protection has become particularly salient given the ease with which digital copyrighted works can be integrated into user-generated content. While an exhaustive list of instances in which the internet users' rights have faced copyright challenges is outside the scope of this Note, it will suffice to say that in addition to private citizens like Stephanie Lenz, public figures, like presidential candidates, and organizations, like their media online. William S. Coats, Jeremiah J. Burke & White & Case LLP, From Star Wars to Second Life: User Generated Content and Copyright Law in the Entertainment Industry, in 14TH ANNUAL INSTITUTE ON INTELLECTUAL PROPERTY LAW, at 15, 19 (PLI Patent, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 947, 2008).

14 See, e.g., Complaint at 4, MoveOn.org Civic Action v. Viacom Int'l., No. 3:07-CV-01657 (N.D. Cal. Mar. 21, 2007), available at http://www.cimedialaw.org/threats/viacom-v-moveonorg-and-brave-new-films (asserting plaintiffs' video parody was so clearly fair use that defendant's takedown notice could not have been made in good faith); Complaint at 4, Doe v. Geller, 533 F. Supp. 2d 996 (N.D. Cal. 2008) (No. C 07 2478 BZ) (asserting defendants did not act with "reasonable care or diligence" and therefore did not act in good faith when requesting the takedown notice).


16 Id.
film production companies, have felt the effects of copyright protection on their speech. Part II of this Note will provide the necessary background for the evaluation of the Lenz decision through a discussion of the DMCA and an explanation of the fair use doctrine. The DMCA and fair use discussions, along with a canvassing of the relevant case law prior to the Lenz decision, will establish a framework for analysis in Part III. Part III will analyze the Lenz decision in light of the DMCA's statutory structure, the fair use doctrine, and the pleading standards of the Federal Rules. Part IV will conclude by arguing that the Lenz decision should be overruled.

II. BACKGROUND

In order to properly contextualize and evaluate the Lenz holding, this Part provides a background to the court's decision. A brief overview of the pleading requirements of an infringement cause of action followed by a discussion of the DMCA and the fair use doctrine will provide the necessary statutory base. Finally, an overview of the prior case law and detailed recount of the Lenz holding will provide the relevant precedent to complete the evaluative framework.

A. FEDERAL PLEADING AND COPYRIGHT INFRINGEMENT ACTIONS

The pleading requirements for an infringement action help demonstrate the assertion that the Lenz decision threatens to disrupt the pleading burden allocation between parties. A party alleging infringement need only set out the necessary elements of the cause of action followed by a discussion of the DMCA and the fair use doctrine will provide the necessary statutory base. Finally, an overview of the prior case law and detailed recount of the Lenz holding will provide the relevant precedent to complete the evaluative framework.


18 See discussion infra Part II.A.1.

19 See discussion infra Part II.A.1.
1. **Rule 8 of the Federal Rules of Civil Procedure.** District courts have original and exclusive jurisdiction over copyright infringement actions. The Federal Rules of Civil Procedure are the procedural rules for civil actions in district courts. Rule 8 of the Federal Rules sets out the federal pleading requirements. In order to properly state a claim for relief, a pleading must contain:

   (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
   (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
   (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Rule 8 specifies that a party responding to a pleading must "(A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party." As the structure of Rule 8 indicates, all that is required of a plaintiff in a copyright infringement action is to give a "short and plain statement" of the claim showing that the pleader is entitled to relief. A plaintiff need not overcome an affirmative defense in the complaint; rather, it is the plaintiff's burden "only to set forth enough factual detail to generate a plausible claim that their exclusive rights . . . were violated." It is then up to the responding party to state any defenses to the claims alleged against it. Thus, in response to a copyright infringement cause of action, the alleged infringing party must assert any defenses, including affirmative defenses, which encompass fair use.

2. **Pleading Copyright Infringement.** In a copyright infringement action, the plaintiff must first generally prove that she owns a valid, registered copyright and that the work is original, creative, and copyrightable subject matter. Next, the

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21 FED. R. CIV. P. 1.
22 FED. R. CIV. P. 8(a)-(b).
23 FED. R. CIV. P. 8(a).
24 FED. R. CIV. P. 8(b).
25 FED. R. CIV. P. 8(a).
27 FED. R. CIV. P. 8(b).
28 Id.
29 Lennon v. Premise Media Corp., 556 F. Supp. 2d 310, 321 (S.D.N.Y. 2008) (stating fair use is an affirmative defense); see also infra Part II.C.2 (discussing fair use as an affirmative defense).
plaintiff must prove the defendant has "wrongfully exercised one or more of the six exclusive rights granted to the copyright owner." Under the Copyright Act, the six exclusive rights enjoyed by a copyright owner are the rights:

1. to reproduce the copyrighted work . . . ;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies . . . of the copyrighted work publicly . . . ;
4. . . . to perform the copyrighted work publicly;
5. . . . to display the copyrighted work publicly; and
6. . . . to perform the copyrighted work publicly by means of a digital audio transmission.

B. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

1. The Purpose of the DMCA and Section 512. The express purpose of the DMCA is "to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age." Enacted in part to implement the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty, Title I of the DMCA addresses the concern of copyright owners that allowing their works to be easily accessible on the internet would subject them to massive piracy given "the ease with which digital works can be copied and distributed worldwide virtually instantaneously." Because digital content is so easy to generate, the potential for copyright violation is enormous. Thus, Title I of the DMCA "protects the rights of proprietors whose works are exploited over the Internet, by strengthening the protections enjoyed by copyright owners through barring certain anti-circumvention techniques and devices."

While Title I protects copyright owners, internet service providers (ISPs) need safeguards against suits brought by copyright owners in response to an ISP's unknowing or innocent facilitation of infringing transmissions. David Nimmer, a leading copyright scholar and professor, explains, "having a profusion of copyrighted works available [as contemplated by Title I] will not serve anyone's interest if the Internet's backbone and infrastructure are sued out of existence for involvement in purportedly aiding copyright infringement." Thus, Congress

\[31\] Id.
\[34\] Id.
\[35\] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT \$ 12B.01 (2009).
\[36\] Id.
\[37\] Id.
\[38\] Id.
sought to protect ISPs by creating a series of safe harbors to limit ISP liability in Title II of the DMCA.\textsuperscript{39} The fear was that “without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”\textsuperscript{40} Thus, the “Online Copyright Infringement Liability Limitation Act” (OCILLA), codified at 17 U.S.C. § 512 (Title II of the DMCA), limits liability of service providers and incentivizes ISPs to remove infringing material upon notice from copyright owners.\textsuperscript{41}

Section 512(c) specifically concerns the liability of ISPs for “[i]nformation residing on systems or networks at [the] direction of users.”\textsuperscript{42} In order for an ISP to be sheltered from liability for copyright infringement under section 512(c), it must fall within one of the following categories: (i) the ISP initially must be unaware of infringing activity, (ii) the ISP must be unaware of “facts or circumstances from which infringing activity is apparent,” or (iii) upon becoming aware of such facts, the ISP must act “expeditiously to remove, or disable access to, the material.”\textsuperscript{43} In order for the “limitations on liability” established by section 512 to apply, the service provider must designate “an agent to receive notifications of claimed infringement” by making the agent’s contact information publicly available through its service.\textsuperscript{44}

In addition to clarifying the standards of liability for online use of creative materials, Congress wanted to empower copyright owners to remove infringing material “from the Internet should technological . . . measures fail to prevent infringing activity.”\textsuperscript{45} The purpose of the Act was to encourage cooperation between ISPs and copyright owners “to detect and deal with copyright infringements that take place in the digital networked environment.”\textsuperscript{46} The following subparts outline the provisions of section 512 that facilitate copyright holders in asserting their rights and explain the notification and counter notification procedures.

2. Components of Section 512. While aimed at shielding ISPs from liability, certain components of section 512 affect the conduct of copyright holders as well

\textsuperscript{39} S. REP. NO. 105-190, at 8, 19 (1998).
\textsuperscript{40} Id. at 8.
\textsuperscript{41} Williams, \textit{supra} note 17, at 12-13.
\textsuperscript{42} 17 U.S.C. § 512(c) (1999).
\textsuperscript{43} Id.
\textsuperscript{44} Id. § 512(c)(2).
\textsuperscript{45} Williams, \textit{supra} note 17, at 12.
\textsuperscript{46} 3 \textsc{Nimmer} \& \textsc{Nimmer}, \textit{supra} note 35, § 12B.01 (quoting S. REP. NO. 105-190, at 20, 40 (1998)).
as internet subscribers. This subpart describes the relevant portions of section 512 in order to provide a framework for evaluating the Lenz decision.

a. The Notification and Counter Notification Procedure. Under section 512, if a copyright holder believes certain content infringes upon her copyright and wants it removed from an internet site, she must send a written communication—called a notification—to the ISP's designated agent. As for the substance of the notification, there are essentially six elements required to provide notice of the infringement and establish its gravity. First, the notification must contain the "signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed." Second, the notification must identify the "copyrighted work claimed to have been infringed." Third, the notification must identify the allegedly infringing material. Fourth, the notification must provide "reasonably sufficient" information "to permit the service provider to contact the complaining party." The fifth and sixth notification elements will be addressed in the following subpart. Upon receipt of a notification, an ISP must either disable access to or remove the subject material. The service provider must then take "reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material." But the subscriber accused of posting infringing material is not without remedy: the subscriber can serve a counter notification in response. Under section 512(g)(3), the allegedly infringing subscriber's written counter notification to the ISP must include functionally the same elements as the notification. Once a service provider has received a proper counter notification, it must send a copy of the counter notification to the complaining copyright holder.

47 See, e.g., 17 U.S.C. § 512(c)(3)(A) (listing elements a copyright owner must satisfy when notifying an ISP of a claimed infringement).
49 The "notice and takedown provision" is codified in 17 U.S.C. § 512. See Dudnikov v. MGA Entmt', Inc., 410 F. Supp. 2d 1010, 1016-17 (D. Colo. 2005) (referring to section 512(c) as the "notice and takedown provision").
50 17 U.S.C. § 512(c)(3); see also Capitol Records, Inc. v. MP3tunes, LLC, 611 F. Supp. 2d 342, 344 (S.D.N.Y. 2009) (referring to a notification as a "Take Down notice").
51 See generally 17 U.S.C. § 512(c)(2) (explaining ISP's responsibility to have a designated agent to receive notifications of claimed infringement).
52 3 NIMMER & NIMMER, supra note 35, § 12B.04[B].
54 Id. § 512(c)(3)(A)(ii).
55 Id. § 512(c)(3)(A)(iii).
56 Id. § 512(c)(3)(A)(iv).
57 3 NIMMER & NIMMER, supra note 35, § 12B.07[A].
59 3 NIMMER & NIMMER, supra note 35, at 12B.07[B][2].
60 See 17 U.S.C. § 512(g)(3) (outlining the requirements of a counter notification).
holder and "inform[] that person that it will replace the removed material or cease
disabling access to it in 10 business days." Next, the service provider must
"replace[] the removed material and cease[] disabling access to it not less than 10,
nor more than 14, business days following receipt of the counter notice," unless
the complaining copyright holder has taken some legal action and so informed the
service provider. The counter notification and "put-back" provisions were
designed to ensure a balance between service providers' incentives to remove
content and users' interest in maintaining access to non-infringing material.

b. Section 512(c)(3)(A)’s "Good Faith" Certification. In addition to the four
required elements of a notification outlined above, section 512(c)(3)(A)(v) also
requires that the notification contain "[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." In order to enforce the
good faith certification requirement of section 512(c)(3)(A)(v) and prevent abuse
of the takedown process, both the notification and counter notification are subject
to section 512(f), which imposes liability for knowingly misrepresenting material
aspects of the claimed infringement. Also, the notification must make "a
statement that the information in the notification is accurate and under penalty of
perjury, that the complaining party is authorized to act on behalf of the owner of
an exclusive right that is allegedly infringed."**

c. Material Misrepresentations. In order to curb abuse of the DMCA's notice
and takedown regime, Congress included section 512(f), which provides an
"expressly limited cause of action for improper infringement notifications." Liability is imposed upon the copyright holder's notification if the notification was
a "knowing misrepresentation." Under section 512(f):

Any person who knowingly materially misrepresents under this
section (1) that material or activity is infringing, or (2) that material
or activity was removed or disabled by mistake or misidentification,

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61 Id. § 512(g)(2)(B).
62 Id. § 512(g)(2)(C).
63 3 NIMMER & NIMMER, supra note 35, at 12B.07[B][3].
64 17 U.S.C. § 512(c)(3)(A)(v). A federal court first addressed what is meant by a "good faith belief" in the context of section 512(c) in 2004. See Rossi v. Motion Picture Ass'n of Am., Inc., 391 F.3d 1000, 1004 (9th Cir. 2004) (holding the "good faith belief" requirement in section 512(c)(3)(A)(v) encompasses subjective, rather than objective standard); see also discussion infra Part II.D.1 (explaining the Rossi holding).
66 Id. § 512(c)(3)(A)(v).
68 Id.
shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, 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, or in replacing the removed material or ceasing to disable access to it.\(^69\)

While the legislative reports fail to define "knowingly materially misrepresents," Congress' intent can be gleaned from the statutory structure and overall purpose of the notice and takedown provisions.\(^70\) Section 512 creates a general notice and takedown process to provide copyright owners clear means and guidelines for removing infringing material, clarifies ISP liability, and allows users to object to removal of content they believe is noninfringing.\(^71\) In order to achieve these goals, section 512(f) discourages misrepresentation in notifications or counter notifications by imposing liability and providing for damages.\(^72\) Thus, for example, if a copyright holder sends a takedown notification to an ISP claiming his copyrighted work was used without his consent and in violation of his copyright, yet knowingly materially misrepresents that the targeted use is an infringement, a cause of action for misrepresentation would lie against that copyright holder under section 512(f).

C. FAIR USE

In addition to the relevant portions of the DMCA, a discussion of the fair use doctrine is necessary to evaluate the propriety of the *Lenz* court's analysis. This subpart will explain the factors set out by the Copyright Act of 1976 to determine whether a use made of a work is fair, note the character of the fair use defense, and comment on the current state of the doctrine.

\(^69\) 17 U.S.C. § 512(f).

\(^70\) See Williams, *supra* note 17, at 17 ("Congress aimed to create a notice-and-takedown process that would facilitate legitimate e-commerce by providing copyright owners with a method by which to remove infringing material, providing ISPs with limitations on liability and clear guidelines on what a copyright owner had to do to seek such removal, and providing Internet users with a mechanism to object to removals when they believe that material they placed online should not have been removed due to the fact that it is noninfringing.").

\(^71\) *Id.*

\(^72\) 17 U.S.C. § 512(f).
1. The Doctrine's Codification. Enacted to codify a limitation on the exclusive rights of copyright holders, the fair use provision of the Copyright Act sought to recognize and preserve the common law doctrine of fair use. According to the legislative history, “Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” Section 107 states that use of a copyrighted work for purposes including (but not limited to) “criticism, comment, news reporting, teaching...scholarship, or research, is not an infringement of copyright.” The statute then enumerates four factors a court should consider when evaluating whether the use made of a work is a fair use. The four factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

Ultimately, a fair use determination is “a mixed question of law and fact.”

2. Fair Use as an Affirmative Defense. Fair use is an affirmative defense to an infringement action, and the party asserting it bears the burden of proof. In resisting pressures from special interest groups to create presumptive categories of fair use, the drafters structured the provision as an affirmative defense requiring a case-by-case analysis. Thus, “it is not the Plaintiffs’ pleading burden [in an infringement action] to set forth allegations that might overcome an affirmative defense, only to set forth enough factual detail to generate a plausible claim that their exclusive rights of reproduction and distribution were violated...” In other words, in the event a targeted use constitutes fair use, the alleged infringer

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74 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:8, at 10–11.
77 Id.
79 Sarl Louis Feraud Int'l v. ViewFinder, Inc., 489 F.3d 474, 484 n.7 (2d Cir. 2007) (citing Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 107 (2d Cir. 1998)).
has the burden of proving fair use, not the copyright holder bringing the infringement claim.

3. The Inherent Subjectivity of Fair Use Determinations. "The doctrine of fair use has been called . . . 'the most troublesome in the whole law of copyright.'" 82 The doctrine earns this distinction because of its inherent subjectivity. 83 Despite the four factor balancing test outlined by 17 U.S.C. § 107, "neither the courts nor the legislature have provided a useful definition of fair use, nor have they devised a meaningful method for determining which uses are fair." 84 The factors are malleable and easily molded to make a case for or against fair use. 85 Further, since there is no guidance as to how the factors should be weighed against each other, the deciding judge retains discretion. 86 Because of the doctrine's inherent subjectivity, copyright experts struggle to predict fair use outcomes. 87 As the Chief Counsel for YouTube noted, "No number of lawyers could possibly determine with a reasonable level of certainty whether all the videos for which we receive disputed takedown notices qualify as fair-use." 88 According to one commentator, "it is virtually impossible for a copyright owner or a user of a copyrighted material, or either party's counsel for that matter, to have actual knowledge that a use is fair prior to litigating the issue." 89

Even the United States Supreme Court has had trouble aligning on the application of the doctrine. 90 All three of the major fair use cases reaching the


83 BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 8:1 (Nov. 2007) ("The central concept underlying the doctrine—an assessment of the 'fairness' of the use in question, based on a balancing of several factors—is inherently subjective.").


87 Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1107 (1990) ("[W]riters, historians, publishers, and their legal advisors can only guess and pray as to how courts will resolve copyright disputes [involving a fair use analysis].").


89 Williams, supra note 17, at 33.

United States Supreme Court were overturned at each prior level of review. The Court has made clear that the doctrine does not lend itself to "bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis." Professor Nimmer, quipped, "Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same." Nimmer and others essentially conclude that using the four factors set out in 17 U.S.C. § 107 to assess whether a particular use is fair is an inconclusive exercise, and a fair use determination is anything but self-evident. Therefore, it is a widely known fact that "fair use determinations are so clouded that no one has [any] sure idea of how they will fare until the matter is litigated." 

As will be further discussed, the burden of the uncertainty surrounding fair use should not be borne by copyright holders who use the established framework to target what they believe to be legitimate infringement of their copyrights.

D. SECTION 512(F) CASES BEFORE LENZ

Prior to the Lenz decision, there were only a handful of federal cases evaluating claims under 17 U.S.C. § 512(f). This Part discusses the relevant cases that form the basis for misrepresentation claims. The first subsection discusses the Ninth Circuit's decision in Rossi v. Motion Picture Ass'n of America, which interprets the "good faith belief" standard of section 512(c)(3)(A)(v). The second subsection

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Women by 2 Live Crew decreased potential licensing revenue).


92 Sony was a 5-4 decision and Harper & Row was a 6-3 decision. Sony, 464 U.S. at 417; Harper & Row, 471 U.S. at 539.

93 Campbell, 510 U.S. at 577.

94 Nimmer, supra note 85, at 280 (concluding that using four factors to determine whether a particular use of a copyrighted work is a fair use is "largely a fairly tale").

95 See, e.g., Nimmer, supra note 85, at 287 (concluding the four factors "are malleable enough to be crafted to fit either point of view"); Williams, supra note 17, at 33-34 (arguing "there is, quite simply, no such thing as a 'self-evident fair use'" in part because "it is virtually impossible for a copyright owner or a user of copyrighted material, or either party's counsel . . . , to have actual knowledge that a use is fair prior to litigating the issue").

96 3 NIMMER & NIMMER, supra note 35, § 12B.08 n.16.

97 391 F.3d 1000 (9th Cir. 2004).
discusses *Dudnikov Entertainment, Inc. v. MGA* and its interpretation and application of *Rossi*.98

1. Rossi v. Motion Picture Ass’n of America. *Rossi* defines the “knowing material misrepresentation” of section 512(f) by interpreting the “good faith belief” requirement of section 512(c)(3)(A)(v).99 *Rossi* involved a tort action brought by an operator of a website that offered downloadable movies against an association of movie copyright owners.100

   a. Rossi’s Facts. Michael Rossi, the owner and operator of “internetmovies.com,”101 sued the Motion Picture Association of America (MPAA)102 after receiving notice from his ISP that his website would be shut down.103 The MPAA, through the DMCA’s “notice and takedown procedures,” had requested that the ISP shut down Mr. Rossi’s site.104 In response to the ISP’s takedown notice, Mr. Rossi filed suit in the United States District Court for the District of Hawaii alleging, among other things, “tortious interference with contractual relations.”105 The district court granted the MPAA’s motion for summary judgment, concluding that “the MPAA ‘had more than a sufficient basis to form the required good faith belief that [Rossi’s] site contained infringing content prior to asking [the ISP] to shut down the site.’”106

   b. Rossi’s Holding. On appeal, Mr. Rossi maintained that the MPAA lacked sufficient information to form the “good faith belief” required by section 512(c)(3)(A)(v) that his website was infringing the MPAA’s copyrights.107 Mr. Rossi suggested the “good faith belief” standard should be that the copyright owner must have conducted a “reasonable investigation into the allegedly offending website.”108 The Ninth Circuit, in rejecting Mr. Rossi’s proposed standard, noted that the overall statutory framework of section 512 supports the conclusion that the “good faith belief” requirement is a subjective, rather than objective, standard.109 The court stated:

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99 *Rossi*, 391 F.3d at 1004.
100 *Id* at 1001–02.
101 Rossi’s website allowed its members to download full-length movies. *Id* at 1002.
102 “The MPAA is a trade association that works to prevent unauthorized copying, transmittal, or other distribution of the movie studios’ motion pictures.” *Id*.
103 *Id* at 1001–02.
104 *Id*.
105 *Id*.
106 *Id* (quoting *Rossi v. Motion Picture Ass’n of Am.*, 67 U.S.P.Q.2d 1047, 1050 (D. Haw. 2003)).
107 *Id* at 1003.
108 *Id*.
109 *Id* at 1005.
Juxtaposing the "good faith" proviso of the DMCA with the "knowing misrepresentation" provision of that same statute reveals an apparent statutory structure that predicated the imposition of liability upon copyright owners only for knowing misrepresentations regarding allegedly infringing websites. Measuring compliance with a lesser "objective reasonableness" standard would be inconsistent with Congress's apparent intent that the statute protect potential violators from subjectively improper actions by copyright owners.\textsuperscript{110}

In light of its interpretation of the statutory framework, the court concluded that Mr. Rossi failed to assert a genuine issue of material fact sufficient to survive summary judgment.\textsuperscript{111}

c. Rossi's Implications. Rossi stands for the proposition that "the 'good faith belief' requirement of section 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard of conduct."\textsuperscript{112} Further, regarding section 512(f)'s knowing material misrepresentation standard, Rossi holds that "'knowingly' requires 'actual knowledge' and that even 'unreasonable' actions on the part of copyright owners do not create potential liability under section 512(f) so long as copyright owners do not engage in 'subjectively improper action.' "\textsuperscript{113} Thus, practically speaking, under Rossi, even if allegedly infringing activity or content is later determined by a court to be a fair use and the copyright holder had submitted a takedown notice, the copyright owner would not have violated section 512(f) unless she had both actual knowledge that the use was fair and acted improperly by sending the takedown notice.\textsuperscript{114}

2. Dudnikov v. MGA Entertainment, Inc. In Dudnikov, the court applied Rossi's analysis to a claim brought by internet users under section 512(f) of the DMCA.\textsuperscript{115} The plaintiff internet users claimed the defendant copyright holders made a knowing material misrepresentation that the subject activity was infringing.\textsuperscript{116} Citing Rossi, the court granted the copyright holders' motion to dismiss, noting that as long as the copyright holder acted with a good faith belief that infringement was occurring, there is no cause of action under section 512(f).\textsuperscript{117}

\textsuperscript{110} Id.
\textsuperscript{111} Id. at 1005–06.
\textsuperscript{112} Id. at 1007.
\textsuperscript{113} Williams, supra note 17, at 29.
\textsuperscript{114} Id. at 34.
\textsuperscript{116} Id. at 1012.
\textsuperscript{117} Id.
a. Dudnikov’s Facts. The plaintiffs were a wife and husband who operated a home-based business selling items on eBay. One of the plaintiffs’ online auction listings was terminated after the defendant, MGA Entertainment, sent a takedown notice stating the plaintiffs were infringing MGA’s copyright by listing a Bratz fleece hat for sale. MGA is the owner of all rights to the Bratz characters and merchandise and the plaintiffs were not licensed to sell such items.

b. Dudnikov’s Holding. The magistrate court applied the Ninth Circuit’s decision in Rossi in evaluating the good faith standard for notification by copyright owners and concluded that MGA was entitled to terminate plaintiffs’ auction of the fleece hat based on its good faith belief that infringement was occurring. In affirming the magistrate judge’s decision to grant MGA’s motion for summary judgment against plaintiffs’ section 512(f) claim, the Colorado District Court agreed that MGA had shown a sufficient basis to form the required good faith belief that the plaintiffs’ auction infringed MGA’s rights and that its actions complied with the DMCA’s notice and takedown requirements.

In essence, both the Rossi and Dudnikov cases stand for the proposition that to avoid section 512(f)’s misrepresentation sanction, copyright holders need only show that they sent a notification to an ISP in good faith and in so doing did not engage in any subjectively improper action.

While section 512(f) misrepresentation claims have been litigated in a few instances and are gaining some traction in complaints, prior to Lenz, no reported case has adjudicated the merits of a section 512(f) misrepresentation claim in the context of fair use and the good faith belief certification under

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118 Id. at 1011.
119 Id.
120 Id. at 1017.
121 Id. at 1013.
122 See generally Rossi v. Motion Picture Ass’n of Am., 391 F.3d 1000, 1003–06 (9th Cir. 2004); Dudnikov, 410 F. Supp. 2d at 1016–18.
123 See, e.g., Dudnikov, 410 F. Supp. 2d at 1010; see also UMG Recordings, Inc. v. Augusto, 558 F. Supp. 2d 1055, 1065 (C.D. Cal. 2008) (concluding UMG had “subjective good faith belief that Augusto was infringing its copyrights” sufficient to grant UMG’s motion for summary judgment on Augusto’s section 512(f) counterclaim).
124 See Michael Warnecke, DMCA’s False Notification Provision Gains Traction in Complaints, Case Law, 12 ELEC. COM. & L. REP. (BNA) 73 (2007) (noting, however, that the section 512(f) claims that have “gained traction in the courts have involved just the sort of conduct one would expect courts to find offensive — namely, claims of infringement untethered to a legitimate copyright interest and assertions of ownership that are inaccurate”).
Thus, the Lenz court engages in an analysis of fair use as it relates to 17 U.S.C. § 512(c)(3)(A)(v) that has heretofore not been undertaken.126

E. THE LENZ HOLDING

The Lenz decision addressed the question of "whether 17 U.S.C. § 512(c)(3)(A)(v) requires a copyright owner to consider the fair use doctrine in formulating a good faith belief that 'use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.'" In her Second Amended Complaint, Lenz alleged that Universal violated 17 U.S.C. § 512(f) by knowingly misrepresenting that her video infringed Universal’s copyright.128 She contended that Universal had actual subjective knowledge of the contents of the video and acted in bad faith by sending the takedown notice despite knowing the material was noninfringing.129 Universal filed a motion to dismiss, asserting that Lenz failed to plead facts making it plausible to believe Universal actually knew it was misrepresenting infringement when it sent its notice.130 In opposing Universal’s motion to dismiss for failing to state a claim, Lenz argued that absent a consideration of all authorized uses, a copyright holder cannot make a good faith representation that a use is infringing.131 Fair use, Lenz contended, "is an authorized use of copyrighted material."132

In light of these arguments, the District Court for the Northern District of California was faced with the question of whether fair use qualifies as a use "authorized by . . . law" as contemplated by the DCMA.133 The court acknowledged that the question of "[w]hether fair use qualifies as a use ‘authorized by law’ in connection with a takedown notice pursuant to the DMCA appears to

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125 In February 2008, District Court for the Northern District of California came close to adjudicating the merits of a section 512(f) claim involving fair use of a copyrighted work, but the case was dismissed for lack of personal jurisdiction. Doe v. Geller, 533 F. Supp. 2d 996 (N.D. Cal. 2008).
126 Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) ("Though it has been discussed in several other actions no published case actually has adjudicated the merits of the issue.").
127 Id.
128 Second Amended Complaint, supra note 12, at 7.
129 Id.
131 Lenz, 572 F. Supp. 2d at 1154.
132 Id.
134 Lenz, 572 F. Supp. 2d at 1154.
be an issue of first impression." A finding that fair use qualifies as a use authorized by law would result in requiring copyright holders to evaluate whether a particular use is fair prior to sending a takedown notice in compliance with section 512's good faith obligation. Before Lenz, however, no court has had to reach the merits of whether section 512 requires a fair use analysis.

Universal's arguments against requiring consideration of fair use for making a certification in good faith were threefold. First, Universal contended that fair use is an "excused infringement," not a "use authorized by the copyright owner or by the law." According to Universal, a finding of fair use implies there was first an infringing use. Thus, Universal argued, Lenz's assertion that her use was a fair use legitimizes Universal's contention that her use was infringing. Second, Universal pointed out that section 512(c)(3)(A) neither mentions fair use nor requires a good faith belief that a given use is not fair use. As Universal contended in its reply brief supporting the motion to dismiss, "[n]othing in the DMCA . . . requires the sender of a takedown notice to make an ex ante determination whether a use would be deemed to be 'fair,' much less to make a representation about that determination under penalty of perjury." Finally, Universal argued that even if a copyright owner had a duty to evaluate whether the allegedly infringing use is fair, "any such duty would arise only after a copyright owner receives a counter-notice and considers filing suit." To resolve the issue, the court first examined the plain meaning of "authorized by law" as provided by the DMCA and found its meaning unambiguous. The court stated, "[a]n activity or behavior 'authorized by law' is one permitted by law or not contrary to law." Despite the court's own acknowledgments that Congress failed to explicitly mention fair use in the DMCA and that fair use merely excuses infringement, the court nonetheless reasoned that fair use still falls within the meaning of use "authorized by law" because fair use of a copyrighted work is not infringement. Having concluded that fair use qualifies as a "use authorized by law," the court held the "good faith belief" requirement of 17

135 Id.
136 Id.
137 Id.
138 Reply in Support of Motion to Dismiss Plaintiff's Second Amended Complaint at 1, Lenz, 572 F. Supp. 2d 1150 (No. C 07-03783-JF).
139 Id.
140 Lenz, 572 F. Supp. 2d at 1154.
141 Reply in Support of Motion to Dismiss Plaintiff's Second Amended Complaint, supra note 138, at 4.
142 Lenz, 572 F. Supp. 2d at 1154.
143 Id.
144 Id.
145 Id.
U.S.C. § 512(c)(3)(A)(v) for issuing a takedown notice requires copyright holders to contemplate whether the use at issue falls within the fair use exception to the Copyright Act. The court held that "an allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA." According to the court, this interpretation "furthers both the purposes of the DMCA itself and copyright law in general" because the decision best strikes a balance between ensuring rapid response to potential infringement and users' "legitimate interests in not having material removed without recourse." Further, the court noted that requiring copyright owners to consider fair use before sending a takedown notice will help "ensure[] that the efficiency of the Internet will continue to improve" without compromising "the fruit of American creative genius." In light of the foregoing, the court denied Universal's motion to dismiss and concluded that Lenz stated a claim under section 512(f) of the DMCA.

III. ANALYSIS

Although seemingly a victory for internet users, the effect of the Lenz v. Universal Music Corp. holding is pernicious. Despite the Lenz court's statement to the contrary, requiring copyright holders to engage in a fair use analysis prior to issuing a takedown notification subverts the overall structure and purpose of the Digital Millennium Copyright Act, and largely serves to dismantle the notice and takedown regime implemented by Congress. Lenz is also inconsistent with established case law interpreting the "good faith belief" certification requirement. Further, requiring a fair use analysis by the copyright holder is in direct conflict with the federal rules of pleading because it imposes a burden on copyright holders that they would not be required to bear in pleading an infringement cause of action. Finally, in addition to subverting the structure and purpose of the DMCA, contravening established case law, and contradicting the federal pleading rules, Lenz's requirement that copyright holders engage in a fair use analysis prior to sending a takedown notice will have a chilling effect on copyright holders asserting their rights via the notice and takedown process. Because of the uncertainty surrounding fair use, copyright holders will be disinclined to send takedown notices for fear of exposing themselves to liability for misrepresentation.

146 Id.
147 Id. at 1154–55.
148 Id. at 1155 (quoting S. REP. NO. 105-190, at 21 (1998)).
149 Id. at 1156 (quoting S. REP. NO. 105-190, at 2 (1998)).
150 Id. at 1157.
Such a chilling effect discourages the creation of original works and their promulgation via the internet. Thus, in mandating that a fair use analysis be undertaken prior to asserting one's rights as a copyright holder, the Lenz decision shifts the balance too far in favor of internet users at the expense of copyright protection. Therefore, the Lenz decision should be overruled.

A. LENZ IS INCONSISTENT WITH AND SUBVERTS THE STRUCTURE AND PURPOSE OF THE DMCA

The legislative history and statutory structure of the DMCA indicate that Congress intended to curb abuse of the notice and takedown process without simultaneously discouraging parties from using it. Rather than disincentivizing the use of the notice and takedown process by facilitating frivolous lawsuits pursuant to section 512(f), Congress sought to achieve a regime in which ISPs, copyright holders, and internet users would work together to address and remedy instances of infringement without resorting to litigation. Thus, the procedures outlined by section 512(c) establish a process designed to resolve potential infringement disputes outside the realm of the courts by empowering copyright holders to achieve removal of what they believe is infringing content while subsequently protecting internet users' right to freely post content. Internet users need not resort to section 512(f) to remedy what they believe is an improper removal of their content. Instead, the DMCA provides a mechanism through which users may compel ISPs to repost their material after receiving a notification of infringement. As noted previously, internet users who believe their uses are noninfringing—for reasons of fair use or otherwise—can serve a counter notification in response to a copyright owner's notification of claimed infringement. The existence of the counter notification and ability to compel the ISP to repost user content indicate that section 512(f) need not be utilized absent manifestly egregious conduct. Allowing a user to assert a cause of action

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151 See supra Part II.B.2.c (explaining section 512(f) was intended to be a very limited cause of action); Williams, supra note 17, at 9 (discussing how “Congress did not intend for § 512(f) to deter copyright owners or internet users from asserting their rights”).

152 See S. REP. NO. 105-190, at 20 (1998) (stating “Title II [of the DMCA] preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment”); see also supra Part II.B.2.a (discussing how the notice and counter notice process provides a vehicle through which copyright holders and internet users can assert their rights in lieu of litigation).

153 See supra Part II.B.2.a (detailing the DMCA’s notification and counter notification procedure).

154 See supra Part II.B.2.a.

155 See supra Part II.B.2.a (discussing the counter notification process and its function as a remedy for internet users who believe their content was improperly removed).
under section 512(f) simply because the copyright holder failed to take fair use into account is contrary to the overall structure and purpose of the DMCA.

While misrepresentation claims are already becoming more prevalent,156 Lenz solidifies the acceptability of section 512(f) claims based on fair use, thereby undermining the DMCA's efficacy. Encouraging misrepresentation claims based on fair use is a "recipe for dismantling the notice-and-takedown/putback process [of the DMCA]."157 The Lenz decision is a giant step towards dismantling the DMCA because it expressly authorizes—indeed encourages—internet users to bring misrepresentation claims rather than utilizing the putback process when they believe their content makes fair use of a copyrighted work after receiving a takedown notification. The Lenz court's encouragement of circumventing the putback process by validating litigation in this context comes at no small price: litigation erodes the very framework of the DMCA and subverts the statute's overall purpose. Indeed, it is the DMCA that is largely responsible for the tremendous growth of the internet, a thriving environment for blogs, search engines, e-commerce sites, video portals, and social-networking platforms.158 The importance of the DMCA "is a rare point of agreement between civil liberties groups and the entertainment industry."159 Erosion, dismantlement, or both, would not only stifle further internet growth but would likely undo the great strides made since the DMCA's enactment.

B. Lenz Departs From Established Precedent

Not only does the Lenz holding offend the statutory structure and stated purpose of the DMCA, as well as threaten further internet innovation; Lenz also goes against established precedent by permitting a cause of action for misrepresentation in the context of fair use. According to one commentator, the Rossi holding suggests that "a copyright owner cannot violate the knowing material misrepresentation standard of section 512(f) even if activity that the copyright owner maintained was infringing in a takedown notice is subsequently determined to be fair by a court."160 In other words, Rossi permits a copyright owner to

156 See Catherine Rampell, Standing Up to Takedown Notices, WASH. POST, Oct. 19, 2007, at D01 (stating copyright claims are increasingly being challenged partly "because of backlash among users and advocacy groups who say copyright holders are abusing the law and wrongfully taking down content").
157 Williams, supra note 17, at 39.
159 Id.
160 Williams, supra note 17, at 34.
properly submit a takedown notice in good faith regardless of whether the use in question is fair. *Lenz*'s requirement that copyright holders must consider whether the use is fair to act in good faith is clearly inconsistent.

C. *LENZ* DISREGARDS FEDERAL PLEADING REQUIREMENTS

Fair use is an affirmative defense to a copyright infringement action and "is relevant only after a copyright owner has made out a prima facie case of infringement." Since a defending party must respond to all claims for relief against it, including pleading all affirmative defenses, fair use is properly pleaded by the party defending an infringement cause of action. Further, a plaintiff to an infringement action need not preempt a defendant's affirmative defense of fair use in order to state a claim for copyright infringement. However, the *Lenz* holding essentially requires copyright holders to utilize a takedown notification to affirmatively preempt what a potentially infringing user would assert in defense to a copyright infringement action. Such a requirement imposes an improper burden on copyright holders.

All that is required of plaintiffs in infringement actions is to give a short and plain statement setting forth enough factual detail to generate a plausible claim that their rights were violated; there is no requirement to overcome an affirmative defense. Instead, it is up to the party defending a copyright infringement action to assert the facts supporting its affirmative defense of fair use. The *Lenz* holding functionally disrupts the pleading burden allocation by requiring would-be plaintiffs to an infringement action to make an *ex ante* determination regarding fair use, a kind of determination that still gives the United States Supreme Court pause.

D. *LENZ* DISRUPTS THE DMCA'S BALANCE BETWEEN FREE SPEECH AND COPYRIGHT PROTECTION

In addition to subverting the structure and purpose of the DMCA, departing from established precedent, and contravening the federal rules of pleading, the *Lenz* holding upsets the balance between protecting creative works and

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162 See supra text accompanying notes 28–29.
163 See supra Part II.A.1.
164 See supra Part II.A.1.
165 See supra text accompanying notes 28–29.
166 See supra note 87 and accompanying text.
encouraging free speech on the internet by leaving many copyright holders unable to protect their copyrighted works from infringement by internet users. Given the generally acknowledged difficulty in determining whether a particular use of a copyrighted work is fair,\(^{167}\) requiring copyright holders to make that determination under penalty of perjury will render copyright holders less inclined to assert their rights using the notice and takedown process for fear of being exposed to misrepresentation claims. This chilling effect on the use of the notification process will subsequently stifle the promulgation of creative works produced and disseminated via the internet due to the perceived difficulty of effectively policing infringement.

Attempting to downplay this effect, the *Lenz* court asserts that the impact of the fair use doctrine is probably exaggerated.\(^ {168} \) According to *Lenz*, there will likely be few cases in which “a copyright owner’s determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation under 17 U.S.C. § 512(f).”\(^ {169} \) Few cases or not, the *Lenz* court’s argument misses the point. Even assuming the court is correct in its assertion that few cases will actually meet the threshold of bad faith, this uncertainty is the crux of the issue: the perceived inability to make a correct fair use determination *ex ante* will result in copyright holders declining to assert their rights via a DMCA notification for fear of being vulnerable to section 512(f) misrepresentation claims.

In addition to creating a chilling effect on copyright holders asserting their rights in the digital environment, the court’s validation of this cause of action is also detrimental to the established procedure set out by the DMCA to deal with potential infringement. Encouraging users to bring suit in hopes of obtaining damages for misrepresentation in the fair use context rather than using the existing procedural channels to contest their content’s removal effectively subverts the overall purpose of the DMCA.

Rather than resolving infringement disputes by way of section 512(f), the DMCA provides “specific notice, take-down, and put-back procedures that carefully balance the First Amendment rights of users with the rights of a potentially injured copyright holder.”\(^ {170} \) Although Congress intended to ensure the costs associated with abuse of the notice and takedown process would be

\(^{167}\) *See supra* Part II.C.3.


\(^{169}\) *Id.*

\(^{170}\) *Batzel* v. *Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003).
borne by abusers,\textsuperscript{171} Congress did not intend section 512(f) to deter copyright owners or internet users from asserting their rights.\textsuperscript{172} As one practitioner states:

\[\text{[Nothing in § 512(f) itself or in the legislative history indicates that Congress intended to create a process in which copyright owners and Internet users would fear voicing their interests to ISPs due to a high risk of liability. Imposing liability for takedown or counternotices aimed at alleged fair use material would create such fear.]}^{173}\]

It is fear, however, that is likely to pervade should the \textit{Lenz} holding be allowed to stand. Copyright holders will be rendered powerless to assert their rights.

Although some may argue that copyright holders could simply choose to enforce their copyrights by bringing suit against the alleged infringer as an alternative to the DMCA's notice and takedown process, this argument is problematic for several reasons. First, forcing copyright holders to resort to remedial litigation would subvert the DMCA's purpose: to facilitate cooperation between copyright holders, ISPs, and internet users to combat infringement while simultaneously avoiding litigation. The DMCA is crucial to facilitating the vitality of the internet, and forcing copyright holders to circumvent the notice and takedown process by resorting to litigation is counterproductive. A second problem with forcing copyright holders to resort to litigation to enforce their copyrights is that litigation will be prohibitively expensive for the average copyright holder. Thus, when faced with incurring litigation expenses, liability for misrepresentation, or both, many copyright holders will have no choice but to forgo asserting their rights and yield to potentially unauthorized uses of their copyrights via the internet.

\textbf{IV. CONCLUSION}

While seemingly a victory for internet users like Stephanie Lenz, the \textit{Lenz} decision unfairly tips the balance in favor of internet users at the expense of not only copyright holders, but also the internet’s continued growth and survival. Therefore, the next time a court faces the question of whether a claim of

\textsuperscript{171} \textit{See supra} Part II.B.2.c. For an example of a case in which the court found a valid claim under section 512(f), see Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204–05 (N.D. Cal. 2004) (suggesting that copyright owner sought to use DMCA as “a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property”).

\textsuperscript{172} \textit{Williams, supra} note 17, at 9.

\textsuperscript{173} \textit{Id.} at 17.
misrepresentation should be permitted to survive a motion to dismiss on the grounds that the copyright holder neglected to consider fair use, let’s not go crazy and instead grant the copyright holder’s motion to dismiss.

Congress, in enacting the DMCA, provided a forum in which disputes over copyrighted material contained in user-generated internet content could be settled outside the realm of litigation. The DMCA’s notification and counter notification process provide a vehicle through which internet users and copyright owners can work together to resolve conflicts. Although section 512(f) of the DMCA does provide recourse to users who feel abused by the notification process, the misrepresentation cause of action was not intended to be used as a sword against copyright holders or create a chilling effect on the use of the notification process. Instead of resorting to litigation, if internet users feel their content was improperly removed because of fair use or otherwise, the DMCA’s counter notification process provides a remedy; section 512(f) claims should be reserved for particularly egregious conduct. Once the content is restored, the copyright owner can then decide whether to pursue an infringement action. This process ensures that copyrights are respected but that free speech is not stifled without recourse.

The DMCA’s established framework strikes a proper balance between protecting copyrighted works and encouraging free speech on the internet. The Lenz decision disrupts this balance by validating and encouraging section 512(f) misrepresentation claims based on a fair use argument by requiring copyright holders to certify that the targeted work does not make fair use of the copyright. Because of the practical difficulty in ascertaining ex ante whether a use of a copyright is considered fair, Lenz effectively renders copyright holders powerless in asserting their rights for fear of being held liable for misrepresentation.

Section 512 of the DMCA cannot continue to provide protection for copyright holders, facilitate the free speech of internet users, and contribute to the continued growth and innovation of the internet if its procedures are undermined by the encouragement of the use section 512(f) as a means of obtaining recourse. In order to restore the balance crafted by the drafters of the DMCA between copyright protection and free speech, the Lenz holding should be overruled.