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Computerized Takedowns: A Balanced Approach to Protect Fair Uses and the Rights of Copyright Owners

Steven M. Davis*

INTRODUCTION

Natalie is a young filmmaker who posts videos on YouTube that document the life of musicians.¹ To that end, Natalie receives revenue from advertisements that run before or during her video. The more views her videos get, the more revenue she receives. In Natalie's videos, she uses photos and video clips of the musicians she documents. As a savvy entrepreneur, she gives her videos a title based on the musician's most popular song. Natalie chooses those types of titles for her videos because she knows that more people are likely to see her video if the title resembles a popular song.

Natalie's videos received hundreds of thousands of views. However, Natalie began to notice that some of her videos were being removed, and she wondered why. She contacted YouTube, and, through several emails, learned that YouTube was removing her videos because a copyright enforcement agency sent "takedown notices"² to YouTube claiming that Natalie was infringing on the musicians' copyrights.

After YouTube notified Natalie that her videos were removed,

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1. The following scenario is based on a hypothetical.
2. See *infra* note 31 and accompanying text.

she sent a “counter notice”³ to inform YouTube that she wanted the videos reposted. However, due to a statutory mandate, YouTube must wait a minimum of ten days to put Natalie’s videos back.⁴ During the required ten-day waiting period, Natalie lost thousands of dollars as a result of lost advertising. Further, for Natalie to redress this wrong, she must now endure an onerous lawsuit against the multi-million dollar company claiming it owns the copyright in her videos. This example, and many more, happen due to the notice-and-takedown scheme under 17 U.S.C. § 512.⁵

That takedown statute creates a tension between copyright owners and Internet users. Because of the takedown statute, copyright owners can remove infringing material from the Internet without filing a lawsuit.⁶ Additionally, the takedown provision shields service providers⁷ from liability when users post infringing material on its website.⁸ However, the rise of user-generated content has created a tension between copyright owners’ need to swiftly remove infringing material and users’ ability to post creative, non-infringing fair uses of, otherwise protected, copyrighted material.

In 2016, this tension was enhanced with the Ninth Circuit Court’s ruling in *Lenz v. Universal Music Corp.*⁹ In *Lenz*, the Ninth Circuit held that “a copyright holder must consider the existence of fair use before sending a takedown notification.”¹⁰ However, the court explained that a copyright owner’s fair use consideration need only amount to a “subjective good faith belief”

3. A counter-notice allows a user, who has his or her content removed via takedown notice, to have their content put back by sending a notice to the service provider that hosted the content. *See infra* Part I.B.

4. 17 U.S.C. § 512(g) (2012).

5. *See Takedown Hall of Shame*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/takedowns> [<https://perma.cc/JJ9F-FKXB>] (last visited Sept. 9, 2017).

6. *See* 17 U.S.C. § 512.

7. *See infra* note 21.

8. *See* S. REP. NO. 105-190, at 45 (1998) (“This ‘notice and takedown’ procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.”).

9. *See* 815 F.3d 1145 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 416 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

10. *Id.* at 1153.

that a user's content is not fair use.¹¹ As a result, *Lenz* creates a problem for a considerable amount of copyright owners who, through authorized third parties, employ computerized methods to search for infringing material posted on the Internet.¹² Because it is unclear whether a computerized method can consider fair use,¹³ or form a good faith belief for the copyright owner, *Lenz* creates uncertainty for owners who use those methods.¹⁴

This Comment argues that copyright owners who rely on computerized methods cannot form a good faith belief if the method used is unable to accurately assess fair use. To satisfy the holding in *Lenz*, copyright owners who use computerized methods should have to show¹⁵ that those methods, during infringement identification, consider the statutory fair use factors,¹⁶ or fair uses recognized by courts.¹⁷

Part I of this Comment discusses the history and purpose of the notice-and-takedown statutory scheme while also reviewing the safeguards in place for users. Part II examines how courts have interpreted the good faith belief requirement in the takedown statute. Part III discusses the fair use doctrine and the problems that a fair use consideration may pose to copyright owners that use computerized methods. Part IV argues that an

11. *Id.* (citing *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)).

12. Caitlin Dewey, *How we're unwittingly letting robots censor the Web*, WASH. POST (Mar. 29, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/03/29/how-were-unwittingly-letting-robots-censor-the-web/?utm_term=.3e1e752dd23d [<https://perma.cc/A7VN-CHZ3>]; see also Rebecca Alderfer Rock, Comment, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 702–03 (2014) (“[L]arge-scale holders of copyrighted materials, such as telecom companies and music companies, use automated processes to scan large quantities of uploaded material in order to search for infringing content.”).

13. Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* 88 (U.C. Berkeley, Pub. L. Res. Paper No. 2755628, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (showing that computer algorithms erroneously identify non-infringing fair uses as infringing).

14. See 815 F.3d 1145 (9th Cir. 2016).

15. For purposes of this Comment, this showing is required only when a user files a misrepresentation in a takedown notice claim. See 17 U.S.C. § 512(f).

16. *Id.* § 107.

17. See *infra* note 138.

objective standard is insufficient to meet the goals of the notice-and-takedown scheme. This Part also shows that, while *Lenz* provides the appropriate baseline for meeting the goals of the Digital Millennium Copyright Act, the notice-and-takedown scheme continues to disproportionately favor copyright owners. Part V recommends that, in response to a misrepresentation in a takedown notice claim, courts should place the burden on copyright owners to show how fair use was considered. This Part also contends that courts should allow copyright owners, with computerized methods comparable to YouTube's Content ID system, to form a good faith belief through a computerized method, so long as that method accurately considers fair use.

I. THE HISTORY AND PURPOSE OF THE NOTICE-AND-TAKEDOWN SCHEME

Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA)¹⁸ “to facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age.”¹⁹ The heart of the DMCA is found in 17 U.S.C. § 512, which “create[s] a series of ‘safe harbors[]’ for certain common activities of service providers.”²⁰ In particular, § 512(c) provides a safe harbor for Online Service Providers (OSPs),²¹ such as YouTube, to avoid secondary liability when a user posts an infringing use of copyrighted material on an OSP's website.²² Equally important, § 512(c)(3) establishes the notice-and-takedown procedure.²³

18. See Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 512, 1201–1205, 1301–1332; 28 U.S.C. § 4001).

19. S. REP. NO. 105-190, at 1–2 (1998).

20. *Id.* at 19 (alterations in original).

21. An OSP is a “provider of online services” for users. See 17 U.S.C. § 512(k)(1)(B) (2012). For example, websites such as YouTube and Facebook are OSPs. In contrast, an Internet Service Provider (ISP) is “an entity offering the transmission, routing, or providing of connections for digital online communications.” *Id.* § 512(k)(1)(A). For example, internet providers, such as Cox Communications and Verizon, are ISPs. This Comment solely focuses on OSPs because safe harbor immunities involving takedown notices generally involve OSPs. See Lydia Pallas Loren, *Detering Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 752 (2011).

22. 17 U.S.C. § 512(c)(1).

23. *Id.* § 512(c)(3).

Yet, service providers have no incentive to investigate the validity of a takedown notice. To qualify for safe harbor protection under § 512(c), an OSP must remove or disable access to an alleged infringement “expeditiously.”²⁴ In other words, OSPs have little autonomy in the notice-and-takedown process because failing to remove or disable access to an alleged infringement “expeditiously” may result in the loss of safe harbor protection and, thus, the attachment of secondary liability.²⁵ Because service providers desire to avoid such liability, many OSPs have developed robust notice-and-takedown procedures.²⁶

A. *The Notice-and-Takedown Process*

Copyright owners need only send a notice to a website to remove allegedly infringing material. Congress intended the notice-and-takedown procedure to provide copyright owners with a means to efficiently remove internet-based copyright infringement without going to court to file a lawsuit²⁷ because “copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”²⁸

Copyright owners are responsible for monitoring and policing web-based copyright infringement.²⁹ Policing copyright

24. *Id.* § 512(c)(1)(C).

25. S. REP. NO. 105-190, at 45 (“[T]he limitation on the service provider’s liability shall be maintained only if the service provider acts expeditiously either to remove the infringing material from its system or to prevent further access to the infringing material on the system or network.”).

26. *See* Loren, *supra* note 21, at 752–53 (describing the requirements service providers must take to maintain safe harbor protection). A service provider must also satisfy two additional conditions to qualify for safe harbor protection. First, for purposes of this Comment, when an OSP obtains “knowledge or awareness” that infringing material is on its system, it must “act[] expeditiously to remove, or disable access to, the material.” 17 U.S.C. § 512(c)(1)(A)(iii). That condition essentially interlocks with the requirement that an OSP, upon receiving a takedown notice, must “respond[] expeditiously to remove” the claimed infringement. *See id.* § 512(c)(1)(C). Second, an OSP must not “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” *Id.* § 512(c)(1)(B).

27. *See* S. REP. NO. 105-190, at 45.

28. *Id.* at 8.

29. *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 is achieved solely through sending a takedown notice.³⁰ To issue a valid takedown notice, the copyright owner must: (1) provide a signature; (2) identify the owner's work; (3) identify the allegedly infringing content; (4) contain the owner's contact information; (5) contain a statement that the owner has a *good faith belief* that use of the alleged infringing material is not *authorized* by the owner, its agent, or *the law*; and (6) contain a statement, under penalty of perjury, that the information in the takedown notice is accurate.³¹ The owner then sends the takedown notice to the OSP where the infringing material is located.³² Once a valid takedown notice is sent to an OSP, the OSP must remove the alleged infringing material to maintain safe harbor protection.³³

B. Safeguards for Users: Counter Notification and Section 512(f) Claims

To ensure that users have a mechanism to push back against improperly sent takedown notices, Congress included two counterweights in § 512: the counter notification procedure and a right of action for misrepresentation in a takedown notice.³⁴

1. Counter Notification

The first tool conferred on users to push back against improper takedowns is the counter notification procedure in § 512(g)(3).³⁵ A counter notice provides users with a mechanism

infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.”); *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 916 (C.D. Cal. 2003) (“The DMCA places the burden on the copyright owner to monitor the internet for potentially infringing sales.”).

30. See 17 U.S.C. § 512(c)(3).

31. *Id.* § 512(c)(3)(A)(i)–(vi) (emphasis added).

32. *Id.*

33. *Id.* § 512(c)(1)(C).

34. See S. REP. NO. 105-190, at 21 (“The provisions in the bill balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”).

35. Section 512(g)(3) states:

To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

to have content that was removed via a takedown notice to be restored. When Congress enacted the DMCA, it explained that the counter notification provision was “added as an amendment . . . to address the concerns of several members of the Committee that other provisions of this title established strong incentives for service providers to take down material, but insufficient protections for third parties whose material would be taken down.”³⁶ In short, the procedure was designed to protect innocent users who post material on websites that could be subject to takedown notices, even though their material was non-infringing.³⁷ However, the counter notification procedure is an insufficient protection for users because of the nature of the procedure itself in comparison with the need of OSPs to preserve safe harbor status.

A service provider need only notify the user that his or her material was removed. To maintain safe harbor protection, an OSP must “take[] reasonable steps promptly to notify the [user] that it has removed or disabled access to the material.”³⁸ Oddly,

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

36. S. REP. NO. 105-190, at 50. Notably, Congress described the counter-notification process as the “put back” procedure. *Id.* at 49–50 (“Subsection [(g)] provides immunity to service providers for taking down infringing material, and establishes a ‘put back’ procedure under which subscribers may contest a complaining party’s notification of infringement provided under subsection (c)(3).”).

37. *See id.* at 50.

38. 17 U.S.C. § 512(g)(2)(A). Generally, to post or upload material to an

an OSP is not required, by the terms of the statute, to inform the user of the counter notification procedure that would allow the user to republish the material.³⁹ This means that OSPs, such as YouTube, can simply remove the material from their websites without informing the user that he or she has the right to put back his or her material.

Nevertheless, once the material is removed and the user learns about its removal, whether through loss of revenue or otherwise, the decision solely rests with the user as to whether sending a counter notice under § 512(g)(3) is appropriate.⁴⁰ If the user sends a counter notice, the OSP is required to put back the removed or disabled material in “not less than 10, nor more than 14, business days following receipt of the counter notice,” unless the copyright owner first files an injunction against the user in connection with the material posted.⁴¹

The requirements for sending a counter notice are similar in some respects and different in others to the requirements for sending a takedown notice. For instance, both require a signature, identification of the material in question, a statement that the sender has a “good faith belief,” and a statement made “under penalty of perjury.”⁴² However, only the sender of a counter notice must “consent to the jurisdiction of [the] Federal District Court for the judicial district in which the [user] is located” and agree to “accept service of process from the person who provided [the takedown] notification.”⁴³

The information needed to send a counter notice deters users because “[t]o issue a counter-notice, a user must reveal her identity and consent to a jurisdiction wherein she may be sued for

OSP’s website requires creating an account with that site. Usually, when a user creates an account, the OSP requires the user to provide his or her contact information, which likely includes a valid email that is confirmed by the OSP and possibly a telephone number.

39. Loren, *supra* note 21, at 759; see 17 U.S.C. § 512(g)(2)(A).

40. See 17 U.S.C. § 512(g)(3)(A)–(D).

41. *Id.* § 512(g)(2)(C).

42. See *id.* § 512(c)(3)(A)(i)–(vi), (g)(3)(A)–(D).

43. *Id.* § 512(g)(3)(D). Compare 17 U.S.C. § 512(g)(3)(D) (requiring a consent to jurisdiction requirement before sending a counter notice) with 17 U.S.C. § 512(c)(3)(A)(i)–(vi) (omitting a consent to jurisdiction requirement before sending a takedown notice).

copyright infringement.”⁴⁴ Because the average internet user likely knows nothing about civil procedure, the “required contents for the counter-notice will cause many individuals to pause before sending one.”⁴⁵ As a result, users “would rather forego having their material reposted than face a lawsuit.”⁴⁶

Indeed, a recent study shows that users rarely send counter notices.⁴⁷ In 2014, Daniel Seng conducted an empirical analysis of takedown notices stored in the Chilling Effect’s project repository (now the Lumen database).⁴⁸ The study showed that 67,571 notices were sent in 2011, and 441,370 were sent in 2012.⁴⁹ Out of those notices, the study found that only fifty-nine counter notices that related to a § 512(c) takedown notice were sent in 2011, and similarly only eighty-two counter notices were sent in 2012.⁵⁰ In other words, counter notices made up less than one-tenth of one percent of all notices sent in 2011 and 2012.⁵¹ It is unclear why counter notices are rarely utilized, but some scholars have advanced several theories including lack of user awareness,⁵² privacy concerns, submitting to intimidating legal language, or actual infringement by the user.⁵³

44. Marc J. Randazza, *Lenz v. Universal: A Call to Reform Section 512(f) of the DMCA and to Strengthen Fair Use*, 18 VAND. J. ENT. & TECH. L. 743, 755 (2016).

45. Loren, *supra* note 21, at 760.

46. *Id.*

47. *See infra* note 51; *see also* Urban et al., *supra* note 13, at 44. In the Urban study, the researchers interviewed twenty-nine OSPs and six major notice senders. Urban et al., *supra* note 13, at 26. Of the thirty-five respondents, only one “reported receiving more than a handful per year.” *Id.* at 44.

48. *See* Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 379–80 (2014). A vast majority of the takedown notices in the Chilling Effects repository were those received by Google and Twitter. *Id.* at 389.

49. *Id.*

50. *Id.* at 427–28.

51. Counter notices made up approximately 0.087% of all notices sent in 2011, and approximately 0.018% of all notices sent in 2012. *See id.*

52. Loren, *supra* note 21, at 759.

53. *See* Zoe Carpou, Note, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users*, 39 COLUM. J.L. & ARTS 551, 566–67 (2016); *see also* Randazza, *supra* note 44, at 755; Seng, *supra* note 48, at 430.

2. *Section 512(f) Claims*

The second tool Congress conferred on users to push back against improper takedowns is the § 512(f) misrepresentation claim.⁵⁴ Section 512(f) provides users with a right of action against anyone who “knowingly” makes a misrepresentation in a takedown notice.⁵⁵ Congress intended § 512(f) to “deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights owners, service providers, and Internet users.”⁵⁶

Importantly, § 512(f) is the only means by which a user can push back against an improperly sent takedown notice in court.⁵⁷ However, except for a few clear-cut § 512(f) cases,⁵⁸ courts have generally wrestled with how § 512(f) should be interpreted and applied because of the limited amount of case law surrounding

54. Section 512(f) states:

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,

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.

17 U.S.C. § 512(f) (2012).

55. *Id.*

56. S. REP. NO. 105-190, at 49 (1998); *see also* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (9th Cir. 2007) (“Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.”).

57. *See* 17 U.S.C. § 512(f).

58. *See* Curtis v. Shinsachi Pharm. Inc., 45 F. Supp. 3d 1190, 1199 (C.D. Cal. 2014) (finding that sending a takedown notice based on a non-existent infringement is sufficient for § 512(f) liability to attach); Smith v. Summit Entm’t LLC, No. 3:11CV348, 2011 WL 2200599, at *4–5 (N.D. Ohio June 6, 2011) (finding a takedown notice issued on the basis of trademark infringement was sufficient evidence for plaintiff to proceed with § 512(f) claim).

such claims.⁵⁹ Under current § 512(f) case law, the plaintiff-user must show that the sender had actual knowledge of the misrepresentation.⁶⁰ But, actual knowledge may be inferred from the sender's failure to form a good faith belief as required in § 512(c)(3)(A)(v) of the takedown statute.⁶¹ For example, if a copyright owner sends a takedown notice for the purpose of removing a competitor's online material, the copyright owner failed to form a good faith belief.⁶²

In short, § 512(f) provides users with the means to fight back against overzealous copyright owners who force OSPs to remove non-infringing material by showing that the copyright owner knowingly misrepresented that the material was copyrighted.⁶³

II. THE GOOD FAITH BELIEF REQUIREMENT AND COMPUTERIZED METHODS

A copyright owner's failure to form a "good faith belief" before sending a takedown notice is sufficient to trigger § 512(f) liability.⁶⁴ This Part examines the primary case law that has interpreted the "good faith belief" requirement in § 512(c)(3)(A)(v) of the takedown statute. Given the vast amount of web-based copyright infringement uploaded daily,⁶⁵ it is likely that the issue of whether a copyright owner can form a good faith belief through a computerized method will come to a head.

59. *Disney Enters., Inc. v. Hotfile Corp. (Hotfile)*, No. 11-20427-CIV, 2013 WL 6336286, at *46 (S.D. Fla. Sept. 20, 2013) ("[T]he parties, like the Court, have grappled with several issues surrounding enforcement of Section 512(f), which is not well understood."); *Ground Zero Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 704 (D. Md. 2011) ("There is not a great deal of case law interpreting [section 512(f)].").

60. *See Lenz v. Universal Music Corp. (Lenz II)*, 815 F.3d 1145, 1154 (9th Cir. 2016).

61. *Id.*

62. *See Curtis*, 45 F. Supp. 3d at 1198–99.

63. *See* 17 U.S.C. § 512(f) (2012).

64. *See id.*

65. Ted Johnson, *NBCU-Backed Study: Online Piracy Continues to Rise Dramatically*, VARIETY (Sept. 17, 2013, 10:04 AM), <http://variety.com/2013/digital/news/piracy-continues-to-rise-dramatically-study-from-nbcu-concludes-1200614944/> [<https://perma.cc/8JJX-XDK7>].

A. *Rossi v. Motion Picture Ass'n of America: Copyright Owners Are Held to a Subjective Good Faith Belief Standard*

In *Rossi v. Motion Picture Ass'n of America*,⁶⁶ the operator of a website advertised that users could download “Full Length” movies.⁶⁷ In response, the Motion Picture Association of America (MPAA) sent several takedown notices to Rossi and his service provider.⁶⁸ However, Rossi’s website in fact did not allow users to download videos.⁶⁹ Rossi urged the Ninth Circuit that § 512(c)(3)(A)(v) should encompass an objective good faith belief standard.⁷⁰ Specifically, Rossi argued that “if [the] MPAA had reasonably investigated the site by attempting to download movies, it would have been apparent that no movies could actually be downloaded from his website or related links.”⁷¹ In rejecting Rossi’s argument, the Ninth Circuit held that § 512(c)(3)(A)(v) encompasses a subjective good faith belief standard because “courts interpreting other federal statutes have traditionally interpreted ‘good faith’ to encompass a subjective standard.”⁷²

Interestingly, the *Rossi* court noted an argument raised by an *amicus curiae* regarding whether a copyright owner employing computerized methods to search for infringing material is sufficient to form a good faith belief.⁷³ The court, however, did not address the argument because “the MPAA employ[ed] three to four employees who actually review[ed] the identified sites.”⁷⁴ Therefore, because there were employees who actually reviewed

66. 391 F.3d 1000 (9th Cir. 2004).

67. *Id.* at 1002.

68. *Id.*

69. *Id.*

70. *Id.* at 1003.

71. *Id.*

72. *Id.* at 1004–05 (citations omitted). Notably, *Rossi* overturned *Online Policy Grp. v. Diebold, Inc.*, in which the United States District Court for the Northern District of California had held that § 512(c)(3)(A)(v) encompassed an objective reasonableness standard. See *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (applying objective standard against copyright owner in the context of a § 512(f) claim).

73. *Rossi*, 391 F.3d at 1005 n.7 (“Amici Curiae Net–Coalition and Internet Commerce Coalition contend that computers conducting automated searches cannot form a belief consistent with the language of the DMCA, because they cannot distinguish between infringing content and content that merely contains words that suggest infringement.”).

74. *Id.*

the sites, and, presumably, acted in good faith in identifying infringing material, the court implicitly found it was unnecessary to analyze whether using computerized methods to find and remove infringing material satisfied the good faith belief requirement.

B. Disney Enterprises, Inc. v. Hotfile Corp.: Purely Computerized Takedowns and Bad Faith

In *Disney Enterprises, Inc. v. Hotfile Corp.*,⁷⁵ a group of large-scale copyright owners⁷⁶ filed several infringement claims based on direct and secondary liability against Hotfile, a web-based company that provided online file storage services.⁷⁷ In response, Hotfile filed a § 512(f) counterclaim against Warner Brothers (Warner).⁷⁸

The facts related to the § 512(f) counterclaim showed that Warner used a computer algorithm that had an error rate of less than one percent.⁷⁹ Yet, the record indicated that Warner’s “efforts to police [infringement] were at times overzealous and overreaching.”⁸⁰ For example, Warner issued takedown notices regarding an application it did not own, called “JDownloader.”⁸¹ The court, in permitting Hotfile to proceed on its § 512(f) counterclaim, found “sufficient evidence in the record to suggest that Warner intentionally targeted files it knew it had no right to remove,”⁸² because Warner “*acknowledged* removing [JDownloader] for reasons unrelated to copyright infringement.”⁸³

Interestingly, before the *Hotfile* court reached its holding, the

75. No. 11-20427-CIV, 2013 WL 6336286, at *14–15 (S.D. Fla. Sept. 20, 2013).

76. The owners included Disney Enter., Inc., Twentieth Century Fox Film Corp., Universal City Studios Prod.s LLLP, Columbia Pictures Indus., Inc., and Warner Bros. Entm’t, Inc. *Id.* at *1.

77. *Id.*

78. *See id.*

79. *Id.* at *15.

80. *Id.* at *16.

81. *Id.* at *48.

82. *Id.*

83. Order Denying Summary Judgment on Hotfile Counterclaim at 97, *Hotfile*, No. 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013) (emphasis added), <https://www.eff.org/document/order-denying-summary-judgment-hotfile-counterclaim-ecf-534> [<https://perma.cc/3W9B-V8Q2>].

court considered the complexities computerized methods potentially entail when analyzing a § 512(f) claim. For instance, Hotfile raised two arguments that the court did not explicitly address.⁸⁴ Rather, after reviewing the relevant § 512(f) precedent, the court stated:

[I]f Warner had some similar type of duty [to consider fair use], it might find itself vulnerable to suit because its pre-notice review was minimal and swift, consisting of mechanically reviewing the titles and superficial attributes of files. Moreover, even if its methodology were reliable, Warner was concerned with determining whether it *owned* the works rather than whether the use of the works *infringed* on its copyrights to support [sending a takedown notice].⁸⁵

The court further explained that “Warner’s reliance on technology to accomplish the task might prevent it from forming any belief at all.”⁸⁶

Moreover, although the opinion is highly redacted, portions of the opinion were unsealed in September 2014.⁸⁷ The unsealed

84. First, Hotfile argued that the “egregious” attributes of Warner’s system, “such as not relying on human review, failing to download mistaken files, and failing to examine file titles,” prevented it from acquiring subjective knowledge. *Id.* at 94. Second, the defendant argued that Warner’s knowledge of the system’s error rate could raise an inference of actual knowledge. *Id.* at 95.

85. *Id.* at 96. The *Hotfile* court, in ending its inquiry into computerized methods, stated:

Ultimately, while these are engaging questions surrounding Warner’s knowledge; its responsibility to investigate; whether it had a good faith belief in infringement in each instance; and whose burden it is to show or refute what—all issues of first impression in this Circuit—there is sufficient evidence in the record to suggest that Warner intentionally targeted files it knew it had no right to remove.

Hotfile, 2013 WL 6336286, at *48.

86. *Id.* at *47. The *Hotfile* court, however, stated that it was “unaware of any decision to date that actually addressed the need for human review, and the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity.” 2013 WL 6336286, at *48.

87. Mitch Stoltz, *EFF Wins Release of Warner Bros. Documents on Robo-Takedown System*, ELECTRONIC FRONTIER FOUND. (Sept. 26, 2014), <https://www.eff.org/deeplinks/2014/09/eff-wins-release-warner-bros-documents> [<https://perma.cc/3QF8-M4LK>].

portions revealed that Warner “uses the *common practice* of having automated systems [] scan link sites and [] issue notifications of infringement to [storage] locker sites when infringing content is detected.”⁸⁸ Furthermore, Warner’s algorithm solely identified infringing material by “us[ing] keywords to search for content based on attributes such as the file’s title, genre, and year of release.”⁸⁹

The unsealed portions of *Hotfile* are important for two reasons. First, it was the first time any court substantially addressed a copyright owner’s use of computerized methods and how that may affect the owner’s ability to form a good faith belief. Second, it was also the first time a copyright owner’s computerized methods were revealed in connection with the takedown process.

C. *Lenz v. Universal Music Corp.: Copyright Owners Are Required to Consider Fair Use Before Issuing a Takedown Notice*

Stephanie Lenz, a mother of two, posted a twenty-nine second video on YouTube, titled “Let’s Go Crazy’ #1.”⁹⁰ The video showed her two young children dancing to the song *Let’s Go Crazy* by Prince.⁹¹ Universal Music Corporation (Universal), as Prince’s publishing administrator, was responsible for enforcing Prince’s copyrights.⁹² Universal sent a takedown notice that listed over 200 videos, including Lenz’s video, to YouTube.⁹³ Prior to sending that takedown notice, Universal used a criterion that did not explicitly consider fair use.⁹⁴ Lenz responded by issuing a counter

88. Order Denying Summary Judgment on Hotfile Counterclaim at 29, *Hotfile*, No. 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013) (alterations in original) (emphasis added) (citation omitted) (internal quotation marks omitted), <https://www.eff.org/document/order-denying-summary-judgment-hotfile-counterclaim-ecf-534> [https://perma.cc/3W9B-V8Q2].

89. *Id.*

90. *Lenz II*, 815 F.3d 1145, 1149 (9th Cir. 2016).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* According to Universal’s criteria, YouTube videos were to be evaluated as to “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.’” *Id.* Furthermore, Universal’s “general guidelines” were to “review the video to ensure that the composition was the focus and if it was [a

notice under § 512(g)(3).⁹⁵ Nonetheless, Universal protested the reinstatement of the video on grounds that Lenz's counter notice was defective and that Lenz was never granted a license in the work.⁹⁶ However, YouTube eventually reinstated the video after Lenz sent a second counter notice.⁹⁷

Lenz filed a § 512(f) misrepresentation claim against Universal in the United States District Court for the Northern District of California.⁹⁸ In response, Universal filed a motion to dismiss.⁹⁹ Universal argued that copyright owners cannot be required to evaluate fair use because fair use is an affirmative defense and, thus not "authorized by the copyright owner or by law" under § 512(c)(3)(A)(v) of the takedown statute.¹⁰⁰ Lenz countered that fair use is authorized by the law because "the fair use doctrine itself is an express component of copyright law."¹⁰¹ The court, in denying Universal's motion, held that a copyright "owner must evaluate whether the material makes fair use of the copyright" before sending a takedown notice because a "fair use is a lawful use of a copyright."¹⁰²

On appeal, the Ninth Circuit held that "fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c)."¹⁰³ In doing so, the court rejected Universal's argument that fair use

Universal employee] then notify YouTube that the video should be removed." *Id.*

95. *Id.* at 1150.

96. *See id.* Universal never mentioned fair use during its protest. *Id.*

97. *Id.*

98. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153 (N.D. Cal. 2008).

99. *Id.*

100. *Id.* at 1154.

101. *Id.*

102. *Id.*

103. *Lenz II*, 815 F.3d 1145, 1153 (9th Cir. 2016). It is worth mentioning that before *Lenz* was appealed to the Ninth Circuit, the case went through various pretrial judgments. *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013) (denying motions for summary judgment); *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466 (N.D. Cal. Feb. 25, 2010) (granting plaintiff's motion for partial summary judgment on affirmative defenses); *Lenz v. Universal Music Corp.*, No. C 07-3783 JF(RS), 2008 WL 4790669 (N.D. Cal. Oct. 28, 2008) (denying motion for interlocutory appeal).

is an affirmative defense in the takedown context.¹⁰⁴ Rather, the court explained that, in the context of takedown notices, “fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses.”¹⁰⁵ However, the court tempered its holding by explaining that before a copyright owner sends a takedown notice, the owner “need only form a subjective good faith belief that a use is not authorized.”¹⁰⁶

Nevertheless, it is clear from *Lenz II* that a user can bring a § 512(f) claim by alleging that a copyright owner did not consider fair use before issuing a takedown notice.¹⁰⁷ Although the court was unclear as to what steps a copyright owner must take to sufficiently consider fair use,¹⁰⁸ the *Lenz II* court stated that if a copyright owner’s fair use consideration amounts to ignorance or neglect, the owner is subject to § 512(f) liability.¹⁰⁹ Furthermore, a copyright owner could also be liable if it merely pays lip service to the fair use consideration.¹¹⁰

D. *Lenz Amended*

Both Universal and *Lenz* petitioned the Ninth Circuit for a panel rehearing, and *Lenz* also petitioned for a rehearing *en banc*.¹¹¹ The Ninth Circuit denied both parties’ petitions,¹¹² but amended its original opinion.¹¹³ In the original opinion, the court had included several paragraphs that seemingly endorsed the use of computerized methods as a means of satisfying the good faith belief requirement.¹¹⁴ For example, the original opinion stated

104. *See id.* at 1152–53.

105. *Id.* at 1153.

106. *Id.* (citing *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004)). The *Lenz II* court also found that a jury must consider whether Universal’s failure to explicitly consider fair use before sending the takedown notice was “sufficient to form a subjective good faith belief about the video’s fair use or lack thereof.” 815 F.3d at 1154.

107. *See id.* at 1154; *see also* Laura A. Possessky, *Throwing the Baby Out with the Bathwater: Lenz v. Universal and the Future of DMCA Safe Harbor Takedown Notifications*, 8 LANDSLIDE 10, 12 (2016).

108. *See Lenz II*, 815 F.3d at 1154.

109. *Id.*

110. *Id.*

111. *Id.* at 1148.

112. *Id.*

113. *Id.*

114. *See Lenz v. Universal Music Corp. (Lenz I)*, 801 F.3d 1126, 1135 (9th

that “a copyright holder’s consideration of fair use need not be searching or intensive . . . [T]he 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.”¹¹⁵ However, the second, later opinion does not include this section, or the paragraphs that seemed to endorse the use of computerized methods to satisfy the good faith belief requirement.¹¹⁶ It is unclear why the court amended its opinion, but it is possible that at least one judge found that *Lenz* was not the appropriate case for delving into the validity of computerized methods given that, according to the facts, the removal of Lenz’s video was not the result of a computerized takedown.¹¹⁷

Another possible reason for why the Ninth Circuit initially endorsed the use of computerized methods, despite that such methods were not at issue in *Lenz*, is found in the case it cited for a different proposition: *Hotfile*. In a parenthetical, the Ninth Circuit quoted a portion of *Hotfile* that referred to the fact that no court had ruled on the need for human review in the context of takedown notices.¹¹⁸ The *Lenz I* court’s citation to *Hotfile* suggests that the Ninth Circuit likely wanted to be the first court to explicitly state a position on computerized methods because most copyright owners are based in California. On the other hand, the Ninth Circuit’s removal of that language could fairly be read as a warning to copyright owners that the use of computerized methods alone is insufficient to form a good faith

Cir. 2015).

115. *Id.* (citing *Hotfile*, No. 11-20427-CIV, 2013 WL 6336286, at *47 (S.D. Fla. Sept. 20, 2013)).

116. Compare *Lenz II*, 815 F.3d at 1145 (omitting any reference to computer algorithms), with *Lenz I*, 801 F.3d at 1135 (referring to computer algorithms).

117. See *Lenz II*, 815 F.3d at 1149; *Lenz I*, 801 F.3d at 1135. It is worth noting that the Ninth Circuit amending an opinion on denial of an *en banc* rehearing is “a sure indication that some post-panel activity has taken place.” Stephen L. Wasby, “A Watchdog for the Good of the Order”: *The Ninth Circuit’s En Banc Coordinator*, 12 J. APP. PRAC. & PROCESS 91, 91–92 (2011).

118. *Lenz I*, 801 F.3d at 1135 (“The Court . . . is unaware of any decision to date that actually addressed the need for human review, and the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity.” (quoting *Hotfile*, 2013 WL 6336286, at *47)).

belief.¹¹⁹

Nevertheless, one thing that did not change between the Ninth Circuit's original and amended *Lenz* opinion is that copyright owners must consider fair use before sending a takedown notice.¹²⁰ However, *Lenz* failed to answer the question of whether a copyright owner can form a good faith belief through a computerized method.

III. FAIR USE

In light of the *Lenz* decision, copyright owners have a duty to consider fair use before sending takedown notices.¹²¹ Because fair use is a complex doctrine, it may be problematic to copyright owners who use computerized methods.

A. *What is a Fair Use?*

A fair use is not an infringement.¹²² Prior to the enactment of

119. See Nicholas Thomas Delisa, Note, *You(Tube), Me, and Content ID*, 81 BROOK. L. REV. 1275, 1282 n.52 (2016) (noting the Ninth Circuit's decision to remove that language "shows that the court is skeptical about the ability of computers to perform a good faith fair use analysis or complete a searching/intensive inquiry").

120. *Lenz II*, 815 F.3d at 1153 ("[A] copyright owner must consider the existence of fair use before sending a takedown notification under § 512(c)."); *Lenz I*, 801 F.3d at 1133. *Lenz* petitioned for writ of certiorari with the United States Supreme Court to answer:

Whether the Ninth Circuit erred in concluding that the affirmation of good faith belief that a given use of material use is not authorized 'by the copyright owner, its agent, or the law,' required under Section 512(c) of the [DMCA], may be purely subjective and, therefore, that an unreasonable belief—such as a belief formed without consideration of the statutory fair use factors—will not subject the sender of a takedown notice to liability under Section 512(f) of the DMCA?

Petition for a Writ of Certiorari, *Lenz*, 2016 WL 4376069, at *i (2016) (No. 16-217). Universal also petitioned for writ of certiorari with the Court to answer "[w]hether a plaintiff who alleges a statutory violation but no concrete or particularized injury has standing under Article III to seek a remedy of nominal damages?" Petition for a Writ of Certiorari, *Lenz*, 2016 WL 4437629, at *i (2016) (No. 16-218).

121. *Lenz II*, 815 F.3d at 1153.

122. 17 U.S.C. § 107 (2012) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) ("Any individual may reproduce a copyrighted work for a 'fair use.'").

the Copyright Act of 1976,¹²³ fair use law was an “exclusively judge-made doctrine.”¹²⁴ The Copyright Act of 1976 codified the doctrine; however, ambiguities in the law remained. When determining whether a use qualifies as “fair,” courts are not guided by bright-line rules.¹²⁵ Rather, the test for fair use is a case-by-case factual inquiry that requires the balancing and weighing of four factors against each other.¹²⁶ Furthermore, while no one factor is dispositive, the Supreme Court has placed emphasis on the first factor with respect to the “transformative” purpose of the use.¹²⁷

The Court has also attached great weight to the third factor,¹²⁸ which evaluates the “amount and substantiality” of the

123. Pub. L. No. 94-553, 90 Stat. 2541 (1976).

124. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994). The United States Supreme Court’s fair use jurisprudence often refers to passages from Justice Story’s opinion in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), as first recognizing the doctrine of fair use in 1841. See *Campbell*, 510 U.S. at 576; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

125. *Campbell*, 510 U.S. at 577 (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”); see also *Harper & Row*, 471 U.S. at 561 (explaining that the examples set forth in the preamble to § 107 are not intended to be an exhaustive list).

126. 17 U.S.C. § 107 (2012). Section 107 provides, in relevant part:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (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.

Id.

127. *Campbell*, 510 U.S. at 579 (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).

128. See *Harper & Row*, 471 U.S. at 565 (“[A] taking may not be excused merely because it is insubstantial with respect to the *infringing* work. As Judge Learned Hand cogently remarked, ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’” (quoting *Sheldon v.*

work copied “in relation to the copyrighted work as a whole.”¹²⁹ Recently, the Second Circuit stated that “[t]he clear implication of the third factor is that a finding of fair use is more likely when *small amounts*, or less important passages, are copied than when the copying is extensive, or encompasses the most important parts of the original.”¹³⁰ In addition, each of the four factors must be “explored, and the results weighed together, in light of the purposes of copyright.”¹³¹

Fair use is a complex and constantly evolving component of copyright law. For instance, Justice Harry Blackmun once stated that “[t]he doctrine of fair use has been called, with some justification, the most troublesome in the whole law of copyright.”¹³² Similarly, in *Authors Guild, Inc. v. Google, Inc.*, the Second Circuit found that Google Books, which allowed internet users to view a limited number of snippets from a catalog of millions of books that Google digitized without authorization from the copyright owners, was a fair use.¹³³ As shown in *Authors Guild*, a fair use analysis is solely based on the factual nature of the copying at issue.¹³⁴ Thus, the ever-changing nature of the internet coupled with the factual nuances involved in determining fair use could present problems to copyright owners that use computerized methods.

Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936)). In *Harper & Row*, the Court rejected the defendant’s argument that publishing 300 words of former President Gerald Ford’s *unpublished* memoir was insubstantial because the 300 words were “essentially the heart of the book.” 471 U.S. at 565 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

129. 17 U.S.C. § 107(3).

130. *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir. 2015) (emphasis added) (citing *Harper & Row*, 471 U.S. at 564–65).

131. *Campbell*, 510 U.S. at 578. The *Campbell* Court declared that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, [t]o promote the Progress of Science and useful Arts.” 510 U.S. at 575 (quoting U.S. CONST. art. I, § 8, cl. 8).

132. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (internal quotation marks omitted)).

133. 804 F.3d at 229.

134. *See id.* at 202.

B. The Implications of a Required Fair Use Consideration

It is clear from *Lenz* that a copyright owner is held to a subjective standard for purposes of conducting the complex and pliable fair use analysis.¹³⁵ However, the decision and its subsequent modification raise several questions that, so far, remain unanswered. How does a copyright owner “consider the existence” of a fair use? What does *Lenz* mean for the vast amount of copyright owners who solely rely on computerized methods? Is it valid to form a subjective good faith belief through the use of computerized methods with human review or without human review, or both? What qualifies as a sufficient fair use analysis for purposes of forming a good faith belief?

To “consider” fair use, one would assume that balancing and weighing the statutory fair use factors is necessary.¹³⁶ Likewise, because fair use law is rooted in the common-law,¹³⁷ a copyright owner considering fair uses recognized by courts¹³⁸ likely satisfies the *Lenz* rule.¹³⁹ While it is clear that computerized methods are able to identify when a user’s uploaded content matches a title,

135. *Lenz II*, 815 F.3d 1145, 1153–54 (9th Cir. 2016).

136. *See* 17 U.S.C. § 107 (2012).

137. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (explaining that “fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act”); H.R. REP. NO. 94-1476, at 66 (1976) (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, *especially during a period of rapid technological change*. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is *intended* to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” (emphasis added)).

138. *See, e.g., Campbell*, 510 U.S. at 569 (finding that a parody in the context of music was fair use); *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (finding that digitizing and indexing millions of books that showed only a limited number of snippets for purposes of efficient searching was fair use); *Katz v. Google, Inc.*, 802 F.3d 1178 (11th Cir. 2015) (finding that reproducing a copyrighted photograph on a blog used for criticism and commentary was fair use); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (finding that reformatting a work for the blind was fair use); *White v. West Publishing Corp.*, No. 12 Civ. 1340(JSR), 2014 WL 3385480 (S.D.N.Y. July 3, 2014) (finding that reprinting publicly filed legal briefs in a database of legal resources was fair use).

139. *See Lenz II*, 815 F.3d at 1153.

video, or audio track of a copyrighted work (i.e., metadata),¹⁴⁰ it is less clear whether computerized methods can adequately perform a fair use analysis during its identification process.¹⁴¹

Moreover, it is uncertain whether the use of computerized methods, alone, is sufficient to satisfy the required good faith fair use consideration because the Ninth Circuit removed all of the language that indicated computerized methods were an adequate means of satisfying the required good faith fair use consideration.¹⁴² Nevertheless, the Ninth Circuit's endorsement of computerized methods in the original *Lenz* opinion, arguably, was a result of the Ninth Circuit originally finding *Lenz* to be the appropriate vehicle for such an endorsement of computerized methods and, subsequently, changing course.¹⁴³ At a minimum, the validity of computerized methods in the notice-and-takedown process is unclear.

IV. ANALYSIS

For copyright owners, computerized methods are the optimal means of identifying internet-based copyright infringement since such methods are inexpensive to employ as compared to a human searching the vast terrain of the internet.¹⁴⁴ Computerized methods also provide the most effective means for protecting the exclusive rights of copyright owners. However, a recent comprehensive study showed that computerized methods tend to have trouble distinguishing between infringing uses and non-infringing fair uses.¹⁴⁵ Equally important, the amended *Lenz*

140. See Order Denying Summary Judgment on Hotfile Counterclaim at 29, 31, *Hotfile*, No. 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013), <https://www.eff.org/document/order-denying-summary-judgment-hot-file-counterclaim-ecf-534> [<https://perma.cc/3W9B-V8Q2>].

141. Urban et al., *supra* note 13, at 95 (“[F]air use analysis is famously fact-specific and nuanced, and generally considered ill-suited for automated decision-making.”); Rock *supra* note 12, at 704 (“The inherent nuances involved in identifying fair use, combined with the necessary limitations of an automated algorithm, suggest that it will be difficult, if not impossible, for a computer program to consistently and accurately identify fair use.”).

142. Compare *Lenz II*, 815 F.3d 1145 (9th Cir. 2016) (omitting any reference to computer algorithms), with *Lenz I*, 801 F.3d 1126, 1135 (9th Cir. 2015) (referring to algorithms).

143. See *infra* Part II.D.

144. Carpou, *supra* note 53, at 564–65.

145. Urban et al., *supra* note 13, at 76.

opinion removed all indications that computerized methods were a sufficient means of satisfying a good faith fair use consideration.¹⁴⁶

Thus, *Lenz* created uncertainty for all stakeholders. Nevertheless, the common thread that runs through *Rossi*, *Hotfile*, and *Lenz* is that each court, given the unique nature of the notice-and-takedown process in connection with computerized methods, considered how the use of computerized methods in the takedown process may affect how the subjective standard is applied and who should have to make certain showings.¹⁴⁷ This thread matters because copyright owners must continue to use computerized methods in order to combat the ever-expanding nature of web-based copyright infringement. Therefore, it is highly likely that a court will be faced with addressing whether a subjective good faith belief standard is appropriate, and how a copyright owner's computerized methods interplays with the duty to consider fair use.

A. An Objective Standard Cuts Against the Purpose of the Notice-and-Takedown Scheme

Before the Ninth Circuit's decision in *Lenz*, scholars and commentators advanced several solutions that mostly centered on

146. Compare *Lenz II*, 815 F.3d 1145 (9th Cir. 2016) (omitting any reference to computer algorithms), with *Lenz I*, 801 F.3d at 1135 (“[T]he 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.”).

147. See *supra* Part II. For example, the *Rossi* court considered but did not address whether computerized methods may change how a subjective standard applies or whether additional burdens may be necessary because the MPAA in fact had its employees review the plaintiff’s website before sending the takedown notices. See *Rossi v. Motion Pictures Ass’n of Am., Inc.*, 391 F.3d 1000, 1005 n.7 (9th Cir. 2004). In contrast, the *Hotfile* court suggested that Warner’s system, which only accounted for a file’s superficial attributes and not fair use, “might prevent [Warner] from forming any belief at all” See *Hotfile*, No. 11-20427-CIV, 2013 WL 6336286, at *47 (S.D. Fla. Sept. 20, 2013). Interestingly, in *Lenz*, the original opinion seemingly endorsed the use of computerized methods, even though computerized methods were not at issue in the case. See *Lenz I*, 801 F.3d 1126, 1129, 1135–36 (9th Cir. 2015). Finally, the Ninth Circuit amended its opinion in *Lenz* by removing all of the language that seemingly endorsed the use of computerized methods in the takedown process. See *Lenz II*, 815 F.3d 1145 (9th Cir. 2016).

the need for an objective standard based on, among other things, concerns for free speech¹⁴⁸ and the lack of human review in the takedown process.¹⁴⁹

An objective good faith belief standard would require copyright owners to give individualized consideration before sending a takedown notice. While an objective standard would certainly deter copyright owners from sending improper takedown notices, an objective standard cuts against the purpose of § 512: “balanc[ing] the *need for rapid response to potential infringement* with the end-users legitimate interests in not having material removed without recourse.”¹⁵⁰ In light of *Lenz*, an objective standard would necessarily imply that a copyright owner’s fair use analysis would be subject to the reasonableness of the consideration, and this consideration may hamper legitimate efforts to curb copyright infringement.¹⁵¹ Because there is no known mechanical fair use test, an objective good faith belief standard essentially requires a copyright owner to give

148. See Jordan Koss, Note, *Protecting Free Speech Unequivocal Fair Users: Rethinking our Interpretation of the § 512(f) Misrepresentation Clause*, 28 CARDOZO ARTS & ENT. L.J. 149, 167–68 (2010) (arguing that “an objective standard under § 512(f) best balances the interests of copyright owners and users”). The concerns for free speech are generally related to the use of takedown notices during political campaigns. For example, during the 2012 United States presidential election, candidate Mitt Romney had a political advertisement removed that showed President Barack Obama singing “Let’s Stay Together” by Al Green because a copyright enforcement agency issued a takedown notice. Amanda Terkel, *Mitt Romney Ad Taken Down Over Copyright Claim*, HUFFINGTON POST (July 16, 2012), http://www.huffingtonpost.com/2012/07/16/mitt-romney-ad_n_1677874.html; see <https://www.youtube.com/watch?v=GIajeW6xPnI>. Based on that and other similar examples, scholars have argued that the notice-and-takedown process allows the censoring of free speech because an OSP must wait at least ten days before complying with a counter notice in order to maintain safe harbor protection. See 17 U.S.C. § 512(g)(2)(C) (2012); Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 191 (2010).

149. See Loren, *supra* note 21, at 783 (arguing for an objective standard); Benjamin Wilson, Comment, *Notice, Takedown, and the Good-Faith Standard: How to Protect Internet Users from Bad-Faith Removal of Web Content*, 29 ST. LOUIS L. REV. 613, 636 (2010) (arguing that copyright owners cannot form a good faith belief without conducting an initial review of the website).

150. S. REP. NO. 105-190, at 21 (1998) (alteration in original) (emphasis added).

151. See *Lenz II*, 815 F.3d 1145 (9th Cir. 2016).

individualized consideration to determine whether the potentially infringing material is fair use rather than using an efficient and cost effective computerized method.

An objective good faith fair use consideration would impose an onerous burden on copyright owners. Because a fair use analysis is complex and ever-changing, holding a copyright owner to an objective standard necessitates the need for attorneys or employees to individually review every conceivable close call of fair use. When *Rossi* was decided in 2004, the internet was starting its transition from dial-up to broadband.¹⁵² At that point, the MPAA had “three to four employees” that reviewed the websites before issuing takedown notices¹⁵³ most likely due to the internet being a smaller terrain. Currently, the internet is now a different place, in which a plethora of potentially infringing material can be uploaded to a website in a matter of minutes.¹⁵⁴ As a result, an objective standard would require a copyright owner to give individualized consideration to each potential infringing use before sending a takedown notice. Thus, an individualized consideration would cost copyright owners a substantial amount in lost revenue due to the massive amount of web-based copyright infringement coupled with the inefficient nature of a human removing web-based infringement.¹⁵⁵

For example, in March 2016, the Takedown Project released a comprehensive study on takedown notices and collected a data set of 108.3 million takedown requests from the Lumen database between May 1, 2013 and October 31, 2013.¹⁵⁶ The study found

152. Kathryn Zickuhr & Aaron Smith, *Home Broadband 2013*, PEW RESEARCH CTR. (Aug. 26, 2013), <http://www.pewinternet.org/2013/08/26/home-broadband-2013/> [<https://perma.cc/DP52-B42T>].

153. *Rossi v. Motion Pictures Ass’n of Am., Inc.*, 391 F.3d 1000, 1005 n.7 (9th Cir. 2004).

154. *Fiber Optic Internet Speed: How fast is Fiber Optic Internet?*, FASTMETRICS, <https://www.fastmetrics.com/how-fast-is-fiber-optic-internet.php>. (last visited Sept. 16, 2017).

155. See Ira Steven Nathenson, *Looking for Fair Use in the DMCA’s Safety Dance*, 3 AKRON INTEL. PROP. J. 121, 128 (2009) (explaining that “fair use is highly indeterminate, and in many cases a lawyer who considers fair use might reasonably conclude that the law is sufficiently unclear that a take-down [notice] can be sent in good-faith” (alteration in original)).

156. Urban et al., *supra* note 13, at 76. According to the study, “all takedown requests” in the dataset “appeared to be automated.” *Id.* at 2. The researchers noted that “[i]t is theoretically possible that these notices were

that roughly one-third (approximately 28.4%) of those requests had “characteristics that raised clear questions about their validity.”¹⁵⁷ More importantly, the study found that “[a]bout one in fifteen (6.6%) of requests were flagged with characteristics that weigh[ed] favorably toward fair use.”¹⁵⁸ In other words, approximately 7.9 million potential fair uses were removed from the internet by the takedown process. To put this into perspective, only one known § 512(f) case could be traced to that same time period.¹⁵⁹

A copyright owner’s duty to consider fair use eliminates the possibility of an objective standard. Due to the needs of copyright owners to remove millions of potentially infringing materials on a daily basis, an individualized consideration of every potential web-based infringement would impede a copyright owner’s ability to deal efficiently with infringement given the pliable nature of a fair use analysis in connection with the internet’s ever-changing nature.¹⁶⁰ Moreover, courts interpreting the takedown and misrepresentation statutes have shown a strong reluctance to entertaining either section as encompassing an objective standard.¹⁶¹ The *Rossi* court and, twelve years later, the *Lenz* court held that, in ruling on a § 512(f) claim, “the good faith belief requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard.”¹⁶²

On the other hand, proponents would argue that an objective standard is needed to put teeth into § 512.¹⁶³ Currently, an

not generated and sent automatically, but this is highly unlikely” because automation is “the standard industry practice[] . . .” *Id.* at 83 n.230.

157. *Id.* at 88.

158. *Id.* at 95.

159. See *Flynn v. Siren-BookStrand, Inc.*, No. 4:13-CV-3160, 2013 WL 5315959 (D. Neb. Sept. 20, 2013).

160. See *Nathenson*, *supra* note 155, at 128.

161. See *Lenz II*, 815 F.3d 1145 (9th Cir. 2016) (rejecting plaintiff’s argument that § 512(c)(3)(A)(v) encompasses an objective reasonableness standard); *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004) (rejecting plaintiff’s argument that a sender of a takedown notice should have to reasonably investigate the website prior to issuing a takedown notice).

162. *Lenz II*, 815 F.3d at 1153–1154 (internal quotation marks omitted); *Rossi*, 391 F.3d at 1004.

163. See *Loren*, *supra* note 21, at 782 (arguing that § 512(c)(3)(A)(v) should encompass an objective standard).

average of two § 512(f) cases have been brought each year while the amount of takedown notices has steadily increased.¹⁶⁴ In addition, the Urban study showed that millions of potential fair uses are removed by computerized methods.¹⁶⁵ Likewise, research also indicates that users rarely send counter notices.¹⁶⁶ Moreover, an objective standard would require an individualized review process before sending a takedown notice due to a higher likelihood of § 512(f) liability.¹⁶⁷ As a result, proponents would argue that an objective standard is necessary to fix the inadequate user push back tools Congress provided in the DMCA.

But, individualized consideration does not fit the balance Congress intended. Congress merely intended a balance between “the need for rapid response to potential infringement [and] the end-users legitimate interests in not having material removed *without recourse*.”¹⁶⁸ Although ineffective, users have recourse in the counter notification process and the ability to bring § 512(f) claims.¹⁶⁹ Furthermore, while an objective standard would increase protections for users, Congress expressly intended the takedown process as a means for copyright owners to efficiently remove web-based infringement.¹⁷⁰ Therefore, an objective standard would distort the balance Congress intended because it would go beyond recourse and into a legal scheme that Congress did not intend through the terms of § 512.¹⁷¹

B. Lenz: The Appropriate Baseline for Protecting Fair Uses and Copyright Owners

While some interest groups contend that *Lenz* did not go far enough in setting a more rigorous standard on copyright

164. *Id.* at 759–60, 782; Seng, *supra* note 48, at 389.

165. Urban et. al., *supra* note 13, at 95–97.

166. *See supra* note 51.

167. *See* 17 U.S.C. § 512(f) (2012).

168. S. REP. NO. 105-190, at 21 (1998) (emphasis added). Recourse is the “[e]nforcement of, or a method for enforcing, a right.” *Recourse*, BLACK’S LAW DICTIONARY 1466 (10th ed. 2014).

169. S. REP. NO. 105-190, at 50 (1998).

170. *Id.* at 45 (“Th[e] ‘notice and takedown’ procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.”).

171. *See id.* at 21.

owners,¹⁷² *Lenz* may deter some copyright owners from sending improper takedown notices. The Ninth Circuit amended its opinion and removed all language that appeared to endorse the use of computerized methods as a sufficient means of satisfying the good faith fair use consideration.¹⁷³ Thus, users may be protected from the imposed duty on copyright owners to consider fair use, and that computerized methods may not be enough to satisfy a good faith fair use consideration.

Moreover, *Lenz* provides an appropriate baseline for protecting fair uses while not imposing an onerous burden on a copyright owner's ability to enforce his or her exclusive rights. For users, copyright owners must actually consider fair use and will be held liable if the owner's fair use consideration amounts to ignorance, neglect, or mere lip service.¹⁷⁴ This is a significant improvement from how some cases were resolved pre-*Lenz*. For instance, in one pre-*Lenz* case, the United States District Court for the District of Colorado found that a copyright owner formed a sufficient good faith belief based on a mere showing of its attorney's conclusory statement.¹⁷⁵ Post-*Lenz*, such a conclusory statement would not be sufficient to satisfy that standard. Given the nature of the discovery process, copyright owners no longer can simply form a good faith belief with a mere conclusory statement.

Alternatively, copyright owners believe that *Lenz* imposes an onerous burden. After *Lenz*, Universal sought review from the United States Supreme Court.¹⁷⁶ The Recording Industry Association of America (RIAA)¹⁷⁷ made the following arguments in support of Universal's petition for writ of certiorari.¹⁷⁸ First,

172. See Corynne McSherry, *Dancing Baby Trial Back On? Another Mixed Ruling in Lenz v. Universal*, ELECTRONIC FRONTIER FOUND. (Mar. 17, 2016), <https://www.eff.org/deeplinks/2016/03/dancing-baby-trial-back-another-mixed-ruling-lenz-v-universal> [<https://perma.cc/MVJ8-VUBM>].

173. See Delisa, *supra* note 119, at 1282 n.52.

174. See *Lenz II*, 815 F.3d 1145, 1154 (9th Cir. 2016).

175. See *Dudnikov v. MGA Entm't, Inc.*, 410 F. Supp. 2d 1010, 1017–18 (D. Colo. 2005).

176. See Petition for Writ of Certiorari, *Lenz II*, 815 F.3d 1145 (9th Cir. 2016) (No. 16-218), 2016 WL 4437629, at *1.

177. The RIAA placed thirteenth among the senders of takedown notices in the Seng study. Seng, *supra* note 48, at 392.

178. Universal's Article III standing argument is beyond the scope of this

RIAA argued that copyright owners “cannot easily engage in the time-consuming, indeterminate exercise of evaluating fair use before sending a takedown notice.”¹⁷⁹ Second, it argued that “considering whether every instance of unauthorized use might be excused by the affirmative defense of fair use would also thwart Congress’s goal of providing copyright owners with a *rapid* response to *potential* infringement.”¹⁸⁰

However, these arguments are exaggerated. *Lenz* did not place an onerous burden on copyright owners. While a copyright owner cannot “easily” engage in a fair use determination, the Ninth Circuit made clear to copyright owners that it intends to be deferential to whatever results form a copyright owner’s fair use analysis.¹⁸¹ The *Lenz* court explicitly stated that if “a copyright holder forms a subjective good faith belief [that] the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder’s belief even if we would have reached the opposite conclusion.”¹⁸² Additionally, given that the threshold for a bad faith fair use consideration is predicated on a copyright owner’s ignorance, neglect, or mere lip service, there is a strong indication that the Ninth Circuit intended to be highly deferential to the copyright owner who makes an actual effort to consider fair use, so long as that effort is more than a facade.¹⁸³ Thus, the required good faith fair use consideration amounts to no more than a small check on a copyright owners otherwise uncontrolled ability to remove any unauthorized uses of its copyrighted material.

Additionally, the means exist for copyright owners to, at a minimum, separate blatantly infringing unauthorized uses from close call fair uses. The model example for such technology is found in YouTube’s Content ID program.¹⁸⁴ In short, YouTube’s

comment. See Petition for Writ of Certiorari, *Lenz II*, 815 F.3d 1145 (9th Cir. 2016) (No. 16-218), 2016 WL 4437629, at *11–12.

179. Brief for Recording Industry Ass’n of Am. as Amicus Curiae Supporting Petitioners at 25, *Lenz II*, 815 F. 3d 1145 (9th Cir. 2016) (No. 16-218), 2016 WL 4938268 (emphasis omitted).

180. *Id.* at 23 (internal quotation marks omitted) (quoting S. REP. NO. 105-190, at 21 (1998)).

181. See *Lenz II*, 815 F.3d 1145, 1154 (9th Cir. 2016).

182. *Id.* (emphasis omitted).

183. See *id.*

184. See *How Content ID Works*, YOUTUBE, <https://support.google.com/>

Content ID is a system where a copyright owner, who satisfies YouTube's criteria, uploads copies of his or her copyrighted material through audio or visual files to YouTube's Content ID database.¹⁸⁵ YouTube then stores that content and scans any video uploaded by users against it.¹⁸⁶ More importantly, the Content ID system identifies audio matches, video matches, partial matches, and other matches, even when the user's uploaded video quality is worse than the copyright owner's video file.¹⁸⁷ If the Content ID flags a sufficient match between the uploaded video and the content in the database, YouTube notifies the copyright owner.¹⁸⁸ The copyright owner, then, has the option to (a) mute the video's audio, (b) block the whole video, (c) make money off the video by running advertisements in the video, or (d) track the video's viewership statistics.¹⁸⁹

Although YouTube is an OSP, its Content ID program clearly illustrates that such methods exist to identify blatant matches and partial matches.¹⁹⁰ Thus, in practice, a copyright owner need only consider fair use when its computerized method identifies an unauthorized use that is not a blatant infringement because sending a takedown notice based on what the copyright owner believes is a blatant infringement likely satisfies the *Lenz* threshold of ignorance, neglect, or mere lip service.

youtube/answer/2797370?hl=en [https://perma.cc/5MZ7-C5VX] (last visited Feb. 3, 2017).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. This Comment assumes that computerized methods are able to separate or "sort" between blatant infringements and borderline fair uses. See, e.g., Kaplan Declaration in Support of Warner's Motion for Summary Judgment on Hotfile's Counterclaim at 5, *Hotfile*, (No. 11-20427), 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013), <https://www.eff.org/document/kaplan-declaration-support-warners-motion-summary-judgment-hotfiles-counterclaim-ecf-308-1> [https://perma.cc/R9LM-YCJR] (describing that Warner's computerized method is "a system that, by design, favors excluding files rather than potentially misidentifying files"); see generally Brief for Motion Picture Ass'n of Am. as Amicue Curiae Supporting Appellant, *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (2016) (No. 13-16107), 2013 WL 5798884, at *3 ("In issuing takedown notices, copyright owners, including the MPAA and its members, are incentivized to focus on blatantly infringing content and to steer clear of fair use.").

C. The Practical Effects of Lenz Weigh in Favor of Copyright Owners

While *Lenz* provides the appropriate baseline for meeting the goals of the notice-and-takedown scheme, copyright owners are likely to continue the common practice of sending massive amounts of takedown notices through computerized methods because the risk of § 512(f) liability is outweighed by the potential for lost revenue from infringement.¹⁹¹ Moreover, a computerized takedown is 2.5 times more likely to sweep up infringing uses than non-infringing uses.¹⁹² On the other hand, Stephanie Lenz-type situations will likely be more prevalent as fair use law continues to evolve and the internet continues to expand. However, given the lack of user pushback,¹⁹³ the status quo is likely to remain even when a fair user has her content removed. Due to these practical effects, the *Lenz* baseline merely tipped the balance slightly toward the side of users while still disproportionately favoring copyright owners. Accordingly, additional safeguards must be in place to protect fair users from improper takedown notices while also accounting for the reality that computerized methods are the standard means used to combat internet-based copyright infringement. Only then can the notice-and-takedown process fit the balance that Congress intended.

V. RECOMMENDATION

A. Copyright Owners Should Have to Show How Fair Use was Considered

To achieve a proportional balance, a copyright owner should have to show, in response to a § 512(f) claim, that the methods used are able to consider the statutory fair use factors,¹⁹⁴ or fair

191. See Possessky, *supra* note 107, at 11.

192. For example, the Urban study showed that nearly a third (28.4%) of takedown requests were questionable based on the face of the takedown notice. See Urban et al., *supra* note 13, at 88. Within that dataset, about one in fifteen requests (6.6%) raised questions about potential fair uses. *Id.* at 95. The bottom line is that computerized takedowns are 2.5 times as likely to sweep up an infringement than not. See *id.* at 88.

193. See Seng, *supra* note 48, at 427–28.

194. 17 U.S.C. § 107 (2012).

uses recognized by the courts.¹⁹⁵ The notice-and-takedown process is akin to an *ex parte* proceeding, such as a prejudgment attachment of property or prejudgment writ of garnishment. Both processes involve one party who, by virtue of a statute, is potentially permitted to remove one's property or online material so long as the statutory grounds are satisfied.¹⁹⁶ However, unlike a takedown notice, which is briefly reviewed by an OSP, an *ex parte* petition is reviewed by an impartial decision-maker, usually a judge.¹⁹⁷ Because the only time a takedown notice's validity receives judicial review is in response to a § 512(f) claim, a similar burden—showing the statutory grounds, including an encompassed good faith fair use consideration, for issuing the takedown notice—should be placed on the copyright owner.

As previously mentioned, the counter notification process is virtually never used because, among other things, users are likely unaware that it exists or are unwilling to submit to intimidating legal language.¹⁹⁸ In addition, § 512(f) claims are rarely filed because the average internet user cannot afford an attorney.¹⁹⁹

195. See *supra* note 138.

196. Usually, the terms of the relevant statute place the burden on the party seeking the attachment. See 28 U.S.C. § 3101(b)(1)(A)–(D) (2012) (requiring the United States to show the statutory grounds in *ex parte* debt collection proceedings); COLO. R. CIV. P. 102(c) (West, Westlaw current with amendments received through July 15, 2017) (requiring the party seeking attachment to show the statutory grounds before a court will issue a writ of attachment in an *ex parte* proceeding). Although neither § 512(c) nor § 512(f) expressly place the burden on the party seeking a takedown notice, the burden should be encompassed in § 512(c)(3)(A)(v) because the notice-and-takedown process is a unique statutory scheme in which First Amendment protections may be at stake and the due process provisions provided by Congress have been inadequate. In addition, the United States Supreme Court has previously invalidated a statute that allowed for the removal of property based on conclusory allegations. See *Connecticut v. Doe*, 501 U.S. 1, 13–15 (1991) (holding that Connecticut's prejudgment statute, which permitted a writ of attachment to issue based on a plaintiff's conclusory allegations that there was probable cause to believe his claim was valid, violated the procedural component of the Due Process Clause of the Fourteenth Amendment).

197. See Nathenson, *supra* note 155, at 145 (discussing how takedown notices are essentially “de facto *ex parte* seizures” because “few users write counter-notifications”).

198. See Loren, *supra* note 21, at 760.

199. For example, Stephanie Lenz brought her § 512(f) claim only after she obtained *pro bono* counsel. See *Lenz II*, 815 F.3d 1145, 1150 (9th Cir.

However, unlike an objective standard, placing the burden on copyright owners to show how they considered fair use weighs in favor of judicial economy because courts will be able to weed out § 512(f) claims against owners who actually considered fair use. Finally, placing the burden on copyright owners is in line with the balance Congress intended because the showing would be minimal since the owner's fair use consideration need only go beyond ignorance, neglect, or mere lip service. Thus, placing the burden on copyright owners would provide a significant improvement over the current procedure governing § 512(f) claims and would not hinder a copyright owners' ability to efficiently remove blatant infringements.

B. Courts Should Allow Copyright Owners to Form a Good Faith Belief Through Computerized Methods that are Comparable to YouTube's Content ID

While a court has never expressly ruled on the validity of a purely computerized takedown, courts should allow copyright owners, with computerized methods comparable to YouTube's Content ID, to form a good faith belief solely through the use of computerized methods, so long as those methods accurately consider the statutory fair use factors²⁰⁰ or fair uses recognized by the courts.²⁰¹ This recommendation could apply in two different situations.²⁰² First, when a user uploads copyrighted material that is, in fact, a blatant infringement and the computerized method flags it as such. In that instance, the copyright owner should be found to have formed a good faith belief because blatant infringements are ordinarily not fair uses.²⁰³ Second, when the computerized method flags a user's posted content as a blatant infringement, but that material *could* qualify as a fair use. In

2016).

200. 17 U.S.C. § 107 (2012).

201. See *supra* note 138.

202. For purposes of this Comment, the following illustrations assume a user brought a § 512(f) misrepresentation claim against the copyright owner. Also, it is worth repeating that these scenarios only apply to copyright owners with computerized methods comparable to YouTube's Content ID.

203. To be clear, this situation applies when a user uploads material as opposed to when an OSP, such as Google, digitizes millions of books that only show a limited number of snippets based on a user's search terms. See *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

that instance, the copyright owner only forms a good faith belief if the method considered the statutory fair uses factors²⁰⁴ or fair uses recognized by courts.²⁰⁵ In other words, a copyright owner, who solely relies on a computerized method to flag infringing material, forms a good faith belief only if the owner demonstrates that its algorithm weighed the fair use factors before the takedown notice was sent.

This recommendation provides a rational middle ground for copyright owners and users. Holding copyright owners accountable for using the most accurate and reliable technology when making a fair use determination increases protection for users because fair uses are less likely to be removed. Furthermore, unlike an objective standard, permitting copyright owners to form a good faith belief through computerized methods fits within the balance Congress intended because copyright owners need those methods in order to rapidly respond to potential infringement.²⁰⁶

CONCLUSION

Congress designed § 512 of the DMCA to balance the exclusive rights of copyright owners with the legitimate interests of users to not have material removed without recourse.²⁰⁷ Prior to *Lenz*, the scales tipped significantly in favor of copyright owners. *Lenz* provides the opportunity to return the scales to a proportional balance because copyright owners now have a legal duty to consider fair use before sending a takedown notice.²⁰⁸ However, large-scale copyright owners have a significant interest in combating web-based infringement and will not be easily deterred because the risk of § 512(f) liability is substantially outweighed by the potential for lost revenue from infringement.²⁰⁹

204. 17 U.S.C. § 107 (2012).

205. See *supra* note 138.

206. See S. REP. NO. 105-190, at 21 (1998) (“[B]alanc[ing] the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”).

207. *Id.*

208. See *Lenz II*, 815 F.3d 1145, 1153 (9th Cir. 2016) (“[A] copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).”).

209. See *supra* Part IV.C.

As a result, *Lenz* does not cure the inherent defects in § 512(c) that leave users at the mercy of copyright owners or, for that matter, anyone. In a matter of minutes, any person or automated computer system can send a takedown notice to an OSP. The OSP, serving as a rubber stamp, has absolutely no reason but to remove a user's generated content. Although users technically have recourse to an improperly sent takedown notice, those counter-weights are essentially useless to the average internet user.

The ever-changing nature of the internet will result in more Stephanie Lenz-type situations. Although *Lenz* is a step in the right direction, the court's vagueness and oversimplification regarding a required good faith fair use consideration only complicates matters for all stakeholders. The most appropriate solution to building on the *Lenz* baseline is two-fold: (1) in response to a § 512(f) claim, copyright owners should have the burden to show that the statutory grounds, including an encompassed good faith fair use consideration, were satisfied before it issued the takedown notice; and, (2) copyright owners, who employ methods comparable to YouTube's Content ID, should be allowed to form a good faith belief through the use of a computerized method, so long as that method considers fair use.