WHAT’S THE USE? GOOD FAITH EVALUATIONS OF ‘FAIR USE’ AND DIGITAL MILLENNIUM COPYRIGHT ACT ‘TAKE-DOWN’ NOTICES

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I. INTRODUCTION

Every day, over 100 million digital videos are viewed, and hundreds of thousands of new ones are posted to the video sharing Web site YouTube.1 Although YouTube is the most prominent video sharing Web site, many more exist, including Blip.tv, Dailymotion, and Veoh.2 Cell phones with video capturing capabilities and faster broadband connections have led to more consumers uploading videos to these Web sites.3 The uses of this digital medium range from private to public4 and from educational to commercial.5 Innovators, entrepreneurs, artists, and casual users alike are limited only by their creativity as to what videos they choose to post.6 However, that same creative freedom is the

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4 YouTube, supra note 1.
6 See YouTube, supra note 1 (recognizing the user community’s broad interests in subject areas such as health, fitness, music, comedy, and film).
basis for the growing controversy over the use of copyrighted materials in users’ posts to video sharing Web sites.

America’s copyright legal regime seeks to protect intellectual works while at the same time allowing for innovation through the transformative use of existing intellectual and artistic works.7 However, the Internet increasingly plays a critical role in the lives of most Americans,8 and has also been a driving force behind recent and significant developments in copyright law.9 The principal organization responsible for the protection of intellectual property throughout the world is the World Intellectual Property Organization (“WIPO”), a specialized agency of the United Nations with 184 member states, including the United States.10 In 1996, WIPO member nations adopted the WIPO Copyright Treaty11 to strengthen copyright protections in light of the rapid development of the Internet and other communications technologies.12 In 1998, Congress passed the Digital Millennium Copyright Act (“DMCA”),13 which, in essence, codified the provisions of the WIPO Copyright Treaty into U.S. law.14 Included within the DMCA was the Online Copyright Infringement Liability Limitation Act (“OCILLA”).15 The inclusion of the OCILLA represented a compromise between copyright holders and online service providers (“OSPs”) on the issue

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8 See Internet World Stats, United States of America, Internet Usage and Broadband Usage Report, http://www.internetworldstats.com/am/us.htm (last visited Oct. 21, 2009) (showing that as of June 2009, 74.1% of the U.S. population used the Internet according to Nielsen Online).
12 See id. at 1.
13 The Contracting Parties, [d]esiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible, . . . [r]ecognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works, . . . [r]eemphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation, . . . [r]ecognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information . . . .
14 Id.
In exchange for the expeditious takedown of copyright infringing materials, OSPs received a safe harbor provision which gave them protection from liability for the unauthorized copyrighted materials posted by their users. Section 512 of the OCILLA provides an extra-judicial procedure for Internet service providers (“ISPs”) to expeditiously remove material that allegedly infringes upon copyrighted material. Empirical data suggests that the majority of takedown notices are sent to service providers most often in their capacity as hosting services under section 512(c) and as Internet search engines under section 512(d). A takedown notice is a written request by the copyright owner (or his authorized representative) sent to a service provider whereby the copyright owner asserts ownership of the copyrighted material claims that the copyrighted material is being used in an unauthorized manner, and demands that the material be removed from the Web site. The written takedown notice must (1) identify the allegedly infringing material, (2) identify the copyrighted material, (3) provide contact information for the complaining party, and (4) include a statement regarding the complaining party’s “good faith belief” that the copyrighted material is being used in an unauthorized manner.

A service provider who is sent and complies with a takedown notice that merely “substantially” complies with section 512 can avoid liability for the unauthorized hosting of copyrighted materials. With the incentive offered by such a “safe harbor” provision, providers presumably have little to lose by accepting a particular takedown notice as compliant with the DMCA and then proceeding to “expeditiously” remove the challenged material. This can result in many non-copyrighted materials being removed. Without the aid of legislative modification or judicial involvement, copyright holders’ ability to restrict

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17 Urban & Quilter, supra note 16, at 622.
18 17 U.S.C. § 512(c)–(d); see also Urban & Quilter, supra note 16, at 622–23.
19 Urban & Quilter, supra note 16, at 644.
21 Id.
22 Id.
the use of their works will stymie creativity and stall innovation. Such a potential abuse of power could result in the loss of balance between the interests of copyright protection and innovation, a balance that Congress seeks to maintain in the American copyright regime. While a copyright holder has a right to restrict the reproduction of their work by others, the longstanding “fair use” doctrine, codified in section 107 by the Copyright Act of 1976 (“Copyright Act”), permits the limited reproduction of copyrighted material without the permission of the copyright holder.

This Comment examines the takedown notice procedure under the DMCA, identifies the practical inequities of the procedure, and suggests solutions meant to restore balance between the interest of copyright holders and third party users. Part II of this Comment explains the potential liability of service providers for copyright infringement by a third party under the Copyright Act of 1976 (“Copyright Act”) prior to enactment of the DMCA, and introduces the “fair use” doctrine. In Part III, this Comment looks at the legislative history related to the DMCA, and discusses the purposes for and aspects of the safe harbor protections afforded by the DMCA. Part III also explains the takedown notice and counter-notice procedures provided in the DMCA, including the meaning of “substantial compliance.” Part IV illustrates the procedural abuses practiced by copyright owners and resulting damage potentially inflicted upon third party users under the notification procedure. Next, Part V of this Comment predicts the effect Lenz v. Universal Music Corp. will have on users of Internet hosting services. Finally, Part VI suggests solutions and statutory language to adjust section 512 procedures to realign them with the congressional intent of balancing the competing interests of innovation and copyright protection.

26 Urban & Quilter, supra note 16, at 636–37, 682.
27 Hurowitz, supra note 7, at 148.
the fair use of a copyrighted work, including such use by reproduction . . . , for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, 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.
II. THE COPYRIGHT ACT OF 1976

A. Purpose for and Protections Granted under Copyright Law

The purpose of copyright protection is “[t]o promote the Progress of Science and useful Arts.” Under the Copyright Act, any original works of authorship in a “fixed . . . tangible medium” in literature, music, drama, motion pictures, sculpture, choreography, and architecture, among others, are considered copyrighted. The copyright owner is given the exclusive right to copy, perform, and distribute or sell their works.

B. Infringements

The Copyright Act provides copyright holders with an enforcement action against unauthorized uses of copyrighted materials. Specifically, the Copyright Act allows for the “legal or beneficial owner” of a copyright to bring suit against an infringing party. A copyright owner who believes their copyright has been infringed on may seek an injunction, impoundment and disposition, damages, and legal costs and attorneys’ fees. Those who “willfully” infringe on a copyright may even be subject to criminal charges.

At the time of its enactment, the Copyright Act did not make an exception for liability extending vicariously from an individual submitting or performing material to another entity acting as a publisher, producer, or host. Third parties could be held liable for the infringement of those they supervised under a respondeat superior theory due to the third parties’ financial gain from the copyright infringement. Recently, courts have extended vicarious liability to ISPs “for infringing content if the ISP has the right and ability to exercise control over the actual user (the true infringing party) and derives profit from the posting.” Courts have also stated that a party may be liable for contributory

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30 U.S. CONST. art. I, § 8, cl. 8.
34 Id.
36 Id. § 503 (2006).
37 Id. § 504 (2006).
38 Id. § 505 (2006).
39 Id. § 506 (2006).
41 NIMMER & NIMMER, supra note 40, at 12-72.
infringement, based on the party’s knowledge and contribution to the ongoing tort.  

C. Allowable Non-Copyright Holder Use: The “Fair Use” Doctrine

The “fair use” doctrine, originally part of the common law, was codified into law with the enactment of the Copyright Act of 1976. The concept behind fair use was described in *Emerson v. Davies*:

[L]iterature, science and art, borrows, and must necessarily borrow [sic], and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.

The fair use doctrine was meant to balance the protections afforded to copyright holders for their creative investment against the need for public dissemination of those same creative works. Without protections that exclude others from freely using, copying, and selling original intellectual and artistic works, there would be little to no incentive for their creation. In order to encourage attractive innovative and creative endeavors, Congress allowed for a limited monopoly of rights that help—but do not perfectly solve—the dilemma of protections relative to the public good and forward innovation. Society would be enriched, and progress and innovation would be fostered by striking a balance between private protections and public needs. For instance, a recent study

(citing A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004, 1022–24 (9th Cir. 2001)).

See Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (stating that anyone “who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (holding that the operator of a flea market who knowingly permitted vendors to sell counterfeit audio recordings which violated the copyrights of their owners could be held liable for contributory infringement of the copyrights).


Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).


See id. at 484–85.

See id.
commissioned by the Computer & Communications Industry Association ("CCIA") found that the fair use exception was responsible for $4.5 trillion in revenue in 2006 and eleven million workers were employed in industries that incorporate fair use.51

The Copyright Act provides that users may use copyrighted materials under the fair use provision for purposes such as "criticism, comment, news reporting, teaching . . . scholarship, or research" without infringing on the copyright, even when the user has not received permission from the copyright owner to do so.52 Furthermore, the Copyright Act provides a list of four factors to be used in determining what constitutes fair use:

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.53

Strictly construed, the language of the Copyright Act relative to fair use would suggest that this list of factors is not exhaustive.54 Therefore, it is not surprising that the Supreme Court held neither a single example of use nor any particular statutory factor to be dispositive in making a fair use determination.55 Rather, the Court found that the Copyright Act “calls for [a] case-by-case analysis” wherein “[a]ll [of the statutory factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”56 At the same time, courts have found other factors deserve consideration in a fair use determination, verifying the “non-exclusive” nature of those factors in § 107 of the Copyright Act.57 Specifically, the Ninth Circuit has indicated that courts “may evaluate whether an alleged infringer has acted in good faith . . . .” in conducting a fair use examination.58 The Supreme Court in Campbell v. Acuff-Rose Music, Inc. gave significant weight to the “purpose and character of use” factor when evaluating fair use and whether the “purpose and character” transforms the

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55 See id.
56 Id. 577–78.
58 Field, 412 F. Supp. 2d at 1122; accord Fisher v. Dees, 794 F.2d 432, 436–37 (9th Cir. 1986).
original work into something new.\textsuperscript{59} However, with such a subjective measure, the fair use doctrine provides the unauthorized user of copyrighted material little comfort as to his or her legal standing.\textsuperscript{60} Regardless, the language of section 512 in the OCILLA does not expressly incorporate the fair use doctrine, leaving the position of those individuals who post material on Web hosting sites even more uncertain.

III. DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

In the twenty years following the passage of the Copyright Act of 1976 much had changed in the world of copyright. In 1993, President Bill Clinton established the Information Infrastructure Task Force ("IITF"), which set up a working group to investigate the Internet’s effect on intellectual property rights.\textsuperscript{61} After examining copyright protections and service provider liability, the working group concluded that the future success of the Internet depended on the protection of copyright and intellectual property.\textsuperscript{62} Furthermore, the group opposed any exemption of liability for service providers, believing the risk of liability was merely a cost of doing business.\textsuperscript{63} The group found that service providers were “in a better position to prevent” copyright infringement compared to an individual copyright holder.\textsuperscript{64} Ultimately, Congress and the WIPO would adopt the view of those in favor of exempting online service providers from liability.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{59} See Campbell, 510 U.S. at 578–79. In evaluating the new work, the court should evaluate whether the work:
\begin{itemize}
\item adds something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message . . . in other words, whether and to what extent the new work is ‘transformative’ . . . the goal of copyright, . . . is generally furthered by the creation of transformative works . . . . Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.
\end{itemize}
\item \textsuperscript{60} See David Nimmer, “Fairest of Them All” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMPP. PROBS. 263, 266–284 (2003) (examining sixty fair use cases and noting the unpredictable nature of the court decisions regarding fair use).
\item \textsuperscript{62} See id. at 16, 116–17, 235.
\item \textsuperscript{63} See id. at 117–18. (“[Online service providers]—and, perhaps only [online service providers]—are in the position to know the identity and activities of their subscribers and to stop unlawful activities.”) Id. at 117.
\item \textsuperscript{64} Id. at 117.
\item \textsuperscript{65} See supra notes 11–23 and accompanying text.
\end{itemize}
With the exponential growth of Internet use in the 1990s, the protections and allowable claims of copyright holders were heavily scrutinized. In the digital environment of the Internet, the publication and distribution of material—whether original works or infringing works—have become widespread and nearly instantaneous. As a result, the emergent role of ISPs, OSPs, and Web site administrators as “hosts” of user-provided or “posted” material made a re-evaluation of the extent and limitations of federal copyright law necessary. At the crux of the debate was the liability that service providers faced regarding content posted by any of their thousands of subscribers. With thousands of postings being made every day, a service provider faced direct, contributory, or vicarious liability for hosting material that, with or without its knowledge, might have infringed upon an existing copyright. ISPs’ concerns only grew stronger after the Ninth Circuit’s decision in Fonovisa, Inc. v. Cherry Auction, Inc. in which the court held that an operator of a physical “swap meet” or “flea market” was liable for vicarious and contributory copyright infringement for the selling of counterfeit works by vendors at the markets. As David Nimmer noted, “[t]he Ninth Circuit’s subsequent reversal of that latter case arguably portends a liberalization of the standards for vicarious liability in


67 See INTELLECTUAL PROPERTY REPORT, supra note 61, at 1–2. The Working Group on Intellectual Property Rights, a subgroup of the IITF, stated that “[w]e are once again faced with significant changes in technology that upset the balance that currently exists under the Copyright Act.” Id. at 14.

68 See S. REP. NO. 105-190, at 8 (1998) (finding that “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously” further protections were warranted for copyright holders); Michelle A. Ravn, Navigating Terra Incognita: Why the Digital Millennium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement, 60 OHIO ST. L.J. 755, 756 (1999); see also LEE A. HOLLAAR, LEGAL PROTECTION OF DIGITAL INFORMATION 135 (2002).

69 See INTELLECTUAL PROPERTY REPORT, supra note 61, at 12, 118, 211–12.

70 See id. at 114–16. In the OCILLA, Congress defined a service provider as: “[A]n entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” 17 U.S.C. § 512 (k)(1) (A)–(B).

71 See INTELLECTUAL PROPERTY REPORT, supra note 61, at 114–16.

72 See, e.g., Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1555–59 (M.D. Fla. 1993) (finding an online bulletin board (“BB”) operator liable for direct infringement related to user posts of copyrighted material); Sega Enters., Ltd. v. Maphia, 857 F. Supp. 679, 681–82, 686–87 (N.D. Cal. 1994) (finding a BB operator liable for direct infringement related to the exchange of unauthorized copies of copyrighted material among the BB users); but see Religious Tech. Ctr. v. Nettcom On-line Commc’n Servs., Inc., 907 F. Supp. 1361, 1381–82 (N.D. Cal. 1995) (holding that the storage and retransmission of infringing user posted material was not direct infringement without a showing of volition on the part of the service provider).

73 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d at 261–64 (9th Cir. 1996).
cyberspace.”74

Given the perceived benefits of a wired society and economy, and the possibility that the existing provider liability laws may hinder the growth and use of the Internet, Congress amended the copyright law and enacted the Digital Millennium Copyright Act.75 Congress expressed its intention to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”76 In its deliberations over the DMCA, the United States Senate Committee on the Judiciary noted the importance of creative industries that depended on copyright protections in the American economy.77 According to copyright holders and their advocates, billions of dollars are lost each year due to unauthorized uses, such as piracy.78

A. Legislative History

1. Limited Liability and Takedown Notice Procedure

   a. H.R. 2180

The legislative history of the DMCA weaves a tangled web. In July 1997, Representative Howard Coble introduced a bill that would give service providers an exemption from direct infringement and vicarious liability for user acts,

74 David Nimmer, Brains and Other Paraphernalia of the Digital Age, 10 HARV. J.L. & TECH. 1, 34 n.142 (1996). Nimmer expressed concern that the decision in Fonovia threatened to “suffocate[] the [Internet].” Id. at 34.
76 S. REP. NO. 105-190, at 1–2.
77 S. REP. NO. 105-190, at 10 (citing 1996 statistics compiled by the International Intellectual Property Alliance, showing that “creative industries accounted for 3.65 percent of the U.S. gross domestic product (GDP) - $278.4 billion” and that “In the last 20 years (1977-1996), the U.S. copyright industries’ share of GDP grew more than twice as fast as the remainder of the economy . . . .”).
so long as the service provider was a passive conduit of the third party user.\textsuperscript{79} In order to qualify for the exemption, a service provider cannot:

\begin{itemize}
  \item initially place the material on-line;
  \item generate, select, or alter the content of the material;
  \item determine the recipients of the material;
  \item receive a financial benefit directly attributable to a particular act of infringement;
  \item sponsor, endorse, or advertise the material; and
  \item \begin{enumerate}
    \item know, [or be] aware by notice or other information indicating, that the material is infringing, or
    \item is prohibited by law from accessing the material \ldots \textsuperscript{80}
  \end{enumerate}
\end{itemize}

However, under H.R. 2180, service providers continued to be liable for contributory infringement, although the bill did limit the remedy for any violation to injunctive relief.\textsuperscript{81}

\textbf{b. S. 1146}

Later on in 1997, Senator John Ashcroft introduced the Digital Copyright Clarification and Technology Education Act of 1997.\textsuperscript{82} More expansive than the House version, S. 1146 provided an exemption from liability to providers of “network services” (including both ISPs and OSPs), “private and real-time communications services” (such as private messaging, e-mail services, chat rooms, and streaming data), and “information location tools” (including search engines and browsers).\textsuperscript{83} In addition, S. 1146 did not mention of a service provider’s ability to receive direct financial benefit tied in any way to an infringing act. However, in a major legislative development, S. 1146 did contain a take down provision removing liability if, after receiving notice, the person removed the infringing material within ten days.\textsuperscript{84}

\textbf{c. The Online Copyright Infringement Liability Limitation Act}

To reconcile the differences between the House and Senate bills, Representative Coble introduced the Online Copyright Infringement Liability Limitation Act in February of 1998.\textsuperscript{85} H.R. 3209 effectively eliminated direct infringement

\textsuperscript{79} Online Copyright Liability Limitation Act, H.R. 2180, 105th Cong. (1997).
\textsuperscript{80} H.R. 2180.
\textsuperscript{81} Id. § 2.
\textsuperscript{83} S. 1146, § 102(a).
\textsuperscript{84} David L. Hayes, \textit{Advanced Copyright Issues on the Internet}, 7 TEX. INTELL. PROP. L.J. 1, 80 (1998).
\textsuperscript{85} Online Copyright Infringement Limitation Act, H.R. 3209, 105th Cong. (1998); Mi-
liability on the part of service providers for the passive acts of storage and transmission of infringing material, so long as the acts were automated and made at the direction of the third party user.86

2. Fair Use Provision

At the same time Congress debated whether ISPs should be liable for copyright violations, Congress also wrestled with the extent to which the fair use doctrine should apply to the digital environment.87 The House Judiciary Committee concluded that fair use should only apply in those instances where an individual had acquired authorized access to a copyrighted work.88 Conversely, the House Energy and Commerce Committee sought to reaffirm the role that fair use plays in weighing copyright owner’s exclusive use against allowing information to flow more freely, particularly in the digital age.89 In its report, the Energy and Commerce Committee stated that the House Judiciary Committee’s version of the bill “could establish the legal framework that would inexorably create a ‘pay-per-use’ society.”90 Ultimately, the final language of the DCMA more closely tracked with the Commerce Committee’s more balanced approach.91 Thus, Congress intended for the doctrine of fair use, as articulated in section 107 of the Copyright Act, to apply to the DMCA.

B. Enactment

The DMCA was enacted on October 28, 1998.92 The Act protects service

chelle A. Ravn, Navigating Terra Incognita: Why the Digital Millennium Act was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement, 60 OHIO ST. L.J. 755, 778–81 (1999).

86 See H.R. 3209, § 2(a).
91 Nimmer, supra note 88, at 694 n.103 (internal citations omitted).

As reported by the Judiciary Committee, the basic provision would have been absolute, with no solicitude for fair use. The Commerce Committee, however, reported out an amended bill that ‘creates a rulemaking proceeding in which the issue of whether enforcement of the regulation should be temporarily waived with regard to particular categories of works can be fully considered and fairly decided on the basis of real marketplace developments that may diminish otherwise lawful access to works.’ . . . The latter approach carried the day.

Id.
providers by limiting their liability for user or third party posted material and
the “intermediate and temporary storage” of such material on the provider’s
network. Thus, the DMCA grants a safe harbor to ISPs in instances when a
user transmits or posts material that infringes or is alleged to infringe upon a
copyright. Congress also provided incentives for service providers to cooper-
ate with copyright holders seeking to protect their works through providing
liability to service providers for the good faith removal of allegedly infringing
material, even if that material is found to be infringing.

C. Provisions

1. Safe Harbor for Providers

The DMCA amends the Copyright Act by providing service providers with
exemptions from liability for four categories of activity. The Act also pro-
vides for the takedown notice and counter-notice procedures relating to “in-
formation residing on systems or networks at [the] direction of users” and the
subsequent effect on third party users. In regard to systems and networks that
host user posted content, protection from liability extends to the provider so
long as it “did not have actual knowledge” that the material was infringing
upon a copyright, and the service provider was not “aware of facts or circum-
stances from which infringing activity [was] apparent.” If the service provider
has this knowledge or awareness of a copyright infringement, the provider is
then required to “act[] expeditiously to remove, or disable access to, the mate-
rial . . . .” The safe harbor clause of the DMCA also requires that when the
service provider has the “right and ability to control [infringing] activity” it
must not “receive a financial benefit directly attributable to the . . . activity.”

93 17 U.S.C. § 512 (a)–(b).
94 Id.
(codified at 17 U.S.C. § 512(g)).
96 17 U.S.C. § 512(a)–(d) (2006) (providing the categories of exemption are: “transitory
digital network communications,” “systems caching,” “information residing on systems or
networks at direction of users,” and “information location tools”).
99 Such knowledge could be gained by the provider itself, through notification provided
by the copyright holder, or from some other source. See infra Part III.C.2.
doctrine centers upon a finding that the principal had control and financial benefit of the
2. **Takedown Notice**

   a. **Procedure**

   The takedown procedure is the key to new protections afforded to service providers, whereby a copyright holder notifies the provider of an alleged infringement.\(^{102}\) The notice procedure enables service providers with the information necessary to quickly “find and examine” infringing material.\(^{103}\) Thus, the DMCA “place[s] the burden” of monitoring the copyright’s use on the copyright holder, rather than the service provider.\(^{104}\) The DMCA takedown notice procedure requires six distinct actions by the copyright holder or a person authorized to act on the copyright holder’s behalf.\(^{105}\) To be effective under the DMCA, a notice must: (1) be signed, physically or electronically, by the copyright owner or authorized agent, (2) identify the copyrighted work that is allegedly infringed upon, (3) identify the material alleged to be causing the infringement—including “information reasonably sufficient to permit the service provider to locate the material” on its network, (4) provide the contact information of complainant, (5) include “[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,” and (6) provide a statement swearing to the accuracy of the information provided in the notice as well as to the authority of the complaining party’s authority to act.\(^{106}\)

   b. **Substantial Compliance**

   The DMCA permits substantial compliance with the statute’s provisions only in instances when a copyright holder identifies the infringed work, the infringing material, and provides the service provider with the copyright holder’s contact information.\(^{107}\) Substantial compliance with the other elements of the takedown notice does not make a service provider statutorily aware of the

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\(^{103}\) Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1087 (C.D. Cal. 2004).

\(^{104}\) Id. at 1113.


\(^{106}\) Id. § 512(c)(3)(A)(i)–(vi).

\(^{107}\) Id. § 512(c)(3)(B)(ii). Compare ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d 619, 625 (4th Cir. 2001) (holding that in providing information identifying (1) sites created to publish plaintiff’s copyrighted pieces, (2) stating specifically that it is copyrighted material, and (3) guiding defendant to Web sites containing the defendant’s copyright information, plaintiff had “substantially complied with the notification requirement . . . .), with Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1090 (C.D. Cal. 2001) (finding that the notification requirements of the DMCA takedown procedure were not substantially complied with when the plaintiff failed to sufficiently identify the allegedly infringing material).
infringing activity. Thus, the DMCA’s “[e]lements of notification” are not strict requirements because the signature, good faith determination of use, and attestation of accuracy do not always have to be provided by the copyright holder. As long as the party substantially meets the other three elements of notification, the burden shifts to the service provider to take reasonable steps to cure the deficiencies of the notice via “prompt[] attempts to contact the person making the notification . . . .”

Under the DMCA, two situations can occur where the provider will be excused from having to comply with a takedown request because the service provider is considered not to have “actual knowledge” or “aware[ness] of facts or circumstances.” The first scenario is when the notice is not substantially compliant. The second is when a substantially compliant notice has been provided but remains uncured even after the “prompt[] attempts” of the provider to contact the complainant. The failure of a provider to take “reasonable steps” to contact or attempt to contact a copyright holder who has substantially complied under section 512(c)(3)(B)(ii) will result in the provider being considered as having knowledge of the infringing materials, and lead to the forfeiture of safe harbor protection and expose the service provider to liability for a proven infringement if the provider does not remove the material quickly.

Thus, the plain wording of section 512(c)(3) of the DMCA suggests that full satisfaction of the notification “elements” is never required. Section 512(c)(3)(A) states that a notice that substantially follows the listed elements is sufficient. The word “substantial” cannot be understood to have the same meaning as “full” or “complete.” Furthermore, as the Fourth Circuit has noted, the standard of substantial following in the DMCA appears to be more

109 Id. § 512(c)(3)(A) (i)-(vi).
110 Id. § 512(c)(3)(B)(ii).
111 Id. § 512(c)(3)(B)(ii).
112 Id. § 512(c)(3)(B)(i).
113 Id. § 512(c)(3)(B)(i)-(ii); see also Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) (illustrating that a substantially compliant notice by itself does not impute knowledge of the infringing act upon a service provider unless it is can be shown that the provider failed to attempt steps to promptly cure the deficient notice).
115 See id. § 512(c)(3)(A) (2006) (providing that a claim of infringement must merely “substantially” comply with the requirements provided).
117 Compare Merriam-Webster’s Collegiate Dictionary 1174 (10th ed. 1997) (defining “substantial” as merely “consisting of or relating to substance”) with id. at 471 (defining “full” as “containing as much or as many as is possible or normal”) and id. at 235 (defining “complete” as “having all necessary parts, elements, or steps”).
than what is required of the copyright holder in practice.\textsuperscript{118} Three of the six “elements” under section 512(c)(3)(A) can be considered optional “requirements”: the “signature of a person authorized to act on behalf of the [copyright holder],” “a statement [attesting to] a good faith belief that use of the material . . . is not authorized by the copyright owner . . . or the law,” and “a statement [attesting] 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 [copyright holder].”\textsuperscript{119} Of course, the presence of these factors might lend some support to an argument regarding the sufficiency of a takedown notice. However, as explained above, section 512(c)(3)(B)(ii) expressly states that a notice that is in mere “substantial[]” compliance is still sufficient to place the burden on the service provider to make a reasonable attempt to cure deficiencies in the notice.\textsuperscript{120}

Under these circumstances, how well can a service provider, but more importantly a third party user, interpret a statute requiring a notification that is “substantially substantial”? In most circumstances, service providers readily acquiesce to takedown notices, even when the notices are faulty, resulting in the removal of third party user posted materials.\textsuperscript{121} In such cases, the service provider satisfies its duty to “respond expeditiously” to a takedown notice regardless of how poorly the notice may comply with the “elements of notification.”\textsuperscript{122} This de facto enforcement leaves the third party user with the difficult and expensive task of determining whether they can prove to a court that the takedown notice was made with a “knowing material misrepresentation.”\textsuperscript{123}

3. Counter-notice

The DMCA scheme of takedown notification also provides that a user whose posted material has been removed subject to a takedown notice may

\textsuperscript{118} See, e.g., ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d 619, 625 (4th Cir. 2001) (stating that some notification requirements are “relaxed” even further in certain circumstances).

\textsuperscript{119} 17 U.S.C. § 512(c)(3)(A)(i), (v)–(vi); see also ALS Scan, 239 F.3d at 625 (referencing satisfying section 512(c)(3)(A)(ii)–(iv) as sufficient).

\textsuperscript{120} See text accompanying supra notes 111 and 113 (stating that a copyright holder must substantially comply with the notification requirements and the service provider bears the burden of taking “reasonable steps” to affect notice).

\textsuperscript{121} See Urban & Quilter, supra note 16, at 637–39.


\textsuperscript{123} See Urban & Quilter, supra note 16, at 639; see, e.g., Online Privacy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (illustrating that the third-party must determine whether they will satisfy the standard that the opposing party knew or should have known “that it was making misrepresentations” and that “the misrepresentation affected the ISP’s response to a DMCA letter.”).
send a counter-notice to the service provider. Essentially, the user must claim that the material removed pursuant to the takedown notice was done by “mistake” or due to “misidentification.” So long as a counter-notice substantially complies with the content requirements of section 512(g)(3), to retain its immunity from liability, the provider must give the copyright owner who initiated the take down procedure notice, and also must restore the posting no sooner than ten business days but within fourteen business days upon receipt of the counter-notice. However, the service provider does not need to replace the removed material if it has received notice from the copyright holder that a court order is being sought to restrain the user’s allegedly infringing act.

Furthermore, a third party user challenging the removal of their post consents to the jurisdiction of the federal district court and acceptance of service of process by the copyright holder when they choose to send a counter-notice to the service provider. Under the DMCA, a user must first agree to be sued by the copyright holder if it desires to challenge the removal of his posting.

IV. PROCEDURAL ABUSE: MISREPRESENTATIONS IN TAKEDOWN NOTICES

Given the costs of litigation, only a small number of users actually challenge a takedown notice or sue the service provider for either improper removal or for a delayed restoration of the material after valid counter-notice. Because of the unlikelihood of a user or service provider challenging a takedown notice, copyright holders can and do, at little expense, issue a flurry of takedown notices to service providers with little fear of resistance. Quite notably, one major study found that approximately one-third of takedown notices contained

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125 17 U.S.C. § 512(g)(3).
126 Id. § 512(g)(3).
127 See id. § 512(g)(2).
128 Id. § 512(g)(2)(C).
129 Id. § 512(g)(3)(D).
130 See id. § 512(g)(3)(D).
131 See Electronic Frontier Foundation, A Guide to YouTube Removals, http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals#dispute (last visited Sept. 23, 2009) (discussing the potential litigation costs and damages arising from takedown notices and counter-notices; cf. Urban & Quilter, supra note 16, at 641, 679 (noting that of the 876 takedown notices in its data set, only seven were challenged with a counter-notice)).
significant flaws in their compliance with the section 512 elements that would likely jeopardize their legal enforceability.\footnote{133 See Urban & Quilter, supra note 16, at 666.}

Takedown notices can contain a number of fatal flaws. For instance, an invalid takedown notice can suffer from the copyright holder knowingly misrepresenting the use of material as being an infringement, attempting the takedown of material that cannot be copyrighted, or failing to comply with statutory requirements.\footnote{134 See, e.g., Online Privacy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (finding that the copyright owner “knowingly materially misrepresented that Plaintiffs infringed [the copyright owner’s] copyright interest); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1108–09 (W.D. Wash. 2004); Kevin Poulsen, *Air Force Cyber Command’s New Weapon: DMCA Notices*, WIRED.COM, Mar. 7, 2008, http://www.wired.com/threatlevel/2008/03/air-force-cyber/ (describing an attempt by the U.S. Air Force to takedown one of their promotional videos from YouTube despite the fact that works of the U.S. government do not receive copyright protection).}

Such occurrences also happen when a statutorily valid notice mistakenly or too broadly identifies allegedly infringing material. This can occur when a Web site is removed because it has one infringing hyperlink or digital image, or when an long essay is blocked because it includes an unauthorized portion of a copyrighted text.\footnote{135 See Jeffrey Cobia, Note, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J.L. SCI. & TECH. 387, 392–93 (2009). The Science Fiction Writers of America (“SFWA”) sent a “mass takedown” notice to the document database Web site Scribd.com demanding the takedown of many copyrighted articles the SFWA did not own. *Id.* In another example, a man sent takedown notices to Web sites featuring a picture of him he did not own, and likely constituted fair use regardless. *Id.*}

The unfortunate and troubling result of this is an Internet where user creativity and innovation are stifled.

\subsection*{A. Knowing Materially}

To protect copyright holders and users from egregious abuse of the takedown notice and counter-notice procedures, Congress provided a private cause of action for intentional misrepresentations made under section 512(c).\footnote{136 17 U.S.C. § 512(f); see also S. Rep. No. 105-190, at 49–50 (1998) (“The put back procedures were added . . . to address the concerns . . . that other provisions of this title established strong incentives for service providers to take down material, but insufficient protections for third parties whose materials would be taken down.”).}

Any person who “knowingly materially” misrepresents a claim of alleged infringement or seeks removal based on mistake or a misidentification of material faces liability for damages to the copyright holder, service provider, or user.\footnote{137 17 U.S.C. § 512(f).} While this provision provides users with some recourse against copyright holders, in practice the individual must determine whether the cost of litigation
is worthwhile, similar to the counter-notice procedure.\textsuperscript{138} Courts have rarely found copyright holders in violation of the provision.\textsuperscript{139} The DMCA misrepresentation provision does not define what it is to “knowingly materially make misrepresent[ations]” under the notification procedure for both takedown and counter-notices.\textsuperscript{140} In this void, courts have provided a definition. In Online Policy Group v. Diebold, Inc., the court stated that to “knowingly materially misrepresent[,]” was akin to bad faith and occurred when the notice sender “actually knew, should have known . . . or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations.”\textsuperscript{141} The court continued by saying that “material” means that “the misrepresentation affected the ISP’s response to a DMCA letter.”\textsuperscript{142}

In light of its interpretation of “good faith,” the court’s concurrent holding that so-called “bad-faith” exists when “[n]o reasonable copyright holder could have believed that the posted information was protected by copyright . . . ”\textsuperscript{143} is somewhat confounding. Diebold’s reasonableness test would suggest an objective standard in the statute. However, the Ninth Circuit subsequently held in Rossi v. Motion Picture Association of America Inc., that under section 512, “[a] copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making [that] mistake.”\textsuperscript{144} Rossi decided that the subscriber must demonstrate “some actual knowledge of misrepresentation on the part of the copyright owner.”\textsuperscript{145} Rossi appears to reject Diebold’s objective standard, and replaces it with a heightened subjective standard that makes it easy for copyright holders to satisfy without running afoul of the DMCA.

B. Subjective Good Faith

The fair use doctrine and the “element of notification,” calling for a good faith belief by the copyright holder, that he has not authorized the allegedly infringing use, is at most a non-requisite factor for substantial compliance.\textsuperscript{146} Thus, the lack of such a good faith determination will not invalidate an otherwise compliant notice under the DMCA. As seen in Diebold\textsuperscript{147} and to be dis-

\textsuperscript{138} See Electronic Frontier Foundation, supra note 131.
\textsuperscript{139} Urban & Quillter, supra note 16, at 629–30 (noting that with the exception of Diebold, “no other § 512(f) cases have dealt such a blow to the complainant.”).
\textsuperscript{140} See 17 U.S.C. § 512(f).
\textsuperscript{141} Diebold, 337 F. Supp. 2d at 1204.
\textsuperscript{142} Id.
\textsuperscript{143} See id. (emphasis added).
\textsuperscript{144} Rossi v. Motion Picture Ass’n of Am. Inc., 391 F.3d 1000, 1005 (9th Cir. 2004).
\textsuperscript{145} Id.
\textsuperscript{146} See discussion supra Part III.C.2.b.
\textsuperscript{147} See supra notes 141 and accompanying text.
cussed infra, the courts will scrutinize a copyright holder’s good faith determination of use in judging the validity of any allegation of misrepresentation on the part of the copyright holder made by the third party user. At the same time, the DMCA calls for an examination of the good faith of a user issuing counter-notices claiming mistaken removal. However, courts require only a subjective good faith belief on the part of copyright holders in their determinations of use when issuing a takedown notice. It is this subjective standard that most undermines those protections the DMCA is meant to provide third party users with. The difference in the subjective and objective standards thus causes an imbalance between intellectual property and use protection, resulting in a chilling effect upon the transformative creativity the DMCA was intended to foster.

C. Threat to Balance

The active use of the safe harbor provisions of the DMCA by service providers has remedied the immediate and massive liability they face. However, no additional protections not already included in the Copyright Act have been made for unauthorized, but legal, third party users. The increasing multitudes of Internet users are the counterpart to service providers in the Internet growth equation. From 1997 to June 2009, worldwide Internet user levels rose from 2% to 24% of the population. As of June 30, 2009, there were over 1.6 bil-

154 International Telecommunications Union, Internet Users Per 100 Inhabitants, http://www.itu.int/ITU-D/ict/graphs/internet.jpg (last visited Oct. 15, 2009); Internet World Stats, supra note 153 (demonstrating that 24.7% of the world’s population used the Internet as of June 2009).
lion Internet users.\textsuperscript{155} The potential volume of user posted material is astronomical.\textsuperscript{156}

In the nine years prior to and including the year of the DMCA’s passage in October 1998, an average of 592,917 copyrights were registered per year.\textsuperscript{157} In comparison, in the nine years following the DMCA’s adoption, an average of 556,378 copyrights were registered per year.\textsuperscript{158} Thus, while Internet usage rates have increased nearly tenfold in the nine years following the passage of the DMCA, the rate of registered copyrights has remained nearly unchanged.\textsuperscript{159}

While the advent of the Internet necessitated new copyright law such as the DMCA,\textsuperscript{160} the disparity between copyright registration rates and dynamic Internet usage growth is itself reason for legislative action to amend the DMCA. With a growing percentage of world population becoming users of the Internet, the opportunity for infringing use of copyright material increases. Likewise, the benefits of transformative and fair (albeit unauthorized) use also increases.\textsuperscript{161}

Were the balance of power between copyright holders’ interests and the public’s fair use of these works to shift only minimally, copyright holders could see their intellectual property rights infringed on or the public could see its opportunities for free expression decrease.\textsuperscript{162} While copyright protections are rooted in the Constitution,\textsuperscript{163} the notion of progress requires forward movement that is impossible without utilizing and building upon existing works.\textsuperscript{164} Thus, Congress must be vigilant in monitoring the balance of rights between copyright holder and third party users, lest one trample upon the other.

Whether it is the individual artist,\textsuperscript{165} a corporation,\textsuperscript{166} industry association,\textsuperscript{167}...
or even the government,\textsuperscript{168} asserting their rights as copyright holders, copyright holders or their authorized agents typically send boilerplate, vague, and potentially non-compliant takedown notices to whomever makes a post that allegedly includes any portion of copyrighted material.\textsuperscript{169} The DMCA provides penalties for those that “knowingly materially misrepresent[s]” under the provision.\textsuperscript{170} In utilizing a subjective good faith standard for “knowing” the statute falls short of counterbalancing the relative ease with which copyright holders can chill the dissemination of information online by use of a procedure requiring only substantial compliance.\textsuperscript{171}

The DMCA’s language suggests that a good faith determination of the authorized or legal use of posted material is, at most, a factor related to burden shifting in attributing knowledge or awareness to a service provider.\textsuperscript{172} Furthermore, the court in \textit{Rossi} stated that “[w]hen enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness [as to the good faith determination on use] . . . [t]he fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a

\textsuperscript{166} See, e.g., Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008) (describing an attempt by Universal Music Group to utilize § 512 to takedown a home video posted on YouTube that featured audio of a song that Universal owned the copyright to).

\textsuperscript{167} Ryan Singel, \textit{Universities Baffled By Massive Surge In RIAA Copyright Notices}, WIRED.COM, Apr. 30, 2009, http://www.wired.com/threatlevel/2008/04/riaa-sends-spik/ [hereinafter \textit{RIAA Copyright Notices}]; see also Kellen Myers, \textit{The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties}, 61 Fed. Comm. L.J. 431, 434 (2009) (discussing that the “large profit potential makes it easier for copyright holders to organize coalitions such as the RIAA to expand the legal protections of intellectual property.”).

\textsuperscript{168} Poulsen, supra note 134. While the government has sent DMCA takedown notices to parties using its materials, no government work can be copyrighted. See 17 U.S.C. § 105 (2006); see also David S. Levitt, \textit{Copyright Protection for United States Government Computer Programs}, 40 IDEA 225, 235 (2000).


\textsuperscript{172} See 17 U.S.C. § 512 (c)(3).
In support of its determination that subjectivity was the appropriate standard, the court further provided that "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." Accordingly, Rossi held that "[t]he . . . structure of § 512 . . . supports the conclusion that [it] imposes a subjective good faith requirement upon copyright owners." The Court explained "that the words of a statute must be read . . . with a view to their place in the overall statutory scheme" and that an "objective reasonableness" standard would be inconsistent with Congress’s apparent intent to protect users from subjectively improper actions by copyright owners.

In narrowly interpreting section 512(f), the court failed to protect users from improper copyright holder actions in the balanced manner historically espoused by Congress through that body’s support of the principles of fair use. The application of a subjective standard of good faith by the court is merely judicial activism. The DMCA’s enactment was based on the need and desire for balanced protections provided to all parties—copyright holders, unauthorized users, and service providers—so that original works were protected, while also allowing innovations and creative endeavors (including fair use situations) to be fostered. With subjective good faith as the standard test for abuse, little stands in the way of copyright holders issuing takedown notices to each and every user posting material identified as being an infringement.

V. LENZ V. UNIVERSAL MUSIC CORP.

A modern example of an alleged copyright infringement occurred in 2008 in Lenz v. Universal Music Corp. Stephanie Lenz sought to memorialize the youth of her children by videotaping them dancing to a short segment of the song “Let’s Go Crazy,” written and performed by Prince. To share this moment with her friends and family, Lenz posted the twenty-nine second video on YouTube.
Universal Music Group (“Universal”) is the copyright owner of “Let’s Go Crazy.” Upon learning of Lenz’s post, Universal sent YouTube a DMCA section 512 takedown notice demanding that the Lenz video clip be removed. YouTube complied and subsequently notified Lenz of the takedown action. Following the procedures set out in the DMCA, Lenz sent a counter-notification to YouTube stating that her use of the “Let’s Go Crazy” audio within her video was a fair use of the copyrighted material. Six weeks after receiving the counter-notification, YouTube reposted Lenz’s video. Lenz subsequently sued Universal for misrepresentation under section 512(f) of the DMCA and for tortious interference regarding her YouTube contract. The United States District Court for the Northern District of California ultimately denied Universal’s motion to dismiss and its attempt to seek interlocutory appeal.

The primary issue in Lenz was whether a copyright owner is required to consider the fair use doctrine in making a good faith determination that the owner’s copyright is not “authorized by . . . law”. The court also considered whether the fair use of copyrighted materials constitutes a use “authorized by law” in accordance with the DMCA’s takedown provision. Universal argued that fair use is not mentioned in the DMCA and thus it is merely an “excused infringement rather than a use authorized . . . by law.” As such, Universal argued that when formulating a takedown notice, a copyright holder does not need to consider whether the fair use doctrine applies. In contrast, Lenz argued that fair use is an authorized use under the DMCA because it is explicitly provided as an authorized use under the Copyright Act. The court held that in making a good faith determination of whether an infringement of an owner’s copyright has occurred, the owner must consider whether the material’s use is

183 Lenz, 572 F. Supp. 2d at 1152.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id. at 1153.
190 Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008). Under the DMCA, a copyright holder alleging that a third party’s use of their work infringes on the holder’s copyright, is only authorized to request that a third party takedown the allegedly infringing work when they have 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.” 17 U.S.C. § 512(c)(3)(A)(v) (2006).
191 Id.
192 Id. (emphasis omitted).
193 Id.
194 Id. The fair use provision of the Copyright Act provides that “the fair use of copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107.
A. Subjective Good Faith: An Impotent Standard

The Rossi court held that a copyright holder, in assessing whether its copyright has been infringed on, is only required to have a subjective, rather than an objective, “good faith belief” before sending a takedown notice to a third party. In Lenz, the court stated that for the copyright owner to meet the notice elements required under section 512(c), the copyright owner must make an initial review prior to sending a takedown notice. The Lenz court expressed skepticism of the copyright holder’s claims that it would be difficult for the copyright holder to evaluate fair use by stating that it would likely only be in rare instances that a court would determine that the copyright holder’s determination was in bad faith. Furthermore, in dismissing Universal’s interlocutory appeal, the court said that the need for a full “investigation” into whether the posted material is a fair use “is likely to be extremely rare.” Finally, the court cautioned that it had “considerable doubt” that Universal would be found to have acted with the Rossi requirement of subjective bad faith.

As part of the notification process, a copyright owner is required to identify the protected material as well as the allegedly infringing material. Such identification embodies the minimal initial review required by the Lenz court. The Lenz court rejected Universal’s argument that a requirement that the copyright holder evaluate fair use prior to sending a takedown notice would harm the holder’s ability to rapidly respond. In cases where the copyright holder’s determination regarding fair use is inaccurate, the court concluded it would be unlikely that the copyright holder would fail to meet the subjective good faith standard under section 512(f).

In light of this, Lenz’s determination that the DMCA takedown notification process requires a determination of fair use has no value. Because courts utilize a subjective standard when judging a copyright holder’s good faith, Lenz’s requirement that fair use be included in the copyright holder’s determination of infringement will do nothing to further the purposes of the DMCA. While Lenz

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195 Lenz, 572 F. Supp. 2d at 1154.
197 Lenz, 572 F. Supp. 2d at 1155.
198 Id.
200 Id. at *3 n.4.
202 Lenz, 572 F. Supp. 2d at 1155.
203 Id.
204 Id.
makes clear that fair use is a manner of use authorized by law, the value of this legal clarification as it relates to the DMCA is eviscerated by utilizing a subjective standard for judging good faith.

*Lenz* and *Rossi* together will only allow a misrepresentation claim against a copyright owner issuing a takedown notice in those cases when the owner knowingly and materially misidentified his own copyrighted material or the allegedly infringing material. In all other cases in which the initial review accurately identifies the material, regardless of the presence or absence of any fair use determination, the result will be the same: no finding of subjective bad faith and thus no violation of the DMCA. Therefore, pre or post-*Lenz*, users cannot cope with ongoing abuse and misuse of the DMCA takedown notice procedure by copyright holders. An amendment to the DMCA is necessary to address the problem of de facto enforcement.

Requiring a solely objective standard for judging good faith as it relates to determinations of whether a use is an infringement or that a takedown notice or counter-notice was issued with ‘knowing’ material misrepresentations might erode some of the extant protection on exclusivity enjoyed by copyright holders. However, abuse of the takedown procedure will continue without some strengthening of the current standard. Instead of a standard that is either wholly subjective or objective, Congress should amend section 512 to expressly include a hybrid subjective/objective good faith standard that allows for the notice giver’s actual subjective good faith to satisfy the statute only in those situations where the community or society at large would acknowledge that good faith effort.

Congress can re-establish balance between copyright holders and legal unauthorized users by implementing a hybrid standard similar to the one used in determining an individual’s privacy interest under the Fourth Amendment. The equitable result would be the protection of intellectual investment and promotion of innovation.

In addition, Congress should make requisite each of the six notification elements under section 512(c)(3) and remove the language of substantial compliance. To do so would cause little imposition, either in time or expense, on the copyright holder utilizing the takedown notice procedure. At the same time, this would put the copyright holder on notice that he or she is expected to play fair while exercising the granted protections. By removing the early use of substantial compliance language, its later use regarding a service provider’s duty

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205 *Id.* at 1154.

206 *See* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that in determining a person’s right to privacy a hybrid requirement exists which looks at whether the person exhibited an actual expectation of privacy and whether that expectation is one that society is prepared to recognize as “reasonable”).
to attempt the cure of a deficient notice could remain. While “perfect notice” would still not be required, the above listed changes to the takedown notice procedure would increase the accountability of copyright holders by giving meaning to section 512(f), give effect to the *Lenz* decision, and restore—at least to a degree—the balance of copyright holder and user interests. The following is specific statutory language meant to amend the DMCA and correct its current procedural inequities:

B. Proposed, amended language of section 512(c)(3)(A):

To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially shall include each of the following:

C. Proposed, amended language of section 512(c)(3)(A)(v):

A statement that the complaining party has a good faith belief, both actual and as recognized by society at large, that use of the material complained of is not authorized by the copyright owner, its agent, or the law— *including, but not limited to fair use.*


Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to fully comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

In a case in which the notification that is provided to the service provider’s designated agent fails to fully comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially fully complies with all the provisions of subparagraph (A).

E. Proposed, amended language of section 512(f):

Any person who knowingly, actually knew or should have known if acting with reasonable care or diligence, and materially misrepresents under this sec-
As it stands, the *Lenz* ruling will have little practical effect. It will not meaningfully prevent abuse of the DMCA’s statutory takedown notice procedure. Thus, by overprotecting copyright holders, the ruling will potentially curb the dissemination of information, especially on the Internet, by users either authorized or excused under the law. Furthermore, failure on the part of Congress to address the inequity of the takedown procedure makes it complicit in a statutory scheme wherein the copyright holders are ex officio judge and sheriff and enforcement is de facto.

VI. CONCLUSION

The requirement that the copyright owner make a good faith determination as to whether the use was authorized or not, including statutory fair use of the material, is a helpful clarification. By interpreting the DMCA as requiring only subjective good faith when determining whether the use was fair makes any determination as to the material’s authorized, excused, or otherwise allowable use irrelevant. The practical result is that already costly litigation is also likely un-winnable and thus pointless. The *Lenz* ruling is trivialized further by the very ease with which a takedown notice can be sent and acted upon. The harm to the user—improper takedown—will already have occurred, leaving no practical recourse. Therefore, regardless of the *Lenz* court’s decision, without either the recommended congressional action or appellate judicial interpretation that establishes a standard higher than mere subjectivity, abuse of the takedown notice procedure will continue, undermining the purpose of the DMCA. Although the speed of technological innovation makes for something of a moving target, Congress must be timely in addressing such technologies so as not to lose sight of that objective. As always, any legislation should have the goal of balancing of often competing interests: protections for intellectual investment and the societal and economic benefit from continued innovation.