

NOTE

COULD SOMEONE “LENZ” A HAND?: MODERNIZING THE DIGITAL MILLENNIUM COPYRIGHT ACT AFTER *LENZ V. UNIVERSAL MUSIC CORP.*

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ABSTRACT

When the Supreme Court of the United States chose to deny a petition for certiorari to *Lenz v. Universal Music Corp.* it left the state of Internet copyright in a field of uncertainty. The case arising from the Ninth Circuit rightfully held that § 512(f) of the Digital Millennium Copyright Act requires fair-use to be considered prior to a takedown notice being issued. However, it wrongfully concluded that fair use, long held to be an affirmative defense, should instead be a right granted by the statute, and elected to impose an easily abused subjective good-faith standard for copyright holders seeking to remove online content for copyright infringement. This oversight on the Ninth Circuit’s part must be corrected by either judicial mandate or legislative changes to the copyright statute. Those who have written on this have continually left out the online community and how they will be affected by the holding in this case. Leaving online content creators and producers out of any solution would be a grave mistake given their influence they have had over Internet legislation in the past decade.

This paper seeks to offer a solution that is capable of balancing the interests of both copyright holders and online content producers that use copyrighted content. This involves critiquing several previously proposed solutions, and offering more statutory solutions that are capable of undoing any uncertainty created from the *Lenz* holding. As online media sharing websites and social media continue to be dominated by profitable user-generated content at a rapidly increasing rate, something must be done to correct this uncertainty in the law.

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INTRODUCTION

In the twenty years since the Digital Millennium Copyright Act's ("DMCA") enactment,² the sheer volume of copyrighted material on the Internet has increased drastically. YouTube has estimated that over seventy-five percent of content on its platform alone contains traces of third-party-owned copyrighted material.³ Through online radio and music streaming services such as Pandora and Spotify, we now have the means of accessing billions of songs every day — each of which constitutes an individual piece of copyrighted material.⁴ However, despite this change, the DMCA itself remains the same.⁵ While some criticize the DMCA for its shortcomings in adapting to the Internet of today,⁶ there is significant disagreement and uncertainty as to whether and how we might modify the DMCA — either structurally or through its implementation — so as to strike a balance between copyright holders' rights to protect their works and individuals' rights to speak freely on the Internet.⁷

The DMCA poses a longstanding but little-discussed problem which entered the legal zeitgeist in 2016 by way of the Ninth Circuit's decision in *Lenz v. Universal Music Corp.* ("*Lenz*"). *Lenz* was a decision of first impression regarding the application of copyright's "fair use" doctrine to the DMCA's notice-and-

² Digital Millennium Copyright Act, 17 U.S.C. §§ 512, 1201-05, 1301-1332 (2012)

³ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32-33 (2d Cir. 2012). This number is staggering when contextualized — at nearly 400 hours of video uploaded to YouTube every minute, it is likely that YouTube hosts a massive amount of potentially infringing content. VidCon, *Industry Keynote with YouTube CEO Susan Wojcicki* (VidCon 2015), YouTube (Sept. 29, 2015), <https://www.youtube.com/watch?v=O6JPxCBIBh8> (reproducing YouTube CEO Susan Wojcicki's keynote address at VidCon 2015, in which she stated "the amount of content grew with more than 400 hours uploaded every single minute to YouTube now").

⁴ See Tim Imgham, *Pandora Slips Further Behind Spotify as Active Listeners Fall by 1.3M*, MUSIC BUS. WORLDWIDE (July 21, 2016), <http://www.musicbusinessworldwide.com/pandora-slips-further-behind-spotify-as-active-users-fall-by-1-3m/> [<https://perma.cc/P99M-89L4>]. Pandora is an online radio service and Spotify is a music catalogue that users can select and arrange playlists of various songs or sound recordings; both require a subscription fee for premium ad-free content. Parker Hall, *Spotify vs. Pandora*, DIGITAL TRENDS (Dec. 14, 2018, 9:08 AM PST) <https://www.digitaltrends.com/music/spotify-vs-pandora/> [<https://perma.cc/CQH8-BG8G>].

⁵ See 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, 772 (2016) (advocating for modifications to the DMCA which would provide "stronger penalties for issuing DMCA notices the in contravention of [copyright's] fair use [doctrine].").

⁶ *Id.* at 745.

⁷ Compare *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1158 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 416 (2016) (Smith, J., concurring) (explaining that fair use must be considered under a subjective good faith standard), with Randazza, *supra* note 5, at 772-73 (asserting that copyright holders who fail to consider fair use should face harsher penalties under the DMCA than they have faced in the past).

takedown provision.⁸ It held that a copyright holder⁹ must take fair use into consideration before alleging copyright infringement and issuing a takedown notice to an online service provider (“OSP”).¹⁰ Many in online communities,¹¹ most prominently YouTube, also believe that copyright claimants need to fully consider fair use prior to issuing a takedown notice, so as to avoid the erroneous removal of lawful content, which could otherwise result in financial harm to the contents’ creators.¹² Some have even heralded the *Lenz* opinion as indicative of doctrinal change, asserting that its effect is to mandate that parties issuing takedown notices now *must* consider fair use in each instance of potential infringement.¹³ Those grievances against rights-holders — which form the basis for supporting *Lenz*’s purported new requirements — may be legitimate, however, as this note discusses, there were both doctrinal and practical problems with the *Lenz* solution.¹⁴

Perhaps the most glaring of such problems was the Ninth Circuit’s eschewing precedent and framing fair use as a *right*,¹⁵ rather than as a *defense*.¹⁶ This sharp departure from precedent misconstrued copyright protection in both the digital

⁸ The “fair use” doctrine allows a party to make unauthorized use of copyrighted material without that use resulting in infringement, provided that use is for an appropriate purpose such as parody or criticism. The DMCA’s notice-and-takedown provision sets out the procedure through which copyright holders may request that online service providers, such as YouTube, remove infringing content from websites. Both are discussed in greater detail in Parts I.A-B below.

⁹ This note, unless stated otherwise, refers to “copyright holders” or “rights-holders” in the abstract — that is, any person, group of persons, or corporate entity may fall under the category of authorship. 17 U.S.C. § 201 (2012) (stating that a copyrighted work’s original author may be one of the copyright’s owners).

¹⁰ *Lenz*, 815 F.3d at 1154.

¹¹ For the purposes of this Note, “online communities” refers to users of an OSP’s service, rather than the OSP themselves.

¹² See, e.g., Channel Awesome, *Where’s the Fair Use – Nostalgia Critic*, YOUTUBE (Feb. 16, 2016), <https://www.youtube.com/watch?v=zVqFAMotwaI> (“Too bad Hollywood doesn’t see the law that way, as for years video producers have been battling off attack after attack resulting in multiple deleted videos, sometimes even deleted channels, affecting the income of people who now do this for a living”).

¹³ *Id.*

¹⁴ *Lenz*, 815 F.3d at 1152. Most notable among those problems — mandating fair use consideration prior to issuing a takedown notice, while only requiring the right holder to provide subjective good faith affirmation it had considered fair use. See also *infra* text accompanying note 79.

¹⁵ *Lenz*, 815 F.3d at 1152; see also *infra* text accompanying notes 75-77.

¹⁶ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 599 (1994) (“Fair use is an affirmative defense”).

and physical worlds.¹⁷ As a result, it led the Ninth Circuit to establish an impractical solution for fixing the means by which rights-holders consider fair use under the DMCA's notice-and-takedown provisions.¹⁸ This solution, if construed liberally, will engender massive confusion over the proper adjudication of fair use. Who determines what use is fair, courts or rights-holders? Do rights-holders need to consider glaring instances of infringement and edge-cases before issuing a takedown-notice? And, at the bottom, whose rights reign supreme, rights-holders or alleged infringers ("creators")? Creators may lose profit in the face of a more powerful party's legal action,¹⁹ but the potential cost to rights-holders attendant to mandated private policing *and* adjudication of fair use is astronomical, especially given the enormous amount of digital content on the Internet.²⁰

Most recently, the Supreme Court of the United States denied petitions for certiorari from both the petitioners and respondents in *Lenz*.²¹ In doing so, it wrongly permitted the Ninth Circuit's opinion to stand as the law of the land. The Court should have corrected the *Lenz* solution, fine-tuning it to provide a better balance between rights-holders and online content producers.²²

Part I of this Note analyzes the historical applications of fair use as a defense to both traditional copyright infringement and the DMCA ("Internet fair use"). Part II analyzes both the Ninth Circuit and the Supreme Court's treatments of *Lenz* and further discusses questions resultant from the case regarding the nexus of fair use and the DMCA. Part III speaks to the development of YouTube's online content creator community, and considers their response to the *Lenz* decision as well as the impact that they, and others like them, may have on future online copyright law. Last, Part IV takes issue with the Ninth Circuit's re-categorization of fair use as a "right" rather than a defense, and proposes solutions to better balance the interests of rights-holders and creators in an age where access to and consumption of digital content is a facet of daily life.²³

¹⁷ See Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 690 (2015) (noting that fair use is traditionally used as an affirmative defense). See also 17 U.S.C. § 107 (2012) (governing fair use considerations).

¹⁸ See *Lenz*, 815 F.3d at 1160.

¹⁹ See Channel Awesome, *supra* note 12.

²⁰ See *Viacom*, 676 F.3d at 33.

²¹ *Universal Music Corp. v. Lenz*, 815 F.3d 1145 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 416 (2016); *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2263 (2017).

²² Unless otherwise stated, this note refers to "online content producers" in the abstract, *i.e.*, any person or group of persons who use copyrighted content in their own works of authorship.

²³ See Jessie Daniels, Apryl Williams and Shantel Buggs, *Digital media technologies in everyday life*, 20 INFO., COMM. & SOC'Y 947, 947 (2017) (asserting that "[d]igital media technologies shape our everyday lives").

I. HISTORY OF THE FAIR USE DOCTRINE AND THE DMCA

A party directly infringes a copyright when, without authorization, it copies, distributes and/or publicly performs or displays a copyrighted work,²⁴ in violation “of the exclusive rights of the copyright owner.”²⁵ In order to establish a *prima facie* case for direct copyright infringement, a copyright owner must first prove that he or she is an owner of the copyrighted work at issue, and must further prove that the creator violated his or her rights under the statute.²⁶ For example, an author could allege that someone copied several pages from her novel, which she is the right-holder to, thus violating her exclusive right to copy the work under § 106 of the Copyright Act.²⁷ Once the author has so proven, she will have demonstrated a *prima facie* case for copyright infringement.²⁸

Parties have several means of defending themselves against allegations of infringement. For instance, the creator may try to persuade the court that the evidence presented does not support the plaintiff's affirmative claim for infringement.²⁹ The creator may show that he never had access to the copyright owner's work and therefore could not have engaged in copying.³⁰ Another option for the creator is an affirmative defense such as fair use — which essentially stipulates to conduct that may constitute copyright infringement, but alleges that the factual circumstances meant that the conduct was appropriate.³¹ Such circumstances include conduct for the purpose of scholarship or commentary.³² Both

²⁴ 17 U.S.C. § 106 (2012).

²⁵ 17 U.S.C. § 501 (2012).

²⁶ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985)) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”).

²⁷ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

28 *Id.*

²⁹ *Arnstein v. Porter*, 154 F.2d 464, 478 (2d Cir. 1946) (“[R]esulting in a categorical denial by defendant of having ever seen or heard plaintiff’s compositions and no showing by plaintiff of any evidence of access worthy of submission to any trier of fact. And I take it as conceded that these trifling bits of similarities will not permit of the inference of copying.”).

³⁰ See *Eyal R.D. Corp. v. JeweleX N.Y., Ltd.*, 576 F.Supp.2d 626, 631 (S.D.N.Y. 2008) (treating a summary judgment motion in defendant alleged that it did not have access to the allegedly infringed work — plaintiff's ring).

³¹ Loren, *supra* note 17, at 690-91.

³² 17 U.S.C. § 107 (2012); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588-89 (1994) (applying fair use to a parodic work); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 932 (2d Cir. 1994) (Jacobs, J., dissenting) (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991)) (“This court has stated on several occasions: ‘ “[I]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end. . . .” ’”).

the statute and the history of fair use contradict the Ninth Circuit's treatment of it as a right rather than a defense.³³

While the fair use doctrine is part of the copyright statute today, it was only officially incorporated into the United States Code in 1976.³⁴ As a result, courts have only applied the statutory language controlling fair use less than half a century. That language, codified at 17 U.S.C. § 107, states: "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."³⁵ Additionally, the statute lists factors that courts "*shall*" consider in evaluating whether a work is fair use, including:

- (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.³⁶

Prior to its codification, the doctrine of fair use existed at common law as a defense in law and equity for alleged copyright infringement.³⁷ However, Congress chose to include the text in the statute as a means of restating the doctrine as it was understood at the time of enactment.³⁸ The factors are therefore common law formulations, and as a result, federal courts have yielded different interpretations thereof, both textual and contextual.³⁹ A proper understanding of the doctrine thus compels an analysis of those differing interpretations.

A. *The Common Law Origins of Copyright's Fair Use Doctrine*

The doctrine of fair use, in its earliest form, was a far cry from later twentieth century interpretations. One of the earliest examples of common law fair use in American jurisprudence comes from Justice Story's opinion in *Folsom v.*

³³ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016), *cert denied*, 137 S. Ct. 2263 (2017); *see also* Loren, *supra* note 17, at 690-91.

³⁴ Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2546 (1976).

³⁵ § 107.

³⁶ *Id.* (emphasis added). The statute's text does not specifically state that a court is limited to considering these factors, but it must consider all of them in turn. *Id.*

³⁷ 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender, Rev. Ed. 2015) (quoting H.R. REP. NO. 94-1476, at 66).

³⁸ *Id.* (noting that the specific examples of fair use that the Committee Reports identified should be taken as no more than that particular Congress' opinion as to how a court would hold, rather than mandating the factors a court *must* consider in every case).

³⁹ *Compare* Harper & Row Pubs., Inc. v. Nation Enters, 471 U.S. 539 (1985), *with* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (allowing for fair use, even where that use was for commercial purposes).

Marsh.⁴⁰ In *Folsom* the defendant — who had allegedly appropriated a portion of text from the plaintiff’s literary work — claimed that because he had abridged the text at issue, his use of the plaintiff’s work was “fair.”⁴¹ Justice Story, writing for the *Folsom* court, explained that “a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of *fair and reasonable criticism*.”⁴² However, because the defendant abridged some of the most important portions of the work at issue, “with a view, not to criticise [sic], but to supersede,” he was liable for copyright infringement.⁴³ Justice Story also set out factors to guide application of fair use similar to those listed in § 107.⁴⁴

It is clear that Justice Story intended to ensure protection of criticism, albeit fair criticism, of a work. It is equally clear that such criticism often requires utilizing some of the original work. Today, where public discourse over vast amounts of media and content dominates popular culture in both digital and physical spaces, it is important that we not unreasonably censure such works — both explicitly critical⁴⁵ and parodic⁴⁶ — in favor of strengthening intellectual property (“IP”) rights.

B. Development of the Digital Millennium Copyright Act

Copyright’s fair use doctrine continued to evolve from its early common law roots through its codification in 1976. From that time through the late 1990’s, rapid technological advancement of an order unprecedented in the world of media and entertainment, and in particular the advent of the World Wide Web, made it difficult for copyright owners to protect their rights to their works.⁴⁷ Congress responded to this advancement in 1998 by passing the DMCA.⁴⁸ In doing so, Congress intended to strike a balance: safeguarding copyright holders’ IP rights, while ensuring the continued development and progression of both new technologies and electronic commerce.⁴⁹ One means of balancing was 17

⁴⁰ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁴¹ *Id.* at 345.

⁴² *Id.* at 344 (emphasis added).

⁴³ *Id.* at 344-45.

⁴⁴ *Id.* at 348.

⁴⁵ E.g., Todd in the Shadows, *POP SONG REVIEW: “Applause” by Lady Gaga*, YOUTUBE (July 24, 2015), <https://www.youtube.com/watch?v=Oq4OUJLLgkI> (video review of a popular song using portions of the song’s music video).

⁴⁶ E.g., SumersetInc, *Mathmaticious*, YOUTUBE (Mar. 13, 2008), <https://www.youtube.com/watch?v=6cAs1YBELmA> (parodying the song, “Fergalicious”).

⁴⁷ See Randazza, *supra* note 5, at 746-47 (noting the challenges copyright holders face under the DMCA).

⁴⁸ 17 U.S.C. § 101 (2012).

⁴⁹ S. REP. NO. 105-190, at 2 (1998).

U.S.C. § 512 — the DMCA’s “safe-harbor” provisions⁵⁰ — under which rights-holders may request removal of specific, infringing, content from websites which have reproduced the content without authorization.⁵¹ OSPs hosting the websites at issue must promptly honor such takedown requests by removing the copyrighted material.⁵² Failure to do so results in contributory liability.⁵³

For example, imagine that a YouTube user uploads the entirety of Quentin Tarantino’s *Pulp Fiction* onto the platform. The party with rights to the film’s presentation, distribution, or transmission — likely either Mr. Tarantino or Miramax, the film’s distributor — may make a formal request to YouTube to have the film removed in compliance with the DMCA.⁵⁴ Under the DMCA’s notice and takedown provision, YouTube is obligated to (1) promptly remove the material; and (2) notify the party that posted the infringing material as to the removal request.⁵⁵ The user then has an opportunity to request restoration of the content by filing a counter-notification alleging that the content is non-infringing.⁵⁶ If YouTube, or any OSP, fails to comply with the notice and takedown procedures, it risks losing its safe harbor protection and may face substantial liability for contributory copyright infringement.⁵⁷ An OSP’s failure to comply with this process affects a waiver of any limitations of liability for copyright infringement, and could result in injunctive relief or monetary damages against the OSP.⁵⁸

Importantly, the DMCA contains no textual provision explicitly requiring that an OSP evaluate an initial takedown request for legitimacy, and certainly not for whether the content was fair use.⁵⁹ Further, many critics of the DMCA asserted that the “safe-harbor” provisions cut against free expression,⁶⁰ while lessening the burden on large copyright holders — in particular film studios and record

⁵⁰ Laura Zapata-Kim, Note, *Should YouTube’s Content be Liable for Misrepresentation Under the Digital Millennium Copyright Act?*, 57 B.C. L. Rev. 1847, 1850 (2016).

⁵¹ 17 U.S.C. § 512(c) (2012).

⁵² *Id.* (stating, *inter alia*, that the OSP must act “expeditiously” when removing content, but failing to further define how expeditious that removal must be).

⁵³ *Id.*; Randazza, *supra* note 5, at 746.

⁵⁴ See Zapata-Kim, *supra* note 50, at 1850 (describing the means by which a copyright holder may issue a notice and takedown request).

⁵⁵ § 512(c)(1)(A)(iii), (C).

⁵⁶ *Id.* at (g)(2)(B)-(C).

⁵⁷ *Id.* at (c)(1).

⁵⁸ *Id.*

⁵⁹ 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, 175-176 (2010) (explaining that private enforcement of the DMCA can often result in censorship).

⁶⁰ Randazza, *supra* note 5, at 747 (noting that DMCA takedowns can limit speech before any adjudication on the underlying copyright claims).

labels — associated with policing infringement of their intellectual property online.⁶¹

In truth, that neither rights-holders nor creators are completely satisfied seems emblematic of the fact that the DMCA favors neither party, but rather a singular goal: protecting the rights of *both* parties.⁶² This goal — preserving the promise of the Internet while stanching the flow of widespread infringing content online — was what Congress had in mind when it passed the DMCA.⁶³ The speed at which content can be copied, uploaded, and distributed, together with the sheer number of people with access to that content, are staggering. Congress wanted to find a way to remove infringing content quickly.⁶⁴ It reasoned that rights-holders were in the best position to *identify* infringing content, and intermediaries were best suited to take it down.⁶⁵ Accordingly, under the DMCA, rights-holders provide notice to intermediaries, and the intermediaries respond by removing infringing content.⁶⁶ It seems evident that such an expedited process is likely the only practicable way to reduce infringement online. If the copyright holder was forced to go through an adjudicatory process to police *every* instance of online content infringement or piracy, the expense and time attendant to such a process would render rights-holders unable to practically protect their IP.

Notwithstanding these advantages for copyright holders, the DMCA is not entirely a pro-rights-holder regime, thanks in part to its counter-notification safeguards. When making an initial takedown request, a copyright holder must provide a statement (1) identifying the copyrighted work and its location; and (2) indicating that the copyright holder is acting in good faith and providing accurate information.⁶⁷ Upon notification that their content is allegedly infringing — either via an OSP’s removal of, or disabling access to that content — a creator can file a counter-notification identifying the content, indicating that its removal was erroneous, and providing both contact information as well as consent to the jurisdiction of United States federal courts.⁶⁸ Following a counter-notification, an

⁶¹ See *id.* E.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149-50 (9th Cir. 2016), *cert denied*, 137 S. Ct. 2263 (2017) (describing how simple it was for UMC to flag Lenz’s video and have it removed).

⁶² See Randazza, *supra* note 5, at 746 (stating the DMCA was passed to, “balance intellectual property rights with the desire to promote the growth of electronic commerce and new technology.”).

⁶³ S. REP. NO. 105-190, at 21 (1998) (“The Committee was acutely concerned that it provide all end-users . . . with appropriate procedural protections to ensure that material is not disabled without proper justification. The . . . [DMCA] balance[s] the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”).

⁶⁴ *Id.*

⁶⁵ See *id.*

⁶⁶ See Zapata-Kim, *supra* note 50, at 1850 (explaining the notice and takedown procedure in detail).

⁶⁷ 17 U.S.C. § 512(c) (2012).

⁶⁸ §§ 512(c), (g).

OSP must notify the rights-holder that it will restore the content to its original state within eleven to thirteen calendar days.⁶⁹ This gives the rights-holder an opportunity to file an infringement lawsuit; if it informs the OSP of such a suit, the OSP must hold off on restoring the content, pending resolution of the legal action.⁷⁰

While this notification system may have been well suited to the Internet of the late 1990s, and while its scheme makes logical sense in the abstract, it is unfit to handle several of the contemporary problems of today's Internet.

C. Contemporary Criticism of the DMCA and the Need to Utilize § 512(f)

In 1998, the year in which Congress passed the DMCA, online media was several quantum leaps from where it is today.⁷¹ Even contemporary giants like Google, Amazon, and Netflix were only in their infancy.⁷² Much of that difference is due to three factors: (1) the sheer amount of content uploaded to the Internet;⁷³ (2) increasingly sophisticated users, many of whom can now create and share various forms of media;⁷⁴ and (3) improved online video streaming and fiber-optic speeds.⁷⁵ These vast improvements in media sharing and user access have created a vibrant forum for Internet users and content creators to make use of a lot of copyrighted content available through digital media. As such, the DMCA has garnered criticism not just from legal scholars, but from

⁶⁹ Zapata-Kim, *supra* note 50, at 1853-54.

⁷⁰ See §§ 512(c), (g).

⁷¹ See Kim Ann Zimmermann & Jesse Emspak, *Internet History Timeline: ARPANET to the World Wide Web*, LIVE SCIENCE (June 27, 2017, 10:46 AM), <https://www.livescience.com/20727-internet-history.html>. [<https://perma.cc/AEV8-SPHH>] (listing major developments in the Internet from 1965 through 2016).

⁷² Avery Hartmans, *15 fascinating facts you probably didn't know about Amazon*, BUS. INSIDER (Aug. 23, 2018, 9:22 AM) <https://www.businessinsider.com/jeff-bezos-amazon-history-facts-2017-4> [<https://perma.cc/Y26V-J27P>] ("When Amazon first launched in 1995 as a website that only sold books."); *A brief history of Netflix*, CNN (July 21, 2014, 6:06 PM), <https://www.cnn.com/2014/07/21/showbiz/gallery/netflix-history/index.html> [<https://perma.cc/8RMK-TQT8>] ("Reed Hastings . . . and Marc Rudolph . . . founded Netflix in 1997"); *Our history in depth*, GOOGLE, <https://www.google.com/about/our-story/> [<https://perma.cc/D72L-WLFR>] (last visited Dec. 29, 2018) (noting that Google's official founding took place in August 1998, which was prior to the DMCA's enactment).

⁷³ See VidCon, *supra* note 3.

⁷⁴ See Ellen J. Helsper, London Sch. Econ. Media Policy Project, *The Emergence of a Digital Underclass: Digital Policies in the UK and Evidence for Inclusion*, MEDIA POLICY BRIEF 3, at 13 (2011) (indicating that Internet breadth of Internet usage has increased); OECD SCIENCE, TECHNOLOGY AND INDUSTRY SCOREBOARD 2017: THE DIGITAL TRANSFORMATION 198 (2017) ("The breadth of activities performed by each Internet user provides an indicator of user sophistication.").

⁷⁵ *Yes, Your Internet Has Gotten a Lot Faster*, FORTUNE (Dec. 30, 2015), <http://fortune.com/2015/12/30/internet-speed-faster/> [<https://perma.cc/VUV7-PV9K>].

many of those who make their living as artists and authors online.⁷⁶ These artists and authors feel that the DMCA provides a tool for large copyright owners to remove or monetize content that is critical of copyrighted works.⁷⁷

News and political organizations, which are themselves the victims of rights-holders overzealous use of DMCA takedown notices, are likewise critical of the DMCA.⁷⁸ Such parties face takedown notices from a whole host of entities — from other news agencies alleging infringing use of portions of their reporting and/or commentary,⁷⁹ to religious groups seeking to stem online ridicule of their views.⁸⁰ These frivolous claims lead some to decry the DMCA’s notice-and-takedown system as state-enabled censorship.⁸¹

To be fair, the DMCA is not entirely to blame. It was established in an era when online mass media was in its infancy, when those balancing OSP, right-holder and creator’s rights could not have possibly predicted the technology boom of the mid to late 2000’s, which brought about Facebook,⁸² YouTube,⁸³

⁷⁶ Channel Awesome, *supra* note 12 (featuring several online film, television, music, and video gaming critics offering criticism of the DMCA’s takedown procedures).

⁷⁷ *See id.* Note that the rights-holders might assert that rather than criticize the copyrighted work, the allegedly infringing content tarnishes it.

⁷⁸ Jordan Koss, *Protecting Free Speech for Unequivocal Fair Users: Rethinking Our Interpretation of the § 512(f) Misrepresentation Clause*, Note and Recent Developments, 28 CARDOZO ARTS & ENT. L.J. 149, 169 (2010) (highlighting time sensitive or controversial issues in which the public was denied access to information because of a DMCA takedown).

⁷⁹ *See id.* at 172. The National Organization for Marriage (NOM), a group opposed to same-sex marriage, sent a takedown request to YouTube over a clip of MSNBC’s Rachel Maddow, posted to YouTube by Ms. Maddow’s fans, in which Ms. Maddow had employed brief clips of NOM’s videos to criticize the organization. *Id.* YouTube complied with the takedown request and removed the video. *Id.*

⁸⁰ *Id.* at 173. (“In 2002, the Church [of Scientology] sent takedown notices to Google, demanding Google take down links running through Xenu.net, an anti-Scientology website that [contained] some copyrighted material owned by the Church. Google complied in order to achieve safe harbor status, and Google’s decision to restrict unequivocal fair use criticism represents a curb on free speech.”).

⁸¹ *See Seltzer, supra* note 59, at 194. This result is a so-called “chilling effect,” whereby “an individual may refrain from speech that the law does not intend to target because of fear that the law will adversely affect him.” *Id.*

⁸² Sarah Phillips, *A brief history of Facebook*, THE GUARDIAN (July 25, 2007, 5:29 EDT), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> [<https://perma.cc/SB7A-WKMR>] (noting that “the facebook” launched in February of 2004).

⁸³ Megan Rose Dickey, *The 22 Key Turning Points In The History Of YouTube*, BUS. INSIDER (Feb. 15, 2013, 9:01 AM), <https://www.businessinsider.com/key-turning-points-history-of-youtube-2013-2> [<https://perma.cc/26FG-DL3Q>] (“On April 23, 2005, YouTube co-founder Jawed Karim posted the very first video to YouTube, entitled ‘Me at the Zoo.’”).

and the iPhone,⁸⁴ all of which serve as fertile ground for copyright infringement.⁸⁵ Because the drafters of the DMCA could not have predicted neither the development of modern content sharing and creation, nor the speed of the modern Internet, the DMCA was ill suited for contemporary online media. Nevertheless, rights-holders still wield a tremendous amount of power when availing themselves of the DMCA notice and takedown procedures. Few cases embody this issue as directly as *Lenz v. Universal Music Corp.*⁸⁶

II. LENZ V. UNIVERSAL MUSIC CORP.

In 2007, Stephanie Lenz uploaded a video to YouTube of her child dancing to Prince's, "Let's Go Crazy."⁸⁷ The video itself only lasted for a few seconds and the song was merely background noise therein.⁸⁸ Universal Music Corp. ("UMC") discovered the video and issued a takedown request to YouTube, alleging that the video was infringing its copyright to the song.⁸⁹ YouTube issued a subsequent copyright infringement notification to Ms. Lenz, who then filed a lawsuit against UMC pursuant to DMCA § 512(f), which provides that any party who "knowingly materially misrepresents" a takedown request is liable for any

⁸⁴ David Pierce & Lauren Goode, *The Wired Guide to the iPhone*, WIRED (Dec. 7, 2018, 8:00 AM), <https://www.wired.com/story/guide-iphone/> [<https://perma.cc/48YZ-872U>] ("Jobs announced the iPhone on January 9, 2007, on stage at the Macworld conference.").

⁸⁵ See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32-33 (2d Cir. 2012) (estimating that over seventy-five percent of content on YouTube contains traces of third-party-owned copyrighted material); Rob Price, *Facebook's new video business is awash with copyright infringement and celebrities are some of the biggest offenders*, BUS. INSIDER (May 6, 2015, 8:14 AM), <https://www.businessinsider.com/facebook-copyright-infringement-facebook-content-id-celebrities-2015-5> [<https://perma.cc/MKZ3-F3DE>] ("It's impossible to quantify just how much copyrighted material is being shared on Facebook. But illegally uploaded videos routinely clock up tens of millions of views, and hundreds of thousands of shares."); Max Slater-Robins, *Apple's App Store has a copyright problem*, BUS. INSIDER (Dec. 3, 2015, 4:55 AM), <https://www.businessinsider.com/lakelubbers-accuses-apple-of-helping-a-developer-who-stole-content-2015-12?r=UK&IR=T> [<https://perma.cc/39MN-GYQM>] (reporting instances in which apps listed in Apple's app store have been employing web scrapers to appropriate copyrighted content from websites).

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

⁸⁷ *Lenz*, 815 F.3d at 1149. It should be noted that the song's author, Prince Roger Nelson, more commonly known by his stage name "Prince," passed away several months after these appellate proceedings. *Compare* *Id.* at 1145 (listing the date of appellate argument as July 7, 2015), with Kory Grow, *Prince Dead at 57*, ROLLING STONE (Apr. 21, 2016, 5:13 PM), <https://www.rollingstone.com/music/music-news/prince-dead-at-57-62331/> [<https://perma.cc/GPX5-MVY5>] (reporting Prince's death on April 21, 2016).

⁸⁸ The video made no comments about the nature of the song/sound recording, nor did it contain any transformative elements altering the song/sound recording in question. *Lenz*, 815 F.3d at 1149.

⁸⁹ *Id.*

damages the allegedly infringing party may occur as a result of the misrepresentative request.⁹⁰

A. Ms. Lenz’s Argument and the Majority Decision

The principal issue before the Ninth Circuit in *Lenz* was whether UMC’s failure to consider fair use of a work prior to issuing a takedown request amounted to a *de facto* absence of good faith belief of unlawful use — that is, whether absent consideration of fair use, a rights-holder can ever 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.”⁹¹

Ms. Lenz asserted that absent such a consideration, a takedown request amounts to an “[abuse of] extrajudicial takedown procedures provided in the DMCA.”⁹² Her argument followed, that a UMC staff member was tasked with monitoring YouTube for infringing videos.⁹³ As that staff member operated on order to find material that made “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” but not on order to consider fair use, UMC could never have adequately formed such a good faith belief.⁹⁴ Therefore, its statement alleging such a good faith belief of unlawful use amounted to a misrepresentation in violation of § 512(f).⁹⁵

The Ninth Circuit agreed. Focusing on § 512(f), the *Lenz* court held that the statute “unambiguously contemplated” fair use as something authorized by the law.⁹⁶ The Ninth Circuit then proceeded to explain the copyright fair use doctrine and the factors courts often employ in applying it.⁹⁷ However, the court broke from precedent — instead of describing fair use as an affirmative defense to copyright infringement,⁹⁸ the Ninth Circuit described fair use of an appropriated work as non-infringing use, and further explained that “[g]iven that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense

⁹⁰ *Id.* at 1150. *See also* 17 U.S.C. §512(f) (2012).

⁹¹ *Lenz*, 815 F.3d at 1151 (citing § 512 (c)(3)(A)(v)).

⁹² *Id.* at 1148.

⁹³ *Id.* at 1149.

⁹⁴ *Id.*

⁹⁵ Transcript of Oral Argument, *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016), *cert denied*, 137 S. Ct. 2263 (2017) (No. 13-16106), 2015 WL 9259957 (transcribing oral arguments in the case, with Lenz asserting “[b]ut I want to be very clear as a—as a baseline that what happened in this case is that Universal never formed a good faith belief or any belief as to fair use at all.”).

⁹⁶ *Lenz*, 815 F.3d at 1151 (stating that “[o]nly [§ 512(f)] subsection (1) is at issue here.”)

⁹⁷ *Id.*

⁹⁸ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); *see also* Loren, *supra* note 17, at 690.

that excuses conduct is a misnomer.”⁹⁹ That is to say, the Ninth Circuit rejected the notion that fair use was an affirmative defense, while nonetheless leaving the burden of establishing fair use on the alleged infringer.¹⁰⁰ The Ninth Circuit then turned to the notice and takedown context, and held that because fair use constituted a “use authorized by law” a rights-holder must consider it prior to sending a takedown request.¹⁰¹

Despite its requirement that rights-holders *consider* fair use, the Ninth Circuit did not insist that they always get the fair use analysis right. Rather — looking to the fact that Congress had not adopted an objective standard for determining whether a use was authorized — the Ninth Circuit determined that § 512(c)(3)(A)(v)’s “good faith” standard only required *reasonable* good faith.¹⁰² From the rights-holder’s perspective, this means that it needs a *subjective* rather than an *objective* belief that the material is infringing.¹⁰³ Therefore, while a copyright holder must consider fair use before sending a takedown notice, the bar for such consideration is not terribly high.¹⁰⁴ That said, UMC, in failing to consider good faith at all prior to sending its takedown notice, UMC had not acted in good faith and the Ninth Circuit accordingly awarded Ms. Lenz nominal damages under § 512(f).¹⁰⁵

B. Judge Smith’s Concurring Opinion and Problems

In his concurring opinion, Judge Smith agreed with the majority that Ms. Lenz’s use of “Let’s Go Crazy” was indisputably fair.¹⁰⁶ He disagreed, however, with the majority’s treatment of “good faith.”¹⁰⁷ Judge Smith noted that UMC admitted it did not consider fair use, but rather considered whether Lenz had made “significant use” of the sound recording in question, which he determined was sufficient to grant Ms. Lenz summary judgment.¹⁰⁸ Whether Judge Smith

⁹⁹ *Lenz*, 815 F.3d at 1152. In so finding, the Ninth Circuit drew from the decisions in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) and *Bateman v. Mnementics, Inc.*, 79 F.3d 1532, 1542 n. 22 (11th Cir.1996). *Id.*

¹⁰⁰ *Id.* at 1153.

¹⁰¹ *Id.* at 1157-58.

¹⁰² *Id.* at 1153-54 (quoting *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004)).

¹⁰³ *Id.* at 1153.

¹⁰⁴ *Id.* at 1154-55. The Ninth Circuit further explained that a creator can assert willful blindness as to fair — that is, that the right holder (1) subjectively believed that there was a high probability that the use was fair; and (2) took deliberate actions to avoid learning that the use was fair — to establish a material misrepresentation under § 512(f). *See id.*

¹⁰⁵ *Id.* at 1156. The Ninth Circuit also held that Lenz could obtain additional relief if she is able to prove that she suffered actual loss as a result of the takedown notice. *Id.*

¹⁰⁶ *Id.* at 1158 (Smith, J. concurring).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1159.

based his determination on an equating of “significant use” with “fair use,” or rather on Ms. Lenz’s use being *de minimis* is unclear.¹⁰⁹

What is clear, however, is that under his approach a rights-holder would have to undertake a more intensive fair use analysis — considering each element of the fair use doctrine, rather than making a merely facially reasonable determination.¹¹⁰ This follows, as per Judge Smith, under the majority’s opinion a rights-holder would avoid § 512(f) liability by affording minimal attention to fair use and attesting that they had in good faith considered the doctrine.¹¹¹ Such a regime, he argued, “eviscerates § 512(f) and leaves it toothless against *frivolous* takedown notices.”¹¹²

Indeed, Judge Smith’s concurrence exposes a weakness in the majority’s opinion, under which copyright holders escape liability under § 512(f) if they make a statement of good faith and the evidence shows that they “considered” fair use.¹¹³ As there are no evidentiary requirements guiding a determination of whether a party “considered” fair use — the statute only requires that a claimant state the work materially infringes,¹¹⁴ and the majority failed to present any such requirements¹¹⁵ — *Lenz* renders the notice and takedown procedure ripe for further abuse by copyright holders.

That said, the concurrence does not necessarily offer a more appealing alternative. Judge Smith’s insistence that copyright holders accurately assess all of the fair use factors would pose insurmountable burdens on the notice-and-takedown process.¹¹⁶ While Judge Smith’s opinion may be ideal to the Ms. Lenz’s of the world, it likely does not seem ideal to Internet intermediaries like YouTube, a platform which might deal with an enormous amount of infringing

¹⁰⁹ *Id.* at 1158-59 n. 4. Judge Smith may have in fact predicted an existing split between the Ninth and Sixth Circuits on the *de minimis* use of sound recordings in digital sampling. Compare *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 275-76 (6th Cir. 2009) (holding that *de minimis* uses of sound recordings are impossible), with *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878-79 (9th Cir. 2016) (excusing the recording artist Madonna’s unauthorized use of a copyrighted sound recording because the use was *de minimis*). Neither Ms. Lenz nor the Ninth Circuit treated the issue, but the facts of the *Lenz* case may have supported an argument that the use at issue was *de minimis* — had it been asserted, if Judge Smith intended the later interpretation, a *de minimis* use would likewise be a non-infringing use. *Id.*

¹¹⁰ *Lenz*, 815 F.3d at 1160 (Smith, J. concurring).

¹¹¹ *Id.*

¹¹² *Id.* (emphasis added).

¹¹³ *Id.*

¹¹⁴ 17 U.S.C. § 512(f) (2012).

¹¹⁵ See *Lenz*, 815 F.3d at 1154-55.

¹¹⁶ See 17 U.S.C. § 107 (2012); see also *Lenz*, 815 F.3d at 1159.

content.¹¹⁷ Given the scope of infringement on such platforms, it could be extremely daunting, if not impossible, to make an accurate fair use determination with respect to *all* such content.¹¹⁸

C. Life After Lenz: The Supreme Court's Denial of Certiorari and the Future

Following the initial appellate proceedings, both parties requested a panel rehearing of the case *en banc*, but the Ninth Circuit denied this petition.¹¹⁹ Ms. Lenz further petitioned for a writ of certiorari before the Supreme Court in August 2016, however, the Supreme Court denied the petition without an accompanying opinion.¹²⁰ A denial of certiorari in the absence of a circuit split is not surprising; it is possible that it may not constitute an endorsement of the Ninth Circuit's decision, so much as a conclusion that the time is not ripe for review. Even so, the denial of certiorari means that the Ninth Circuit opinion remains valid law in that jurisdiction. Therefore, in the Ninth Circuit, at least, courts will now treat fair use as a right granted by the statute rather than an affirmative defense.¹²¹

The Ninth Circuit's approach to fair use runs in tension with the traditional fair use doctrine. While the *Lenz* court relied on an older Eleventh Circuit decision, *Bateman v. Mnemonics, Inc.* to support its characterization,¹²² several other federal courts of appeal have issued contemporary opinions holding that fair use is not a right, one noting that "a court may dispose of a *copyright infringement action* based on the *fair use affirmative defense*."¹²³ As an affirmative defense,

¹¹⁷ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012) (noting the staggering amount of copyrighted content uploaded to YouTube). These include parody and criticism videos that use significantly higher amounts of copyrighted material than the minute amount used in *Lenz*'s video. *See, e.g.*, Channel Awesome, *Top 11 Worst Movie Sequels*, YOUTUBE (Jan. 18, 2017) https://www.youtube.com/watch?v=0Y_3igyDom4 (using short sections of footage from movie sequels including, but not limited to *The Godfather Part III* and *The Secret of N.I.M.H. 2: Timmy to the Rescue*, for purposes of criticism). *See also* Seng, *infra* note 131, at 443.

¹¹⁸ Additionally, as discussed below, like the majority Judge Smith characterizes fair use as a right rather than an affirmative defense. *See infra* note 123 and accompanying text.

¹¹⁹ *Lenz*, 815 F.3d at 1148.

¹²⁰ Petition for Writ of Certiorari, *Universal Music Corp. v. Lenz*, 137 S. Ct. 416 (No. 16-218).

¹²¹ *Lenz*, 815 F.3d at 1153. While this particular distinction may not be outcome determinative in factually similar future cases, it does mean that under the current doctrine courts will look to an incorrect interpretation of common law. This error leaves room for courts to distinguish and sets the stage for future divergence among the federal courts.

¹²² *Id.* at 1152-53 (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir.1996)).

¹²³ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 689 (7th Cir. 2012) (emphasis added).

it is a defense that “a *defendant* bears the burden of proving,”¹²⁴ not a presumption of innocence to be used as a shield to any and all claims. Indeed, the Eleventh Circuit itself abandoned *Bateman* in 2010, noting that Supreme Court precedent views fair use as an affirmative defense rather than an element of infringement.¹²⁵

The denial of certiorari does not solely favor defendants. By denying certiorari, the Court also left in place the Ninth Circuit’s adoption of the ‘substantive good faith’ approach, despite concerns about whether it is too protective of copyright holders. It also preserved the lower courts’ rulings that Ms. Lenz only deserved nominal damages.¹²⁶ However, absent the development of a circuit split,¹²⁷ it seems that *Lenz* will remain one of the governing cases on Internet copyright.

III. CASTING A WIDE [INTER]NET: HOW THE CREATOR COMMUNITY MIGHT FIND ITS VOICE

The business of producing and profiting from parodying or criticizing copyrighted material has substantially grown over the last decade, and certainly within the last five years.¹²⁸ Although the DMCA applies to the entirety of U.S. web activity, one group that stands to benefit, or suffer, significantly from *Lenz* is the community of parodists, critics, vloggers, and musicians on America’s

¹²⁴ *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 484 n.7 (2d Cir. 2007) (emphasis added).

¹²⁵ *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239 (11th Cir. 2010) (“[D]efendant-appellees misrepresent Judge Birch’s comments. In *Bateman v. Mnemonics, Inc.*, Judge Birch commented that ‘[a]lthough the traditional approach is to view ‘fair use’ as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976.’ Several years later in *Suntrust Bank v. Houghton Mifflin Co.*, Judge Birch commented that ‘fair use is commonly referred to as an affirmative defense, and, as we are bound by Supreme Court precedent, we will apply it as such.’”) (citations omitted).

¹²⁶ *Lenz*, 815 F.3d at 1157.

¹²⁷ See Arian Galavis, Note, *Reconciling the Second and Ninth Circuit Approaches to Copyright Preemption: A Universal System is Paramount to the Protection of Idea Purveyors’ Rights*, 19 B.U.J. SCI. & TECH. L. 157, 159-60 (2013). Both the Second and Ninth Circuits hear the majority of copyright cases on appeal in the United States and as a result have developed different philosophies when it comes to claims of copyright infringement. *Id.* A circuit split may develop between these two courts of appeal. *Id.*

¹²⁸ See, e.g. Chris Heller, *The Onion is Not a Joke*, ATLANTIC (May 1, 2015), <https://www.theatlantic.com/technology/archive/2015/05/area-media-company-makes-money/392141/> [<https://perma.cc/4XAT-RSRR>]. Online entertainment constitutes a rapidly growing industry that may now rival TV as the new source for the most accessible form of media. See Ashley Rodriguez, *The internet is finally going to be bigger than TV worldwide*, QUARTZ (June 12, 2018), <https://qz.com/1303375/internet-usage-will-finally-surpass-tv-in-2019-zenith-predicts/> [<https://perma.cc/7CJZ-G7QZ>].

most popular media platform: YouTube.¹²⁹ As early as 2011, primarily in response to the Stop Online Piracy Act (“SOPA”) and Protect Intellectual Property Act (“PIPA”) discussed below,¹³⁰ YouTube channels, and in particular smaller YouTube channels that focus on movie reviews and parodies, have begun resisting the sheer number of takedown notices issued to YouTube *en masse*.¹³¹ In addition, YouTube creators have produced videos to educate their viewers and one another about fair use — both what it is, and how it works.¹³² Some of these videos address the *Lenz* decision, and conclude that uses of works for parodic and/or critical purposes are presumptively fair unless demonstrated otherwise.¹³³ To the extent that *Lenz* itself erred in finding fair use as a right rather than an affirmative defense, however, these videos are offering erroneous advice. Indeed, as Justice Kennedy warned in his *Campbell* concurrence, “not just any commercial takeoff [can be] rationalized *post hoc* as a parody.”¹³⁴ Despite this, the online community will prove instrumental for outlining and potentially reshaping a DMCA that better serves content creators of transformative works.¹³⁵ On the other hand, some rights-holders view the DMCA as too weak.¹³⁶ As a

¹²⁹ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012) (noting the amount of content uploaded to YouTube).

¹³⁰ Chenda Ngak, *SOPA and PIPA Internet Blackout Aftermath, Staggering Numbers*, CBS NEWS (Dec. 19, 2012, 4:48 PM), <http://www.cbsnews.com/news/sopa-and-pipa-internet-blackout-aftermath-staggering-numbers/> [https://perma.cc/EBJ4-K2A5] (Article on the public criticism against both the Stop Online Piracy Act and the Protect IP Act.).

¹³¹ Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 395 (2014) (noting that parties such as Microsoft issue as many as ten-thousand takedown notices per year).

¹³² Vlogbrothers, *The Bizarre State of Copyright*, YOUTUBE (Aug. 15, 2014), https://www.youtube.com/watch?v=hG_FCQiKUws (educational video on the basic principles surrounding DMCA and fair use).

¹³³ Channel Awesome, *supra* note 9. The creators, and by extension the viewers, may draw the somewhat erroneous conclusion that any use intended for parody or criticism counts as fair use by default and cannot be considered infringing.

¹³⁴ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 599, 600 (1994) (Kennedy, J., concurring) (emphasis added) (“Fair use is an *affirmative defense*, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original”); *Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394, 1403 (9th Cir. 1997) (“We completely agree with the district court that Penguin and Dove’s fair use defense is ‘pure shtick’ and that their post-hoc characterization of the work is ‘completely unconvincing’”).

¹³⁵ See Larry Magid, *SOPA and PIPA Defeat: People Power or Corporate Clout?*, FORBES (Jan. 31, 2012, 10:40 AM), <http://www.forbes.com/sites/larrymagid/2012/01/31/sopa-and-pipa-defeat-peoples-power-or-corporate-clout/#49a2609c3336> [https://perma.cc/HG3S-W9SL] (article on the massive public unity shown online in opposition to SOPA and PIPA).

¹³⁶ Brad Plumer, *Everything you need to know about Congress’s online piracy bills, in one post*, WASH. POST (Dec. 16, 2011), <https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-congresss-online-piracy-bills-in-one->

result of this, there has been a lot of foment in recent years over proposed revisions to the DMCA and online copyright enforcement.¹³⁷

A. SOPA and PIPA: The First Call to Arms

In the fall of 2011, Congressman Lamar Smith (R-TX) proposed the Stop Online Piracy Act (“SOPA”).¹³⁸ The language of the bill would have broadened the scope of criminal copyright infringement online, allowing the U.S. Attorney General to obtain criminal sanctions, including injunctions, against any site it determined was facilitating online piracy of copyrighted material.¹³⁹ Additionally, SOPA would have allowed copyright holders to request a restriction on all advertising revenue from any sites or domain names dedicated to “theft of U.S. property” — that is, copyright infringement.¹⁴⁰ Concurrent with the House of Representative’s consideration of SOPA, Senator Patrick Leahy (D-VT) introduced the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (the “PROTECT IP Act” or “PIPA”) in the Senate.¹⁴¹ Despite their different names, PIPA and SOPA contained many of the same provisions.¹⁴²

post/2011/12/16/gIQAz4ggyO_blog.html?utm_term=.1b6294e3ee7c [https://perma.cc/W8X3-SF7T] (“Yet companies . . . aren’t currently obliged to actively police their sites for illegal content, and, under the DMCA’s “safe harbor” provisions, service providers aren’t held liable for the content on their sites. . . . Yet copyright holders say the current regime doesn’t go far enough.”).

¹³⁷ See, e.g., Dugie Standeford, *US Government, Copyright Industry Continue Push for Stronger Enforcement*, INTELLECTUAL PROPERTY WATCH (Feb. 13, 2008), <https://www.ip-watch.org/2008/02/13/us-government-copyright-industry-push-for-stronger-enforcement/> [https://perma.cc/V46R-6B4E] (writing that major U.S. film, music, and software copyright holders are pushing for a “tougher stance against international crime groups trafficking in stolen and counterfeit IP.”).

¹³⁸ STOP ONLINE PIRACY ACT, H.R. 3261, <https://www.congress.gov/bill/112th-congress/house-bill/3261/all-info> [https://perma.cc/WY8W-8W5G] (last visited, Dec. 29, 2018).

¹³⁹ Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(b)(5) (2011).

¹⁴⁰ *Id.* at §§ 103(b)(2), (c)(1).

¹⁴¹ Protect IP Act, S.968, 112th Cong. (2011); PROTECT IP ACT, S.968, <https://www.congress.gov/bill/112th-congress/senate-bill/968/all-info> [https://perma.cc/8HMQ-2AHU] (last visited, Dec. 29, 2018).

¹⁴² Compare Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (Authorizing the Attorney General to seek a court order against a US-directed foreign infringing site committing or facilitating online piracy including the owner, operator, domain name registrant, or the site or domain name itself”) with Protect IP Act, S.968, 112th Cong. (2011) (“The Attorney General may commence an in personam action against – (A) a registrant of a nondomestic domain name used by an Internet site dedicated to infringing activities; or (B) an owner or operator of an Internet site dedicated to infringing activities accessed through a nondomestic domain name”).

Though well intentioned in stopping the ever-increasing practice of online piracy,¹⁴³ both SOPA and PIPA faced widespread opposition as a result of their broad grants of power to both the Justice Department and copyright holders.¹⁴⁴ Many online service providers, took steps to voice their concern, with notable examples including Google's blacking-out its logo and directing users to an online petition, as well as Wikipedia's blacking-out its site in protest.¹⁴⁵ To some, more concerning still was the fact that several of the bill's biggest supporters were large corporate rights-holders, such as NBCUniversal, Time Warner, MCA Records and the Motion Picture Association of America, who controlled the rights to large quantities of copyrighted material, and who many felt would utilize the bill's broad police powers to assert their copyrights against legally protected uses.¹⁴⁶

Smaller online content producers, in particular critics who frequently use copyrighted content in their reviews, spoke out against the legislation as well — even going so far as to record their own trip to Washington during which they met with Congressional staffers to discuss the two controversial bills.¹⁴⁷ They too feared the kind of power the bill might grant to large corporate rights-holders, and resultantly encouraged their viewers to contact their representatives and request that Congress not censor content on the Internet.¹⁴⁸

¹⁴³ See Plumer, *supra* note 136 (“But various hosting and link sites for pirated goods have been moving outside the United States, making it harder for the federal government to take them down. Essentially, copyright holders are asking for a really enormous sledgehammer to play this game of whack-a-mole.”). See also Robert Steele, *If You Think Piracy is Decreasing, You Haven't Looked at the Data...*, DIGITAL MUSIC NEWS (July 16, 2015), <http://www.digitalmusicnews.com/2015/07/16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/> (describing the increasing rate of internet piracy and how efforts to curb its practice have been ineffectual).

¹⁴⁴ Ngak, *supra* note 130 (“[A]bout 75,000 websites took part in the protest...Wikipedia says 162 million people viewed the blackout landing page, 8 million U.S. visitors looked up Congressional representatives and 12,000 people posted comments on Wikimedia Foundation's blog post announcing the blackout. The Los Angeles Times says Google confirmed that 4.5 million people signed the company's petition to protest SOPA and PIPA, while 350,000 emails were sent to representatives via SopaStrike.com and AmericanCensorship.org. Twitter reported over 2.4 million SOPA-related tweets between 12 a.m. and 4 p.m. EST on Jan. 18, [2011] with the top five terms being SOPA, Stop SOPA, PIPA, Tell Congress and #factswith-outwikipedia.”).

¹⁴⁵ Magid, *supra* note 135.

¹⁴⁶ See Connor Adams Sheets, *SOPA Supporters: Companies and Groups that Support the Controversial Bill*, INT'L BUS. TIMES (Jan. 5, 2012), <http://www.ibtimes.com/sopa-supporters-companies-groups-support-controversial-bill-391250> [<https://perma.cc/M4AB-44RH>].

¹⁴⁷ Nostalgia Chick, *Mr. Awesome Goes to Washington*, YAHOO (Dec. 15, 2011), <https://www.yahoo.com/entertainment/v/mr-awesome-goes-washington-040213617.html> (recording events which took place from December of 2011 to January of 2012).

¹⁴⁸ *Id.* (reproducing activists' statements, including “I feel like you start by going after sites for a monetary reason and then you start going after sites because you don't like what they're

On January 20, 2012, Congress acquiesced and “indefinitely shelved” the bills.¹⁴⁹ Perhaps the most interesting part of this turn of events is what it teaches us about the power of online communities — within a relatively short period of time, a small number of dispersed Internet stakeholders successfully mobilized vast numbers of people, both on and off-line. Who is to say that a similar movement will not likewise mobilize and petition for legislative change if the DMCA’s notice and takedown procedures fail to curb rights-holder overreach as a result of the holding in *Lenz*?

B. Reactions to Lenz

Although the YouTube community has had less of a reaction to *Lenz* than it did to SOPA and PIPA, several online content producers have taken note of the holding. The Internet review channel, Channel Awesome, produced a video called “Where’s the Fair Use?” in 2016 and referenced the holding in *Lenz*, stating that it justifies Channel Awesome’s use of copyrighted content in film, television, and music review videos.¹⁵⁰ While not directly critical of the DMCA, the video, which included contributions from several YouTube content creators, mostly decried YouTube’s easily abused notice and takedown policy, and unwillingness to address it.¹⁵¹ In particular, the creators complained that both they and their viewers suffered when a video was unavailable for a period of time following a rights-holder’s copyright claim.¹⁵²

Even so, the video arguably takes an overly optimistic view of fair use, how it functions, and the implications of *Lenz*. While it is true that using copyrighted material sparingly for parody and criticism is a hallmark of the fair use doctrine,¹⁵³ fair use does not create an automatic right to use content based on a person’s intent.¹⁵⁴ Indeed, like the majority in *Lenz*, the video’s producers seem to neglect the fact that fair use is an *affirmative defense*.¹⁵⁵ As use of non-*de*

saying [about the underlying copyrighted work]” and “[e]ducate yourself on how the bills may affect you, and contact your Senator or Representative”)

¹⁴⁹ Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html> [<https://perma.cc/GZX9-FGCA>].

¹⁵⁰ Channel Awesome, *supra* note 12.

¹⁵¹ *Id.*

¹⁵² *Id.* (“Every other day we have to fight off a new claim”); Kristofer Erickson & Martin Kretschmer, “*This Video is Unavailable*”: *Analyzing Copyright Takedown of User-Generated Content on YouTube*, 9 JIPITEC 75, 83 (2018) (“For example, blocked videos could indicate that they were “unavailable due to a copyright complaint” or “no longer available in your territory” (also due to copyright).”).

¹⁵³ See 17 U.S.C. § 107.

¹⁵⁴ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994). See also *supra* text accompanying note 134.

¹⁵⁵ *Id.* at 599.

minimis amounts of copyrighted content without securing a license is presumptively infringement.¹⁵⁶ Absent a defendant's demonstration that its use was fair in a court of law, a copyright holder is well within its rights to request that YouTube takedown the purportedly infringing content, and YouTube is within its rights to comply with that request to avoid liability.¹⁵⁷

The creator's frustration with YouTube is misplaced, as, given its status as an OSP, YouTube has certain obligations under the DMCA. Those obligations create a tricky balance for YouTube. While it makes sense for YouTube to want content creators to drive viewership — which results in financial success for both the creators and the platform — if such success requires acting outside the DMCA safe harbors, it runs the risk of facing substantial liability for contributory copyright infringement.¹⁵⁸ This precarious balancing, which is symptomatic of the DMCA writ at large, compels an interpretation of § 512(f) that protects those who use copyrighted material fairly,¹⁵⁹ but also allowing rights-holders to enforce their rights without infringing free speech.¹⁶⁰

If the events surrounding SOPA and PIPA are an indication, the Internet has objected to broad legal protections favoring rights-holders. What should come next is mutually beneficial change. For certain online content creators who use copyrighted works, the DMCA permits rights-holder removal of creator content with little consideration as to the use of the underlying copyrighted content.¹⁶¹ The DMCA must better protect online fair use, while still providing protection against unlawful appropriation of rights-holders' content. Absent such a change, the Internet may lose its status, or at least fail to achieve its purported promise, as a platform for free expression and creativity.¹⁶²

¹⁵⁶ 17 U.S.C. § 501(a) (2012). Violating any of the rights contained in § 106 of the copyright statute is infringement.

¹⁵⁷ 17 U.S.C. § 512(c)(1)(C).

¹⁵⁸ *See id.*

¹⁵⁹ *Lenz v. Universal Music Corp.*, 815 F.3d at 1145, 1156 (holding that misrepresenting a claim violates § 512(f)).

¹⁶⁰ Seltzer, *supra* note 59, at 175.

¹⁶¹ Channel Awesome, *supra* note 9 (“I received a strike on my account [referring to alleged use of copyrighted content] on one of the ‘Midnight Screenings’ reviews . . . in which me and another person [sic] sit in a car . . . after going to see a movie . . . and we just talk about the movie. There’s [sic] no clips, no footage, it is just us sitting in a car, talking about a movie.”)

¹⁶² Mignon Clyburn, Comm’r, Fed. Commc’ns Comm’n, Remarks (as prepared) at the Voices for Internet Freedom Public Forum (June 13, 2017) (“We ensured that balanced rules were in place for broadband providers and content creators alike, rules that would preserve the internet as a platform for creativity and innovation for decades to come.”)

IV. PROPOSED SOLUTIONS & CRITICISMS THEREOF

Calls for reforming the DMCA’s takedown procedures, particularly from those who assert that the DMCA improperly favors rights-holders, have persisted since 2010, the year of *Lenz*’s district court decision.¹⁶³ Proposed reforms have ranged from practical,¹⁶⁴ to stringent,¹⁶⁵ to woefully harsh.¹⁶⁶ A new and reformed § 512 will ensure that as much fairly used content as possible remains online, while still allowing copyright holders the ability to efficiently enforce their rights. Absent Supreme Court consideration of *Lenz*,¹⁶⁷ the task of finding the DMCA’s equitable balance between rights-holders and content creators will fall to Congress or courts outside of the Ninth Circuit.¹⁶⁸ Ultimately, Congress or the courts should find a solution that preserves the interests of copyright law.¹⁶⁹

A. Judicial Solutions

Above all else, copyright law’s principal goal should be to incentivize authorship, while avoiding taking action that chills speech — and in particular avoiding actions which disincentivize engagement with works in new, expressive and sometimes critical ways, such as parody and satire. Allowing copyright holders to censor critical works runs counter to that goal by both chilling speech and

¹⁶³ Compare Randazza, *supra* note 5, with Joseph M. Miller, *Air Use Through the Lenz of § 512(C) of The DMCA: A Preemptive Defense to a Premature Remedy?*, 95 IOWA L. REV. 1697, 1702 (2010) (both calling for reforms to the DMCA despite six years having elapsed between their respective publications).

¹⁶⁴ Miller, *supra* note 163, at 1725 (advocating for an application of an objective standard to rights-holder’s affirmations of good faith belief).

¹⁶⁵ Randazza, *supra* note 5, at 777-78 (suggesting an affirmed statement of good faith from the rights-holder prior to issuing a notice as a requirement, in a manner similar to the resolution in *Lenz*).

¹⁶⁶ *Id.* at 778 (further proposing a regime in which rights-holders would lose their copyright if they misrepresented their good-faith belief as to unlawful infringement).

¹⁶⁷ The Supreme Court denied certiorari to both petitioners and respondents. Petition for Writ of Certiorari, *Lenz v. Universal Music Corp.*, 137 S. Ct. 2263 (2017) (No. 16-217); Petition for Writ of Certiorari, *Universal Music Corp. v. Lenz*, 137 S. Ct. 416 (2016) (No. 16-218).

¹⁶⁸ Those courts will need to depart from both the majority and concurring opinions in *Lenz*. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154-55 (9th Cir. 2015) (holding that a party’s subjective consideration of fair use would be sufficient); *id.* at 1159-60 (Smith, J., concurring) (arguing against the majority’s subjective good faith analysis, and instead proposing a more searching and objective consideration of the fair use doctrine).

¹⁶⁹ See U.S. CONST. art. I § 8, cl. 8 (inuring in Congress the power to “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”); Stacey L. Dogan & Joseph P. Liu, *Copyright Law and Subject Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. 203, 216-18 (2005) (discussing the policies underlying judicial treatment of copyright law in the context of software disputes).

preventing content creators from engaging in authorship through expressive re-use of copyrighted elements.¹⁷⁰ The most troubling stories involving DMCA takedown requests involve no copyrighted content at all.¹⁷¹ A reasonable solution to the problem of baseless takedowns should include some disincentive to rights-holders' issuance of baseless takedown requests.¹⁷²

Although copyright law allows for fair use of copyrighted materials,¹⁷³ copyright owners are entitled to protect their rights as well.¹⁷⁴ The Ninth Circuit abridged those rights inasmuch as it installed a significant obstacle that rights-holders must pass before gaining the ability to make a *prima facie* claim against anyone who copies or makes works derivative of their copyrighted work.¹⁷⁵ A threshold requirement for any true solution must therefore include a correction of the Ninth Circuit's error and a recognition that fair use is an affirmative defense.¹⁷⁶

Such a correction will not, however, satisfy content creators' valid concerns — *i.e.*, under *Lenz*, copyright holders would still be able to issue a takedown request with a mere facial consideration of whether a use was fair.¹⁷⁷ The following proposals for judicial responses to *Lenz* seek to balance the interests at play.

1. The Overly-Stringent: Copyright Cancellation for “Misuse”

One potential solution, which owes its origin to the doctrine of copyright misuse, proposes the nullification of rights-holder's copyright registrations, where that rights-holder frequently issues baseless takedown requests.¹⁷⁸ This solution would pose a serious threat to rights-holders.

Copyright misuse is a separate affirmative defense available in cases in which a rights-holder attempted to extend the exclusionary power granted under copyright law beyond the usual scope of protection — at times through conduct otherwise regulated under antitrust law.¹⁷⁹ Traditionally, courts have rejected

¹⁷⁰ *Id.* at 749-50 (noting how some rights-holders abuse the DMCA to censor critical speech).

¹⁷¹ See Randazza, *supra* note 5, at 749-51. See also Channel Awesome, *supra* note 161 and accompanying text.

¹⁷² *Id.* at 750-51, 775 (advocating for harsher punishments for rights-holders if they make claims in bad faith).

¹⁷³ 17 U.S.C. § 107 (2012).

¹⁷⁴ 17 U.S.C. § 106 (2012).

¹⁷⁵ *Id.*

¹⁷⁶ This threshold requirement serves to protect rights-holders, as conceptualizing fair use as a right too easily permits infringers to escape the burden of proving that their use was fair. See text accompanying *supra* notes 121-125.

¹⁷⁷ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152-54. (9th Cir. 2015).

¹⁷⁸ See *id.* at 775-76.

¹⁷⁹ NIMMER, *supra* note 37, at §§ 13.09[A][1][a], [A][2][a]. See also *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990) (upholding a claim of copyright misuse in a

claims of copyright misuse, reasoning that, “one who has entered into an illegal contract does not thereby place himself outside the protection of the law so as to permit others to injure him with impunity.”¹⁸⁰ For instance, the *Apple, Inc. v. Psystar Corp.* court rejected a misuse defense premised upon Apple’s having restricted use of Mac OS X software to Apple hardware, because, *inter alia*, (1) the software was licensed rather than sold; and (2) that license neither “re-strict[ed] competitor’s ability[ies] to develop their own software, nor [did] it preclude customers from using non-Apple components with Apple computers[.]” and thus did not have a sufficient anti-competitive effect to warrant a finding of misuse.¹⁸¹

Ultimately, this kind of behavior is different from copyright holders’ issuance of takedown requests, however carelessly done, as rather than action contemplated under copyright law, misuse reflects an effort to improperly expand the scope of a rights-holder’s monopoly.¹⁸² Even if copyright misuse were to apply to instances of frivolous takedown requests, proponents of the instant solution propose remedies that go beyond those usually observed for copyright misuse.¹⁸³ Whereas copyright misuse traditionally bars a rights-holder from recovering damages or equitable relief, advocates of the instant solution would divest the rights-holder of any and all rights to their protected work, albeit temporarily.¹⁸⁴ Though this solution does not mandate that a rights-holder’s copyright immediately falls into the public domain and would permit re-application for registration, it still subjects the rights-holder to a heavy loss — rendering willful appropriation of a formerly copyrighted work without consequence.¹⁸⁵ As such, this solution puts the thumb on the scale in favor of potential infringers, and would ultimately discourage rights-holders from enforcing their legal rights.¹⁸⁶

Although this particular solution may go too far, one can make a case for punishing those who consistently issue baseless takedown notices, which can

case in which multiple copyright owners selected licensees in such a way as to inhibit third party competition because such licenses amounted to a use of “copyright in a manner contrary to public policy”).

¹⁸⁰ NIMMER, *supra* note 37, at § 13.09[A][2][a]-[b].

¹⁸¹ 658 F.3d 1150, 1159-60 (9th Cir. 2011).

¹⁸² Nimmer, *supra* note 37, at § 13.09[A][3][d]. By way of example, the Third Circuit heard a case of potential misuse alleging that Disney selectively licensed the use of its film trailers on websites. *Video Pipeline, Inc. v. Buena Vista Home Entm’t.*, 342 F.3d 191, 203 (3d Cir. 2003) (ultimately dismissing the case because the selective licensing at issue did not present the public policy concerns copyright misuse should prevent).

¹⁸³ Nimmer, *supra* note 37, at § 13.09[A][1][a].

¹⁸⁴ Randazza, *supra* note 5, at 749-51.

¹⁸⁵ *Id.* at 775-76. Were a rights-holder to successfully restore their copyright, they would not be able to seek redress for appropriation which occurred during the period in which the mark had been cancelled. *Id.*

¹⁸⁶ *See* 17 U.S.C. § 106 (2012) (setting out the rights attendant to a grant of copyright protection).

cause financial harm to the aggrieved creator.¹⁸⁷ Whether necessary to protect rights-holders or not, the DMCA should not be used as either a tool to chill free speech nor as a means to disincentivize future authorship.¹⁸⁸ Perhaps a more measured solution would thus include adding a damages provision, making statutory damages available to targets of improper takedown notices, in § 512(f).¹⁸⁹

2. The Impractical: Individual Fair Use Consideration

Many mechanisms for rewarding authorship may introduce some form of inefficiency.¹⁹⁰ Whether such a mechanism is worthwhile turns on weighing that inefficiency against its benefits — which in this case calls for consideration of whether a mechanism will sufficiently incentivize authorship without unduly interfering with speech or technological development.¹⁹¹ For example, by promoting rights-holders interests SOPA and PIPA would have incentivized authorship, but posed a significant risk to creator-speech.¹⁹² Some solutions purporting to effectively balance those competing concerns call for searching consideration of fair use on a case by case basis.¹⁹³ Those solutions, however, are impractical — either in terms of cost or incentive.¹⁹⁴

As discussed above, Judge Smith's concurrence in *Lenz* serves as the paradigm for this sort of a proposal.¹⁹⁵ In that concurrence, Judge Smith criticizes the majority's *subjective* fair use test as one that rights-holders can easily abuse and calls for an objective searching consideration, on a case-by-case basis, of whether the rights-holder considered each fair use element.¹⁹⁶ The trouble with

¹⁸⁷ See *Monetization During Content ID Disputes*, YOUTUBE (Feb. 21, 2017), <https://support.google.com/youtube/answer/7000961> (noting YouTube's recent change in its handling of advertising revenue for videos that were the targets of takedown notices; where a rights-holder issuing a takedown request in bad faith could formerly reap one-hundred percent of the videos advertising revenue prior to the filing of a counterclaim, that revenue is now placed in a "side-pot" until the dispute is resolved).

¹⁸⁸ Rebecca Alderfer Rock, Comment, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious*, 86 TEMP. L. REV. 691, 699 (2014).

¹⁸⁹ §512(f) presently has no method of assessing damages apart from those already granted under the copyright statute See *infra* text accompanying note 209. See also 17 U.S.C. § 504 (2012) (statutory damages provision).

¹⁹⁰ See Seltzer, *supra* note 59, at 179-80.

¹⁹¹ *Id.*

¹⁹² See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Protect IP Act, S. 968, 112th Cong. (2011); Julian Sanchez & David Segal, *Blackout Protesting SOPA, PIPA Bills Makes Statement on Censorship*, (Nov. 19, 2012), <https://www.cato.org/publications/commentary/blackout-protesting-sopa-pipa-bills-makes-statement-censorship> [<https://perma.cc/7L5Q-PZU4>].

¹⁹³ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1159-60 (9th Cir. 2015) (Smith, J., Concurring).

¹⁹⁴ See *infra* text accompanying notes 196-205.

¹⁹⁵ See *supra* Part II.B.

¹⁹⁶ See *Lenz*, at 1159-60 (Smith, J., Concurring).

this proposal, however, comes with implementing a consideration of fair use on an objective basis. While the fair use factors are incorporated into the statute, they are largely a restatement of common law principles to *guide* consideration of fair use in evaluating a claim, rather than to serve as a formula for application to each claim.¹⁹⁷ Fair use can still lie even if one such element is absent.¹⁹⁸ How can we fairly expect a rights-holder — who may very well not have legal training, and much less be a judge — to determine whether a third-party use is fair? ¹⁹⁹ Judge Smith’s proposal, therefore, essentially calls for an exponential growth in the size of OSP legal teams.²⁰⁰ While well intentioned, such a solution may be too impractical and costly to impose.

One means to rectify the deficiencies in Judge Smith’s proposed solution is to rely on third parties known to use “reporting agents” to issue notice and takedown proceedings on rights-holders’ behalves.²⁰¹ As noted above, the numerosity of content might render rights-holders unable to examine each piece of content themselves. Indeed, there is an “undeniable trend . . . for the continued use of [third parties] to detect infringement and issue takedown notices on behalf of copyright owners.”²⁰² It stands to reason that reporting agents receive some kind of compensation for their efforts. Were such compensation based on the number of takedown requests an agent issues, for example, the resulting incentives — to request the takedown of as many potentially infringing works as possible — might exacerbate the DMCA’s existing issues, including continued disciplinary action against, and monetary harm to, content creators.²⁰³

While content creators can file counter-notifications, some have pointed out that those filing counter-notifications are required to make “a statement under

¹⁹⁷ See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (Mass. Cir. Ct. 1841); Judge Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105-06 (1990).

¹⁹⁸ See *Cariou v. Prince*, 714 F.3d 694, 706-07 (2d Cir. 2013) (finding that transforming a work with a new significant meaning or message was sufficient to satisfy fair use, despite the third fair use factor “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” not being present).

¹⁹⁹ See Randall P. Bezanson & Joseph M. Miller, *Scholarship and Fair Use*, 33 COLUM. J.L. & ARTS 409, 469-70 (2010) (commenting that flexibility in modern fair use is not only justifiable, but necessary); see also Joseph E. Sullivan, *Campbell V. Acuff-Rose Music, Inc., and the Economic Approach to Parody: An Appeal to the Supreme Court*, 11 U. MIAMI ENT. & SPORTS L. REV. 105, 120 (1993) (“Lower courts surely will face difficulty in construing the factors in factually dissimilar situations. In particular, fair use precedent is difficult to analogize to parody decisions, which involve a number of concerns not present in other copyright areas.”).

²⁰⁰ See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012) (noting the staggering amount of copyrighted content uploaded to YouTube).

²⁰¹ See Seng, *supra* note 131, at 396 (noting the increased use of such “reporting agents”).

²⁰² *Id.* at 396.

²⁰³ See Vlogbrothers, *supra* note 132 (explaining YouTube’s strike system, wherein an account may receive strikes even for *alleged*, but not confirmed, violations of YouTube’s copyright policy).

penalty of perjury that the [creator] has a good faith belief that the material was removed or disabled as a result of . . . misidentification[.]” or mistake.²⁰⁴ As a result, those content creators — who face temporary loss of revenue regardless of whether they successfully have the content restored²⁰⁵ — are forced to incur liability as a result of rights-holders frivolous overreach.²⁰⁶ As a result, reporting agents do not mitigate the issues inherent in Judge Smith’s proposed solution.

B. Alternative Solutions: “Dancing” Around the Judiciary

Ultimately, Congressional modification of the DMCA through legislation could add clarity and balance that has escaped the judiciary thus far.

1. Damages: Giving § 512(f) “Teeth”

Despite Ms. Lenz’s victory on the merits of her case, the overall outcome was more or less a stalemate, as UMC merely needed to pay nominal damages.²⁰⁷ The lesson from *Lenz* thus is that even if a court finds that a rights-holder issued a frivolous takedown request, there might be no real resultant penalty. While the DMCA does provide for the recovery of, “any damages, including costs and attorneys’ fees, incurred by the alleged infringer . . . who is injured by such misrepresentation”²⁰⁸ it contains no statutory guarantee for specific damages.²⁰⁹

This is problematic for a number of reasons. First, it is unclear whether the language of the statute would capture any and all advertising revenue that an alleged infringer may have lost. Further, even absent cognizable economic injury, damages may serve an important role in deterring bad-faith notice and takedown procedures. Although Judge Smith’s concurring opinion may have problems in its practical applicability, he was certainly correct that § 512(f) needed “teeth” to have the force of law.²¹⁰ Those “teeth” might take the form of the following modified version of § 512(f):

Misrepresentations—Any person who knowingly materially misrepresents under this section . . . shall be liable for any damages, including *but not limited to* costs and attorneys’ fees, *or any loss of revenue, personal loss, or any other out-of-pocket or property loss* incurred by the alleged infringer *as a result of the takedown . . . double damages may be assessed*

²⁰⁴ Seltzer, *supra* note 59, 178, n.35.

²⁰⁵ See *A Guide to YouTube Removals*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/intellectual-property/guide-to-youtube-removals> [<https://perma.cc/WB89-6524>] (last visited Dec. 29, 2018) (noting that a rights-holder has 10 business days to respond to a counter-notification).

²⁰⁶ Seltzer, *supra* note 59, 178, n.35.

²⁰⁷ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1156 (9th Cir. 2015)

²⁰⁸ *Id.* (quoting 17 U.S.C. § 512(f)).

²⁰⁹ The absence of a specific statutory damages provision is unlike a number of other portions of the Copyright Act. See, e.g., 17 U.S.C. § 504; 17 U.S.C. § 512 (both providing for statutory damages).

²¹⁰ See *Lenz*, 815 F.3d at 1160.

*in the interest of deterring misrepresentative notice and takedown procedures. An alleged infringer’s damages shall not be limited to damages administered under this or any related federal statute.*²¹¹

2. Chilling-Effects: Stricter Scrutiny for Parodies and Criticisms

Much of the DMCA’s criticism has centered on rights-holder’s use of the notice and takedown provision to stifle online speech.²¹² This follows, as — apart from the fact that the First Amendment provides for a fundamental right to free speech²¹³ — fair use has always protected certain types of speech.²¹⁴ As such, the DMCA should protect works which serve as a medium for such speech. Courts should grant parodic and critical works greater deference, and consider whether a rights-holder has intentionally used § 512 to police critical or humorous uses of a work.²¹⁵ As this is a legislative solution, language reflecting this modification should find a home in the DMCA’s § 512(f),²¹⁶ which relates to rights-holder misrepresentations. It might read as follows:

Misrepresentations and Omissions.— Any person who

(1) knowingly materially misrepresents under this section – (a) that material or activity is infringing, or . . .

(2) *by preponderance of the evidence is found to have failed to consider whether the material or activity is a work of parody or criticism and was determined to be a legally protected fair use . . .*

shall be liable for any damages. . . .

Two modifications in particular are worth noting. First, the provision shifts the evidentiary standard from *Lenz*’s subjective belief to a “preponderance of the evidence.” A “preponderance of the evidence” standard would disallow rights holders to utilize the easily satisfied subjective belief standard, and instead allow for a balanced determination — one which the content creator should easily overcome if they genuinely intended fair use.

²¹¹ The italicized text represents modifications to the original provision.

²¹² Randazza, *supra* note 5, at 747.

²¹³ *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the right to freedom of expression as a limitation on state power as well as the federal government).

²¹⁴ See 17 U.S.C. § 107 (2012) (codifying fair use and specifically referring to “parody...[and] criticism” in its preamble); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (stressing the importance of criticism).

²¹⁵ Note that a work’s status as parodic and/or critical does not ipso facto grant it the status of using a copyrighted work fairly. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 600 (1994) (Kennedy, J. concurring).

²¹⁶ One might hope to add the provision to § 107, however that section already states that some fair uses are ones of “criticism, [or] comment.” 17 U.S.C. § 107.

Further, per Justice Kennedy's concurrence in *Campbell*, courts applying this evidentiary standard "must take care to ensure that not just any commercial take-off is rationalized post hoc as a parody."²¹⁷ That is to say, the provision (1) mandates that rights-holders consider the effect their claim will have on Internet speech; and (2) vests courts — who we have trusted to take care in discerning works deserving of First Amendment protections from commercial works — with the discretion to determine how valid that consideration was. This will prevent bad faith infringers from claiming good faith despite only making a cursory consideration thereof, and will further prevent creators from improperly claiming First Amendment protection over commercial works.

3. Congress Reaches Out: Including Content Creators

Whatever solution we pursue, Congress must — as it and the U.S. Copyright Office have on prior occasions²¹⁸ — reach out to interested stakeholders in deterring what aspects of the DMCA are in need of amendment. As the cases of SOPA and PIPA indicate, the online creator community have shown they are capable at harnessing the general public *en masse* in order to influence public policy.²¹⁹ The Internet can work for all parties who use it, and not only the ones who profit most from it. Time will tell if new developments, adverse to online content creators, ripen into a movement similar in tenor to the "Stop-SOPA/PIPA" movement, or fall short of becoming popular like the most recent one-hit-wonder.

CONCLUSION

The DMCA represents a bargain between OSPs and corporate rights-holders — in which OSPs gained limited liability in exchange for protecting complying

²¹⁷ *Campbell*, 510 U.S. at 600.

²¹⁸ See, e.g., Section 512 Study: Request for Additional Comments, 81 Fed. Reg. 78636 (Nov. 8, 2016) (announcing that the U.S. Copyright Office was considering comments regarding the DMCA's safe harbor provisions which would "reply or expand upon issues raised in written comments" submitted in 2016); Bill Chappell, *Q&A: Congress, SOPA And A Fight Over The Web*, NPR (Jan. 18, 2012, 8:19 PM), <https://www.npr.org/2012/01/18/145423947/q-a-sopa-congress-and-a-fight-over-the-web> [<https://perma.cc/B5WX-HMCF>] ("Some co-sponsors of the bill have abandoned it, after hearing from their constituents."); Grant Gross, *House committee appears headed toward approving SOPA*, MACWORLD (Dec. 16, 2011, 10:15 AM), https://www.macworld.com/article/1164339/house_committee_appears_headed_toward_approving_sopa.html [<https://perma.cc/K77C-JU8Q>] ("Issa, Representative Jason Chaffetz, a Utah Republican, and other opponents of SOPA asked Smith to delay the markup of the bill and hold a hearing featuring Internet engineers and their views on whether the bill would harm Internet security.")

²¹⁹ Ngak, *supra* note 130 (commenting on the Internet's response to SOPA and PIPA).

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with rights-holder policing efforts.²²⁰ The DMCA did not, however, consider the proliferation of Internet content and the growing needs of content creators — who have faced, and absent amendment to the DMCA will continue to face — real harm due to rights-holder overzealousness.

In negotiating a new bargain, Congress must look beyond Hollywood, Nashville, and Silicon Valley, and reach out to their constituents, who arguably serve as the driving force behind modern media consumption and creation in the 21st century. The Internet represents a boundless frontier for creative and technical innovation, as well as social change. The way to foster that creativity is not to silence it, but first to take a step back, and listen.

²²⁰ *Online Policy Group v. Diebold, Inc.* 337 F. Supp. 2d 1195, 1206 (N.D. Cal. 2004) (“Congress carefully balanced the competing interests of copyright holders, ISPs, and the public, by providing immunity, subject to relief, for any misuse of the statute.”).