

## **Copyright Holders Must Consider Fair Use Before Sending DMCA Notice**

Copyright owners must consider whether a potential infringer's use is a fair use before it can send a takedown notice or it may face potential liability for bad faith notification, the Ninth Circuit said.

Under the Digital Millennium Copyright Act, a copyright owner may request that an internet service provider take down infringing content. The notice must affirm that the use of the material "is not authorized by the copyright owner, its agent, or the law."

In a case of first impression, Universal Music Corp. sent a takedown notice for a 29-second YouTube video of a mother's two young children in the family kitchen dancing to the song *Let's Go Crazy* by Prince. The "dancing baby" video was taken down and the mother sent a counter notice to reinstate the video. The video ultimately was reinstated.

The mother filed a lawsuit claiming, among other things, that Universal misrepresented facts in its takedown notice. Under the DMCA, if an entity abuses the Act, it may be subject to liability for damages. Both sides filed for summary judgment, which the trial court denied, but it certified to the appellate court the question whether fair use must be considered before notice can be sent.

"The DMCA requires consideration of fair use prior to sending a takedown notification," the appellate court found. "To be clear, if a copyright holder ignores or neglects our unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under § 512(f)."

Universal sent the takedown notice after reviewing YouTube's content to see if it "embodied a Prince composition" and if it made "significant use" of the composition. Universal's internal guidelines did not specifically include any consideration of fair use. The appellate court noted that anyone who makes a fair use of a work is not an infringer. "Fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c)" of the DMCA.

Because the DMCA requires consideration of fair use prior to sending the takedown notice, the appellate court said "a jury must determine whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof." The appellate court acknowledged that there is a "pressing crush of voluminous infringing content that copyright holders face in a digital age. But that does not excuse a failure to comply with the procedure outlined by Congress."

*Lenz v. Universal Music Corp. et al.*, Ninth Cir.No. 13-16106 and 13-16107, issued Sept. 14, 2015.

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