

Fair Use Through the *Lenz* of § 512(c) of the DMCA: A Preemptive Defense to a Premature Remedy?

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*ABSTRACT: Copyright holders use § 512(c) takedown notice procedures as a sword to suppress potentially fair uses of their works where Congress intended § 512(c) to be used as a shield to protect their copyrights. The potential for § 512(c) abuse continues to grow, but *Lenz v. Universal Music, Corp.* represents a judicial recognition of abuse as well as an effort to quash it by requiring copyright holders to consider the fair-use defense prior to sending takedown notice. Thus, *Lenz* holds copyright holders accountable for abusing § 512(c). However, *Lenz* is only a step in the right direction, and its judicial and statutory limits need to be revisited.*

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I. INTRODUCTION

America is an information culture. In contrast to the world in which Guttenberg developed his printing press, there are few obstacles censoring, limiting, or delaying the information that is publically accessible. Society's capacity to locate, consume, and disseminate information is unsurpassed, largely as a result of a revolution in publishing equal to, if not greater than, the Guttenberg press: the Internet. The Internet surpasses Guttenberg's press with its diverse, accessible, inexpensive, and simple communication tools such as Facebook, MySpace, LinkedIn, Skype, Blogger, and YouTube. These tools fall just shy of Harry Potter's magical floo-powder in their ability to transport individuals—rather, their images and words—into any shop, school, home, or hamlet.

America is also a “remix culture.”¹ Hand in hand with society's unprecedented ability to access or relay information is society's ability to quote, parody, or otherwise restructure information and publish it online in altered form. Though copyright law protects much of the information society consumes from reproduction, adaptation, and distribution, copyright law also protects those who remix that information for certain purposes. Remixing and disseminating information for purposes such as criticism, scholarship, and education, for example, are uses whose social benefits outweigh the costs to the copyright holder—a doctrine called fair use.² Thus, bloggers can quote and criticize books they have recently read,³ comedy groups can parody Junior Miss USA contestants⁴ and presidential candidates,⁵ and search engines can index photographs.⁶

In traditional copyright cases, where the copyright holder sues the user for infringement, each side will present its case, resulting in an injunction against uses that are infringing (or damages). However, the speed with which the Internet can disseminate potentially infringing information and the sheer amount of Internet users who are involved in remixing prompted quicker and more-controversial procedures in copyright law. Instead of suing each and every potential infringer on the Internet, copyright holders can simply notify the online-service provider (“OSP”) of the potentially

1. Lawrence Lessig, *In Defense of Piracy*, WALL ST. J., Oct. 11, 2008, at W3, available at <http://online.wsj.com/article/SB122367645363324303.html>.

2. See 17 U.S.C. § 107 (2006) (listing the factors taken into consideration when determining fair use); see also *infra* Part III.A (discussing the doctrine of fair use).

3. Dwight Garner, *A Woman's Undying Gift to Science*, N.Y. TIMES, Feb. 3, 2010, at C1, available at <http://www.nytimes.com/2010/02/03/books/03book.html?ref=books>.

4. QuietLibrary, *Miss Teen South Carolina Calls 911*, YOUTUBE (Aug. 28, 2008), <http://www.youtube.com/watch?v=F226II-lo5M>.

5. *Saturday Night Live* (NBC television broadcast Oct. 9, 2008), available at http://www.nbc.com/Saturday_Night_Live/video/clips/update-thursday-debate-open/742065/ (skit of Obama and McCain debate).

6. Google Image Search, <http://images.google.com/> (last visited June 19, 2010).

infringing material and require the OSP to remove it or risk sharing liability for infringement. Thus, the copyright holder achieves speedy removal of potentially infringing information. This change positively affects society where the infringement is clear. Where infringement is not clear, however, the change can harm society by depriving it of valuable information.

For example, imagine you are a proud parent recording your baby's first steps.⁷ Your baby appears to have a keen sense of rhythm, for you notice that he is swaying back and forth to music playing from the radio. You review the video and decide it is too cute to keep to yourself, so you get online, upload the video onto YouTube, and forward it to all of your friends and family. Your dad, who has always been slow to respond to e-mails, responds a few days later with a short e-mail: "What video?" Confused, you go online to find it, but it is gone. That day, however, you receive an e-mail from YouTube saying that the owner of the copyright in the music to which your child was grooving demanded the video be taken down for infringement.

The law provides the proud parent with remedies that, at best, cause substantial delay in restoring the video or remain out of reach either because the cost of litigation is too high or because the standard of proof is too difficult. The result? A time-sensitive video has lost much of its "bang," and the next time the parent captures a cute moment on video, she may choose to avoid the Internet as a forum for sharing it and wait instead until the next family reunion.

Perhaps the most disturbing part of this story is that everyday users cannot access their remedies as readily as copyright holders, who, as in the example above, may be large and wealthy companies. Nor can users access remedies until after the copyright holder has already been granted its remedy. This inequality leads to abuse by those who can easily affect takedowns, aggravating the loss or delay in the dissemination of valuable information to society and chilling online speech.

It gets worse. Society has the potential to lose more than family videos. Copyright holders can also effect the removal of time-sensitive news reports, political parodies, competitors' sale advertisements, and demonstrators' calls to organize before the merits of their claims of infringement have ever been determined. Thus, takedown provides a premature remedy that, when used abusively, benefits copyright holders to the detriment of the rest of society.

However, the everyday parent from the example above called on the courts to address the inequality and abuse fostered by the takedown process. The result is *Lenz v. Universal Music Corp.*,⁸ a 2008 decision by a California district court that decided that since copyright holders can receive a remedy before a court determines whether the fair-use defense applies, copyright

7. This example is drawn from the subject case of this Note, *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

8. *Id.*

holders are now required to consider fair use *before* they seek takedown.⁹ The decision, in effect, applies the fair-use defense preemptively in an effort to prevent a premature remedy from becoming an abusive tactic.

This Note examines how *Lenz* employs the fair-use analysis in the context of online-copyright laws—specifically those governing the takedown process in section 512(c) of the Digital Millennium Copyright Act of 1998¹⁰ (“DMCA”)—and ultimately concludes that while *Lenz* is a step in the right direction, it does not go far enough to relieve an excessive burden on users and eliminate abusive practices. Part II introduces § 512(c), reviewing the history and purpose of the DMCA and the takedown process. This part also examines the “good-faith belief” of infringement that the law requires copyright holders to form prior to sending takedown notices. Users who litigate over takedowns must prove that copyright holders lacked a good-faith belief using a subjective standard. This burden presents a tremendous obstacle to a user’s recovery and fosters an abusive online environment. Thus, copyright holders can use § 512(c) as a sword to suppress unwanted expression rather than a shield to protect their own rights.

Part III then introduces the *Lenz* decision as a response to § 512(c) abuses, including its effect on the application of fair use when used in the context of § 512(c). After introducing *Lenz*, this Part reviews the history and purpose of fair use and how it is traditionally applied in copyright litigation involving the Internet. Finally, this Part argues that *Lenz* recognizes the abusive environment § 512(c) creates and that *Lenz* attempts to provide a solution by requiring copyright holders to replace their “shoot, ready, aim” strategy with the responsibility of considering whether online postings are fair use *before* initiating takedown procedures. *Lenz* thus departs from the traditional application of fair use as an affirmative defense by giving it a preemptive posture in the context of § 512(c).

Part IV recommends additional changes in § 512(c) litigation that may level the playing field between copyright holders and users more adequately than the measures adopted in *Lenz* can on their own. One improvement that would build on *Lenz* is to replace the subjective good-faith standard with an objective one. Such a change lowers the burden of proof on the user and puts very little burden on the copyright holder. Another suggested improvement, taken from copyright litigation outside of the DMCA, is the doctrine of copyright misuse, which borrows from patent law and essentially punishes copyright holders who use their copyrights to suppress legitimate uses or claim greater rights than they really have. Finally, this Note suggests adopting the “unreasonable claims” standard for awarding attorney’s fees, which is a doctrine that is gaining traction in copyright litigation outside of the DMCA and is meant to deter frivolous infringement claims.

9. *Id.* at 1154.

10. 17 U.S.C. § 512(c) (2006).

This Note advocates increased protection for Internet users from potential abuses of § 512(c), a process designed to effectively protect copyrights from online infringement. In doing so, this Note does not advocate diminishing copyright protection, only to realign the incentives that the takedown process, when left unchecked, creates. The hope is that properly aligning the incentives and distributing the relative burdens will eliminate abusive tactics that unduly enlarge copyright protection and chill free speech over the Internet.

Creating copyright protections for the copyright holder as well as the fair user is a difficult balancing act, an effort that is currently embodied in the DMCA. Thus, the first step is to understand how the DMCA and its takedown procedures initially developed.

II. SECTION 512(C) OF THE DMCA

The DMCA developed, in part, as an extension of the Copyright Act to cover new digital forms of information dissemination, including the Internet. Section 512(c) of the DMCA is the end product of a compromise between OSPs and copyright holders. It absolves OSPs from liability when they comply with demands from copyright holders to remove potentially infringing material. Conspicuously absent from these negotiations were the Internet users, resulting in a compromise that provides a quick and effective solution for OSPs and copyright holders, and a heavy burden on Internet users. However, § 512(c) was not intended to burden the public, but rather, to protect the legitimate rights of copyright holders. Thus, this Note first addresses the history and purpose of § 512(c), the takedown process, and the requirement of a good-faith belief, and concludes with an examination of how § 512(c) missed its mark and gave birth instead to an abusive regime of online-copyright enforcement.

A. HISTORY AND PURPOSE

In 1998, Congress passed the Online Copyright Infringement Liability Limitation Act (“OCILLA”),¹¹ as Title II of the DMCA.¹² Part of its purpose was “to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”¹³ Congress sought to ensure improvement and expansion of Internet services and felt that the proper way to do so was to define when an OSP could avoid liability for transmitting potentially infringing material.¹⁴

11. *Id.* § 512.

12. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

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

14. *Id.*

The Senate Committee for the Judiciary sympathized with OSPs.¹⁵ Recognizing that case law on this issue is still developing,¹⁶ the Committee decided not to “embark[] upon a wholesale clarification” of the issue, but rather to allow the law to continue evolving by creating “safe harbors” based upon “common activities” of OSPs.¹⁷

Ultimately, the DMCA sought to accomplish its goals through a structure that (1) “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements” online, and (2) “provides greater certainty to [OSPs] concerning their legal exposure for infringements that may occur in the course of their [common] activities.”¹⁸

The safe-harbor provisions provide OSPs with relief from monetary damages¹⁹ and, in some cases, from injunctions.²⁰ This compromise between copyright holders and OSPs hinges on compliance with the takedown provisions of § 512(c).

B. “EXPEDITIOUS” TAKEDOWN

In essence, the DMCA safe harbors require OSPs to comply “expeditiously” with the takedown procedures embodied in § 512(c) to avoid liability. However, copyright holders and users have responsibilities outlined in the takedown process as well. These responsibilities were initially intended to balance the copyright holder’s need for fast action to avoid potentially widespread and instantaneous harms to their copyrights with the Internet user’s right to access, remix, and disseminate information within the bounds of fair use. Subpart B.1 examines the technical requirements of

15. *Id.* at 19.

16. The committee specifically noted that most of the cases address liability from either a contributory or vicarious liability standpoint, citing such cases as *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (illustrating contributory liability); and *Marobie-FL v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997) (illustrating vicarious liability). S. REP. NO. 105-190, at 19 & n.20.

17. S. REP. NO. 105-190, at 19. The Committee identified four common activities for which an OSP could qualify for safe harbor: “(1) digital network communications, (2) system caching, (3) information stored on service providers, and (4) information location tools.” *Id.*; *see also* 17 U.S.C. § 512(a)–(d) (2006) (listing nearly identical headings for four exceptions in the DMCA). The Committee clearly stated that OCILLA is not an attempt to mandate when an OSP is or is not liable for copyright infringement; rather, it is to provide limited liability for qualifying situations in which an OSP “is found to be liable under existing principles of law.” S. REP. NO. 105-190, at 19.

18. S. REP. NO. 105-190, at 20.

19. *Id.* Section 512(k)(2) defines monetary relief as “damages, costs, attorneys’ fees, and any other form of monetary payment.” 17 U.S.C. § 512(k)(2).

20. S. REP. NO. 105-190, at 20. Where an OSP qualifies for a safe harbor, the court limits an injunction against an OSP to two forms: (1) a restraining order compelling the OSP to terminate the infringing subscriber’s account, or (2) a restraining order compelling the OSP to take “reasonable steps” to block the infringing subscriber’s access to “a specific, identified, online location outside the United States.” 17 U.S.C. § 512(j)(1)(B)(i)–(ii).

the takedown process for copyright holders and users. Subpart B.2 then examines in greater detail the copyright holder's obligation to form a good-faith belief and the standard the courts use to evaluate this belief.

1. The Takedown Process

The takedown process involves statutorily explicit technical requirements that provide both the copyright holder and the user, at least on the surface, with an alternative to litigation. In addition, they provide OSPs with safe harbors to avoid secondary liability. As previously mentioned, these safe harbors only apply to specific "common activities," in which OSPs may unknowingly facilitate millions of violations of copyright law.²¹ This Note focuses on only one of these safe harbors: § 512(c).

Section 512(c) deals specifically with providing a safe harbor to OSPs for the "common activity" of passively hosting user information that Internet users post.²² An OSP is not liable for copyright infringement for material that a user passively stores and ultimately controls if: (1) the OSP either has no knowledge or awareness of the infringing material or "expeditiously" removes it upon obtaining knowledge or awareness; or (2) the OSP derives no "financial benefit" from the infringing material; and (3) "upon notification . . . , [the OSP] responds expeditiously to remove, or disable access to," the allegedly infringing material.²³ The § 512(c) safe harbor also requires that the OSP provide the Copyright Office with the contact information of an agent designated to receive notices of alleged infringement.²⁴

A "takedown" notice must contain six specific elements to be effective:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

21. See *supra* notes 16–17 and accompanying text (discussing the "common activities" to which the safe harbors apply).

22. 17 U.S.C. § 512(c). This is the third "common activity" addressed by the Committee. See *supra* note 17 and accompanying text (discussing the "common activities" to which the safe harbors apply).

23. 17 U.S.C. § 512(c)(1).

24. *Id.* § 512(c)(2).

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.²⁵

In addition to enjoying safe harbor from copyright holders, an OSP will not be liable to a user for complying in good faith with the § 512(c) takedown provisions, even if a court ultimately finds that the allegedly infringing material is not in fact infringing.²⁶

If, after the OSP has taken down the allegedly infringing material and has taken “reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material,”²⁷ the user wishes to contest the takedown notice, the user may send the OSP’s designated agent a counter-notification that contains an electronic signature, identifies the removed or blocked material, states a good-faith belief that the material was removed by mistake, and provides the user’s contact information and consent to federal jurisdiction.²⁸

After receiving a counter-notification, an OSP maintains a safe harbor as long as it “promptly provides the [copyright holder] with a copy of the counter notification, and informs [the user] that it will replace the removed material or cease disabling access to it in 10 business days.”²⁹ The OSP must then restore the material within ten to fourteen days, unless the copyright holder notifies the OSP’s designated agent that it has filed an action against the subscriber.³⁰ If either the copyright holder or the user misrepresents the information in his notification or counter-notification, it will be liable to the other—and possibly to the OSP—for damages, including attorney fees.³¹

Of special importance in this Note is the specific element of the takedown notice that requires the copyright holder to formulate a good-faith belief that the user has posted infringing material.

25. *Id.* § 512(c)(3)(A).

26. *Id.* § 512(g)(1).

27. *Id.* § 512(g)(2)(A).

28. 17 U.S.C. § 512(g)(3).

29. *Id.* § 512(g)(2)(B).

30. *Id.* § 512(g)(2)(C).

31. *Id.* § 512(f).

2. Formulating a Good-Faith Belief

A key requirement of the § 512(c) procedures, one that courts have only recently explored, is that the copyright holder must formulate, prior to sending the notice, a “good faith belief” that the allegedly infringing material is not authorized.³² The leading case addressing the requirement of a “good faith belief” in § 512(c)(3)(A)(v) takedown notification is *Rossi v. Motion Picture Ass’n of America*.³³ The only other court in the Ninth Circuit to touch on the issue of good-faith belief—a decision published earlier in the same year—did not reach the merits of the issue.³⁴ Only one court outside of the Ninth Circuit has published a decision on the formulation of a good-faith belief, and, because its circuit had not ruled on the issue before, it adopted the Ninth Circuit’s *Rossi* analysis.³⁵

In *Rossi*, an owner of an online movie directory sued the Motion Picture Association of America (“MPAA”) in tort after the MPAA sent the OSP a takedown notice pursuant to § 512(c).³⁶ *Rossi*’s online directory advertised downloadable movies, which created the impression that unauthorized movies could be downloaded from the site, prompting the MPAA to send several takedown notices.³⁷ *Rossi* argued that the MPAA did not have enough information to form a “good faith belief,” and that had the MPAA conducted a reasonable investigation of the website it would have discovered that it could not download movies from the site—essentially *Rossi* asked the Court to apply an objective standard to determine whether the MPAA

32. 17 U.S.C. § 512(c)(3)(A)(v) requires a copyright holder sending a § 512(c) takedown notice to include “[a] statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”

33. *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000 (9th Cir. 2004).

34. *Doe v. Geller*, 533 F. Supp. 2d 996 (N.D. Cal. 2008). In *Doe*, the plaintiff, an activist against “irrational beliefs,” uploaded a video clip on YouTube that included another video clip, describing the psychic powers that the defendant claimed to possess, in an effort to discredit the defendant. *Id.* at 1002. After the defendant sent the OSP a takedown notice, the plaintiff sued, alleging misrepresentation by the defendant pursuant to § 512(f). *Id.* at 1003. Ultimately, the court dismissed the case for lack of personal jurisdiction and did not reach the merits of the case. *Id.*

35. See generally *Dudnikov v. MGA Entm’t, Inc.*, 410 F. Supp. 2d 1010 (D. Colo. 2005). The *Dudnikov* court declined to hold the defendant to an objective standard of good-faith belief; rather, the court granted the defendant’s motion for summary judgment against the plaintiffs’ § 512(f) claim because the plaintiffs failed to show that the defendant lacked a subjective good-faith belief that the plaintiffs’ online-auction-site posting (of a picture of a fleece hat with “Bratz” doll images on it) infringed upon the defendant’s copyright when it sent the § 512(c) takedown notice. *Id.* at 1012–13.

36. *Rossi*, 391 F.3d at 1001–02.

37. *Id.* at 1002.

formulated a “good faith belief.”³⁸ The MPPA responded that a “good faith belief” should be a subjective standard of reasonableness.³⁹

The court reasoned that the statute “impos[es] liability upon copyright owners only for *knowing* misrepresentations regarding allegedly infringing websites.”⁴⁰ Furthermore, “Congress’s apparent intent that the statute protect potential violators from *subjectively* improper actions by copyright owners” would be undermined if the court were to “[m]easur[e] compliance with a lesser ‘objective reasonableness’ standard.”⁴¹

In conclusion, the court added that the “good faith” standard has traditionally been a subjective standard, and that since Congress did not expressly include an objective standard in the takedown provisions, a subjective standard applies to § 512(c)(3)(A)(v) “good faith belief.”⁴² The court ultimately granted summary judgment for the MPAA.⁴³

The subjective standard of forming a good-faith belief imposes a very high standard of proof upon Internet users. Thus, § 512(c), in light of the *Rossi* standard, has led to a regime that favors copyright holders, often at the expense of Internet users. In other words, the *Rossi* standard opens the door for copyright holders to use § 512(c) takedown procedures “as a sword to suppress publication . . . rather than as a shield to protect [their] intellectual property.”⁴⁴

C. ABUSE OF § 512(c)

One could argue that courts could not foresee the potential abuses that their treatment of § 512(c) might produce. The reality, however, is that whatever the courts might have intended, the result is not what Congress intended with the DMCA. This Subpart addresses the abuses that currently exist and may exist in the future as a result of § 512(c) and *Rossi*.

Many Internet users already feel that § 512(c) creates an oppressive online environment. For example, an anonymous group posted videos on

38. *Id.* at 1003–04.

39. *Id.* at 1004.

40. *Id.* at 1005 (emphasis added).

41. *Rossi*, 391 F.3d at 1005.

42. *Id.* at 1004.

43. *Id.* at 1007.

44. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 n.5 (N.D. Cal. 2008) (quoting *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1205 (N.D. Cal. 2004)). The *Diebold* court noted that because “[n]o reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with [Plaintiff’s] voting machines were protected by copyright,” since they were clearly within fair use, the plaintiff knowingly misrepresented its § 512(c) claims. *Diebold*, 337 F. Supp. 2d at 1204. The *Diebold* case illustrates the difficulty of meeting the “knowing material representation” standard; although the plaintiff succeeded in its § 512(f) claim, it did so only because the allegedly infringing material was unequivocally fair use. *Id.* at 1204–05. However, *Diebold* does not discuss the formulation of a “good faith belief” specifically or its interaction with the doctrine of fair use. *Id.*

YouTube protesting practices in the Church of Scientology.⁴⁵ In response, the church, through the American Rights Council, sent four thousand takedown notices to YouTube, prompting the following user response:

YouTube, you need to REVIEW YOUR POLICY on copyright claims, the current system is far to [sic] susceptible to ABUSE All [a copyright holder has] to do to get a video taken down is make a claim and it is instantly pulled; this is WRONG, when a claim is made the person who uploaded the video should have a chance to respond BEFORE the video is removed, this stops people [from] getting their way instantly. YouTube PLEASE sort this problem out and do not let Scientology control this website.⁴⁶

Embodied in this example are several concerns: (1) copyright holders can orchestrate the removal of allegedly infringing material regardless of the merit of their claim, (2) takedown takes effect before an Internet user can contest the claim, and (3) this process harms the Internet user.

First, a copyright holder can easily send a § 512(c) notice to an OSP and receive an “expeditious” takedown, regardless of the merits of the claim.⁴⁷ The procedure “effectively constitutes an extra-judicial temporary restraining order, based solely on the copyright holder’s allegation of copyright infringement.”⁴⁸ The reason that the allegations carry so much weight is that the ultimate effect of the “safe harbor” provisions—which some initially hailed as the “economic salvation of the Internet”—is to remove any incentives OSPs might have had for reviewing content and questioning the frivolous claims, even though they are arguably in the best position to do so.⁴⁹ The fear is that in doing so they risk losing the safe harbor for “knowingly” hosting infringing material.⁵⁰ In addition, OSPs will

45. See Nate Anderson, *Scientology Fights Critics with 4,000 DMCA Takedown Notices*, ARS TECHNICA, Sept. 8, 2008, <http://arstechnica.com/news.ars/post/20080908-scientology-fights-critics-with-4000-dmca-takedown-notices.html> (illustrating how the Church of Scientology’s use of DMCA takedown notices is potentially abusive).

46. *Id.*

47. 17 U.S.C. § 512(c), granting expeditious takedown, necessarily precedes § 512(g), granting users a right to initiate put-back procedures.

48. Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 639 (2006).

49. *Id.* at 637–39.

50. *Id.* at 638. The authors note that:

[T]he OSP would lose the safe harbor if it decided not to comply with a particular notice in the belief that a copyright holder knowingly misrepresented the allegation of infringement when the copyright holder had simply made a mistake or otherwise did not have the requisite intent to misrepresent. Since the OSP is largely immunized from acting on a notice in good faith but not from failing to act on a notice in good faith, the OSP is likely to always err on the side of caution and on the side of the complaining copyright holder.

lose the safe harbor if they fail to comply with the takedown notices, providing additional incentive to automatically comply with the notices.⁵¹ Second, takedown takes effect before an Internet user can contest the claim. Thus, § 512(c) poses potential free-speech and due-process burdens to the user.⁵² Because OSPs have greater incentives to comply without question to the takedown notices, copyright holders may send frivolous notices, intimidating both OSPs and users and chilling legitimate online speech.⁵³ In addition, § 512(c) denies users “due process” insofar as it removes a right to display material that may qualify as fair use before given notice or the opportunity to contest the removal in a hearing.⁵⁴

Third, § 512(c) procedures harm Internet users. Although the put-back procedures are arguably simple to follow,

the material, once removed must stay down *at least* 10-14 days according to the statute. The effect may be to substantially burden expressive and other individual rights. In the case of expressive materials, this could be especially significant: ten days to two weeks may greatly diminish the value of the call to a protest, the competitive price, or the newsworthy blog entry.⁵⁵

Id.

51. *Id.*

52. *Id.* at 637–38. However, the Supreme Court is generally hesitant to subject copyright laws to independent First Amendment scrutiny, unless they somehow “alter[] the traditional contours of copyright protection.” *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) (stating that copyright laws, authorized by the Copyright Clause, have built-in First Amendment protections; namely, the idea/expression dichotomy and the fair-use defense); *see also* Lee Ann W. Lockridge, *The Myth of Copyright’s Fair Use Doctrine as a Protector of Free Speech*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31, 31 (2007) (“[F]air use is not, and never has been, intended or designed to restrain copyright in the face of the First Amendment.”); *cf.* *Golan v. Gonzalez*, 501 F.3d 1179, 1195–97 (10th Cir. 2007) (remanding for independent First Amendment scrutiny of the Uruguay Round Agreements Act, which restored copyright protection to certain foreign works that had fallen into public domain in the United States, because taking works out of the public domain falls within the *Eldred* “traditional contours” exception). Regarding potential due process issues, reasoning raised in the context of § 512(h) (subpoenas to OSPs) applies equally here. *See* JAY DRATLER, JR., *CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM* § 6.05[1][c] (2007) (recognizing potential due process violations in § 512(h) subpoena provisions).

53. Urban & Quilter, *supra* note 48, at 637–39.

54. *See* DRATLER, *supra* note 52, § 6.05[1][c] (providing an analogous argument using § 512(h) subpoena provisions).

55. Urban & Quilter, *supra* note 48, at 637; *see also* Lessig, *supra* note 1 (claiming that in this twenty-first-century “remix culture,” the burden of takedown regulation rests largely on the shoulders of kids). Arguably, the DMCA takedown procedures follow a trend that began in 1909 of providing greater copyright protection to copyright holders and less tolerance of innocent infringers. *See* R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 134 (2007) (stating that since 1909, “[t]he general risk of committing copyright infringement increased dramatically, as ever more material was protected for ever longer periods against ever more uses”).

This harm to the defendant is compounded by the defendant's burden to prove that the copyright holder lacked a subjective good-faith belief that the material the defendant posted is not an authorized use. Proving that the copyright holder lacked a "good faith belief" under *Ross*'s subjective analysis presents a difficult barrier to relief.⁵⁶ Arguably, a copyright holder could simply argue that he or she considered whether the material was fair use prior to sending the takedown notice. A defendant, on the other hand, would have the difficult task of taking the court into the mind of the copyright holder and proving that the copyright holder did not consider fair use. Practically speaking, the success of the defendant's argument depends on the blatancy of the fair use—a determination that is rarely obvious.⁵⁷ Users justifiably fear abusive takedown practices. Some studies show, for example, that between 2002 and 2005, the number of § 512(c) takedown notices increased by nearly five times, making it likely that the threat and burden of abusive takedown practices are likely to continue and even increase.⁵⁸ This abuse has received little attention apart from unsuccessful lawsuits, many of which were pro se, to claim relief from frivolous and abusive takedown practices. Whether the time was ripe for change or the plaintiff was incredibly sympathetic, the *Lenz* case finally brought abusive takedown practices into the spotlight.

III. *LENZ* INTRODUCES FAIR USE INTO THE GOOD-FAITH BELIEF

This Part of the Note explores a recent California district court opinion involving a mother—and her dancing toddler—who decided to stand against what she perceived as abuse brought on by the application of § 512(c). The court's decision in *Lenz v. Universal Music Corp.*⁵⁹ helps to equalize the burdens created by § 512(c) by requiring copyright holders to consider the fair-use defense in order to claim a good-faith belief that the user's material infringed on its copyright. This gives the fair-use defense a preemptive posture, meaning that it imposes a new requirement upon copyright holders that is intended to make them think carefully before initiating takedown and to ultimately curb abusive or frivolous claims.

56. Urban & Quilter, *supra* note 48, at 628.

57. See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008) (presenting empirical evidence that illustrates the wide disparity between courts in their application of the fair-use elements).

58. Urban & Quilter, *supra* note 48, at 645. This study recognizes that its sample data consists of only 876 notices from both Google and individual users, *id.* at 644; however, in 2004, The Planet provided 1600 more notices that were not yet integrated into the study. *Id.* at 643. In addition, with Google's 2006 acquisition of YouTube, Google will most likely continue to add thousands more notices to the study. Furthermore, the *Lenz* case, discussed in Part III.B, noted that because of the "Prince Policy," Universal sent YouTube thousands of takedown notices in the months just preceding the case. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

59. *Lenz*, 572 F. Supp. 2d 1150.

To understand how *Lenz* alters the function of fair use from its traditional use as an affirmative defense, this section will first review the doctrine of fair use in its traditional function as an affirmative defense. Second, it will illustrate how courts have historically applied fair use to cases involving the Internet. Third, it will review the *Lenz* decision. This detailed analysis of fair use will provide the context for the fourth and final portion of this Part, which analyzes the function of fair use in § 512(c) after *Lenz*.

A. HISTORY OF FAIR USE IN THE INTERNET CONTEXT

To fully understand the impact of *Lenz* on the doctrine of fair use, this Note will first examine the doctrine, including its history and purpose, its traditional posture and application, and its current application in cases of online infringement outside of § 512(c).

1. History and Purpose of Fair Use

The development of fair use follows the creation of statutory copyright protection in both England and the United States. The Statute of Anne, which was the first English statute to offer copyright protection to authors, sought to “Encourage[] . . . Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned.”⁶⁰ The Founders adopted similar language in the Copyright Clause of the Constitution, which gives Congress the power “[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.”⁶¹ Both statutes indicate that a government’s grant to authors of a monopoly over the right to reproduce their works is an incentive for progress and development.

Within a short time after the creation of these statutes, courts recognized that there are occasions when progress and development would be better served by allowing certain other uses of the original work. Thus, the doctrine of “fair use” developed as a common-law concept, beginning in 1740 England⁶² with the doctrine of “fair abridgment.”⁶³ English courts developed various tests to balance the right-to-a-monopoly protection with the benefit of certain uses to the public.⁶⁴ However, in 1841 the landmark

60. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

61. U.S. CONST. art. I, § 8, cl. 8.

62. *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 491 (Ch.) (no. 130) (adopting the doctrine of “fair abridgment” to treat abridgments that are more than “colourably shortened” as new works for the purposes of copyright protection).

63. For a comprehensive reference on the development of the common-law doctrine of fair use, see generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995).

64. *See id.* (reviewing the development of common-law tests for fair abridgment and fair use).

decision *Folsom v. Marsh*⁶⁵ not only compiled the older English decisions into a concise and comprehensive test for “fair use,” but also laid the foundation for what Congress would eventually adopt, almost in its entirety, into the Copyright Act of 1976: “In short, we must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”⁶⁶ The doctrine of “fair use” was codified as section 107 of the Copyright Act of 1976.⁶⁷ Section 107 states:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁶⁸

In codifying fair use, Congress had no desire to “freeze” the common-law doctrine; rather, it recognized that the doctrine was unpredictable and sought to identify consistent principles that could be applied on a case-by-case basis.⁶⁹ The House Report also notes that “[a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.”⁷⁰ However, the House felt that the “set of criteria” that the courts developed and Congress codified

65. *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901) (holding that an abridged biography of George Washington, containing complete personal letters copied from the original work, was not a fair use of the work).

66. *Id.* at 348.

67. 17 U.S.C. § 107 (2006).

68. *Id.* This final paragraph is an alteration to Justice Story’s analysis due to “a process of accretion” from conflicting views over photocopying for educational uses. H.R. REP. NO. 94-1476, at 66 (1976).

69. H.R. REP. NO. 94-1476, at 66.

70. *Id.* at 65.

would “provide some gauge for balancing the equities.”⁷¹ Although this would undoubtedly be helpful to future courts, the House Report indicates that the general purpose behind § 107 is to “offer[] some guidance to users in determining when the principles of the doctrine should apply.”⁷² The Report cited several examples of situations in which users relied on the fair-use doctrine:

Quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.⁷³

Thus, fair use developed as Congress codified the attempts of both English and American courts to balance the economic incentive of a copyright with the public benefit derived from allowing certain uses of the copyrighted work. To this end, courts have developed their rules surrounding the application of the fair-use doctrine to maintain this balance. The next Subpart reviews what the application of fair use in litigation looks like.

2. Fair-Use Analysis

As mentioned above, the fair-use analysis involves various elements balanced together to determine whether the use is more valuable to society than the cost to the individual copyright holder. This Subpart does not attempt to survey the application of fair use in all courts, as traditional fair use is not the focus of this Note, nor do courts agree in their fair-use analyses.⁷⁴ This Subpart reviews the analyses of leading cases to present enough of an overview for the reader to understand the effect *Lenz*’s application of fair use has on abusive § 512(c) practices and to evaluate whether *Lenz* solves the problem posed by those abusive practices. Thus, this Subpart begins by reviewing the traditional posture of fair use in copyright

71. *Id.*

72. *Id.*

73. *Id.* (quoting U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTER’S REPORT ON THE GENERAL REVISION OF COPYRIGHT LAW 24 (1961)).

74. *See generally* Beebe, *supra* note 57 (illustrating through empirical evidence how courts differ in their application of fair use).

litigation, followed by a general review of how the elements of fair use apply to both traditional and digital media.

a. An Affirmative Defense

The traditional posture of fair use, which continues today for the most part, is that fair use is an affirmative defense to an action for copyright infringement.⁷⁵ This means that it is raised in answer to an infringement claim, resulting in the proponent of the defense bearing the burden of proof for each element of the defense.⁷⁶ However, courts weigh each element together, meaning that they could find that the second use is fair even if an element weighs against it, as long as the elements weigh in favor of fair use when taken together.⁷⁷

b. Substantive Analysis of the Fair-Use Elements

The fact that courts weigh the elements together means that, although the fair-use doctrine is codified, its substantive application is essentially ad hoc.⁷⁸ This is also a result of Congress's intent. Congress made very clear that it had "no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."⁷⁹ Congress hopes that courts would "be free to adapt the doctrine to particular situations on a case-by-case basis."⁸⁰ Despite the difficulty in predicting outcomes under the fair-use defense, it is helpful to review briefly how courts substantively apply or weigh the elements in traditional copyright litigation.

i. Purpose and Character

The first element courts weigh in analyzing fair use is the purpose and character of the new use. The Supreme Court defined the inquiry as whether the new work supplants the original or "adds something new, with a further purpose or different character," adding "new expression, meaning,

75. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

76. *See id.* (explaining that the defendant had difficulty carrying the burden of proving the fourth element).

77. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (concluding that the use of the original photos as thumbnail search results was fair, even though one factor weighed in favor of the plaintiff, one factor was neutral, and only two factors weighed in favor of the defendant).

78. *Id.* Even Justice Story recognized that there are "[m]any mixed ingredients" to consider in determining fair use. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901). For example, an author's expression may be indistinguishably "fused" into another author's work without being piracy, or inclusion of the prior work as the principle value to a "mosaic" work may be deemed piracy. *Id.* One might also create a collection of poetry, the selections of which constitute "all the best pieces at large of a favorite poet" and the "entire value" of the second work and be deemed to infringe. *Id.*

79. H.R. REP. NO. 94-1476, at 66 (1976).

80. *Id.*

or message.”⁸¹ In other words, the question is “whether and to what extent the new work is ‘transformative.’”⁸² Though transformative use is not required, “the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.”⁸³

ii. Nature of the Use

In addition to considering the purpose and use of the allegedly infringing work, courts consider the nature of the original work. The Supreme Court defines this element as a “recognition that some works are closer to the core of intended copyright protection than others.”⁸⁴ Creative works, for example, “are closer to the core . . . than are more fact-based works.”⁸⁵ Thus, photographs and music, which are considered more creative, would be entitled to greater protection from infringement.⁸⁶

iii. Amount and Substantiality

Next, the court examines the amount and substantiality of the material taken from the original in proportion to the new work. This factor asks the question whether the proportion used in relation to the whole of the new work is “reasonable in relation to the purpose of the copying.”⁸⁷ The Supreme Court said that “the extent of permissible copying varies with the

81. *Campbell*, 510 U.S. at 579 (finding the satirical rap song *Pretty Woman*, by 2 Live Crew, a fair use of the Roy Orbison song *Oh, Pretty Woman*).

82. *Id.* Judge Pierre Leval, who presided over a number of cases involving fair use in his years on the United States Southern District of New York bench, introduced the concept that the first element boils down to the transformativeness of the second work. *See* Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (stating, under the first factor, “the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*”).

83. *Campbell*, 510 U.S. at 579. Recent scholarship addresses the difficulties in defining “transformative.” For example, one scholar uses the example of Surrealist artist René Magritte, whose work *The Treachery of Images* (1929) includes a rendering of a pipe with the caption “Ceci n’est pas une pipe,” or “This is not a pipe.” Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 445 (2008). Heymann’s example reflects her espousal of the reader-response theory to define “transformative,” which is that, despite what an artist means to convey, “[t]he reader . . . is the one who determines, ultimately, the meaning of the work,” so “transformative” should be defined from the perspective of the reader, not the artist. *Id.* at 446; *see also* Lockridge, *supra* note 52, at 31 (arguing that “[t]he conflict between copyright and free speech could be lessened by . . . eliminat[ing] the focus on commercial use and . . . expand[ing] the understanding of the broader public-benefit purpose underlying the Supreme Court’s analysis of transformative uses”).

84. *Campbell*, 510 U.S. at 586.

85. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001)).

86. *Id.* (treating photographs as creative in nature); *see also Campbell*, 510 U.S. at 586 (treating music as creative in nature).

87. *Campbell*, 510 U.S. at 586.

purpose and character of the use.”⁸⁸ In musical parody, for example, a second artist may make use of recognizable sights and sounds, “the heart” of the original, as long as it is not excessive.⁸⁹

iv. Effect on Potential Market and Value

Finally, courts examine the effect of the new use on the potential market for and value of the original work. Where the second use is merely a verbatim duplication for commercial purposes, it is presumptively unfair.⁹⁰ However, where the second use is transformative, the question becomes whether the second use “usurps” demand for the original.⁹¹

The Supreme Court views this analysis in two parts: (1) whether the second use supplants market demand for the original work, and (2) whether the second use intrudes into the copyright owner’s right to produce derivative works based on the original.⁹²

v. Other Factors

Acting in line with Congress’s desire not to “freeze” the doctrine,⁹³ many courts have weighed additional factors in the balance. For example, the Supreme Court has considered the amount of the original work used by a defendant in relation to his or her own work—as opposed to a comparison with the original.⁹⁴ In addition, scholars note that other courts have considered whether the use of the original work was merely “incidental” to the defendant’s work or whether the defendant showed bad faith.⁹⁵ William F. Patry notes that still other courts have taken into consideration such factors as privacy, exploitation, error, and misuse of copyright to suppress negative commentary or to protect personal image.⁹⁶ One scholar noted that these additional factors “can be given whatever weight the courts wish.”⁹⁷

88. *Id.* at 586–87.

89. *Id.* at 588.

90. *Id.* at 591.

91. *Id.* at 592 (quoting *Fischer v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

92. *Campbell*, 510 U.S. at 590.

93. *See supra* notes 69–73 (discussing the legislative history leading to the fair-use provision).

94. *Harper & Row v. Nation Enters.*, 471 U.S. 539, 548–49 (1985) (rejecting the fair-use defense after calculating that the magazine’s use of a forthcoming autobiography of President Ford, especially valuable and substantial portions regarding his pardon of President Nixon, constituted thirteen percent of its own article).

95. ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT: CASES AND MATERIALS* 769 (7th ed. 2006).

96. PATRY, *supra* note 63, at 568–69.

97. *Id.* at 569. This uncertainty has recently prompted the creation of best-practice guidelines for industries that frequently use copyrighted materials in derivative works, such as documentaries. *See, e.g.*, CTR. FOR SOCIAL MEDIA, AMERICAN UNIV., *DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE 1* (2005), available at http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf; CTR. FOR SOCIAL MEDIA, AMERICAN UNIV.,

Thus, each factor recognizes that the public benefit derived from certain uses of the original work outweigh the scope of copyright protection. The fair-use defense, as codified, is an instrument that Congress hopes will provide consistent principles to the court's ad hoc substantive evaluation of copyright-infringement cases, as well as to users' assessment of the viability of their use of another's original work.

3. Fair Use on the Internet

Having reviewed the doctrine of fair use and its traditional application, it is helpful to see how courts apply fair use in the Internet context before discussing the effect *Lenz* has on the function of fair use in § 512(c) litigation. It is also important at this point to review the methods by which copyright litigation arises over Internet uses. This Note focuses on litigation involving the Internet arising over copyright holders' use of § 512(c) takedown procedures. The other type of litigation involving the Internet is when copyright holders forego § 512(c) procedures and directly sue the alleged infringer. This Subpart begins with an examination of the second type of cases in order to provide context for the function of fair use in the § 512(c) cases.

The leading cases of Internet fair use involve the question of whether search-engine thumbnail images of original photographs constitute fair use.⁹⁸ In *Kelly v. Arriba Soft Corp.*, for example, the court interpreted "transformative" under the first factor (purpose and character) so as to include "thumbnail" images of original art on search engines, taking into account such considerations as their use for indexing and reference—as opposed to economic or aesthetic use—and their reduced image resolution or quality as compared to the original.⁹⁹

CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 1 (2008), available at http://www.centerforsocialmedia.org/sites/default/files/online_best_practices_in_fair_use.pdf. The Center for Social Media code is described as follows:

This is a guide to current acceptable practices, drawing on the actual activities of creators, . . . and backed by the judgment of a national panel of experts. It also draws, by way of analogy, upon the professional judgment and experience of documentary filmmakers, whose own code of best practices has been recognized throughout film and television businesses.

Id. (citation omitted).

98. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (finding Internet search-engine thumbnail images of original photographs a fair use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (same).

99. *Kelly*, 336 F.3d at 818.

Under the analysis of the second factor (nature), the court considered the fact that the art was previously published on another website.¹⁰⁰ A work is more likely to be fair use if the original has already been published.¹⁰¹

As far as the third factor (amount and substantiality used in proportion to the original), the court stated that a search engine may copy the entire original “to allow users to recognize the image and . . . pursue more information about [it],” but not to sell it.¹⁰² In other words, if the use is transformative in that the search engine is only for reference, then the search engine is entitled to use the entire image. This factor, however, is more difficult to predict, as it does not always weigh against the copying party where he or she “copies as much as is necessary for his or her intended use.”¹⁰³

As to the fourth factor (effect on the potential market for or value of the original), the court observed that thumbnail images of the original photographs cannot supplant the market for the originals because enlarging such low-resolution images to full-size images would result in a loss of clarity.¹⁰⁴ Thus, in an online context, a court is unlikely to find any market harm where the reduced quality of the second use precludes the possibility of supplanting either the original market or the derivative market for the original.¹⁰⁵

Having reviewed fair use in traditional copyright litigation, including cases involving alleged infringement over the Internet, this Note next examines the *Lenz* case to discuss the application of the fair-use defense in the context of § 512(c) litigation.

B. LENZ V. UNIVERSAL MUSIC CORP.

The example of the mother and her dancing baby given in the introduction is based on the *Lenz* case and presents a story that each of us can relate to, for it involves the chilling effect of abusive practices in § 512(c) procedures on the most basic level of society: the everyday person. Though previous cases challenging abusive § 512(c) practices failed, this case introduced a new element into the analysis of whether the § 512(c)

100. *Id.* at 820.

101. *Id.* In the final analysis, however, this factor carried little comparative weight in the fair-use balance. *See also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats [where works] . . . copy publicly known, expressive works.”).

102. *Kelly*, 336 F.3d at 821.

103. *Id.*

104. *Id.*

105. *Id.*; *cf.* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (suggesting that, had the plaintiff claimed market harm by showing that the search engine sold the thumbnail images for download to cellular phones, this factor might have favored the plaintiff).

takedown notice was a frivolous and abusive claim: the doctrine of fair use.¹⁰⁶

This case presented an issue of first impression: “Whether fair use qualifies as a use ‘authorized by law’ in connection with a [DMCA] takedown notice.”¹⁰⁷ If so, then *before* sending a takedown notice, a copyright holder must first consider fair use in order to have a good-faith belief that the use is unauthorized.¹⁰⁸

On February 8, 2007, Stephanie Lenz posted a twenty-nine-second video recording on YouTube.com (“YouTube”) of her son¹⁰⁹ dancing in the kitchen and labeled it “‘Let’s Go Crazy’ #1” (“the video”).¹¹⁰ About twenty seconds of the Prince song *Let’s Go Crazy* is audible in the background.¹¹¹ Soon after Lenz posted the video, Universal Music Corporation (“Universal”), the owner of the copyright to *Let’s Go Crazy*, sent YouTube a takedown notice pursuant to § 512(c) of the DMCA.¹¹² The following day, YouTube removed the video and notified Lenz of Universal’s takedown notice alleging copyright infringement and of her right to use the counter-notification procedures in the DMCA.¹¹³

On June 27, 2007, Lenz sent YouTube a counter-notification, stating that the video constituted fair use of *Let’s Go Crazy* and demanding that YouTube repost the video.¹¹⁴ YouTube reposted the video six weeks later.¹¹⁵ Less than a month after Lenz sent the counter-notification, she filed a suit against Universal, alleging “misrepresentation pursuant to [§ 512(f)] and tortious interference with her contract with YouTube.”¹¹⁶ On April 8, 2008,

106. See *supra* Part III.A (discussing the doctrine of fair use).

107. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008).

108. *Id.* (quoting 17 U.S.C. § 512(c)(3)(A)(v) (2000), which requires a copyright owner to include in its takedown notice, a “statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law”).

109. *Id.* at 1151–52. As part of the current description to her video, Lenz recently posted the following: “In this video Holden is about 13 months and had just learned to walk.” Edenza, “*Let’s Go Crazy*” #1, YOUTUBE, (Feb. 7, 2007), <http://www.youtube.com/watch?v=N1KfjHFWlhQ>. He was 18 months at the time of the suit.

110. *Lenz*, 572 F. Supp. 2d at 1152.

111. *Id.* at 1152. The Court noted that though the sound quality was poor, among those parts which were audible were the lyrics “‘C’mon baby let’s get nuts” and a “distinctive” guitar solo. *Id.*

112. *Id.* at 1152–53 (citing 17 U.S.C. § 512(c)).

113. *Id.* YouTube’s e-mail also warned Lenz that any repeated offenses could lead to the deletion of her account as well as all of her posted videos. *Id.* Lenz posted this and other videos for the purpose of sharing them with friends and family. *Id.* at 1152 n.1.

114. *Id.* at 1152.

115. *Lenz*, 572 F. Supp. 2d at 1152. As of the date of the *Lenz* decision, “*Let’s Go Crazy*” #1 had been viewed over 593,000 times. *Id.* At the time this Note was written, the video had been viewed 951,523 times. Edenza, *supra* note 109.

116. *Lenz*, 572 F. Supp. 2d at 1153.

the court granted Universal's motion to dismiss.¹¹⁷ After the court granted Lenz leave to amend her complaint, she filed a second amended complaint on April 18, 2008, alleging only misrepresentation under § 512(f).¹¹⁸ On May 23, 2008, Universal again filed a motion to dismiss.¹¹⁹

Neither party disputed that Lenz used copyrighted material nor that Universal owned the copyright; rather, Lenz argued that Universal misrepresented "a good faith belief" of infringement in its takedown notice.¹²⁰ Lenz argued that Universal sent the takedown notice not out of a good-faith belief of infringement, but to "appease Prince because Prince 'is notorious for his efforts to control all uses of his material on and off the Internet.'"¹²¹

117. *Id.*

118. *Id.* 17 U.S.C. § 512(f) states:

Any person who knowingly materially misrepresents under this section . . . that material or activity is infringing, . . . shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

17 U.S.C. § 512(f) (2006).

119. *Lenz*, 572 F. Supp. 2d at 1153.

120. *Id.* at 1153–54.

121. *Id.* at 1152 (quoting Opposition to Motion to Dismiss Second Amended Complaint at 3, *Lenz*, 572 F. Supp. 2d 1150 (No. C 07-03783-JF)). The court noted that about the same time Lenz posted the video (September 2007), Prince spoke out about "reclaim[ing] his art on the Internet." *Id.* (quoting Mike Collett-White, *Prince To Sue YouTube, eBay over Music Use*, REUTERS, Sept. 13, 2007, <http://www.reuters.com/article/idUSL1364328420070914>). In addition, in October 2007, Universal commented to ABC News:

Prince believes it is wrong for YouTube, or any other user-generated site, to appropriate his music without his consent. That position has nothing to do with any particular video that uses his songs. It's simply a matter of principle. And legally, he has the right to have his music removed. We support him and this important principle. That's why, over the last few months, we have asked YouTube to remove thousands of different videos that use Prince music without his permission.

Id. (quoting Chris Francescani, *The Home Video Prince Doesn't Want You To See*, ABC NEWS, Oct. 26, 2007, <http://abcnews.go.com/TheLaw/home-video-prince/story?id=3777651>).

Lenz further argued that a copyright owner cannot formulate a good-faith belief that the use of the video is not “authorized” without first considering fair use because fair use is an “authorized” use of a copyright under § 107,¹²² and the video is a fair use of *Let’s Go Crazy*.¹²³ Lenz cites the fair-use provisions in § 107, which state in part, “the fair use of a copyrighted work . . . is not an infringement of copyright.”¹²⁴

Universal, in support of its motion to dismiss, argued that fair use is only *excused* infringement, not legally authorized use.¹²⁵ It argued further that § 512(c) does not mention fair use, and the duty to consider fair use should arise, if at all, only in the context of copyright litigation.¹²⁶

Ultimately, the court concluded that fair use is a legally authorized use.¹²⁷ To get there, the court first determined that the phrase “use authorized by law” unambiguously means a use “permitted by law or not contrary to law,” as made clear from the text of the fair-use provisions themselves.¹²⁸

Accordingly, the court held that in order to formulate a good-faith belief of infringement, a copyright holder must first evaluate whether the use was fair use.¹²⁹ Thus, Lenz’s allegation that Universal “acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.”¹³⁰ The court concluded that this reading is consistent with the DMCA’s goal of “balanc[ing] the need for rapid response to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse.”¹³¹

By incorporating fair use into its analysis of whether the copyright holder formulated a good-faith belief, the *Lenz* decision creatively adapted the function of fair use to respond to the modern need to balance a copyright holder’s right to protect its material on the Internet with the user’s right to post a legitimate remix of that material. Just as § 512(c) alters the traditional posture of a legal dispute, *Lenz* alters the traditional posture of the fair-use defense. In essence, if § 512(c) creates a premature remedy,

122. *Lenz*, 572 F. Supp. 2d at 1154. 17 U.S.C. § 107 states in part: “[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107.

123. *Lenz*, 572 F. Supp. 2d at 1154.

124. 17 U.S.C. § 107.

125. *Lenz*, 572 F. Supp. 2d at 1154.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Lenz*, 572 F. Supp. 2d at 1155.

131. *Id.* (quoting S. REP. NO. 105-190, at 21 (1998)).

then it is necessary to apply the fair-use defense preemptively. Put another way, if a user does not get the chance to present her defense prior to having an injunction declared against her, then the copyright holder must apply the defense prior to claiming infringement.

C. LENZ GIVES FAIR USE A PREEMPTIVE POSTURE

Lenz brings to light the reality of threatening and abusive practices resulting from § 512(c) takedown provisions as well as the realization that the heavy burden created by § 512(c) is borne by unsophisticated publishers—the public¹³²—while the safe harbor virtually eliminates the burden to copyright holders and OSPs. However, while *Lenz* may not be a complete solution, its preemptive-fair-use analysis is an important step toward rebalancing the burdens.

Lenz demonstrates that proving the copyright holder lacked a “good faith belief” under *Rossi*’s subjective analysis¹³³ presents a difficult barrier to relief.¹³⁴ *Lenz* was able to survive a motion to dismiss by creating an issue of material fact as to whether Universal subjectively considered fair use prior to sending the takedown notice by referring to the “Prince Policy.”¹³⁵ However, the court noted that it has “considerable doubt that *Lenz* will be able to prove that Universal acted with the subjective bad faith required by *Rossi*, and following discovery, her claims well may be appropriate for summary judgment.”¹³⁶

Although there may be some cases in which fair use is so clear that no reasonable person could consider a subsequent work to be infringing,¹³⁷ the difficulty in meeting the *Rossi* standard lies in the fair-use analysis itself. Fair use is a very tailored analysis, applied on a case-by-case basis, and is therefore unpredictable.¹³⁸ Thus, in § 512(c) cases where the use is not clearly fair, Internet users will have the difficult task of showing that a copyright holder knew that the use was fair before sending the notice,¹³⁹ resulting in a strong presumption of good faith in favor of the copyright holder.

132. See Lessig, *supra* note 1 (observing that the “remix culture” is made up of the public).

133. See *supra* text accompanying notes 39–42 (discussing *Rossi*’s subjective analysis requirement).

134. Urban & Quilter, *supra* note 48, at 639.

135. *Lenz*, 572 F. Supp. 2d at 1152; see also *supra* note 121 and accompanying text (reviewing the “Prince Policy”).

136. *Lenz*, 572 F. Supp. 2d at 1156.

137. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204–05 (N.D. Cal. 2004); see also *supra* note 44 (discussing the *Diebold* case and the burden of showing a “knowing material representation”).

138. See *supra* Part III.A.2.b (discussing the ad hoc nature of the fair-use analysis); see also Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1273–74 (2008) (recognizing the burden that the unpredictability of fair use places on would-be fair users).

139. Urban & Quilter, *supra* note 48, at 629–30.

Lenz helps to rebalance the burden by placing fair use under the umbrella of authorized uses that a copyright holder must consider before it can properly send a takedown notice in good faith.¹⁴⁰ In doing so, *Lenz* essentially gives the fair-use defense a quasi-offensive posture. Instead of copyright holders suing for infringement and users defending with fair use, Internet users can now sue copyright holders under § 512(f) claiming misrepresentation of good faith and alleging that the copyright holder failed to consider fair use before sending the takedown notice.

If fair use is a defense in this context, it is certainly now a preemptive one. In other words, if courts attach liability to copyright holders who fail to consider fair use prior to sending takedown notices, then copyright holders have the incentive to stop sending frivolous notices, OSPs have less incentive to passively comply with such notices in light of their desire to increase their user base and the less-threatening nature of take-down notices, and abusive takedowns will be less frequent. Thus, putting the fair-use defense into play as *Lenz* did preempts improper and premature takedowns. In fact, the *Lenz* decision already appears to have borne fruit by encouraging various organizations, including OSPs, to act more assertively against abusive practices.¹⁴¹

Despite the growing trend to counter abusive takedown practices following the *Lenz* decision, *Lenz* does not do enough. *Lenz* ultimately fails to rebalance the burdens and the incentives by giving fair use a preemptive posture. Though it is a start, more is needed. What follows is an assessment of *Lenz* as an incomplete solution to abusive takedown practices.

D. LENZ PROVIDES AN INCOMPLETE SOLUTION

It seems likely that the potential for abuse, along with its consequences, will continue unless Congress and the courts revisit the process.¹⁴² In recognition that the takedown provisions of the DMCA have created such a burden, citizens, scholars, and Internet providers are questioning the effects of these provisions.¹⁴³ The *Lenz* decision adds fuel to the fire by raising

140. See *supra* Part III.B (discussing the court's inclusion of fair use within the authorized uses a copyright holder must consider prior to sending a takedown notice in good faith).

141. For examples of individuals and businesses questioning copyright holders and finding creative solutions, see Anthony Falzone, *YouTube Shows Us How To Be a Good Intermediary*, FAIR USE PROJECT, Aug. 13, 2008, <http://cyberlaw.stanford.edu/node/5836>; and *infra* text accompanying note 143.

142. See *supra* Part II.C (noting the rise in takedown notices and potential for abuse).

143. In addition to *Diebold*, *Rossi*, *Doe*, and *Lenz*, Internet users brought two other § 512(f) cases against copyright holders. See generally *Novotny v. Chapman*, No. 3:05cv370, 2006 WL 2335598 (W.D.N.C. Aug. 9, 2006) (denying plaintiffs' motion for a preliminary injunction); *Dudnikov v. MGA Entm't, Inc.*, 410 F. Supp. 2d 1010 (D. Colo. 2005) (granting summary judgment for the defendant). These cases also help to illustrate the user burden, because in both cases the plaintiffs appeared pro se and were unable to sustain their respective burdens. *Novotny*, 2006 WL 2335598, at *1 (failing to show a likelihood of actual and imminent injury);

awareness of abusive tactics and the burden on the public as well as potential legal gaps.¹⁴⁴

IV. GIVING *LENZ* SOME “TEETH”: SUGGESTED IMPROVEMENTS

Lenz provides a good start to equalizing the burdens that have historically been out of balance under § 512(c), not only in providing a preemptive fair-use analysis, but also in adding “bite” to its “bark” in granting eligibility for damages.¹⁴⁵ The court stated, “*Lenz* did incur actual damages in reviewing counter-notice procedures, seeking the assistance of an attorney, and responding to the takedown notice.”¹⁴⁶ As most plaintiffs contesting § 512(c) procedures will be similar to Mrs. *Lenz*, this bodes well for future plaintiffs. However, the court concluded that the “damages may be nominal,”¹⁴⁷ which may severely limit *Lenz*’s deterrent effect.

Clearly, the “bite” is not very strong when considered in light of the fact that most plaintiffs are like Mrs. *Lenz*, while many of the copyright holders are larger, wealthier organizations like Universal. As the law develops in this area, Congress and the courts should consider adopting an objective standard of good faith instead of a subjective one, as well as importing existing copyright and intellectual property remedies to give “teeth” to *Lenz*’s deterrent efforts. Among the remedial doctrines the courts should adopt are: (1) an objective good-faith standard, (2) the doctrine of copyright misuse, and (3) the unreasonable-claims standard for awarding attorney’s fees.¹⁴⁸

Dudnikov, 410 F. Supp. 2d at 1012 (failing to show that the copyright holder knowingly misrepresented the § 512(c) claim). One preeminent fair-use scholar has suggested deregulation. See Lessig, *supra* note 1 (discussing fair use in a remix culture). A scholarly organization called the Chilling Effects Clearinghouse collects thousands of takedown notices from users and Internet search engines, such as Google, analyzes their claims, and provides data and resources in an effort to confront potential and existing abuses. Urban & Quilter, *supra* note 48, at 623; see also Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited Feb. 23, 2010). In addition, Internet companies are beginning to question the fairness of the takedown provisions. See Falzone, *supra* note 141; see also *supra* note 97 (providing examples of organizations that have responded by creating their own standards of best practices). Even the 2008 presidential candidates have sought relief from burdensome takedown notices. Lessig, *supra* note 1; see also Nate Anderson, *YouTube to McCain: No Special Treatment for DMCA Takedowns*, ARS TECHNICA, Oct. 15, 2008, <http://arstechnica.com/news.ars/post/20081015-youtube-to-mccain-no-special-treatment-for-dmca-takedowns.html> (suggesting a solution for political candidates, which YouTube rejected).

144. See sources cited *supra* note 143 (citing examples of individuals, organizations, businesses, and politicians already affected by inequalities of § 512(c)).

145. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1157 (N.D. Cal. 2008).

146. *Id.* at 1156.

147. *Id.* at 1157.

148. At least one scholar has called for similar changes in traditional copyright law and fair-use application. See Cotter, *supra* note 138, at 1271. Professor Cotter suggests six reforms to prevent over enforcing copyright law to the point of deterring would-be fair users: (1) relying on a liability-rule system that creates a “compulsory license” for users who infringe, *id.* at 1292;

A. ADOPTING AN OBJECTIVE GOOD-FAITH ANALYSIS

One gap that *Lenz* and future cases still have to deal with is the *Rossi* standard of subjective good faith, which *Rossi* created, in part, from lack of congressional guidance in § 512(c).¹⁴⁹ Congress should revisit that provision and indicate an objective evaluation. Rossi persuasively argued that all a copyright holder needs to do is perform a minimal investigation—following the hyperlink—to learn that there is no violation, but the court declined to impose an objective good-faith standard under § 512(c), leaving a heavy burden on the public.¹⁵⁰

B. INCORPORATING THE DOCTRINE OF COPYRIGHT MISUSE

Another potential solution is the doctrine of copyright misuse, which “prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly.”¹⁵¹ In *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, the court elaborated on this doctrine, stating:

[F]or a copyright owner to use an infringement suit to obtain property protection . . . that copyright law clearly does not confer, hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process.¹⁵²

In *WIREdata*, the copyright holder of a tax-assessment database collected and compiled uncopyrightable public tax information, then sued a municipality for accessing that information because it was contained within the holder’s copyrighted database.¹⁵³ This case did not present misuse because the copyright holder was not trying to prevent the municipality from revealing its own tax information, so the penalty of abuse of process in a copyright context is unclear.¹⁵⁴ At least one scholar suggests remedies similar to those applied in the context of patent law, from which the

(2) reducing or eliminating statutory damages “for the good-faith, but unsuccessful assertion of fair use,” *id.* at 1300; (3) imposing sanctions similar to those imposed by the doctrine of misuse, *id.* at 1302; (4) modifying the rules governing the award of attorney’s fees from the American rule (each side pays its own way) to something more akin to the English rule (the losing party pays), *id.* at 1304–08; (5) reallocating some of the burdens of proof to increase the accuracy and consistency in fair-use application, *id.* at 1309; and (6) adjusting the currently unpredictable standard of fair use to trigger rebuttable presumptions at certain levels of use, *id.* at 1312.

149. See *supra* Part II.B.2 (explaining that good faith requires a subjective standard partly because courts impose a subjective standard where Congress has not explicitly indicated an objective one).

150. See *supra* Part II.C (indicating that those who bear the burden are the public, many of whom are unsophisticated and unable to bear the cost of such a burden).

151. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026–27 (9th Cir. 2001).

152. *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003).

153. *Id.* at 641–42.

154. *Id.* at 646–47.

doctrine of misuse originated.¹⁵⁵ These remedies include denying the plaintiff any recourse in copyright infringement until the plaintiff cures the misuse, cancellation of the plaintiff's copyright, or granting the defendant a compulsory license.¹⁵⁶

WIREDdata's explanation of misuse makes it easy to imagine a case in which a copyright holder asserts its copyright to suppress unwanted criticism, parodies, or otherwise fair publications of its material. Were courts to apply this doctrine in the context of § 512(c) litigation, it would effectively restore balance to the protection of Internet publication for both sides. First, the specter of forfeiting their copyrights, even momentarily, would deter over-zealous copyright holders from bringing frivolous claims. At the same time, it would in no way diminish legitimate use of their copyrights or of § 512(c) procedures. Instead, it would build on the foundation laid by *Lenz* by providing copyright holders with greater incentives to be thoughtful when considering whether a user's remix of the material constitutes fair use.

Second, the doctrine of copyright misuse gives the fair user leverage, or "teeth," to back *Lenz* up. Whereas *Lenz* turns out to be little more than a warning, the doctrine of copyright misuse attaches actual and undesirable consequences upon the copyright holder who brings frivolous claims. At the same time, this doctrine in no way favors fair users over copyright holders. Rather, it equalizes the power of the two parties. If copyright holders can deprive fair users of their right to post a remixed version of the copyrighted material within the bounds of fair use, then the fair user should have an equal right to claim forfeiture of the copyright holder's copyright, at least until the misuse is cured.

C. AWARDING ATTORNEY'S FEES FOR UNREASONABLE CLAIMS

Another potential solution is for courts to award attorney's fees when a copyright holder unreasonably uses the § 512(c) takedown procedures. As mentioned earlier in this Note, § 512 already allows for damages; however, the application of damages in Mrs. *Lenz's* case suggests that such damage awards will be minor.¹⁵⁷ Outside of § 512, copyright law has begun to apply greater damages where infringement claims are unreasonable, a doctrine that courts should carry over into § 512 suits.

In *Mattel, Inc. v. Walking Mountain Products*,¹⁵⁸ the defendant took a series of seventy-eight photographs of a Barbie doll posed as if "being

155. JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse To Protect Digital Free Speech*, 13 TEX. INTELL. PROP. L.J. 83, 115 (2004).

156. *Id.* Harris's article expresses concern over granting statutory damages in light of free-speech concerns and therefore suggests that the area of damages for misuse is an area in need of scholarly review. *Id.*

157. *See supra* notes 145–47 and accompanying text (discussing award of damages in *Lenz*).

158. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

attacked by vintage kitchen appliances.”¹⁵⁹ He called the series “Food Chain Barbie,” and stated that the purpose of the photographs was to criticize the objectifying effect Barbie has on women and to “lambast” what he calls the “beauty myth.”¹⁶⁰

The court applied the four-element fair-use test to the facts and found that the photographer’s work fell within the definition of fair use.¹⁶¹ In arriving at its conclusion, the court also vacated the district court’s initial decision not to award attorney’s fees because the district court failed to adequately support its denial.¹⁶² The court then remanded with instructions that attorney’s fees were appropriate when the defense advances the aims of the Copyright Act.¹⁶³ On remand, the district court found that the defense did, in fact, further the purposes of the Copyright Act and awarded approximately \$1.6 million in attorney’s fees.¹⁶⁴

Central to the district court’s determination that the attorney’s fees were reasonable was its finding that the plaintiff’s claim for copyright infringement was unreasonable.¹⁶⁵ The court’s test of unreasonableness included an evaluation of whether the claim was frivolous, the motivation of the defendants, the legal and factual reasonableness of the claims, and the need to compensate the defendant while deterring such actions by future

159. *Id.* at 796.

160. *Id.*

161. *Id.* at 806. The court concluded:

Having balanced the four § 107 fair use factors, we hold that Forsythe’s work constitutes fair use under § 107’s exception. His work is a parody of Barbie and highly transformative. The amount of Mattel’s figure that he used was justified. His infringement had no discernable impact on Mattel’s market for derivative uses. Finally, the benefits to the public in allowing such use—allowing artistic freedom and expression and criticism of a cultural icon—are great. Allowing Forsythe’s use serves the aims of the Copyright Act by encouraging the very creativity and criticism that the Act protects.

Id.

162. *Id.* at 816. Apparently, the district court misstated the law, claiming that attorney’s fees are inappropriate where the *fees* would not advance the purposes of the Act. *Id.* at 815–16. However, the Ninth Circuit quickly corrected the misstatement: “Under the Copyright Act, the question is whether a successful *defense* of the action furthered the purposes of the Act, not whether a *fee award* would do so.” *Id.* at 816.

163. *Mattel*, 353 F.3d at 816.

164. *Mattel, Inc. v. Walking Mountain Prods., Inc.*, No. CV99-8543RSWL(RZX), 2004 WL 1454100, at *1, *4 (C.D. Cal. June 21, 2004).

165. *Id.* at *2.

plaintiffs.¹⁶⁶ As a preliminary matter, the court held that the claim was legally and factually insufficient to support copyright infringement.¹⁶⁷

The court stated that the claim was frivolous, in part because the copyright holder was a “sophisticated entity” with “good legal representation,” and the claim fit into a well-settled area of law with “little likelihood of success.”¹⁶⁸ In addition, the claim was meant to discourage the defendant from merely “using Barbie’s image in his artwork.”¹⁶⁹ Finally, as to compensation and deterrence, the court made it very clear that a situation where a large corporation sues an individual artist with such an unreasonable claim “is just the sort of situation in which this Court should award attorneys fees to deter this type of litigation.”¹⁷⁰

In the context of § 512(c) litigation, this doctrine would apply a little differently than in *Mattel*. The user sues the copyright holder under § 512(f) for misrepresenting a good-faith belief that the material was not an authorized use. After *Lenz*, this means that the user must show that the copyright holder lacked a subjective good-faith belief (a standard that should be changed to objective) that the material was not fair use. Thus, the unreasonable-claim doctrine would not apply to the user’s claim; rather, courts should apply it to the copyright holder’s decision to initiate takedown procedures under § 512(c). Where the court determines that the use was clearly fair and that the copyright holder’s decision to use § 512(c) was unreasonable, courts should award attorney’s fees to the user.

The effects of applying this doctrine mirror the effects of applying the doctrine of misuse. The doctrine gives the fair-user leverage and deters frivolous claims while at the same time imposes no additional burden on either party. This compels § 512(c) to provide equal access to relief, thereby providing the social benefits of wide dissemination of information that the Founders intended.

V. CONCLUSION

Copyright law, at least as far as the Internet is concerned, has not yet achieved a proper balance between the rights of copyright holders to protect their works from unfair uses and the right of users to remix those works within the bounds of fair use. Left on its own, § 512(c) is subject to abuse, chilling online speech, and depriving the public of one of its most valuable

166. *Id.* at *1. The actual test is taken from *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151 (3d Cir. 1986). The *Lieb* factors are “[f]rivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at 156 (internal quotations omitted).

167. *Mattel*, 2004 WL 1454100, at *1–2.

168. *Id.* at *2.

169. *Id.*

170. *Id.*

resources—information. *Lenz* attempts to curb the abuse and its negative effects by forcing copyright holders to evaluate whether the online use of their material is fair use before ever sending a takedown notice. *Lenz* fails, however, to make it possible for users to prove that copyright holders did not consider fair use. Thus, courts should apply additional doctrines to finish what *Lenz* began.