

Legal Alert

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9TH CIRCUIT: COPYRIGHT HOLDERS CAN'T SEND A DMCA TAKEDOWN NOTICE WITHOUT CONSIDERING FAIR USE

Copyright protection is a right built into our Constitution.¹ But our founders understandably did not anticipate how an author's rights might be affected by cassette tapes, DVRs, or the internet. Copyright law has accordingly struggled to keep up with modern technology.

In 1998, the Digital Millennium Copyright Act ("DMCA")² established a system for copyright holders to remove their unauthorized material from websites like YouTube. If a holder sends YouTube a "takedown notice"—which must include a statement that the holder has a good faith belief that the material in question is not authorized by law—YouTube must quickly disable access to that content. The YouTube submitter can then file a "counter-notice" and the holder will then have 10 days to either file a lawsuit or allow the video to be restored. Holders that abuse the DMCA's takedown provisions are subject to damages, including attorneys' fees.

In *Lenz v. Universal Music Corp*³ a mother posted on YouTube a video of her baby dancing to Prince's *Let's Go Crazy*, which played in the background (watch it at <https://www.youtube.com/watch?v=N1KfjHFWlhQ>). Universal Music Group ("UMG") was responsible for enforcing Prince's copyrights and, after watching the video, sent a takedown notice to YouTube. YouTube disabled the video, the mother sent a counter-notice and UMG protested the counter-notice. The mother then sent a second counter-notice and filed a lawsuit against UMG for abuse of the DMCA. Both parties then moved for summary judgment.

The 9th Circuit ruled that UMG—and any other copyright holder—is required to first analyze whether the content would be considered a "fair use" under copyright law before it can issue a takedown notice. If the holder forms a "subjective, *good faith* belief" that the material in question "does not constitute fair use," it may send the takedown notice. If, however, the holder does not analyze fair use or merely "pays lip service to the consideration of fair use...when there is evidence to the contrary" it can be liable under the DMCA. Ms. Lenz's case was remanded back to the district court to proceed to trial on her DMCA claim.

To determine fair use under U.S. law, the material must be analyzed using a statutory, multi-element balancing test. The analysis is rarely straightforward, but fair use can include use for commentary, criticism, news reporting, teaching, and many other situations.

If you believe that your copyright has been infringed, or if you wish to use someone else's copyrighted material, the attorneys at Gammage & Burnham can analyze your situation to determine if it involves fair use.

¹ Art. 1, § 8, cl. 8.

² Specifically, Title II of the DMCA, found at 17 U.S.C. § 512

³ Decided on September 14, 2015 and found at

<http://cdn.ca9.uscourts.gov/datastore/opinions/2015/09/14/13-16106.pdf>.

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