

Federal Judge Says Copyright Owners Must Consider Fair Use Before Sending Takedown Notices

The U.S. District Court for the Northern District of California ruled Aug. 20, 2008 that copyright owners must determine whether online content makes fair use of a copyright before demanding a host Web site remove the content.

The court held in *Lenz v. Universal Music Corporation*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), that Universal Music Corporation must determine whether the “fair use” doctrine applies to a copyrighted song used in a video posted on popular Internet video hosting site YouTube before issuing a notice to YouTube to remove the video from its site.

“Fair use” is a principle that allows the use of copyrighted material for certain purposes, depending on the nature of the use, the nature of the copyrighted work, the amount of the work used, and the economic impact of the use. Fair use of a copyrighted work does not constitute an infringement of copyright, according to the Copyright Act of 1976, 17 U.S.C. § 107.

In February 2007, plaintiff Stephanie Lenz posted to YouTube a 29-second video of her toddler dancing in her kitchen. In the video, Lenz’s toddler danced to 20 seconds of the song “Let’s Go Crazy” by the artist professionally known as Prince. Universal holds the copyright to “Let’s Go Crazy.”

On June 4, 2007, Universal demanded that YouTube remove the content uploaded to the Web site by Lenz. It sent YouTube a “takedown notice,” a request that an online content provider remove copyrighted material from a Web site because of a copyright violation. Takedown notices are issued pursuant to provisions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, which provides online service providers with a “safe harbor” from copyright infringement lawsuits as long as they comply with requests from copyright holders to remove unauthorized material.

YouTube sent Lenz an e-mail telling her it was removing her video from its Web site in response to Universal’s allegations of copyright infringement, according to the court’s opinion, written by Judge Jeremy Fogel. On June 5, 2007, YouTube removed Lenz’s video.

Lenz sought advice from the Electronic Frontier Foundation (EFF), a non-profit cyber rights legal organization, according to the court opinion, and

she informed YouTube on June 27, 2007 in a “counter-notification” that her use of Prince’s song as background music for her home video was a fair use of the copyright. Therefore, she claimed, she had not infringed on Universal’s copyright for the song. Lenz demanded YouTube post her video again. YouTube posted the video on its Web site again six weeks after receipt of the counter-notification.

Reuters reported in a Sept. 13, 2007 story that Prince released a statement saying he was planning to sue YouTube and other Web sites for unauthorized use of his music on their sites. “Prince strongly believes artists as the creators and owners of their music need to reclaim their art,” the statement said. Prince plans to file lawsuits in the United States and the United Kingdom, according to a Sept. 13, 2007 story on the Web site c|net news.

Lenz asserts that Prince’s demand that Universal send a takedown request was not based on an evaluation of the particular characteristics of her home video but rather was based on his belief that “as a matter of principle” the video should be removed because it included his music, Fogel’s opinion said.

Section 512(f) of the DMCA says that copyright owners who file DMCA takedown notices without a good faith belief that the use of the material infringes a copyright can be liable for misrepresentation. Lenz argued that copyright owners who do not evaluate whether the use of their copyrighted material is fair use cannot represent that they have a good faith belief that the material infringes a copyright.

Lenz filed a civil suit on July 24, 2007, alleging that Universal was liable for misrepresentation under § 512(f) of the DMCA because it had not considered whether fair use applied to authorize Lenz’s use of Prince’s song in her home video before sending a takedown notice to YouTube. She asked for unspecified monetary damages, including attorneys’ fees.

Universal argued that the DMCA does not reference the fair use doctrine, according to the court’s opinion. Therefore, the law does not require a copyright owner to determine whether fair use applies before demanding a Web site remove copyrighted content. Universal also stated that, as a matter of policy, copyright owners would be unable to respond to copyright infringements in a timely manner if they were expected to consider the fair use doctrine before issuing takedown notices. An evaluation of fair use could be complex, Universal argued.

Fogel rejected Universal’s argument, holding that consideration of the fair use doctrine is part of the review required by the DMCA. “[I]n the majority of

cases,” wrote Fogel, “a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner’s ability to respond rapidly to potential infringements.”

However, Fogel ruled that a full investigation by a copyright owner to verify whether a claim of infringement is accurate is not required. In order to prevail on a claim for misrepresentation under the DMCA, the plaintiff must show subjective bad faith on the part of the copyright owner in its determination that use of copyrighted material does not constitute fair use. The district court ruled in *Lenz*’s favor and denied Universal’s motion to dismiss.

The Citizen Media Law Project, a research organization dedicated to the study of cyberspace and media law, said in an Aug. 22, 2008 story that plaintiffs might have difficulty meeting the standard for misrepresentation claims articulated in *Lenz*. Specifically, a plaintiff might have to show that a copyright owner knew a copyright had not been infringed and yet issued a takedown notice despite this knowledge. This type of showing would require a plaintiff to produce “smoking gun” e-mails or memos demonstrating the copyright holder’s subjective belief that use of the copyrighted material was fair use.

Universal spokesman Peter Lofrumento stated that Universal remains confident it will prevail in the case, according to an Aug. 20, 2008 story posted on the *Wired* magazine blog “Threat Level.” On August 29, Universal filed a motion for an interlocutory appeal, a request to an appellate court to review a district court’s ruling before the trial phase of a case has concluded. Universal seeks to have the district court’s ruling that it must consider fair use before issuing a takedown notice reviewed by the 9th Circuit.

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