

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STEPHANIE LENZ,
*Plaintiff-Appellee/
Cross-Appellant,*

v.

UNIVERSAL MUSIC CORP.;
UNIVERSAL MUSIC PUBLISHING INC.;
UNIVERSAL MUSIC PUBLISHING
GROUP INC.,
*Defendants-Appellants/
Cross-Appellees.*

Nos. 13-16106
13-16107

D.C. No.
5:07-cv-03783-
JF

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Northern District of California
Jeremy D. Fogel, District Judge, Presiding

Argued and Submitted
July 7, 2015—San Francisco, California

Filed September 14, 2015
Amended March 17, 2016

Before: Richard C. Tallman, Milan D. Smith, Jr.,
and Mary H. Murguia, Circuit Judges.

Order;
Opinion by Judge Tallman;
Partial Concurrence and Partial Dissent by Judge Milan D.
Smith, Jr.

SUMMARY*

Digital Millennium Copyright Act

The panel filed (1) an order amending its prior opinion and dissent and denying appellants' petition for panel rehearing and cross-appellant's petitions for panel rehearing and rehearing en banc; and (2) an amended opinion and dissent in an action under the Digital Millennium Copyright Act.

The panel affirmed the district court's denial of the parties' cross-motions for summary judgment on a claim that the defendants violated 17 U.S.C. § 512(f) by misrepresenting in a takedown notification that the plaintiff's home video constituted an infringing use of a portion of a Prince composition.

The panel held that the DCMA requires copyright holders to consider fair use before sending a takedown notification, and that there was a triable issue as to whether the defendant copyright holders formed a subjective good faith belief that plaintiff's use was not authorized by law. Regarding good faith belief, the panel held that the plaintiff could proceed under an actual knowledge theory. The panel held that the willful blindness doctrine may be used to determine whether a copyright holder knowingly materially misrepresented that it held a good faith belief that the offending activity was not a fair use. The plaintiff here, however, could not proceed to trial under a willful blindness theory because she did not

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

show that the defendants subjectively believed there was a high probability that the video constituted fair use. The panel also held that a plaintiff may seek recovery of nominal damages for an injury incurred as a result of a § 512(f) misrepresentation.

Judge M. Smith concurred in part and dissented in part. Dissenting from Part IV.C of the majority opinion, addressing good faith belief, he wrote that there was not a triable issue and that the plaintiff was entitled to summary judgment. He wrote that he agreed with the majority's conclusion that the DCMA requires copyright holders to consider whether potentially infringing material is a fair use before issuing a takedown notice, but he would clarify that § 512(f)'s requirement that a misrepresentation be knowing is satisfied when a party knows that it is ignorant of the truth or falsity of the misrepresentation. He also would hold that defendants' actions were insufficient as a matter of law to form a subjective good-faith belief that plaintiff's video was not a fair use.

COUNSEL

Kelly M. Klaus (argued) and Melinda LeMoine, Munger, Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellants/Cross-Appellees.

Corynne McSherry (argued), Cindy Cohn, Kurt Opsahl, Daniel K. Nazer, and Julie Samuels, Electronic Frontier Foundation, San Francisco, California; Ashok Ramani, Michael S. Kwun, and Theresa H. Nguyen, Kecker & Van Nest LLP, San Francisco, California, for Plaintiff-Appellee/Cross-Appellant.

Steven Fabrizio and Scott Wilkens, Jenner & Block LLP, Washington, D.C., for Amicus Curiae Motion Picture Association of America, Inc.

Jennifer Pariser, Of Counsel, Recording Industry Association of America, Washington, D.C.; Cynthia Arato, Marc Isserles, and Jeremy Licht, Shapiro, Arato & Isserles LLP, New York, New York, for Amicus Curiae Recording Industry Association of America.

Joseph Gratz, Durie Tangri LLP, San Francisco, California, for Amici Curiae Google Inc., Twitter Inc., and Tumblr, Inc.

Marvin Ammori and Lavon Ammori, Ammori Group, Washington, D.C., for Amicus Curiae Automatic, Inc.

Julie Ahrens and Timothy Greene, Stanford Law School Center for Internet and Society, Stanford, California, for Amici Curiae Organization for Transformative Works, Public Knowledge, and International Documentary Association.

Catherine R. Gellis, Sausalito, California, for Amicus Curiae Organization for Transformative Works.

ORDER

The opinion and dissent filed on September 14, 2015 and published at 801 F.3d 1126 are hereby amended. The amended opinion and dissent are filed concurrently with this order.

With these amendments, the panel has voted to deny Universal's petition for panel rehearing and Lenz's petition

for panel rehearing. Judge Tallman and Judge Murguia have voted to deny Lenz’s petition for rehearing en banc, and Judge M. Smith has voted to grant Lenz’s petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. No judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

Universal’s petition for panel rehearing is **DENIED**. Lenz’s petition for panel rehearing or rehearing en banc is **DENIED**. No future petitions for panel rehearing or petitions for rehearing en banc will be entertained.

OPINION

TALLMAN, Circuit Judge:

Stephanie Lenz filed suit under 17 U.S.C. § 512(f)—part of the Digital Millennium Copyright Act (“DMCA”)—against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively “Universal”). She alleges Universal misrepresented in a takedown notification that her 29-second home video (the “video”) constituted an infringing use of a portion of a composition by the Artist known as Prince, which Universal insists was unauthorized by the law. Her claim boils down to a question of whether copyright holders have been abusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use. We hold that the statute requires copyright holders to consider fair use before sending a

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.