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
	
	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

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

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

SUMMARY[*]

Digital Millennium Copyright Act

The panel affirmed the district court's denial of the parties' cross-motions for summary judgment in an action under the Digital Millennium Copyright Act ("DMCA") alleging 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 DMCA requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the 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 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.

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

Judge M. Smith concurred in part, dissented in part, and concurred in the judgment. Dissenting from Part IV.C of the majority opinion, addressing good faith belief, he questioned whether § 512(f) directly prohibits a party from misrepresenting that it has formed a good faith belief that a work is subject to the fair use doctrine. He wrote that the plain text of the statute prohibits misrepresentations that a work is infringing, not misrepresentations about the party's diligence in forming its belief that the work is infringing. Judge M. Smith disagreed that there was any material dispute about whether the defendants considered fair use, and he wrote that the willful blindness doctrine does not apply where, as here, a party has failed to consider fair use and has affirmatively misrepresented that a work is infringing.

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, Keker & 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 fo Transformative Works, Public Knowledge, and International Documentary Association.

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 takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law. We affirm the denial of the parties' cross-motions for summary judgment.

I

Founded in May 2005, YouTube (now owned by Google) operates a website that hosts user-generated content. *About YouTube*, YouTube.com, https://www. youtube.com/yt/about/ (last visited September 4, 2015). Users upload videos directly to the website. *Id.* On February 7, 2007, Lenz uploaded to YouTube a 29-second home video of her two young children in the family kitchen dancing to the song *Let's Go Crazy* by Prince.[1] Available at https://www.youtube.com/watch?v=N1Kf JHFWlhQ (last visited September 4, 2015). She titled the video "'Let's Go Crazy' #1." About four seconds into the video, Lenz asks her thirteen month-old son "what do you think of the music?" after which he bobs up and down while holding a push toy.

At the time Lenz posted the video, Universal was Prince's publishing administrator responsible for enforcing his copyrights. To accomplish this objective with respect to YouTube, Robert Allen, Universal's head of business affairs, assigned Sean Johnson, an assistant in the legal department,

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[1] YouTube is a for-profit company that generates revenues by selling advertising. If users choose to become "content partners" with YouTube, they share in a portion of the advertising revenue generated. Lenz is not a content partner and no advertisements appear next to the video.

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