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Ninth Circuit Finds Copyright Holders Must Consider Fair Use Before Issuing DMCA Takedown Notices

Article By:

Intellectual Property Group

On Monday, September 14, 2015, the Court of Appeals for the *Ninth Circuit* clarified that it is not enough that a copyright holder merely identifies an unauthorized infringing work online before sending a takedown notice. A copyright holder must also consider and form a subjective good faith belief whether the unauthorized work is a "fair use" that does not infringe the copyright. If not, the copyright holder may be subject to damages, which may include court and attorneys' fees and costs.

Background:

On February 7, 2007 Stephanie Lenz uploaded a 29-second home video entitled, "Let's Go Crazy #1," of her two children dancing in the family's kitchen to a song by Prince, *Let's Go Crazy*. Prince's copyright administrator, Universal, had been assigned to monitor YouTube on a daily basis for potentially infringing works, and a staff member discovered Lenz's video.

In deciding whether Lenz's video was infringing, Universal's staff member evaluated whether the video "embodied a Prince composition," whether the video made "significant" and identifiable use of the composition, and whether the composition was "the focus" of the video. The staff member contrasted videos that met those guidelines with other videos that may not be subject to takedown, such as those that used "literally one line, half line" of the composition or that "distorted" the composition "beyond reasonable recognition." Universal's guidelines did not include any explicit consideration of the doctrine of "fair use," which grew as a defense to copyright infringement and was codified into law as part of the Copyright Act of 1976.

Because (1) the staff member "recognized *Let's Go Crazy* immediately," (2) the video was titled in part "Let's Go Crazy," (3) Prince's composition was played in the background through the entire video, and (4) it was "the focus" of the video, Universal identified Lenz's video in a takedown notification to YouTube under the Digital Millennium Copyright Act (DMCA), along with some other 200 videos.

The DMCA, 17 U.S.C. § 512(c), allows online content hosts to avoid copyright liability if they expeditiously remove infringing content after a copyright holder submits a takedown notice to the content host. As part of the notice, the copyright holder must include a "good faith belief" statement under 17 U.S.C. § 512(c)(3)(A)(v), as Universal did in this case: "We have a good faith belief that the

above-described activity is not authorized by the copyright owner, its agent, or the law." After removing the content, the host must notify the user of the takedown, and the user then has the option under § 512(g)(3)(C) of re-enabling the content by submitting a similar "good faith belief" statement, namely that the material was removed "as a result of mistake or misidentification." If the copyright holder does not thereafter file suit against the user, the host must restore access to the content.

YouTube removed the video on June 5, 2007 after receiving Universal's notification, and notified Lenz via email. On June 7, 2007, Lenz submitted a counter-notification under the DMCA, which YouTube provided to Universal. Universal protested the counter-notification, reiterating that Lenz's use was unlicensed, but again made no mention of "fair use." On June 27, 2007, after obtaining *pro bono* counsel, Lenz sent a second counter-notification, which caused YouTube to reinstate the video in mid-July, 2007.

Lenz then filed suit against Universal on July 24, 2007. As amended, Lenz's suit claimed that Universal violated 17 U.S.C. § 512(f), which states that a party who misrepresents "that material or activity is infringing" may be "liable for any damages, including costs and attorneys' fees" incurred as a result of relying on that misrepresentation in removing or disabling access to the material. Both parties moved for summary judgment on the § 512(f) claim. The trial court denied both motions, which were appealed to the Ninth Circuit.

Ninth Circuit Decision:

The Court of Appeals for the Ninth Circuit affirmed the district court, finding that copyright holders "cannot shirk their duty to consider…whether allegedly infringing material constitutes fair use." The court found the trial court's denial of Universal's summary judgment motion was appropriate because Universal had not demonstrated that it considered whether the Lenz video may be authorized by fair use (as § 512(c)(3)(A)(v) requires) prior to issuing its takedown notice.

The Ninth Circuit first confirmed that fair use is in fact an "authorized" use under the law. The fair use statute, 17 U.S.C. § 107, explicitly permits fair use as a non-infringing use. The Ninth Circuit rejected Universal's argument that fair use is not "authorized" because it is an affirmative defense that essentially "excuses" infringement; although fair use began as an excuse to infringement, it is now a statutory doctrine and a "right granted by the Copyright Act of 1976." Further, the fair use statute uses language similar to other "authorized" uses, such as compulsory licenses.

Accordingly, the Ninth Circuit went on to examine whether Universal "formed a good faith belief that" the Lenz video was not fair use. The court noted that this belief need only be a subjective good faith belief that the use is not authorized. In sum, if Universal knowingly misrepresented a good faith belief that the video was not fair use, it could be liable under § 512(f). In affirming the lower court's denial of summary judgment, the Ninth Circuit found that a jury must decide whether Universal's actions were sufficient to form that subjective good faith belief about the video's fair use.

The Ninth Circuit also held that courts may determine whether a copyright holder had a good faith belief using the "willful blindness" doctrine, which precludes a copyright holder from "bury[ing] its head in the sand" to avoid jeopardizing its good faith belief. Therefore, if a copyright holder subjectively believes that there is a high probability that facts will show a use is fair, and takes deliberate actions to avoid learning of those facts, it may be liable under § 512(f). However, in this case, Lenz did not provide evidence that Universal had a subjective belief that facts would support a high probability there was fair use, and so Lenz did not show "willful blindness."

Finally, although it was premature to decide damages questions, the Ninth Circuit found that even if the damages for an improper DMCA takedown notice were insignificant, Lenz could still "vindicate her statutorily created rights by seeking nominal damages," which may ultimately include court costs and attorneys' costs and fees.

Implications:

The instant implication is that copyright holders who issue DMCA notices *en masse* now must factor in potential liability for mis-issued notices. The Ninth Circuit has clearly identified a higher bar for issuing notices – fair use must be at least considered. Therefore, copyright holders who use the takedown procedures often should immediately reevaluate and clarify their takedown notice policies to ensure that both automated and individual notices consider fair use.

However, the Ninth Circuit went to lengths to reassure copyright holders. Although the court disapproved the takedown notice sent in this case, it does not prohibit a copyright holder from issuing DMCA notices using automated procedures. The Ninth Circuit specifically stated that it is "mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age," and approved using automated notices, stating "the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use."

Further, although fair use is a complex test that carefully compares the abstract characteristics of a specific use, including the use's nature, amount, and transformative ability, against the copyright owner's interest in controlling that use, the Ninth Circuit specifically said that a good faith belief "does not require investigation" of the content and it "need not be searching or intensive."

Subsequent cases will likely add clarity to how a copyright holder's algorithmic procedures take those factors into account in "good faith." Until then, however, the Ninth Circuit indicated that the most typical automated takedown notices may not be subject to heightened requirements; where a user essentially just copies content without transformation — i.e., where (1) the video track matches a copyrighted work, (2) the audio track matches, and (3) nearly the entirety of the uploaded work is comprised of that single copyrighted work — automated takedown notices would still sufficiently account for fair use. A staff member may then review the remaining content for fair use.

Despite these guidelines, a large gray area still remains, and even faintly transformative uses — mashups, remixes, and juxtaposition of content — require at least a subjective belief that such material is not fair use before issuing a takedown notice. Until the law further clarifies how much consideration of fair use is "enough," the time-tested advice still holds: consult your lawyer.

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