

[US] The obligation to consider fair use

IRIS 2015-10:1/29

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On 14 September 2015, the United States Court of Appeals for the Ninth Circuit held that copyright holders must consider whether a disputed use of its copyrighted work is protected as fair use by the *Digital Millennium Copyright Act* ("DMCA") before sending a takedown notification. The ruling came in a case that resolved a dispute between a private individual and the company Warner Music Corporation ("Universal") over whether a video that the former litigant posted on YouTube infringed one of their copyrighted works.

On 7 February 2007, the private citizen, a mother of two children, uploaded a 29-second home video titled "'Let's Go Crazy' #1" to YouTube, in which her two young children danced to the song Let's Go Crazy by Prince in the family kitchen (the "Video"). Universal sent a notice to YouTube requesting that they take the video down because it contained unauthorized use of the copyrighted song. The woman subsequently filed a lawsuit against Universal arguing that Universal's request should be denied because her use of the copyrighted music is permitted as fair use under the DMCA.

Under Section 512(c)(3)(A) of the DMCA, a takedown notification must include identification of the copyrighted work, identification of the allegedly infringing material, and a statement that the copyright holder believes in good faith that the infringing material "is not authorized by the copyright owner, its agent, or the law." The plaintiff argued that Universal's takedown notification was not made in good faith because they did not perform any analysis of whether her use of the copyrighted material was permitted as fair use under the DMCA. The Court agreed with the plaintiff's argument, finding that a copyright holder can only satisfy the good faith requirement by considering whether the potentially infringing material is fair use. It explained that, while the Court is ultimately in no position to dispute a copyright holder's belief even if it would have reached the opposite conclusion, the copyright holder must be able to form a subjective good faith belief that the allegedly infringing material does not constitute fair use.

The Court acknowledged that there is some level of uncertainty regarding how this might be achieved because the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity, and it is unaware of any decision that has addressed the need for human review. However, it provided guidance on how the requirement might be

met. The copyright holder's consideration of fair use need not be searching or intensive, because it is mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age. The Court explained in dicta that the consideration of fair use may be sufficient if copyright holders utilize computer programs that automatically identify for takedown notifications content where: "(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matches the audio track of that same copyrighted work; and (3) nearly the entirety . . . is comprised of a single copyrighted work."

The Court also agreed with the plaintiff's request that Universal be required to pay her damages for initiating a takedown notification that was not made in good faith. Under the DMCA, a plaintiff may seek recovery of any damages, including costs and attorney's fees, incurred by the alleged infringer. It found that a copyright holder will be found to have "knowingly materially misrepresented that it held a good faith belief" if the plaintiff can establish two factors: "(1) the defendant subjectively believed that there is a high probability that the video constituted fair use, and (2) the defendant took deliberate actions to avoid learning of that fact." The Court held that Universal did not form any subjective good faith belief about the video's fair use because it failed to consider fair use at all, and knew that it failed to do so.

The ruling of the United States Court of Appeals for the Ninth Circuit

<http://www.eff.org/document/9th-circuit-opinion-lenz>

The video is available at:

<http://www.youtube.com/watch?v=N1KfJHFWlhQ>

