

Nos. 13-16106 & 13-16107

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

STEPHANIE LENZ,

Plaintiff/Appellee/Cross-Appellant,

v.

**UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC.,
AND UNIVERSAL MUSIC PUBLISHING GROUP,**

Defendants/Appellants/Cross-Appellees.

*On Appeal from the United States District Court,
Northern District of California, San Jose Division,
The Honorable Jeremy Fogel, United States District Judge,
Case No. 07-cv-03783-JF*

**BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC.
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure:

The Motion Picture Association of America, Inc. certifies that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Amicus curiae the Motion Picture Association of America, Inc. (“MPAA”) respectfully submits this brief with the consent of all parties.¹ See Fed. R. App. P. 29(a).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The MPAA’s members and their affiliates are the leading producers and distributors of audiovisual works in the theatrical, television and home entertainment markets, in all formats and channels of distribution including online. The MPAA members responsible for this brief are not parties to this case or affiliates of those parties.²

The MPAA’s interest in this case is substantial given that MPAA members are continually confronted by the on-line piracy of their works on a massive, global scale. One of the only ways they have to address the enormous challenges posed by internet piracy is through the notice-and-takedown provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512. The notice-and-

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the MPAA states that no counsel for a party has written this brief in whole or in part; that no party or counsel for a party has made a monetary contribution that was intended to fund the preparation or submission of this brief; and that no person other than the MPAA, its members, and its counsel has made a monetary contribution that was intended to fund the preparation or submission of this brief.

² The members of the MPAA are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

takedown regime has become an essential anti-piracy tool in the fifteen years since the DMCA's enactment. The MPAA and its members send literally millions of takedown notices every year, and the rapid and efficient issuance and processing of these notices is critical to the expeditious removal of pirated content.

Although this case concerns a single 29-second clip, the positions advocated by Plaintiff-Appellee Stephanie Lenz ("Plaintiff" or "Lenz") threaten to undermine the DMCA's notice-and-takedown regime. Subjecting copyright owners to liability for the failure to analyze fair use and other potential affirmative defenses to copyright infringement before sending a takedown notice would fundamentally alter the statutory notice-and-takedown system by imposing significant and unwarranted burdens. Furthermore, the District Court's ruling allowing Section 512(f) plaintiffs to proceed to trial on a willful blindness theory, even in the absence of any evidence of the copyright owner's subjective awareness of a high probability of fair use, threatens to further erode the intended efficacy of the notice-and-takedown system.

SUMMARY OF ARGUMENT

In the present appeal, Lenz is in essence seeking to re-litigate the central holding of *Rossi v. Motion Picture Association of America, Inc.*, 391 F.3d 1000 (9th Cir. 2004), and impose unwarranted burdens on copyright owners that would be detrimental to the notice-and-takedown regime designed by Congress. Based

on a single short clip that was reposted once Lenz submitted a valid DMCA counter-notice to YouTube, Lenz is attempting to require all copyright owners to review each and every allegedly infringing internet posting for all possible affirmative defenses to copyright infringement, including fair use, before sending a takedown notice. Such a requirement is contrary to *Rossi* and other interpretive case law, the language and structure of the Copyright Act, and Congressional intent.

Imposing liability under Section 512(f) for the failure to analyze fair use or other affirmative defenses would have disastrous consequences for the MPAA and its members, which as noted send literally *millions of takedown notices every year*. Reviewing each and every clip for potential defenses prior to sending a notice would upend the “smooth” “efficient” and “expeditious” notice-and-takedown procedures carefully designed by Congress. Imposing such liability is also wholly unnecessary. The notice-and-takedown and put-back procedures adequately accommodate fair use concerns. In issuing takedown notices, copyright owners, including the MPAA and its members, are incentivized to focus on blatantly infringing content and to steer clear of fair use. Consequently, in the MPAA’s real world experience, the number of counternotices asserting either fair use or any type of mistake in the takedown process is *de minimis*, both as an absolute number and in proportion to the massive number of takedown notices the members must

constantly send. And in those extremely rare instances, the content is promptly reposted (absent the filing of a lawsuit by the copyright holder). Thus even where misidentification or mistakes are made (including situations involving fair uses), the DMCA's counternotice procedures in Section 512(g) provide a streamlined "safety valve" to correct such situations.

In *Rossi*, the plaintiff and his amici sought to impose on all copyright holders a duty of "reasonable investigation" into alleged infringement and potential affirmative defenses before sending a takedown notice. This Court squarely rejected that position and made clear that Section 512(f) provides "an expressly limited cause of action for improper infringement notifications, imposing liability *only if the copyright owner's notification is a knowing misrepresentation.*" *Rossi*, 391 F.3d at 1004-05 (emphasis added). In light of that holding, a copyright holder's failure to analyze fair use or other potential affirmative defenses before sending takedown notices is not actionable under Section 512(f), because the defendant does not have actual knowledge that its takedown notices contain a material misrepresentation.

Lenz's argument is also at odds with the statutory scheme and Congressional intent, as the district court recently held in *Tuteur v. Crosley-Corcoran*, No. Civ. A. 13-10159-RGS, — F. Supp. 2d —, 2013 WL 4832601 (D. Mass. Sept. 10, 2013). In carefully designing the notice-and-takedown and put-back procedures,

Congress sought to balance the need for the rapid removal of massive quantities of potentially infringing material with the need to promptly repost content that is removed in error. Congress did not require copyright owners to analyze affirmative defenses such as fair use before issuing a takedown notice because to do so would be “at odds with Congress’s express intent of creating an ‘expeditious[],’ ‘rapid response’ to ‘potential infringement’ on the Internet.” *Id.* at *7 (citations omitted). Furthermore, fair use is an affirmative defense to a claim of infringement, and if Congress had intended to shift the burden of proof with respect to such defenses from internet users to copyright holders, it would have done so expressly. Congress simply could not have intended an assessment of fair use – a particularly complex and malleable legal doctrine – to precede the sending of each and every one of millions of takedown notices.

The District Court’s decision to allow Lenz’s willful blindness theory to proceed to trial, even in the absence of any evidence that the defendant was aware of a high probability of fair use, also threatens to undermine the efficient functioning of the notice-and-takedown system. Given that Lenz failed to raise a genuine dispute of material fact as to an essential element of her willful blindness theory – whether the defendant was subjectively aware of a high probability of fair use of Prince’s works – summary judgment should have been available to dispose of her claim. The District Court compounded its error by allowing Lenz to argue

an objective knowledge standard to the jury – whether “*a reasonable actor in Universal’s position* would have understood that fair use was ‘self-evident’” – which is contrary to the willful blindness doctrine and *Rossi*, and which is also at odds with the streamlined notice-and-takedown system designed by Congress. 1ER 20 (emphasis added).³

ARGUMENT

I. SECTION 512(F) OF THE DMCA DOES NOT IMPOSE LIABILITY ON COPYRIGHT HOLDERS FOR THE FAILURE TO ANALYZE AFFIRMATIVE DEFENSES SUCH AS FAIR USE BEFORE SENDING TAKEDOWN NOTICES.

In this appeal, the Court is confronted with essentially the same arguments it considered and rejected in *Rossi*. “The issue boils down to the proper test of what is required of a copyright owner prior to the filing of a takedown notice.” *Tuteur*, 2013 WL 4832601, at *6. Lenz argues that all copyright owners must review each and every allegedly infringing clip they identify on the internet for possible affirmative defenses to copyright infringement, including fair use, before sending a takedown notice, or face liability under Section 512(f). That is wrong. Such a requirement is inconsistent with *Rossi* and the many cases adopting *Rossi*’s subjective knowledge standard. It is also at odds with the language and structure of the Copyright Act, Congressional intent, and reasonable practicability.

³ Citations to Appellants’ Excerpts of Record (“ER”) include the volume number and page number where the cited material can be found. For example, this citation is to Volume 1, page 20.

The volume of online piracy – and the resulting number of takedown notices that the MPAA and its members are forced to send – is truly staggering. In just the last two years, MPAA members and their affiliates sent *more than 25 million takedown requests* to Google Search alone. If a review for fair use and other potential affirmative defenses were required before each takedown notice is sent, the streamlined notice-and-takedown system that Congress designed would become a legal logjam. Such a troubling result is completely unwarranted, because there is absolutely no evidence to suggest that the notice-and-takedown and put-back procedures fail to adequately accommodate fair use concerns. And, as expressly provided for in the DMCA, in the exceedingly rare case in which a removed clip arguably qualifies as fair use, it is promptly reposted upon submission of a valid counter-notice.

A. Congress Designed The DMCA’s Notice-And-Takedown And Put-Back Procedures To Balance The Rapid Removal Of Massive Quantities Of Infringing Material With The Prompt Reposting Of Content That Is Erroneously Removed.

As this Court recognized in *Rossi*, “the DMCA contains a number of measures designed to enlist the cooperation of Internet and other online service providers to combat ongoing copyright infringement.” 391 F.3d at 1003. In enacting the DMCA, Congress understood that the internet poses unique and unprecedented challenges for the protection of copyrighted material because it allows works to be copied and disseminated instantaneously on a massive scale.

See S. Rep. No. 105-190, at 8 (1998) (“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1124 (N.D. Cal. 2002) (“Congress was concerned with promoting electronic commerce while protecting the rights of copyright owners, particularly in the digital age where near exact copies of protected works can be made at virtually no cost and distributed instantaneously on a worldwide basis.”).

Thus, in the DMCA, Congress sought to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” H.R. Rep. 105-551(II), at 49 (1998). At the same time, Congress sought to “balance the need for rapid response to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse.” S. Rep. 105-190, at 21.

These goals are reflected in the DMCA’s carefully crafted, multi-step “notice-and-takedown” and “put-back” procedures for the rapid removal of allegedly infringing material and the prompt reposting of content that was removed

in error.⁴ Congress intentionally drafted these provisions so that they would “operate efficiently” and “smoothly,” and so that the service provider could “find and address the allegedly infringing material expeditiously.” H.R. Rep. 105-551(II), at 55-56; S. Rep. 105-190, at 46-47. As the Report of the Senate Committee on the Judiciary notes, “[t]his ‘notice-and-takedown’ procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.” S. Rep. 105-190, at 45; *see also* H. R. Rep. 105-551(II), at 54.

Once a copyright owner submits a takedown notice that complies with the statutory requirements, *see* 17 U.S.C. § 512(c)(3)(A), the service provider must “respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing,” in order to be eligible for the DMCA’s safe harbors. *Id.* § 512(c)(1)(C). The DMCA then provides a set of put back procedures in Section 512(g) “*for ascertaining whether the material is indeed infringing.*” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1020 n.12 (9th Cir. 2013) (emphasis added). The subscriber may submit a counter-notice to the

⁴ In addition to following the notice-and-takedown and put-back procedures, service providers must also meet several additional independent requirements in order to be eligible for the DMCA’s safe harbors from liability for copyright infringement. 17 U.S.C. § 512(c)-(d); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039-47 (9th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3137 (U.S. Sept. 12, 2013) (No. 13-334); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014-15 (9th Cir. 2013).

service provider, which must then repost the removed material within 10 to 14 business days unless the copyright owner sues the subscriber for infringement. 17 U.S.C. § 512(g)(2)-(3); *see Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1105 n.4 (9th Cir. 2010).

The takedown notice procedures recognize the need to remove potentially infringing content quickly in order to minimize the harm from infringement on the internet. The longer that infringing content remains online, the greater the danger that it will be disseminated to thousands or even millions of internet users, resulting in “massive, repeated, and worldwide infringement.” *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1073 & n.2 (D. Ariz. 2006) (“When digital works are distributed via the internet, as in this case, every downloader who receives one of the copyrighted works from Defendant is in turn capable of also transmitting perfect copies of the works. Accordingly, the process is potentially exponential rather than linear, threatening virtually unstoppable infringement of the copyright.” (citing *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013–14 (9th Cir. 2001))); *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-29 (2005) (noting concern that “digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works.”).

The counter-notice or “put back” procedures recognize that the rapid removal of potentially infringing content in response to takedown notices will inevitably lead to “mistakes” or “misidentifications,” and that there must be “procedures for ascertaining whether the material is indeed infringing.” *Shelter Capital*, 718 F.3d at 1020 n.12. In this way, the put-back procedures provide an important counterbalance to the takedown notice system. H.R. Rep. 105-551(II), at 59-60 (“The put-back procedures were added to balance the incentives created in new Section 512 for service providers to take down material against third parties’ interests in ensuring that material not be taken down.”). As this Court has observed, taken together, the “notice, take-down, and put-back procedures . . . carefully balance the First Amendment rights of users with the rights of a potentially injured copyright holder.” *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003).

B. Section 512(f) Provides A Limited Remedy Against Those Who Have Actual, Subjective Knowledge That They Are Materially Misrepresenting That Content Posted On-Line Is Infringing.

This Court explained in *Rossi* that in Section 512(f) of the DMCA, Congress provided for an “expressly limited cause of action for improper infringement notifications” or counter-notifications, “imposing liability only if the copyright owner’s notification [or the subscriber’s counter-notice] is a knowing misrepresentation” as to the infringing (or non-infringing) status of material at

issue. *Rossi*, 391 F.3d at 1004-05. The Court made clear that the plaintiff in a Section 512(f) action bears the burden of proving that the defendant had actual, subjective knowledge of a material misrepresentation in a takedown notice. *Id.*

The plaintiff in *Rossi* operated a website that advertised “Full Length Downloadable Movies” and posted graphics for movies whose copyrights were owned by MPAA members. *Id.* at 1002. After viewing the website, but without actually attempting to download any movies, the MPAA sent several DMCA takedown notices to Rossi and his internet service provider. *Id.* Rossi subsequently sued the MPAA for tortious interference with contract and other state law claims. The MPAA argued that its compliance with the DMCA was a complete defense to Rossi’s claims. *Id.*

Rossi, in contrast, claimed that the MPAA had not complied with the DMCA. He argued that “the copyright owner is required to conduct a reasonable investigation” into alleged infringement before sending a takedown notice, and that the failure to do so constitutes a knowing material misrepresentation under Section 512(f). *Rossi*, 391 F.3d at 1003. According to Rossi, the MPAA could not have formed a “good faith belief” that his site was distributing infringing material because a “reasonable investigation” would have revealed that users could not actually download movies there. *Id.* In support of Rossi, *Amici* NetCoalition and Internet Commerce Coalition similarly argued that copyright owners should be

required to engage in an objectively reasonable investigation into alleged infringement – including an assessment of fair use and other potential affirmative defenses – before sending a takedown notice. Brief of Amici Curiae NetCoalition and Internet Commerce Coalition, *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000 (9th Cir. 2004) (No. 03-16034), 2003 WL 23301158, at *7-8.

The Ninth Circuit rejected Rossi’s and his amici’s reading of the statute. Declining the invitation to impose broad investigative duties on copyright owners before sending a takedown notice, this Court held that Section 512(f) provides “an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner’s notification is a knowing misrepresentation.” *Rossi*, 391 F.3d at 1004-05. Under *Rossi*, an “unknowing mistake” in a takedown notice is not actionable “even if the copyright owner acted unreasonably in making the mistake.” *Id.* at 1005. Instead, “some actual knowledge of misrepresentation on the part of the copyright owner” is required. *Id.* Any attempt to “[m]easur[e] compliance with a lesser ‘objective reasonableness’ standard would be inconsistent with Congress’s apparent intent that the statute protect potential violators from *subjectively* improper actions by copyright owners.” *Id.*

Subsequent to *Rossi*, every court that has examined the standard for knowledge under Section 512(f) has followed *Rossi*’s reading of the statute, requiring actual, subjective knowledge of a material misrepresentation. *See, e.g.,*

Tuteur, 2013 WL 4832601, at *6-7; *Cabell v. Zimmerman*, Case No. 09 Civ. 10134(CM), 2010 WL 996007, at *4-5 (S.D.N.Y. Mar. 12, 2010); *Third Educ. Grp., Inc. v. Phelps*, 675 F. Supp. 2d 916, 927 (E.D. Wis. 2009); *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1065 (C.D. Cal. 2008), *aff'd on other grounds*, 628 F.3d 1175 (9th Cir. 2011); *Dudnikov v. MGA Entm't, Inc.*, 410 F. Supp. 2d 1010, 1013 (D. Colo. 2005); *see also* 4 *Melville B. Nimmer & David Nimmer, Nimmer on Copyright* § 12B.08[A] & n.8 at 12B-146 (2013) (only “mendacious individual[s]” may be held liable for damages pursuant to 512(f); “[i]nnocent misrepresentations are not subject to those damages”).⁵ And under *Rossi*’s well-established reading of the statute, Lenz’s arguments are untenable.

C. Imposing Section 512(f) Liability For The Failure To Evaluate Affirmative Defenses Such As Fair Use Before Sending A Takedown Notice Would Be Inconsistent With *Rossi*, The Statutory Scheme, And Congressional Intent.

Nothing in Section 512(f) (or in any related statutory provision) imposes liability for the failure to evaluate fair use or other affirmative defenses before sending a takedown notice – defenses that might be raised if an infringement suit were filed against the subscriber posting the material. To the contrary, as *Rossi* makes clear, the copyright owner sending the notice must have actual, subjective

⁵ In *Disney Enterprises, Inc. v. Hotfile Corp.*, Case No. 11-cv-20427-KMW, slip op. (S.D. Fla. Sept. 20, 2013), ECF No. 534, the district court also adopted the *Rossi* standard but found disputed facts precluding summary judgment. *Id.* at 93-95.

knowledge that it is misrepresenting that the material is infringing. *See Rossi*, 391 F.3d at 1005. Indeed, the District Court recognized that the position advocated by Lenz would conflict with *Rossi*. 1ER 18 (clarifying that “in light of *Rossi*,” the “mere failure to consider fair use would be insufficient to give rise to liability under Section 512(f)” and that a plaintiff “must demonstrate” that a defendant “had some actual knowledge that its Takedown Notice contained a material misrepresentation”); *see also Tuteur*, 2013 WL 4832601, at *7 (acknowledging same).

Lenz cites a different provision of the statute – 17 U.S.C. § 512(c)(3)(A)(v) – in arguing that a failure to consider affirmative defenses such as fair use must be actionable as a knowing misrepresentation under Section 512(f). She claims that unless a copyright owner considers affirmative defenses such as fair use before sending a takedown notice, the copyright owner cannot form a “good faith belief” that the use of the copyrighted material is not “authorized by the copyright owner, its agent, or the law.” 17 U.S.C. § 512(c)(3)(A)(v). That is incorrect. Affirmative defenses to copyright infringement, including fair use, excuse conduct that otherwise is actionable as infringement, as the Supreme Court and this Court have made clear. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (Congress “structured [Section 107] as an affirmative defense”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (same); *Monge v.*

Maya Magazines, Inc., 688 F.3d 1164, 1170 (9th Cir. 2012) (“This affirmative defense presumes that unauthorized copying has occurred, and is instead aimed at whether the defendant’s use was fair. As with all affirmative defenses, . . . the defendant bears the burden of proof.”).

Requiring copyright owners to consider all possible affirmative defenses before sending a takedown notice would improperly shift the burden of proof to the copyright owner. Nothing in Section 512(f) or elsewhere in the DMCA suggests that Congress intended to depart from the “longstanding convention” that the party asserting an affirmative defense bears the burden of proof. *E.g.*, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91-92 (2008) (explaining that “Congress writes laws” against the “backdrop” of this “longstanding convention” and that the Supreme Court respects it absent “compelling reasons to think that Congress meant to put the burden of persuasion on the other side.”).

Congress knew how to refer to defenses to infringement, including fair use, in Section 512 of the DMCA and elsewhere in the Copyright Act. *See* 17 U.S.C. § 512(l) (providing that service provider’s “defense[s]” to infringement “under this title,” which includes fair use, are unaffected by the DMCA safe harbors); *see also* 17 U.S.C. §§ 108(f), 118(e), 401(d), 402(d), 504(c)(2). And indeed, Congress was keenly aware of fair use concerns in enacting the DMCA. *See* H.R. Rep. 105-551(II), at 25 (lengthy discussion of “Fair Use In The Digital Environment,”

particularly in relation to Title I of the DMCA). And yet in carefully specifying each element of a takedown notice, “Congress did not require that a notice-giver verify that he or she had explored an alleged infringer’s possible affirmative defenses prior to acting, only that she affirm a good faith belief that the copyrighted material is being used without her or her agent’s permission.” *Tuteur*, 2013 WL 4832601, at *7. The reason Congress did not impose such a requirement is that to do so “would have put the takedown notice procedure at odds with Congress’s express intent of creating an ‘expeditious[],’ ‘rapid response’ to ‘potential infringement’ on the Internet.” *Id.* (citing 17 U.S.C. § 512(c)(1)(A)(iii); S. Rep. 105-190, at 21).

Fair use is a particularly complex doctrine because it requires the balancing of multiple factors. *Monge*, 688 F.3d at 1170; *Campbell*, 510 U.S. at 578 (all of the fair use factors “are to be explored, and the results weighed together, in light of the purposes of copyright.”); 17 U.S.C. § 107 (setting forth the statutory fair use factors). The Supreme Court has emphasized that the fair use analysis does not lend itself to “bright-line rules,” but rather “calls for case-by-case analysis.” *Campbell*, 510 U.S. at 577; *see also Harper & Row*, 471 U.S. at 560 (“[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” (quotation marks omitted) (alteration in original)).

In light of the “porous nature” of the fair use inquiry, applying the fair use defense in any given case can be complex and time-consuming and can yield divergent results. *Monge*, 688 F.3d at 1171; *see also id.* at 1183 (referring to this Court’s “long journey through the nooks and crannies of fair use law”); *see e.g.* 4 *Nimmer on Copyright* § 12B.08, at 12B-145 & n.1 (observing that fair use determinations can be hotly contested and that even the same facts can and often do lead judges to reach differing results; “it might even take adjudication up to and including the Supreme Court before the winner’s identity is established.”); *id.* § 13.05, at 13-156 (“The malleability of fair use emerges starkly from the fact that all three [Supreme Court fair use] cases [*Sony*, *Harper & Row*, and *Campbell*] were overturned at each level of review, two of them by split opinions at the Supreme Court level.” (footnotes omitted)); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176-77 (9th Cir. 2007) (this Court held defendants’ use of thumbnail images was fair use, whereas district court, based on same facts, held it was not).

Thus, requiring copyright owners to analyze fair use and other affirmative defenses before sending takedown notices would conflict with Congress’s design of the notice-and-takedown system as an “expeditious[],” “rapid response” to “*potential infringement*” on the internet. 17 U.S.C. § 512(c)(1)(A)(iii); S. Rep. No. 105-190, at 21 (emphasis added). It is entirely implausible that Congress would

have carefully specified each step in the takedown notice and put back procedures so as to ensure that they would “operate efficiently” and “smoothly,” and yet at the same time demand that the burden of proof with respect to affirmative defenses including fair use be shifted to copyright owners who must then engage in a burdensome case-by-case analysis of such defenses before each notice is sent. H.R. Rep. 105-551(II), at 55-56; S. Rep. 105-190, at 46-47. The statutory structure instead shows that Congress intended for a subscriber’s affirmative defenses to infringement to be raised, considered, and if necessary litigated, through the counter-notice or “put back” procedures set forth in Section 512(g). *Shelter Capital*, 718 F.3d at 1020 n.12 (noting that Section 512(g) provides the “procedures for ascertaining whether the material is indeed infringing.”). That is entirely appropriate given that in litigation the subscriber would bear the burden of proof as to any affirmative defense to copyright infringement. *Monge*, 688 F.3d at 1170.

D. Given The Millions Of Takedown Notices MPAA Members Send Annually, It Would Be Detrimental To The Notice-And-Takedown System To Impose Liability For Failing To Analyze Affirmative Defenses Such As Fair Use.

In the fifteen years since enactment of the DMCA, the notice-and-takedown system has become increasingly important to copyright owners as the volume of internet piracy has skyrocketed. According to Google’s “Transparency Report,” during just the month of September 2013, Google received requests to remove

more than 21.5 million links to infringing content from the Google Search index.⁶ Scanning just the Google search index for infringing links is daunting by any measure; scanning the entire internet for infringement is truly a Sisyphean task. Although YouTube does not publish statistics on the number of takedown notices it receives, it reports that currently “100 hours of video are uploaded to YouTube *every minute*.” <http://www.youtube.com/yt/press/statistics.html> (last visited Oct. 14, 2013; emphasis added). Continually reviewing this volume newly-posted content obviously poses enormous challenges for copyright owners, and YouTube is just one among many sites that allow users to post content online.

In the face of the floodtide of online infringement, the MPAA and its members send literally millions of takedown requests each year to Google and other service providers. For example, over the last two-and-a-half years, MPAA members and their affiliates sent over 25 million removal requests to Google Search alone.⁷ Given the exponential pace at which content is easily posted or

⁶ <http://www.google.com/transparencyreport/removals/copyright/> (last visited Oct. 14, 2013) (stating the total number of “[c]opyright removal requests received for Search in the past month,” and providing a chart showing “URLs requested to be removed from Search per week,” from July 18, 2011 through the present). The data provided in the Transparency Report include only those removal requests sent to Google Search via an on-line form. They do not include removal requests sent to Google services other than Google Search, such as YouTube or Blogger, and they do not include removal requests submitted by means other than the on-line form, such as by fax. *Id.* (link titled “*What’s not included*”).

⁷ MPAA members and their affiliates have requested the removal of tens of millions of infringing URLs from Google Search since July 2011, which is when

linked to on the internet, and the fact that infringing material can be re-posted or moved faster than it can be detected, it is vital that copyright owners have the ability to send DMCA takedown notices quickly and efficiently, as Congress intended. If copyright owners were required to analyze fair use and other affirmative defenses before each and every takedown notice is sent, on pain of liability under Section 512(f), the takedown notice system would effectively grind to a halt, thereby depriving copyright owners of one of the only tools Congress provided to deal with online piracy.

Contrary to Lenz's claims, there is no evidence to suggest that the notice-and-takedown and put-back procedures fail to accommodate fair use concerns, or that the takedown notice system results in anything more than a *de minimis* number of erroneous removals. In this and several other Section 512(f) cases in which EFF has served as counsel to a party or *amicus curiae*, EFF has devoted substantial resources to identifying and exposing alleged abuses in the takedown notice

Google began reporting copyright removal data in its Transparency Report. *See* <http://www.google.com/transparencyreport/removals/copyright/owners/> (last visited Oct. 14, 2013) (indicating that “Fox” requested removal of more than 15 million URLs; “NBCUniversal” requested removal of more than 5.7 million URLs; “Walt Disney Company” requested removal of over 2.3 million URLs; ; “Warner Bros. Entertainment Inc.” requested removal of more than 1.8 million URLs; and “Paramount Pictures Corporation” and “Paramount” requested removal of more than 1.3 million URLs.)

system.⁸ And yet EFF has been able to “point to but a handful of examples.” *Tuteur*, 2013 WL 4832601, at *7. Even in those few alleged cases of abuse, including the clip at issue in this lawsuit, the material was promptly reposted when the subscriber submitted a valid counter-notice. These few examples do not warrant “resetting of the balance” that Congress struck in the DMCA, and even if future events were to warrant a rebalancing, that would be a matter for Congress, not the courts. *Id.*⁹

Lenz and EFF have also argued that the “put back” procedures are inadequate because the 10-day period to restore material after receipt of a counter-notice is too long given the potential First Amendment interests at stake. That time period, however, was specified by Congress after substantial consultations with all stakeholders and full consideration of free speech and other concerns.¹⁰ It was

⁸ E.g., Brief of Amici Curiae Electronic Frontier Foundation and Digital Media Law Project at 11-12, *Tuteur v. Crosley-Corcoran*, No. 13-cv-10159, 2013 WL 4832601 (D. Mass. Sept. 10, 2013), ECF No. 35-1, *available at* https://www.eff.org/sites/default/files/eff_and_dmlp_tuteur_brief.pdf.

⁹ There is no evidence to suggest that the large volume of takedown notices results in anything more than a tiny number of counternotices, both in absolute terms and relative to the total number of takedown notices. Google’s Transparency Report does not even include any data on the number of counternotices Google receives. In the MPAA’s experience, the number of counternotices is exceedingly small, which is no doubt due to the fact that the MPAA and its members seek to give fair use a wide berth in issuing takedown notices by focusing on blatantly infringing content.

¹⁰ Additionally, Lenz’s counsel, EFF, has argued that the “put back” procedures are ineffective because subscribers who have their content removed may not know that they have the ability to file a counter-notice. However, EFF has proffered no

specifically designed in part to give the copyright owner sufficient time to file suit against the subscriber before the material is reposted. Even if there were some merit to Lenz’s criticism of the statutorily-prescribed time period, that too would be a matter for Congress rather than this Court.

II. THE DISTRICT COURT’S DECISION PERMITTING LENZ’S WILLFUL BLINDNESS THEORY TO PROCEED TO TRIAL THREATENS TO UNDERMINE THE NOTICE-AND-TAKEDOWN SYSTEM.

The District Court erred in allowing Lenz’s willful blindness theory to survive summary judgment. Lenz failed to raise a genuine dispute of material fact as to an essential element of her willful blindness theory – whether the defendants were subjectively aware of a high probability of fair use of Prince’s works. Because Lenz failed to proffer any evidence of such a subjective awareness, her willful blindness theory should have been rejected at the summary judgment stage instead of being allowed to proceed to trial. The District Court compounded its error by allowing Lenz “to argue [to a jury] that *a reasonable actor in Universal’s position* would have understood that fair use was ‘self-evident,’ and that this circumstance is evidence of Universal’s alleged willful blindness.” 1ER 20

evidence to substantiate this concern, and many service providers, including Google, specifically inform subscribers whose content has been removed of the counter-notice procedures. Google also provides users with an easy-to-use online form for submitting counternotices. https://support.google.com/legal/contact/lr_counternotice?product=websearch&contact_type=lr_counternotice&rd=1 (last visited Oct. 14, 2013).

(emphasis added). Such an objective standard runs afoul not only of the willful blindness doctrine generally but also Section 512(f) and *Rossi*. Unless reversed, the District Court's ruling could undermine the notice-and-takedown system by subjecting MPAA members and other copyright holders to meritless Section 512(f) claims premised on a flawed application of willful blindness.

As the Supreme Court explained in *Global-Tech Appliances, Inc. v. SEB SA*, 131 S. Ct. 2060 (2011), in order to establish a defendant's willful blindness, the plaintiff must show that the defendant (1) subjectively believed that there is a high probability that a fact exists and (2) took deliberate actions to avoid learning of that fact. *Id.* at 2070. The District Court correctly concluded that Lenz failed to proffer any evidence under the first willful blindness factor, but inexplicably allowed Lenz to proceed to trial on a willful blindness theory. 1ER 20.

Under well-established summary judgment principles, Universal, as the moving party, had the initial burden of identifying those portions of the summary judgment record demonstrating the absence of a triable issue of material fact. *E.g., Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). Universal met that initial burden with respect to Lenz's allegation that Universal was subjectively aware of a high probability of fair use of Prince's works. *See* Defendants' Notice of Motion and Motion for Summary Judgment, Dkt. 395, at 22-23. Consequently, Lenz had to present specific facts showing that there is a

genuine issue for trial. *E.g.*, *Arpin*, 261 F.3d at 919. She failed to present any such facts, as the District Court recognized. 1ER 20. That should have been the end of the matter, resulting in the dismissal of Lenz’s willful blindness theory.

By allowing the issue to proceed to trial even in the absence of any evidence under the first willful blindness factor, the District Court ignored the important element of intent (willfulness). The Supreme Court explained in *Global-Tech* that “a willfully blind defendant is one who *takes deliberate actions to avoid confirming a high probability of wrongdoing . . .*” 131 S. Ct. at 2070-71 (emphasis added). Thus, the actions under the second willful blindness factor must be taken *deliberately*, i.e. for the purpose of avoiding confirmation of what the defendant subjectively believes is highly likely to be true under the first willful blindness factor. *E.g.*, *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (explaining that the word “deliberately” in the second willful blindness factor connotes an intent or a conscious choice to avoid learning the truth). Without a subjective awareness of a high probability of fair use, a Section 512(f) defendant’s actions cannot be a *deliberate* attempt to blind itself to fair use.¹¹

¹¹ The contrast between the facts of this case and *Global-Tech* could hardly be more stark. In *Global-Tech*, the Supreme Court held that the following facts were “more than sufficient” to support a jury finding that the alleged patent infringer, Pentalpha, willfully blinded itself to the patented nature of the deep fryer it copied from its competitor, SEB: Pentalpha was well aware of SEB’s successful deep fryer and decided to copy it in all respects except its cosmetic features; Pentalpha chose to copy an overseas model of the fryer rather than a U.S. model, knowing

The District Court further erred by allowing Lenz “to argue [to a jury] that *a reasonable actor in Universal’s position* would have understood that fair use was ‘self-evident,’ and that this circumstance is evidence of Universal’s alleged willful blindness.” 1ER 20 (emphasis added). That standard, premised on what an objectively reasonable actor in Universal’s position would have known, runs afoul not only of the willful blindness doctrine, which requires a *subjective awareness* of a high probability of the fact at issue, *e.g.*, *Global-Tech*, 131 S. Ct. at 2070, but also this Court’s decision in *Rossi*, which makes clear that Section 512(f) requires *subjective knowledge* of a misrepresentation, not “a lesser ‘objective reasonableness’ standard.” 391 F.3d at 1005.

A subjective awareness requirement plays an important role in willful blindness because it gives the doctrine “an appropriately limited scope that surpasses recklessness and negligence.” *Global-Tech*, 131 S. Ct. at 2070. The District Court’s decision overrides that limitation with what is in effect a negligence standard. Furthermore, as this Court recognized in *Rossi*, a subjective

that the overseas model was unlikely to bear U.S. patent markings; and, most egregiously, Pentalpha decided not to inform the attorney from whom it sought a right-to-use opinion “that the product to be evaluated was simply a knockoff of SEB’s deep fryer.” 131 S. Ct. at 2071-72. The Supreme Court could not “fathom what motive [Pentalpha] could have had for withholding this information [from the attorney] other than to manufacture a claim of plausible deniability in the event that [Pentalpha] was later accused of patent infringement.” *Id.* at 2071. In the present case, in contrast, Lenz failed to proffer *any* evidence of the defendants’ subjective awareness of a high probability of fair use, or of deliberate actions taken to avoid confirming that subjective awareness.

belief standard also appropriately limits the scope of Section 512(f). *Rossi*, 391 F.3d at 1005. The District Court's decision would flout this limitation as well.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed and summary judgment should be entered for Defendants-Appellants.

October 16, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), because it contains 6,489 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the type size and type face requirements of Fed. R. App. P. 32(a)(5) and (6), because it is written in 14-point Times New Roman font.

DATED: October 16, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service of this brief will be accomplished by the appellate CM/ECF system.

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