

# IP Alert: 9th Circuit Rules on Fair Use Considerations in DMCA Takedowns

September 16, 2015

This week an important ruling was handed down by the United States Court of Appeals for the 9th Circuit, holding that copyright owners who make DMCA takedown requests must consider whether the user has a fair use defense prior to making the takedown request. The 9th Circuit held 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. The opinion is perhaps best summarized by the panel's admonition that "Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law. That this step imposes responsibility on copyright holders is not a reason for us to reject it."

The important takeaway from this case is that copyright owners should not file DMCA takedown requests without giving each situation careful review to ensure that the use actually violates a copyright and that the user does not have a fair use defense.

This case, *Lenz v. Universal Music Corp. et al*, No. 13-16106 (9th Cir. Sep. 14, 2015), involved the famous "dancing baby" YouTube video in which a mom had filmed her toddler dancing to a Prince song ("Let's Go Crazy"), which played in the background. The entire video is only 29 seconds long, although the mom does ask the baby in it if he likes the music. Universal Music pointed to this fact as evidence that the video focused on the song. It sent YouTube a DMCA takedown request, and YouTube removed the video. The mom filed a counter-notice claiming fair use, which Universal protested. However, the mom was able to secure pro bono legal representation from the Electronic Freedom Foundation and filed a lawsuit over the dispute. YouTube reinstated the video in the interim. The case garnered quite a bit of attention, and Google, Twitter, and Tumblr submitted amicus briefing supporting the mom, while the Motion Picture Association of America and Recording Industry Association of America submitted amicus briefing on behalf of Universal.

The 9th Circuit held that the mom/plaintiff could proceed with her case and attempt to prove that Universal had actual knowledge that her use fell under fair use, although it found that the facts of this case did not reflect that Universal had demonstrated a willful blindness to the issue.



Although the case has been widely reported in the press as a victory for fair use and the dancing baby, the opinion does contain some helpful language for copyright owners. In particular, the panel held that if "a copyright holder forms a subjective good faith belief the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder's belief even if we would have reached the opposite conclusion." However, it also noted that "[a] copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to . . . liability." The panel did relieve copyright holders from the burden of making a "searching or intensive inquiry" into fair use and indicated that even the use of computer algorithms to process large volumes of content and search for infringement "appears to be a valid and good faith middle ground" for meeting the DMCA's requirements to consider fair use, although some additional human review may be necessary prior to submitting a takedown request.

Finally, the panel held that a plaintiff in a copyright takedown dispute may pursue nominal damages to vindicate her statutorily created rights, although it deferred on determining the scope of recoverable damages, which might include attorneys' fees and costs.

If you have any questions regarding your takedown request policy or a specific instance of potential copyright infringement, please contact a member of Gray Plant Mooty's intellectual property team for assistance.