

PUBLIC REDACTED VERSION
Nos. 13-16106, 13-16107

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

STEPHANIE LENZ,
Plaintiff/Appellee/Cross-Appellant,

vs.

**UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC.,
AND UNIVERSAL MUSIC PUBLISHING GROUP,**
Defendants/Appellants/Cross-Appellees.

Appeal from the United States District Court
for the Northern District of California
Honorable Jeremy Fogel, United States District Judge
Dist. Ct. Case No. 07-cv-03783

**APPELLANTS' FIRST BRIEF ON CROSS-APPEAL
PUBLIC REDACTED VERSION**

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UNIVERSAL MUSIC PUBLISHING GROUP

PUBLIC REDACTED VERSION

CORPORATE DISCLOSURE STATEMENT

Universal Music Corp. and Universal Music Publishing, Inc. are directly or indirectly owned by Vivendi S.A., which is publicly traded on NYSE Euronext.

Universal Music Publishing Group is the colloquial name used to refer to the music publishing operations of the Universal Music Group of companies, all of which are directly or indirectly owned by Vivendi S.A.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellants-Cross-Appellees are not aware of any related cases other than Plaintiff-Appellee-Cross-Appellant's cross-appeal, Case No. 13-16107.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff-Appellee (“Lenz”) alleges that (1) defendants (“Universal”) violated 17 U.S.C. § 512(f) by “knowingly materially misrepresent[ing]” that Lenz’s YouTube posting entitled “Let’s Go Crazy #1” infringed the copyrighted composition “Let’s Go Crazy,” and (2) YouTube’s temporary removal of “Let’s Go Crazy #1” caused Lenz to “incur[]” actual damages, both of which are required for a § 512(f) violation. At summary judgment, Lenz produced not a shred of evidence to support either element of her § 512(f) claim. She failed to show any evidence that Universal made a “*knowing* misrepresentation” that her posting infringed, as required by this Court’s controlling decision in *Rossi v. Motion Picture Association of America Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004) (emphasis added). Indeed, Lenz failed to show a misrepresentation that her posting infringed. Lenz failed to produce any evidence that she incurred even a penny’s worth of actual damages. No evidence of knowing misrepresentation and no evidence of damages means no claim for relief under § 512(f). This Court should reverse the district court’s failure to grant summary judgment to Universal.

This case arose in 2007, while Universal was the copyright administrator for compositions by the singer-songwriter known as Prince. [REDACTED]

[REDACTED]

[REDACTED]—Universal manually reviewed

postings that incorporated Prince's compositions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The posting at issue here—Lenz's "Let's Go Crazy #1"—used Prince's work as the background soundtrack for a video of two children running around a kitchen. The music and lyrics ("C'mon baby, let's get nuts") played throughout the posting; an off-camera voice asked one of the children, "What do you think of the music?"; and the posting took the name of Prince's well-known work (plus "#1"). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

After YouTube removed the posting, Lenz exercised her ability to lodge a counter-notification with YouTube. YouTube restored the posting several weeks later, and it has been viewed more than a million times since. Concurrent with the

¹ The cites to the Excerpts of Record ("ER") include the volume number, page number and (where appropriate) a cite to the paragraph or line numbers referenced. For example, this cite is to Volume 8, page 1384, lines 17-22, and page 1388 lines 4-10.

re-posting, Lenz initiated this lawsuit. Several years of litigation followed, including extensive discovery by Lenz into the minutiae of Universal's procedures regarding the request to remove "Let's Go Crazy #1," and multiple revisions by Lenz of her theory of how the takedown allegedly caused her to incur damage.

[REDACTED] Lenz failed to produce any evidence to support either of the essential elements of her claim.

No evidence Universal made a knowing misrepresentation of infringement. The record contains no evidence that, when it requested the removal of "Let's Go Crazy #1," Universal believed that the posting did not infringe. On the contrary, the undisputed record shows that Universal [REDACTED] [REDACTED] reached an unassailable, good faith conclusion that the posting infringed "Let's Go Crazy." Under *Rossi*, this evidence should have ended Lenz's case.

In the district court, Lenz offered two theories for imputing actual knowledge to Universal where none existed. Neither of these theories has legal or factual merit. *First*, Lenz alleged that Universal failed to consider the applicability of the fair use defense under copyright, and that if Universal had evaluated the posting under the multi-factor test of 17 U.S.C. § 107, Universal would had to have recognized that her posting "self-evident[ly]" would be excused as a fair use. 6ER 1039 ¶ 34. The district court, in a published opinion at the dismissal stage,

originally held that an *ex ante* failure to “consider” fair use before sending a takedown notice could support a claim under § 512(f). 6ER 1005, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008). The argument necessarily fails under *Rossi*, however, as the district court later determined at summary judgment. 1ER 18. The contention that Universal should have recognized that Lenz’s posting was fair use, but did not, is a textbook example of *post-hoc* second-guessing; *Rossi* makes clear that is not actionable under § 512(f). There is no evidence that Universal recognized that Lenz’s posting would be adjudicated to be subject to the affirmative defense of fair use, but decided to send the notice notwithstanding that knowledge. And nothing in the text, structure or legislative history underlying §512 generally, or § 512(f) in particular, shows that Congress intended for copyright owners—upon penalty of a claim for damages—to have to engage in the ad-hoc, time-consuming process of conducting an evaluation of what this Court has called the “most troublesome” doctrine in all of copyright, *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012), in order to avail themselves of notice-and-takedown process in responding to the mushrooming proliferation of copyright infringement on the internet. The statutorily prescribed counter-notification and put-back procedures—which Lenz fully availed herself of in this case—show that Congress did *not* intend for § 512(f) to create a damages remedy for a failure to “consider fair use.” What is more, even if § 512 *did* require

Universal to “consider fair use,” Lenz failed to show, as was her burden, that such consideration would have caused Universal to recognize “Let’s Go Crazy #1” as a “self-evident” fair use.

Second, Lenz argued that knowledge of a misrepresentation could be imputed to Universal under the “willful blindness” doctrine. Lenz had no evidence to support this theory. Among other things, the Supreme Court’s controlling decision on the meaning of willful blindness, *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), required Lenz to show that Universal “subjectively believe[d] that there [was] a high probability” that it was requesting takedowns of postings that qualified for the fair use defense. *Id.* at 2070. The district court recognized Lenz’s total failure of proof on this issue. 1ER 20. Inexplicably, however, the district court denied Universal’s motion on the ground that it, the party *without* the burden to prove willful blindness, failed to *negate* the applicability of that doctrine. *Id.* This was a complete inversion of Rule 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

No evidence that Lenz incurred any damages. Universal was also entitled to summary judgment on the separate and independent question of whether Lenz “incurred” “any damages” “as the result of” the claimed misrepresentation. 17 U.S.C. § 512(f). Lenz never produced evidence that she actually was or ever stood to be out of pocket even one penny “as the result of” YouTube’s temporary

removal of her YouTube posting. All of Lenz's legal fees have been provided free of charge; she lost no wages; she paid YouTube nothing; and she incurred no additional costs in responding to the takedown notice itself—notwithstanding Lenz's [REDACTED] effort to discover some evidence, however minimal, of actual loss.

The district court's order denying Universal's motion for summary judgment should be reversed, and the case remanded for entry of judgment for Universal.

STATEMENT OF ISSUES

1. Whether Lenz presented evidence from which a jury could conclude that Universal “knowingly materially misrepresent[ed]” that Lenz’s “Let’s Go Crazy #1” posting infringed Prince’s “Let’s Go Crazy”?
2. Whether, in the absence of evidence of a knowing material misrepresentation, Lenz could proceed to trial on the theory that Universal violated § 512(f) by allegedly failing to “consider” fair use?
3. Whether Lenz presented evidence from which a jury could conclude that Universal “willfully blinded” itself to Lenz’s “Let’s Go Crazy #1” constituting a fair use?
4. Whether the district court erred in concluding that Universal had to show that it “*lacked* a subjective belief that there was a high probability that any

given video might make fair use of a Prince composition,” 1ER 20, to obtain summary judgment?

5. Whether, assuming Lenz satisfied the knowing material misrepresentation requirement of § 512(f), Lenz presented evidence from which a jury could conclude that she had “incurred” “damages” “as the result of” YouTube’s reliance on Universal’s notice?

Section 512 of Title 17 of the United States Code is reprinted on the attached addendum, on yellow paper.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the case presents a federal question under 17 U.S.C. § 512(f).

Universal’s appeal is from the district court’s denial of Universal’s motion for summary judgment in the January 24, 2013 Order Denying Cross-Motions for Summary Judgment (“Order”). 1ER 10. The parties jointly asked the court to certify the Order for appellate review pursuant to 28 U.S.C. § 1292(b). The district court did so on March 1, 2013. The parties petitioned this Court for permission to appeal on March 11, 2013. This Court granted permission on May 30, 2013 and directed the parties to perfect their appeals within 14 days. 1ER 1. Universal perfected its appeal on June 4, 2013. The Order is thus properly before this Court pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE CASE

On July 24, 2007, Lenz filed a complaint alleging (1) a violation of 17 U.S.C. § 512(f), (2) interference with contract, and (3) seeking a declaratory judgment of non-infringement. 6ER 1057. Lenz filed an amended complaint on August 15, 2007, alleging the same claims. 6ER 1051. Universal moved to dismiss the amended complaint. On April 8, 2008, the district court dismissed all claims in the amended complaint, the third with prejudice. 6ER 1042. On April 18, 2008, Lenz filed a second amended complaint, alleging only her claim for violation of § 512(f). 6ER 1034.

Universal moved to dismiss the second amended complaint. 6ER 1010. The district court denied Universal's motion in a published order. 6ER 1000, published at 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

On July 13, 2012, the parties filed cross-motions for summary judgment. 8ER 1508, 1537. On January 24, 2013, the district court denied both motions in the Order. 1ER 10.

The parties jointly requested that the district court certify the Order for appeal pursuant to 28 U.S.C § 1292(b). 1ER 49. On March 1, 2013, the district court certified the Order. 1ER 3.

Universal and Lenz timely petitioned this Court for permission to appeal. This Court granted such permission on May 30, 2013, and the parties thereafter perfected these appeals on June 4, 2013.

STATEMENT OF FACTS

A. The Proliferation of Unauthorized Uses of Copyrighted Works on YouTube

Universal's notice regarding Lenz's posting did not occur in a vacuum. It involves the challenges that all copyright owners and administrators face in combating the problem of widespread infringing content on the internet, including infringing content posted to sites such as YouTube, a so-called "user-generated-content" site. 5ER 829 ¶8. In 2007, as today, YouTube was a for-profit, commercial website, where postings were available to a mass audience. 5ER 854. YouTube generates revenue by selling advertising—on its own behalf and for those who post their videos on its site—and key to generating that revenue is maximizing the number of users on that site. 4ER 515; 8ER 1363:10-22. It often is impossible to tell what the true purpose is of a YouTube posting based solely on viewing the video alone. 5ER 832 ¶ 15. Persons who post videos do not always describe their purpose in doing so. And many innocuous-appearing videos—even those of cute children playing in domestic settings—can appear with explicit advertising appearing alongside the posting. 4ER 526. Whatever the nature of Lenz's film footage in her private possession, the *posting* of that video was not, as

she has repeatedly characterized it, a mere “home video.” Once on YouTube, the posting was part of a commercial site available to an audience around the world.

Unauthorized uses of copyrighted works on the internet have proliferated to an extent never before imagined. *See generally Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-29 (2005). YouTube has never been a stranger to this phenomenon. From its inception, YouTube hosted tremendous quantities of infringing material. 5ER 829 ¶ 9. A study that Google conducted on a random sampling of postings in 2006 revealed that 63% of YouTube videos contained copyrighted material, or had been removed and taken down. 5ER 905 ¶ 322, 911 ¶ 362, 929-37, 941-45, 949; *see Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32-34 (2d Cir. 2012) (summarizing some of the evidence of proliferation of infringements on YouTube 2005-2007). As the Second Circuit observed, as of “March 2010, ... site traffic on YouTube had soared to more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute.” *Viacom*, 676 F.3d at 28. Studies have found that well over half of YouTube postings—some estimating as high as 75-80% of such postings—incorporate copyrighted works. *Id.* at 33.

The ease with which YouTube users can post videos incorporating copyrighted content to a vast internet audience implicates an important right for songwriters: the synchronization right. This is the right to use music in timed-

relation to video images. It is an exclusive right of the composition copyright owner. *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 527 (9th Cir. 2008). The right to license composition synchronizations is separate from the rights that exist in sound recordings that embody such compositions. *Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004). Because the composition copyright owner exclusively controls the licensing of synchronization rights — without the constraint on other composition rights applied by statutory compulsory licenses — the market for synchronization rights is very valuable. 8ER 1462 ¶¶ 5-6; 8ER 1360:7-1361:8.

B. Universal’s Role as Administrator of Prince’s Copyrighted Compositions, Including Universal’s Review of YouTube Postings Incorporating Those Works

In 2007, Universal served as Prince’s publishing administrator. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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C. Universal Reviews, and Requests That YouTube Remove, Plaintiff’s “Let’s Go Crazy #1” Posting

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

concluded [REDACTED] that it should be included on the takedown request to YouTube—a list that included (for that day alone) more than 200 videos making unauthorized uses of Prince compositions. 4ER 533. As required by YouTube, Universal’s email included language that matches the items listed as necessarily included in a takedown notice under 17 U.S.C. § 512(c)(3)(A).²

D. Lenz Incurred No Damages as a Result of YouTube’s Reliance on Universal’s Notice

YouTube removed the “Let’s Go Crazy #1” posting and sent Lenz an email notifying her that it had done so. 4ER 548. After receiving a conforming counter-notice from Plaintiff, YouTube restored Plaintiff’s video to the site just over six

² Universal maintained in its notice, and continues to believe, that a request to YouTube to remove infringing content is not a notice subject to the DMCA, because YouTube’s prospective liability for infringing content is not “by reason of the storage” of such material “at the direction of” YouTube users. 17 U.S.C. § 512(c)(1). Universal did not move for summary judgment based on this position. For purposes of this appeal, Universal assumes that its notice was subject to § 512 of the DMCA.

weeks after its removal. 4ER 599:22-600:21. Lenz's posting remains on YouTube to this day. As of the summary judgment filing in July 2012, "Let's Go Crazy #1" had been viewed on YouTube more than a million times. 4ER 526, 627.

As discussed further in the argument section, damages is an element of Lenz's § 512(f) claim. Lenz, however, has never been able to identify any sum of money that she lost as a result of YouTube's temporary removal of "Let's Go Crazy #1." Lenz admitted to a friend that the loss of hosting cost her nothing. She wrote: "I don't care that YouTube doesn't want to host it. Not like I'm paying them." 4ER 512.

Lenz also did not expend out-of-pocket expenses of any kind in connection with sending YouTube a counter-notification to restore the posting. Lenz was not employed, so she lost zero wages as the result of working on the counter-notification. 4ER 561:18-562:17. Lenz's legal counsel helped her prepare the counter-notification, but that also has not required, and never will require, Lenz to spend even a cent out of her own pocket: her counsel are providing all services pro bono, [REDACTED]

[REDACTED] 4ER 597:1-598:1, 615:2-621:1; 8ER 1438.

Lenz's failure to produce evidence of damages has not been for want of trying. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Proceedings in the District Court

Lenz’s operative complaint alleged that Universal had violated § 512(f) because her posting made “a self-evident non-infringing fair use” of “Let’s Go Crazy,” and that Universal either “had actual subjective knowledge,” or “should have known,” that Lenz’s posting did not infringe. 6ER 1039-40 ¶¶ 34-36. Among the facts that Lenz alleged in her complaint were that she had shot the video because her children had recently heard Prince play during the Super Bowl halftime show, 6ER 1036 ¶ 12; her son was just learning to walk when the video was made, *id.* ¶ 16; that “Lenz thought her friends and family, particularly her mother in California, would enjoy seeing Holden’s new ability to dance,” *id.*; and that Lenz’s mother has difficulty downloading email files but knows how to access the YouTube website.” *Id.* When Universal reviewed Lenz’s posting and sent its notice, it did not know, and could not have known, any of these details Lenz alleged made her claim of fair use “self-evident.”

Although Lenz has taken the position in litigation that the posting's qualification for the fair use defense is "self-evident," neither Lenz nor her trusted confidantes and counsel have instantaneously recognized her posting to be "self-evident" fair use. Lenz admitted, in a public blog posting not long after speaking to her current lawyers (at the Electronic Frontier Foundation), that "[m]ine's not a 'fair use' case at all." 4ER 502 (emphasis added). Lenz testified repeatedly that someone could look at her posting and reasonably conclude that it was infringing and not a fair use. 4ER 605:19-25; 4ER 590:1-16, 592:24-593:2, 606:23-607:6; *see also* 8ER 1422:2-8. A friend whom Lenz considered expert in legal issues told her squarely that, "using copyrighted music as background music *is* copyright infringement, unless you have obtained permission." 4ER 653. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The district court denied Universal's motion to dismiss Lenz's amended § 512(f) claim, concluding, in a published order, that the allegation that Universal "issu[ed] a takedown notice without proper consideration of the fair use doctrine ... is sufficient to state a misrepresentation claim" under § 512(f). 6ER 1005, 572 F. Supp. 2d at 1155.

In July 2012, after nearly two years of discovery, the parties filed cross-motions for summary judgment. 8ER 1508, 1537. On January 24, 2013, the district court denied both motions in the Order. 1ER 10. In contrast to its order at the dismissal stage, the district court concluded that the “mere failure to consider fair use” cannot sustain liability in light of *Rossi*, without some additional showing of bad faith. 1ER 18. The court held, however, that Lenz had raised a triable issue on her contention that Universal had “willfully blinded” itself to the possibility of fair use. 1ER 19-20. The court recited the controlling two-part test on willful blindness—both elements of which a plaintiff must satisfy—from the Supreme Court’s decision in *Global-Tech*, 131 S. Ct. at 2070. 1ER 19. The court further held that Lenz failed to present evidence to create a triable issue as to the first element, namely, evidence showing that Universal subjectively believed there was a high probability that either YouTube postings in general or Lenz’s posting in particular made a fair use of copyrighted material. 1ER 20. The court nevertheless held that Universal was not entitled to summary judgment because it had “not shown that it *lacked* a subjective belief that there was a high probability that any given video might make fair use of a Prince composition.” *Id.*

Finally, the district court considered whether Lenz had “incurred” “any damages ... as the result of” the removal of her posting. 17 U.S.C. § 512(f). Although there was no evidence that Lenz had incurred, or ever will incur, a

penny's worth of loss, the district court held that Lenz might at trial be able to produce evidence of some nominal expenditure of resources, including "telephone bills," that potentially could be recoverable under § 512(f). [REDACTED]

[REDACTED] The court also stated that the value of counsel's time in assisting Lenz with her counter-notification might constitute compensable damages, notwithstanding the fact that counsel have provided all services pro bono.

This interlocutory appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's denial of summary judgment. *California ex. rel. California Dept. of Toxic Substances Control v. Neville Chemical Co.*, 358 F.3d 661, 665 (9th Cir. 2004). This Court "determine[s] whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

ARGUMENT

I. Lenz Failed to Produce Any Evidence at Summary Judgment That Universal Knowingly Materially Misrepresented—or Misrepresented at All—that “Let’s Go Crazy #1” Was Infringing

A. Section 512(f) Creates Liability Only for Knowing Material Misrepresentations

1. Congress Intended for the Statutory Counter-Notification Procedures to Be the Primary Means of Addressing Notifications of Infringement Claimed to Be Mistaken

The reach of § 512(f) can only be understood against the framework for “taking down” material claimed to be infringing and “putting back” material whose takedown is alleged to have been mistaken. The relevant framework is established through the DMCA’s “safe harbor” provisions, 17 U.S.C. § 512. Enacted in 1998, the DMCA was intended primarily to balance the rights of copyright holders in preventing the mass infringement of their content in the online environment with the interests of internet service providers in limiting their liability for infringements occurring through their services. Congress recognized that the “copyright industries are one of America’s largest and fastest growing economic assets,” S. Rep. No. 105-190, at 10 (1998) (“Senate Report”), and that the benefits of internet communication could easily be hijacked by infringers “to destroy the value of American intellectual property.” H.R. Rep. No.105-551, pt. 1, at 9 (1998) (“House Report”). To address these concerns, while at the same time limiting the potential liability of defined non-culpable service providers, Congress in § 512 provided a

set of incentives for copyright owners and providers to cooperate in the identification and removal of infringing material.

In particular, Congress conditioned service providers' eligibility for a number of safe harbor limitations on liability on those providers' establishment and operation of expeditious "notice and take down" procedures. Among other things, § 512(c) limits the monetary relief that may be awarded against service providers for liability "by reason of the storage at the direction of a user" of infringing material residing on the provider's "system or network." 17 U.S.C. § 512(c). To claim the benefit of the § 512(c) safe harbor, the service provider must satisfy several prerequisites, including (as relevant here) an expeditious response to "notification of claimed infringement," "to remove, or disable access to, the material that is claimed to be infringing." *Id.* § 512(c)(1)(C). An effective notification is a written communication to a dedicated agent that includes substantially the elements specified in § 512(c)(3)(A). Upon receiving a notification that complies with the elements, the service provider must expeditiously "take down," or remove the content in order to be eligible for the § 512(c) limitations on liability. The legislative history underlying the notice and takedown provisions confirms what the text and structure make plain: that Congress intended 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.” Senate Report at 20.

Congress also recognized that some parties whose material was removed pursuant to such notifications might contend that their use was not infringing and that the service provider should restore it. To that end, Congress also conditioned the service provider’s immunity from liability from claims by such users on the provider’s implementation of counter-notification and “put-back” procedures. 17 U.S.C. § 512(g). Under these procedures, the user whose material is blocked or removed may send a counter-notification whose content must include “[a] statement under penalty of perjury that the subscriber has a good faith belief that the material was removed ... as a result of mistake or misidentification.” *Id.* § 512(g)(3)(C). The provider then must provide the counter-notification to the copyright owner. At that point, the copyright owner has 10 days to file an infringement suit, the filing of which obviates the provider’s liability to the user for not restoring the material. If no such suit is filed, then the provider maintains its immunity from the user’s claim by restoring the material online. *Id.* § 512(g)(2)(C). The counter-notification procedures provide the primary incentives protecting user interests that non-infringing material “not be taken down.” House Report, pt. 2, at 59. Together, the “notification and counter-notification requirements ... attempt to balance the duties of service providers, the

rights of copyright owners and the rights of other users.” *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1179 (C.D. Cal. 2002).

The procedures further reflect Congress’s awareness that notice-and-takedown necessarily would take place under significant time pressures. Copyrighted material may be uploaded, downloaded, and reposted immediately and exponentially. This undeniable fact creates a significant need for rapid-fire responses to infringing activity, and the statute offers incentives for an “expeditious” system of notices and responses. As the legislative history describes, Congress was concerned with “balance[ing] *the need for rapid response to potential infringement* with the end-users legitimate interests in not having material removed without recourse.” Senate Report at 21 (emphasis added).

2. Section 512(f) Provides a Narrow Cause of Action for Knowing Material Misrepresentations, Not Mistakes, as This Court Has Clearly Held

Against the background of the notice-and-takedown and counter-notification procedures, § 512(f) is properly understood for what it plainly is, and what this Court has held it to be: an “expressly limited cause of action” that applies only to a copyright owner who “knowingly materially misrepresents” that a particular use is infringing. *Rossi*, 391 F.3d at 1004-05 & n.6.

Section 512(f) provides:

Any person who *knowingly materially misrepresents* under this section ... that material or activity is infringing ... shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer ... as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing[.]

Id. (emphasis added.)

This Court's opinion in *Rossi* is the leading decision on § 512(f). *Rossi* makes clear that a plaintiff bears the burden of proving that the § 512(f) defendant had the *subjective* mental state of "actual knowledge" that it was materially misrepresenting that material was infringing. *Rossi*, 391 F.3d at 1004-05. In *Rossi*, the plaintiff operated a website that advertised "Full Length Downloadable Movies" and posted graphics for movies whose copyrights were owned by members of the Motion Picture Association of America ("MPAA"). Following the DMCA's notice-and-takedown procedures, the MPAA sent notices of infringing conduct to Rossi and his internet service provider. Rossi sued the MPAA for tortious interference with contract and other related torts. *Id.* at 1002. The MPAA argued that its compliance with the DMCA was a complete defense to Rossi's claims. Rossi, in contrast, claimed that the MPAA had not complied with the DMCA. He argued that, under an *objective* standard, the MPAA could not have formed a "good faith belief" that Rossi's site was making infringing material available, because "a reasonable investigation into" his website would have revealed that users could not actually download movies there. *Id.* at 1003.

This Court rejected Rossi’s reading, instead holding that the “interpretive case law and the statutory structure [of the DMCA] support the conclusion that the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) *encompasses a subjective, rather than objective, standard.*” *Id.* at 1004 (emphasis added).

In § 512(f), Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner’s notification is a knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.

Id. at 1004-05 (citations omitted). This Court thus rejected the imposition of an “objective standard of review for gauging the reasonableness” of a copyright owner’s “conduct in notifying” parties of an “allegedly infringing website.” *Id.* at 1004. Instead, this Court held that a copyright owner cannot be liable under Section 512(f) “*even if the copyright owner acted unreasonably in making the mistake. See § 512(f). Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.*” *Id.* at 1005 (emphasis added).

Numerous courts around the country have followed the *Rossi* decision, or likewise held that the statute’s plain language shows that it applies only to knowing material misrepresentations. *See Tuteur v. Crosley-Corcoran*, ___ F. Supp. 2d

___, 2013 WL 4832601, at *6-8 (D. Mass. Sept. 10, 2013); *Cabell v. Zimmerman*, 2010 WL 996007, at *4-5 (S.D.N.Y. Mar. 12, 2010); *Third Educ. Group, 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*, *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011); *Dudnikov v. MGA Entm't, Inc.*, 410 F. Supp. 2d 1010, 1013 (D. Colo. 2005) (all following *Rossi*); *see also Biosafe-One, Inc. v. Hawks*, 524 F. Supp. 2d 452, 469 (S.D.N.Y. 2007) (not citing *Rossi* but reaching same conclusion).

Rossi and cases following it prohibit § 512(f) liability based on what a copyright owner “must have known” or “should have known.” The district court here, in a decision that pre-dated *Rossi*, had held without analysis that “[k]nowingly” in § 512(f) meant that “a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations.” *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004). Imposing liability based on what a copyright owner “should have known if it acted with reasonable care or diligence” is an objective reasonableness standard. It is inconsistent with the plain language of § 512(f) and *Rossi*. *See, e.g., Dudnikov*, 410 F. Supp. 2d at 1017-18 (an “attack of the ‘reasonableness’ of [a copyright owner’s] good faith belief on the ground” that the copyright owner “‘knew better’

than to conclude that” the content “was infringing [its] rights” is “misplaced” and “has no bearing on the good faith showing”) (emphasis added); *Augusto*, 558 F. Supp. 2d at 1065 (“Augusto’s allegations that UMG *should have known better* do not create a genuine issue of material fact as to this issue” under Section 512(f) (emphasis added); *Cabell*, 2010 WL 996007, at *4-5 (holding that argument that “Defendant *should have known the real facts*” irrelevant because “negligence is *not the standard for liability under section 512(f)*”) (emphases added).

B. Lenz Produced No Evidence That Universal Knew It Was Misrepresenting “Let’s Go Crazy #1” as Infringing

Applying *Rossi*, Lenz’s case is at an end. Plaintiff provided not a shred of evidence—none whatsoever—that Universal knowingly misrepresented to YouTube that “Let’s Go Crazy #1” was infringing. Lenz produced no evidence showing that Universal subjectively believed that “Let’s Go Crazy #1” was not infringing and yet decided to send the notice anyway.

In fact, the undisputed evidence showed that Universal’s review of Lenz’s posting led to the considered judgment that the posting should be removed.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In sum, there is absolutely no evidence that Universal knowingly misrepresented that Lenz’s posting was infringing. Indeed, based on the undisputed facts as described, there was no evidence that Universal made any misrepresentation that Lenz’s posting infringed. The district court should have granted Universal summary judgment on this ground alone.

C. The Failure to “Consider Fair Use” Before Sending a Takedown Notice Cannot Convert an Unknowing Mistake into a Knowing Misrepresentation

Throughout the case in the district court, Lenz tried to overcome her failure of proof on the knowledge requirement with proxies for actual, subjective knowledge. None of these efforts is sufficient to overcome summary judgment.

Lenz's first, and most ambitious theory is that a copyright owner may be held liable for making a knowing material misrepresentation that a use infringes if the owner fails to "consider fair use." The district court initially held that an allegation that a copyright owner failed to satisfy this amorphous and undefined standard sufficed to proceed past a motion to dismiss. 6ER 1005, 572 F. Supp. 2d at 1155. In its summary judgment order, the district court recognized that this standard could not be reconciled with *Rossi*. 1ER 18. The latter holding was plainly correct.

1. The Language, Structure and Purpose of § 512 Show There Is No Liability for the Mere Failure to "Consider Fair Use" Before Sending a Takedown Notice

Nothing in the text, structure or legislative history underlying § 512 supports the proposition that an *ex ante* failure to "consider fair use" is equivalent to a knowing material misrepresentation that the use of a work is infringing. The statute does not say that in express terms. Nor can it be said that a copyright owner who has failed to consider fair use *knows* that it is materially misrepresenting that a work is infringing. Lenz has argued that the statute equates a failure to consider fair use with a knowing material misrepresentation of infringement, because the statute provides that a compliant notice must affirm the sender's "good faith belief that use of the material in the manner complained of is *not authorized by* the copyright owner, its agent, or *the law*." 17 U.S.C. § 512(c)(3)(A)(v) (emphases

added). As demonstrated in the next section, “authorized by ... the law” cannot reasonably be construed to mean “authorized by ... fair use,” which is (as the Supreme Court and this Court have repeatedly held) an affirmative defense — not a freestanding “authorization” to utilize copyrighted material. But even assuming (counter-factually) that the statute does have this meaning, a copyright owner still has not knowingly misrepresented that a use is infringing by failing to consider fair use. The *most* that can be said is that a copyright owner acted negligently in sending the notice without considering fair use. Negligence is measured against an objective reasonableness standard of what an actor “should have known,” which does not suffice to create liability under § 512(f), as *Rossi* makes clear. *Rossi*, 391 F.3d at 1005.

The structure of § 512 does not support liability for damages for failing to engage in an *ex ante* consideration of fair use. On the contrary, the structure of the statute clearly shows that Congress intended the primary avenue for relief for mistaken takedowns to be the counter-notification and put-back procedure, which Lenz successfully utilized in this case. 4ER 550.

No other material explaining Congress’s purpose behind § 512 generally or § 512(f) in particular supports importing the requirement Lenz’s claim depends on. The legislative history, which states that § 512(f) is intended to “balance *the need for rapid response to potential infringement* with the end-users legitimate interests

in not having material removed without recourse,” Senate Report at 21 (emphasis added), is inconsistent with such a requirement. As discussed below, this Court and others have recognized that fair use is “the most troublesome” and unpredictable doctrine in the whole law of copyright. *Monge*, 688 F.3d at 1170 (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)). It is inconceivable that Congress intended for copyright owners to wade into the application of the most “troublesome” doctrine before sending every takedown notice, upon penalty of liability under § 512(f). *See Tuteur*, 2013 WL 4832601, at *6-8.

2. “Authorized by ... the Law” Does Not Mean Excused by the Fair Use Defense

As noted, Lenz’s theory has been that “authorized by ... the law” in § 512(c)(3)(A)(v) is equivalent to “excused by the fair use defense.” As discussed, even if that were so, a copyright owner’s alleged failure to consider the applicability of the fair use still would not be equivalent to the owner’s knowing misrepresentation that a use was infringing. But Lenz’s argument fails for another reason: “authorized by ... the law” does not and cannot reasonably be construed to mean “excused by the fair use defense.”

“Authorized,” which is the language of § 512(c)(3)(A)(v), means “endowed with authority” or “sanctioned by authority: APPROVED,” Webster’s New International Dictionary 147 (3d ed. 1968); *see also* Webster’s New International

Dictionary 186 (2d ed. 1959) (same). Fair use is not an “endowment” or “sanction” of authority. It is an *affirmative defense*, as the Supreme Court, this Court, and others have made clear repeatedly. *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*, 688 F.3d at 1170 (characterizing the “fair use doctrine” as a “affirmative defense”); *Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 59 (1st Cir. 2012); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007); H.R. Rep. No. 102-836, at *3 n.3 (1992) (report on 1992 amendment to § 107) (“the burden of proving fair use is *always* on the party asserting the defense”) (emphasis added). Fair use, in short, *excuses* conduct that otherwise *is infringing*.

Ex ante consideration of the possible application of the fair use is particularly ill-suited to the notice-and-takedown system that Congress envisioned in § 512. As discussed, Congress’s goal was to create a system providing for “rapid response” system to “*potential infringement*” on the Internet. Senate Report at 21 (emphasis added). The process of evaluating and making judgments about fair use is anything but rapid, simple or expeditious. As this Court and others have emphasized, fair use is a notoriously “troublesome” doctrine to apply. *Monge*, 688 F.3d at 1170. Whether a use does or does not amount to a fair use is not a clear-

cut—or, as Lenz calls it, “self-evident” determination. 6ER 1039 ¶ 34. The determination involves an intense equitable balancing of multiple factors, including four factors set out in the text of Section 107.³ The Supreme Court has emphasized that the fair use analysis does not lend itself to “bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”

Campbell, 510 U.S. at 577. “Since 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.” *Harper & Row*, 471 U.S. at 560 (alteration, citation and internal quotation marks omitted). The indeterminacy of the fair use inquiry is legendary.⁴ Evaluating fair use is not an “I know it when I see it” exercise, *cf.*

³ The statutory factors are “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.

⁴ As Professor Nimmer observes in his leading copyright treatise, each of the Supreme Court’s three landmark fair use decisions was “overturned at each level of review, two of them by split opinions at the Supreme Court level”; Professor Nimmer points to this divergence on whether a use is fair or not – even on the same facts, within the same litigation – as proof of “[t]he malleability” of the fair use inquiry. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05, at 13-156 (Matthew Bender, rev. ed.) (footnotes omitted); *see also* David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 *Law & Contemporary Problems* 263, 269-80 (2003) (analyzing courts’ analysis of § 107 factors in 60 cases and concluding that “had Congress legislated a dartboard rather (footnote continued)

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), that a copyright owner can resolve quickly and expeditiously. It is time consuming, “open-ended,” and indeterminate. *See Monge*, 688 F.3d at 1170; *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (fair use doctrine is “so flexible as virtually to defy definition”) (citation and internal quotation marks omitted); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.08, at 12B-147 n.16 (Matthew Bender, rev. ed.) (“Usually, fair use determinations are so clouded that one has no sure idea how they will fare until the matter is litigated.”).

Adding to the complexity, many of the important facts that are necessary to any consideration of fair use will lie exclusively with the party *asserting the defense*. The party that incorporated the copyrighted work in the manner alleged to be a “fair use” is the person who knows facts relevant to whether in fact the use is a “fair use.” As an example, one of the statutory factors in deciding whether a use is a fair use is its “purpose and character.” 17 U.S.C. § 107. A copyright owner viewing a posting on YouTube cannot necessarily derive the “purpose and character” of the use because it is not obvious from the posting itself. That is the case here, where Lenz alleges, for example, that she posted “Let’s Go Crazy #1”

than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same”).

for her mother to view, and that her mother has trouble opening large email attachments. 6ER 1036-37 ¶¶ 16, 18. No viewer of her YouTube posting alone could know that. To the contrary, what the viewer knows is that the posting appears on a commercial site. YouTube allows its users to monetize their postings through advertising, something that posters of videos in domestic settings featuring children utilize to earn revenue from their viewers. 8ER 1363:10-22; 5ER 832 ¶ 15; 4ER 526.

In light of Congress’s purposes, §§ 512(c)(3)(A)(v) and 512(f) cannot reasonably be construed to impose liability on a copyright owner simply because it did not *consider* this highly time-consuming, complex and indeterminate multi-factor fair use analysis prior to sending a takedown notice—particularly in a world where infringing uses proliferate at an exponential rate. *See Tuteur*, 2013 WL 4832601, at *7 (noting inconsistency between requiring a fair use analysis in advance of sending a takedown notice and Congress’s stated purpose in enacting DMCA). Congress instead intended to address the possibility that a fair use defense applied to removed materials through the counter-notification and “put-back” procedures, *see* 17 U.S.C. § 512(g)(1), (g)(2), and (g)(4).

“[A]uthorized by ... law” language *does* have meaning without incorporating the fair use defense, because the Copyright Act *does* affirmatively grant rights of use. *See, e.g.*, 17 U.S.C. § 115 (compulsory statutory license to make and

distribute copies of sound recordings that embody musical compositions); 17 U.S.C. § 115 (c)-(d) (secondary transmissions of copyrighted content by cable providers subject to compulsory statutory license); 17 U.S.C. §§ 112, 114. These compulsory license provisions serve as a means by which property is taken from copyright owners by operation of law – and the copyright owner’s intent is irrelevant. These compulsory licenses thus “authorize[] by ... law” the use of a particular sound recording or composition under certain applicable circumstances set forth in the statute. Because notice to the copyright owner is required for compulsory licenses, *see, e.g.*, 17 U.S.C. § 115(b)(1) & 37 C.F.R. § 201.18, a copyright owner can know whether the use has been “authorized by ... law” before sending a notice. This straightforward question of whether a particular use has been licensed under a compulsory scheme must be what Congress meant by “authorized by ... law” – not whether the user could successfully prevail on the affirmative defense that the use is subject to the fair use doctrine.

3. Even if § 512(c)(3)(A)(v) Required Universal to “Consider” Fair Use Before Sending the Notice, Lenz Failed to Introduce Evidence Showing That Universal Necessarily Would Have Concluded Her Use Was Fair

Finally, as the plaintiff alleging a violation of § 512(f)—and as the party asserting fair use—Lenz had to show that Universal’s “consideration” of fair use necessarily would have led it to conclude that the defense applied to “Let’s Go

Crazy #1.” *See, e.g., Amazon.com, Inc.*, 508 F.3d at 1163 (party claiming fair use bears burden of proving it). Lenz failed to do this.

From the outset of the case, Lenz has alleged that her use was “self-evident[ly]” fair, such that anyone with any semblance of knowledge of copyright would instantly understand that her posting was a fair use. 6ER 1039 ¶ 34. Such *ipse dixit* fails to discharge Lenz’s burden. As the case law discussed in the preceding section makes clear, fair use is never self-evident, but instead must be established through a fact-intensive review under the statutory factors set forth in § 107. *See, e.g., Monge*, 688 F.3d at 1170. What is more, Lenz’s assertion that her use was “self-evidently” fair is completely undermined by the record evidence showing that neither Lenz nor the trusted and knowledgeable advisors to whom she looked for guidance [REDACTED] immediately recognized her posting to be self-evident fair use. *See* 4ER 502 (Lenz: “[m]ine’s not a ‘fair use’ case at all.”); 4ER 653; 8ER 1329. [REDACTED]

[REDACTED] 4ER 605:19-25; 4ER 590:1-16, 592:24-593:2, 606:23-607:6; *see also* 8ER 1422:2-8. Lenz’s theory of self-evident fair use was unsupported legally and factually.

Lenz likewise failed to introduce evidence showing that, upon a consideration of all four of the factors in 17 U.S.C. § 107, Universal was bound to recognize that “Let’s Go Crazy #1” made a fair use of “Let’s Go Crazy”:

“The Purpose and Character of the Use.” This factor considers whether the claimed fair use is (i) commercial, 17 U.S.C. § 107(1), and (ii) “transformative.” *Monge*, 688 F.3d at 1175. As discussed, while Lenz’s private filming and performance of her video may have been non-commercial, her *posting* to YouTube was indisputably commercial in nature. Universal was not bound to conclude otherwise.

Lenz likewise failed to show that Universal necessarily had to credit that posting to be transformative. Lenz claimed that her use was transformative because “Let’s Go Crazy” was simply incidental background music to the posting’s main event, which she says were the images of her children running around the kitchen. Those courts that have considered claims of fair uses of works in the background have concluded that using a work for “a central purpose for which it was created” are not “incidental.” *See Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (incidental use of copyrighted poster of painting in episode of television program not a fair use where poster’s “decorative effect”—“a central purpose for which it was created”—was “plainly evident”); *Higgins v. Detroit Educational Television Found.*, 4 F. Supp. 2d 701, 707 (E.D. Mich. 1998) (finding fair use where use of composition that was not “by any means the focal point of the action”); *Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585, 589 (E.D. Mich. 1997) (analyzing whether copyrighted paintings were

the “focus” of the motion picture). Soundtrack use is an intrinsic use for music. Lenz failed to show that Universal necessarily would have been required to find her use of “Let’s Go Crazy”—as background music to a video of kids “going crazy” in the kitchen—was incidental and thereby transformative.

“*The Nature of the Copyrighted Work.*” Universal obviously would not have been required to find that this factor favored a finding of fair use, and Lenz has never claimed otherwise. Musical compositions are “precisely the sort of expression that the copyright law aims to protect.” *Leadsinger*, 512 F.3d at 531; *see Campbell*, 510 U.S. at 586.

“*The Amount and Substantiality of the Use.*” The third factor considers what portions of the copyrighted work were taken in relation to the whole, and conversely to what degree the copyrighted work is embodied in the second work. *See Harper & Row*, 471 U.S. at 565-66. The inquiry has both qualitative and quantitative dimensions—what was taken is as significant as how much was taken. *Salinger v. Random House*, 811 F.2d 90, 98-99 (2d Cir. 1987). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Lenz failed to establish that Universal would have been required to weigh this factor in favor of fair use.

“The Effect of the Use on the Potential Market for or Value of the Copyrighted Work.” This factor does *not* ask whether “Let’s Go Crazy #1” by *itself* resulted in any lost revenue. Rather, it asks “whether unrestricted and widespread conduct of the sort engaged in by [Lenz] ... would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Universal would not have been bound to

find that this factor, or indeed any of the four fair use factors, weighed in favor of fair use.

In sum, Lenz failed to introduce evidence showing that Universal necessarily would have deemed “Let’s Go Crazy #1” to be a fair use, even if Universal had been required to undertake such a review as a prerequisite to sending a takedown notice (which Universal was not required to do).

D. Lenz Produced No Evidence That Universal Was “Willfully Blind” to Fair Use

Plaintiff’s second proxy for knowledge was the claim that Universal willfully blinded itself to the possibility that postings incorporating Prince’s works were subject to the “fair use” affirmative defense. This theory is also unavailing because Lenz had no evidence that Universal met the standards for “willful blindness.”

The Supreme Court’s opinion in *Global-Tech* establishes the two prerequisites for willful blindness: “(1) the defendant *must subjectively believe* that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.” 131 S. Ct. at 2070 (emphasis added). Lenz presented no evidence sufficient to satisfy either prong.

As to the first prong, Lenz produced no evidence that Universal, prior to sending the notice in question on June 4, 2007 subjectively believed that there was a high probability that the postings on YouTube incorporating Prince’s works

constituted “fair use” generally, or that there was such a high probability as to “Let’s Go Crazy #1” specifically. Plaintiff presented no evidence that Universal had a subjective belief that it was requesting the removal of postings possibly subject to a fair use defense.

The district court recognized that Lenz presented no evidence on the first prong of *Global-Tech*. 1ER 20. Nevertheless, the court denied summary judgment to Universal on the ground that it—the defendant (and party without the burden)—failed to show “that it *lacked* a subjective belief that there was a high probability that any given video might make fair use of a Prince composition.” *Id.* This was manifestly wrong under *Celotex*, 477 U.S. 317. That case makes clear that the Federal Rules “mandate[] the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. Once the moving party points out that there is no evidence to support a particular essential element as to which the non-moving party bears the burden, the non-moving party must then come forward with evidence demonstrating that there is a genuine issue of material fact as to that element to avoid summary judgment. *Id.* Following *Celotex*, this Court has held that a moving party may carry its initial burden of production on summary judgment in two ways. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210

F.3d 1099, 1105-06 (9th Cir. 2000). It may *either* “produce evidence negating an essential element of the nonmoving party’s case” or it “may carry its initial burden of production by showing that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial.” *Id.* Here, Universal offered both: it presented evidence of what its knowledge actually was, which refuted this element, and it demonstrated that Plaintiff had no contrary evidence to permit her to carry her burden on this point. 8ER 1533-34. It was obliged to do no more to obtain summary judgment.

Lenz also failed to produce any evidence of Universal’s liability under the second prong of *Global-Tech*, *i.e.*, evidence showing that Universal took “*deliberate* actions to avoid learning” about fair uses, whether Lenz’s or others. 131 S. Ct. at 2070 (emphasis added). Lenz’s failure of proof was not surprising: given the absence of any evidence showing that Universal subjectively believed its removal procedures were taking down fair uses, there was of course no evidence that Universal took deliberate steps to avoid discovering such uses. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] There is not a shred of

evidence that Universal conducted this review in a manner designed to avoid learning of anything.

The district court's contrary conclusion, that Lenz had presented sufficient evidence on the second prong of *Global-Tech*, was simply incorrect. The district court said that the evidence showed that Universal assigned the review of YouTube postings "to a single person who was not given any information or training about fair use." 1ER 20. That statement overlooks not only the record evidence about the training and instruction the employee actually received; it also ignores the fact that there was no evidence that Universal assigned the employee to conduct the review *so that Universal would avoiding discovering fair uses*. No jury could conclude on this record that Universal's review procedures amounted to deliberate acts to avoid learning of the potential "fair use" of any copyrighted work in any particular posting. Lenz's attempt to use "willful blindness" as a proxy for knowledge fails.

II. Lenz Failed to Produce Any Evidence at Summary Judgment That She Incurred Any Damages as the Result of YouTube's Removal of Her Posting

A. Lenz Bore the Burden of Proving That She Incurred Actual Monetary Loss

Lenz's claim fails for the entirely independent reason that she suffered no damages as a result of YouTube's reliance on Universal's notice. Such damages

are a required element of a claim under § 512(f). A party who makes a knowing material misrepresentation under the statute is

liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

17 U.S.C. § 512(f) (emphases added). Section 512(f) thus makes clear that the potential plaintiff must be “injured by” an actionable misrepresentation. And, the statute makes clear what the nature of the injury must be to count as “any damages” for purposes of the statute: specifically, “any damages, including costs and attorneys’ fees,” that are “*incurred ... as the result of the service provider relying upon such misrepresentation.*”

In the district court, Lenz repeatedly changed her theory as to how she had allegedly been damaged. However, Lenz never identified *any* money that she actually lost or expended—or ever stands to lose or to spend—as the result of YouTube’s reliance on Universal’s notice.

Lenz tried to avoid this problem by claiming to be entitled to “nominal” damages. Permitting “nominal” damages would essentially eliminate the damages element from the statute, and rewrite decades of law on common law misrepresentation. Damages are an essential element of 512(f), just as they are in

any claim for misrepresentation under the common law. And just as in common law misrepresentation, Plaintiff must demonstrate that she suffered *actual economic loss*. See Restatement (Second) of Torts §§ 525, 549 (*pecuniary loss* is an element of misrepresentation claims). As stated by a unanimous Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the common law tort of misrepresentation imposes two important requirements. The first is that “the common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted *but also that he suffered actual economic loss*.” *Id.* at 343-44 (emphasis added).⁵ The second is that the plaintiff must show that the alleged misrepresentation was not just a “but for” cause of the claimed damage, but that the alleged misrepresentation *proximately* caused those damages. *Id.* at 344. Construing § 512(f) to allow for “nominal” damages in the absence of actual economic loss would represent a radical departure from the well-established law of misrepresentation. Nothing in the text, structure or legislative history of § 512 shows that Congress intended to reverse the common law presumption that a misrepresentation plaintiff cannot obtain judgment on her claim without having suffered any actual pecuniary loss.

⁵ The Restatement describes this as “pecuniary loss.” See Restatement (Second) of Torts § 525.

B. Lenz Presented No Evidence Showing That She Incurred Any Loss as the Result of YouTube’s Temporary Removal of Her Posting

Lenz’s disclosures on claimed damages at the time of summary judgment listed three categories of claimed damages. 4ER 668-69. Lenz’s evidence in all three categories failed to show that she incurred (or ever has a chance of incurring) any actual loss.

The Loss of YouTube’s Hosting Services and “Chilling” of Plaintiff’s First Amendment Rights. YouTube is and has always been free for Lenz, and she has admitted she has no damages with regard to its hosting services: “I don’t care that YouTube doesn’t want to host it. Not like I’m paying them.” 4ER 512; accord 8ER 1426. In addition, Lenz did not lose access to YouTube for her other postings. 4ER 571:3-572:1. As for claimed First Amendment damages: there is no state action, and the claim that Plaintiff has been “chilled” in exercising her rights has no factual support (and indeed is contrary to the facts). *See, e.g.*, 4ER 672-78.

Lost Time and Resources. Lenz claimed she lost five to 10 hours of time responding to Universal’s notice, and that such time should be compensated at the applicable minimum wage. 4ER 668. But Lenz admitted that this alleged lost time did not translate into any actual loss; Lenz did not lose any actual wages. 4ER 561:18-20, 611:2-24.

In assessing whether Lenz’s time and resources could sustain the element of damages, the district court opined that, “Lenz must have incurred at least minimal expenses for electricity to power her computer, internet and telephone bills, and the like, that potentially could be recoverable under § 512(f).” 1ER 22. However, there was no evidence before the court that any such expenses had been incurred. The district court erred in concluding that Lenz “must have incurred” these expenses without any evidence, which served to eliminate Lenz’s burden to create a genuine issue of material fact.

What is more, the district court’s assumption ignored the evidence Universal presented revealing that no such damages were incurred. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The district court’s assumption that Lenz “must have incurred” these expenses is thus not only unsupported by the record; the record contradicts that supposition.

Attorney’s Fees and Costs. Finally, Lenz has pointed to damages allegedly “incurred” from work done by her lawyers in responding to Universal’s notice and in bringing this lawsuit. These fees cannot suffice to satisfy the element of “damages” under the statute.

As the district court correctly recognized, attorney's fees and costs "incurred" in this litigation cannot be sufficient, and it would be inconsistent with the text of the statute to hold that they are. 6ER 983. The statute provides that the "damages" that a plaintiff "incur[s]" may include "costs and attorneys' fees," but what is critical is that the plaintiff actually has to have "incurred" those fees, and the plaintiff must have done so "*as the result of*" the service provider's removal or replacement of the material in question, *not as the result of filing the litigation*. Reading § 512(f) to make fees and costs for *bringing the § 512(f)* claim "damages" is a bootstrap: it would allow a plaintiff to establish an element of a claim just by filing suit. It cannot be that one satisfies the element of having "incurred" damages under 512(f) by hiring a lawyer to bring a lawsuit under 512(f). There must be some basis for damages other than simply costs associated with the litigation itself.

After the district court correctly rejected attorney's fees related to the litigation itself, Lenz on summary judgment refined and focused her "attorney's fees" theory to isolate only those fees allegedly "incurred" in pre-litigation efforts to restore her posting to YouTube. But even as to the counter-notification, Lenz "incurred" no attorney's fees at all. Lenz's uncontroverted testimony was that she had no obligation to pay any of her several lawyers anything for any of this work. 4ER 616:3-23. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Lenz never had, and never will have, an obligation to pay her lawyers any money out of her own pocket for their work on the counter-notification, or anything else.

In sum, Lenz introduced no evidence of damages “incurred” that qualify under § 512(f). This failure of proof alone entitled Universal to summary judgment.

CONCLUSION

Universal respectfully submits that the district court’s denial of Universal’s motion for summary judgment should be reversed, and the case should be remanded with instructions to enter judgment for Universal.

DATED: October 9, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It is proportionately spaced using Microsoft Word 2003 in 14 point Times New Roman type, and contains 11,724 words, not including those sections excluded in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

DATED: October 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2013, I caused this public, redacted version of the foregoing Appellants' First Brief on Cross-Appeal to be electronically filed with the Clerk of the Court for the United States Court of Appeals 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 public, redacted version will be accomplished by the appellate CM/ECF system.

DATED: October 9, 2013

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