

Nos. 13-16106, 13-16107

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.

Appeal from the United States District Court
for the Northern District of California
No. 07-cv-3783
The Honorable Jeremy Fogel

**BRIEF OF *AMICUS CURIAE* THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the Recording Industry Association of America states it has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. ONLINE INFRINGEMENT IS RAMPANT AND DAMAGING TO THE RECORDING INDUSTRY	3
II. TAKEDOWN NOTICES ARE ESSENTIAL TO COUNTERING ONLINE INFRINGEMENT.....	8
III. THE NOTICE-AND-TAKEDOWN PROCEDURE IMPOSES SIGNIFICANT BURDENS ON THE RECORDING INDUSTRY	12
IV. THE DMCA’S NOTICE-AND-TAKEDOWN PROCEDURE IS THE MOST EFFECTIVE AND AVAILABLE MECHANISM FOR FIGHTING ONLINE INFRINGEMENT.....	17
V. REQUIRING COPYRIGHT OWNERS TO CONSIDER FAIR USE WOULD IMPOSE AN ADDITIONAL BURDEN THAT IS UNWARRANTED AND UNNECESSARY	18
VI. PLAINTIFF’S PER SE LIABILITY RULE WOULD LEAD TO ABSURD AND UNFAIR RESULTS	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001)	4
<i>Arista Records LLC v. Lime Grp. LLC</i> , 784 F. Supp. 2d 398 (S.D.N.Y. 2011)	17
<i>Biosafe-One, Inc. v. Hawks</i> , 524 F. Supp. 2d 452 (S.D.N.Y. 2007)	14
<i>Bridgeport Music, Inc. v. Still N The Water Pub.</i> , 327 F.3d 472 (6th Cir. 2003)	7
<i>Harper & Row Pubs., Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	20
<i>Lenz v. Universal Music Corp.</i> , No. 5:07-CV-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013)	19, 24
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	23
<i>Perfect 10, Inc. v. CCBill, LLC</i> , 488 F.3d 1102 (9th Cir. 2007)	23
<i>Rossi v. Motion Picture Association of America Inc.</i> , 391 F.3d 1000 (9th Cir. 2004)	24
<i>Tuteur, M.D. v. Crosley-Corcoran</i> , --- F. Supp. 2d ---, No. 13-10159-RGS, 2013 WL 4832601 (D. Mass. Sept. 10, 2013)	14
<i>UMG Recordings, Inc. v. Shelter Capital Partners LLC</i> , 718 F.3d 1006 (9th Cir. 2013)	11, 14

Viacom Int’l Inc. v. YouTube, Inc.,
 No. 07 Civ. 2103 LLS, 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013)18

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 676 F.3d 19 (2d Cir. 2012) 6, 11, 12

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Counter Notification Basics, YouTube.com, <http://www.youtube.com/yt/copyright/counter-notification.html>20

Disputing Copyright Notifications, FairUseTube.org, <http://fairusetube.org/guide-to-youtube-removals/4-disputing-copyright-notifications>21

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Internet Archive, <http://web.archive.org/web/20130507114703/http://www.youtube.com/yt/press/statistics.html>12

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Scope of the Problem, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem4, 7

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Transparency Report, Google, <http://www.google.com/transparencyreport/removals/copyright/> 15

INTEREST OF *AMICUS CURIAE*

With the consent of all parties, *amicus curiae* the Recording Industry Association of America (“RIAA”) respectfully submits this brief in support of defendants/appellants/cross-appellees Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (“Appellants”) and the affirmance of that portion of the trial court’s ruling on summary judgment holding that Section 512(f) of the Digital Millennium Copyright Act does not impose liability upon a sender of a takedown notice for not conducting a fair use analysis.¹

The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major recorded music companies. Its members are the music labels that comprise the most commercially successful record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry and technical research; and monitors and reviews state and federal laws, regulations and policies. The RIAA protects the ability of the record industry to invest in new

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the RIAA states that counsel for the parties have not authored this brief in whole or in part, no party contributed money intended to fund the preparation or submission of this brief, and no person other than the RIAA contributed money intended to fund the preparation and submission of this brief.

artists and new music and, in the digital arena, to give online services space to continue to prosper.

Despite the best efforts by its members to increase the availability of their works through authorized services,² unlawful competition from infringers continues to inhibit optimal growth of legitimate online music services. This infringing conduct, which is growing exponentially, deprives the members of the RIAA (and other copyright holders) of important sources of revenue, destroys the value of American intellectual property, and unfairly disadvantages service providers that cooperate to limit infringement and provide lawful access to authorized content. Because a rule requiring copyright holders to conduct a fair use investigation before issuing a takedown notice would exacerbate those

² The members of the RIAA have given invaluable support to the growth of lawful internet use of recorded content. Thus, RIAA member companies licensed certain uses of their recordings on the YouTube.com website, after the site created and implemented a filtering system, in order to facilitate copyright licensing and protection. And recently, they entered a joint venture with Google whereby professionally produced music videos may be viewed on the Vevo.com website (also accessible as a “channel” on the YouTube.com website). *See* Amir Efrati, *Google Takes 7% Stake In Vevo*, Wall St. J. Digits Blog, (July 3, 2013, 8:34 PM), <http://blogs.wsj.com/digits/2013/07/03/google-takes-7-stake-in-vevo/>. The RIAA also has announced, along with the National Music Publishers’ Association, an effort to establish a micro-licensing system that will make it easier for occasional online users of music to obtain licenses at affordable prices. *See* Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock ‘Millions’ In New Revenue*, Billboard (June 13, 2013, 5:11 AM) <http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could>.

problems and impose significant burdens on the RIAA's members, the RIAA has a compelling interest in this case.

SUMMARY OF ARGUMENT

As Appellants have convincingly established in their opening brief, Section 512(c) of the Digital Millennium Copyright Act ("DMCA") does not require a copyright owner, when issuing a takedown notice, to consider whether the use of that owner's material is subject to the fair use defense. The RIAA submits this *amicus* brief to highlight the significant practical burdens that such a requirement would impose on it and its members. In particular, a requirement that a copyright owner precede every takedown notice with a consideration and determination of the applicability of the fair use defense threatens to gut the important protections that Congress provided when enacting the DMCA's notice-and-takedown provisions.

ARGUMENT

I. ONLINE INFRINGEMENT IS RAMPANT AND DAMAGING TO THE RECORDING INDUSTRY

When Congress enacted the DMCA in 1998, it anticipated that the ease of digital dissemination over the internet "will unfortunately . . . facilitate pirates who aim to destroy the value of American intellectual property." H.R. Rep. No. 105-551, pt. 1, at 9 (1998). Congress was right. Online infringement, especially for recorded music, is rampant. For example:

- From 2004 to 2009, approximately 30 *billion* songs were illegally downloaded on file-sharing networks. *See* Scope of the Problem, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem (last visited Oct. 16, 2013).
- As of 2011, it was estimated that 28 percent – over one in four – of internet users accessed unauthorized music services on a monthly basis. *See* International Federation of the Phonographic Industry, Digital Music Report 2012 at 16 (2012), <http://www.ifpi.org/content/library/dmr2012.pdf>.
- A 2011 study estimated that the United States consumes between \$7 to \$20 billion worth of digitally pirated recorded music in a year. Frontier Economics, Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy at 56 (Feb. 2011), <http://www.iccwbo.org/Data/Documents/Bascap/Global-Impacts-Study-Full-Report/>.
- Nearly 30 percent of North American internet users engage in infringement. *See* NetNames, Sizing the Piracy Universe at 8 (2013), http://www.netnames.com/Sizing_the_piracy_universe/download-the-report.
- In January 2013 alone, more than 432 million unique internet users, scattered across the globe, explicitly sought infringing content. *See id.* at 3; *see also* MarkMonitor, Traffic Report: Online Piracy and Counterfeiting at 7 (January 2011), https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf (2011 study concluding that 43 online piracy sites had 146 million visits per day, representing more than 53 billion visits per year).

In 1999, Napster launched a peer-to-peer file sharing program allowing users to share infringing copies of recorded music through the company's centralized server. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). That marked the beginning of large-scale online infringement of recorded music.

Since then, online systems that profit from infringement have proliferated and take many different forms, including (1) storage sites that enable or encourage users to upload copyrighted content that is accessible to other users, *see, e.g.*, 4Shared, <http://www.4shared.com/?locale=en> (last visited Oct. 16, 2013); (2) peer-to-peer (“P2P”) sharing networks that enable users to illegally download copyrighted content from each other for free, while the service provider profits from advertising, subscriptions or donations, *see, e.g.*, The Pirate Bay, <http://thepiratebay.sx/> (last visited Oct. 16, 2013); (3) infringement directories that provide working links to infringing content, *see, e.g.*, Torrentz, <http://torrentz.eu/> (last visited Oct. 16, 2013); and (4) applications that facilitate infringement on mobile and connected devices, *see, e.g.*, The Pirate Bay Browser, Google Play, <https://play.google.com/store/apps/details?id=net.caffeinelab.pbb&hl=en> (last visited Oct. 16, 2013) (offering Pirate Bay access for Android-based mobile devices).³

³ And new systems are always evolving, often armed with ingenious technological devices to hide infringement and thwart copyright owners from protecting their rights. For example, within a year after federal authorities shut down the file hosting site Megaupload and indicted its executives, Megaupload’s founder created a new site which (1) used encryption technology in an attempt to insulate itself from claims that it knowingly aided infringement and (2) lacked a search function, making it harder for copyright holders to identify infringing content. *See* Jeremy Kirk, *File-sharing site Mega fields 150 copyright infringement warnings*, PC World (Jan. 30, 2013, 4:00 AM), <http://www.pcworld.com/article/2026678/filesharing-site-mega-fields-150-copyright-infringement-warnings.html>. In

Online infringement of music is particularly rampant on user-generated content (“UGC”) sites, including YouTube, the site on which Plaintiff posted her video. These sites host massive amounts of copyrighted material. And their owners know exactly what is going on. Copyright holders’ six-year struggle (still ongoing) to hold YouTube liable for knowingly housing infringing content unearthed evidence of YouTube’s knowledge that “75-80% of all YouTube streams contained copyrighted material.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012); *see id.* (financial advisor “estimated that more than 60% of YouTube’s content was ‘premium’ copyrighted content – and that only 10% of the premium content was authorized”).

It is particularly easy for users on UGC sites to engage in the unauthorized use or copying of recorded music. They can post wholesale copies of protected audio-only or audiovisual (music video) works, providing unauthorized, free access to a work to anyone who visits the site. Users may make use of any number of “ripping” technologies (available for free), by which they can download just the music portion of any audiovisual work on YouTube or other sites. *See, e.g.*, Listen

another example, The Pirate Bay – another notorious online piracy site – recently launched a browser that enables access to infringing content to people in countries that have blocked The Pirate Bay’s regular service. *See* Nick Bilton, *The Pirate Bay Offers Web Browser to Avoid Censorship*, N.Y. Times Bits Blog (Aug. 10, 2013, 4:47 PM), <http://bits.blogs.nytimes.com/2013/08/10/the-pirate-bay-offers-piratebrowser-to-avoid-censorship/>.

ToYouTube.com, <http://www.listentoyoutube.com/> (last visited Oct. 16, 2013) (“ListenToYouTube.com is the most convenient online application for converting YouTube flash video to MP3 audio. This service is fast, free, and requires no signup. All you need is a YouTube URL, and our software will transfer the video to our server, extract the MP3, and give you a link to download the audio file.”). And it is a simple matter for users to appropriate copyrighted music for their “own” video creations, as the Plaintiff in this case did here. Copyright law requires users to obtain a synchronization license to make such works, *see, e.g., Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 481 n.8 (6th Cir. 2003), but of course UCG users who create these videos routinely do so without permission.

These unauthorized uses of copyrighted music on UCG sites and other online services unfairly and unlawfully deprive the RIAA’s members and other copyright holders of significant revenue and allow these sites and their advertisers to profit from infringing acts. Indeed, this widespread theft of intellectual property has harmed the entire recording industry. Since Napster’s launch in 1999, music sales have shrunk by more than half. *See* Scope of the Problem, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem (last visited Oct. 16, 2013). And from 1999 to 2011, album sales – in physical and digital form combined – decreased by more than 39 percent, from 755

million to 458 million. *See* Eduardo Porter, *The Perpetual War: Pirates and Creators*, N.Y. Times, Feb. 4, 2012, at SR10, *available at* http://www.nytimes.com/2012/02/05/opinion/sunday/perpetual-war-digital-pirates-and-creators.html?_r=0. Also, people who access infringing music on infringing sites are less likely to also pay for legitimate access to recorded music. *See* International Federation of the Phonographic Industry, *Digital Music Report 2012* at 16 (2012), <http://www.ifpi.org/content/library/dmr2012.pdf>. (demonstrating that just 35 per cent of P2P users in the U.S. in 2010 also paid for music downloads; P2P users spent \$42 per year on music on average, compared with \$76 among those that pay to download and \$126 among those that pay to subscribe to a music service).

II. TAKEDOWN NOTICES ARE ESSENTIAL TO COUNTERING ONLINE INFRINGEMENT

Appellants' opening brief explains the purpose of the DMCA safe harbor provisions and how they work. Congress believed that applying traditional copyright infringement rules to internet service providers – whose liability can turn on the conduct of users they know nothing about or cannot control – might unduly hamper the growth of the internet. So it sought to strike a balance between the rights of copyright owners and the interests of service providers. On the one hand, Congress gave qualifying service providers broad immunity from infringement liability based on the conduct of users. At the same time, Congress conditioned

these safe harbors on the requirement that service providers promptly remove infringing material once they are on notice of infringement. (Appellants' Br. at 20-22). Under Section 512, a service provider can receive safe harbor protection only if it does not have "actual knowledge" of infringing material *and* is not aware of "facts or circumstances from which infringing activity is apparent" – so-called "red flag" or constructive knowledge – *and* acts expeditiously to remove infringing material upon obtaining such knowledge or awareness. 17 U.S.C.

§ 512(c)(1)(A)(i), (ii). Section 512 requires that a service provider also expeditiously remove such material upon receipt of a "notice-and-takedown" letter like the one at issue here. *See id.* § 512(c)(1)(C). Thus, actual knowledge of infringing material, awareness of facts or circumstances that make infringing activity apparent, or receipt of a takedown notice will each trigger an obligation to remove expeditiously the infringing material.⁴

⁴ This Circuit has explained the interplay between actual notice/red flag knowledge and the receipt of a "takedown" letter as follows:

Notably, the statute specifies that notice of infringement by or on behalf of a copyright holder that does not substantially comply with § 512(c) "shall not be considered . . . in determining whether a service provider has actual knowledge or [has red-flag knowledge]." 17 U.S.C. § 512(c)(3)(B)(i). Proper DMCA notice under 17 U.S.C. § 512(c)(3) provides only a *claim* of infringement, and is not necessarily sufficient by itself to establish actual or "red flag" knowledge. Instead, proper DMCA notice gives rise independently to an obligation to remove the allegedly infringing material as

Copyright holders, including members of the RIAA, have taken the position that a provider has “red flag” knowledge when it is aware of facts and circumstances about general infringing activity on its site. “Red flag” knowledge, on this view, does not require knowledge of specific instances of infringement of a particular copyrighted work. *See, e.g.,* Appellants’ Br. at 55-72, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-56777 (9th Cir. Apr. 20, 2010).⁵ That standard, they argue, best implements the balance that Congress struck in the DMCA. And it properly incentivizes service providers to cooperate with copyright owners to limit infringement and to control infringing content before it is widely disseminated. *See id.*

Ultimately, however, the federal courts that have considered the question have held that knowledge or awareness of infringement of specific copyrighted

well as to procedures for ascertaining whether the material is indeed infringing. *See* § 512(g).

UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1021 n.12 (9th Cir. 2013).

⁵ In *UMG Recordings*, for example, this Circuit held the following evidence to be insufficient to put the provider on “red flag” notice: news articles specifically faulting the provider for its lack of copyright enforcement, labeling the provider “a haven for pirated content”; quotations attributed to the provider’s CEO acknowledging that the company hosts “a wide range of unauthorized and full-length copies of popular programs”; and an email from a user of the provider’s service, whose material had been removed from the provider’s site, complaining that he was being unfairly singled out because he had seen “plenty of [other] copyright infringement material on the site.” 718 F.3d at 1024-25.

works is required under both the “actual knowledge” and “red flag” prongs. These courts have concluded that the dividing line between actual and “red flag” knowledge is subjective versus objective knowledge, and not specific versus generalized knowledge. Accordingly, these courts have held that a provider has actual knowledge when it has “specific knowledge of particular infringing activity” and “red flag” knowledge when it is aware of facts that “would have made the specific infringement ‘objectively’ obvious to a reasonable person.” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021, 1026 (9th Cir. 2013) (internal quotation marks omitted); *see Viacom Int’l*, 676 F.3d at 31. These courts also have held that service providers have no affirmative obligation to monitor their services for possible infringement; rather, that burden falls “squarely on the owners of the copyright.” *UMG Recordings*, 718 F.3d at 1022 (internal quotation marks omitted); *see Viacom Int’l*, 676 F.3d at 35.⁶

Thus, taken together, under these decisions, the only way a copyright holder can be certain that a service provider has an obligation to “takedown” the infringing material is to send the provider a formal “takedown” notification under Section 512(c). In other words, at least under the current legal landscape, the

⁶ *Viacom* and *UMG Recordings* each also held that the willful blindness doctrine may be applied to demonstrate knowledge or awareness of specific instances of infringement under the DMCA. *See UMG Recordings*, 718 F.3d at 1023; *Viacom Int’l*, 676 F.3d at 35.

careful balance that Congress sought to strike in enacting the DMCA rests on sending the “takedown” notice. It is, practically speaking, virtually the only thing a copyright owner can do to be sure that a service provider is obligated to take down infringements of the owner’s work or lose its immunity from infringement liability.

III. THE NOTICE-AND-TAKEDOWN PROCEDURE IMPOSES SIGNIFICANT BURDENS ON THE RECORDING INDUSTRY

Although the notice-and-takedown procedure has essentially become the only meaningful tool available for copyright holders to halt massive online infringement on a rapid basis, that tool is far from perfect. It is a time consuming, costly, and incomplete fix to the infringement problem that copyright holders like the RIAA’s members face.

First of all, trying to keep up with the sheer quantity of infringing content available on the internet is a never-ending task. For example, as of March 2010, YouTube was adding 24 hours of new content to its site *every minute*. *Viacom Int’l*, 676 F.3d at 28. By May 7, 2013, that number had tripled to 72 hours of new content. *See* Internet Archive, <http://web.archive.org/web/20130507114703/http://www.youtube.com/yt/press/statistics.html> (last visited Oct. 16, 2013). As of October 16, the number jumped to *100 hours* of new content every minute. Statistics, YouTube, <http://www.youtube.com/yt/press/statistics.html> (last visited Oct. 16, 2013). And that is just one of the many sites that host UGC content that

copyright holders must tirelessly monitor to protect their works. Service providers, moreover, have employed various means to make it difficult to locate infringing works in this sea of content: for example, eliminating the ability to search a site. *See* Jeremy Kirk, File-sharing site Mega fields 150 copyright infringement warnings, PC World (Jan. 30, 2013, 4:00 AM), <http://www.pcworld.com/article/2026678/filesharing-site-mega-fields-150-copyright-infringement-warnings.html>.

For those works that the RIAA and its members do succeed in locating, they must then send a formal takedown notice to the service provider. That is an equally cumbersome task, given the volume of infringement and number of infringing sites. The statute requires that a notice must (1) be “a written communication,” (2) made to the service provider’s “designated agent,” (3) bear the signature of a person authorized to act on behalf of the copyright holder; (4) state that the signer is authorized to act on behalf of that owner; (5) swear, under penalty of perjury, that the information provided is accurate; (6) state that the sender “has a good faith belief that use of the material in the manner complained of is not authorized”; (7) identify the copyrighted work that is allegedly infringed; (8) identify the material that is claimed to be infringing and that is to be removed, in a manner “reasonably sufficient to permit the service provider to locate the material”; and (9) contain information reasonably sufficient to provide the service provider to contact the complaining party. 17 U.S.C. § 512(c)(3)(A)(i)-(vi).

The copyright owner must satisfy all of those requirements for each and every notice it sends. And it must notify service providers of each and every infringing work. Nor is it enough to send one notice covering a particular sound recording and expect that the service provider will take down all copies appearing on its site. Rather, the copyright owner must identify each URL (Uniform Resource Locator, or web address) containing or linking to the unauthorized use of its work.⁷ New notices also must be sent each time a prior infringement is reposted.⁸

⁷ Upon receipt of the takedown notice, the service provider need only remove or disable access to the specific copies of the work at the particular URLs found by the copyright owner and specified in the notice. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 528-29 (S.D.N.Y. 2010). The provider need not remove other copies of the exact same work indexed by it and remaining on its server, even though multiple copies of the same work frequently are present. Accordingly, additional notices must be given to address those duplicative infringements.

⁸ Even if a site responds to the takedown notice by removing the infringing content (and not all do), many sites do nothing to stop the removed content from being reposted. Or the user simply finds a new site on which to continue her infringement. *See, e.g., Biosafe-One, Inc. v. Hawks*, 524 F. Supp. 2d 452, 461 (S.D.N.Y. 2007) (alleged infringer moved its allegedly infringing website to a new domain after being shut down by first web hosting company who received a takedown notice under the DMCA); *Tuteur, M.D. v. Crosley-Corcoran*, --- F. Supp. 2d ---, No. 13-10159-RGS, 2013 WL 4832601, at * 1 (D. Mass. Sept. 10, 2013) (alleged infringer moved her blog from one hosting site to another in order to repost copyrighted photo).

These requirements are burdensome to meet as it is, even without the addition of an unwarranted fair use analysis. For example, the RIAA must search many hundreds of websites to locate specific URLs containing or linking to the unauthorized uses of its members' works. The RIAA must also determine the site's designated agent, which some sites make difficult or confusing to identify.

Nevertheless, despite the massive increase in infringing content on the internet, and the "whack-a-mole" nature of the enforcement effort, the RIAA has engaged in a notice-and-takedown effort on behalf of its members, as that is the only direct remedy for the massive piracy problem. To this end, in the past five years, the RIAA has issued notices covering in excess of 46 million acts of infringement. And the rate of infringement, and hence notices, is increasing every day. At the time of this filing, the RIAA is issuing more than 2 million notices per month to Google alone. *See* Transparency Report, Google, <http://www.google.com/transparencyreport/removals/copyright/> (last visited Oct. 16, 2013).

Trying to keep up with this volume of infringement is a Sisyphean task. In addition to retaining outside antipiracy vendors at considerable cost, the RIAA has an entire department dedicated to identifying infringement and issuing takedown requests. As noted above, the RIAA pursues many different tasks and functions for its members; issuing takedown notices is only part of its mission. Yet the

RIAA's notice-and-takedown department has become the *largest department* in the organization. And even this is not enough. Thus, the RIAA also relies on the efforts of the International Federation of the Phonographic Industry, which represents the recording industry worldwide with some 1,300 members in 66 countries and affiliated industry associations in 55 countries, *see* About, International Federation of the Phonographic Industry, http://www.ifpi.org/content/section_about/index.html (last visited Oct. 16, 2013), and has its own dedicated department tasked with combating online infringement through the notice-and-takedown procedure.

A representative of the American Association of Independent Music (“A2IM”), the trade association for independent music labels, summed it up best when testifying about the burden of the notice-and-takedown process to the House Judiciary Committee earlier this year:

The time and capital investment required for our community of like-minded, but proudly Independent small business people to monitor the web for usage and take subsequent legal action simply does not exist. A2IM member music labels do not have the financial means or resources to house a stable of systems people and lawyers to monitor the Internet and bombard users with DMCA takedown notices for seemingly endless illegal links to our musical copyrights.

Innovation in America: The Role of Copyrights: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the

Judiciary, 113th Cong. 6 (2013) (statement of Tor Hansen, Co-President/Co-Founder YepRoc Records/Redeye Distribution).

IV. THE DMCA'S NOTICE-AND-TAKEDOWN PROCEDURE IS THE MOST EFFECTIVE AND AVAILABLE MECHANISM FOR FIGHTING ONLINE INFRINGEMENT

Notwithstanding the difficulty, burden, and limitations of the DMCA's notice-and-takedown procedure, it remains the most effective, and only practical, mechanism for copyright holders to address infringement online.

Litigation against individual internet posters is an obviously ineffectual tool for tackling a problem of this magnitude. There are simply too many infringers across too many countries to sue. The speed at which online infringement travels is too fast. And formal litigation is notoriously slow and costly.

To be sure, copyright owners can use litigation in a more targeted way against large-scale infringing services. And they have. But these lawsuits have limits of their own. To begin with, some of the defendants operating these infringing services are not subject to U.S. jurisdiction. Moreover, going after large-scale infringing services requires large-scale litigation – which can take years to conclude and demands significant financial investments. To take one example, it took RIAA members' over four years to shut down LimeWire, a peer-to-peer network rife with infringement, and another year to settle the damages. *See Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 431 (S.D.N.Y. 2011).

Viacom International's suit against YouTube is another example. *See Viacom Int'l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 LLS, 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013). That suit has been pending over six years, and is currently in the midst of its second trip to the Second Circuit. These massive and lengthy civil cases do not provide a workable solution to the full scope of online copyright infringement.

V. REQUIRING COPYRIGHT OWNERS TO CONSIDER FAIR USE WOULD IMPOSE AN ADDITIONAL BURDEN THAT IS UNWARRANTED AND UNNECESSARY

Plaintiff's contention that copyright owners should be required to conduct a fair use analysis every time they identify an instance of unauthorized online use would effectively decimate the one, albeit imperfect, rapid legal tool – notice and takedown – that copyrights holders have to fight online infringement.

As Appellants have explained in their opening brief, the fair use defense is one of the most confounding doctrines in copyright law. It is notoriously troublesome to apply. It does not lend itself to rapid or simple judgments. And it can require consideration of facts that may lie exclusively with the party asserting the defense. (Appellants' Br. at 32-35). Accordingly, it is fanciful to believe that copyright holders dealing with infringement on the massive scale that exists in the online world could easily engage in this time-consuming, indeterminate exercise. To the contrary, adding that type of inquiry to the already enormous and expensive

burdens that the notice-and-takedown procedure imposes on copyright holders would render that procedure effectively useless.

That much is clear from the district court's summary judgment order. Clearly troubled by the burden that would be imposed by an *ex ante* fair use determination, the district court opined that a copyright holder need not engage in a "full-blown fair use analysis" but, instead, should make "at least an initial assessment as to whether the fair use doctrine applies to the use in question." *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783-JF, 2013 WL 271673, at *6 (N.D. Cal. Jan. 24, 2013). Yet the court gave no guidance as to what such a truncated "initial assessment" would look like or how that differs from what Appellants did in this case. Any attempt to lessen the copyright holder's burden through application of something less than a "full-blown" analysis is simply not tenable.

Given the uncertainty of the fair use test to begin with, which requires balancing a non-exhaustive list of four factors, *see* 17 U.S.C. § 107, how can a copyright holder be expected to conclude that a use is fair or not? And how could a court fairly test whether a party did so, in good faith? What happens if the copyright holder recognizes that some of the statutory factors strongly support the existence of the defense, but others do not? What if the copyright holder simply cannot predict how a court would evaluate the use? Does a copyright holder need to anticipate and consider arguments that a user would make in asserting a fair use

defense? What about unauthorized use of a non-published work (*e.g.*, use of work that has been leaked and is about to be commercially released), which is entitled to greater protection, *see Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) – how much extra weight can the copyright owner give to a finding of infringement in that setting? All of these questions confound the fair use analysis. Indeed, skilled copyright practitioners often cannot counsel clients on this question with any high degree of confidence, so how can the law expect copyright holders to do any better? All of this uncertainty highlights another problem with a requirement for an *ex ante* consideration of fair use: it will necessarily invite unfair *ex post* second-guessing about the appropriate amount of fair use consideration and inquiry in any given case.

There is, moreover, no reason to believe that a requirement to consider fair use would meaningfully, or even minimally, benefit those who use copyrighted material for legitimate fair uses. As demonstrated in Appellants' brief, internet users who believe their content is protected by the fair use defense have an effective and efficient remedy at their disposal: the DMCA counter-notice and put-back procedure. (Appellants' Br. at 20-23). There are ample free resources to assist users with the process. YouTube and other sites have mechanisms that facilitate the user's submission of a counter-notice. *See Counter Notification Basics*, YouTube.com, <http://www.youtube.com/yt/copyright/counter->

notification.html (last visited Oct. 16, 2013). And numerous other online resources are available, including at least one site that automatically generates counter-notices based on answers to a short form questionnaire. *See* DMCA Counter-Notification, Chilling Effects, <http://www.chillingeffects.org/dmca/counter512.pdf> (last visited Oct. 16, 2013); *see also* Disputing Copyright Notifications, FairUseTube.org, <http://fairusetube.org/guide-to-youtube-removals/4-disputing-copyright-notifications> (last visited Oct. 16, 2013).

Nor is there reason to believe that, absent the requirement, copyright holders will send a tidal wave of takedown notice targeting legitimate fair uses. To the contrary, over the last five years, the RIAA has received a minuscule number of counter-notices in response to the over 46 million takedown notices it has issued. If the takedown procedure were being abused at the expense of fair use – which is the premise of Plaintiff’s lawsuit – the number would almost certainly be materially higher. The paucity of counter-notices indicates that any problem resulting from a failure to consider fair use is illusory.

Furthermore, a user who believes his use is fair and issues a counter-notice gets his work rapidly reposted *for good*, unless the copyright holder wishes to pursue a lengthy and expensive lawsuit. With the scale tipped in favor of the user in this way, Congress cannot also have intended the copyright holder to take on the additional obligation to examine the user’s possible fair use defense each and every

time it sends a takedown notice. Congress enacted the DMCA, in great part, to combat online infringement. In accord with that intent, this Court should continue to place the burden of demonstrating fair use with the user – where it belongs.

VI. PLAINTIFF’S PER SE LIABILITY RULE WOULD LEAD TO ABSURD AND UNFAIR RESULTS

Plaintiff asks this Court to hold that Section 512(f) liability is established whenever “the sender of a takedown notice knowingly failed to consider fair use but nonetheless affirmed that it had formed a good-faith belief that a targeted use was not authorized by law.” (Pl.’s Pet. for Permission to Appeal at 15; *see id.* at 12-14 and 17). In other words, under Plaintiff’s view, the sole question under Section 512(f) is apparently whether the copyright owner failed to consider the question of fair use, regardless of whether the use is, in fact, fair.

Plaintiff’s position cannot be reconciled with the actual language of Section 512(f). That section imposes liability for “knowingly materially misrepresent[ing] . . . that material or activity *is infringing*.” 17 U.S.C. § 512(f) (emphasis added).⁹

⁹ The section does not, as Plaintiff suggests, impose strict liability for an alleged misstatement of the sender’s good faith belief that a particular use is not “authorized” by the copyright owner, by that owner’s agent or by law, as required under Section 512(c)(3)(A)(v). If Congress wanted to impose liability for a sender’s misstatement of such good faith belief, Congress would have said so expressly and Section 512(f) would have imposed liability on one who “knowingly materially misrepresents under this section its good faith belief that use of the material in the manner complained of is not authorized” But that is not what Section 512(f) says.

By conditioning liability on a failure to consider fair use, Plaintiff's strict liability position ignores the critical issue of infringement entirely. Thus, under Plaintiff's theory, she is entitled to recover damages against Appellants for allegedly misrepresenting that her video "*is infringing*" even if her video does, in fact, infringe. That, most certainly, is not the purpose behind Section 512. Indeed, as this Circuit previously recognized in *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1112 (9th Cir. 2007), the purpose of Section 512 is to promote the free dissemination of *non-infringing* works. As the Court explained: although "accusations of alleged infringement have drastic consequences," "[i]f the content infringes, justice has been done." *Id.* (emphasis added).

Under Plaintiff's *per se* rule, a court would never reach the critical question of infringement. To the contrary, a court could find a copyright holder liable under Section 512 for effectuating the removal of *infringing* works, simply because the holder failed to consider the fair use defense. The Court should not construe the DMCA to permit such an absurd result.

Plaintiff's position also subverts the traditional burdens associated with the fair use defense. It is well recognized that the burden of establishing fair use rests on the party that copies a protected work without affirmative permission – not on the party whose work is used without authorization. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). Yet under Plaintiff's

interpretation, a party who engages in unauthorized copying will never be put to the task of defending its use. Rather, the burden will shift to the copyright holder to demonstrate the effort it undertook to investigate fair use, with the ultimate question – whether or not the use is fair – completely ignored. And if the holder did not undertake such an investigation, a poster even of infringing conduct will be put on a fast track to damages. And such a poster will always be able to demonstrate some level of damage – if items such as the cost of sending a counter-notice are included, as the district court held. *See Lenz*, 2013 WL 271673 at *9. So unless copyright owners can demonstrate the consideration they gave the question of fair use before sending the DMCA notice, posters will always prevail on a 512(f) claim, even if their use is infringing. Congress did not intend to give users this kind of windfall.

CONCLUSION

A requirement that a copyright owner must consider the fair use defense before issuing a takedown notice would be contrary to the important balance struck by Congress when it enacted the DMCA. It is not necessary to protect the posters of non-infringing content. And by substantially increasing the burdens copyright owners already face in combating online infringement, it will undermine – if not render useless – the important notice-and-takedown procedure. Consistent with this Court’s prior ruling in *Rossi v. Motion Picture Association of America Inc.*,

391 F.3d 1000 (9th Cir. 2004), the RIAA urges the Court to affirm that portion of the district court's summary judgment order ruling that a sender of a takedown notice is not liable under the DMCA for not conducting a fair use analysis.

Dated: New York, New York
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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 5,942 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

By: s/ Cynthia S. Arato
Cynthia S. Arato

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.

Dated: October 16, 2013

By: s/ Will Binkley
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