Painting Independent Artists into a Corner with Broad Strokes of 512(f) Liability: The Potential Harm of an Overreaching Objective Standard

Noah J. Wald

Follow this and additional works at: http://scholarship.law.berkeley.edu/bjesl

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/bjesl/vol4/iss1/5

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z384M1N

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Entertainment and Sports Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Painting Independent Artists into a Corner with Broad Strokes of 512(f) Liability: The Potential Harm of an Overreaching Objective Standard

Noah J. Wald

TABLE OF CONTENTS

I. Introduction ........................................................................................................................................ 117

II. Section 512(f) Requires a Subjective Good Faith Belief that a Use is Infringing. ........................................... 118
   A. The DMCA and OCILLA ............................................................................................................. 118
   B. The Notice, Takedown, and Counter Notice Procedure. ...................................................... 119
   C. Liability for Misrepresentations Contained in Takedown Notices. .............................................. 121
   D. Section 512(f) Case History ....................................................................................................... 122
      2. Rossi v MPAA—9th Cir. (2004). ....................................................................................... 124

III. Policy Arguments Supporting the Objective Standard ................................................................. 130
   A. Fair Use is Incapable of Certain and Definite Prediction, Rendering an Objective Standard Impracticable. .................. 130
      1. A Fair Use Determination Lacks Absolute Predictability. .... 130
      2. Transmuting an Affirmative Defense into a Prerequisite Evaluation. ................................. 133
   B. Undue Increased Burdens on Smaller Rights Holders—Laws Designed to Address the Elephants will Crush the Mice ............ 135
   C. The True Aim of Section 512(f): Takedown Notices Used as Censorship. .......................... 137
   D. Outside of Clear, Subjective Abuses, Damages are Speculative ........................................... 139

IV. Conclusion ...................................................................................................................................... 140
I. INTRODUCTION

Recently, courts have been trying to decipher the extent to which a copyright owner must evaluate a potential infringing use before issuing a takedown notice, which has in turn spawned much scholarly comment. Only a handful of cases over the last ten years have addressed the issue directly; however, the subject recently came to a head amidst a 2013 suit filed by Lawrence Lessig, a Harvard Law Professor and one of the foremost copyright scholars in the country.

Mr. Lessig filed suit against an Australian record label that issued a takedown notice in response to his online posting of a video of a lecture he presented at a Creative Commons conference in which he discussed cultural developments in the Internet age. The video contained clips of an Internet phenomenon described as “copycat” videos, in which multiple online users made similar videos based off one another, all set to the song “Lisztomania.” The Australian owner of the song responded by issuing a takedown notice to Lessig, and now Lessig is seeking damages for the issuance of that takedown notice.

The Lessig case presented a near perfect test case for opponents of the DMCA takedown procedure to obtain a ruling that would expand liability for sending takedown notices to uses that are objectively fair uses. However, in contrast to the basis of liability asserted in the Lessig complaint, the Ninth Circuit has held that a copyright owner should only be liable for sending a takedown notice when there is a subjective lack of good faith behind the notice. Opponents disagree, arguing that an objective standard should be imposed and that a party should be liable for issuing notices to uses that are “clearly” fair uses. Unfortunately, Lessig’s case was settled in early 2014 and did not result

---


5. E.g., id. (alleging the defendant should be liable for issuing a takedown notice to a use that was an educational fair use); Tuteur v. Crosley-Corcoran, 961 F.Supp.2d 333 (D. Mass. 2013) (arguing for the use of an objective standard in determining liability for sending a notice); see also Koss, supra note 1.
Because the determination of liability for sending takedown notices remains unresolved, this paper seeks to further the discussion, and argues that the imposition of an objective standard to evaluate liability for sending takedown notices is impracticable, inconsistent with the law, and will result in increased and undue burdens on independent creators and their ability to protect their creations.

Part II first presents a summary of the notice and takedown procedure under the DMCA, followed by an outline of the statutory structure of section 512(f), and lastly a review of the relevant case law interpreting liability under section 512(f).

Part III presents a series of policy arguments focused on how an objective standard would impact less prominent independent content creators. First, it is argued that due to the inability to predict fair use with certainty, requiring legally uneducated creators and artists to conduct an analysis of all potential defenses to infringement will undoubtedly result in deterrent effects on those unfamiliar with the law who fear liability for misunderstanding the complicated nuances of fair use and other defenses to infringement. Next, it is argued that because the burden to police infringement has been placed solely on copyright owners, adding the additional burden of evaluating all possible and potential defenses to infringement will result in an imbalance with excessive burdens on copyright holders. Finally, it is argued that the existing subjective standard is sufficient to find liability in classic abuses of the notice and takedown process, and that an objective standard is an unnecessary expansion of liability.

II. SECTION 512(f) REQUIRES A SUBJECTIVE GOOD FAITH BELIEF THAT A USE IS INFRINGING.

A brief outline of the notice and takedown process and section 512(f) liability, as well as a review of the existing case law addressing section 512(f) liability, are necessary to set forth the current landscape. This section presents a brief history and a basic explanation of the notice and takedown procedure, which is more closely scrutinized in Part III. Next, this section summarizes the relevant statutory sections that compose section 512(f). Finally, this section reviews the relevant case law interpreting section 512(f) liability.

A. The DMCA and OCILLA

Title II of the Digital Millennium Copyright Act ("DMCA") sought to address the liability, or limitations thereof, for online service providers ("OSPs") that host and transmit potentially infringing material through their online networks. In the late 1990’s, as the Internet began to grow

---


exponentially, a debate between OSPs and big content owners began to emerge concerning the extent of secondary liability that would be imposed on OSPs that hosted infringing content. On one hand, big content owners argued that OSPs should be strictly liable for copyright infringements occurring on their networks, and on the other, OSPs argued that without some form of protection the online environment and economy would be stifled due to fear of liability. Additionally, Congress recognized the need to clarify the extent of liability of OSPs in order to facilitate an efficient online marketplace for content and expression and 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.” It was these interests that Congress intended to balance with the enactment of the Online Copyright Infringement Liability Limitation Act (“OCILLA”), codified in Title II of the DMCA.

In an effort to balance these competing interests, Congress elected to put the burden to police the Internet for infringing content on copyright holders and not OSPs. OCILLA provides various safe harbor protections for OSPs against copyright infringement for certain activities that occur on their online networks. The notice and takedown procedure is a condition for OSPs to qualify for safe harbor protection against copyright infringement involving “Information residing on systems or networks at direction of users,” i.e. OSPs hosting user-provided content.

In an effort to balance the burden of policing the Internet for infringing content, this safe harbor requires that OSPs assist copyright owners in removing infringing content from their online networks. This is accomplished via the notice and takedown procedure.

B. The Notice, Takedown, and Counter Notice Procedure.

In order to avail itself of safe harbor protection under Section 512(c), an OSP must, “upon notification of claimed infringement . . . respond[] expeditiously to remove, or disable access to, the material that is claimed to be (1998) (“Title II clarifies the liability faced by service providers . . . ”); H.R. Rep. No. 105-796 (1998). For a further discussion of the history and implementation of the DMCA, see Nimmer, supra note 1; JAY DRATLER JR & STEPHAN M. MCJOHN, CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM § 1.02 (ALM Properties, Inc. 2009); Williams, supra note 1, at 10-15 (2007).

8. See generally Bleech, supra note 1, at 248-57 (2009) (discussing in detail the legislative history surrounding the notice and takedown procedure).

9. See Reichman, Dinwoodie & Samuelson, supra note 1, at 998-95. See generally David Nimmer, supra note 1 (providing an in-depth review of the DMCA’s legislative history and its use in scholarly commentary).


12. Id. § 512(c)(1)(C). OCILLA also provides OSP safe harbor protection against copyright infringement for activities related to “Transitory Digital Network Communications,” id. § 512(a), and “System Caching.” Id. § 512(b).

13. Id.; see also Brandon Brown, Note, Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World, 23 BERKELEY TECH. L. J. 437, 445 (2008); Williams, supra note 1.
infringing or to be the subject of infringing activity.”  

14 If a copyright owner believes that an OSP is hosting material that infringes the owner’s copyright, the copyright owner can send a notice to the OSP identifying the allegedly infringing content.  

Upon receipt of such a notice, the OSP is required to remove or disable access to the allegedly infringing content.  

Next, the OSP must “take[] reasonable steps to promptly notify the [alleged infringer] that it has removed or disabled access to the material.” — notice that the material was taken down, hence the name “Takedown Notice.” Upon its prompt notification from the OSP that its material has been claimed to be infringing on the copyright of another and has been removed or disabled, the alleged infringer has the ability to respond to the takedown notice by sending the OSP their own counter notice. Through this counter notice, an alleged infringer can contend that the material was removed as result of a mistake or misidentification.  

Upon receipt of a counter notice, OSPs are required to promptly provide the copyright owner who sent the original notice with a copy of the counter notice and inform the copyright owner that the material will be replaced or access will be restored in ten business days. The final step in the process requires that the OSPs replace or restore access to the complained of material, unless the OSP receives notice from the copyright owner that they have filed an action seeking a court order to restrain infringing activity committed by the alleged infringer. The entire process (when contested by the subscriber/alleged infringer) can be illustrated as follows:

<table>
<thead>
<tr>
<th>Step</th>
<th>From</th>
<th>To</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Copyright Owner</td>
<td>OSP</td>
<td>Notice of infringement of its copyright</td>
</tr>
<tr>
<td>2</td>
<td>OSP</td>
<td>Subscriber/Alleged Infringer</td>
<td>Notice material has been taken down</td>
</tr>
<tr>
<td>3</td>
<td>Subscriber/Alleged Infringer</td>
<td>OSP</td>
<td>Counter Notice claiming mistaken removal</td>
</tr>
<tr>
<td>4</td>
<td>OSP</td>
<td>Copyright Owner</td>
<td>Copy of Counter Notice &amp; Notice of Replacement w/in 10 days</td>
</tr>
<tr>
<td>5</td>
<td>Copyright Owner</td>
<td>OSP</td>
<td>Notice of Filed Action seeking court order w/in 10-14 days; OR Replacement of the material</td>
</tr>
</tbody>
</table>

14. 17 U.S.C. § 512(c)(1)(C). Safe Harbor protection is also conditioned on the OSP’s lack of actual knowledge of infringing activities, the absence of facts or circumstances from which infringing activity is apparent, and the expeditious removal or disabling of access to such material once knowledge or awareness arises. Id. § 512(c)(1)(A)(i)-(iii). Furthermore, if it possesses the ability to control the activity, the OSPs cannot receive a financial benefit directly attributable to the infringing activity—reflecting principles of secondary copyright infringement liability. Id. § 512(c)(1)(B).

15. Id. § 512(c)(3)(A).

16. Id. § 512(c)(1)(C).

17. Id. § 512(g)(2)(A).

18. Id. § 512(g)(2)(B); Id. § 512 (g)(3).

19. Id. § 512(g)(3)(C).

20. Id. § 512(g)(2)(B).

21. Id. § 512(g)(2)(C).
Taking a step back and ignoring the OSPs role of forwarding communications, the process can be summarized as consisting of the following three steps:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Copyright Owner Sends Takedown Notice</td>
<td></td>
</tr>
<tr>
<td>2. Subscriber/Alleged Infringer Sends Counter Notice</td>
<td></td>
</tr>
<tr>
<td>3. Copyright Owner Files Action w/in 10-14 days or the material is restored</td>
<td></td>
</tr>
</tbody>
</table>

If an OSP implements a process in conformity with these steps and subsequently complies with this notice, takedown, and counter notification system, the OSP will be immune from any liability resulting from infringing content placed on its online networks by other users.

While this process was designed to balance burdens between content owners and OSPs, Congress also recognized that empowering content owners with the ability to send notices and remove content could naturally result in abuses of the process. Therefore, the notice and takedown procedure is also designed to impose liability for knowing misrepresentations contained in notices.

C. Liability for Misrepresentations Contained in Takedown Notices.

The current debate, and the issue presented by the Lessig case, surrounds a portion of Title II of the DMCA that creates liability for knowing, material misrepresentations contained within a takedown notice or a counter notice. Specifically, Section 512(f) provides, “[a]ny person who knowingly materially misrepresents under this section that the material or activity is infringing, or that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages . . . .” The ambiguity fueling the debate involves the interpretation and application of this statutory section when it is combined with the statutorily required contents of a takedown notice.

Among the required contents of a takedown notice, a copyright owner is required to include “[a] statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” It is the words at the end of this section, “or the law,” that have lead to the ambiguity surrounding section 512(f) liability. It is argued that the inclusion of these words requires that the

---

22. See, e.g., S. Rep. No. 105-190, at 49 (1998) (“[Section 512(f)] is intended to deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and Internet users.”); Williams, supra note 7, at 15 (“Congress also included penalties for knowing material misrepresentations regarding the nature of online material in § 512(f). While this provision was undoubtedly designed to prevent abuse, it is also part of a statutory structure designed to facilitate use of the notice-and-takedown process.”).


24. Id. § 512(c)(3)(A)(v).
copyright owner assess whether the use they are complaining of is in any way authorized by any aspect of copyright law, specifically the doctrine of fair use, and that failing to do so would give rise to liability under Section 512(f) for the commission of a knowing misrepresentation.\textsuperscript{25}

The interpretation of the word “knowingly,” and the extent to which it requires a content owner to consider the possibility that an alleged infringement is otherwise authorized by “the law” has spurred fierce scholarly debate as well as several lower court decisions.\textsuperscript{26} The main theme of this debate is the extent to which a copyright holder must evaluate the possibility that a use is a fair use under section 107 of the Copyright Act before issuing a takedown notice, and whether issuing a notice to a use that is arguably a “clear” fair use is a misrepresentation of a good faith belief that the material is infringing.

An initial decision from the Northern District of California interpreted this section to impose liability for a knowing misrepresentation of a good faith belief under an objective standard, finding the issuance of notices to objectively fair uses to be knowing misrepresentations.\textsuperscript{27} However, the Ninth Circuit disagreed in Rossi v. MPAA and held that whether a misrepresentation has been “knowingly” committed must be evaluated on a subjective basis.\textsuperscript{28} Building off of the Ninth Circuit’s holding in Rossi, the United States District court for the District of Massachusetts held in Tuteur v. Crosley-Corcoran that in order to prove a knowing misrepresentation, a complaining party must prove actual knowledge of a misrepresentation.\textsuperscript{29} Critics and subsequent plaintiffs disagree and argue that copyright owners should be liable for issuing notices to uses that are “clearly” or “objective” fair uses.\textsuperscript{30} To better present the current debate, an exploration of recent cases addressing this issue follows.

\textit{D. Section 512(f) Case History}

The case law addressing liability under Section 512(f) began emerging in 2004, and the issue has since only arisen in a handful of cases.\textsuperscript{31} Three main

\textsuperscript{26} \textit{E.g.}, \textit{Tuteur}, 961 F.Supp.2d 333; Rossi, 391 F.3d 1000; Online Policy Group v. Diebold, 337 F.Supp.2d 1195 (N.D. Cal. 2004); Lenz v. Universal Music Corp., 572 F.Supp.2d 1150 (D. Cal. 2008); Lenz v. Universal Music Corp., 2013 WL 271673 (D. Cal. Jan. 24, 2013); Williams, \textit{supra} note 1 (arguing against the imposition of an objective standard); Koss, \textit{supra} note 1 (arguing for a subjective standard based on unequivocal fair uses); Cobia, \textit{supra} note 1 (arguing that the takedown process is wrought with problems); Bleech, \textit{supra} note 1, at 260 (arguing that the subjective good faith standard undermines the concept of 512(f) liability).
\textsuperscript{27} \textit{Online Policy Group}, 337 F.Supp.2d 1195.
\textsuperscript{28} Rossi, 391 F.3d 1000.
\textsuperscript{29} \textit{Tuteur}, 961 F.Supp.2d 333.
\textsuperscript{31} See Koss, \textit{supra} note 1, at 156.
cases from the Northern District of California and the Ninth Circuit set the legal backdrop for analyzing Section 512(f) liability, while recent cases have arisen out of the District Court of Massachusetts. They are analyzed in turn.


One of the early cases addressing Section 512(f) liability was Online Policy Group v. Diebold, in which two college students brought a claim against Diebold, a manufacturer of electronic voting machines. After the reliability and verification procedures of Diebold’s voting machines became the subject of public criticism, students obtained emails between Diebold employees that contained discussions about issues with the machines, and posted the emails on various websites. In response, Diebold sent DMCA takedown notices to the students’ OSPs, as well as to an online news article that provided a hyperlink to the posted email archives. In response, the students and the publisher of the online news article brought suit alleging Diebold’s claim of infringement was based on knowing material misrepresentations.

The court initially assessed the plaintiff’s use of the emails and determined that at least a portion of the email archive was not protected by copyright law. While not specifically labeling the use a fair use, the court found, “[t]he purpose, character, nature of the use, and the effect of the use upon the potential market . . . all indicate[d] that at least part of the email archive is not protected by copyright law.” The court also found that the use was transformative in that it was used to support criticism within the public’s interest.

The court’s section 512(f) analysis centered on the proper interpretation of the words “knowingly materially misrepresented.” The court rejected both the plaintiff’s proposed interpretation, which applied a likelihood of success standard and the defendant’s proposed “frivolous” standard, and instead held that, “[k]nowingly means 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.” Although the court defined “knowingly” to include actual knowledge, the court also set forth an objective standard for evaluating a knowing misrepresentation under Section 512(f) by defining “knowingly” to also include an instance when

---
32. Online Policy Group, 337 F.Supp.2d at 1197-98.
33. Id.
34. See id.
35. Id. at 1198.
36. Id. at 1203.
37. Id.
38. Id.
39. See id. at 1203-04.
40. Id.
the issuing party “should have known if it acted with reasonable care.”

Applying this objective standard to the facts before it, the court concluded that Diebold knowingly and materially misrepresented that infringement had occurred with respect to the portions of the posted content that were “clearly subject to the fair use exception.” This was because in the court’s view, “[n]o reasonable copyright holder could have believed,” that the portions of the debated content criticizing and discussing potential problems with the Diebold voting machines were protected by copyright. To rephrase, because a reasonable copyright holder would have concluded that the use in this situation was a fair use, a knowing misrepresentation occurred when Diebold claimed that the use was an infringement.

_Diebold_ sets forth the notion of using an objective standard to evaluate whether a knowing misrepresentation has occurred. Since Diebold was using takedown notices to censor criticism of its products, it is not surprising that the court had little difficulty in finding liability. In describing the rationale behind Diebold’s liability, the court interpreted section 512(f) in an overly broad manner, focusing on the nature of the use, rather than Diebold’s intent behind issuing the notice. Only several months later, the Ninth Circuit, when presented with a less sympathetic plaintiff, specifically rejected the imposition of an objective standard and set forth a different standard.

2. _Rossi v MPAA—9th Cir. (2004)._ 

In _Rossi v Motion Picture Association of America_, the plaintiff brought an action against the Motion Picture Association of America (“MPAA”) claiming the MPAA did not have sufficient information to form a good faith belief that the plaintiff was infringing its copyrights before issuing a takedown notice. The plaintiff owned and operated a website that provided a directory of websites containing information about movies. A member of the MPAA became aware of the plaintiff’s website and noticed that graphics for some of its members’ copyrighted movies were present on the site, along with content directing users to “join to download full length movies,” among other statements indicating that illegal downloading of movies was possible. In response, the MPAA sent the plaintiff a takedown notice. The problem for the MPAA was that none of the links on the plaintiff’s page actually provided a downloadable file of any movies; rather, the website was misleading visitors in

---

41. See Koss, _supra_ note 1, at 156-60 (discussing the court’s objective standard interpretation).
42. _Online Policy Group_, 337 F.Supp.2d at 1204-05.
43. See id.
44. For a further discussion on Diebold’s use of the DMCA for censorship, see Part III.C.
45. See _Rossi_, 391 F.3d 1000, 1003.
46. _Id._ at 1001-02.
47. See _id._ at 1002.
48. _Id._
its offers for free downloads.\textsuperscript{49}

In lieu of sending a counter notice, the plaintiff filed suit, claiming that had the MPAA tried to download any of the films, it would have realized that it was impossible.\textsuperscript{50} Therefore, the plaintiff argued that by failing to conduct a deeper investigation into the infringing nature of the links, the MPAA lacked a good faith belief in issuing a takedown notice.\textsuperscript{51} The court summarized the plaintiff’s position as one arguing for an objective standard in evaluating the good faith belief of a party sending a takedown notice—much like the one employed by the California District Court in \textit{Diebold}.\textsuperscript{52}

The Ninth Circuit disagreed with the plaintiff’s offered objective standard, and instead reasoned that, “interpretive case law and the statutory structure of §512(c) support the conclusion that the ‘good faith belief’ requirement in §512(c)(3)(A)(v) encompasses a subjective, rather than an objective, standard.”\textsuperscript{53} The court reasoned that in interpreting the meaning of “good faith belief” within the context of other federal statutes, courts have traditionally interpreted “good faith” to encompass a subjective standard.\textsuperscript{54} Furthermore, the court noted that Congress “could have easily incorporated an objective standard of reasonableness,” and reasoned that failing to do so reflected Congress’ intent to adhere to the traditional subjective standard in good faith requirements.\textsuperscript{55}

Recognizing that “good faith” is to be evaluated subjectively, the \textit{Rossi} court concluded that the statutory structure of Section 512 supported the imposition of a subjective, rather than an objective, standard for evaluating knowing misrepresentations. In comparing the “knowing misrepresentation” aspect of Section 512(f) with the “good faith” requirement in Section 512(c)(3)(A)(v), the court found that an objective standard would be inconsistent with the apparent Congressional intent to protect against subjectively improper actions by copyright holders.\textsuperscript{56} According to the court,

\begin{itemize}
\item \textsuperscript{49} See \textit{id.} at 1003-04.
\item \textsuperscript{50} \textit{id.}
\item \textsuperscript{51} \textit{id.}
\item \textsuperscript{52} \textit{id.} at 1004.
\item \textsuperscript{53} \textit{id.}
\item \textsuperscript{54} \textit{id.} (“[C]ourts interpreting other federal statutes have traditionally interpreted ‘good faith’ to encompass a subjective standard. \textit{See e.g.}, Alvarez v. IBP, Inc., 339 F.3d 894, 910 (9th Cir.2003) (“[t]o satisfy \[29 U.S.C.] § 260, a FLSA-liable employer bears the difficult burden of proving both subjective good faith and objective reasonableness”) (citations omitted); \textit{see also} Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992) (“The legislative history of \[42 U.S.C.] § 11112(a) indicates that its reasonableness requirements were intended to create an objective standard, \textit{rather than} a subjective good faith standard.”) (emphasis added); Brooks v. Village of Ridgefield Park, 185 F.3d 130, 137 (3rd Cir. 1999) (“The good faith requirement is a subjective one that requires that the employer have an honest intention to ascertain and follow the dictates of the \[Fair Labor Standards] Act. The reasonableness requirement imposes an objective standard by which to judge the employer’s conduct.”) (alterations and internal quotation marks omitted). These cases demonstrate that the objective reasonableness standard is distinct from the subjective good faith standard, and that Congress understands this distinction.
\item \textsuperscript{55} See \textit{id.}
\item \textsuperscript{56} \textit{id.}
\end{itemize}
because “good faith” must be evaluated subjectively, any claim that a good faith belief was in fact a misrepresentation requires a showing of a subjective lack of good faith.57

After setting forth this line of reasoning, the Rossi court went on to explain, “[a] copyright holder 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 demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”58 In applying this subjective standard to the MPAA’s actions, the court found that the misleading statements on the plaintiff’s website were sufficient to create a subjectively reasonable belief that the material was infringing—i.e. because the MPAA subjectively believed the websites to be infringing based on the statements, they possessed good faith in issuing the takedown notice.59


Lenz v. Universal Music Corp. presented yet another opportunity for an application and interpretation of liability under section 512(f).60 In Lenz, a woman videotaped her young child running around and dancing to a song by the recording artist formally known as Prince.61 The woman posted the video on Youtube for her family and friends to observe and enjoy.62 Universal Music Corp. issued a takedown notice in response.63 The woman responded with a counter notice claiming that the video qualified as a fair use and was therefore not infringing.64 The video was permanently reposted to the Youtube website about six weeks later.65 The woman subsequently filed a Section 512(f) suit alleging Universal Music Corp. committed a misrepresentation in its takedown notice, and Universal Music Corp. filed a motion to dismiss.66

In Lenz, the objective-subjective standard was again a central issue, but was presented in a new light—whether a copyright owner is required to evaluate the potential fair use of a user’s content in order to form a good faith belief that it is infringing.67 Restated, the court was confronted with whether a fair use qualifies as a use that is “authorized by law” as set forth in Section 512(c)(3)(A)(v), requiring evaluation by a copyright holder before issuing a takedown notice.68

57. Id. at 1005.
58. Id.
59. Id. at 1005-06.
61. Id. at 1151-53.
62. Id. at 1152.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id. at 1154.
68. Id.
In denying Universal Music Corp.’s motion to dismiss, the court stated, “in order for a copyright owner to proceed under the DMCA with a ‘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, the owner must evaluate whether the material makes fair use of the copyright.”69

In the context of the pending motion to dismiss, the court held that, “[a]n allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.”70 In this regard, Lenz seems to support the objective standard set forth in Diebold. Although Lenz initially interpreted section 512(f) as imposing liability for an objective lack of good faith, the Lenz court later contradicted this holding in deciding subsequent summary judgment motions.

In 2013, the Lenz court issued another opinion, this time addressing joint motions for summary judgment.71 In part of the opinion, the court reiterated its prior holding, “that at minimum . . . a copyright owner must make at least an initial assessment as to whether the fair use doctrine applies to the use in question in order to make a good faith representation that the use in not ‘authorized by law.’”72 However, in addressing the claims for summary judgment, the court acknowledged and accepted Universal Music Corp.’s argument that Rossi was controlling.73 The court stated that in light of Rossi, a “mere failure to consider fair use” would be insufficient to give rise to Section 512(f) liability.74 Rather, the court held that it must be demonstrated that one possessed actual knowledge that its takedown notice contained a misrepresentation.75

By requiring some proof of actual knowledge, the Lenz court reaffirmed the subjective standard set forth in Rossi, which conflicted with the court’s own prior holding that a copyright owner must evaluate fair use before issuing a notice. The court addressed this apparent incongruity by equating a failure to assess fair use prior to sending a takedown notice with willful blindness on the part of the copyright owner, which is tantamount to knowledge.76 In other words, if a copyright owner was willfully blind to the potential of fair use, then the owner possessed knowledge that the use might not be infringing, and therefore, lacked a good faith belief in issuing the takedown notice. Thus, the Lenz court adopted the objective good faith standard but also limited the interpretation of an “objective good faith belief” to exclude a belief that was not based on willful blindness.

69. Id.
70. Id. at 1155.
72. Id. at *6.
73. See id.
74. Id.
75. Id.
76. Id. at *7.
However, it is important to note that while the court held that willful blindness to a potential fair use may prevent a “good faith belief” that the material is infringing, a finding of willful blindness still requires proof that a defendant possessed a “subjective belief that there was a high probability that a fact exists.”

Therefore, while Lenz excludes willfully blind assertions from qualifying as a “good faith belief,” it maintains the same subjective standard evaluation that was set forth in Rossi. A review of these three cases displays that the current case law emanating out of the Ninth Circuit appears to have settled on a subjective standard for evaluating knowing misrepresentations in Section 512(f) cases. Plaintiffs in the Ninth Circuit making alleged fair uses and seeking to assert claims under Section 512(f) have a strict standard to meet in order to prevail on their claims—that an owner possessed a subjective belief that the use was not infringing or that the owner possessed a subjective belief that the work was a fair use. Thus, plaintiffs bringing claims after these cases have turned to other jurisdictions in hopes of different results.


After the subjective good faith standard was set forth by the Ninth Circuit in Rossi and Lenz, section 512(f) plaintiffs naturally sought out other jurisdictions that might be more lenient to their position. The case of Tuteur v. Crosley-Corcoran required the Massachusetts District Court to address the same issue—the proper test of what is required of a copyright owner prior to filing a takedown notice. In Tuteur, an online debate was ensuing between two bloggers about midwifery. As the feud enlarged, the defendant took a picture of herself giving the middle finger and posted it on her blog with a caption stating that she was giving the plaintiff “something else to go back to her blog and obsess about.” The plaintiff accepted the challenge and reposted the picture of the defendant on her own blog. The defendant then sent a takedown notice claiming that the plaintiff had violated her copyright by posting the picture on her blog without the defendant’s consent. The plaintiff switched OSPs and reposted the picture, and the defendant sent a second takedown notice. The plaintiff subsequently filed suit, seeking liability under Section 512(f).

The plaintiff, supported by amicus briefs from the Electronic Frontier Foundation and the Digital Medial Law Project, argued that a copyright owner should be required to investigate any possibly applicable fair use, as well as

---

77. See id.
79. Id. at 335.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
other affirmative defenses that the alleged infringer may possess prior to sending a notice. The defendant, supported by an amicus brief submitted by the MPAA, argued that liability should rest on a copyright owner’s actual, subjective belief that they are making a misrepresentation. Additionally, the defendant produced evidence that she sought out the advice of counsel before sending the takedown notice, and the attorney that she consulted also submitted an affidavit that he evaluated and rejected the potential for fair use before advising his client to issue the notice.

In reviewing the existing case law, the court sided with the defendant’s argument and found that the most analogous case was Rossi, in which the Ninth Circuit’s posited that a subjective, rather than objective, standard should apply. The court was also persuaded by the argument that because fair use is an affirmative defense, Congress could not have intended the DMCA to require every takedown notice be preceded by an analysis of the possible applicability of fair use. The court found the Ninth Circuit’s decision was more persuasive than a decision from a California District Court, the Lenz court retreated from its earlier ruling imposing an objective standard in light of Rossi, and the imposition of an objective standard would be contrary to the Congressional intent behind the notice and takedown system. In summary, the Massachusetts District Court’s decision is in accord with the Ninth Circuit’s approach in that they both found that liability for a knowing misrepresentation under Section 512(f) requires evaluation under a subjective standard; therefore, an owner is only liable for sending a bad faith takedown notice if they possess a subjective belief that the use is a fair use.

Despite the District of Massachusetts adoption of the 9th Circuit’s interpretation that 512(f) liability requires a subjective misrepresentation, the Lessig case challenged this interpretation and sought to impose an objective standard in its place.

85. Id. at 343.
86. Id.
87. Id at 342.
88. Id. at 342 (“The Ninth Circuit specifically 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.’” (citing Rossi v. Motion Picture Ass’n of Am., Inc., 391 F.3d 1000 (9th Cir. 2004); Cabell v. Zimmerman, 2010 WL 996007, at *4–5 (S.D. N.Y. Mar. 12, 2010) (adopting Rossi); Third Educ. Group, Inc. v. Phelps, 675 F.Supp.2d 916, 927 (E.D. Wis. 2009) (same); 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) (same); Dudnikov v. MGA Entm’t, Inc., 410 F.Supp.2d 1010, 1013 (D. Colo. 2005) (same)).
89. Tuteur, 961 F.Supp.2d at 342.
90. Id. at 343.
91. Id. at 344.
III. Policy Arguments Supporting the Objective Standard

As the prior Section discusses, the current case law requires that a copyright owner possess actual, subjective knowledge that it is sending a takedown notice to a work that is not infringing in order to commit a misrepresentation under Section 512(f). Therefore, when a claimed infringement is allegedly a fair use, it will only constitute a misrepresentation if the individual copyright owner believed that the work was protected by fair use. The converse is that if an owner is unaware that a use may be a fair use, then sending a takedown notice will not constitute a knowing misrepresentation. This Section seeks to further explain why the established subjective standard better serves the intent behind section 512(f) liability.

Specifically, this Section first argues that requiring copyright owners to evaluate fair use prior to sending a takedown notice is not only impracticable, but is tantamount to transmuting an affirmative defense into a plaintiff’s initial burden. Next, this Section argues that even if an objective standard were to be accepted, it would unduly increase the already heavy burdens placed upon copyright owners via the notice and takedown procedure, and that instead, these burdens should be shared amongst all parties—the copyright owner, the user, and the OSP. Finally, this Section argues that a subjective standard is sufficient to find liability in the types of situations that section 512(f) was designed to prevent.

A. Fair Use is Incapable of Certain and Definite Prediction, Rendering an Objective Standard Impracticable.

Despite the case law from both the Ninth Circuit and the District Court of Massachusetts, arguments continue to be made that an objective standard should be imposed in Section 512(f) cases to determine whether a copyright owner possessed a good faith belief when sending a takedown notice, and that a copyright owner should be liable if they send a takedown notice to a user whose use is, from an objective point of view, a fair use, regardless of whether the owner was aware of the potential that the use qualifies as a fair use. However, these arguments overlook, or at the least diminish, the fact that fair use is a legal doctrine that does not lend itself to certain and definite preliminary determination. Furthermore, these arguments fail to reconcile the fact that fair use is an affirmative defense to infringement with the idea that the burden to identify and assert that defense should be placed on the alleged infringer and not the copyright holder.

1. A Fair Use Determination Lacks Absolute Predictability.

As often stated and recently quoted by the Ninth Circuit in 2012, “[t]he Fair use doctrine has been called ‘the most troublesome in the whole law of
copyright.”

While the concept of a fair use may be simple to understand, the application and determination of whether a use is a fair use is not a bright line analysis. The doctrine of fair use is codified into U.S. Copyright Law in 17 U.S.C. Section 107. Section 107 provides four factors that are to be analyzed on a case-by-case analysis for determining whether a use qualifies as a fair use. Despite the enumeration of these four factors, due to the fact intensive inquiry that a determination of fair use requires, one cannot predict with absolute certainty whether a use is a fair use. Because of this lack of certainty in predicting whether a use is a fair use, imposing liability for an incorrect prediction is overly harsh and unwarranted.

It is not argued that fair use is completely unpredictable to any degree whatsoever. In fact, recent articles and empirical studies have analyzed the predictive nature of fair use and concluded that there are various ways to categorize and estimate whether a use will be judged as a fair use. The findings of these studies and the conclusions drawn from them are not contested. However, while these studies have helped identify general patterns that define fair use and create increased predictability, they do not posit that the level of predictability has achieved perfection. In fact, some of the more prominent studies acknowledge that there are still individual instances in which the predictability of fair use is low, such as educational uses or uses that tread the uncertain line between parody and satire, which evince that fair use cannot be predicted with absolute certainty. Additionally, many prominent critics of

93. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis.”).
94. See Campbell, 510 U.S. at 575-78.
96. See, e.g., Campbell, 510 U.S. at 577; David Nimmer, "Fairest of Them All" and other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 282 (2003) ("[T]he distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined."); Cobia, supra note 1, at 389-90.
98. See e.g., Beebe, supra note 97, at 621-24 (concluding an empirical study of 306 fair use cases and finding that despite inductive precedent from higher courts, lower courts continue to base holdings on other criteria); Samuelson, supra note 97, at 2541 (arguing that fair use is “more” coherent and “more” predictable, and not perfectly coherent and predictable); id. at 2543 (“Unbundling fair uses into policy-relevant clusters will not cure all of fair use’s ills, but unbundling will provide courts with a more useful and nuanced tool kit . . . .”); id. at 2551 (discussing the uncertainty that still remains regarding the difference between a parody and a satire); id. at 2621 (recommending that judges and commentators should look to common patterns in order to build a “more predictable body of fair use law,” as opposed to positing that fair use can
the DMCA, such as Fair Use Tube and Chilling Effects, also describe fair use as lacking in certain predictability, and Professor Lawrence Lessig himself has described fair use as merely, “the right to hire a lawyer.”

Despite the unpredictability of fair use, it is still argued that some uses are so clearly a fair use, that no reasonable person could believe otherwise—i.e. the use was objectively a fair use. However, the overlooked issue is how to establish the extent of knowledge the objective person possesses about fair use. For example, it may be simple for legal scholars, students, and practitioners who have studies copyright law to recognize a strong possibility that a use is a fair use. However, the arguments surrounding clear fair uses diminish when one considers what the lay copyright owner knows about fair use.

Big companies like the MPAA and the RIAA, who own thousands of copyrights, are likely to be well versed in the details of copyright law. However, this line of thinking overlooks a solo artist who paints a picture in their apartment, or a lone guitar player who writes a song in their dorm room. It is a misconception to assume that just because a creator has sought out protection for their creation via the laws of copyright, that they are in fact educated on all aspects of the laws of fair use and other potential defenses to infringement.

To set forth one example, consider a layperson consulting the codification of fair use in the Copyright Act. Aside form the four factors set forth, the statute also provides a non-exhaustive list of six examples of fair uses, including teaching, scholarship, and research related uses. Therefore, one would likely assume those examples are instructive on the issue, and that if the use in question fell within one of those categories, it was a fair use. However, despite these explicit examples set forth in the statute, defendants in fair use cases perfectly predicted); see also Pamela Samuelson & Members of the CPP, The Copyright Principles Project: Directions for Reform, 25 BERKELEY TECH. L.J. 1175, 1206 (2010) (recommending that the Copyright Office consider development a mechanism to provide guidance on issues involving fair use).

99. FAIR USE FAQs, FAIR USE TUBE, http://fairusetube.org/fair-use-faqs (last visited Nov. 21, 2013) (“In considering a fair use defense to a claim of infringement, a court will focus its inquiry on the specific facts of the individual case. Therefore, it is very difficult to predict with accuracy what a court will do until it engages in the inquiry.”); Copyright and Fair Use, CHILLING EFFECTS, http://chillingeffects.org/fairuse/ (last visited Nov. 21, 2013). (“Of course, even with these factors, it is problematic and often unyielding to try to predict what uses a court will deem fair.”).


101. E.g., Lenz v. Universal Music Corp., 572 F.Supp.2d 1150, 1155 (D. Cal. 2008); Koss, supra note 1 (arguing that some uses qualify as “unequivocal fair use”).

102. Cf. Cobia, supra note 1, at 395-96 (“[T]hose who are aware of counter-notices and the DMCA are also usually aware of copyright law and tend to over-comply with its terms; those who do not know about counter-notices are more likely to be one-time uploaders, oblivious to copyright law.”). The converse rationale applies—smaller copyright owners not well versed in the DMCA and copyright law, like smaller users of online content, are similarly “oblivious” to copyright law.

cases involving educational uses rarely succeed in asserting a fair use defense, and even judges and scholars have difficulty differentiating between criticism in the form of protected parody and criticism in the form of unprotected satire.104 Similarly, the Supreme Court has stated that a use categorically falling into one of the enumerated exceptions is not dispositive of the fair use analysis, and rather is just another factor to be analyzed.105 In other words, even if a use is arguably a clear or unequivocal fair use—e.g., if the use is for critical or educational use—that is merely a factor to be analyzed in the fair use analysis, and does not by itself establish that the use is a fair one.

Although fair use may be subject to some prediction, the level of prediction has not reached a degree to which a use can be preliminarily analyzed and determined with certainty to qualify as a fair use. Therefore, if liability were imposed based on an objective standard, the result would be the imposition of a penalty for incorrectly evaluating a potential fair use. While some situations may present uses that are almost certainly fair uses, this does not justify an overreaching objective standard imposing liability in the other situations where the use is not so clearly a fair use.

Furthermore, section 512(g)(3)(c) imposes a reciprocal requirement that counter notices contain a statement of good faith belief that the material was removed by mistake.106 If liability is to be imposed because a good faith belief is lacking when a use is objectively fair, then similarly, a good faith belief would also be lacking if a use, thought to be a fair use by the secondary user, was in fact not objectively a fair use. Thus, imposing liability based on an objective standard would also result in liability for the allegedly infringing party who incorrectly predicts the outcome of the fair use determination. Surely, this cannot be the intent of section 512 liability.

2. Transmuting an Affirmative Defense into a Prerequisite Evaluation.

Aside from the inability to predict with certainty whether a use is a fair use, another argument in opposition to an objective standard is that fair use is an affirmative defense; accordingly, the burden to assess and assert the defense should be placed on the alleged infringer, not the copyright holders seeking to protect their works. Fair use is an affirmative defense against a claim of copyright infringement.107 In a standard copyright infringement case, a

104. See, e.g., Samuelson, supra note 97, at 2582, 2585 (discussing the educational fair use exceptions and stating, “[i]n the few litigated cases, however, fair use defenses have rarely succeeded.”); Christopher J. Brown, Comment, A Parody of a Distinction: The Ninth Circuit’s Conflicted Differentiation Between Parody and Satire, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 721 (2004).
the defendant who has allegedly infringed a plaintiff’s copyright can respond by asserting the fair use defense, and if the court finds the use to be a fair use, then the use is deemed not an infringement. This argument was made by the MPAA in its amicus brief filed in Tuteur—that “[a]n affirmative defense, fair use serves to excuse a use that otherwise is infringing, not to create an affirmative right of use.”

The strength of this argument is apparent when applied to sections 512.

Because fair use is an affirmative defense to infringement, the question as to whether the use is a fair one is determined later, during adjudication of the suit for infringement. Therefore, even in a case where a use is eventually held to be a fair use, the allegation of infringement has already occurred. However, proponents of an objective standard for 512(f) liability do not argue that plaintiffs bringing copyright suits should be liable for misrepresentations based on a defendants successful fair use defense. Similarly, when an owner sends a takedown notice claiming that a use is infringing his or her copyright, he or she is not committing a misrepresentation in alleging an infringement regardless of whether the use is questionably, unequivocally, or ultimately held to be a fair use.

Because fair use is an affirmative defense, the idea of imposing an objective standard requiring copyright owners to evaluate the potential of fair use before sending a notice conflicts with the basic principle of an affirmative defense. Just as one would not argue a copyright owner is required to evaluate and conclude that a use is not a fair use before filing a suit for copyright infringement, it is similarly backwards to argue that a copyright owner must bear the burden of evaluating all the user’s potential defenses before issuing a takedown notice. Surely Congress did not seek to transmute the affirmative defense of fair use into a plaintiff’s prerequisite burden just because the forum is a takedown notice and not a judicial proceeding. Furthermore, requiring copyright owners to evaluate and conclusively determine all potential defenses for an alleged infringement will increase the considerable burdens already imposed on copyright holders, especially for

Inc, 60 F.3d 913, 918 (2d. Cir. 1994) (citing Campbell, 510 U.S. at 590) (“Fair use serves as an affirmative defense to a claim of copyright infringement, and thus the party claiming that its secondary use of the original copyrighted work constitutes a fair use typically carries the burden of proof as to all issues in the dispute.”); Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 342 F.3d 191, 197 (3rd. Cir. 2003) (“[Fair use] is an affirmative defense for which the alleged infringer bears the burden of proof.”); 18 AM. JUR. 2D Copyright and Literary Property § 78 (2013).


109. See, e.g., Campbell, 510 U.S. 569, 590 (“[F]air use is an affirmative defense . . . ”).

110. See BLACKS LAW DICTIONARY (9th ed. 2009) (defining “affirmative defense” as “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense.”) (emphasis added); see also Campbell, 510 U.S. 569, 590 (discussing the difficulty proponents of the fair use defense would have carrying the burden of proof).
smaller independent artists.

B. Undue Increased Burdens on Smaller Rights Holders—Laws Designed to Address the Elephants will Crush the Mice.

In addition to the difficulty surrounding the predictability of fair use and the inconsistency in shifting an affirmative defense to a plaintiff’s initial burden, an objective standard in Section 512(f) cases would create increased, undue burdens on smaller copyright holders. In a 1998 article, Peter P. Swire presented the metaphor of “Elephants and Mice” to explore how regulation of the Internet would be most effective.111 In his metaphor, Elephants represent the major organizations with extensive operations, and mice represent the smaller, mobile users and websites.112 Swire used this metaphor to argue that the Elephants, due to their large size, are squarely in the public view and cannot escape scrutiny or avoid complying with controlling laws.113 Mice on the other hand, due to their small size and operations, often go unnoticed and escape liability for failing to comply with the laws.114 Swire argued that due to the size and public presence, regulation of the Internet would evolve to address the issues surrounding the Elephants in the industry, and that subsequent legislation would be inadequate in addressing the actions of the Mice.115

The “Elephants and Mice” metaphor, while not directly applicable as set forth by Swire, can nonetheless be adapted for use in the context of Section 512(f) liability. In this context, the term “Elephants” will be used to refer to the large entities administering many thousands of copyrights, such as the MPAA or the RIAA, and the term “Mice” will be used to describe the smaller, independent content creators who own one or several of their own copyrights. The essence of this argument is that because of the prominence and size of the Elephants, the idea of requiring copyright owners to evaluate uses for all potential defenses may appear to be a minimal burden; however, this overlooks the impact of this increased burden on the Mice.

The burden to police the Internet for infringing content has already been placed solely on copyright holders, to the exclusion of the OSPs.116 When the DMCA was enacted in 1998, large corporations and studios dominated the major entertainment industries, and this burden to monitor for infringement, while not financially insignificant, was capable of being borne by the

---

112. Id. at 1019-20.
113. Id.
114. Id.
115. See id.
Elephants. However, the last fifteen years have seen a massive rise in the independent creator across many creative industries, including the music industry, the movie industry, the video gaming industry, and the comic industry. Additionally, the rise of Internet content that must be policed has steadily increased at extraordinary rates. As just one example, YouTube’s statistics state, “100 hours of video are uploaded to YouTube every minute,” which equates to 52,560,000 hours of video posted online per year for just one website. For the Mice, the costs of policing for infringing content are increasing at exponential rates, and this burden alone presents a barrier to adequate protection of their copyrights.

Interpreting section 512(f) as imposing an objective standard that requires copyright owners to evaluate all potential defenses before issuing a takedown notice would arguably not be a large burden on the Elephants who are well experienced in copyright law and possess in-house legal counsel or ready

---

117. E.g., Lessig, supra note 100, at 7 (“For the Internet has unleashed an extraordinary possibility for many to participate in the process of building and cultivating a culture that reaches far beyond local boundaries.”).


119. E.g., Elizabeth Ai, The Future is Here . . . If You Want It: The Rise of Crowdfunding, Film Independent, http://www.filminddependent.org/blogs/the-future-is-here-if-you-want-it-the-rise-of-crowdfunding/#Up7xJGGQY0 (last visited Nov. 22, 2013) (“[T]he rapid advancement of technology and social media has made filmmaking and distribution tools widely accessible. . . . For a relatively small capital investment, sometimes zero dollars, aspiring filmmakers have the means to introduce themselves to the world, produce teasers for their visions, and share it with millions of people . . . .”).

120. E.g., Jeffery Matulef, Gone Home Creator on the Rise of Non-Combat First-Person Games: Ex-BioShock Dev. Insists Now is the Time to Go Indie, EUROMAGER (July 13, 2012), http://www.eurogamer.net/articles/2012-07-13-gone-home-dev-on-the-rise-of-non-combat-first-person-games (“We’re in the middle of this really vital period where independent creators can get people excited about a game . . . without requiring all the machinery of a huge triple A publishing organization to actually get it into peoples hands and get it made.”).


122. See, e.g., PEW RESEARCH CENTER, ONLINE VIDEO 2013 12 (2013) (finding that the number of adult Internet users who post content online has doubled since 2009).


124. See Cobia, supra note 1, at 397 (“The DMCA is somewhat effective for copyright holders who have a large number of copyrights or groups that represent a large number of copyrights, but offers poor protection for those who own only a few copyrights.”).
access to legal counsel. However, this line of thinking ignores that increasing the already existing burdens on the Mice will result in even less protection, especially if liability is imposed when independent creators, less educated in copyright law, incorrectly predict whether a use is a fair use.

Instead of increasing the burden on copyright holders, the burdens should be shared amongst all interested parties, including the secondary user making an alleged fair use. The idea of balancing burdens and interests led to the enactment of the DMCA, and as time passes and technology evolves, this policy should continue to drive interpretation and application of the DMCA. In the context of section 512(f) liability, the burdens should be shared across all parties—the copyright owners, the OSPs, and the secondary users of content. The burden to police the Internet for infringing content is already borne solely by copyright holders. Requiring a user of content to assert that their use is fair by sending a counter notice is a nominal burden, especially considering that all that is required is sending an email. The burden endured by a user in sending a counter notice does not compare to the burden placed on copyright owners to police the Internet and assess all potential defenses for a use. Furthermore, a user wishing to make a fair use of a work, in most instances, is essentially seeking to use existing works free of cost. Spreading the burden by requiring a user to send an email asserting their claims to fair use is a minimal request to ask of users receiving free content and strikes a better balance in the application of section 512.

C. The True Aim of Section 512(f): Takedown Notices Used as Censorship.

Because of the increased burden of policing the Internet for infringing content, many of the metaphorical Mice are forced to utilize large third party services that monitor for infringement on behalf of many individual of copyright holders. Due to the mammoth amount of content on the Internet, these third party policing services have implemented procedures that use software to identify instances of infringing content and then automatically issue takedown notices in response. However, software is never perfect, and with the near endless amount of content on the Internet, it is inevitable that some automatically generated takedown notices will be issued to uses that are questionably fair uses or otherwise excused from infringement. This is a result of placing the burden to police for infringement on the copyright holders, and imposing liability because a use is objectively a fair use punishes copyright owners for bearing this burden. As discussed above, analyzing knowing misrepresentations with an objective standard is inconsistent with the intent behind section 512(f) liability. Rather than attempting to categorize automatic

125. E.g., Cobia, supra note 1, at 397 ("[E]ffective use of the DMCA requires the copyright holder to either monitor the entire Internet to ensure copyrights are not violated or join a cartel of other copyright holders, such as the Recording Industry Association of America or the Motion Picture Association of America.").
takedown notices as knowing misrepresentations via an objective standard, misrepresentations under section 512 should be evaluated subjectively and limited to instances where the copyright owners are attempting to abuse the takedown notice procedure.

Some holders of copyrights are misusing takedown notices in attempts to censor criticism or commentary, and commentators have argued that such abuses of takedown notices threaten free speech. A recent situation involving a video game developer and an online video game critic squarely frames this problem. John Bain, operating under the online alias of “TotalBiscuit,” runs a YouTube channel that provides critical reviews of computer games called “TotalBiscuit, the Cynical Brit,” which is self described as “YouTube’s #1 PC gaming Critic.” Total Biscuit provided a “scathing” review of the video game “Day One: Gary’s Incident,” which was produced by Wild Games Studios. In response, Wild Games Studios sent a takedown notice to YouTube and had the video review removed.

Now, had Wild Games Studios merely been oblivious to the law, especially fair use, then its actions would not be knowing misrepresentations under a subjective standard, despite the strong objective indication that the use was criticism and, thus, was a fair use. However, Wild Games Studios previously gave Bain permission to use clips of its games through private emails, and also issued statements claiming that the public was free to use its games in YouTube videos. But, when negative publicity surrounding the game surfaced, Wild Games Studios acted swiftly by issuing takedown notices to try and silence the negative review on Bain’s channel.

The same basic fact pattern was also present in Diebold, where the manufacturers of voting machines sent takedown notices in response to articles criticizing the reliability of their products. Diebold claimed that posting their internal emails discussing the problems with their machines infringed their copyrights in those emails, but the court saw through their weak claim of copyright in those emails. Diebold was not concerned about the value and integrity of the internal emails; rather, Diebold wanted to silence criticism

126. See, e.g., Cobia, supra note 1, at 399-400 (“DMCA takedown procedure, in a worst-case scenario, arguably resembles censorship...[T]he constitutional right to free speech, might, in some circumstances, be curtailed by the takedown...”). Koss, supra note 1, at 169-73 (discussing three examples of takedown notices used to curb free speech).

127. Cynical Brit: YouTube’s #1 PC Gaming Critic, YOUTUBE, http://www.youtube.com/user/TotalHalibut (last visited Nov. 24, 2013). This link also provides a video created by John Bain personally describing his ordeal.


129. Id.

130. See id.


132. See id. at 1197-99, 1203-04.
about their products. Diebold had never attempted to commercialize their alleged copyrights, and did not subsequently file suit for infringement, which showed that it was not truly concerned about infringement of its claimed copyrights, but instead was looking to use the takedown notice as a means for censorship. While the Diebold court was correct in finding liability, the court clouded the waters when it focused on the character of the use, instead of focusing on Diebold’s intent behind issuing the takedown notice.

Not only are these clear examples of abusing the notice and takedown procedure to censor comment, but they also present clear examples of a subjective lack of good faith belief in the issuance of takedown notices. Despite the fact that Bain’s use likely qualified as a fair use, Wild Games Studio’s actions nonetheless displayed the subjective lack of good faith behind their notice because it previously approved of such uses. Similarly, even though the plaintiff’s use in Diebold was likely a fair use, Diebold’s subjective lack of belief in their claims of infringement was evidenced by their complete lack of effort to protect and utilize their claimed copyrights. It is this type of attempted censorship that section 512(f) was designed to prevent, and the imposition of a subjective standard is sufficient to impose liability in such situations and curb abuses in similar circumstances. Expanding liability under section 512(f) via an objective standard is not necessary to combat these types of abuses.

D. Outside of Clear, Subjective Abuses, Damages are Speculative.

Even if one was to overlook the uncertainty of a fair use and to minimize the effects on the smaller copyright holders that would result from an objective standard, claims under Section 512(f) based on alleged fair uses cannot be reconciled with the fact that damages in the majority of situations are basically nonexistent. With the exception of situations involving instances of censorship of critical speech, it is difficult to find any damage incurred by the user that had his or her content temporarily removed. The counter notice procedure affords a user the opportunity to have their material reposted: all they must do is send an email in response to the takedown notice they receive, which is hardly a burdensome task worthy of monetary compensation. In such a situation, the material would have been removed, and would have been inaccessible for 10-14 days, before being reposted pursuant to a counter notice. One cannot deny that serious harm occurs, to both the speaker as well as the public, in situations where takedown notices are used to censor speech, and where as a result, that speech becomes inaccessible to the public for 10-14 days. However, outside of the censorship scenario, any resulting harm from the temporary removal of content is hard to conceive.

For example, in Lenz, the plaintiff argued that her damages consisted of ten hours of her time that she spent sending two counter notices, calculated at

133. See id. at 1203.
the minimum wage rate, as well as her attorneys’ fees. However, the plaintiff admitted that she did not lose any actual wages. In essence, the plaintiff argued that her damages consisted of her having to send an email counter notification, and that she should be compensated for 10 hours time for doing so. The plaintiff also claimed that she was damaged by the removal of her video from the Internet and by the chilling effect of her free speech. However, the video was merely a video of the plaintiff’s child, created and posted to share with friends and family. The plaintiff was not making any commercial use of the video, so she did not suffer any monetary damages from the removal of the video. Further, when it comes to public interest, a playful video of someone’s child is far less important speech than criticism, especially when compared to the removal of quasi-political speech in Diebold. It seems that the claimed damage from the temporary removal of the content in Lenz, was merely that the plaintiff’s family or friends had to wait a couple more days to view the video.

Outside of the instances where takedown notices are used for censorship purposes, damages for temporary removal of content are very speculative. The lack of harm in non-censorship situations further supports the argument that imposing liability to situations outside of clear abuses, like those discussed above in section III.C, is an overreaching extension of section 512(f) liability.

IV. CONCLUSION

The notice and takedown procedure under the DMCA has created a landscape in which content owners are burdened with policing the vast Internet for infringements of their works. In addition to this already resource-heavy burden, it is now argued that copyright owners should be required to evaluate all potential defenses to an infringement before issuing a takedown notice, and that if an evaluation is incorrect, that liability should be imposed via section 512(f).

Instead of imposing liability on copyright owners for misrepresentations evaluated under an objective standard, the existing precedents emanating from the 9th Circuit and the District of Massachusetts interpreting section 512(f) liability to require a subjective lack of good faith in issuing a takedown notice should be embraced and maintained. Expanding liability under an objective standard will result in an overreaching application of liability that will impose additional burdens on copyright holders and will result in liability for incorrect predictions of the uncertain fair use doctrine. Liability under section 512(f) should be limited to situations where takedown notices are sent with subjective bad faith, such as when copyright owners seek to censor criticism.

135. Id.
136. Id. at *8.
137. See id. at *1.