Cooley

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On September 14, 2015, the Ninth Circuit Court of Appeals held that parties who send "takedown notices" under the authority of the Digital Millennium Copyright Act ("DMCA") must consider whether the subject work constitutes a fair use in forming and asserting a subjective, good faith belief that the work is unauthorized.

The decision in *Lenz. v. Universal Music Corp et al*., Nos. 13-16106/13-16107, holds ramifications for all copyright owners who use takedown notices, because it requires them first to specifically consider whether the work is a "fair use" under copyright law—or risk liability for failing to do so.

Background

In February 2007, plaintiff Stephanie Lenz uploaded a video to the content hosting site YouTube depicting her 13-month old son dancing to a popular and recognizable song by the artist Prince, "Let's Go Crazy." The owner of copyright in the song sent YouTube a takedown notice under the DMCA that included a representation that it held a "good faith belief that the … activity [was] not authorized by the copyright owner."

YouTube removed the video, but Ms. Lenz submitted a response claiming her use of the song was a "fair use," resulting in the video's reinstatement. The US Copyright Act provides that a use of a copyrighted work for purposes such as criticism, comment, news reporting, and teaching is a "fair use" and not an infringement. The law lists several factors for determining fair use, such as whether the use was noncommercial, only took a small portion of the work, or did not affect the market for the work.

Ms. Lenz sued the copyright owner in district court, alleging that it had violated the DMCA by falsely stating in its takedown notice that it had a good faith belief that she infringed its copyright. The copyright owner argued that fair use is only a defense to infringement, and so it was not obliged to consider whether the use was fair. Both parties filed motions for summary judgment, which the district court denied, holding that copyright owners must take into account fair use of the work.

On appeal, the Ninth Circuit disagreed with the argument that copyright owners need not even consider whether the challenged content constitutes a fair use. This is because the copyright law specifically authorizes fair use of copyrighted works. Therefore, a copyright owner cannot have a "subjective, good faith belief that the work was unauthorized" if it never even considered whether the work was a fair use under the law.

Accordingly, the court held that a copyright owner can be held liable for a false takedown notice if a plaintiff is able to prove that it had not formed a good faith belief the video was not authorized by law.

Practical considerations

Section 107 of the DMCA not only contemplates, but specifically authorizes the fair use of copyrighted works. Therefore, fair use is not merely a "defense" that an infringer may assert, but means that the user is not an infringer in the first place.

As a result, when thinking about whether to have a video or other work taken down as infringing, copyright owners must consider whether it is a fair use before sending a DMCA takedown notice. Those who do not can be found liable—and may have to pay damages—to recipients of a wrongfully issued notice.

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