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Cases of Note--Copyright

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LEGAL ISSUES

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Cases of Note — Copyright

Don't You Dare Ignore Fair Use — The Dancing Baby Case

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STEPHANIE LENZ V. UNIVERSAL MUSIC CORP; UNIVERSAL MUSIC PUBLISHING INC.; UNIVERSAL MUSIC PUBLISHING GROUP INC. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 2015 U.S. App. LEXIS 16308 (2015).

Stephanie Lenz uploaded onto YouTube a 29-second video of her two very young kids dancing to **Prince's** *Let's Go Crazy.* And she gave it a name. "Let's Go Crazy." Original.

She asks the 13 month-old what he thinks of the music, and he responds by bobbing while holding a push toy.

Yes, right up there with cat videos. What did we do before YouTube?

Universal was the publishing administrator in charge of guarding **Prince's** copyright. And trained lawyers sat monitoring YouTube daily.

With their legal skills and ear for music, they dismissed one line/half a line of a song or ones in raucous bars with music in the background. Their guidelines did not include any consideration of fair use.

As **Lenz** asked her toddler his opinion of the music, they determined the **Prince** composition "was very much the focus of the video." And jumping all over this, they sent a take-down notice to YouTube. This included a "good faith belief" statement as per 17 U.S.C. § 512(3)(A)(v) which notes a good faith belief that the use is not authorized by copyright owner, agent or law.

YouTube yanked the video and notified **Lenz**. Uh-oh.

Our furious mother seems to have read up on the law and fired off a counter-notification to **Universal** under § 512(g)(2)(B). **Universal** riposted that she had neglected to swear she wasn't perjuring herself as per § 512(g)(3)(C).

Is that a pretty good guide to managing the legal end of your YouTube cat videos?

Well, by gosh, **Lenz** corrected her counter-notice, and YouTube caved and restored it. But not content with her victory, **Lenz** sued in 2007 with some procedural floundering around until, in 2008, she went forward with only one claim for misrepresentation under § 512(f).

And then we got a partial motion for summary judgment, an interlocutory appeal and blah blah, and we're before the 9th Circuit.

The Appeal

Yes, it's the "evidence viewed in a light most favorable to the non-moving party presents issues of material fact." ***Warren v. City of Carlsbad***, 58 F.3d 439, 441 (9th Cir. 1995).

In 1998, the DMCA added some stuff among which is Title II — Online Copyright Infringement Liability Limitation Act — 17 U.S.C. § 512.

Under 512(c), service providers like YouTube and Google may escape copyright infringement liability if they "expeditiously" remove stuff upon receiving notice of infringement. And there are elements as stated above. And the service provider has to tell the user.

The restoration by counter-notification is automatic and must be done within ten days. And then the copyright owner and cat video producer slug it out with YouTube stepping back out of the way.

And there's punishment for abusing the DMCA.

Must Consider Fair Use

And now we get to the big point. 17 U.S.C. § 107 "empowers" and "formally approves" fair use. "[A]nyone who … makes a fair use of the work is not an infringer of the copyright with respect to such use." ***Sony Corp. of Am. v. Universal City Studios, Inc.,*** 464 U.S. 417, 433 (1984).

Fair use is not merely an affirmative defense, but a right granted by the ***Copyright Act of 1976***. ***Bateman v. Mnemonics, Inc.,*** 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

So. Did **Universal** misrepresent its good faith belief that the dancing baby was not subject to fair use? A copyright holder is not liable for a simple blunder. There must be "a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner." ***Rossi v. Motion Picture Ass'n of Am. Inc.,*** 391 F.3d 1000, 1004-05 (9th Cir. 2004).

Universal is only liable if it knowingly misrepresented its good faith belief in violation. But it must consider fair use!! Which they didn't do.

Although the consideration doesn't have to be "searching or intensive." That monitoring attorney can make a pretty snap decision while wading through the "crush of voluminous" mess on the Web. Computer algorithms will do. Human review is not required.

And what does our outraged mother win? Well, she gets to go to a jury to seek nominal damages a mere eight years after she began.

Little Red Herrings
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flash when another budget is cut, or when some administrator says, "But it's all on the Internet," or when some legislator claims that higher education gets way too much money. Wait. Scratch that last one. If we alarm on that one none of us will get any sleep. Better to have it glow gold when a legislator says something intelligent about libraries.

We could even place giant-sized Libbits in town squares in case everyone thought they were too square and wouldn't wear them. These life-sized Libbits would gong mercilessly when books were removed to make way for computers, or when deans or directors were reminded that they didn't generate enough revenue or were simply financial black holes.

Libbits could become the latest craze. Everyone would want one and would check to see how many glowing lights showed goals being reached. Granted, it might take a few years for even one library to have all five lights shining at once. But think of how it might work: people would not go to bed before checking on their favorite library and would not go to sleep until they had helped that library reach its goals. They would climb out of bed and write another check before firing off another email to some legislator.

OK, OK. I get it. It's a pipedream that even **Apple** wouldn't fall for. So what do we do in the meantime?

We fall back on that timeworn but as yet unsuccessful other fit, the throwafit. We throwafit and continue making our case, as often as we can, as much as we can, and with as much devotion as we always have.