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BE WARY OF ADDING YOUR OWN SOUNDTRACK: *LENZ v. UNIVERSAL* AND HOW THE FAIR USE POLICY SHOULD BE APPLIED TO USER GENERATED CONTENT

I. INTRODUCTION

A. *The Prevalence of User Generated Content*

The most popular websites on the Internet today are those that contain user generated content (UGC).¹ These websites allow users to upload material that the users create; however, this material may contain copyrighted works.² Not only are these websites frequently visited, they are also highly lucrative businesses.³ Websites such as YouTube, Facebook, and MySpace have millions of members and are worth hundreds of millions of dollars.⁴ According to one report, websites utilizing UGC earned approximately one billion dollars in advertising revenue in 2007.⁵ In fact, UGC is “currently one of the fastest growing forms” of media found on the Internet.⁶ Another survey shows that over half of the Internet users in the United States view UGC at least once a month.⁷ Copyright holders are now concerned that their intellectual property rights are being

1. INTERACTIVE ADVER. BUREAU, USER GENERATED CONTENT, SOCIAL MEDIA, AND ADVERTISING—AN OVERVIEW I (Apr. 2008), http://www.iab.net/media/file/2008_ugc_platform.pdf [hereinafter IAB I].

2. Note, *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 HARV. L. REV. 1387, 1398 (2008) [hereinafter *Middle-Ground Approach*].

3. IAB I, *supra* note 1 (stating that in 2006, sixty-nine million users in the United States visited UGC websites, and UGC websites generated one billion dollars in advertising revenue in 2007).

4. Knowledge@Wharton, *What is YouTube Really Worth?*, FORBES, Oct. 6, 2006, http://www.forbes.com/entrepreneurs/2006/10/05/google-yahoo-youtube-ent-fin-cx_kw_1006wharton.html.

5. Paul Verna, *User Generated Content: Will Web 2.0 Pay Its Way?*, EMARKETER (June 2007), available at http://www.emarketer.com/Reports/All/Emarketer_2000421.aspx?src=report_head_info_reports.

6. IAB I, *supra* note 1.

7. eMarketer, *User Generated Content, Fad or For Real?*, INTERACTIVE ADVER. BUREAU, May 2008, http://www.iab.net/insights_research/iab_research/1675/287430.

violated with the increasing popularity of UGC websites.⁸

As a result of these emerging intellectual property issues, lawmakers should pass new laws, and the judiciary should interpret existing laws to help those most negatively affected by the increase in UGC. The parties that would benefit from such intervention include the creators of media containing potentially infringing UGC, the websites that host UGC, and the copyright holders who wish to protect their interests.

The Digital Millennium Copyright Act of 1998 (DMCA) allows a copyright holder to request by way of a takedown notice that a website remove material if there is an infringement on its copyright.⁹ The main dispute is whether the copyright holder should have a subjectively or objectively reasonable basis for filing the takedown notice. This Comment proposes that clear and objective preconditions should be satisfied before a copyright holder can properly file a takedown notice. Such preconditions are consistent with the fair use doctrine of copyright law and will balance the creativity of UGC creators with the rights of copyright holders.

Part I of this Comment describes the issues users may face when confronted with allegations that their uploaded content infringes a copyright and suggests that a set of objective preconditions be satisfied before a copyright holder can send a takedown notice. Part II provides background information on laws and key concepts, such as the DMCA and the fair use doctrine. Part III analyzes the feasibility of applying the fair use doctrine to UGC. Finally, Part IV describes other frameworks for reconciling conflicts between UGC and copyright law that will balance the rights of people who wish to upload UGC with the need for copyright protection.

B. The Issue

The issue with UGC is that it frequently contains copyrighted materials.¹⁰ Common examples include copyrighted music playing in the background of a blog or used as a soundtrack in a home video.¹¹ In situations like these, most UGC creators are unaware that they may be violating copyright law.¹² Thus, these creators may be surprised that under

8. Middle-Ground Approach, *supra*, note 2.

9. 17 U.S.C. § 512 (2006).

10. Scott Karp, *A Lot of User-Generated Content Is Really User-Appropriated Content*, PUBLISHING 2.0, Nov. 18, 2006, <http://publishing2.com/2006/11/18/a-lot-of-user-generated-content-is-really-user-appropriated-content/>.

11. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008) (order denying Universal's motion to dismiss).

12. Bloggers' 'Unclear but Concerned' About Legal Liabilities,

current federal law a mere allegation of copyright infringement is sufficient for the copyright holder to file a takedown notice with the website or Internet service provider (ISP).¹³ A takedown notice requires the ISP to remove the allegedly copyrighted content or otherwise make the website inaccessible.¹⁴ This may lead to situations where UGC creators find themselves in a David-versus-Goliath battle against media conglomerates, which are most often the copyright holders that have the resources to file such takedown notices.

Stephanie Lenz's recent lawsuit against Universal Music Corp., Universal Music Publishing, and Universal Music Publishing Group (collectively, Universal) illustrates the friction between UGC creators and copyright holders.¹⁵ In February 2007, Lenz uploaded to YouTube a home video of her one-and-a-half-year-old son dancing to music in their kitchen in order to share the video with her family and friends.¹⁶ The song "Let's Go Crazy," by the musician Prince, played in the background of the twenty-nine-second video.¹⁷ In June 2007, Universal, which owns the copyright to the song, sent a notice to YouTube demanding that the website remove the video on the theory that it contained material that infringed its copyright.¹⁸ YouTube subsequently notified Lenz via email that her video was removed due to Universal's allegation of copyright infringement.¹⁹ YouTube also warned Lenz that she may be permanently banned from YouTube if it found her infringing on copyrights in the future.²⁰ Later that month, with legal assistance from the Electronic Frontier Foundation, Lenz sent YouTube a counter-notification claiming that her video constituted fair use of the copyrighted material.²¹ YouTube re-posted the video approximately six weeks later.²²

Universal relied on the DMCA to issue the takedown notice.²³ The

<http://researchcopyright.blogspot.com/2008/05/bloggers-unclear-but-concerned-about.html> (May 22, 2008, 11:19 a.m.).

13. 17 U.S.C. § 512.

14. THE FAIR USE NETWORK, *'Take It Down!': A Guide to Assessing & Responding to DMCA § 512 Takedown Notices*, <http://fairusenetwork.org/reference/td.php> (last visited Feb. 15, 2009).

15. *Lenz*, 572 F. Supp. 2d at 1150.

16. *Id.* at 1151–52.

17. *Id.* at 1152.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Lenz*, 572 F. Supp. 2d at 1152.

22. *Id.* As of December 1, 2008, the video can still be accessed at: <http://www.youtube.com/watch?v=NIKfJHFWlhQ>.

23. *Id.*

DMCA stipulates that a valid takedown notice requires that the copyright holder have "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."²⁴ Lenz argued that she was authorized to use the song under the fair use doctrine of copyright law.²⁵ The crux of Lenz's argument was that copyright holders cannot, in good faith, order materials taken down without first considering the issue of fair use.²⁶ Universal argued that the DMCA does not even mention fair use, nor does it require a good faith belief that the use of the copyrighted material was not fair use.²⁷ Universal argued that, under the DMCA, it merely had to demonstrate a subjective good faith belief that Lenz violated copyright law, making it easier for Universal and other similarly situated copyright holders to issue takedown notices.²⁸ Universal contended that this subjective "good faith" standard in the DMCA is ideal for two reasons.²⁹ First, copyright holders may not be able to respond quickly to possible copyright infringements if they are required to consider fair use possibilities before issuing takedown notices.³⁰ Second, it is difficult for copyright holders to predict whether a court may rule in its favor since a determination of fair use is a fact-intensive inquiry.³¹ On April 8, 2008, the court granted Universal's motion to dismiss the complaint.³² However, the court allowed Lenz to file an amended complaint on April 18.³³ In the most recent development, the court denied Universal's August 20, 2008 motion to dismiss the amended complaint.³⁴

The court's decision in *Lenz v. Universal* will set a precedent as to how courts will resolve copyright infringement cases involving UGC. If the court agrees with Lenz, copyright holders will have to make an analysis of fair use before sending a takedown notice. If the court rules in Universal's favor, users such as Lenz may be subjected to even more takedown notices alleging infringement.

24. 17 U.S.C. § 512(c)(3)(A)(v) (2006).

25. *Lenz*, 572 F. Supp. 2d at 1154.

26. *Id.*

27. *Id.*

28. *See* 17 U.S.C. § 512(c)(3)(A)(v); *see also Lenz*, 572 F. Supp. 2d at 1153.

29. *Lenz*, 572 F. Supp. 2d at 1155.

30. *Id.*

31. *Id.*

32. *Id.* at 1153.

33. *Id.*

34. *Id.* at 1157.

II. BACKGROUND

A. User Generated Content

Unlike professionally produced traditional media, user generated content (UGC) is produced by individuals with little or no technical expertise or creative experience.³⁵ Many different types of media that Internet users see online, such as blogs and social networking pages, feature or qualify as UGC.³⁶ Typically, users upload UGC to websites that host the content.³⁷ These websites include video-sharing sites such as YouTube, or social networking sites like Facebook.³⁸ The users who upload this content do so for the sake of sharing and generally do not have an expectation to earn any money as a result of their work.³⁹ Other reasons for uploading UGC include connecting with peers, achieving recognition for creativity, or, simply, self-expression.⁴⁰ The Organization for Economic Co-operation and Development, an international organization of thirty developed countries with a mandate to promote economic growth and financial stability, defines UGC as “i) content made publicly available over the Internet, ii) which reflects a ‘certain amount of creative effort’, and iii) which is ‘created outside of professional routines and practices.’”⁴¹

The first characteristic of UGC is that the content must be published or otherwise made available over the Internet.⁴² The content should be accessible on a public website or to a more restricted audience on a social networking site.⁴³ This definition excludes email or other forms of instant messaging.⁴⁴ The second characteristic is that the content must be the product of some creative effort.⁴⁵ The creative effort can include anything

35. IAB I, *supra* note 1. Of course, this is not to say that professionals cannot create UGC as a hobby or even in the course of their work. The distinction is that creation of UGC is typically a lay pursuit that is not exclusively generated by professionals.

36. *See id.*

37. *Id.*

38. *Id.*

39. SACHA WUNSH-VINCENT & GRAHAM VICKERY, ORG. FOR ECON. CO-OPERATION AND DEV., PARTICIPATIVE WEB: USER-CREATED CONTENT 8 (2007), <http://www.oecd.org/dataoecd/57/14/38393115.pdf>.

40. *Id.*

41. WUNSH-VINCENT & VICKERY, *supra* note 39, at 4.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

from personal thoughts posted on a blog to home videos.⁴⁶ Finally, UGC “is generally created outside of professional routines and practices,” which implies that the creators generally are not professionals and do not expect to make a profit from publishing their content.⁴⁷

The rise in the popularity of UGC and its accompanying legal issues cannot be ignored. In fact, according to a study commissioned by Nokia, a world leader in cellular telecommunications, up to twenty-five percent of the entertainment enjoyed by consumers in the next five years will be UGC, rather than traditional professionally created media content.⁴⁸

B. The Digital Millennium Copyright Act

Enacted in 1998, the Digital Millennium Copyright Act of 1998 (DMCA) was Congress’s effort to balance “the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet.”⁴⁹ Congress designed the DMCA to “enlist the cooperation of Internet and other online service providers to combat ongoing copyright infringement.”⁵⁰ Consequently, the DMCA provides various remedies for copyright holders who claim a violation of their rights, such as monetary and injunctive relief.⁵¹ The copyright holder may seek an order restraining the service provider from either providing access to the infringing material or providing access to the user engaged in infringing activity.⁵² Courts, when considering injunctive relief, look at factors, such as the magnitude of harm the copyright holder is likely to suffer if the material is not removed and whether an injunction is feasible, effective, and less burdensome than other available remedies.⁵³

To take advantage of the injunctive protection offered by the DMCA, the copyright holder must follow the notice and takedown provisions § 512(c)(3).⁵⁴ First, a party authorized to act on behalf of the copyright holder must send a written, signed notice of infringement to the service

46. *Id.*

47. WUNSH-VINCENT & VICKERY, *supra* note 39, at 4.

48. *User-Generated Content: The Entertainment News of the Future?*, GIZMAG, Dec. 4, 2007, <http://www.gizmag.com/user-generated-content-entertainment-of-the-future/8449/> (explaining Nokia has over 900 million customers worldwide).

49. H.R. REP. NO. 105-551, pt. 2, at 21 (1998).

50. *Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004).

51. 17 U.S.C. § 512 (2006).

52. *Id.* § 512(j)(1)(A)(i)–(iii).

53. *Id.* § 512(j)(2)(A)–(D).

54. *Id.* § 512(c)(3).

provider.⁵⁵ Second, the copyright holder, or its agent, must identify and locate the content claimed to contain the copyrighted material, thereby allowing the service provider to remove the offending material.⁵⁶ Finally, and most importantly, the DMCA calls for a “statement that the complaining party *has 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.”⁵⁷

To help elicit compliance from online service providers and websites that host UGC, the DMCA offers a “safe harbor” provision insulating service providers or hosts from liability associated with copyright infringement suits.⁵⁸ Content hosts must satisfy three requirements to claim a safe harbor defense under the DMCA.⁵⁹ First, the host must not possess actual knowledge that the material on its network infringes on any copyrighted material.⁶⁰ Therefore, if the host learns of any infringing material, it must remove the content immediately.⁶¹ “Once the [host] has actual knowledge of the infringing material, it loses the safe harbor protections unless it complies with the DMCA.”⁶² Second, the host must not “receive a financial benefit directly attributable to the infringing activity.”⁶³ Third, upon receipt of the copyright holder’s takedown notice, the host must remove or disable access to the infringing material.⁶⁴ Last, the host must clearly post its copyright law policy, including the notice and takedown policies set out in the DMCA.⁶⁵

Moreover, even though a host is not required to actively patrol its network for infringing material,⁶⁶ if a host comes across such content, the host must remove it immediately.⁶⁷ Consequently, the host is not liable to any person for removing or disabling access to alleged infringing content, nor does it have to notify the user prior to removal of such content.⁶⁸ It must, however, notify the user after removal of the content and advise the

55. *Id.* § 512(c)(3)(A).

56. *Id.* § 512(c)(3)(A)(ii).

57. 17 U.S.C. § 512(c)(3)(A)(v) (emphasis added).

58. *Id.* § 512(c)(1).

59. *Id.* § 512(c)(1)(A)–(C).

60. *Id.* § 512(c)(1)(A)(i)–(ii).

61. *Id.* § 512(c)(1)(A)(iii).

62. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1201 (N.D. Cal. 2004).

63. 17 U.S.C. § 512(c)(1)(B).

64. *Id.* § 512(c)(1)(C).

65. *See id.* § 512(i)(1)(A).

66. *See id.* § 512(i)(1)(B)–(2).

67. *See id.* § 512(c)(1)(A)(i)–(ii).

68. *Id.* § 512(g)(1).

user of the opportunity to file a counter-notice against the copyright holder claiming that there is no copyright infringement.⁶⁹ Once the user's counter-notice is submitted to the host, the host must notify the copyright holder of the user's objection.⁷⁰ The copyright holder then has two weeks to file suit in a federal court, or else the host may repost the material.⁷¹

Unfortunately, the DMCA provides precious few protections for the user. It is important to note that the DMCA does not require the host to give notice or warning to the user before removing content.⁷² The key provision protecting users is § 512(f), which punishes a copyright holder who knowingly misrepresents an infringement claim.⁷³ Accordingly, the DMCA states that "[a]ny person who knowingly materially misrepresents under this section (1) that material or activity is infringing . . . shall be liable for any damages."⁷⁴

In *Online Policy Group v. Diebold, Inc.*, the court tested this misrepresentation provision.⁷⁵ The defendant, Diebold, Inc., manufactured electronic voting machines that received criticism for their unreliability.⁷⁶ Diebold employees exchanged internal emails containing evidence that noted the problems associated with the machines.⁷⁷ Though the source was unclear, eventually the email archive was reproduced on the Internet.⁷⁸ The plaintiffs, represented by a nonprofit legal advocacy group, Online Policy Group, were college students who posted a hyperlink to the Diebold email archive in the comments section of an online newspaper article criticizing the electronic voting machines.⁷⁹ "[I]n an alleged effort to prevent further public viewing of the email archive" and avoid more public embarrassment, Diebold sent DMCA takedown notices to entities hosting the emails.⁸⁰ Diebold advised the hosts that "they would be shielded from a copyright infringement suit . . . if they disabled access to or removed the allegedly infringing material."⁸¹ Essentially, Diebold wished to use the

69. 17 U.S.C. § 512(g)(2)(A)–(B).

70. *Id.* § 512(g)(2)(B).

71. *Id.* § 512(g)(2)(C).

72. *Id.* § 512(c)(3)(A).

73. *Id.* § 512(f).

74. *Id.* § 512(f)(1).

75. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

76. *Id.* at 1197.

77. *Id.*

78. *Id.*

79. *Id.* at 1197–98.

80. *Id.* at 1198.

81. *Online Policy Group*, 337 F. Supp. 2d at 1198.

DMCA to compel the hosts to remove the leaked email archive.⁸² The plaintiffs filed suit and alleged that Diebold knowingly and materially misrepresented its copyright infringement claim.⁸³

The *Diebold* court cited the misrepresentation provision of the DMCA and stated, “any person who sends a cease and desist letter with knowledge that claims of infringement are false may be liable for damages.”⁸⁴ The court first held that publication of the emails was lawful and not a violation of copyright law because the emails possessed public interest value.⁸⁵ The court noted that Diebold had not identified any specific commercial purpose effected by the publication of the emails and that there was no evidence that the publication had any effect on the market value of those emails.⁸⁶ The court further reasoned that the plaintiffs neither attempted to sell the emails for profit nor prevented Diebold from making a profit by revealing the emails.⁸⁷ Instead, the plaintiffs published the emails “to support criticism that is in the public interest, not to develop electronic voting technology.”⁸⁸

As for the misrepresentation clause of the DMCA,⁸⁹ the court concluded that requiring “a party to have an objectively measured ‘likelihood of success on the merits’ in order to assert claims of copyright infringement would impermissibly chill the rights of copyright holders.”⁹⁰ This indicates that the court did not want to make it difficult for copyright holders to initiate takedown notices nor make it too easy for them to be liable for misrepresentation. Instead, the court adopted the statutory language and held that “[a] party is liable if it ‘knowingly’ and ‘materially’ misrepresents that copyright infringement has occurred.”⁹¹ It held that “[n]o reasonable copyright holder could have believed that the [emails] discussing possible technical problems . . . were protected by copyright.”⁹²

82. *See id.*

83. *Id.*

84. *Id.* at 1202.

85. *Id.* at 1203 (“The purpose, character, nature of the use, and the effect of the use upon the potential market for or value of the copyrighted work all indicate that at least part of the email archive is not protected by copyright law.”).

86. *Id.*

87. *Online Policy Group*, 337 F. Supp. 2d at 1203.

88. *Id.*

89. 17 U.S.C. § 512(f) (2006).

90. *Online Policy Group*, 337 F. Supp. 2d at 1204.

91. *Id.* (defining “knowingly” as when a party that actually knew, or should have known if it acted with reasonable care, that it was making misrepresentations and “material” as the misrepresentation affected the websites’ response to the takedown notice).

92. *Id.*

Thus, Diebold was held liable for misrepresenting a copyright infringement claim for the purposes of suppressing embarrassing emails which were not protected under copyright law.⁹³ In support of its holding, the court stated that Diebold used the DMCA “as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”⁹⁴

The *Diebold* holding provides a deterrent against those who knowingly misrepresent a copyright infringement claim in hopes of receiving financial gain or to restrain publication of information. This portion of the DMCA provides recourse for the creators of UGC by allowing them to file counterclaims against copyright holders.⁹⁵ However, this provision of the DMCA does not level the playing field for UGC creators who wish to protect their fair use rights from allegations of copyright infringement.⁹⁶ The *Diebold* court’s reluctance to require copyright holders to be able to present an objective “likelihood of success” prior to asserting copyright claims indicates a willingness to insulate copyright holders from liability as long as there is no knowing misrepresentation.⁹⁷

C. The Fair Use Doctrine

Copyright law is rooted in Article 1, Section 8 of the United States Constitution, which provides that “[t]he Congress shall have Power . . . To promote the Progress of Science.”⁹⁸ When the first Copyright Act was enacted in 1790, Congress believed protecting copyrights was a way of promoting science and the arts.⁹⁹ Congress has since revised copyright law every forty years to keep pace with technological advances.¹⁰⁰

The judicial doctrine of fair use was applied at common law as a defense against alleged copyright infringement.¹⁰¹ Congress codified the fair use defense for the first time in the Copyright Act of 1976 (the “Act”), noting it was “one of the most important and well-established limitations on the exclusive right of copyright owners.”¹⁰² The Act states that the

93. *Id.* at 1204–05.

94. *Id.* at 1205.

95. 17 U.S.C. § 512(f) (2006).

96. See H.R. REP. NO. 94-1476, at 65–66 (1976).

97. *Online Policy Group*, 337 F. Supp. 2d at 1204.

98. U.S. CONST. art. 1, § 8.

99. H.R. REP. NO. 94-1476, at 47 (1976).

100. *Id.*

101. *Id.* at 65.

102. *Id.*

reproduction of copyrighted works “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”¹⁰³ The Supreme Court has consistently held that fair use is not an infringement of copyright.¹⁰⁴ The four factors that courts consider when determining whether fair use applies are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁰⁵

The first factor asks whether the use of the copyrighted material “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁰⁶ This “transformative” work furthers the goal of copyright law—the promotion of science and the arts.¹⁰⁷ The second factor recognizes that “some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”¹⁰⁸ The third factor asks whether the “quantity and value of the materials used are reasonable for the purpose of the copying.”¹⁰⁹ Finally, the fourth factor takes into account the extent of market harm caused by the alleged infringer.¹¹⁰ This factor further considers the effect of large-scale copying on the potential market, taking into “account not only . . . harm to the original but also . . . harm to the market for derivative works.”¹¹¹ Courts use this four-factor analysis to determine whether a defendant can raise fair use as an affirmative defense to allegations of copyright infringement.¹¹²

However, fair use cannot authorize the use of copyrighted material because it is only a defense to copyright infringement. Users cannot apply

103. 17 U.S.C. § 107 (1976).

104. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (explaining that “anyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use”).

105. 17 U.S.C. § 107.

106. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (deciding whether parody is a fair use).

107. *Id.*

108. *Id.* at 586.

109. *Id.*

110. *Id.* at 590.

111. *Id.*

112. H.R. REP. NO. 94-1476, at 65 (1976).

fair use principles until after their content is removed and the copyright holder alleges infringement.¹¹³ This concept was illustrated in *Campbell v. Acuff-Rose Music, Inc.*¹¹⁴ At trial, the owners of the copyright to Roy Orbison's song, "Oh, Pretty Woman," alleged that the rap music group 2 Live Crew, and its record label, infringed the copyright when 2 Live Crew released its own rendition similarly titled, "Pretty Woman."¹¹⁵ The main issue before the Supreme Court was whether 2 Live Crew's song could be construed as fair use within the meaning of the Act.¹¹⁶ Both parties acknowledged that, absent a finding of fair use through parody, 2 Live Crew's song was an infringement.¹¹⁷ After considering the four fair use factors, the Court found that 2 Live Crew had a valid fair use defense because the use of Orbison's song was parody.¹¹⁸

This case can be compared to those involving UGC and the DMCA. It is important to note that in *Acuff-Rose*, the members of 2 Live Crew could not have asserted fair use prior to releasing their song.¹¹⁹ 2 Live Crew could only raise the fair use defense after they were sued. Thus, prior to releasing the album, 2 Live Crew and its record label sought permission from Acuff-Rose to use Orbison's song.¹²⁰ 2 Live Crew's manager sent the lyrics and a recording of the song to Acuff-Rose and offered to appropriately credit the authors of the original song in addition to paying a royalty fee.¹²¹ However, Acuff-Rose denied the request.¹²² Regardless, 2 Live Crew released the album containing the parody, giving credit to Orbison and Acuff-Rose as the original authors of "Oh, Pretty Woman."¹²³ The album sold nearly 250,000 copies before Acuff-Rose filed suit.¹²⁴

In a typical case of UGC and copyright infringement, it would be unrealistic and inefficient for a home video creator to seek the permission of a record company for use of background music. UGC creators will likely not have the resources to petition a record company for permission.

113. See, e.g., *Campbell*, 510 U.S. at 577 (explaining that courts must look at the four-factor test after infringement to see if the fair use defense applies).

114. *Id.* at 569.

115. *Id.* at 572-73.

116. *Id.* at 571-72.

117. *Id.* at 574.

118. *Id.* at 594.

119. *Campbell*, 510 U.S. at 577 (explaining that courts will only undergo the four factor analysis to apply fair use after copyright infringement is alleged).

120. *Id.* at 572-73.

121. *Id.* at 572.

122. *Id.* at 572-73.

123. *Id.* at 573.

124. *Id.*

Likewise, copyright holders would be inundated with requests seeking permission to use their content. Because the fair use doctrine operates solely as a defense, it does not offer blanket permission to all those who meet its four criteria. Therefore, if copyright holders decide to aggressively pursue infringement cases, the fair use doctrine alone does not protect UGC creators against both the risk of costly litigation and the removal of their work.

D. The Relationship Between Consumers and Copyright Holders

Congress created the DMCA to compel websites and Internet service providers (ISPs) to assist in the battle against online piracy by granting them a safe harbor from copyright infringement liability.¹²⁵ Websites and ISPs were given a powerful tool to fight copyright infringement while the rights of copyright holders remain protected. But what about consumers? Consumers, especially those who upload UGC, are a large, but seemingly forgotten, demographic whose rights are not well-represented under the DMCA. Admittedly, the misrepresentation clause of the DMCA does provide some recourse for consumers who are the subject of wrongful takedown notices.¹²⁶ However, consumers may only act *after* their content is taken down.¹²⁷

The relationship between consumers and copyright holders can best be explained by dividing consumers into three categories.¹²⁸ Identifying the types of consumers and their respective interests “may introduce a new dimension to standard copyright analysis, which often favors copyright owners, by incorporating a legitimate interest . . . to balance the scope of rights shaped by the . . . DMCA regime.”¹²⁹ Understanding the different types of interactions between consumers and copyright holders will help create a copyright framework that promotes creativity and opportunities for UGC.

Traditional views of copyright law deal with the first two types of consumers: the “consumer-shopper” and the “consumer-author.”¹³⁰ The consumer-shopper is one who purchases products based on the price and

125. *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004).

126. 17 U.S.C. § 512(f) (2006).

127. *Id.*

128. See Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119, 1138 (2007) (separating consumers into three categories and proposing that new “consumer-participants” be given rights).

129. *Id.* at 1122.

130. *Id.*

the utility of the product.¹³¹ These types of consumers are passive and generally do not factor in to copyright law because they usually do not help promote the policy of copyright law.¹³² The only way consumer-shoppers can help further the goals of copyright law is to create the market for information and, thus, encourage others to produce original content.¹³³

Consumer-authors create new content by building upon pre-existing works.¹³⁴ They help further copyright's policy goals of promoting creativity and productivity, and are an important consideration in any discussion of copyright law.¹³⁵ "Creation is presumed to be incremental—new works are built upon previous works—and the rights of current authors are balanced against those of subsequent authors."¹³⁶ Consumer-authors change, or even improve, pre-existing works and promote creativity by adding something unique to the original work.¹³⁷ This type of consumer is entitled to protection from copyright laws because they are able to show that their use of the original material is productive and adds something new for everyone's benefit.¹³⁸

The third type of consumer is one who makes use of copyrighted works for self-consumption or for their own personal benefit.¹³⁹ These "consumer-participants" include users who upload UGC onto the Internet and who risk being accused of copyright violations because of their actions.¹⁴⁰ A commentator has stated that "[f]rom this perspective, both authors and consumers of information actively participate in advancing the ultimate goal of copyright law, which is promoting progress."¹⁴¹ Copyright law encourages people to participate in the creative process rather than simply encouraging the creation of content.¹⁴² The creation process

131. *Id.*

132. *Id.* at 1138.

133. *See id.* ("To the extent that consumers are present under a traditional copyright framework, they are treated as purchasers of copies who, by paying for access to copyrighted materials, provide just compensation and secure incentives to authors so that authors will invest in further creation.").

134. Elkin-Koren, *supra* note 128, at 1138.

135. *Id.*

136. *Id.*

137. *Id.* at 1139.

138. *Id.*

139. *Id.* at 1139–41.

140. *See* Elkin-Koren, *supra* note 128, at 1141. Because users take part in the creative process, UGC should fall into this category.

141. *Id.* at 1139–40 (elaborating further that progress is served "by providing authors with sufficient incentives to invest in producing new works" and allowing "the public [to] gain access to these works and be able to extract their value").

142. *Id.* at 1140.

involves pre-existing content and the input of human capital.¹⁴³ “Consumption, in this sense, cultivates . . . further creation: it educates; it stimulates our minds; it expands our understanding of the world around us; it provides inspiration.”¹⁴⁴ Furthermore, recognizing the benefits of consumption-as-participation is important to ensure that creativity can emerge at all levels.¹⁴⁵ An analysis of copyright law shows that it can incorporate the interests and rights of consumer-participants.¹⁴⁶ The rights of copyright holders, who often spend large amounts of money lobbying for laws that many consumers are unaware of,¹⁴⁷ should be balanced with those of consumers. One way to find that balance is to incorporate the fair use doctrine into provisions of the DMCA.

III. THE FAIR USE DOCTRINE AS APPLIED TO USER GENERATED CONTENT

A. The Current Subjective Good Faith Analysis in the Digital Millennium Copyright Act

In *Lenz v. Universal Music Corp.*, the plaintiff contended that her use of the Prince song should be exempt from copyright infringement.¹⁴⁸ Lenz’s argument was that fair use authorized the use of the copyrighted material.¹⁴⁹ She further argued that copyright holders cannot make a good faith infringement claim, as required by the Digital Millennium Copyright Act (DMCA), “without considering all authorized uses of the material, including fair use.”¹⁵⁰ Lenz asserted that copyright holders should make a fact-specific determination before issuing takedown notices.¹⁵¹ On the other hand, Universal argued that it should not even have to evaluate fair use before issuing a takedown notice because it would “lose the ability to respond rapidly to potential infringements.”¹⁵² Universal also claimed that “fair use is merely an *excused* infringement of a copyright rather than a use *authorized* by the copyright owner or by law.”¹⁵³

143. *Id.*

144. *Id.* at 1140–41.

145. *Id.* at 1152.

146. Elkin-Koren, *supra* note 128, at 1122.

147. *Id.* at 1154.

148. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

149. *Id.* at 1154.

150. *Id.*

151. *Id.* at 1154–55.

152. *Id.* at 1155.

153. *Id.* at 1154.

Lenz has not been decided,¹⁵⁴ but if the court finds for *Lenz*, copyright holders will have to make a fair use analysis for every takedown notice sent out.¹⁵⁵ Otherwise, copyright holders will risk liability for misrepresentation of their claims.¹⁵⁶ It is difficult for a user to sue a record company alleging it knowingly misrepresented a copyright infringement claim by using the same criteria employed in *Diebold*.¹⁵⁷ However, the mere threat of litigation may deter record companies from overzealously asserting copyright infringement and require them to consider whether each individual case is reasonable. On the other hand, if the court rules that fair use is never self-evident and that the copyright holder only has to use a subjective good faith analysis, then consumers such as *Lenz* are back to square one—at risk of unreasonable takedown notices at the hands of copyright holders.

A federal district court in *Rossi v. Motion Picture Association of America Inc.*,¹⁵⁸ was the first to interpret the meaning of “good faith belief” within the context of the DMCA.¹⁵⁹ In *Rossi*, the Motion Picture Association of America (MPAA) issued takedown notices for Rossi’s website, internetmovies.com, based on the belief that it provided downloads of movies to members.¹⁶⁰ In fact, although the website advertised “Full Length Downloadable Movies” and “NOW DOWNLOADABLE,” no movies were available for download.¹⁶¹ Instead, Rossi described his website as an online directory of websites containing information about movies for paid members.¹⁶² The MPAA filed a takedown notice under the DMCA after one of its members found the website.¹⁶³ Rossi was notified that his page would be taken down, but he was able to find another server to host it prior to commencing his lawsuit against the MPAA.¹⁶⁴ Rossi’s main argument was that the MPAA did not have enough information to form a “good faith belief” that he had infringed

154. Universal’s motion to dismiss the case was denied on August 20, 2008. *Lenz*, 572 F. Supp. 2d at 1151.

155. *Id.* at 1154.

156. *Id.* at 1154–55.

157. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004); see discussion *supra* Part II.B.

158. *Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000 (9th Cir. 2004).

159. *Id.* at 1004.

160. *Id.* at 1001–02.

161. *Id.* at 1002–03.

162. *Id.* at 1002.

163. *Id.*

164. *Rossi*, 391 F.3d at 1002.

the MPAA's copyright, as required by the DMCA.¹⁶⁵ Furthermore, Rossi contended that a copyright holder must conduct a reasonable investigation into the allegedly infringing activity to have a good faith belief of a copyright violation.¹⁶⁶ Rossi argued that if the MPAA had conducted such an investigation of his website, it would have concluded that his website was not a source for downloading movies and therefore was not in violation of any copyrights.¹⁶⁷ Essentially, Rossi argued for an objective standard of review for measuring the reasonableness of the MPAA's takedown notice.¹⁶⁸ The MPAA, on the other hand, argued that "the good faith belief requirement is subjective" and noted that Congress could have but did not expressly impose a specific objective standard.¹⁶⁹

In its discussion, the court first noted the legislative intent of the DMCA to "balance the need for rapid response to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse"¹⁷⁰ by "preserv[ing] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements."¹⁷¹ The court pointed to prior decisions where "good faith" in other federal statutes was traditionally interpreted as a subjective standard, distinct from an objective standard.¹⁷² The court explained that Congress understood this distinction and "could have easily incorporated an objective standard of reasonableness" when it enacted the DMCA.¹⁷³ However, since Congress did not do so, the court inferred Congress's intent to use the subjective standard traditionally associated with a good faith requirement.¹⁷⁴

The court buttressed its conclusion by focusing on the particular structure of the statute.¹⁷⁵ The court pointed to Congress's inclusion of a cause of action for improper infringement notifications where a copyright holder is liable only after a demonstration of some actual knowledge of misrepresentation.¹⁷⁶ According to the court, this statutory structure imposes liability upon copyright holders only for knowing

165. *Id.* at 1003.

166. *Id.*

167. *Id.*

168. *Id.* at 1004.

169. *Id.*

170. *Rossi*, 391 F.3d at 1003 (quoting S. REP. NO. 105-190, at 21 (1998)).

171. *Id.* (quoting H.R. REP. NO. 105-551, pt. 2, at 49 (1998)).

172. *Id.* at 1004.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Rossi*, 391 F.3d at 1004-05.

misrepresentations.¹⁷⁷ Therefore, “[m]easuring compliance with a lesser ‘objective reasonableness’ standard would be inconsistent with the Congress’s apparent intent that the statute protect potential violators from *subjectively* improper actions by copyright owners.”¹⁷⁸

The court used the statutory structure of the DMCA, along with case law, to support its conclusion that the DMCA required only a subjective good faith belief.¹⁷⁹ The court examined the information on Rossi’s website and concluded that the representations on the website led the MPAA to presume in good faith that there were movies available for download and, therefore, had a valid reason to issue the takedown notices.¹⁸⁰

B. Is a Subjective Good Faith Standard Preferable?

It is easy to see how the copyright holders in *Lenz* and *Rossi* were led to believe that their copyrights were being infringed. For example, in *Lenz*, the title of the video was nearly identical to that of the Prince song.¹⁸¹ In *Rossi*, the website’s advertisements were sufficient to fool visitors into thinking that there actually were movies available for download.¹⁸² However, large media conglomerates—common copyright holders—have extensive resources at hand that should permit at least a cursory investigation into potential infringement of their copyrights.

If, for example, Universal Music Corp. (Universal) was compelled to use an objective good faith standard, it would probably realize that a short video clip of a toddler dancing to the faint background music of a Universal artist is insufficient for a finding of copyright infringement. In September 2007, Prince publicly spoke out about his efforts to “reclaim his art on the Internet,” and threatened to sue for infringement.¹⁸³ *Lenz* asserted that Universal sent the takedown notice to appease Prince and did not possess any good faith belief that there was copyright infringement.¹⁸⁴ If required to use a list of objective criteria in assessing the video, it is unlikely that the

177. *Id.* at 1005.

178. *Id.* (emphasis in original).

179. *Id.* at 1004.

180. *Id.* at 1005.

181. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008). *Lenz*’s video was titled “Let’s Go Crazy #1” while Prince’s song was called “Let’s Go Crazy.” *Id.* at 1152.

182. *Rossi*, 391 F.3d at 1005. *Rossi* acknowledged that his own customers often believed that actual movie downloads were available. *Id.*

183. *Lenz*, 572 F. Supp. 2d at 1152.

184. *Id.*

reviewer, acting on behalf of Universal, would have sought a takedown notice.

Likewise, if the MPAA in *Rossi* was compelled to use an objective good faith standard, it would probably find insufficient evidence of copyright infringement. The court in *Rossi* noted that many anti-piracy departments use software to roam the Internet to detect potentially infringing material.¹⁸⁵ The MPAA acknowledged that it uses this type of software in conjunction with a few employees who actually review the red-flagged sites, and that it is the employees who ultimately decide whether a website contains infringing material.¹⁸⁶ All an MPAA employee had to do was attempt to download a movie and, being unable to do so, conclude that there was no copyright violation.

A subjective good faith standard makes it easier for media conglomerates, such as Universal, to issue takedown notices without pausing to consider the content and context of the user generated content (UGC). But why do copyright holders file seemingly unreasonable suits claiming infringement? One reason could be that after being exposed to piracy in the digital age for so long, copyright holders have an “itchy trigger finger” when asserting their rights.¹⁸⁷

When protecting a right essential to one’s livelihood, one may lose sight of the bigger picture. In *Lenz*, the bigger picture included the negative press generated by such actions against a working mother—one commentator called Universal’s actions “the latest, and most extreme, example of content producers attempting to prevent *any* use of copyright material without their permission.”¹⁸⁸ This negative publicity often leads to an increased “backlash” among users and advocacy groups who argue that copyright holders wrongfully and illegally send takedown notices.¹⁸⁹ Use of the current mode of subjective analysis may expose both parties to expensive litigation by giving rise to multiple simultaneous lawsuits by consumers, such as *Lenz*, against a large copyright holder, such as Universal.

185. *Rossi*, 391 F.3d at 1005 n.7.

186. *Id.*

187. See Craig W. Walker, Note, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. L.J. & TECH. 1, 3 (2004) (acknowledging “the increase in copyright infringement that has accompanied the proliferation of the Internet”).

188. Mark Huffinan, *Universal Sues Over Background Music In Toddler Video*, CONSUMERAFFAIRS.COM, July 26, 2007, <http://www.consumeraffairs.com/news04/2007/07/crazy.html> (emphasis added).

189. See Catherine Rampell, *Standing Up To Takedown Notices*, WASH. POST, Oct. 19, 2007, at D2 (reporting that challenges to copyright claims appears to be increasing).

C. Copyright Holders Should Employ an Objective Good Faith Standard

An objective good faith standard would compliment the fair use doctrine already established in common law and codified in the Copyright Act.¹⁹⁰ When a copyright holder alleges an infringement, courts have applied the fair use doctrine as a guideline to decide what kinds of uses to permit.¹⁹¹ Likewise, the DMCA can incorporate a similar analysis and require those alleging infringement to establish sufficient ground for filing a takedown notice based on the facts of the individual case. Such a framework would curb the number of frivolous takedown notices and protect of UGC creators.

D. A Recommendation for an Objective Good Faith Standard

An objective good faith standard based on the fair use doctrine need not be complicated. The following three-prong test would sufficiently separate fair use of copyrighted works from obvious and egregious copyright violations:

- (1) Does the user profit from the uploaded content?
- (2) Does the user's content hurt or devalue, or threaten to hurt or devalue, the copyrighted work?
- (3) Does the user broadcast substantially all of the copyrighted work without attempting to add content or express creativity?

This framework, if incorporated into the DMCA, could balance the rights of UGC creators with those of media companies seeking to protect their copyrights.

If the answers to all three of the above questions are "no," then the DMCA should prohibit the copyright holder from sending a takedown notice. This framework will promote equity between copyright holders and those consumer-participants who wish to use such works for non-commercial, creative purposes.

1. Does the User Profit From the Uploaded Content?

The first question, whether a user is gaining financially from the UGC, is stricter than the fair use allowed under the Copyright Act¹⁹² since

190. H.R. REP. NO. 94-1476, at 65 (1976).

191. *See, e.g., Sony Corp. of Am. Inc. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (holding an "individual may reproduce a copyrighted work for a 'fair use'").

192. *See, Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (holding that the commercial nature of the work is only one factor in the enquiry).

fair use is a defense even if the copyright infringer makes money from the work.¹⁹³ This part of the analysis focuses on the user and asks whether the user has benefitted at the expense of others. It also indirectly asks whether a user can realistically make a living from the UGC in question, thereby becoming a professional media creator. Not protecting the right to make a profit from UGC falls within the spirit of that type of media—media created by amateurs for home and personal use. This analysis also protects the amateur nature of UGC since the user is not making a profit from the use of another’s copyrighted work.

Admittedly, this question does not address the fact that content hosting sites gain the most under this type of fair use analysis. For example, YouTube gains revenue from advertisements shown on its site.¹⁹⁴ The more visitors that view YouTube’s site, the more it can charge its advertisers.¹⁹⁵ Therefore, it benefits YouTube to have less-restrictive copyright laws for UGC because it can attract more users and viewers to its site, regardless of whether the UGC creator gained financially from the use of copyrighted work.

Another scenario that further complicates the situation above is that YouTube now offers revenue sharing for qualified “independent video creators and media companies who are looking for online distribution and who meet our qualifications.”¹⁹⁶ In a revenue-sharing program, the hosting website shares a portion of the proceeds generated from the views of the uploaded video with the video’s creator.¹⁹⁷ The website acts as a distribution platform for UGC. The YouTube Partner Program requires that all videos contain original content and that all creators own the copyrights for “all audio and video content.”¹⁹⁸ This originality requirement negates the need for fair use policy since there is no use of another’s copyrighted work. Presumably, YouTube screens each applicant of the Partner Program and checks all uploaded content for originality.¹⁹⁹

193. *See id.* at 594 (holding that 2 Live Crew’s commercial release of parody song is acceptable fair use).

194. Brian Stelter, *Those YouTube Videos Are Pulling in Serious Money*, N.Y. TIMES, Dec. 11, 2008, at A26.

195. *See id.* (discussing the relationship between traffic and revenue).

196. YouTube, *The YouTube Partner Program: Cash in on Your Creativity*, <http://www.youtube.com/partners> (last visited Dec. 1, 2008) [hereinafter *YouTube Partner Program*].

197. Brian Stelter, *Those Funny YouTube Videos Are Pulling in Serious Money*, N.Y. TIMES, Dec. 11, 2008, at A1.

198. *See* YouTube Partner Program, *supra* note 196.

199. The author attempted to sign up for the Partner Program and received the following error message: “Based on an automated review of your account it is unlikely that you will qualify for the YouTube Partner Program. Applications are reviewed for a variety of criteria, including

However, the possibility still exists that other UGC-hosting websites will offer similar revenue sharing programs, without a stringent originality requirement.

2. Does the User's Content Hurt or Devalue, or Threaten to Hurt or Devalue, the Copyrighted Work?

The second question, whether the UGC hurts or devalues the copyrighted work, shifts the focus from the uploader of UGC to the copyright holder. This part of the analysis protects the right of copyright holders to exclusively profit from their works. It would be unfair for UGC to devalue the original copyrighted work. Again, this question attempts to balance the rights of UGC creators with those of copyright holders: not only should the UGC creator not gain financially from their creation, the copyright holder's stake must not be negatively impacted. Unauthorized uses of copyrighted works devalue or harm the creator when UGC takes away from the sales of the original. For example, if Lenz's YouTube video containing Prince's music actually posed a threat to the sale of Prince's music, then Universal could satisfy this criterion.²⁰⁰ However, under this framework, it is unlikely that Universal could show that a short home video would hurt sales.

Another hypothetical is to take the 2 Live Crew parody of "Oh, Pretty Woman" and change the facts of the case to fit today's world.²⁰¹ Suppose 2 Live Crew was an amateur band and uploaded the song onto its blog for its friends and family to listen to free of charge. Nevertheless, the holder of the copyright in the original song may have an objective belief that the parody is not a fair use. To establish such a belief, the copyright holder must show how the parody threatens to hurt sales of the original hit song.²⁰² In this hypothetical, the amateur band and its free access to its parody of the copyrighted song is unlikely to hurt the sales of the original song. On the other hand, under the original facts of *Acuff-Rose Music*,²⁰³ the record company would have a good chance of showing that 2 Live Crew, a professional band making a profit from its parody, is hurting sales of the original song.

There are at least two ways that Acuff-Rose could show that the

but not limited to the size of your audience, country of residence, quality of content, and consistency with our Community Guidelines and Terms of Use."

200. See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

201. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).

202. *Id.*

203. *Id.*

parody is hurting or devaluing the original. First, it could conduct surveys showing that respondents believed 2 Live Crew's song was an original composition and they did not know Roy Orbison's song existed. Such a showing would demonstrate harm to the copyrighted work because the public is misled as to the origin of the song. Simply put, the listener does not place credit where it is due because of the parody. Second, Acuff-Rose could show that radio play of the original song has declined since the release of the parody, thus hurting its revenue.

One problem with this second prong is that it places the copyright holder at risk of losing money before it can show that UGC is hurting its copyrighted work. To answer the second question in the affirmative, the copyright holder will likely wait weeks to gather the results of the market research. By then, it is likely that the copyright holder will lose revenue. However, these uses of copyrighted works in UGC are unlikely to substantially affect large media companies and may in fact indirectly benefit them.²⁰⁴ Society should place the cost associated with protecting the fair use of copyrighted works on those who are most capable of bearing the burden. A media company which takes a small loss from lack of radio play can more easily absorb the costs than a private individual like Lenz, who would have to spend considerable amounts of time and money to procure legal counsel to fight copyright infringement allegations. Thus, it is equitable to require the copyright holder to be sure of the devaluation of its copyrighted work before bringing suit, even where it involves absorbing an initial loss in revenue. This ensures there is no arbitrary takedown of UGC.

3. Does the User Broadcast Substantially All of the Copyrighted Work Without Attempting to Add Content or to Express Creativity?

Finally, the third question asks if the user broadcasted substantially all of the copyrighted work without any attempt to add content or creative expression. This question shifts the focus away from the user and copyright holder to the furtherance of public policy goals. Part of the legislative intent of the DMCA was to "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of

204. See, e.g., Amy R. Mellow, Note, . . . *And the Ruling on the Field Is Fair: A Fair Use Analysis of Uploading NFL Videos onto YouTube and Why the NFL Should License Its Material to the Website*, 17 S. CAL. INTERDISC. L.J. 173, 192 (2007) (explaining that short video clips of NFL games on YouTube do not affect the marketability of live broadcasts); Michael Driscoll, Comment, *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?*, 6 J. MARSHALL REV. INTELL. PROP. L. 550, 564–66 (2007) (explaining the marketing benefits of unauthorized YouTube video clips for network giants NBC and CBS).

services on the Internet will expand” without compromising “the movies, music, software, and literary works that are the fruit of American creative genius.”²⁰⁵ Requiring creators of UGC to add content or creative expression ensures that the use of the copyrighted work, even if somewhat detrimental to the copyright holder’s interests, promotes important social goals. Objective criteria applied to the fair use policy will allow freedom of expression and help foster creativity. Society is better off when individuals are free to discover new methods of creating videos or blogs without the fear of copyright infringement stifling their creativity.

Lenz’s video of her toddler dancing is an example of adding new content to a copyrighted work.²⁰⁶ In fact, since the focus of the video is her child,²⁰⁷ it is probably better to characterize her video as adding copyrighted work to original content. Indeed, it is already clear that Lenz is not making a profit from her video because the video is not sold, and she is not receiving a share of the advertisement revenue from YouTube.²⁰⁸ It is also unlikely that her video has hurt the artistic reputation of Prince or has decreased his record sales.²⁰⁹ Lenz did what millions of people around the world do every day—she shot videotape footage of her child to preserve memories.²¹⁰ But, instead of keeping the footage on her videotape, Lenz utilized today’s technology to share her video with friends and family.²¹¹ Lenz used the tools and resources available to her to foster her imagination and share her creativity.²¹² Lenz did not set out to use the Prince song in her video—the use of the song was incidental because her child happened to be dancing to that particular song.²¹³ The focus, or original content, of the video is the toddler dancing.²¹⁴ The background, or copyrighted work, is the Prince song.²¹⁵ In essence, Lenz did not purposely set out to create new content; she simply captured a spontaneous moment that happened to contain a copyrighted work.

An example of UGC failing the third prong of this framework is

205. S. REP. NO. 105-190, at 2 (1998).

206. *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008).

207. Rampell, *supra* note 189 at D1.

208. Jonathan Bailey, *Copyright Cases to Watch: Lenz v. Universal*, THE BLOG HERALD, Oct. 8, 2007, <http://www.blogherald.com/2007/10/08/copyright-cases-to-watch-lenz-v-universal/>.

209. Lawrence Lessig, *Digital Economy Remixes Outmoded Copyright Notions*, WINNIPEG FREE PRESS, Jan. 11, 2009, at D0.

210. Lenz, 572 F. Supp. 2d at 1152.

211. Lessig, *supra* note 209, at D0.

212. *Id.*

213. Lenz, 572 F. Supp. 2d at 1152.

214. Rampell, *supra* note 189, at D1.

215. Lenz, 572 F. Supp. 2d at 1152.

copyrighted content uploaded onto websites simply for the sake of distribution. There are many examples of entire copyrighted music videos that are uploaded onto websites.²¹⁶ These music videos are usually recorded from television and then broadcast over the Internet to a wider audience.²¹⁷ This “copy and paste” activity, without more, does not promote the societal goals mentioned above. There was no use of creativity and the unauthorized presence of the video on the Internet does nothing to inspire other viewers to use their own imagination.

Another prevalent example of UGC that will not pass muster with the third prong is copyrighted songs uploaded onto YouTube with no accompanying video content.²¹⁸ In these instances, the viewer watches a black screen, which sometimes displays the song title and lyrics as the music plays.²¹⁹ Here, the song is uploaded almost in its entirety for the sake of sharing music. There is no added content to the song and no video images that accompany the music to show the uploader used creativity and inventiveness.²²⁰ This does not promote society’s goals of enhancing the Internet or nurturing imagination because it fails to inspire and lacks creative development.

In conclusion, if the answers to the objective three-pronged framework are all in the negative, then the DMCA should prohibit the copyright holder from sending a takedown notice. This suggested way promotes an equitable balance between the rights of copyright holders and those of consumer-participants.

IV. ANOTHER VIEW OF USER GENERATED CONTENT AND COPYRIGHT LAW

In late 2007, several leading Internet and media companies adopted a set of guidelines that would govern user generated content (UGC), known as the Principles for User Generated Content Services (Principles).²²¹

216. Eugene C. Kim, Note, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139, 141 (2007).

217. See Sebastian Borza, *Music Videos and Copyright, Information Technology and the Law*, Apr. 6, 2005, <http://courseblog.cs.princeton.edu/spring05/cos491/?p=276> (“In general, people can copy music videos to a digital recorder like the TiVO relatively easily, as with any other TV show. From here, the videos are then ‘ripped’ to the user’s computer . . . and then passed throughout the internet via BitTorrent, mIRC, webpages, and other p2p programs.”).

218. See, e.g., YouTube, *The Scientist-Coldplay with Lyrics*, <http://www.youtube.com/watch?v=7Z2wTU8PONG> (last visited Feb. 20, 2009). A quick search of any popular song on YouTube will show the prevalence of music without video.

219. *Id.*

220. *Id.*

221. Principles for User Generated Content Services, <http://www.ugcprinciples.com> (last

These companies include CBS, Disney, Fox Entertainment, Microsoft, MySpace, NBC-Universal, Sony, and Viacom.²²² However, some notable industry giants did not sign on: Google, including its subsidiary YouTube, and Facebook.²²³ The enacted Principles act as a compromise in which copyright holders will not sue content providers so long as the latter makes a concerted effort to block infringing materials.²²⁴ The Principle's four main objectives are: "(1) the elimination of infringing content on UGC Services, (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, (3) the accommodation of fair use of copyrighted content on UGC services, and (4) the protection of legitimate interests of user privacy."²²⁵

The Principles are not legally binding. They are simply an agreement between industry powerhouses to work together and self-regulate before taking the costly route of litigation.²²⁶ Indeed, supporters note that the Principles are "not intended to be and should not be construed as a concession or waiver with respect to any legal or policy position or as creating any legally binding rights or obligations."²²⁷ The most notable feature of the Principles is that they require content providers to install filtering software that patrols for infringing content.²²⁸ Supporters of the Principles believe that filtering software can effectively and efficiently identify infringing content by comparing the content to "Reference Material" provided by copyright owners.²²⁹ The Reference Material includes "(1) the reference data for content required to establish a match with user-uploaded content, (2) instructions regarding how matches should be treated, and (3) representations made in good faith that [the copyright holder] possesses the appropriate rights regarding the content."²³⁰ Google, YouTube, and Facebook—leaders in search technology, video sharing, and social networking, respectively—did not agree to the Principles²³¹ likely

visited Nov. 3, 2008) [hereinafter *Principles*].

222. *Id.*

223. *Id.*

224. *See id.* (explaining that "[i]f a UGC Service adheres to all of these Principles in good faith, the Copyright Owner should not assert a claim of copyright infringement against such UGC Service with respect to infringing user-uploaded content that might remain on the UGC Service despite such adherence to these Principles").

225. *Id.*

226. *Id.*

227. Principles, *supra* note 221.

228. *Id.*

229. *Id.*

230. *Id.*

231. See Sherwin Siy, *Unprincipled "Principles" for User Generated Content*, PUBLIC KNOWLEDGE, Oct. 18, 2007, <http://www.publicknowledge.org/node/1230> (explaining that

due to the risk of alienating their customer bases if they used intrusive filtering technologies.

The Principles also note, “When sending notices and making claims of infringement, Copyright Owners should accommodate fair use.”²³² However, the Principles do not state how fair use should be evaluated.²³³ There is no mention of whether copyright owners should evaluate fair use based on a subjective or objective reasonableness standard.²³⁴ Thus, the Principles fail to address the dispute regarding what standard is more equitable in balancing the rights of copyright holders and consumer-participants.

Finally, the most glaring flaw of the Principles is that they fail to include any consumer advocacy groups.²³⁵ The agreement is a compromise between two competing giants—the “copyright owner” and the “UGC Service.”²³⁶ However, perhaps the most important voice, that of the consumer, is not represented at all. The Principles help foster a better understanding between copyright holders and UGC services, but they do not take into account the concerns of UGC creators.²³⁷ Ordinary users who create UGC still have no recourse if their content is wrongfully and unfairly taken down.

V. CONCLUSION

When the House of Representatives (House) passed the Digital Millennium Copyright Act (DMCA), the House noted, “The principle of fair use involves a balancing process, whereby the exclusive interests of copyright owners are balanced against the competing needs of users of information.”²³⁸ The House also recognized that fair use is “critical to advancing the personal interests of consumers” and “critical to promoting a

Google/YouTube, Facebook, and Yahoo are all absent from the Principles probably because they did not want others regulating their business or enforced deadlines).

232. Principles, *supra* note 221.

233. *See id.* (explaining that copyright owners and UGC services should cooperate in accommodating fair use before infringement occurs, but never explaining what constitutes fair use or the standard to be applied).

234. *See id.* (arguing that in order for both copyright owners and UGC services to comply with the Principles, a standard for fair use must be set).

235. *See id.* (explaining that the Principles only encompass the interests of the UGC operators and not the consumer-participants who post the UGC).

236. *Id.*

237. Siy, *supra* note 231 (arguing that the Principles do not take into account the interests of the consumer-participants who create the UGC).

238. H.R. REP. NO. 105-551, pt. 2, at 25 (1998) (noting that “[t]his balance is deeply embedded in the long history of copyright law”).

robust electronic marketplace.”²³⁹ Despite the culture of fair use embedded in copyright law, the DMCA still appears to favor copyright holders because a mere subjective good faith belief of copyright violation is sufficient to warrant a takedown notice.²⁴⁰ This leaves the content-generating user with a choice: live with the takedown or spend legal fees to fight media giants.

The proposal of an objective standard requires the copyright holder to ask and answer three questions in good faith before the copyright holder decides to send a takedown notice.²⁴¹ This proposal invokes the spirit of the fair use doctrine and is an equitable balance between competing interests. The House committee even recognized the need for an equitable balance when drafting the DMCA because many of the expressed private and public interests predicted that the new law would “undermine Congress’ long-standing commitment to the concept of fair use.”²⁴² The House report on the DMCA included an excerpt of a letter sent to the committee by the Consumers’ Union, an independent consumer advocacy group:

“These newly-created rights will dramatically diminish public access to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them. It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.”²⁴³

The Consumers’ Union wrote the letter in 1998. User generated content (UGC) has been around in one form or another since the early years of the Internet. However, UGC did not become a dominant form of global media affecting how audiences are reached until the last five years, with the widespread availability of high-speed Internet access and search technology.²⁴⁴ Still, these decade-old concerns regarding traditional forms of media can be applied to UGC. Congress can reconsider the DMCA in light of new technological developments, such as UGC, or the courts,

239. *Id.* at 26.

240. See 17 U.S.C. § 512 (2006) (explaining that the allegation must merely be made in writing and under good faith for a takedown notice to be issued).

241. See discussion *supra* Part III.D.

242. H.R. REP. NO. 105-551, pt. 2, at 26 (1998).

243. *Id.*

244. See IAB I, *supra* note 1.

beginning with *Lenz v. Universal*, can interpret the DMCA to require an objective good faith standard before a takedown notice is sent.²⁴⁵ After all, Congress “fully respects and extends into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.”²⁴⁶ Thus, an objectively reasonable standard in determining fair use would restore the balance between copyright holders and users. This balance benefits all if it can effectively reduce litigation and improve the relationship between UGC creators and copyright holders. The three-part framework in analyzing objective good faith seeks to find this balance by using fact-specific questions that can be answered objectively. Therefore, the amateur nature of UGC and the right of copyright holders to exclusively profit from their work would be protected, while still promoting the important societal goal of inspiring creativity.

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245. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

246. H.R. REP. NO. 105-551, pt. 2, at 26 (1998).

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