

# PUBLICATION

---

## Dancing Baby Says Play Fair: Copyright Holders Must Consider Fair Use Before Sending a DMCA Takedown Notice

September 17, 2015

With the exponential growth of internet commerce, business owners are increasingly receiving "takedown" notices under the Digital Millennium Copyright Act (DMCA), involving copyrighted works allegedly improperly used on their websites or promotional channels. A recent decision by the Ninth Circuit Court of Appeals gives recipients of such notices a limited means to challenge the notices.

On September 14, 2015, the Ninth Circuit Court of Appeals ruled that the DMCA requires copyright holders to consider fair use before sending a DMCA takedown notification. The closely-watched case, which has come to be known as the "Dancing Baby" case, involved a YouTube video wherein the plaintiff's infant son can be seen dancing to the Prince song "Let's Go Crazy." After discovering the video on YouTube, Universal Music Corporation sent YouTube a DMCA takedown notice regarding the video. The plaintiff, Stephanie Lenz, responded to Universal's takedown notice with a DMCA counter-notice, demanding that her video be reinstated on YouTube. Subsequently, she filed suit against Universal for misrepresentation under the DMCA, which subjects a copyright holder to liability if the copyright holder materially misrepresents that the material at issue – in this case Lenz's YouTube video – is infringing.

The basis for Lenz's misrepresentation claim is found in section 512(c)(3)(A)(v) of the DMCA, which requires a takedown notification 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." Lenz contended that fair use is an authorization under the law as contemplated by the DMCA and, therefore, failure to consider fair use results in a party serving a DMCA takedown notice that lacks the requisite "good faith belief."

The primary challenge to requiring a party to consider fair use before serving a DMCA takedown notice is the subjective nature of what qualifies as fair use. Generally, fair use of copyrighted material is defined as the copying of such material for a limited and "transformative" purpose, such as for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." As neither the DMCA or the Copyright Act include a black-line test for fair use, any considerations now required in the wake of this ruling will call for the subjective consideration of the copyright holder, prior to sending a DMCA takedown notice, as to whether the unauthorized use of its copyrighted materials constitutes fair use.

While the Ninth Circuit's ruling does add an additional requirement for copyright holders prior to sending a DMCA takedown notice, the court lessened the impact of its ruling by holding that if a copyright holder forms a subjective good faith belief that the allegedly infringing material does not constitute fair use, then the courts are "in no position to dispute the copyright holder's belief even if [the court] would have reached the opposite conclusion." Although the Ninth Circuit requires that more than mere "lip service" be paid to the fair use consideration, the copyright holder's consideration of fair use need not be searching or intensive," as the "formation of a subjective good faith belief does not require investigation of the allegedly infringing content."

DMCA takedown notices have become a common way for individuals and businesses to protect their copyrighted materials. If you have any questions or want to discuss how this decision could impact your

business – either in sending a notice or upon receiving a notice – please contact an attorney in the Firm's Intellectual Property Group.