

§ 512 – RECENT CASE LAW

■ Felicity Kohn



**Lenz v. Universal Music Corp.,
815 F.3d 1145 (9th Cir. 2016)**



"Let's Go Crazy" #1



Stephanie Lenz

Subscribe 169

1,902,228 views

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2,776 323



■ ***Lenz v. Universal Music Corp.,***
815 F.3d 1145 (9th Cir. 2016)

FACTUAL BACKGROUND

In 2007, Stephanie Lenz posted on YouTube a 29-second video of her toddler dancing to the Prince song “Let’s Go Crazy.”

<https://www.youtube.com/watch?v=N1KfJHFWlhQ>

Universal Music Corp. (“Universal”) sent a takedown notice to YouTube, claiming that Lenz’s video violated its copyright in the song.


Lenz filed suit under Section 512(f), claiming Universal abused the takedown procedures by failing to consider fair use before sending its notice.



**■ *Lenz v. Universal Music Corp.*,
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FACTUAL BACKGROUND


- Assistant in Universal’s legal department was assigned to search YouTube for Prince songs and send takedown notices where he deemed appropriate.
- He considered whether the videos “embodied a Prince composition” by making “significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video.”
- Fair use was not explicitly included in Universal’s guidelines, but its takedown notice stated it had a good faith belief that “the infringing material was not authorized by the copyright holder, its agent, or the law.”



■ ***Lenz v. Universal Music Corp.,***
815 F.3d 1145 (9th Cir. 2016)

PROCEDURAL HISTORY

- Both parties cross-moved for summary judgment, and the district court denied both motions.
- The district court then certified its summary judgment order for interlocutory appeal to the Ninth Circuit.



**Lenz v. Universal Music Corp.,
815 F.3d 1145 (9th Cir. 2016)**

HOLDING

The Ninth Circuit held that the DMCA requires copyright holders to consider fair use before sending takedown notices.

In this case, the court found a triable issue of fact as to whether Universal formed a subjective good faith belief that the video did not constitute fair use before sending its takedown notice.



■ ***Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016)**

REASONING

- Universal argued that fair use is not “authorized by the law” because it is an affirmative defense that excuses otherwise illegal conduct. The court disagreed.
- The Ninth Circuit cited to the Supreme Court’s statement in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), that “anyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use” to justify its conclusion. 815 F.3d at 1152.
- The Ninth Circuit further found that even if fair use is considered a traditional affirmative defense, Section 107 of the Copyright Act created a type of non-infringing use, and thus, fair use is “authorized by the law.”




**■ *Lenz v. Universal Music Corp.*,
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REASONING

The Ninth Circuit then considered whether a genuine issue of material fact existed as to whether Universal knowingly misrepresented that it had formed a good faith belief that Lenz’s video did not constitute fair use.


- This is a subjective standard, as established in *Rossi v. Motion Picture Association of America, Inc.*, No. 03-16034 (9th Cir. 2004).
- That said, mere lip service to having considered fair use will not allow a copyright holder to escape liability under Section 512(f) if there is evidence in the record to the contrary.



BMG Rights Management (US) LLC v. Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

FACTUAL AND PROCEDURAL BACKGROUND


- BMG sought to hold Cox liable for the infringing activity of its subscribers based on their uploading and downloading of copyrighted musical works using the peer-to-peer file sharing network BitTorrent.
- The plaintiffs enlisted Rightscorp to identify infringing uses of their copyrighted works and send takedown notices to the ISP.
- According to BMG, Rightscorp sent 2.5 million notices to Cox identifying instances of infringement by its users.



BMG Rights Management (US) LLC v. Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

COX'S ACCEPTABLE USE POLICY


- Cox has an Acceptable Use Policy that prohibits subscribers from using Cox's internet service to engage in copyright infringement and provides that violation of any terms of the policy may result in suspension or termination of access to the Cox service or the user's account.
- Cox's response to a user's infringement theoretically ratchets up in severity, from a warning to suspension or termination of the user's account, depending on the number of complaints received.



***BMG Rights Management (US) LLC v. Cox Communications, Inc.*, 149 F.Supp.3d 634 (E.D. Va. 2015)**

COX'S ACCEPTABLE USE POLICY


- The court highlighted three aspects of Cox's Abuse Tracking System ("CATS").
 - First, when Cox receives multiple complaints in one day for a single account, those complaints are "rolled up" and only the first complaint is counted.
 - Second, Cox imposes a "hard limit" on the number of complaints a complainant can submit per day that will receive customer-facing action; the default limit is 200 complaints per complainant per day, which Cox claims is necessary to prevent a single complainant from overwhelming the company.
 - Third, while Cox maintains a complete record of the complaint history for its accounts, if no complaints concerning a given account are received within six months, the cycle restarts and that user's proverbial slate is wiped clean.



BMG Rights Management (US) LLC v. Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

QUESTION PRESENTED


- Is Cox entitled to protection under the DMCA safe harbor provisions?
 - The parties cross-moved for summary judgment on this issue.



BMG Rights Management (US) LLC v. Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

HOLDING

The district court found that Cox did not reasonably implement its repeat infringer policy, and was therefore not entitled to protection under the safe harbor provision of the DMCA.



BMG Rights Management (US) LLC v. Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

REASONING

- Based on its interpretation of Section 512(i), the court found that Cox does not terminate access of repeat infringers under appropriate circumstances.
- It did not decide whether other aspects of Cox's policy might also render Cox ineligible for the DMCA safe harbor.



BMG Rights Management (US) LLC v.

Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

REASONING

- The court found that prior to the Fall of 2012, Cox failed to implement its repeat infringer policy; accounts of chronic infringers were nominally terminated but in fact reactivated upon request and the users were given clean slates. Emails from senior management show this was an unwritten company policy.
- After the Fall of 2012 when this suit was filed, Cox ceased its policy of reactivating terminated accounts, but instead stopped terminating them in the first place.
- The case went to jury trial on the issue of Cox's vicarious and contributory infringement.

BMG Rights Management (US) LLC v.

Cox Communications, Inc., 149 F.Supp.3d 634 (E.D. Va. 2015)

CURRENT STATUS

- In a jury trial in 2016, Cox was found innocent of vicarious infringement but liable for willful contributory infringement.
- The jury awarded BMG \$25 million in statutory damages. Post-trial, Cox moved for a new trial, while BMG sought judgment as a matter of law on its claim of vicarious infringement and permanent injunctive relief.
- The court denied both parties' motions and entered final judgment in accordance with the verdict.
- The case is now on appeal to the Fourth Circuit.



EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)

FACTUAL BACKGROUND

- MP3tunes was founded in 2005 by the former operator of MP3.com, which had been found liable for copyright infringement in 2000.
- MP3tunes ran the website MP3tunes.com, which permitted customers to purchase MP3s of music created by artists who were not associated with major record labels.
- It later added a “locker storage” service, associated with a website called sideload.com, which allowed users to search for free music on the Internet that they could then download to their “lockers.”
- Those songs were then added to sideload.com’s index of searchable songs.



■ ***EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)***

FACTUAL BACKGROUND

- Thus, the more songs that users downloaded into their so-called “lockers,” the larger the sideload.com database of available music became.
- As a result, MP3tunes encouraged users to upload songs from their own accounts, regardless of whether those songs came from websites that appeared to contain infringing material.



■ *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016)

PROCEDURAL HISTORY

- November 9, 2007: EMI Publishing and EMI Records bring suit claiming thousands of works.
- March of 2014: **jury trial** resulting in a **\$48 million** verdict.
- September 29, 2014: JMOL decision.
- October 25, 2016: Second Circuit decision largely **reinstating** verdict.



EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)

SECOND CIRCUIT APPEAL

The Second Circuit appeal addressed two rulings made by the district court concerning the DMCA:

- (1) that MP3tunes reasonably implemented a repeat infringer policy and was therefore eligible for DMCA safe harbor protection; and
- (2) that the jury's finding of red flag knowledge or willful blindness was wrong as a matter of law.



EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)

SECOND CIRCUIT DECISION

The Second Circuit found that:

- (1) whether MP3tunes had reasonably implemented a repeat infringer policy was a question of material fact for the jury, and therefore vacated the district court's judgment in favor on MP3Tunes; and
- (2) the plaintiff had not failed as a matter of law to show that the defendants had red flag knowledge of or were willfully blind to infringement on their websites, and therefore reversed that portion of the district court's judgment.



EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)

DEFINITION OF REPEAT INFRINGER

- The district court defined a “repeat infringer” as one who uploads infringing content to the Internet, with knowledge that such material is infringing.
- The Second Circuit rejected that definition, finding that a user who repeatedly interferes with one of the exclusive rights of a copyright holder (whether uploading or downloading copyrighted material from the Internet without permission) is a “repeat infringer.” 844 F.3d at 89.



EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)

IMPLEMENTATION OF REPEAT INFRINGER POLICY

- In order to show that it had implemented a policy re repeat infringers (using the Second Circuit's definition), MP3tunes presented evidence that it had terminated 153 users who had shared locker passwords.
- But in response, plaintiffs showed that MP3tunes made no effort to connect infringing content of which it was made aware through takedown notices to users who repeatedly downloaded that infringing content.
- The court found that asking MP3tunes to connect information already in its possession with known users was not, as a matter of law, inconsistent with Section 512(m)(1), under which an ISP does not have an affirmative duty to monitor infringing activity on its site.



■ *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016)

RED FLAG KNOWLEDGE/WILLFUL BLINDNESS

- [E]ven if a service provider has a reasonably implemented repeat infringer policy, it relinquishes the DMCA’s safe harbor if it
 - First, has “**actual knowledge** that the material ..on the system is infringing” or “is [] aware of facts or circumstances from which **infringing activity is apparent,**” and
 - Second, “upon obtaining such knowledge or awareness, [does not] act[] **expeditiously to remove,** or disable access to, the material.”



■ ***EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)***

RED FLAG KNOWLEDGE/WILLFUL BLINDNESS

The jury found that MP3tunes had knowledge as to four categories of files:

- (1) those stored on domains identified in takedown notices as having **ten or more** infringing files;
- (2) sideloads of MP3s before **January 2007** [reversed by JMOL];
- (3) certain sideloads by **MP3tunes executives**; and
- (4) works by the **Beatles** [reversed by JMOL].

Second Circuit found jury had sufficient evidence to conclude MP3tunes had red flag knowledge or was willfully blind to infringement on its website.




■ ***EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016)***

RED FLAG KNOWLEDGE/WILLFUL BLINDNESS

The Second Circuit emphasized that nothing in its decision should be construed to condition safe harbor on a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.


- *“A time-limited, targeted duty—even if encompassing a large number of songs—does not give rise to an ‘amorphous’ duty to monitor in contravention of the DMCA.”*



***Mavrix Photographs, LLC v.
LiveJournal, Inc., No. 8:13-cv-00517 (9th Cir. 2017)***

FACTUAL BACKGROUND


- LiveJournal is a social media and blogging platform.
- Mavrix sued LiveJournal for posting twenty of its copyrighted photographs online.
- The district court held that LiveJournal was shielded from liability under the safe harbor provided by Section 512(c) of the DMCA because the photographs were posted at the direction of the user.



Mavrix Photographs, LLC v. LiveJournal, Inc., No. 8:13-cv-00517 (9th Cir. 2017)

PROCEDURAL HISTORY


- Mavrix appealed the district court's summary judgment decision in favor of LiveJournal.
- Mavrix contended that LiveJournal is not eligible for DMCA safe harbor protection because of its use of moderators.
 - The photographs were submitted by users, but LiveJournal posted them only after a team of volunteer moderators led by a LiveJournal employee reviewed them for compliance with the site's rules and approved them.
 - The rules pertain to copyright infringement as well as substantive compliance for users, e.g., to include the article and picture referenced in the post rather than referring users to another site, and to keep the material in posts recent.



■ ***Mavrix Photographs, LLC v.
LiveJournal, Inc., No. 8:13-cv-00517 (9th Cir. 2017)***

QUESTION PRESENTED


- Does the common law of agency apply to LiveJournal's safe harbor defense?



■ ***Mavrix Photographs, LLC v.
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HOLDING


- Yes, the common law of agency applies to the safe harbor defense.
- As there are genuine disputes of material fact regarding whether the moderators are LiveJournal's agents and therefore make LiveJournal liable for their acts, the Ninth Circuit reversed and remanded for trial.
- On remand, if the fact finder concludes that the moderators are agents of LiveJournal, the fact finder must then assess whether Mavrix's photographs were nevertheless posted at the direction of users.



■ ***Mavrix Photographs, LLC v. LiveJournal, Inc.*, No. 8:13-cv-00517 (9th Cir. 2017)**

REASONING


- Statutes are presumed not to disturb the common law, unless the language of the statute is clear.
 - Pursuant to this principle, courts have applied common law in cases involving federal copyright law, including the DMCA. *See, e.g., Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).



***Mavrix Photographs, LLC v.
LiveJournal, Inc., No. 8:13-cv-00517 (9th Cir. 2017)***

REASONING

- Applying the common law of agency, the court found that Mavrix presented evidence that LiveJournal gave its moderators explicit and varying levels of authority to screen posts, and provided criteria for accepting or rejecting posts.
 - This created a genuine issue of material fact concerning whether the moderators had actual authority.
- In addition, Mavrix presented evidence that LiveJournal users may reasonably have believed that the moderators had authority to act for LiveJournal (e.g., presuming that if material was approved by a moderator, it must not infringe copyright), thus creating a genuine issue of material fact regarding whether the moderators were endowed with apparent authority.



Mavrix Photographs, LLC v. LiveJournal, Inc., No. 8:13-cv-00517 (9th Cir. 2017)

WHETHER THE SAFE HARBOR STILL APPLIES IF MODERATORS ARE AGENTS

- If the fact finder concludes that the moderators are agents of LiveJournal, the fact finder must then assess whether the photos at issue were posted at the direction of the user.
- The safe harbor applies as long as the service provider carried out only those activities that were “narrowly directed” towards enhancing the accessibility of the posts.
 - Such activities include automatic processes, such as reformatting posts, as well as screening for infringement or pornography.
- If the moderators’ activities went beyond the limited activities the courts have approved as accessibility enhancing, then the safe harbor is not available to LiveJournal.

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