

**Nos. 13-16106, 13-16107**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**STEPHANIE LENZ,**  
*Plaintiff/Appellee/Cross-Appellant,*

v.

**UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC.,  
AND UNIVERSAL MUSIC PUBLISHING GROUP,**  
*Defendants/Appellants/Cross-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
HONORABLE JEREMY FOGEL, UNITED STATES DISTRICT JUDGE  
CASE No. 5:07-cv-03783-JF

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**ANSWER TO LENZ'S PETITION FOR REHEARING EN  
BANC OR PANEL REHEARING**

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**MUNGER, TOLLES & OLSON LLP**  
KELLY M. KLAUS  
kelly.klaus@mto.com  
MELINDA LEMOINE  
melinda.lemoine@mto.com  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
Telephone: (213) 683-9100

**SIDLEY AUSTIN LLP**  
MARK E. HADDAD  
mhaddad@sidley.com  
555 West Fifth Street, 40<sup>th</sup> Floor  
Los Angeles, California 90013  
Telephone: (213) 896-6000

Attorneys for Defendants/Appellants/Cross-Appellees  
UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC., AND  
UNIVERSAL MUSIC PUBLISHING GROUP

## **CORPORATE DISCLOSURE STATEMENT**

Universal Music Corp. and Universal Music Publishing, Inc. are directly or indirectly owned by Vivendi S.A., which is publicly traded on NYSE Euronext. Universal Music Publishing Group is the colloquial name used to refer to the music publishing operations of the Universal Music Group of companies, all of which are directly or indirectly owned by Vivendi S.A.

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## INTRODUCTION

Ms. Lenz asks the en banc court to overrule or limit *Rossi v. MPAA*, 391 F.3d 1004 (9th Cir. 2004). *Rossi* held that, by requiring in 17 U.S.C. § 512 of the Digital Millennium Copyright Act (“DMCA”) that copyright holders form a “good faith belief” in the propriety of their takedown notices, and by imposing damages liability only where holders “knowingly” misrepresent infringement, Congress set a subjective standard of liability. Lenz now insists that the measure of liability under section 512 is objective—what a copyright holder should have known.

Lenz lacks standing to seek such review. She used the statutory put-back procedure to re-post her video on YouTube before bringing suit, and suffered no concrete injury-in-fact. Even if Lenz did have standing, her petition would not satisfy the standards for en banc review. Lenz does not identify a single decision that conflicts with or criticizes *Rossi*. See Fed. R. App. P. 35(b)(1). Instead, numerous courts in and out of this Circuit have followed *Rossi*. See *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 342-43 (D. Mass. 2013) (collecting cases). Furthermore, it is Lenz’s proposed reading of “good faith belief” that would conflict with settled Supreme Court precedent interpreting that phrase, see *Cheek v. United States*, 498 U.S. 192 (1991), and this Court must presume that Congress intended to preserve that settled meaning. Absent any indication that *Rossi* conflicts with other decisions, Lenz’s proposed question does not warrant en banc review.

Lenz’s policy concerns also do not merit en banc review. In section 512, Congress balanced the needs of copyright holders, internet service providers, and internet users by facilitating both the prompt takedown of infringing material and

the reposting of material that users believe was erroneously taken down. Here, Universal, YouTube, and Lenz used that process and it worked as Congress intended. Although Lenz and her *amici* express concern that a subjective standard may unreasonably stifle some types of speech, there is no evidence that Congress shared this concern, and Lenz's facts do not implicate it.

Finally, Lenz's petition for panel rehearing is unsound. Lenz wrongly claims it is "undisputed" that Universal did not consider fair use before sending its notice. Although Universal did not label its review "fair use," Universal did consider facts and circumstances that substantively considered fair use.

### **REASONS WHY LENZ'S PETITION SHOULD BE DENIED**

Lenz did not suffer an injury-in-fact. She lacks standing and her case should be dismissed. Even if Lenz did have standing, however, her proposed questions for review lack merit.

#### **I. Lenz Lacks Article III Standing.**

The parties did not originally brief whether Lenz suffered an injury-in-fact. Nevertheless, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Inst.*, 555 U.S. 488, 499 (2009). Because, given the lack of briefing, the panel may have "overlooked or misapprehended" the basis for jurisdiction, Fed. R. App. P. 40(a)(2), Universal petitioned for panel rehearing on this important issue.

As Universal's petition explains, Lenz successfully used the statutory put-back process, which "resulted in YouTube's reinstatement of the video in mid-July" 2007, before she filed suit. Slip Op. 7. At summary judgment, Lenz adduced no evidence that the temporary takedown of her video prior to filing suit had



caused her economic loss. As to non-pecuniary harm, the panel correctly held that her allegation that she has been chilled by her experience from posting any other videos creates no basis for Lenz to seek even nominal damages. Slip Op. 23 n.4; *see Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013); *Gest v. Bradbury*, 443 F.3d 1177, 1182 (9th Cir. 2006). Having suffered no concrete or particular injury that a court can redress, Lenz lacks standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-07 (1998).

Lenz's petition confirms that Lenz is fighting only for a general cause, and not seeking a remedy for any injury particular to her. Even if the statutory put-back procedure might be an ineffective remedy for some whistleblowers, scholars, political parodists, or others, it *was* effective for Lenz. For her, the put-back procedure worked precisely as Congress intended. When a litigant seeks review of important legal issues, a court must be "especially rigorous" in evaluating standing before "reaching the merits of a dispute." *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

## **II. Lenz's Proposed Question Does Not Merit En Banc Review.**

Even if Lenz had standing, the question she raises would not warrant en banc review. In *Rossi*, the court unanimously held that a copyright holder's liability under section 512 depends upon the holder's *subjective* view as to whether online content is infringing. No court has questioned that holding, and no case conflicts with *Rossi*'s reasoning.<sup>1</sup>

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<sup>1</sup> To be clear, Universal believes that certain issues in this litigation, including standing, are exceptionally important. But Lenz's petition does not seek review of those issues.

**A. *Rossi* Is Grounded In The DMCA’s Plain Language And Relevant Case Law.**

Section 512(c) requires a copyright holder to have a “good faith belief” that an internet posting is not authorized before sending a takedown notice. In seeking to overturn *Rossi*, Lenz primarily argues that courts should construe “good faith belief” as equivalent to a belief “that is also *reasonably* held . . . .” Pet. 10. The statute’s text does not support this reading, and the case law forecloses it.

Lenz’s reading conflicts with the plain meaning of the constituent terms “good faith” and “belief,” which each refer to one’s state of mind. Lay and legal dictionaries alike equate *good faith* not with objective reasonableness, but with “sincerity” and “honesty.” *E.g.*, Oxford English Dict. (3d ed. 2014), [www.oed.com/view/Entry/363783](http://www.oed.com/view/Entry/363783) (“[f]aithfulness, loyalty, truthfulness; *esp.* honesty or sincerity of intention” or “undertaken in the belief that what one is doing is right or correct”); Black’s Law Dict. (10th ed. 2014) (“Good faith” is “[a] state of mind consisting [of] . . . honesty in belief or purpose”). The term “belief,” in turn, expresses one’s subjective “[m]ental conviction,” Oxford English Dict. (3d ed. 2014), [www.oed.com/view/Entry/363783](http://www.oed.com/view/Entry/363783), or “state of mind . . . regard[ing] the existence or truth of something as likely or relatively certain,” Black’s Law Dict. (10th ed. 2014). It is highly doubtful that a legislature bent on establishing an objective standard of liability would do so by conjoining two plainly subjective terms.

Were there any room for doubt about the plain meaning of “good faith belief,” the Supreme Court foreclosed it in *Cheek v. United States*, 498 U.S. 192 (1991). The lower courts had upheld Cheek’s conviction for willful tax evasion despite his “good-faith belief” that his wages were not income, because those courts

(like Lenz) thought a “good-faith belief” exists “only if the defendant’s beliefs are objectively reasonable.” *Id.* at 198. The Supreme Court reversed. It rejected the “requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating . . . evidence purporting to show a defendant’s awareness of the legal duty at issue.” *Id.* at 203. The Court reasoned that an objective standard made little sense for a concept like “belief,” as “[k]nowledge and belief are characteristically questions for the factfinder,” and “[c]haracterizing a particular belief as not objectively reasonable [would impermissibly] transform[] the inquiry into a legal one and would prevent the jury from considering it.” *Id.*

In so holding, the Court considered and rejected the very policy argument Lenz asserts, that a subjective standard permits defendants to “escape liability based on *unreasonable* beliefs about the law.” Pet. 16; *see id.* at 3, 13-17 (arguing in the alternative that *Rossi* should be limited to issues of fact). The Supreme Court ruled that a jury is fully capable of dispatching incredible assertions of purported belief, whether of law or fact. *Id.* at 203-04 (“[T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties.”).

There is a “presumption that Congress is aware of settled judicial and administrative interpretation[s] of terms when it enacts a statute.” *Nat’l Cable & Telecommc’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (quotation omitted); *see In re Egebjerg*, 574 F.3d 1045, 1050 (9th Cir. 2009) (courts must “presume that when Congress legislates, it is aware of past judicial interpretations and practices” (construing *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992))). Because

*Cheek* was handed down some seven years prior to the DMCA, this Court should presume that Congress was aware of *Cheek*'s interpretation of "good faith belief."

That *Cheek* was a criminal case does not affect its application here. *Rossi*'s construction of "good faith belief" accords not only with *Cheek*, but with the construction of "good faith belief" in civil contexts.<sup>2</sup> For example, the Patent Act requires a patentee who seeks to "charg[e] a person with infringement" to "specify the patented process alleged to have been used and the reasons for a good faith belief that such process was used." 35 U.S.C. § 287(b)(5)(B). In *GP Indus. v. Eran Indus.*, 500 F.3d 1369 (Fed. Cir. 2007), the Federal Circuit held that a violation of that statute requires *both* objective unreasonableness *and* subjective bad faith. *Id.* at 1375 ("Subjective considerations of bad faith are irrelevant if the assertions are not objectively baseless. . . . Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." (citation omitted)).

Other civil statutes likewise support for *Rossi*'s observation that, "[w]hen enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness." 391 F.3d at 1004. For example, there is a defense against civil actions for invasions of privacy, but only when "the officer or employee had a *reasonable good faith belief* in the lawfulness of his conduct." 42 U.S.C. § 2000aa-6 (emphasis added). Congress similarly could have added the word "reasonable" to

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<sup>2</sup> The Sixth Amendment concerns noted in *Cheek* also have an analog here, as Universal's liability under the Copyright Act is subject to comparable Seventh Amendment protections, *cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998), and the need for a jury to determine the issue of "belief" is the same.

the phrase “good faith belief” in section 512(c), but it did not.

Another example comes, ironically, from one of the few cases that Lenz suggests might conflict with *Rossi*. In *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986), *abrogated by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990)), as Lenz notes, this Court found in the context of Rule 11 that a “good faith belief in the merit of a legal argument is an objective condition.” *See* Pet. 10 (quoting *Zaldivar*, 780 F.2d at 831). But *Zaldivar* reached that conclusion only because of changes to Rule 11 that intentionally replaced the prior *subjective* standard with a new *objective* standard. *Zaldivar* explains that, “[p]rior to the 1983 amendments, Rule 11 was interpreted to require subjective bad faith by the signing attorney to warrant the imposition of sanctions.” *Zaldivar*, 780 F.2d at 829. “Th[at] interpretation was *compelled*,” *Zaldivar* further explains, “because the text of the former Rule was plainly subjective in its focus” on an attorney’s “*knowledge, information, and belief*” about the support for his arguments. *Id.* (emphases added). In contrast, “[t]he new text [of Rule 11] represents an *intentional abandonment of the subjective focus* of the Rule in favor of an objective one,” which now uses “a ‘*reasonableness*’ standard” that “is more stringent than the *original good-faith formula . . .*” *Id.* (emphasis added) (quoting Rule 11 advisory committee note). *Zaldivar* thus illustrates that, when Congress wants to create an objective standard, it knows how to do so by adding language (like “reasonable inquiry”) that is absent here.<sup>3</sup>

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<sup>3</sup> Lenz also cites cases interpreting the bankruptcy code and U.C.C. *See* Pet. 15-16. The bankruptcy cases largely predate *Cheek*, address the statutory phrase “good faith” rather than “good faith belief,” and involve the distinct concept of good faith in business that “is not susceptible of precise definition.” *In re Agric. Research &*  
(continued . . .)

Finally, Lenz argues that Congress’s use of the word “knowingly” in section 512(f) establishes an objective standard that includes “constructive knowledge,” *i.e.*, what an actor “should have known.” Pet. 10-11 & n.37 (citation omitted). This attack fails for reasons similar to Lenz’s arguments as to “good faith belief.” When Congress intended to create liability under a “should-have-known” standard elsewhere in the DMCA, it said so expressly. *See* DMCA, Pub. L. No. 105-304, sec. 103, § 1202(b)(3), 112 Stat. 2860, 2872 (1998) (codified at 17 U.S.C. § 1202(b)(3)) (“knowing, or, . . . having reasonable grounds to know”); *see also id.* sec. 406, § 4001(a), 112 Stat. at 2903 (codified at 28 U.S.C. § 4001(a)) (“knows or has reason to know”); *id.* sec. 202, § 512(c)(1)(A)(ii), (d)(1)(B), 112 Stat. at 2880-81 (codified at 17 U.S.C. § 512(c)(1)(A)(ii)) (“is not aware of facts or circumstances from which infringing activity is apparent”). Because Congress added objective qualifiers to “knowingly” elsewhere in the DMCA, but omitted any in section 512(f), courts should not write in such a limitation. When “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Lenz also cites to the construction of “knowingly” in *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884), but *Cooper* involved contractual fraud rather than a statute. *Id.* at 152-55. Subsequent decisions make clear that the term “knowingly,” and

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(. . . continued)  
*Tech Grp.*, 916 F.2d 528, 536 (9th Cir. 1990); *see* 11 U.S.C. § 548(c). The U.C.C.’s definition of good faith includes “honesty in fact.” U.C.C. § 1-201(b)(20).

its frequent companion “willfully,” are “susceptible to more than one meaning” and must be construed in light of the statute where they appear. *United States v. Liu*, 731 F.3d 982, 989 & n.2, 993 (9th Cir. 2013); *see id.* at 990 (citing *Cheek* with approval). In *Liu*, this Court interpreted the statutory prohibition against “knowingly” trafficking in counterfeit or illicit labels to apply only to defendants who were subjectively aware of the labels’ counterfeit or illicit nature. *Id.* at 993. Similarly, in *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 563-64 (1971), the Supreme Court held that “knowingly” violating the Interstate Commerce Act required assessing the defendant’s subjective awareness of facts constituting the violation. *See SEC v. Todd*, 642 F.3d 1207, 1219 (9th Cir. 2011) (“knowingly” is subjective for securities regulations). Because section 512(c)’s “good faith belief” standard is subjective, and because Congress omitted objective language from section 512(f), *Rossi* correctly construed section 512 to impose a subjective standard.

**B. Lenz’s Policy Concerns Do Not Warrant En Banc Review.**

Lacking any basis in the statute or case law to support en banc review, Lenz asks this Court to reverse *Rossi* based on policy concerns. This policy-based request is both improper and unsupported.

By advancing an interpretation of section 512 that the plain language forecloses, Lenz is asking the Court to amend rather than to apply the statute. Where the statute’s plain language is constitutionally sound, courts may not “alter the text in order to satisfy the policy preferences of” litigants. *Barnhart*, 534 U.S. at 462; *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (“[I]t is not for [courts] to substitute [their] view of . . . policy for the legislation which has been passed by Congress.” (quotation omitted)).

Lenz's arguments about the DMCA also fundamentally misunderstand its history and purpose. Lenz claims that section 512 is "unique" and capable of abuse because "it provides copyright owners with a streamlined, extra-judicial means of silencing speech." Pet. 7. Lenz's concern is that whistleblowers, political parodists, and others will be unable to vindicate their right to post critical commentary, because the targets of their criticism will "escape liability" under the subjective standard. *Id.* at 16. But nothing suggests Congress shared these concerns. Congress was well aware that copyright holders regularly asked internet service providers to take down infringing material. Congress intended section 512's takedown provisions not to discourage takedowns, but to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. 105-190, 105th Cong., at 20; *see id.* at 45 ("Th[e] 'notice and takedown' procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.").

Congress's silence about the potential abuses of section 512's takedown procedure likely reflects the lack of a meaningful connection between the abuses Lenz emphasizes and the choice among standards of mens rea. Intentional interference with pre-election political speech, for example, easily satisfies a subjective liability standard. Conversely, instances of poets or professors wrongfully taking down postings that criticize their works are probably the work of copyright holders who lack any understanding of copyright law; a judicial decision announcing an objective standard under section 512 is unlikely to alter their conduct. *See* Pet. 8.



Moreover, determining whether a subjective standard of liability encourages copyright holders to be unreasonably ignorant of the law, *see, e.g.*, Pet. 12-13, is a task fit more for a congressional hearing than for en banc review. Similar concerns could be advanced whenever Congress adopts a subjective standard, but whether such concerns would ever materialize is unclear. In the nearly 25 years since *Cheek* was decided, for example, the subjective standard for ignorance of one's tax liability has not incentivized widespread nonpayment of taxes, and so Congress can reasonably conclude that subjective standards do not lead inexorably to anarchy. That has been true of the DMCA, for, even "[i]n amici's experience, most DMCA notices are valid, well-founded, and sent in good faith." Brief of Automattic Inc. at 4.

Even where a takedown notice is improper, moreover, Congress created the put-back procedure to "balance the need for rapid response to potential infringement with the end-users['] legitimate interests in not having material removed without recourse." S. Rep. 105-190, 105th Cong., at 20-21, 49. On this point, Lenz's presentation of the Senate Report is inaccurate. Congress did not "craft[] § 512(f)" to be the "recourse" for improper takedowns, *see* Pet. 11-12, but instead to "deter knowingly false allegations." S. Rep. 105-190, at 49. The primary "recourse" for an improper takedown instead is the put-back remedy. Lenz's inaccurate interpretation of the Senate Report is clear when her quotation is read in context, which shows that Congress was explaining why public entities could comply with the notice-and-take down process without implicating due process concerns because "the provisions for the replacement of removed or disabled materials in subsection 512(f) [later codified as subsection 512(g)] provide all the process that

is due.” *Id.* at 20-21. Lenz and *amici* also contend that the DMCA’s put-back procedures are difficult to use and unsuitable for whistleblowers or others who desire anonymity (*see, e.g.*, Brief of Public Knowledge, et. al., at 10), but overruling *Rossi* will not address that problem, because litigating under an “objective” standard of liability also is difficult, also defeats anonymity, and also is subject to abuse.

Finally, Lenz’s policy concerns are not at play here. Universal did not stifle political speech, expose a whistleblower, or instruct employees that names alone are copyrighted. Lenz freely and successfully used the put-back procedures, and her content remains online. Even if the Court were inclined to address such policy concerns, it should wait until they manifest themselves in facts before the Court.

### **III. Lenz’s Requested Basis For Panel Rehearing Is Unfounded.**

Alternatively, Lenz asks the panel to hold, under the subjective standard, that Universal is liable as a matter of law, because its “guidelines” for takedown notices “made no mention of fair use.” Pet. 18. Granting Lenz’s request would be highly unusual, because “[k]nowledge and belief are characteristically questions for the factfinder . . . .” *Cheek*, 498 U.S. at 203.<sup>4</sup>

In assailing Universal’s guidelines, Lenz elevates form over substance. While the guidelines did not mention “fair use” by name, Universal did assess, as a practical matter, each statutory fair use factor, held a good faith belief that Lenz’s posting infringed Prince’s copyright in *Let’s Go Crazy*, and did not knowingly misrepresent infringement.

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<sup>4</sup> *See Pierce v. United States*, 252 U.S. 239, 250-51 (1920); *United States v. Kelley*, 136 F.2d 823, 826-27 (9th Cir. 1943) (“The conflict, if any, was for the jury, not the court, to resolve.”).

Purpose and Character of the Use. Universal’s review considered the two elements of the first fair use factor, whether Lenz’s posting was or was not (a) commercial and (b) transformative. *See Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 627-28 (9th Cir. 2003), *overruled on other grounds, Flexible Life-line v. Precision Lift*, 654 F.3d 989, 995 (9th Cir. 2011). Universal considered all YouTube postings—including Lenz’s—to be commercial, because YouTube is a for-profit service that depends on audio-visual content to attract users and increase YouTube’s bottom line.<sup>5</sup> (8ER 1362:16-1363:22 (Allen Dep.)). Universal also determined that Lenz’s “Let’s Go Crazy #1” posting was not transformative, because Universal determined that *Let’s Go Crazy* was a focus of this posting. Although Lenz claims that Universal sent the takedown notice merely “because the song *Let’s Go Crazy* could be heard in the background,” Pet. 2, Universal concluded that *Let’s Go Crazy* was a focus of the posting because (1) the music played loudly and continuously throughout the posting; (2) the posting used the composition’s title; and (3) the voice in the background specifically called attention to the music. (8ER 1389:4-1395:16 (Johnson Dep.)). Based on this fact-specific conclusion, Universal’s policies deemed this posting (like others that made Prince’s works their focus) to be a synchronization use that Prince, as the owner, had the right to decide whether to license. (8ER 1347:9-1348:22 (Allen Dep.)). While Universal’s guidelines did not refer by name to “transformative use,” Universal reached a good

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<sup>5</sup> YouTube’s for-profit, commercial status is directly relevant to any consideration of fair use because YouTube’s compliance with the takedown (and put-back) requirements of 17 U.S.C. § 512(c) and (g) are designed to limit YouTube’s liability for money damages.

faith judgment that this posting did not transform the composition. *See Elvis Presley*, 349 F.3d at 629 (use not transformative where, *inter alia*, it “serve[d] the same intrinsic entertainment value that is protected by Plaintiff’s copyrights”).

The Nature of the Copyrighted Work. Universal considered Prince’s musical compositions to be highly creative. (8ER 1360:16-1361:19 (Allen Dep.)). Such works are at the heart of the Copyright Act’s protection. *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 531 (9th Cir. 2008).

Amount and Substantiality of the Portion Used. Universal’s review considered the amount of the use of *Let’s Go Crazy*, playing through the entirety of a nearly 30-second posting, which is a substantial amount of a composition of less-than-five minute’s duration. (8ER 1389:4-1395:16 (Johnson Dep.)). Universal thus considered the substance of the third fair use factor. *Salinger v. Random House*, 811 F.2d 90, 98-99 (2d Cir. 1987).

Effect Upon the Potential Market. Universal requested the takedown of postings for which a Prince composition was a focus specifically to maximize the market value of Prince’s works. Robert Allen explained that limiting the synchronization of a composition increased the value of the synchronization right and increased the potential revenue from future licenses, if and when Prince elected to grant such licenses. (8ER 1462 ¶ 6; 8ER 1360:7-1361:8 (Allen Dec. & Dep)). By taking into account the effect of “unrestricted and widespread” comparable uses, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)—here, widespread synchronizations of Prince’s compositions in YouTube postings—Universal considered the fourth fair use factor. Preserving a copyright holder’s ability to change

his mind whether to grant licenses is directly relevant to fair use. *See Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000).

Lenz asks the panel to ignore Universal's evidence because Johnson did not employ guidelines that expressly required him to check a box, by name, for each fair use factor. Pet. at 18-19. The evidence summarized above, and reviewed in more detail in Universal's First and Third Briefs (pp. 36-41 and 34-42, respectively), shows that Lenz's argument is formalistic and ignores the substance of Universal's consideration. If anything, the record shows that Universal is entitled to summary judgment on the grounds that it *did* consider fair use. But at the very least, Lenz is not entitled to summary judgment on this issue.

### CONCLUSION

For the foregoing reasons, Lenz's petition should be denied.

Dated: November 16, 2015

/s/ Mark E. Haddad

Mark E. Haddad  
SIDLEY AUSTIN LLP  
555 West Fifth Street, Suite 4000  
Los Angeles, California 90013  
Telephone: (213) 896-6000

Dated: November 16, 2015

/s/ Kelly M. Klaus

Kelly M. Klaus  
Melinda LeMoine  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
Telephone: (213) 683-9100

*Attorneys for Universal Music Corp.,  
Universal Music Publishing, Inc., and  
Universal Music Publishing Group*

### CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4 and 40-1(a), I certify that the attached Answer to Lenz's Petition for Rehearing En Banc or Panel Rehearing is in compliance with Fed. R. App. P. 32(c) and this Court's order of October 26, 2015 (Dkt. 91), contains 4,127 words (excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), and does not exceed 15 pages.

Dated: November 16, 2015

/s/ Mark E. Haddad

Mark E. Haddad  
SIDLEY AUSTIN LLP

*Attorneys for Universal Music Corp.,  
Universal Music Publishing, Inc., and  
Universal Music Publishing Group*

**STATEMENT OF RELATED CASES**

Defendants/Appellants are not aware of any cases before this Court related to this action.

Dated: November 16, 2015

*/s/ Mark E. Haddad*

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Mark E. Haddad

SIDLEY AUSTIN LLP

*Attorneys for Universal Music Corp.,  
Universal Music Publishing, Inc., and  
Universal Music Publishing Group*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 16, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 16, 2015

*/s/ Mark E. Haddad*

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Mark E. Haddad  
SIDLEY AUSTIN LLP

*Attorneys for Universal Music Corp.,  
Universal Music Publishing, Inc., and  
Universal Music Publishing Group*