Nos. 13-16106, 13-16107

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before the Honorable Richard C. Tallman, Milan D. Smith, Jr.,
and Mary H. Murguia, Circuit Judges
(Opinion filed September 14, 2015)

STEPHANIE LENZ,

Plaintiff-Appellee/Cross-Appellant,

v.

UNIVERSAL MUSIC CORP.; UNIVERSAL MUSIC PUBLISHING, INC.; AND UNIVERSAL MUSIC PUBLISHING GROUP,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Honorable Jeremy Fogel, United States District Judge
Dist. Case No. 5:07-cv-03783-JF

PLAINTIFF-APPELLEE/CROSS-APPELLANT'S ANSWER TO DEFENDANTS-APPELLANTS/CROSS-APPELLEES' PETITION FOR PANEL REHEARING

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I. INTRODUCTION

Stephanie Lenz easily satisfies all three prongs of the standing inquiry—injury in fact, causation and redressability. Universal's belated suggestion otherwise rests entirely on its hope that this Court will ignore both the direct harm its DMCA claim caused her, and Congress's choice to provide a remedy for that harm.

Injury in fact: Ms. Lenz's video was censored for over six weeks. Conflating "particularized and concrete" with "pecuniary," Universal insists that she was not injured because she suffered no lost revenues or other pecuniary loss. But courts have long recognized that non-pecuniary injury can support standing. In any event, Ms. Lenz did suffer calculable economic harm. In addition to losing the ability to share her video on YouTube for over six weeks, she was forced to retain *pro bono* counsel, whose efforts were needed to ensure that access to her video was restored. Universal's false takedown notice created the need for that investment of time, and it would have been necessary even if she had not sued.

Causation: Universal does not challenge that Ms. Lenz's injury is fairly traceable to its conduct. Since her injury was caused by Universal's takedown notice she satisfies the second requirement of standing.

Redressability: The existence of a remedy—even nominal damages—assures that Ms. Lenz's injury can be redressed by a favorable judgment.

Moreover, 17 U.S.C. § 512(f) renders Universal liable for "any damages" for its misdeeds—broad language that encompasses, at a minimum, compensation for the harm of private censorship, for her lost time and for the time spent by her *pro bono* counsel.

Despite Universal's belated attempt—eight years into this litigation—to claim otherwise, these facts establish standing. While Universal's failure to raise this point sooner cannot waive the issue, it does raise questions whether even Universal truly believes its claim to be credible.

Universal's petition for panel rehearing should be denied.

II. ARGUMENT

To establish standing, Stephanie Lenz must show (1) a concrete and particularized injury; (2) that her injury was caused by Universal; and (3) that her injury is likely to be redressed by a favorable judgment.[1] Ms. Lenz satisfies each of those elements.

A. Ms. Lenz has suffered concrete and particularized injury in fact.

An injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent" rather than "conjectural or

[1] *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 908 (9th Cir. 2011).

hypothetical."[2] Ms. Lenz's video was taken down from YouTube for six weeks.[3] That censorship is an actual, not a conjectural or hypothetical, injury. And Ms. Lenz complains about the takedown of *her* video of *her* children[4]—a harm concretely grounded in her own, particular video.

Ms. Lenz's claim is based on injury to a statutory right expressly created by Congress.[5] Section 512(f) creates standing for any person "who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation *in removing or disabling access* to the material or activity claimed to be infringing."[6] Where a statute confers a legal right, the Supreme Court has held that invasion of that right establishes injury in fact.[7]

These facts are wholly unlike those before the Supreme Court in *Spokeo, Inc. v. Robins*.[8] The question presented in *Spokeo* is "[w]hether Congress may confer Article III standing upon a plaintiff who suffers *no concrete harm*" based on

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[2] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted).

[3] 1SER 100 ¶ 8.

[4] *Id.* ¶¶ 3–4.

[5] 17 U.S.C. § 512(f).

[6] *Id.* (emphasis added).

[7] *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[8] No. 13-1339 (S. Ct. argued Nov. 2, 2015).

a "*bare violation* of a federal statute."[9] Ms. Lenz does not allege the bare violation of a statute; she alleges a violation that led to her video—which she filmed, to which she owns the copyright, and which featured her children—being censored for weeks. She had to expend personal effort and ultimately retain counsel to have the video restored.[10] As discussed above, this is a concrete harm that is particular to her.

Spokeo, in contrast, involves Thomas Robins's claim that a website operator published inaccurate information about him in violation of the Fair Credit Reporting Act.[11] Mr. Robins did not allege that anyone acted in reliance on this false information.[12] If Universal had sent a false takedown notice to YouTube but *nothing more had happened*, this case might be analogous to *Spokeo*. On those facts Ms. Lenz would be alleging a bare misrepresentation without further effect. But those are not the facts. Instead, Universal's misrepresentation led YouTube to disable access to her video, and her video remained disabled for over six weeks.

Universal argues *Spokeo* is relevant because the Supreme Court might hold

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[9] Petition for a Writ of Certiorari at i, *Spokeo, Inc. v. Robins*, No. 13-1339 (S. Ct. May 1, 2014) (emphases added).

[10] 1SER 94–97, 100 ¶¶ 6–7.

[11] *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 410–11 (9th Cir. 2014).

[12] *See* Transcript of Oral Argument at 37:17–25, *Spokeo, Inc. v. Robins*, No. 13-1339 (S. Ct. Nov. 2, 2015).

that "a violation of statutory rights that does not cause an individual an injury-in-fact does not confer standing on that individual."[13] But Universal's violation of § 512(f) *did* cause Ms. Lenz an injury in fact—she was "injured by [Universal's] misrepresentation, as the result of the service provider relying upon such misrepresentation in *removing or disabling access to the material or activity claimed to be infringing* . . . ."[14] Thus however the Supreme Court decides *Spokeo,* it will have no effect on her standing here.

Indeed, the facts of this case do not approach the outer limits of Congress's ability to grant statutory standing, because Ms. Lenz does not assert a "generalized grievance" based on harm that is no different for her than for others members of the public.[15] She uploaded *her own* video, and the video depicts *her* children, not someone else's. Her complaint is that *her specific* video was taken down. This is more concrete and particular than, for example, the offense of seeing the same "In God We Trust" motto that is seen by anyone who examines a coin—an offense that this Court held was sufficiently concrete and particularized to establish standing in *Newdow v. Lefervre.*[16] Similarly, this Court easily concluded that allegations of

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[13] Pet. for Panel Reh'g 9.

[14] 17 U.S.C. § 512(f) (emphasis added).

[15] *Lujan,* 504 U.S. at 575.

[16] 598 F.3d 638, 642 (9th Cir. 2010).

widespread dragnet wiretapping sufficed to establish standing for particular plaintiffs, where those plaintiffs alleged that *their concrete and particular* communications were among those captured by the dragnet.[17]

Universal nonetheless insists that Ms. Lenz has no standing because she suffered no "pecuniary loss" or "lost revenue."[18] But financial harm is not a prerequisite for standing—to the contrary, the Supreme Court has held that any "individual subjected to an adverse effect has injury enough to open the courthouse door."[19] A recent Third Circuit decision reinforces the point. In *In re Google Inc. Cookie Placement Consumer Privacy Litigation*,[20] the defendants argued that the plaintiffs lacked standing because their allegations of pecuniary harm were insufficient. Calling the defendants' focus on economic loss "misplaced," the court held that "a plaintiff need not show actual monetary loss for purposes of injury in fact."[21] Although the "injury must affect the plaintiff in a personal and individual way,"[22] this "does not demand that a plaintiff suffer any particular type of harm to

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[17] *Jewel*, 673 F.3d at 910.

[18] Pet. for Panel Reh'g 4.

[19] *Doe v. Chao*, 540 U.S. 614, 624–25 (2004).

[20] No. 13-4300, 2015 WL 6875340, at *4 (3d Cir. Nov. 10, 2015).

[21] *Id.*

[22] *Id.* (citing *Lujan*, 504 U.S. at 560 n.1).

have standing."[23] The invasion of a legal right created by statute suffices to create standing.[24] "Sure enough, the Supreme Court itself has permitted a plaintiff to bring suit for violations of federal privacy law absent any indication of pecuniary harm."[25]

Indeed, the Supreme Court and the Ninth Circuit have long recognized a wide range of non-pecuniary interests as sufficient to support standing, including denial of a statutory right to access information,[26] an interest in living in a racially integrated community,[27] architectural barriers confronted by a person with a disability,[28] and interference with playing the music of a nightclub owner's choice.[29] Even the petitioner in *Spokeo* concedes that injury in fact "can take the form of pecuniary loss *or* nonpecuniary injuries that are concrete, such as loss of enjoyment of public resources and discriminatory treatment."[30] Article III does not close the federal courthouse doors to Ms. Lenz merely because Universal claims

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[23] *Id.*

[24] *Id*.

[25] *Id*. (citation omitted).

[26] *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989).

[27] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–12 (1972).

[28] *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1042–43 (9th Cir. 2008).

[29] *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1055 (9th Cir. 2002).

[30] Reply Brief for Petitioner at 4, *Spokeo, Inc. v. Robins*, No. 13-1339 (S. Ct. Sep. 30, 2015).

she did not prove a quantifiable pecuniary loss. Such a rule would sharply limit Congress's ability to regulate in a host of domains—such as environmental protection and civil rights and freedom of speech—where the harms suffered by ordinary people might not always be calculable in precise dollar amounts. This panel cannot, and should not, upend existing understandings of Congress's power and federal court jurisdiction.

What is more, although she does not need to show pecuniary harm to establish standing, Ms. Lenz *has* suffered economic harms, including having to expend effort to restore her video and having to retain counsel to assist her.[31] That her counsel represents her *pro bono* changes nothing—as this Court has held, a person can "incur" legal fees if they have "a contingent obligation to repay the fees in the event of their eventual recovery."[32]

B. Universal caused Ms. Lenz's injury by sending its takedown notice.

Universal through silence effectively concedes causation—as well it must. The causation prong of the standing inquiry requires that "the injury has to be fairly. . . trace[able] to the challenged action of the defendant, and not . . . th[e]

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[31] 1SER 94–97, 100 ¶¶ 6–7; Appellee and Cross-Appellant's Answering and Opening Br. on Cross-Appeal 63–65.

[32] *Morrison v. Comm'r of Internal Revenue*, 565 F.3d 658, 662 (9th Cir. 2009); *see also* 8ER 1439–40 (retainer agreement).

result [of] the independent action of some third party not before the court."[33] Here, YouTube took down Ms. Lenz's video in reliance on Universal's claim that the video was not authorized by the law.[34] This is precisely the form of causation prescribed by § 512(f).

C. A favorable judgment will redress Ms. Lenz's injury.

The third prong of the standing inquiry requires that it be "likely" rather than "speculative" that a favorable decision will redress the injury.[35] As the panel explained, "Lenz may vindicate her statutorily created rights by seeking nominal damages."[36] This is no different from nominal damages in a case brought under 42 U.S.C. § 1983,[37] which this Court has held is enough to confer standing.[38]

Universal argues that "[i]f Congress could create standing for uninjured plaintiffs simply by granting them a nominal recovery, then injury-in-fact would cease to be 'a hard floor of Article III jurisdiction that cannot be removed by

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[33] *Lujan,* 504 U.S. at 560–61 (alteration in original) (quotation marks and citation omitted).

[34] 2SER 255 ¶ 11.

[35] *Lujan,* 504 U.S. at 561 (quotation marks and citation omitted).

[36] *Lenz v. Universal Music Corp.*, No. 13-16106, slip op. at 25 (9th Cir. Sept. 14, 2015). In this respect, the panel was unanimous. *See id.* at 26 (Smith, J., concurring in all but Part IV.C of the majority opinion).

[37] *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986).

[38] *Bernhardt v. Cty. of L.A.*, 279 F. 3d 862 (9th Cir. 2002).

statute.'"[39] But Universal's complaints about Ms. Lenz's supposed lack of redress *assume* a lack of injury in fact. It argues she "has suffered *no concrete injury personal to her* that a court can redress," she "did not adduce any evidence of *a concrete injury-in-fact* that a favorable decision could redress," she "suffered *no injury* that a court can redress," and "her lawsuit presents *no injury* that a court could redress and thus no case or controversy."[40] This is a red herring, *because she has suffered injury in fact.* Her video of her children was censored for six weeks. Allowing her to recover at least nominal damages thus does not remove the "hard floor" of injury in fact.

Universal facilely argues that "Lenz suffered no injury-in-fact from using the DMCA's 'put-back' procedure," and thus that there is no injury to redress.[41] But Ms. Lenz does not seek redress for *her own* use of the counter-notification procedure. She seeks damages for the harm caused by *Universal's* false takedown notice, including attorneys' fees and costs associated with the need to counter-notice in order to get her video restored—a problem *Universal* created, not Ms. Lenz. Every day that her video remained down increased the harm to her. While the restoration of her video kept this harm from increasing still further, it did

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[39] Pet. for Panel Reh'g 7 (quoting *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009)).

[40] Pet. for Panel Reh'g 2, 3, 4, 9 (emphases added).

[41] *Id.* at 9.

not redress the injury caused by the video already having been disabled for over six weeks or compensate her for the efforts needed to get her video restored and hold Universal accountable.

Even if Ms. Lenz is awarded only nominal damages for that injury, the Ninth Circuit has repeatedly held that such damages satisfy the redressability prong and overcome any suggestion of mootness.[42] None of the cases cited by Universal question or undermine this principle. Indeed, in *Floyd v. Laws*,[43] this Court held that nominal damages are *mandatory* when a constitutional right has been violated. The other cases cited by Universal, such as *Aetna Life Ins. Co. v. Haworth*[44] and *MedImmune, Inc. v. Genentech, Inc.*,[45] do not even discuss nominal damages, and provide no basis for the panel to depart from settled Ninth Circuit precedent.

And although nominal damages are enough to establish standing (and thus to deny Universal's petition), Ms. Lenz is also entitled to compensatory damages for the censorship of her video from YouTube for six weeks, for her time and effort, and for her *pro bono* counsel's time getting her video restored, issues that have

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[42] *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 427 (9th Cir. 2008) (although plaintiffs "may be entitled to collect *only* nominal damages . . . they nonetheless present justiciable challenges"); *Bernhardt*, 279 F.3d at 872; *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir. 1992) (per curium).

[43] 929 F.2d 1390, 1402–03 (9th Cir. 1991).

[44] 300 U.S. 227 (1937).

[45] 549 U.S. 118 (2007).

already been fully briefed.[46] Indeed, as has also already been fully briefed, she also is entitled to recover damages for attorneys' fees spent on this lawsuit.[47]

III. CONCLUSION

Supreme Court and Ninth Circuit precedent firmly establish Ms. Lenz's standing to hold Universal accountable for its improper takedown notice, and thus panel rehearing on the issue of standing is unnecessary. Whatever decision the Supreme Court reaches in *Spokeo*, she will still have standing to seek redress for her actual and concrete injury to her personalized interests. Universal's eleventh-hour challenge to Ms. Lenz's standing is without merit, and thus its petition for rehearing should be denied.

Respectfully submitted,

DATED: November 24, 2015

By: */s/ Michael S. Kwun*
MICHAEL S. KWUN

Attorneys for Plaintiff, Appellee, and Cross-Appellant STEPHANIE LENZ

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[46] Appellee and Cross-Appellant's Answering and Opening Br. on Cross-Appeal 58–61, 63, 64–65.

[47] *Id.* at 65–68.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 32-3 and 40-1, the attached PLAINTIFF-APPELLEE/CROSS-APPELLANT'S ANSWER TO DEFENDANTS-APPELLANTS/CROSS-APPELLEES' PETITION FOR PANEL REHEARING is in compliance with Fed. R. App. 32(c) and the Court's order filed November 3, 2015 (ECF No. 75). It does not exceed 15 pages, is proportionately spaced and Microsoft Word 2010 reports that it contains 2,609 words, not including those sections excluded in Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: November 24, 2015

By: */s/ Michael S. Kwun*
MICHAEL S. KWUN

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015, I electronically filed the foregoing PLAINTIFF-APPELLEE/CROSS-APPELLANT'S ANSWER TO DEFENDANTS-APPELLANTS/CROSS-APPELLEES' PETITION FOR PANEL REHEARING, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. 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 24, 2015

/s/ Roseann Cirelli
ROSEANN CIRELLI