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Lenz v. Universal Music Corp.

815 F.3d 1145 (9th Cir. 2016)

CAITLIN B. WILEY*

BACKGROUND

Plaintiff Stephanie Lenz made a short video of her children dancing to the Prince song, *Let's Go Crazy*, and uploaded it to YouTube on February 7, 2007. In the video, titled “‘Let’s Go Crazy’ #1,” Lenz’s children played with toys and danced to the song for 29 seconds.

Defendant Universal Music Corp. (“Universal”) monitored YouTube videos for any unauthorized use of Prince songs, and Sean Johnson, an assistant at Universal, enforced Prince’s copyrights. During Johnson’s daily evaluation of YouTube, he came across Lenz’s “‘Let’s Go Crazy’ #1” video.

Johnson added Lenz’s video to a list of videos to be removed from YouTube for unauthorized use. YouTube received the list, sent Lenz a takedown notification, and removed the video on June 5, 2007. On June 7, 2007, Lenz sent a letter to YouTube arguing against the takedown of her video. YouTube forwarded the letter to Universal, who responded with the same takedown notification language in terms of Lenz’s unauthorized use of copyrighted material. On June 27, 2007, Lenz obtained a lawyer and sent another letter to YouTube arguing against the takedown of her video. YouTube restored Lenz’s video in mid-July.

PROCEDURAL HISTORY

Lenz filed a complaint against Universal in late July 2007 alleging a tortious interference claim, seeking declaratory relief for her video. The district court dismissed Lenz’s initial complaint. In August 2007, Lenz filed an amended complaint and a second amended complaint in April 2008 alleging misrepresentation per 17 U.S.C. § 512(f).¹

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1. 17 U.S.C. § 512(f) (2012) (“Any person who knowingly materially misrepresents under this section (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access

Universal tried to dismiss the second complaint, but the district court denied its request. Lenz then filed a motion for summary judgment against Universal's affirmative defenses and the district court granted partial summary judgment on six of the affirmative defenses. Both Lenz and Universal filed motions for summary judgment on Lenz's allegation of misrepresentation and the district court denied both parties' motions.

After denial of the parties' motions for summary judgment, they both filed for appeal. The district court granted an interlocutory appeal for the circuit court's appellate review of both parties' motions on the misrepresentation claim. Ultimately, the Ninth Circuit upheld the district court's denial of both parties' motions for summary judgment.

Lenz filed a petition for rehearing *en banc* with the Ninth Circuit, and on March 17, 2016, the Ninth Circuit denied the re-hearing and issued an amended opinion.

ISSUE

The Ninth Circuit Court of Appeals considered the following issues: (1) whether there is a requirement for copyright holders to consider fair use under 17 U.S.C. § 512(c)(3)(a)(v) and (2) whether fair use constitutes potential infringement of a copyright pursuant to 17 U.S.C. § 107.²

After deciding the above issues, the Ninth Circuit had to address an attendant issue: whether Universal intentionally misrepresented a good faith belief that Lenz's video was fair use.

DECISION

The Ninth Circuit affirmed the requirement under § 512(c)(3)(a)(v) for copyright holders to consider fair use before issuing a takedown notice. The court also held a copyright holder must consider fair use as authorized in § 107.³ After these holdings, the court deferred to a jury to determine if Universal misrepresented that it held a subjective good faith belief before the takedown notification was sent.

The amended opinion issued by the Ninth Circuit denied the parties' petitions for rehearing and elaborated further on its fair use analysis under § 107.⁴

to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.”).

2. Lenz v. Universal Music Corp., 815 F.3d 1145, 1151 (9th Cir. 2016).

3. 17 U.S.C. § 107 (2012).

4. Lenz, 815 F.3d at 1148.

REASONING

To determine whether there is a requirement for copyright holders to consider fair use under § 512(c)(3)(a)(v), the court looked to the plain language of the statute. The court concluded that fair use was clearly authorized pursuant to the statute and that a four-factor test should be used for consideration of the fair use defense. The four factors include: (1) the commercial nature of the work, including its not-for-profit, educational functions; (2) the basic and inherent features of the copyrighted work; (3) the amount and substance of the copyrighted work used in relation to the entire content; and (4) the impact on “the potential market for or value of the copyrighted work.”⁵ Because § 512(c)(3)(a)(v) authorizes fair use, the court concluded that fair use was also authorized under § 107 as a matter of law.

When determining whether Universal had a subjective good faith belief that Lenz’s work was not considered fair use, the court deferred to the lower court jury. Despite the deferred ruling, the court laid out the framework to determine whether a subjective good faith belief exists. The court followed its prior reasoning in *Rossi v. Motion Picture Association of America, Inc.*⁶ to determine whether Universal structured a subjective good faith belief of Lenz’s video. In *Rossi*, the court reasoned that the good faith belief requirement constituting fair use should be subjective, not objective.⁷ The Ninth Circuit affirmed the subjective good faith belief of fair use standard, contending that if Congress had wanted an objective good faith belief, they would have put the word “objective” in the statutory language of the Digital Millennium Copyright Act.

The last issue that the court decided was whether Universal intentionally misrepresented a good faith belief about Lenz’s fair use. The district court ruled that Lenz could go to trial on this issue based on the willful blindness doctrine. The willful blindness standard states that a party must prove actual knowledge that the copyright holder intentionally misrepresented his or her good faith belief.⁸ The Ninth Circuit rejected Lenz’s reliance on the willful blindness doctrine because Lenz failed to provide evidence of Universal’s subjective awareness that Lenz’s video had a high probability of being fair use.

Finally, the Ninth Circuit held that Lenz could seek nominal damages for the misrepresentation injury she suffered under § 512(f).⁹ Although the court said Lenz’s harm was unquantifiable, she was still entitled to recover damages she suffered after Universal misrepresented its good faith belief that her video did not constitute

5. *Id.* at 1152.

6. 391 F.3d 1000 (9th Cir. 2004).

7. *Id.* at 1004.

8. *Lenz*, 815 F.3d at 1155.

9. *Lenz*, 815 F.3d at 1156.

fair use. At the end of the interlocutory appeal hearing, the Ninth Circuit affirmed the district court's denial of both parties' cross-motions for summary judgment.

In the amended opinion, the Ninth Circuit denied the petitions for rehearing, and stated that it would not look into whether a copyright holder's subjective belief that the work constituted infringement was in good faith or not.¹⁰

DISSENT

Judge Smith wrote a powerful dissent making it even stronger in the amended opinion. He stated that Universal did not consider fair use before issuing its takedown notice. This undisputed fact implied that Universal did not have a subjective good faith belief and that its "takedown notice was a knowing misrepresentation."¹¹ He continued by arguing that § 512(c)(3)(a)(v) does have a subjective good faith requirement, but that Universal's actions did not amount to subjective good faith.¹² In conclusion, he cautioned that if companies can require takedowns without considering fair use, it jeopardizes the viability of the concept, which goes against the legislative intent.¹³

10. *Lenz*, 815 F.3d at 1154.

11. *Id.* at 1159–60.

12. *Id.* at 1160.

13. *Id.*