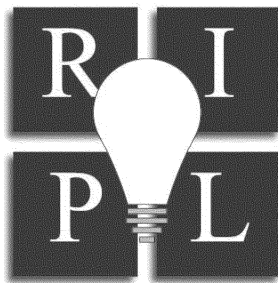


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THE THROW DOWN OVER TAKEDOWNS: AN ANALYSIS OF THE *LENZ* INTERPRETATION OF 17 U.S.C. § 512(F)

IAN RUBENSTRUNK

ABSTRACT

Recently, a YouTube user and mother of two, Stephanie Lenz, filed a lawsuit against Universal Music Corporation which had the potential for broad impact on the internet. Everyone from politicians, to teachers, to musical artists could have gained more protection of their rights as internet users. With millions of people having access to the internet and YouTube “vloggers” reaching the million mark in subscribers, the court’s interpretation of 17 U.S.C. § 512(f) could have had a significant impact. The issue in the case was what “any damages” meant in a clause creating liability for a party that incorrectly has material removed from a website. The court, however, did not take a position consistent with the intent of Congress when it passed the DMCA, adding § 512(f). This comment suggests that other courts reject the *Lenz* court’s narrow interpretation and instead apply a broad interpretation that could allow greater recovery.

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INTRODUCTION

One week prior to an election, a significant amount of material is taken down from politician John Doe's campaign website because it is supposedly infringing on a copyright. Candidate Doe calls his attorney and asks him to investigate the notice and prepare a response. Mr. Doe then calls a website designer, telling the designer that he needs a new site up and running as soon as possible regardless of the cost. Three days after the election, Doe's website's material is finally put back up, but he lost the election. What are his options?

Compare this predicament to one that a YouTube² user and mother of two would face.³ A mother posts a video of her kids dancing to a song.⁴ She does not have a high-powered attorney on retainer. She does not know much about "takedown notices"⁵ or "put-back notices."⁶ She does not know much about copyright or fair use. Instead, she just wants to share her video of her kids. Are all the costs and fees a lawyer will charge worth it to learn about copyright and fair use to help draft a put-back notice? Is it really worth all her time and effort?

* © Ian Rubenstrunk 2011. Ian Rubenstrunk, J.D. Candidate, January 2012, The John Marshall Law School. Bachelor of Science in English and Political Science, University of Colorado at Boulder, May 2008. I would like to thank my family, friends, and classmates for their continued support throughout the process of producing this work. I would also like to thank my editors Michael Eisnach, Brandon Nemecek, and Calvin Townsend. Finally, thank you to the staff of *The John Marshall Review of Intellectual Property Law* for their invaluable editorial assistance. Any mistakes in this article are my own.

² YouTube allows its users to upload, watch and share user-created video clips. For more information on YouTube visit <http://www.youtube.com>.

³ This comment analyzes the ongoing case of *Lenz v. Universal Music Corp.* See *Lenz v. Universal Music Corp.*, No. 07-CV-03783 (N.D. Cal. filed July 24, 2007). This case is about a mother, Stephanie Lenz, who filmed her kids dancing in her kitchen while a song owned by Universal Music played in the background of the video. When she posted the video on YouTube, Universal asked YouTube to remove the video, claiming that it infringed on Universal's copyright in the song. Lenz then decided to file a lawsuit against Universal under 17 U.S.C. § 512(f). As a result of this lawsuit, the court was faced with interpreting the language of the statute in order to determine what fees and costs were recoverable as a part of the lawsuit.

⁴ edenza, "*Let's Go Crazy*" #1, YOUTUBE (Feb. 7, 2007), <http://www.youtube.com/watch?v=N1KfJHFWlhQ> (showing the video that became the subject of litigation). Since posting, the video has received over one million views.

⁵ A "takedown notice" is not a statutory term but it commonly refers to a copyright holder's request for a poster's potentially infringing material to be removed. When a copyright holder discovers that potentially infringing material has been posted on a website, the owner sends such a notice to the Online Service Provider requesting that the infringing material be removed. For further discussion of the procedures see *infra* Part I.C.

⁶ The term "put back notice" is not a statutory term but it commonly refers to the poster's response to a "takedown notice" demanding that posted material be returned to the website. Such a response claims that the material is not infringing and the material should be returned to the website.

Recently, this somewhat “run of the mill” hypothetical turned into a real life legal battle. Stephanie Lenz, a YouTube subscriber and mother, has been paving the way for internet users to have a greater incentive to take action when their videos, songs, and other internet materials are taken down inappropriately.⁷ With millions of people having access to the internet,⁸ and YouTube “vloggers”⁹ reaching the one million mark in subscribers,¹⁰ there was a possibility that her case could have a dramatic effect on internet user rights. The court, however, did not adopt Lenz’s position when it interpreted § 512(f) of the U.S. Code.¹¹

This comment examines the February 25, 2010 ruling in the ongoing case, *Lenz v. Universal Music Corp.*,¹² and the impact it will have on the willingness of internet users to protect their rights. Part I provides a background for the discussion of the misrepresentation section of Title 17 of the U.S. Code, which was added by the Digital Millennium Copyright Act (“DMCA”).¹³ Part II analyzes whether the court’s interpretation of § 512(f) of the DMCA comports with the purpose of the Act. Finally, Part III proposes that the courts reconsider the decision in *Lenz* to allow for a broader recovery of damages to promote internet user rights.

⁷ In July 2010, the Librarian of Congress made the determination that certain uses of a copyrighted DVD were no longer considered a violation of copyright. See Notice of Final Rule, 75 Fed. Reg. 43,825 (July 27, 2010) (codified at 37 C.F.R. pt. 201). This rule classifies some uses of digital media as non infringing. The Librarian of Congress must evaluate whether copyrighted material and its uses are harmed by the anti-circumvention statute. 17 U.S.C. § 1201(a)(1) (2006). Pursuant to this authority, the Librarian has designated that people who circumvent security measures on certain types of media are exempt from the statutory provision prohibiting such acts. 37 C.F.R. § 201.40 (2010). This rule states that motion picture DVD’s, circumvented “solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment” will not be liable for infringement. *Id.* In addition, the person using of the copyrighted material must have reasonable grounds for believing that circumvention is necessary to fulfill: (1) educational purposes by professors and universities, or (2) documentary filmmaking, or (3) noncommercial videos. *Id.* This becomes of paramount importance to the issues discussed in this comment because it grants a much wider permissible use of copyrighted material online. It is no longer permissible for a copyright owner to send a takedown notice for the use of clips from a DVD. Such an exemption does not apply to the *Lenz* case because this case involves Stephanie Lenz’s use of an audio sound recording.

⁸ THE WORLD BANK, WORLD DEVELOPMENT INDICATORS 310–13 (2011), <http://data.worldbank.org/data-catalog/world-development-indicators>.

⁹ The term “vlogger” is a term used to describe a person who video blogs. This is essentially someone who records on a video journal or diary of themselves, sharing their thoughts and opinions on various topics, and then posts that video on the internet. A blogger, and similarly a blog, is a written version.

¹⁰ David Sarno, *YouTube’s Fred is First Online Video Star to Break 1M Subscribers*, L.A. TIMES (Apr. 8, 2009 3:05 PM), <http://latimesblogs.latimes.com/technology/2009/04/youtubes-fred-is-first-online-video-star-to-break-1m-subscribers.html> (telling the story of YouTube’s first vlogger to reach one million subscriptions).

¹¹ *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344, 1352 (N.D. Cal. 2010).

¹² *Id.*

¹³ 17 U.S.C. § 512(f) (2006).

I. BACKGROUND

To fully understand how this short YouTube clip had the potential to be so influential, it is necessary to understand the foundational legal concepts involved. This section explains what happened in the *Lenz* case. Then, it discusses the DMCA and the congressional intent behind the act. Next, this section looks at copyright infringement and the fair use defense to infringement. Finally, the specific issues involved in *Lenz* are discussed, the takedown procedure is explained, and the remedies available to someone affected by a takedown notice are outlined.

A. History of the Lenz Case

On February 7, 2007 Stephanie Lenz recorded a video of her kids dancing in the kitchen and posted it to YouTube shortly thereafter.¹⁴ As her kids dance around the kitchen, Prince's "Let's Go Crazy" plays in the background.¹⁵ The song is hardly audible, and the clip is only twenty-nine seconds long.¹⁶

On June 4, 2007 Universal Music Corporation demanded from YouTube that the video be taken down, claiming that the inclusion of the song was copyright infringement.¹⁷ On June 27, 2007, Lenz sent Universal a put back notice per the procedures outlined in the DMCA, claiming that her video was not infringing any copyright and that her inclusion of the song in the video was fair use.¹⁸ Despite the put back notice, the video was not replaced after the ten day period outlined in the DMCA, and the video remained inaccessible at the time of the filing of the civil suit for misrepresentation under the DMCA.¹⁹

In her amended complaint, Lenz claims that the use of the song is self-evident fair use and that the plaintiffs should have known it was not infringing.²⁰ Additionally, Lenz claims damages from the expenses she incurred in responding to the notice as well as infringement upon her first amendment rights.²¹

On September 21, 2007, Universal moved to dismiss the amended complaint and the motion was partially granted on April 8, 2008.²² Subsequently, Universal again moved to dismiss on different issues and was denied on August 20, 2008.²³ After the denial of the motion, the case proceeded with discovery. On February 25, 2010 the court granted partial summary judgment, which included a discussion of damages

¹⁴ See Second Amended Complaint ¶ 12, *Lenz v. Universal Music Corp.*, No. 07-03783 (N.D. Cal. filed July 24, 2007).

¹⁵ *Id.*

¹⁶ *Id.* ¶ 14.

¹⁷ *Id.* ¶ 21.

¹⁸ *Id.* ¶ 27.

¹⁹ *Id.* ¶ 28.

²⁰ *Id.* ¶¶ 34–35.

²¹ *Id.* ¶ 38.

²² *Lenz v. Universal Music Corp.*, No. 07-03783 (N.D. Cal. Apr. 8, 2008) (order partially granting Universal's motion to dismiss).

²³ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151 (N.D. Cal. 2008).

under 512(f).²⁴ Presently, the case remains in discovery stages as the two sides prepare for trial.

B. Legislative Purpose of the DMCA

In passing the DMCA, Congress recognized that the law struggled to keep up with the fast-paced development of new technology and recognized that the law needed to adapt to new changes.²⁵ The DMCA was designed to create an environment where electronic commerce and digital technology could advance and flourish globally.²⁶ Congress hoped to make digital networks safe places to disseminate and make use of copyrighted materials and make available to the public “the fruit of American creative genius.”²⁷ In creating this piece of legislation, Congress conducted extensive research and sought a broad spectrum of viewpoints to ensure that they could protect the interests of all internet users and copyright holders.²⁸

The DMCA added § 512 to Title 17 of the U.S. Code, which is entitled “Limitations on liability relating to material online.”²⁹ Within § 512 are the takedown notice provisions as well as the misrepresentation provisions, § 512(c) and § 512(f) respectively.³⁰ Parts of § 512 were intended to promote responsible use of the internet and copyrighted material, while at the same time protecting intellectual property rights.³¹ Additionally, other amendments were tailored to redress internet user’s rights.³² Congress explained that they were “acutely concerned” with providing sufficient safeguards to ensure user material was only taken down with “proper justification.”³³

The misrepresentation section in § 512(f) created a cause of action against any person who knowingly materially misrepresents that material or activity online is infringing, or that material or activity was removed or disabled by mistake or

²⁴ *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344 (N.D. Cal. 2010) (order granting partial summary judgment).

²⁵ See S. REP. NO. 105-190, at 2 (1998).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *id.* at 2–4.

²⁹ 17 U.S.C. § 512 (2006).

³⁰ *Id.* § 512(c), (f).

³¹ S. REP. NO. 105-190, at 2 (1998).

³² *Id.* at 67 (“Sections created so that] computer users are given reasonable notice of when their Web sites are the subject of infringement complaints, and to provide procedures for computer users to have material that is mistakenly taken down put back online.”); *id.* at 45 (stating that the “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); see Matt Williams, *The Truth and the “Truthiness” About Knowing Material Representations*, 9 N.C.J.L. & TECH. 1, 16–17 (2007) (opining that Congress wanted to create legal provisions that would facilitate efficient electronic commerce). Mr. Williams explains that this process should protect both copyright owners from users who are infringing upon their rights, as well as protecting internet users from having their material removed when it should not have been. *Id.* Additionally it is noted that there is limited liability for online services providers as a means to bring about this goal. *Id.*

³³ S. REP. NO. 105-190, at 21.

misidentification under the put-back procedure.³⁴ The clause makes copyright owners liable for damages, including attorney's fees, incurred by a party who is injured by the misrepresentation.³⁵ Congress's intent behind this section was to deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and internet users.³⁶ While Congress seemed to focus on internet users in passing § 512, it made clear that this was not intended to replace any existing copyright principles.³⁷

C. Infringement and The Takedown Process

The *Lenz* case is primarily about the online takedown procedures of copyright law, which were added by the DMCA. Universal claimed that by including a clip of Prince's song, "Let's Go Crazy," in her video, Stephanie Lenz infringed the copyright held by Universal.³⁸ This section discusses the proper procedures for dealing with potentially infringing material.

1. Infringing Material

In order for a takedown notice to be valid, the material targeted must in fact infringe someone's copyright.³⁹ There are many ways to infringe a copyright—from unauthorized reproduction to illegally downloading music.⁴⁰ Frequently, internet users will upload an entire movie or song to YouTube without the copyright owner's permission.⁴¹ Infringing material can also include material like video footage of a Major League Baseball game without the League's express written consent or photographs embedded in blog postings.⁴² Any copyright owner—from a

³⁴ 17 U.S.C. § 512(f).

³⁵ S. REP. NO. 105-190, at 49.

³⁶ *Id.*

³⁷ *Id.* at 29.

³⁸ *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344, 1346–47 (N.D. Cal. 2010).

³⁹ 17 U.S.C. § 512(c); *see supra* note 7 (discussing the new categories of non-infringing uses). This is another circumstance in which the change would have a dramatic affect on internet user rights. Now that ripping DVDs and posting them for particular uses is now permissible, copyright owners of large movie corporations are much more limited in their ability to take down portions of their DVDs that have been posted online.

⁴⁰ *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (2001).

⁴¹ *See, e.g.*, smallyoville, Collective Soul THE WORLD I KNOW, YOUTUBE (Nov. 5, 2009) <http://www.youtube.com/watch?v=sl0J0K-Tjlc>. This video plays the song "The World I Know" by the band Collective Soul in its entirety. The song was originally released in 1995 but is currently featured in a car commercial. Even with the song's increased exposure, the video has not been removed, despite little evidence of fair use.

⁴² *See, e.g.*, Emma Carmichael, *We Need Youth Baseball Teams to Reenact MLB Highlights for Us Because MLB Hates Its Fans (and Probably Children, Too)*, DEADSPIN (Apr. 18, 2011, 1:40 PM) <http://deadspin.com/#!5793065/we-need-youth-baseball-teams-to-reenact-mlb-highlights-for-us-because-mlb-hates-its-fans-and-probably-children-too>. Ms. Carmichael explains how the sports blog DEADSPIN has attempted to post videos of MLB games and they have continually received takedown

photographer to a movie studio to a record producer to a newspaper writer—can request that infringing material be removed from a website, as long as the requester owns the copyright.⁴³ One of the most important requirements of this request is that the material must be infringing.⁴⁴ If the use of the material is fair use or if the work is not copyrighted, the party requesting a takedown has no valid course of action.⁴⁵

An alleged infringer has defenses available to a claim of infringement. Among these defenses is fair use, which allows individuals to use copyrighted works, in limited ways, even without obtaining permission.⁴⁶ The Copyright Act outlines a four factor test to aid in the determination of whether a use falls under the fair use exception.⁴⁷ Though these four factors are explicitly listed, a court may also consider other factors it deems appropriate when making a fair use determination.⁴⁸

2. Takedown Process

A takedown notice is a notice sent to an Online Service Provider (“OSP”) indicating that infringing material exists somewhere on a website.⁴⁹ A proper takedown notice must be in writing and submitted to an agent of the service provider.⁵⁰ The writing must include, among other information, a statement that the complaining party submitted the takedown notice with a good faith belief that the use of the material was not authorized by the owner or the law.⁵¹ Recent case law has established that the standard of good faith is a subjective standard,⁵² which means rather than comparing the actions of the accused party to that of a reasonable person, the courts look at whether the accused party believes they acted in good faith.⁵³ As part of this good faith requirement, a copyright owner must take into account fair use before issuing a takedown notice.⁵⁴

notices. *Id.* The article goes on to explain how the MLB “vigilantly” patrols the internet for unauthorized use of MLB videos and has them removed. *Id.*

⁴³ 17 U.S.C. § 512(c)(3)(A)(vi) (2006).

⁴⁴ *Id.* § 512(c)(3)(A)(i)-(iii).

⁴⁵ *Id.*

⁴⁶ *See id.* § 107; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (explaining that fair use of a copyrighted work is not infringing with regards to that use).

⁴⁷ *See* 17 U.S.C. § 107.

⁴⁸ *Campbell v. Acuff-Rose*, 510 U.S. 569, 577–78 (1994) (explaining that the statute does not create a bright line test by which fair use will be judged).

⁴⁹ *See* 17 U.S.C. § 512(c)(3)(A)(ii)–(iii), (k).

⁵⁰ *See id.* § 512(c)(3)(A).

⁵¹ *See id.* § 512(c)(3)(A)(v). *But see* *Brave New Films 501(C)(4) v. Weiner*, 626 F. Supp. 2d 1013, 1018 (N.D. Cal. 2009) (explaining where takedown notice did not include a good faith statement, it did include a statement about risk of perjury which the court found to be sufficient to fulfill the requirements of the statute).

⁵² *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1004–05 (9th Cir. 2004).

⁵³ *Id.*

⁵⁴ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (explaining that requiring fair use consideration is consistent with congressional intent). Here, the court explains that the unnecessary removal of material causes significant injury to the public, especially in time sensitive cases. *Id.* The court also acknowledges that the put back procedures do not provide an adequate remedy for the harm that a takedown would present in a time sensitive situation. *Id.* The

Once an OSP receives a takedown notice, it must act “expeditiously” to remove or disable access to the infringing content.⁵⁵ The OSP must then promptly notify the subscriber whose content was affected by the takedown.⁵⁶ If a subscriber feels that the takedown was incorrect the subscriber has two courses of action.⁵⁷ The first option is to file a put-back notice with the service provider.⁵⁸ This notice must be made in good faith and must contain substantially the same information as the original takedown notice.⁵⁹ The OSP then must notify the original complainer that a put-back notice has been filed and restore the alleged infringing material to the website no sooner than ten business days and no later than fourteen business days.⁶⁰ The second option is to file a lawsuit alleging misrepresentation under § 512(f).⁶¹

D. Damages Provision and 17 U.S.C. § 512(f)

1. Lenz Interpretation of § 512(f)

The misrepresentation provision added by the DMCA in § 512(f) creates a cause of action for an internet user whose material was inappropriately taken down.⁶² The dispute over the interpretation of words in § 512(f) formed the core of the February 2010 *Lenz* decision.⁶³ Section 512(f) states:

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,

court then offers that requiring a copyright owner to discern whether or not a copy falls under fair use would be a sufficient alternative to address the concerns raised by time sensitive issues. *Id.* The court also feels that the requirement of this step is permissible under the “good faith” requirement from *Rossi*. *Id.*

⁵⁵ S. REP. NO. 105-190, 44 (1998) (explaining there are limitations on liability for OSPs who execute takedown notices and these protections are not eliminated, so long as the OSP acts quickly to remove or disable the content requested). The report also explains that due to the fact sensitive nature of these kinds of cases there is no hard and fast rule for what amount of time equates to acting “expeditiously.” *Id.*

⁵⁶ 17 U.S.C. § 512(g)(2)(A).

⁵⁷ *Id.* § 512(f)–(g).

⁵⁸ *See id.* § 512(g)(3). *See also* S. REP. NO. 105-190 at 28 (1998) (establishing the standard against which a notification is to be judged is one of substantial compliance.) Later the report offers that technical errors (such as misspelling a name), do not disqualify service providers and copyright owners from the protections afforded under the statute. *Id.* at 29. Congress expects that the parties will comply with the functional requirements of the notice provisions to ensure that the process goes smoothly. *Id.*

⁵⁹ 17 U.S.C. § 512(g)(3).

⁶⁰ *See id.* § 512(g)(2)(C).

⁶¹ *Id.* § 512(f).

⁶² *Id.*

⁶³ *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344, 1350 (N.D. Cal. 2010) (explaining that the extent of damages that are recoverable is an issue of first impression in the district court).

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 to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.⁶⁴

The particular words at issue in the *Lenz* case were “any damages.”⁶⁵ Interpreting the language of § 512(f) was an issue of first impression for the court.⁶⁶ *Lenz* argued that the phrase “any damages” should be read to mean “any harm whatsoever.”⁶⁷ If interpreted this way, it would mean that damages begin accumulating, especially attorney’s fees, once the owner sends an improper take down notice.⁶⁸ Universal argued that a damage award should be limited to economic and pecuniary damages proximately caused by the alleged misrepresentation.⁶⁹

Ultimately, the court concluded that Congress did not intend to cover pre-litigation attorney’s fees in its passing § 512(f) and its usage of the word “any”⁷⁰ and ruled that the statute does not provide for recovery of any harm whatsoever that is proximately caused by an improper take down notice.⁷¹ In coming to this conclusion the court analyzed the statutory language, the “overall statutory scheme,” and the congressional intent behind the provision.⁷² The court held that damages should be covered by § 505 of the Copyright Act and that attorney’s fees might be recoverable but recovery is not mandatory.⁷³

II. ANALYSIS

The interpretation by the court in the *Lenz* case creates a number of problems for internet users and potential litigants. The court has explained that fees and costs associated with responding to a takedown notice are recoverable.⁷⁴ Furthermore, the fee shifting provisions of Copyright law permits the recovery of fees and costs for

⁶⁴ 17 U.S.C. § 512(f).

⁶⁵ *Lenz*, 94 U.S.P.Q.2d (BNA) at 1350 (noting that in order to decide the case, the court must determine what types of damages are compensable under the statute).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* When the language of a statute is unclear there are rules that guide the interpretation of the language. These rules are the canons of statutory construction. These canons include applying the plain meaning of the statute, determining the legislative intent, and interpreting the statute in such a way that avoids absurd results. See *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001) (defining canons of construction as interpretive tools to help courts determine the meaning of legislation); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that if Congress has explained its intent behind a statute, the courts must give effect to that expressed intent); *Shelton v. Morehead Mem'l Hosp.*, 347 S.E.2d 824, 828 (N.C. 1986) (“Legislative intent controls the meaning of a statute.”).

⁷³ *Lenz*, 94 U.S.P.Q.2d (BNA) at 1350.

⁷⁴ *Id.*

litigation.⁷⁵ This decision, however, limits the amount recoverable. Based on this interpretation, the only amount that can be recovered is any cost incurred responding to the notice and any attorney's fees from § 505, and those are not guaranteed. The costs incurred between responding to the notice and the end of litigation are in flux and may not be recoverable according to this interpretation. It is this elimination of costs that defeats the purpose behind § 512(f). The problems do not end here. Based on the interpretation by the *Lenz* court, it is not clear whether lost profits or any other costs or fees resulting from an improper takedown notice would be recoverable.

This section analyzes the *Lenz* interpretation by applying the court's interpretation to a number of situations which demonstrate that it is inconsistent with the congressional intent behind § 512(f).

A. Hypothetical One: Internet User Suffers Economic Damages Resulting From Responding to an Improper Takedown Notice

Consider a community college sociology professor who maintains a blog for her students, where she posts images, songs, videos,⁷⁶ and articles.⁷⁷ She requires that her students be responsible for some of the material on the blog, and she uses the blog material as one of the main tools to educate her students about societal phenomena.⁷⁸

One day, she receives a takedown notice⁷⁹ from her blog hosting company on behalf of the copyright owner, claiming that the photos and videos used are infringing and demanding that she take them down.⁸⁰ Given the large number of

⁷⁵ 17 U.S.C. § 505 (2006).

⁷⁶ This is likely the exact scenario being targeted by the Library of Congress. See discussion *supra* note 7. In order to promote the goals of copyright, the material should be available to learn from and to promote new works. Permitting schoolteachers in particular the ability to make films available to their students greatly broadens the usefulness of copyrighted works. Conversely, this makes teachers likely targets for improper takedown notices if a copyright owner is unaware of the change imposed on July 26, 2010. The expansion of permissible uses then makes it all the more imperative that teachers have means by which they can ensure their use of copyrighted material is protected and not abused, like the ability to enforce their rights under § 512(f).

⁷⁷ *E.g.*, CONSTITUTIONAL LAW PROF BLOG, <http://lawprofessors.typepad.com/conlaw> (last visited June 9, 2011). Part of the idea for this hypothetical problem was taken from first-hand experience of teachers using blogs for educational purposes.

⁷⁸ Nate Anderson, *Any Use of This Article Without the NFL's Express Written Consent is Prohibited*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/02/challenging-copyright-at-the-nfl.ars> (last visited June 9, 2011). This article provided inspiration for the hypotheticals presented. The article explains that a legal professor posted a section of the NFL copyright policy, announced at the beginning of the live telecasts of each game, on her blog for her students to show that it was over reaching. *Id.* She then received multiple takedown notices saying her use of the clip was infringing on their copyright. *Id.*

⁷⁹ For an example of a takedown notice from the National Football League, see Wendy Seltzer, *My First DMCA Takedown*, WENDYSELTZER.ORG (Feb. 13, 2007), http://wendy.seltzer.org/blog/archives/2007/02/13/my_first_dmca_takedown.html.

⁸⁰ See *Twelve Inches Around Corp. v. Cisco Systems Inc.*, No. 08-6896, 2009 WL 928077, at *2 (S.D.N.Y. Mar. 12, 2009) (explaining that the alleged infringer received a takedown notice that included statements that material was infringing and subsequent to receiving the notice the ISP took down the website). See also *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 46

images and essays on her website, the website host disables access to the entire site.⁸¹ The material on her site, however, likely falls under the fair use exception because her site is used for educational purposes and is therefore non-infringing fair use.⁸²

The professor, not knowing much about copyright, but knowing that she needs her site back, finds a copyright attorney. Her attorney does some research, determines that the material falls under the fair use exception to copyright infringement, and drafts a put-back notice.⁸³ More than two weeks have passed since the site was first taken down before it is finally put back up. During that time, the students in her class did not learn the material from the site nor did they have access to an entire semester's worth of material as they prepared for their final exam. Additionally, the professor must pay her attorney for the work he did in order to get the site back up and operating.

The only likely way she can recoup the losses associated with responding to the notice is through litigation, which will cost her more money in attorney's fees. Furthermore, the professor learned that she can recover "any damages" from the misrepresentation and so she decides to file a lawsuit.

In her lawsuit, she alleges that she suffered economic damages (the costs she incurred responding to the takedown notice) as well as non-economic damages (stress,⁸⁴ diversion of resources and time,⁸⁵ and damage to her reputation her reputation as a professor based on poor reviews by students and the administration.)⁸⁶ Based on the *Lenz* decision, the fees associated with responding to the notice are recoverable; this was not disputed in the case.⁸⁷ There is no guarantee, however, that she will be able to recover the attorney's fees associated with the cost of litigating the case, or for any of the other damages she suffered. Given the

(S.D.N.Y. 2009) (discussing the failures of the copyright owner to comply with the requirements for a takedown notice, including failure to identify particular material that was infringing).

⁸¹ See 17 U.S.C. § 512(f)(2) (2006) (stating that material can be wrongfully disabled in addition to being wrongfully removed).

⁸² See *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983) (discussing the guidelines Congress has adopted with respect to fair use of material for educational purposes). While not mandatory the guidelines are meant to be helpful in determining the "minimum standard" for fair use. *Id.* First the copying must fall into the category of "brevity" and "spontaneity." *Id.* Additionally, the spontaneity element is such that the delay in getting permission would render the use of the material ineffective. *Id.* The second part is a cumulative affect test, meaning the material is only used for one course in the school. *Id.* The final test is that the user provide a copyright notice, acknowledging the authorship and copyright. *Id.*; *cf.* *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344, 1347 (N.D. Cal. 2010) (holding that fair use of copyrighted material is not an infringement).

⁸³ See 17 U.S.C. § 512(g)(3) (describing the fair use exception).

⁸⁴ See, e.g., *Salinas v. O'Neill*, 286 F.3d 827, 832 (5th Cir. 2002) (explaining that damages for emotional distress including sleeplessness, anxiety, stress, and humiliation can be appropriate in certain types of cases).

⁸⁵ See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 369 (1982) (explaining that the defendant's violations of the fair housing act were a strain on the organizations resources and frustrated their purpose of promoting the fair housing act by having to divert their resources to address the defendant's actions giving them a cause of action on which to sue).

⁸⁶ See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) ("[T]he state interest in compensating private individuals for injury to their reputation adequately supports awards of presumed and punitive damages-even absent a showing of 'actual malice.'").

⁸⁷ *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344, 1352 (N.D. Cal. 2010).

specialized knowledge of her attorney, his hourly fee was high, but he was able to work quickly. Litigating the matter, however, will surely take more time than filing a put-back notice and explaining the basics of copyright. This likely means that the cost of litigating the suit is more than the amount the professor can hope to recover under the interpretation announced in *Lenz*.⁸⁸

This result does not provide an adequate remedy to the harm the professor suffered. Given the high costs, it would not be financially reasonable for the professor to pursue litigation that would cost her more than she would likely be able to recover. Using the *Lenz* interpretation, it would not be in the professor's best interest to file a suit, and this is not consistent with congressional intent.⁸⁹ If this interpretation were to stand, it would require that internet users spend more money than they could ever reasonably hope to recover in a lawsuit. Given the cost, the only parties that this provision would benefit are large corporations or wealthy individuals, such as movie studios or celebrities. The practical effect of this interpretation is that § 512(f) would be rendered meaningless and would fail to provide protection to the internet users whom Congress sought to protect in passing this provision.

On the other hand, if the "any damages" language of the statute was read as a "but for" test—any injury that occurs "but for" the improper takedown notice—then the professor would be able to not only recover the costs associated with responding to the notice but also recover costs associated with the lawsuit and her non-economic damages. This interpretation would create a situation where the copyright owner could be liable for attorney's fees, which would create a deterrent and fulfill the goal of the statute.⁹⁰ Not only would a broader interpretation create an incentive for users to file suits, the threat of a lawsuit would likely encourage copyright owners to be more diligent in ensuring proper takedown notices.⁹¹

⁸⁸ *Earth Flag Ltd. v. Alamo Flag Co.*, 154 F. Supp. 2d 663, 670 (S.D.N.Y. 2001) (awarding two defendants substantial attorney's fees). In *Earth Flag*, the Plaintiff brought a copyright infringement suit against two defendants, Alamo and eBay. *Id.* The plaintiff lost the case and the court subsequently granted the defendants attorney's fees in the amount of \$36,561.92 for Alamo and \$69,565.00 for eBay. *Id.* The court acknowledged that this case had little merit, however, the court attributed the high amount of hours billed to the fact that a motion for summary judgment included novel questions concerning the DMCA and § 512(c). *Id.* The hourly rates varied from \$150 per hour up to \$225, all of which the court said were reasonable. *Id.* This case stands for the proposition that § 512 of the DMCA is complex, that the time necessary to try a case on copyright infringement is substantial, as well as the cost. *Id.* If this result were applied analogously to any of the hypothetical situations all of the potential clients could end up incurring nearly the \$36,561.92 in attorney's fees. This would likely outweigh any award for infringement of first amendment rights or declaratory judgment of non-infringement as sought in *Lenz*. Therefore this case shows that the costs associated with prosecuting the case, with no guarantee of recovering the high fees, creates little to no incentive.

⁸⁹ See generally S. REP. NO. 105-190 (1998) (discussing the purpose of the statute).

⁹⁰ S. REP. NO. 105-190, at 49 (stating the goal of § 512(f) is to deter false misrepresentation claims).

⁹¹ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (reiterating *Lenz's* argument that Universal has implemented a sweeping policy to take down Prince's copyrighted work, since their client has taken a strong public stance against people using his songs without his permission, and in doing so they deliberately ignore fair use exceptions).

B. Hypothetical Two: Internet User Suffers Non-Economic Damages as a Result of Receiving an Improper Takedown Notice

For this hypothetical, assume that the professor does not immediately hire an attorney. Instead, the professor runs a search on the internet after receiving the takedown notice, learns about her rights, and determines an appropriate course of action. Given her limited knowledge in the field, it takes her some time to determine that the use of the material does not infringe any copyright and that she can file a put-back notice to have the material returned to the website. She creates a put-back notice and sends it to the blog host and the copyright owner. The site is back up after ten days, and on the eleventh day⁹² she receives another notice from the same copyright owner, stating that her site has been taken down.⁹³ The professor realizes that her students are unable to access the required online material. Because time is of the essence, she hires an attorney to file a lawsuit against the copyright owner.⁹⁴

In her complaint, the professor alleges only non-economic damages including stress, loss of time to perform her other responsibilities as a professor (since she had to research how to respond), and damage to her reputation as a professor based on poor reviews by students and the administration. According to the *Lenz* court, the purpose of § 512(f) would be defeated if the damages were limited to economic damages.⁹⁵ Rather, there need only be *some* demonstrable damage.⁹⁶ If the professor can demonstrate that she suffered the alleged harm, she would have a sufficient set of recoverable damages. Yet, she may only receive a nominal award.⁹⁷

⁹² See 17 U.S.C. § 512(g)(2)(B) (2006) (explaining the time requirements for put back procedures).

⁹³ See Anderson, *supra* note 78 (explaining that the professor in this story provided the NFL with a put back notice claiming that her use of the clip she posted was for educational purpose and fair use). After the video was reposted after the statutory period, the professor received a second notice from the NFL, again asserting her use of the video was infringing. *Id.*

⁹⁴ *Id.* The story explains that the professor who was sought out by the NFL explained that she would have filed suit if she would have received a third notice). This is demonstrative of the fact that even a law professor who is very familiar with her rights isn't particularly inclined to file a suit for knowing misrepresentation. *Id.* This is meant to be an indication of the likelihood an average internet user would file a suit and how little of a deterrent affect the statute has given the lack of lawsuits. *Id.* See also *Amaretto Ranch Breedables v. Ozimals, Inc.*, No. 10-05696, 2010 U.S. Dist. LEXIS 141242, at *4 (N.D. Cal. Dec. 21, 2010) (“[The] Defendant chose to lodge a DMCA Takedown Notification rather than first (or simultaneously) filing an infringement lawsuit. By doing so, it ran the risk that Plaintiff would sue pursuant to § 512(f) and argue that the Notification was improper.”). Additionally the court acknowledged that claims under § 512(f) are “viable as stand-alone causes of action.” *Id.*

⁹⁵ *Lenz v. Universal Music Corp.*, No. 07-3783, 94 U.S.P.Q.2d (BNA) 1344, 1353 (N.D. Cal. 2010) (holding that if a plaintiff incurs damage, any damage is sufficient to bring a claim under the statute).

⁹⁶ *Id.*

⁹⁷ *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 714 (Del. Super. Ct. 1967) (explaining that nominal damages are “in name only” and are merely a recognition of a technical injury suffered by the plaintiff). The court also explains that they are typically awarded in some “trivial or trifling amount.” *Id.* See also *Stanton v. New York & E. Ry. Co.*, 22 A. 300, 303 (Conn. 1890) (explaining that nominal damages are “a mere peg to hang costs on”); *Henson v. Prue*, 810 A.2d 912, 916 (D.C. App. 2002) (explaining that one dollar is typically the amount awarded for nominal damages); *Stoll Oil Refining Co. v. Pierce*, 343 S.W.2d 810, 811 (Ky. Ct. App. 1961) (stating that nominal damages are awarded to a litigant who has established a cause of action but has not established

This creates another situation where the professor would not have a proper remedy available. The only likely way she could recover for the harms she suffered is through a lawsuit. Yet, given the interpretation provided by the *Lenz* court, a lawsuit will cost her more than she can hope to recover. Thus, it is once again economically unreasonable for her to file a lawsuit.

Under the “but for” test, the professor would get the relief she needs. If the “but for” test were applied to the “any damages” language, the costs associated with litigation, as well as her non-economic damages, would be “but for the takedown notice”⁹⁸ and recoverable. If there is no guarantee that attorney’s fees will be recoverable and perhaps only a nominal award for non-economic damages, then there is minimal incentive to file suit. Should this occur, the deterrent purpose of the provision is severely minimized.

C. Hypothetical Three: Internet User Suffers Economic Damages and Lost Profits as a Result of an Improper Takedown Notice

This example deals with a potter who makes bowls. The potter initially began making ceramic bowls as a hobby, but then came across the website Etsy,⁹⁹ where he could sell his handmade crafts. As his product gained popularity, he moved away from Etsy and set up his own website where he advertised and sold his work, which he had expanded to all dinner wares. On his site, he placed images of products from Pottery Barn,¹⁰⁰ using the Pottery Barn name, logo, images, and descriptions of all of their ceramics that were similar to his.¹⁰¹ On the website he critiqued the quality, aesthetic appeal, and cost of the Pottery Barn materials, which likely qualifies the use of the copyrighted material as a fair use.¹⁰² The potter was able to make some

compensatory damages); *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 727 (Pa. 1964) (explaining nominal damages signify that no real damage or loss has occurred). *See also Salinas v. O’Neill*, 286 F.3d 827, 830 (5th Cir. 2002) (implying that damages for emotional injuries are presumed to be nominal unless the plaintiff can provide supporting evidence that the injuries were severe). When this is applied to the hypotheticals, it demonstrates that given the seemingly low severity of the plaintiffs in the examples would likely only get an award of nominal damages, which would be outweighed by the vast costs. *See discussion supra* note 88.

⁹⁸ *See, e.g., Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987) (explaining the “but for” standard as meaning “but for [the proposed action], these activities would not occur.”).

⁹⁹ *Etsy—About*, ESTY, <http://www.etsy.com/about.php> (last visited June 9, 2011) (“Our mission is to enable people to make a living making things, and to reconnect makers with buyers.”).

¹⁰⁰ *About Us*, POTTERY BARN, <http://www.potterybarn.com/about-us> (last visited June 9, 2011) (“Pottery Barn . . . is founded on the idea that home furnishings should be exceptional in comfort, style and quality. Our in-house designers draw their inspiration from time-honored models in America and around the world to create unique collections at an excellent value.”).

¹⁰¹ *See Compare and Save*, REGRETSY, <http://www.regretsy.com/category/compare-and-save/> (last visited June 9, 2011). Regretsy is a website that mocks the website Etsy, by re-posting things on its own site found on the Etsy site. This particular section called “Compare and Save” shows a number of listings where people have posted handmade crafts or are selling products that are very similar to products sold at other stores like IKEA or Home Depot.

¹⁰² *See, e.g., Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 677–78 (D. Minn. 1995) (demonstrating that despite the newspapers reprinting of a copyrighted story for a commercial purpose, it was still permissible fair use given the purpose of criticism of the story); *Lindberg v. County of Kitsap*, 948 P.2d 805, 814 (Wash. 1997) (stating that use of copyrighted drawings for purposes of criticism was permissible fair use).

money off of selling his work, not a booming business, but a steady flow of a small amount of money.¹⁰³

One day he receives a takedown notice from Pottery Barn, saying that his use of their images and descriptions on his website is infringing. The website provider disables access to his website.¹⁰⁴ The potter calls his attorney and asks him what he should do and the attorney drafts a put-back notice. In the mean time, not wanting to lose out on sales during the holiday shopping rush, the potter calls up a website design agency and pays them a premium price to create a new website and purchase a new domain name so that he can continue to sell his goods without interruption.¹⁰⁵ Eventually, his original site is put back up, three days after the end of the holiday shopping rush. The potter is very disappointed that his site was down during his most profitable week of the year, and he files a suit under § 512(f).

It is clear that the potter will be able to recover for the costs associated with responding to the notice.¹⁰⁶ His attorney was well versed in the DMCA, copyright law, and the fair use exception, so it only took him one hour to get the notice drafted and sent, which incurred minimal cost. Additionally, the potter claimed lost profits in his complaint, which he can prove through diligent record keeping.

This situation is different from the previous hypothetical scenarios for a number of reasons. First of all, damages arise not only from responding to the notice but also from lost profits and the costs associated with a new website and domain name.¹⁰⁷ Under the *Lenz* interpretation of “any damages,” it is unclear whether lost profits and the costs associated with getting a new website up and running will be recoverable. This creates quite a problem for the potter.

The potter’s ability to get meaningful relief could be severely limited. His attorney’s fees associated with responding to the notice are relatively low because his attorney was well versed in this area of the law. He is unsure if he can recover for the costs associated with the new site, and despite it being his best selling week, his lost profits are also low. Regardless of the differences between this hypothetical and the previous two, the result is the same. There is a minimal, if any, incentive for the potter to bring a lawsuit under § 512(f). The cost of litigation is still likely higher

¹⁰³ Tessa Rosario, *How to Make Money on Etsy*, BROKELYN (July 13, 2009), <http://www.brokelyn.com/how-to-make-money-on-etsy> (explaining how people can make money on Etsy and the varying levels of income its users make).

¹⁰⁴ Jeff Diehl, *EFF and 10 Zen Monkeys vs. Michael Crook and DMCA*, (Nov. 1, 2006), <http://www.10zenmonkeys.com/2006/11/01/eff-crook-dmca-lawsuit> (providing an example that an entire website can be shut down).

¹⁰⁵ *Id.* This story provided partial inspiration for this hypothetical situation. The author of the blog, 10 Zen Monkeys, posted an image of Michael Crook, a notorious abuser of DMCA takedown notices, on his blog. *Id.* He then received a takedown notice from Crook, which caused his blog to be shut down, to which the author responded by taking his site to another hosting company, which was more expensive. *Id.*

¹⁰⁶ See *Lenz v. Universal Music Corp.*, 94 U.S.P.Q.2d (BNA) 1344, 1352 (N.D. Cal. 2010).

¹⁰⁷ See Posting of knownick, *DMCA Takedown notice—filed counter-notification—how long?*, GOOGLE ADSENSE (Jan. 7, 2011), <http://www.google.com/support/forum/p/AdSense/thread?tid=13b9a6c233eb7e14> (complaining that lost profits can be the outcome of take down notices). In this scenario a gentlemen is looking to find out how long his website advertising will be down after he refilled his counter notification claim. *Id.* Here the man followed proper procedures for his website, and has been unable to get a response from Google about re-implementing his ad services, which is costing him money. *Id.* This is meant to demonstrate that the process in which these problems are resolved is often slow but can have a serious impact.

than the amount recoverable should he win the lawsuit, even when lost profits are included. This demonstrates yet another circumstance where the innocent internet user is left to bear the costs of another party's abusive acts. Clearly, this does not deter copyright owners from filing improper takedown notices.

Taken as a whole, these are just a few hypothetical situations that demonstrate that if the costs associated with litigation outweigh the potential recovery, then the deterrent effect of § 512(f) is greatly diminished. There are numerous other situations where this could happen, like the initial example in the introduction of the politician who lost the election.¹⁰⁸ There is no incentive for him to file a suit because he likely only has non-economic damages. After spending large sums of money on a campaign, it is a worthless consolation prize to have the court decline a meaningful damages award and merely acknowledge unfair treatment.

The above examples demonstrate that the *Lenz* interpretation greatly minimizes the incentive for a harmed internet user to file a lawsuit under § 512(f). As a result, § 512(f) is rendered meaningless and no longer serves the purpose of deterring copyright owners from abusing takedown notices. If Congress intended that this provision have far reaching implications, the *Lenz* interpretation would defeat this purpose by limiting the benefit of this provision to a small number of people. As discussed above, if the internet user of average means is unable to utilize § 512(f), then the provision is rendered meaningless.

III. PROPOSAL

This section proposes that courts reject the *Lenz* interpretation of the “any damages” clause of § 512(f). Rather than limiting the damages available to potential plaintiffs, courts should interpret the language more broadly so as to effectuate the legislative intent of the DMCA, which is to effectively deter abusive copyright owners.

Since this issue revolves around one case, the solution is rather straightforward: change the interpretation of the statutory language. The court should interpret the “any damages” language in § 512(f) to mean absolutely any damages. Any injury caused by or occurring “as a result of,”¹⁰⁹ the misrepresentation of infringement should be compensable. There is substantial fundamental legal precedent in other

¹⁰⁸ See, e.g., *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 961 (D.N.H. 1978) (explaining that a person running for office copied a fifteen second clip of his opponent's song for an advertisement and it was determined to be fair use since it was for purposes of political debate); *YouTube Obeys Fake Takedown Request From 15 Year Old*, MASHABLE (Apr. 15, 2011), <http://mashable.com/2007/04/14/youtube-takedown> (explaining how a 15 year old sent a notice to YouTube pretending to be a production company requesting clips of the show be taken down). YouTube not only complied with the request but cautioned users that if they uploaded clips from the show their accounts could be deleted. *Id.* See also *Did Flickr Delete Obama Joker Image After Receiving Fake Takedown Notice?*, READWRITEWEB (Aug. 27, 2009, 12:20 PM), http://www.readwriteweb.com/archives/flickr_took_down_obama_joker_photo_after_fake_dmca_notice.php (explaining that an image of President Obama was removed from the photo hosting website Flickr and the takedown notice was not provided by the actual copyright holder).

¹⁰⁹ 17 U.S.C § 512(f) (2006).

fields of law to establish the “but for” test as a way of determining causation.¹¹⁰ A “but for” analysis asks, “Would the plaintiff have suffered the injury but for, or without, the defendants conduct?”¹¹¹

Applying the “but for” standard would not offend the traditional canons of statutory construction. Such canons include applying the plain meaning of the language,¹¹² looking to legislative intent,¹¹³ and avoiding absurdity.¹¹⁴ As was discussed earlier, the plain meaning of “any” is very broad and is synonymous with “all.” Applying the “but for” standard to make recovery more inclusive would not offend the plain meaning of the statute, since it is not any more expansive than the current language. If the “but for” interpretation was applied, it would seemingly be analogous with the “as a result of” language in the statute.¹¹⁵

Perhaps the most important factor overlooked here is the legislative intent in passing this provision.¹¹⁶ The court explained that the intent does not support a “but

¹¹⁰ See, e.g., *United Indus. Syndicate, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312, 1316 (8th Cir. 1982) (demonstrating the use of the “but for” test in contract law by asserting that “[t]he fundamental measure of contract damages is that which places the non-breaching party in the position it would have been but for the breach.”). See also *Long v. Eastfield College*, 88 F.3d 300, 308 (5th Cir. 1996) (explaining that the “but for” test is used to determine causation in Title VII cases of employee discrimination); *Meyer Corp., U.S. v. EVCO Intern., Inc.*, No. 09-297, 2010 WL 1759462, at *4 (E.D. Cal. 2010) (explaining that the “but for” test is the test that the Ninth Circuit uses in establishing jurisdiction).

¹¹¹ See *Boykin v. La. Transit Co.*, 707 So.2d 1225, 1230 (La. 1998) (describing the but for test as one which asks would the injury have occurred if the defendant’s conduct never occurred); *Callahan v. Cardinal Glennon Hosp.* 863 S.W.2d 852, 860–61 (Mo. 1993) (en banc) (citing *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS*, § 41, at 266 (5th ed. 1984) (defining “but for” as when a defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct)).

¹¹² See *Johnson v. United States*, 529 U.S. 694, 723–24 (2000) (Kennedy, J., concurring in part) (establishing that the rules of construction call for words to be interpreted in their ordinary meaning); *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 909–10 (Mo. 2006) (en banc) (explaining that when legislative intent cannot be determined then the plain meaning of the words in the statute should be used to decipher such intent); *Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741, 746–47 (N.J. 2009) (clarifying that unless the legislature has used a technical term, words should be given their ordinary meaning when interpreting a statute); *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1218 (Ohio 1999) (standing for the proposition that a statute should be read so that words have their normal meaning); *Yonkings v. Wilkinson*, 714 N.E.2d 394, 396 (Ohio 1999) (explaining the rules of construction require “words must be taken in their usual, normal or customary meaning.”).

¹¹³ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (demanding that the court give effect to the unambiguously expressed intent of Congress); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998) (listing the legislative intent as the first element in statutory construction).

¹¹⁴ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating statutory interpretations that would produce absurd results should be avoided if there are other acceptable interpretations available that would comport with the intent of the statute); *Cheryl P. v. Superior Court*, 42 Cal. Rptr. 3d 504, 512 (Cal. Ct. App. 2006) (explaining the literal meaning of a word should not be applied if it would lead to an absurd result).

¹¹⁵ See *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1134 (explaining that “but for” means that the injury occurred “as a result of” the defendant’s conduct).

¹¹⁶ *Alvarez v. Pappas*, 890 N.E.2d 434, 441 (Ill. 2008) (stating that the legislative intent rule of statutory interpretation is the most important canon while all others are subordinate); *Rural Water Dist. #2 v. City of Louisburg*, 207 P.3d 1055, 1060 (Kan. 2009) (explaining that the legislative intent rule of interpretation is the most fundamental of the rules).

for” test. The legislative intent, however, would in fact be furthered if the “but for” standard were applied. The reality of the situation is that the more damages a copyright owner could be liable for, the greater deterrent the clause is likely to be. This certainly furthers legislative intent. If Congress intended a more limited recovery, it would have used more limiting language.

Even under a proximate cause standard instead of a “but for” test, litigation would arguably be a reasonably foreseeable risk of filing a takedown notice that misrepresents infringement.¹¹⁷ The existence of § 512(f) should be sufficient to make litigation foreseeable to a copyright owner considering filing a takedown notice. Additionally, the language of the statute itself anticipates litigation, in that it specifically lists “attorney’s fees” as compensable damages.¹¹⁸ It is foreseeable that someone would have to hire an attorney to litigate this issue based on its complexity and the fact that § 512(f) anticipates attorney’s fees.

There are additional benefits to applying the “but for” standard to the damages language in § 512(f). In light of the Ninth Circuit’s decision in *Rossi v. Motion Picture Association of America*,¹¹⁹ which requires subjective good faith as it applies to “knowingly misrepresents,”¹²⁰ the “but for” standard would encourage copyright owners to police themselves. Since the subjective good faith standard is likely very difficult to prove,¹²¹ there is even less of an incentive for victims of takedown abuse to file suit and a minimal deterrence to copyright owners, if any. Providing an opportunity for more expansive recovery by plaintiffs could help shift the balance back toward legislative intent to deter action by overbearing copyright owners.

The “but for” standard would best fulfill the legislative goals of § 512(f) in deterring copyright owners from knowingly filing misrepresentation notices. This is a better means of applying the law because it allows for a broader recovery. It would create greater potential liability for the copyright owner and a more effective deterrent. If the potential cost to the copyright owner for losing a case on a § 512(f) claim is low, then the deterrent is also low. If the deterrent effect can be achieved, then the legislative intent of § 512(f) will be satisfied.¹²²

¹¹⁷ *Ney v. Yellow Cab Co.*, 117 N.E.2d 74, 79 (Ill. 1954) (limiting an actionable act of negligence to those which could have reasonably been foreseen or anticipated as a probable result of the conduct); *Hack v. New York, C. & St. L.R. Co.*, 169 N.E.2d 372, 376–77 (Ill. App. 1960) (explaining part of the test for proximate cause is what a reasonably prudent person would have foreseen as a potential result of their conduct); *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980) (clarifying the specific manner in which the injury occurred and the particular type of injury need not be foreseeable, but rather just harm itself).

¹¹⁸ See 17 U.S.C. § 512(f) (2006).

¹¹⁹ *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000 (9th Cir. 2004).

¹²⁰ See *id.* at 1004 (9th Cir. 2004) (establishing a subjective good faith standard by which the “knowingly” of “knowingly misrepresent” should be judged).

¹²¹ Eric Goldman, *Rare Ruling on Damages for Sending Bogus Copyright Takedown Notice—Lenz v. Universal, TECH. & MARKETING BLOG* (Feb. 26, 2010), http://blog.ericgoldman.org/archives/2010/02/standards_for_5.htm (opining that the *Rossi* decision makes it very difficult for a plaintiff to win a § 512(f) case). Eric Goldman is an Associate Professor of Law at Santa Clara University School of Law teaching Cyberlaw and Intellectual Property.

¹²² See SEN. REP. NO. 105-190 (1998), at 49 (stating that § 512(f) “is intended to deter knowingly false allegations . . . that are detrimental to . . . Internet users”).

CONCLUSION

The current state of the law interpreting 17 U.S.C. § 512(f) is ill-suited to fulfill the goal of Congress in creating the provision. Despite the *Lenz* court applying legitimate legal reasoning in its decision, the court failed to properly consider the clearly demonstrable intent of the legislature. The court would have been more consistent with the fundamentals of statutory interpretation had it decided in favor of the plaintiff, Stephanie Lenz.

Section 512(f), which is supposed to facilitate the path of development and expansion of electronic commerce, will fail to carry out its intended purpose under such a narrow interpretation. Given the new challenges posed by the decision, it is unlikely that internet users will be able to protect themselves against the abuses of overbearing copyright owners and savvy web surfers.

When considering the explicit goals of the Digital Millennium Copyright Act, the recent *Lenz* decision falls short of accomplishing those goals. It is clear that applying a broader interpretation of “any damages”—one in line with time tested standards in other fields of law—would encourage users to exercise their rights and to deter copyright owners from inappropriately applying an avoidable restriction on their work.