



## US FAIR USE IN THE AGE OF YOUTUBE<sup>GENEVIEVE HALLE-DESILETS\*</sup>

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A recent US Court of Appeal decision confirmed that fair use must be considered prior to requesting the removal of a video on the Internet.

The facts giving rise to the dispute are as follows. On February 7, 2007, Stephanie Lenz published a 29-second video <<https://www.youtube.com/watch?v=N1KfJHFWlhQ>> on YouTube of her little boy dancing to the Prince song, "Let's Go Crazy". At the time, Universal Music Corp., Universal Music Publishing Inc. and Universal Music Publishing Group (collectively "Universal"), acted as Prince's copyrights administrator. Declaring that they believed, in good faith, that this video violated Prince's copyright, Universal sent YouTube a takedown notice, citing the Digital Millennium Copyright Act ("DMCA"), pursuant to which YouTube complied and removed the video.

On July 24, 2007, Ms. Lenz filed a lawsuit against Universal before the US District Court, Northern District of California, alleging that Universal, by asking YouTube to remove the video, was misinterpreting the provisions of the DMCA. Judge Fogel agreed with her <[https://www.eff.org/files/filenode/lenz\\_v\\_universal/lenzorder082008.pdf](https://www.eff.org/files/filenode/lenz_v_universal/lenzorder082008.pdf)>, concluding that the DMCA includes the obligation to consider "fair use", in good faith, before requesting the removal of a video from a website. In closing, the judge stated that: "Requiring owners to consider fair use will help ensure that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand" without compromising "the movies, music, software and literary works that are the fruit of American creative genius." An appeal against this decision was filed.

On September 14, 2015, in a judgment <<http://cdn.ca9.uscourts.gov/datastore/opinions/2015/09/14/13-16106.pdf>> by the US Court of Appeal for the Ninth Circuit, judge Tallman again ruled in favour of Ms. Lenz, stating that "fair use" must be considered before requesting the withdrawal of a video. He concluded that "...because 17 U.S.C. § 107 created a type of non-infringing use, fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before sending a takedown notification under §512(c)."

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\* From ROBIC, LLP, a multidisciplinary firm of Lawyers, and Patent and Trade-mark Agents. Published in the Winter 2016 (Vol. 19, no. 2) Newsletter of the firm. Publication 068.201E.

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What is the American notion of “fair use”? It represents an exception to the general rules of copyright law, which provides that, in certain cases, a copyrighted work can be used without the permission of the copyright holder. It should be noted that a similar concept exists in Canada, called “fair dealing”. However, there are differences between these two concepts, such as the presence of a list of factors in the US legislation. Furthermore, fair use has a broader scope than fair dealing.

In Canada, a fair-dealing provision specifically aimed at user-generated content was introduced to the Copyright Act, when it was last reformed in 2012. The purpose of this provision, commonly known as the “YouTube exception”, is to allow certain non-commercial uses of works protected by copyright, under four conditions: (1) the new work must be used for solely non-commercial purposes, (2) the source of the content being used must be mentioned when possible, (3) the creator of the new work must have reasonable grounds to believe that the content being copied did not itself infringe copyright, and (4) the new work must not have a substantial adverse effect on the original work.

In light of the recent decision of the US Court of Appeal, it is clear that the user who generates content online for non-commercial purposes is entitled to some protection under US law. This protection, however, seems to be more vaguely defined than the exception for non-commercial user-generated content, which is clearly provided for under the Canadian Copyright Act. Nevertheless, it is certainly a step in the right direction!



