Cracking the Code:
Legal Issues for Artists in the Digital Age
Wednesday, May 6, 2020

Welcome & Introduction – 9:25 AM to 9:30 AM

Legal Issues in Digital Media – 9:30 AM to 10:30 AM
Anthony Ramirez, Morrison & Foerster LLP
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Legal & Business Considerations for Influencers – 10:30 AM to 11:30 AM
Anita K. Sharma, Sharma Law PLLC
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Break: 11:30 AM to 11:45 AM

User-Generated Content & Copyright Infringement – 11:45 AM to 12:45 PM
Robert J. deBrauwere, Pryor Cashman LLP
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Presenter Q&A – 12:45 PM to 1:15 PM

Legal Issues for Artists in the Digital Age
May 6, 2020

Robert J. deBrauwere co-chairs Pryor Cashman's Digital Media Group and is a member of the Intellectual Property, Media + Entertainment and Litigation Groups. His extensive knowledge of the interplay between IP, technology, media, entertainment and music has earned him the role of trusted business and legal advisor to some of the world's most cutting-edge companies and influential artists and songwriters. A former computer programmer and concert and theater sound/lighting engineer, Rob understands how technology and entertainment intersect in the digital world. He recognizes the challenges that accompany the design and development of new applications, products and distribution channels, and works alongside his clients to devise solutions that are scalable and secure.

Anthony Ramirez is of counsel in the Technology Transactions Group in the New York office of Morrison & Foerster. Anthony advises clients on general commercial and transactional matters. His clients include technology, media, and communications companies with considerable intellectual property assets. His practice focuses on the legal aspects of licensing and commercializing technology and intellectual property, as well as negotiating general commercial contracts. He also regularly assists clients with legal issues relating to mobile applications and social media.

Anita K. Sharma is an entertainment lawyer and producer based In New York City. Her entertainment law practice covers the areas of film, television, intellectual property, digital media and branded entertainment. Anita has developed a specialized digital media practice representing YouTubers and digital influencers like Lilly Singh (IISuperwomanII), Marcus Butler, Dulce Candy, Judy Travis (ItsJudysLife) Louis Cole (FunForLouis), Jasmeet Singh (JusReign), Sara Lynn Cauchon (The Domestic Geek) and LaToya Ali (LaToya Forever).
As a producer, in 2010 Anita produced her first award-winning feature film, Stag, that premiered at the LA Comedy Fest where it won "Best Ensemble" & the "Award of Excellence". In 2011 she produced The Conversation, an online interactive website companion piece to Sarah Polley's film Take This Waltz. In 2010, Anita produced the short film Champagne, which premiered at the 2010 Toronto International Film Festival. In 2012 Anita was invited to attend the Rotterdam International Film Festival's Producer's Lab and the Toronto International Film Festival's Producer's Lab. In 2014 she participated in the Producer's Network at the Cannes International Film Festival.

17 U.S. Code § 512. Limitations on liability relating to material online

(a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) SYSTEM CACHING.—

(1) LIMITATION ON LIABILITY.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) CONDITIONS.—The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—

(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) DESIGNATED AGENT.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) ELEMENTS OF NOTIFICATION.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)

(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) INFORMATION LOCATION TOOLS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1)

(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e) LIMITATION ON LIABILITY OF NONPROFIT EDUCATIONAL INSTITUTIONS.—

(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) MISREPRESENTATIONS.—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 to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) Replacement of Removed or Disabled Material and Limitation on Other Liability.—

(1) No liability for taking down generally.— Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) CONTENTS OF COUNTER NOTIFICATION.—To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) LIMITATION ON OTHER LIABILITY.—

A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(h) Subpoena To Identify Infringer.—

(1) Request.—
A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request.—The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena.—
The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) Basis for granting subpoena.—
If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) ACTIONS OF SERVICE PROVIDER RECEIVING SUBPOENA.— Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) RULES APPLICABLE TO SUBPOENA.— Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

(i) CONDITIONS FOR ELIGIBILITY.—

(1) ACCOMMODATION OF TECHNOLOGY.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) DEFINITION.—As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) INJUNCTIONS.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) SCOPE OF RELIEF.—

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) CONSIDERATIONS.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) NOTICE AND EX PARTE ORDERS.—
Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) DEFINITIONS.—

(1) SERVICE PROVIDER.—

(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) MONETARY RELIEF.—
As used in this section, the term "monetary relief" means damages, costs, attorneys' fees, and any other form of monetary payment.

(l) OTHER DEFENSES NOT AFFECTED.—
The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely

upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(m) PROTECTION OF PRIVACY.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) CONSTRUCTION.—

Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

(Added Pub. L. 105–304, title II, § 202(a), Oct. 28, 1998, 112 Stat. 2877; amended Pub. L. 106–44, § 1(d), Aug. 5, 1999, 113 Stat. 222; Pub. L. 111–295, § 3(a), Dec. 9, 2010, 124 Stat. 3180.)

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47 U.S. Code § 230. Protection for private blocking and screening of offensive material

(a) FINDINGS The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

(1) TREATMENT OF PUBLISHER OR SPEAKER
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) EFFECT ON OTHER LAWS

(1) NO EFFECT ON CRIMINAL LAW

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON SEX TRAFFICKING LAW Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) DEFINITIONS As used in this section:

(1) INTERNET

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER
The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

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The Law and Business of Social Media

S.D.N.Y.: Public Display of Embedded Instagram Photo Does Not Infringe Copyright


By Amber Harezlak & Aaron Rubin on May 4, 2020

A federal district court in New York **held** that a photographer failed to state a claim against digital-media website **Mashable** for copyright infringement of a photo that Mashable embedded on its website by using Instagram's application programming interface (API). The decision turned on Instagram's terms of use.

Mashable initially sought a license from the plaintiff, a professional photographer named Stephanie Sinclair, to display a photograph in connection with an article the company planned to post on its website, mashable.com. The plaintiff refused

Mashable's offer, but Mashable, nevertheless, embedded the photograph on its website through the use of Instagram's API.

Instagram's terms of use state that users grant Instagram a sublicensable license to the content posted on Instagram, subject to Instagram's privacy policy. Instagram's privacy policy expressly states that content posted to "public" Instagram accounts is searchable by the public and available for others to use through the Instagram API.

The plaintiff conceded that she was bound by Instagram's terms of use but argued, among other things, that the sublicense right was invalid because it was "created by a series of complex, interconnected documents." The court found this argument unpersuasive, stating that "[w]hile Instagram could certainly make its agreements more concise and accessible, the law does not require it to do so."

This case serves as a good reminder of the importance of website terms of use in protecting website operators and their customers. Unfortunately, because the court determined that Instagram had granted Mashable a valid sublicense, the court did not reach a question that is still open in the Second Circuit: whether embedding an image on a website constitutes copyright infringement. As we **previously reported** a federal court in New York held that embedding a Tweet in blogs and news articles constituted infringement. That case **settled** following an appeal. **Courts in California**, however, have reached a different conclusion.

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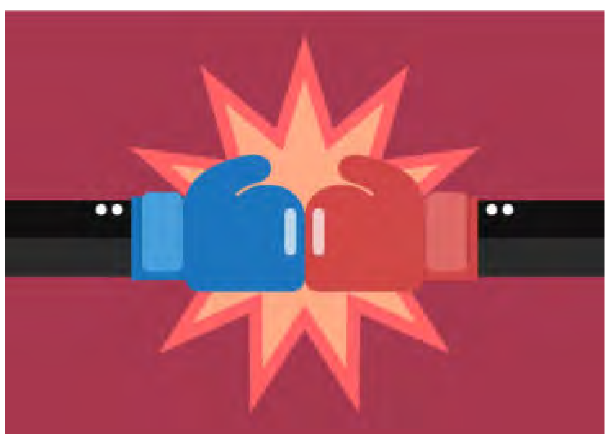
Computer Service Providers Face Implied Limits on CDA Immunity


By J. Alexander Lawrence & Janelle Hyun on April 7, 2020



Often lauded as the **most important law for online speech**, **Section 230 of the Communications Decency Act (CDA)** does not just protect popular websites like Facebook, YouTube and Google from defamation and other claims based on third-party content. It is also critically important to spyware and malware protection services that offer online filtration tools.

Section 230(c)(2) grants broad immunity to any interactive computer service that blocks content it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Under a plain reading of the statute, Section 230(c)(2) clearly offers broad protection. With respect to what the phrase "otherwise objectionable" was intended to capture, however, the protections are less clear.

A federal district court in California recently had the opportunity to clarify the scope of this catchall phrase. In ***Asurvio LP v. Malwarebytes, Inc***., the Northern District Court of California held that Section 230 provided Malwarebytes immunity for its allegedly anticompetitive conduct and tossed the case. To fully understand this decision, a comparison with an earlier (but still recent) Ninth Circuit decision, ***Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.***, which found otherwise, is critical. Notably, the two cases involved the same defendant, like state and federal claims, and identical defense under Section 230 raised by Malwarebytes. Why, then, did the two decisions result in a different outcome? Certainly, the legislative objective behind Section 230 played a role. But, more importantly, the answer lies in the plaintiffs' status as a direct competitor, a standard nowhere to be found in Section 230.

Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.

Enigma Software involved directly competing security software developers. Generally, when these providers identify malicious programs based on self-identified criteria and a user later attempts to open or download those programs, the user is alerted of a security risk, discouraged from downloading and advised to block the content. For eight years, Malwarebytes flagged programs it viewed obtrusive, misleading or deceptive as malware. It later started to block programs that it believed its users did not seem to like. Among these blocked programs were Enigma's most popular competing offerings.

Calling out the practice as anticompetitive, Enigma filed an action against Malwarebytes. Enigma claimed that Malwarebytes was engaging in deceptive business practices in violation of New York state law, interfering with business and contractual relations in violation of New York common law and violating the Lanham Act by deceiving Enigma's potential consumers. Malwarebytes successfully transferred the case to the Northern District Court of California and countered, claiming that the catchall phrase of Section 230(c)(2) gave Malwarebytes immunity for amending its filtering guidelines, irrespective of any anticompetitive motives, which it, of course, denied existed.

The Ninth Circuit had to decide whether Section 230(c)(2) conferred on online service providers unfettered discretion to screen any material they considered objectionable by providing immunity from liability. In reversing the district court's dismissal of Enigma's claims, a split Ninth Circuit panel found that the catchall phrase did not contemplate programs considered objectionable solely for anticompetitive reasons. In reaching this conclusion, the panel turned to the goals Congress sought to achieve with Section 230.

The statutory aims of Section 230 include:

- Promoting continued development of the Internet and interactive computer services;
- Preserving the "vibrant and competitive free market" for the Internet and interactive computer services;
- Encouraging the development of technologies that "maximize user control"; and
- Removing barriers for the "development and utilization of blocking and filtering technologies" that help restrict minors' access to indecent online content.

In light of these objectives, the Ninth Circuit held that an unqualified immunity would stifle rather than promote competition and forestall development of online blocking technology. The Ninth Circuit, therefore, found that "otherwise objectionable" does not encompass programs considered objectionable for purely anticompetitive reasons.

In a pointed dissent, Judge Rawlinson noted the court must presume that Congress "says in a statute what it means and means in a statute what it says." Judge Rawlinson argued that the majority's real complaint was not that the district court construed the statute too broadly, but that the statute is written too broadly. But, in his view, that defect, if it is a defect, is one beyond the courts' authority to correct. Judge Rawlinson would have held that the Ninth Circuit had no authority to rewrite the CDA safe harbor. That is Congress's job.

Asurvio LP v. Malwarebytes, Inc.

Against this backdrop, the Northern District Court of California was once again called upon to explore the scope of the catchall "otherwise objectionable" language. In *Asurvio*, the plaintiff developed "software solutions that work in real time in the background of the operating system to optimize processing and locate and install all missing and outdated software drivers" and provided "technical support services for the removal of Spyware and Malware and all other facets of personal computer use." Starting in 2017, Asurvio listed its technical support services in its boilerplate terms and conditions, which included technical support for removing malware. Shortly thereafter, Malwarebytes classified Asurvio's products as potentially unwanted programs and discouraged its users from using Asurvio's programs. As in *Enigma Software*, Asurvio brought claims for tortious interference with contractual relations, unfair competition and violation of the Lanham Act. Just as it did in *Enigma Software*, Malwarebytes invoked Section 230(c)(2) immunity.

Pointing to *Enigma Software*, Asurvio argued that Section 230(c)(2) immunity did not protect Malwarebytes for screening Asurvio's programs for anticompetitive purposes. The district court disagreed. Unlike Enigma, the court found that Asurvio was not Malwarebytes' direct competitor. Asurvio, the court found, did not develop and market online filtration tools. The court also rejected Asurvio's attempts to cast itself as a competitor, stating that a broad reading of competition would "render the statutory immunity meaningless." Thus, because Asurvio did not directly compete with Malwarebytes, the limitations on Section 230(c)(2) recognized in *Enigma*

Software were inapplicable. Malwarebytes was immune from liability, and Asurvio's claims were altogether dismissed.

Takeaway

By drawing limits on Section 230(c)(2) immunity that appear nowhere in the statute, *Enigma Software* has been criticized as a "**pro-spam, pro-virus and pro-spyware/adware**" decision, which harmed both the public and developers of online blocking technologies. While Malwarebytes could not get the full Ninth Circuit to hear the case, it has expressed an intention to seek Supreme Court review and has until mid-May to make that filing.

It remains to be seen whether the *Enigma Software* decision will get Supreme Court review or whether federal courts outside of the Ninth Circuit will follow the same reasoning, but one thing is certain: *Enigma Software* introduced into Section 230(c)(2) new limits on Section 230 immunity, which the *Asurvio* court was obliged to follow. So, questions remain to be answered: how will courts define a direct-competitor? What about partial-competitors? What would be required to prove anticompetitive motives? Will courts impose other implied limitations on Section 230 immunity? How far will the courts go to carve out other conduct from Section 230 immunity? We will see how the law develops in this area.

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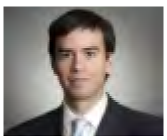
Just Browsing: District Court Finds Browsewrap Agreement Enforceable



By Anthony M. Ramirez & Katherine DeVries on November 4, 2019

Courts continue to grapple with the enforceability of online agreements. While courts generally enforce clickwrap agreements—online agreements where users affirmatively show their acceptance after being presented with the terms, usually by clicking "I agree"—browsewrap agreements have stood on shakier enforceability grounds. Browsewrap agreements are online terms that, unlike a clickwrap agreement, do not require any affirmative indication of consent. Indeed, users can often continue using a website without ever viewing the terms of a browsewrap agreement, or possibly even knowing they exist. As the Northern District of California's decision in ***Alejandro Gutierrez v. FriendFinder Networks Inc.*** demonstrates, browsewrap agreements are not *always* unenforceable, but reaching such a determination can be a highly fact-specific inquiry requiring significant discovery—including discovery of offline activities, such as phonecalls between the user and the online service provider.

AdultFriendFinder.com (AFF) is an online dating website. The website is generally free, although users can pay for particular upgrades and services. Users must register to use the site, and AFF collects users' personal information as part of the registration process. Use of AFF is governed by the site's Terms of Use (the Terms). Users don't have to explicitly agree to the Terms in order to register or use AFF, but the Terms are readily available on the site, and they state that continued use of AFF constitutes acceptance. The Terms also include an arbitration provision.

Gutierrez began using AFF at least as early as July 2003, and continued using it for over a decade. Throughout this time, he provided personal information to AFF, including his name, address, credit card information, and photos.

Gutierrez alleges that, in October 2016, someone hacked AFF's systems and downloaded the personal information of 339 million AFF users. Based on this security breach, Gutierrez brought a putative class action in the federal district court of the Northern District of California against FriendFinder Networks, Inc. ("FriendFinder"), which owns and operates AFF. FriendFinder sought to dismiss the action and compel arbitration, based on the arbitration provision in the Terms. Gutierrez argued that he was not bound by the arbitration provision, because he never agreed to the Terms.

Ultimately, the court found that Gutierrez *did in fact* agree to the Terms, *despite the absence of evidence that he had ever viewed them*, and granted FriendFinder's motion to compel arbitration. According to the court, the Terms could be considered a browsewrap agreement because AFF did not require users to expressly indicate consent, or visit any page containing the Terms, before registering and using the site. Although browsewrap agreements are rarely enforced, the court found that the Terms were enforceable against Gutierrez in this instance. According to the court, Gutierrez was on *inquiry* notice that his continued use of the site would constitute an indication of his intent to be bound, and Gutierrez in fact gave such an indication by using the site after receiving the notice.

Importantly, the court based its finding on a 2013 call between Gutierrez and a FriendFinder customer support representative. Gutierrez called FriendFinder customer support after losing access to AFF. The representative informed Gutierrez that he'd lost access to AFF because he had posted his email address in an AFF chatroom "in violation of [AFF's] Terms of Use." When Gutierrez said he didn't understand why posting in a chatroom was "such a big deal," the customer support representative explained, "Because we set restrictions on the website . . . . you need to follow our rules and regulations." According to the court, this conversation constituted notice to Gutierrez that, if he wanted to use AFF, he would be bound by the Terms. Once Gutierrez regained access to AFF, he continued using the site. Although he never read the Terms, the Terms were readily available on AFF. Because Gutierrez continued to use AFF *after* the representative notified him that the Terms govern his use of the site, and because the Terms clearly state that continued use of AFF constitutes acceptance, the court found that Gutierrez had in fact accepted the Terms.

Although the court ultimately enforced AFF's browsewrap terms, this case should still be a warning to website operators about the risks of using browsewrap agreements. The court could have reached a different decision if the plaintiff hadn't had a separate customer support call that mentioned the Terms, or if FriendFinder had been unable to produce evidence of the call.

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CREATOR AGREEMENT

This Creator Agreement (the "**Agreement**") is entered into as of [redacted] (the "**Effective Date**") by and between Studio 71, LP ("**S71**"), a Delaware limited partnership with offices located at 8383 Wilshire Blvd., Suite 1050, Beverly Hills, California 90211 on the one hand, and [redacted] ("**Creator**") [redacted], a [redacted] corporation with an address at [redacted] on the other hand, with respect to the development, production, and delivery of the promotional campaign related to the [redacted] production (the "**Campaign**") for [redacted] ("**Advertiser**"). S71 and Creator shall at times be individually referred to herein as a "**Party**" and collectively as the "**Parties**".

WHEREAS, S71 had entered into a Production Agreement with Advertiser for the Campaign;

WHEREAS, S71 has engaged Creator to develop, produce, and deliver the "**Deliverables**" (as defined herein) for the Campaign pursuant to the terms and conditions set forth herein;

NOW THEREFORE, in consideration of the mutual covenants and conditions set forth herein, and for other good and valuable consideration, the legal sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **CAMPAIGN & DELIVERABLES**. Creator shall be responsible for the satisfactory delivery of the following deliverables (the "**Deliverable(s)**") in accordance with the requirements and delivery schedule(s) as further described herein:

    a. **Social Media**. Creator shall publish, and maintain for a period of 90 days (except with respect to any Instagram Stories that shall expire automatically), the following social media posts (each, a "**Social Media Post**" and collectively, the "**Social Media Posts**") to their social media accounts outlined below (each a "Channel"):

        1. Instagram**:** 1 In-Feed Post, 1 Story (2 Frames)
            a. Instagram In-Feed Post
                i. **Rough Cut Due:** TBD
                ii. **Post Date:** TBD
                iii. **General/Creative Requirements:** Promotional post driving to [redacted] YouTube Video (as defined below)
                iv. **Distribution:** [redacted]
            b. Instagram Story
                i. **Rough Cut Due:** TBD
                ii. **Post Date:** TBD
                iii. **General/Creative Requirements:** Promotional post driving to [redacted] YouTube Video (as defined below); static or video at Creator's discretion
                iv. **Distribution:** [redacted]

        ii. Social Media Analytics. Upon request by S71, Creator shall provide S71 with available and relevant social and web analytics report(s) as it relates to the Deliverables herein. Analytics shall include, but are not limited to, social engagement metrics such as impressions, likes, shares, and other relevant data. When available and requested by S71, Creator shall authenticate relevant social media platforms with S71's dashboard, and maintain such authentication for duration of the Term.

    b. **Videos** (each, a "**Video**" and collectively, the "**Videos**"):

        i. Dedicated Video:
            1. Distribution: Creator shall distribute Video #1 on Creator's YouTube channel located at [redacted], commencing on TBD mutually agreed upon date and continuing for a ninety-day period from initial posting (the "**Distribution Term**").
            2. [redacted] – [redacted]
            3. Delivery Schedule:
                a. Creative Treatment Due Date: TBD mutually agreed upon date
                b. Rough Cut #1 Due Date: TBD mutually agreed upon date
                c. Final Cut Due Date: TBD mutually agreed upon date
                d. Post Date: TBD mutually agreed upon date

4. Subsequent Post Restrictions. Creator agrees not to post any other content to the above-mentioned Channel for at least eighteen (18) hours after going live.

ii. Requirements for all Videos. Creator agrees to comply with the following requirements for all of the above Video(s):

1. YouTube Ad Policies. Creator shall be solely responsible for compliance with YouTube's Ad Policies (https://support.google.com/youtube/answer/188570?topic=30084&ctx=topic&hl=en) and YouTube's paid product placements and endorsements policy (https://support.google.com/youtube/answer/154235?hl=en).
2. YouTube Disclosure Tool. Check the following boxes under the *Advanced Settings* tab:
   a. Content Declaration: This video contains paid promotion such as paid product placement, sponsorships or endorsement
   b. Help me inform viewers of paid promotion by adding a disclosure to this video. Additional disclosures for this video may be required under applicable law.
3. Creative Treatment and Other Requirements for the Video(s):
   a. General Creative: [redacted]
   b. On-Screen Requirements:
      i. On-Screen graphic logo ([redacted] to provide)
   c. Verbal Requirements:
      i. CTA: [redacted]
      ii. Thank you: Organic verbal "thank you" to the Advertiser at the end
   d. Description Box Requirements:
      i. TBD, [redacted] to provide

2. **TERM**. Commencing on the Effective Date and continuing through and until Creator's full and complete delivery of the Deliverables and completion of Creator's services and/or obligations hereunder (the "**Term**"). Upon the expiration or termination of this Agreement, all provisions of this Agreement which expressly or by necessary implication survive the expiration or earlier termination of the Term shall survive the execution, delivery, suspension and termination of this Agreement or any provision hereof.

3. **COMPENSATION**. The Campaign fee is [redacted] ($[redacted]) with S71 receiving [redacted] ([redacted]%) of such fee equaling [redacted] ($[redacted]) and as full and complete consideration for the Deliverables provided herein and the rights and licenses granted hereunder by Creator, the sufficiency of which is acknowledged and agreed by Creator, and on condition that Creator fully and faithfully performs the duties and obligations required to be performed hereunder, and provided that Creator is not in uncured material breach hereunder, S71 shall pay Creator the remainder of such fee equaling [redacted] ($[redacted]) (the "**Creator Fee**"). The Creator Fee is payable to Creator within forty-five (45) days after full receipt by S71 from the Advertiser (in the next applicable statement). Payment is subject to delivery of all Deliverables as required hereunder. Creator shall be solely responsible for all production and licensing costs relating to the Deliverables outlined in this Agreement, except for materials provided by S71 or Advertiser. All payments hereunder are conditioned upon: (i) S71 receiving a fully executed Agreement from Creator; and (ii) Creator's compliance with all applicable governmental requirements including completing, signing and delivering to S71 all required tax forms as provided to Creator; and (iii) where applicable, Creator providing appropriate account and routing information for payment deposits. If this Agreement is terminated by S71 without cause at any time, Creator shall receive the full Creator Fee.

4. **FTC COMPLIANCE**. The Federal Trade Commission ("**FTC**") requires certain disclosures in online marketing to improve consumer trust and prevent deceptive advertising techniques, and requires Creator to clearly and conspicuously disclose Creator's relationship with Advertiser when making any promotional statements about Advertiser or its products/services. All disclosures must be prominent, and all related statements must be true and accurate. Further, the disclosure must "live" with the content, e.g. this disclosure must appear in EACH individual Deliverable required hereunder. Creator acknowledges and agrees to comply with (i) the S71 FTC Compliance Policy, attached hereto and incorporated by reference herein as **Exhibit B**; and (ii) the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising ("**FTC Guides**"), which may be found at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements[redacted]testimonials/091005revisedendorsementguides.pdf. S71 and Advertiser shall have the right to approve disclosures for compliance before posting any Deliverable. Creator hereby agrees to use reasonable efforts to immediately correct any non-compliant disclosures upon notification thereof (e-mail shall suffice) by S71 or Advertiser.

5. **APPROVALS PROCESS**. Creator shall comply with the following:

   a. **Social Media Posts:** Creator agrees to one (1) round of edits of each Social Media Post based on reasonable FTC disclosure concerns and conformity with the guidelines herein and other requirements provided to Creator prior to execution of this Agreement.
   b. **Revisions:** Creator, Advertiser and S71 will use best efforts to keep revisions to a minimum.
   c. **Final Social Media Posts:** Unless otherwise mutually agreed upon by the Parties in writing (e-mail shall suffice), Creator

shall submit the final version of each Social Media Post, including, without limitation, all copy, captions, titles, and description sections, to S71 for approval (no approval to be unreasonably withheld, conditioned, or delayed) at least one (1) business day prior to each Social Media Post's post date (as set forth above). Creator agrees that Creator's revisions shall not include any material additions, deletions, or modifications of the (i) creative treatment; or (ii) previous draft of such Social Media Post (unless otherwise directed by S71).

6. **OWNERSHIP & LICENSES**:

a. **Ownership**. Except for the Advertiser Materials, Creator shall own all right, title and interest in and to the Deliverables. The "Advertiser Materials" shall be defined as any and all names, trademark, and/or servicemarks provided and/or approved by Advertiser solely for use in the Deliverables as set forth herein, if any, including, without limitation, any and all Advertiser logos, identifying features, items, slogans, and any other materials provided to Creator by Advertiser or by S71 on behalf of Advertiser for use in the Deliverables. Advertiser shall retain all right, title, and interest in and to the Advertiser Materials, and the use of the Advertiser Materials by Creator shall inure to the benefit of Advertiser.

b. **Name & Likeness**. Creator hereby grants S71 and Advertiser a non-exclusive right and license to use Creator's name and likeness solely as embodied in the final Deliverables in connection with the Campaign and the Deliverables as set forth herein.

c. **Third-Party Materials**. Creator agrees not to use any unlicensed third party materials (including, without limitation, unlicensed music or footage) in the Deliverables. Except with respect to the Advertiser Materials, Creator shall be solely responsible for ensuring that such third party materials are properly cleared and licensed, and, if applicable, Creator shall provide all licenses and other clearance materials upon request by S71. S71 recommends using music from the S71 library or music which does not require a license for the distribution means contemplated hereunder.

d. **Usage**. Subject to S71's compliance with the terms and conditions contained herein, Creator grants S71 and Advertiser the right to organically share the Deliverables on S71 and Advertiser's owned and operated social media platforms for thirty (30) days after initial posting by Creator. S71 and Advertiser agree to tag Creator in each instance in accordance with industry standards. All rights not expressly granted by Creator herein are expressly reserved by Creator.

e. **Unauthorized Use**. It is understood and agreed that any authorized use of the Deliverables in accordance with the license granted herein may be retained, reposted or otherwise used by third parties and may be available and accessible online through third party websites and/or social media following expiration of the applicable license term. Such third-party usage shall not give rise to a claim against S71 or Advertiser, unless such third-party usage is at the direction and/or authorization of S71 or Advertiser, and S71 and Advertiser/Agency shall not have any obligation to monitor, request, require removal, or cessation of any such availability of or accessibility to the content. S71 and Advertiser/Agency maintains the right to use the Deliverables, or any part thereof, as internal, non-public historical and reference material beyond expiration of the applicable license term.

7. **EXCLUSIVITY**:

a. **Advertiser Exclusivity within Deliverables**. Advertiser shall be the only brand appearing within each Deliverable. Creator shall avoid displaying all unlicensed third party brands' logos, trademarks, trade names, designs, materials, and other intellectual property, to the extent reasonably practicable, and shall blur any prominent logos appearing in the foreground of the Deliverables.

b. **Creator Exclusivity**. For a period of ninety (90) days following the initial public distribution of the Social Media Posts, Creator shall ensure the Creator does not directly enter into an agreement for paid online production and promotional services substantially similar to those provided hereunder with those competitor brands listed in Exhibit C attached hereto and incorporated herein by this reference. Said exclusivity will not limit Creator's right to appear in any of the entertainment fields, events or in the entertainment portion of any motion picture, television, radio or other program regardless of the sponsors.

8. **REPRESENTATIONS & WARRANTIES**. Creator hereby represents and warrants that: (i) it has and will continue to have the full right, power, and authority to enter into this Agreement, grant the rights herein granted, and perform its obligations hereunder; (ii) the Deliverables and all material created, added, interpolated and/or submitted by Creator shall be wholly original to Creator (or shall otherwise be properly licensed by Creator), excluding Advertiser Materials; (iii) Creator's performance of the services hereunder, the Deliverables (except with respect to the Advertiser Materials) , and any elements thereof, do not and will not infringe, misappropriate, or otherwise violate the intellectual property, privacy, or publicity rights of any third parties or constitute defamation thereof; (iv) the Deliverables (except with respect to the Advertiser Materials) shall not contain any vulgarity, offensive language, profanity, graphic content, or lewd acts, statements, images or materials; and (v) all services rendered by Creator shall be promptly rendered in a professional manner in accordance with the highest standards customary to the entertainment industry, and shall be performed in accordance with any applicable platform regulations and all federal, state and local laws and regulation, including, without limitation, the FTC Guides. S71 hereby represents and warrants that it has and will continue to have the full right, power, and authority to enter into this Agreement, grant the rights herein granted, and perform its obligations hereunder.

9. **INDEMNIFICATION**. Each party (each, an "**Indemnifying Party**") shall indemnify, defend, save and hold the other party, including Advertiser, its affiliates, subsidiary, and parent corporations, and their respective officers, directors, employees, agents, successors, and assigns (each, an "**Indemnified Party**") harmless from and against any and all third party claims, liabilities, losses, damages, suits, actions, losses, costs, expenses (including reasonable outside attorneys' fees), judgments and penalties (collectively, "**Losses**"), arising out of, resulting from, based upon or incurred because of: (i) a party's own breach of any agreement, obligation, undertaking, representation or warranty hereunder; (ii) a party's own act of gross negligence, or malicious, criminal, or willful tortious misconduct in connection with this Agreement; and (iii) a party's own exploitation of the Deliverables (subject to each party's indemnification obligations herein). The Indemnified Party will reasonably cooperate in the defense of any claim covered by this indemnification provision. The Indemnified Party shall have the right to participate in the defense of any Losses and to employ counsel, at its own expense, separate from the counsel employed by an Indemnifying Party. An Indemnifying Party shall not consent to, and no Indemnified Party shall be required to agree to, any settlement, compromise, or judgment that: (i) the Indemnifying Party does not fully pay for; (ii) provides for injunctive or other non-monetary relief affecting any other Indemnified Party or includes any statement or implication of any wrongful or improper act or omission by any Indemnified Party; (iii) does not include as an unconditional term, a release from all liability of each Indemnified Party with respect to such Losses by each third party that has claimed, or has a right to make a claim for, or with respect to any Losses; and (iv) is in derogation of the Indemnified Party's rights and/or remedies.

10. **INSURANCE**. Creator may provide and maintain, at its own expense, at all times during the Term of this Agreement: (i) commercial general liability insurance covering, without limitation, bodily injury, property damage, personal injury and advertising liability including premises operations, and blanket contractual liability; and (ii) miscellaneous professional liability insurance covering wrongful acts arising out of services provided, media liability including, errors and omissions, copyright infringement, trademark infringement, defamation, libel, slander and invasion of privacy and network security and privacy liability.

11. **CONFIDENTIALITY**:

    a. **Confidential Information**. All information and materials furnished or communicated to Creator (whether oral or written) relating to the Campaign, the Advertiser, and S71, including, but not limited to, the terms of this Agreement, business plans, marketing strategies, web-site passwords, and any other trade secret or non-public business information, is "**Confidential Information**" that is proprietary to S71 and/or Advertiser. Creator agrees to maintain in strict confidence all such Confidential Information, except only to the extent that such information is made publicly available, was known to Creator prior to any disclosure, or as necessary to complete Creator's obligations herein, including but not limited to, disclosure to Creator's professional advisors. All persons receiving access to the Confidential Information shall be advised of the confidential nature of such information or materials and shall agree to be bound by the terms and conditions of this Agreement as a condition to obtaining access to such Confidential Information. Creator agrees that it will not use any Confidential Information in any manner, other than in connection with performing its services hereunder. In the event that Creator becomes legally compelled to disclose any of the Confidential Information, Creator will provide S71 with prompt prior written notice of such requirement so that S71 may seek a protective order or other appropriate remedy and/or waive compliance with the terms of this Agreement. In the event that such protective order or other remedy is not obtained, or that S71 waives compliance with the provisions hereof, Creator agrees to furnish only that portion of the Confidential Information which is legally required, in Creator's reasonable discretion. Creator shall continue to be bound by its obligations of confidentiality with regard to any Confidential Information following termination of this Agreement.

    b. **Materials**. If pursuant to this Agreement, S71 supplies Creator with any intangible or tangible materials regarding the Campaign and/or Advertiser or otherwise, the same being deemed an "Advertiser Material" hereunder, Creator obtains no proprietary rights in such Advertiser Materials and may only use such Advertiser Materials for the limited purpose of performing this Agreement. S71 and/or Advertiser maintain hereunder all proprietary rights to such Advertiser Materials. Proprietary rights pursuant to this paragraph means all title and interests in the Advertiser Materials, including, but not limited to, all rights related to copyrights, trademarks, patents, trade secrets, and all other intellectual property rights. S71 represents and warrants that any Advertiser Materials provided to Creator for use in the Deliverables and/or in connection with the Campaign will not infringe, misappropriate, or otherwise violate the intellectual property, privacy, or publicity rights of any third parties or constitute defamation thereof.

12. **TERMINATION**. S71 shall have the right to immediately terminate this Agreement, and Creator shall return any and all fees received hereunder, in the event: (i) Creator engages in any actions involving moral turpitude that brings Creator, S71, or Advertiser under actual ridicule, contempt, scandal, public disrepute, or which in the reasonable judgment of S71 is materially detrimental to S71, or Advertiser; or (ii) Creator fails to cure any material breach of this Agreement within a commercially reasonable period of time upon receipt of S71's written notice (e-mail shall suffice) of such breach (including, without limitation, failure to comply with the FTC Guides, terms of this Agreement, and delivery schedule(s) set forth herein).

13. **NON-DISPARAGEMENT**. Creator acknowledges and agrees to take no action, which is intended, or would reasonably be expected, to disparage or otherwise lead to unwanted, unfavorable, materially adverse publicity to Advertiser or S71.

14. **NON-UNION**. This Agreement and Campaign will not be subject to any union or guild rules or obligations. Except with respect to the Advertiser Materials , Creator is responsible for obtaining all waivers, consents and releases which may be required to ensure that

S71 and Advertiser may make use of the Deliverables in accordance with this Agreement without violating or infringing the rights of any party. Creator's indemnity obligations set forth in Paragraph 9 above shall apply to any breach by Creator of representation and warranty set forth in this paragraph and Creator acknowledges that S71 and Advertiser shall be relieved from any liability or indemnity obligations in connection therewith. Notwithstanding the foregoing, in the event that this Agreement and Campaign are subject to any provisions of any applicable union or guild rules or obligations, Creator acknowledges and agrees that (i) the Creator Fee provided to Creator is inclusive of all of Creator's services that may be required by S71 hereunder, except as may be expressly limited by such applicable union or guild rules or obligations, in which event Creator shall be entitled to additional compensation or other payments (e.g. health and pension, residuals, etc.) required by such applicable union or guild rules or obligations at the minimum terms provided thereunder, and if the applicable union or guild rules or obligations provides no minimum terms, Creator hereby agrees that such additional services shall be rendered without the payment of additional compensation or payment; and (ii) to the extent that any provision of this Agreement conflicts with the minimum provisions of such applicable union or guild rules or obligations, the provisions of the applicable union or guild rules or obligations shall prevail; provided, however, that in such event, this Agreement shall be modified only to the extent necessary to permit compliance with the minimum terms and conditions of the applicable union or guild rules or obligations.

15. **MISCELLANEOUS**.

a. **Independent Contractor**. Creator is an independent contractor and not employee of S71 or Advertiser. Accordingly, Creator understands that Creator shall not be: (i) entitled to participate in any of S71's or Advertiser's benefit plans; (ii) covered by S71's or Advertiser's health insurance or worker's compensation policies; or (iii) entitled to any unemployment benefits in the event its services are terminated. Creator represents that it is, and shall remain, for so long as this Agreement is in effect, responsible for withholding payments and taxes with respect to Creator's services hereunder, whether pursuant to any social security, unemployment insurance, old age pensions, worker's compensation or disability benefits, legislation or regulation throughout the Term.

b. **Severability/Headings**. Should any provision(s) of this Agreement for any reason be declared invalid, void or unenforceable by a court of competent jurisdiction, such adjudication shall in no way affect any other provision(s) of this Agreement or the validity or enforcement of the remainder of this Agreement, and the provision(s) affected shall be curtailed only to the extent necessary to bring the Agreement within the applicable requirements of the law. The headings used herein are for convenience use only and are not part of this Agreement.

c. **Amendment/Waiver**. This Agreement may be amended, supplemented or modified only through an express written instrument signed by both Parties. No waiver by any Party of the breach of any term or condition of this Agreement shall constitute a waiver of, or consent to, any subsequent breach of the same or any other term or condition of this Agreement.

d. **Assignability**. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors, licensees and assigns, except that Creator's obligations hereunder may not be delegated and Creator may not assign, transfer, pledge, encumber or dispose of any of Creator's rights hereunder without S71's prior written consent.

e. **Governing Law**. This Agreement shall be governed by the laws of the State of California, applicable to contracts executed and to be fully performed therein. Any controversies or disputes arising out of or relating to this Agreement shall be resolved exclusively in either the state or federal courts located in Los Angeles, California, and the Parties hereby consent to the exclusive personal jurisdiction of such courts.

f. **Entire Agreement/Counterparts**. All exhibits and attachments to this Agreement are incorporated into this Agreement by reference. This Agreement together with the exhibits is the entire agreement of the parties and supersedes all other agreements and understandings of the Parties, whether written or oral. This Agreement may be executed by either Party upon a separate identical counterpart, each of which shall be deemed an original, and all of which together shall constitute one Agreement. Facsimile and/or electronically scanned signature pages shall be deemed acceptable as originals.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

[redacted]

By: ________________________________
Name: ______________________________

STUDIO 71, LP

By: ____________________________
Name: __________________________
Title: __________________________

INDUCEMENT

The undersigned acknowledge that [redacted] has read the foregoing Creator Agreement and if [redacted] fails to fulfill its obligations, then to that extent the undersigned agree to be bound by the terms hereof, to the same extent as if they were a party thereto, agree to look solely to [redacted] with respect to any compensation or consideration payable to the undersigned in connection with said Creator Agreement and agree to guarantee unconditionally the obligations of [redacted] pursuant to said Creator Agreement.

____
[redacted]

EXHIBIT B

FTC Disclosure Guidelines for Influencers

I. Overview

Both [redacted] (“**you**”) and Studio 71, LP (“**S71**”) can be held legally liable if you fail to disclose your relationship with an advertiser, and any consideration given to you by S71 or the advertiser, or if you make false, atypical or unsubstantiated claims about advertiser’s products and services in the content and messages you create and distribute. S71 is providing these FTC Disclosure Guidelines For Influencers (the “**Guidelines**”) to you so you can better understand your obligations when you (i) create and share advertiser “paid for” or advertiser branded-content; or (ii) otherwise promote an advertiser or its products or services. These Guidelines apply to all messages and communications made by you in traditional media as well as non-traditional media, such as on social media platforms (e.g., YouTube, Snapchat, Instagram, Facebook, Twitter, etc.).

The Federal Trade Commission’s (“**FTC**”) Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “**FTC Guides**”) are intended to ensure that advertisements are not deceptive to the average consumer. You **must** comply with the FTC Guides, and all other applicable laws and regulations in all content and communications made on behalf of advertisers.

The full version of the FTC Guides are located at http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf. For more information about the FTC Guides, please watch the FTC’s video guidance for influencers on how to comply with the FTC Guides: https://www ftc.gov/tips-advice/business-center/advertising-and-marketing/endorsements and follow the FTC Guides FAQs, available at https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

Specifically, the FTC requires disclosures to be made by influencers so that consumers are: (1) not mislead about the commercial nature of an endorsement; and (2) aware of the material connection between the advertiser and endorser.

To achieve this goal, you must **clearly and conspicuously disclose** that you have a connection with a brand or advertiser (e.g., you are a paid influencer), the nature of your relationship and if applicable, that you have received something of value in all content and communications where you promote the company, its products, or services.

Disclosures are required where an influencer is incentivized – either through being paid money or receiving other compensation or incentives for the influencer’s comments and/or content. Examples of such incentives include: (1) actual money; (2) free or discounted products or services; (3) a commission through an affiliate program; and (4) early access to content or products.

When necessary, disclosures must appear in ALL TYPES OF CONTENT, including short form content, (e.g., Twitter). Where there are multiple forms of content for a specific campaign, the disclosure must appear in **each** piece of content. If you share that piece of content on a social media platform, the disclosure must still appear when shared (i.e. the disclosure must travel with the content).

While some platforms offer built-in disclosure functionality, note that such tools may be insufficient on their own to comply with the FTC Guides. As a rule of thumb, all disclosures must meet the following guidelines:

- **Proximity:** Disclosures must be placed close to the statement or endorsement (i.e., the disclosure should be made near the triggering claim and in the same post).
- **Prominence:** Disclosures must be prominent, immediately noticeable to the consumer, on the screen long enough to be understood and must be viewable on any device where the content can be viewed.
- **Understandable Language:** Disclosures must use plain, comprehendible language to clearly convey to the viewer of the content that there is a paid endorsement. For verbal disclosures, the influencer cannot speak too quickly or quietly.
- **Connection:** Disclosures must be connected to the content and travel with the content if reposted by another user or viewed out of context.
    - o **Ex:** It is insufficient to post an endorsement in a first tweet (“**Tweet #1**”) and a follow up tweet that says “#Ad” (“**Tweet #2**”). When Tweet #1 is retweeted, the disclosure in Tweet #2 will not follow directly after Tweet #1 to users’ feeds.

See Section III (FTC Guidelines Compliance) below for additional guidance.

II. Additional Obligations

In addition to ensuring your content complies with the FTC Guides, you must further ensure that you **do not**:

- Post content that conflicts with the terms of use and any specific branded content policies of each relevant social platform;
- Post about an advertiser, its products or services until you have actually tried or used such products or services;
- Make false or unsubstantiated claims about an advertiser, product or service - e.g., “Company X’s lotion will cure cancer!”;
- Make statements that do not accurately reflect your honest, current opinions based on your own personal experience;
- In connection with performing your services for a brand/advertiser: (i) use false or deceptive identities, names or accounts; or (ii) make it appear as though any aspect of the campaign was more successful than it actually was through unauthentic interactions by you or third parties you engage, manage or transact with (*e.g.*, click-fraud, manipulating your social media followings, etc.).

III. FTC Guidelines Compliance

a. **Videos**: For longer length video content on platforms such as YouTube and Facebook, you must disclose both verbally **and** with a text overlay. For shorter length or ephemeral video content on platforms such as Instagram and Snapchat, you must disclose via a text overlay directly on the video itself.

i. ***Verbal Disclosures***

1. When to disclose:

a. Custom/Dedicated Videos (where the advertiser appears throughout the video): Say the disclosure at the beginning of the video.

b. Integration videos (where the advertiser appears only in a distinct part of the video, e.g., beauty haul videos): Say the disclosure close to the product or claim that would require a disclosure.

2. How many times to disclose:

a. If the video is long, the disclosure may need to be repeated multiple times throughout.

b. The disclosure should appear multiple times where there is a livestream or multi-story post.

3. Examples:

a. "This video is sponsored by Company X."

b. "Thanks, Company X, for sending me the gift of Product Y to try and review."

c. "Company X reached out to me to promote Product Y, but all my opinions are my own."

d. I received monetary compensation [and/or free product or services] from Company X in exchange for my endorsement of Company X.

e. "This video is a paid advertisement for Company X."

ii. ***Text Disclosures***

1. How to disclose:

a. Must appear on screen long enough to be noticed, read and understood.

b. Must be prominent (i.e., noticeable and readable). Do not make the font too small or in the same color as the background; do not bury the disclosure with a lot of other text or fine print.

c. Usage of a company's name and/or logo is insufficient on its own.

2. Examples:

a. "This video is sponsored by Company X."

b. "Company X reached out to me to promote Product Y, but all my opinions are my own."

c. "This video is a paid advertisement for Company X."

3. Examples of disclosures for space constraint platforms like Twitter:

a. "Ad"

b. "Advertisement"

c. "Paid Advertisement"

d. "Sponsored Advertising Content"

iii. ***Description Box/Caption***

1. Your disclosures are deemed to be **INSUFFICIENT** if your only disclosure is in the description box or caption. Such disclosures should be used in conjunction with the verbal and text disclosure.

2. Your disclosures should appear at the beginning of the text in the description box/caption and **must** appear above the fold.

b. **Social Media Posts**

i. Each social post must include an appropriate disclosure - the disclosure must travel with the post if it can be reposted somewhere. Where applicable, the disclosure should include a text overlay on the image itself.

ii. ***Image Posts***

1. Where possible, you should disclose via a text overlay directly on the image itself.

iii. ***Text/Caption Disclosures***

1. Do not bury the disclosure in a string of hashtags or other text as these disclosures may be easily skipped by readers.
2. Take advantage of clear, one word disclosure language that can be used in a hashtag.
   a. Always use one of the following:
      - #Advertisement
      - #Ad
      - #Sponsored
   b. **NEVER** use the following:
      - #collab
      - #collaboration
      - #partner
      - #spon
      - #promoted

**Please understand that we may monitor your activities with regard to compliance with these Guidelines and S71 may take corrective action, including withholding payment and/or terminating your relationship with S71, if you do not follow these Guidelines. Both you and S71 potentially could be legally liable if you fail to disclose your relationship with an advertiser, including receipt of any payment or something of value that S71 or an advertiser has given you.

DISCLAIMER: These Guidelines are just a guide to help you better understand influencer disclosure obligations and cannot be relied on as a complete statement of the FTC's disclosure rules or legal advice. S71 makes no representations or warranties that your compliance with these Guidelines will prevent regulatory action by the FTC, other action by any applicable social platforms and associated costs and/or damages. For full compliance, influencers should engage their own counsel and fully review the FTC Guides, related documents analyzing the FTC Guides issued by the FTC (see links above), and any specific platform rules and requirements.

POLICY ACKNOWLEDGEMENT FORM

By signing below, I hereby acknowledge receipt of these Guidelines and confirm I will comply with them in all respects.

[redacted]: ____

Creator Signature: ____

Date: ________________________

INDUCEMENT

The undersigned acknowledge that [redacted] has read the foregoing FTC Disclosure Guidelines for Influencers and if [redacted] fails to fulfill its obligations, then to that extent the undersigned agree to be bound by the terms hereof, to the same extent as if they were a party thereto, agree to look solely to [redacted] with respect to any compensation or consideration payable to the undersigned in connection with said FTC Disclosure Guidelines for Influencers and agree to guarantee unconditionally the obligations of [redacted] pursuant to said FTC Disclosure Guidelines for Influencers.

____
[redacted]

EXHIBIT C

Competitors List:

[redacted]

[redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DEVUMI, LLC, a limited liability company, and

GERMAN CALAS, JR, individually and as an officer of DEVUMI, LLC,

Defendants.

Case No. 9:19cv81419

COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC"), for its Complaint alleges:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to obtain permanent injunctive relief, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), in connection with the sale of fake indicators of social media influence.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Venue is proper in this District under 28 U.S.C. § 1391(b)(2), (c)(1), (c)(2), and (d) and 15 U.S.C. § 53(b).

PLAINTIFF

4. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41–58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b).

DEFENDANTS

6. Defendant Devumi, LLC ("Devumi"), is an inactive Wyoming limited liability company with its last known principal place of business at 1900 Grant Street, Suite 1050, Denver, CO 80203. Devumi is also an inactive Florida limited liability company with its last known principal place of business at 222 Clematis Street, Unit 206, West Palm Beach, FL 33401. Devumi has transacted business in this District and throughout the United States.

7. Defendant German Calas, Jr. ("Calas") is the owner and Chief Executive Officer of Devumi. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Devumi, including the acts and practices set forth in this Complaint. Defendant Calas resides in this District and, in connection with the matters alleged herein, has transacted business in this District and throughout the United States.

COMMERCE

8. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS ACTIVITIES

9. Defendants have operated the Devumi.com, TwitterBoost.co., Buyview.co, and Buyplays.co websites. Through these websites, Defendants have sold fake indicators of social media influence, including fake followers, subscribers, views, and likes, to users of different social media platforms, including LinkedIn, Twitter, YouTube, Pinterest, Vine, and SoundCloud.

10. Indicators of social media influence are important metrics that businesses and individuals use in making hiring, investing, purchasing, listening, and viewing decisions. If these metrics are misleading because they are faked, that could induce consumers to make less preferred choices. Fake indicators of social media influence may undermine the influencer economy and consumer trust in the information that influencers provide.

11. Defendants sold fake LinkedIn followers to marketing, advertising, and public relations firms; management consulting firms; companies offering computer software solutions; banking, investment banking, and other financial services firms; human resources firms; and companies offering numerous other services. Defendants sold over 800 orders of fake LinkedIn followers. Defendants enabled purchasers of LinkedIn followers to deceive potential clients, investors, partners, and employees.

12. Defendants sold fake Twitter followers to actors, athletes, musicians, writers, and other individuals who wanted to increase their appeal as influencers. Defendants also sold fake

Twitter followers to motivational speakers, law firm partners, investment professionals, experts, and other individuals who wanted to boost their credibility to potential clients for their services. Defendants fulfilled over 58,000 purchases of fake Twitter followers. Defendants enabled purchasers of Twitter followers to deceive their potential clients about their influence, whether clients were seeking to hire them as influencers or to hire them for other services.

13. Defendants sold fake subscribers to the operators of YouTube channels and fake views to the posters of individual YouTube videos, including musicians who wanted to inflate the popularity of their songs. Defendants had over 4,000 sales of fake YouTube subscribers and over 32,000 sales of fake YouTube views. Defendants enabled purchasers of fake YouTube subscribers and views to deceive potential viewers and potential music purchasers.

14. Between 2014 and 2018, Devumi or its parent company paid Defendant Calas $2.5 million.

15. Based on the facts and violations of law alleged in this Complaint, the FTC has reason to believe that Defendants are violating or are about to violate laws enforced by the Commission because, among other things, Defendants engaged in their unlawful acts and practices repeatedly over a period of three years and stopped their unlawful conduct only after they received a Civil Investigative Demand from the FTC.

VIOLATIONS OF THE FTC ACT

16. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

17. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

Count I

Means and Instrumentalities to Deceive

18. As described in Paragraphs 9 through 13, in numerous instances, Defendants have sold and distributed fake followers, subscribers, views, and other indicators of social media influence to users of various social media platforms, including LinkedIn, Twitter, YouTube, Pinterest, Vine, and SoundCloud, thereby allowing those users to exaggerate and misrepresent their social media influence.

19. In so doing, Defendants have provided such users of social media platforms with the means and instrumentalities for the commission of deceptive acts or practices.

20. Therefore, Defendants' acts or practices as set forth in Paragraph 18 constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

CONSUMER INJURY

21. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

22. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Sections 13(b) of the FTC Act, 15 U.S.C. § 53(b) and the Court's own equitable powers, requests that the Court:

A. Enter a permanent injunction to prevent future violations of the FTC Act by Defendants;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act, including the disgorgement of ill-gotten monies;

C. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

Dated: October 18, 2019

/s/ Michael Ostheimer

MICHAEL OSTHEIMER
Federal Trade Commission
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Email: mostheimer@ftc.gov

Attorney for Plaintiff
FEDERAL TRADE COMMISSION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TEAMI, LLC, a limited liability company,

ADI HALEVY, a/k/a Adi Arezzini, individually and as an officer of TEAMI, LLC, and

YOGEV MALUL, individually and as an officer of TEAMI, LLC,

Defendants.

Case No. 8:20-cv-518

COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC"), for its Complaint alleges:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to obtain permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a), 52, in connection with the labeling, advertising, marketing, distribution, and sale of numerous Teami brand tea products that purportedly provide various health benefits and Teami brand tea-based skincare products.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Venue is proper in this District under 28 U.S.C. § 1391(b)(1), (b)(2), (c)(1), (c)(2), and (d), and 15 U.S.C. § 53(b).

PLAINTIFF

4. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which prohibits false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b).

DEFENDANTS

6. Defendant Teami, LLC ("Teami") is a Florida limited liability company with its principal place of business at 10801 Endeavor Way, Suite A, Seminole, Florida 33777. Teami transacts or has transacted business in this District and throughout the United States.

7. At all times material to this Complaint, acting alone or in concert with others, Teami has advertised, marketed, distributed, or sold Teami teas and skincare products to consumers throughout the United States.

8. Defendant Adi Halevy ("Halevy"), also known as Adi Arezzini, is the Chief Executive Officer, a co-founder, and a fifty percent owner of Teami. At all times material to this Complaint, acting alone or in concert with others, she has formulated, directed, controlled, had

the authority to control, or participated in the acts and practices of Teami, including the acts and practices set forth in this Complaint. She is responsible for Teami product branding, copywriting, and the approval of each product page on Defendants' website, www.teamiblends.com (the "Teami website"). Defendant Halevy has appeared in Teami product advertising. She also personally evaluates the ingredients that compose each of Teami's products to determine what benefits each ingredient has alone or in conjunction with other ingredients, reviews literature related to each ingredient, and creates samples of each product, which she tests herself for taste and efficacy. In addition, Defendant Halevy is responsible for the development and approval of Teami's social media policy, disseminating the social media policy throughout the company, and providing instructions to staff on its implementation. Defendant Halevy resides in this District and, in connection with the matters alleged herein, transacts or has transacted business in this District and throughout the United States.

9. Defendant Yogev Malul ("Malul") is the Creative Director, a co-founder, and a fifty percent owner of Teami. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Teami, including the acts and practices set forth in this Complaint. He is responsible for the development and selection of each product Teami offers, as well as the Teami website and graphic design of each product page. He also personally evaluates the ingredients that compose each of Teami's products to determine what benefits each ingredient has alone or in conjunction with other ingredients, reviews literature related to each ingredient, and creates samples of each product, which he tests himself for taste and efficacy. Defendant

Malul resides in this District and, in connection with the matters alleged herein, transacts or has transacted business in this District and throughout the United States.

COMMERCE

10. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS ACTIVITIES

11. Since 2014, Defendants have advertised, offered for sale, sold, and distributed Teami tea products. These include Teami Profit tea, Teami Alive tea, Teami Relax tea, Teami Skinny tea, and Teami Colon tea. Teami Skinny tea and Teami Colon tea are sold together in a bundle called the Teami 30 Day Detox Pack. Defendants have also advertised, offered for sale, sold, and distributed Teami skincare products including the Teami Green Tea Blend Detox Mask and Teami Soothe Tea Infused Facial Oil. In addition to advertising Teami products on the Teami website, Defendants have paid celebrities, including Kylie Jenner and Demi Lovato, and other influencers to promote them on Instagram and other social media.

12. Teami Profit tea contains green tea, peppermint leaf, goji berries, red dates, roselle, nettle leaf, and lingzhi ganoderma. Teami Alive tea contains green tea, lemongrass, honey, and ginger. Teami Relax tea contains peppermint, yarrow, lemongrass, lavender flower, chamomile, orange peel, and valerian root. Teami Skinny tea contains oolong tea, yerba mate, lotus leaf, lime leaf extract, ginger root, rhubarb root, and jiao gulam. Teami Colon tea contains sienna leaf and root, hawthorn berry extract, lotus leaf, lime leaf and extract, psyllium husk seed, phaseolus calcaratus seed, rhubarb root, poria cocos stem bark, and valerian root.

13. Defendants sell their Teami teas and skincare products on the Teami website. On the website, packages of Teami Profit tea, which contain thirteen servings, cost $29.99; packages of Teami Alive tea, which contain fifteen tea bags, cost $19.99; packages of Teami Relax, which contain thirteen servings, cost $29.99; Teami 30 Day Detox Packs cost $49.99; jars of Teami Green Tea Blend Detox Mask cost $29.99; and bottles of Teami Soothe Tea Infused Facial Oil cost $39.99. Defendants sell most of their Teami teas and skincare products on www.amazon.com. Selected Teami products are also available at retailers nationwide, including Vitamin World and Ulta Beauty.

14. Defendants disseminate or cause to be disseminated advertisements for Teami Profit tea, Teami Alive tea, Teami Relax tea, and the Teami 30 Day Detox Pack. Advertisements for Teami products include, but are not necessarily limited to, the attached Exhibits 1 through 14. These materials contain the following statements and depictions, among others:

A. Teami Profit Tea

1. Excerpts from the Teami Profit product page of the Teami website; captured on November 6, 2018

Teami Profit
DESCRIPTION

Your body is your temple and deserves to profit from all that nature has to offer. Natural tea allows the body to rejuvenate from the inside out, gaining a strong internal foundation. For centuries, tea has been used in alternative medicine to treat everything from cancer to constipation. The human body needs to have all the necessary vitamins and minerals in order to protect itself from infection and illness.

The ingredients in Teami Profit have been shown to:
. . . .
- Fights [sic] against cancerous cells

(Exhibit 1, portion of Teami Profit product page on the Teami website).

2. **Excerpts from the 30~7 Best Detox product page of the Teami website; captured on November 6, 2018**

The ingredients in Teami Profit have been shown to:
….
- Helps [sic] unclog arteries …

(Exhibit 2, portion of Teami 30~7 Best Detox Plan page on the Teami website).

B. Teami Alive Tea

Excerpts from the Teami Alive product page of the Teami website; captured on November 6, 2018

Teami Alive
DESCRIPTION

Have you ever found yourself feeling "dead", with zero energy to get motivated in your day to day life? Do you get sick on and off, not finding a permanent solution to your physical issues?
....

Teami Alive was developed with 3 main ingredients to directly target your bodily issues, and solve them! The unique and delicious combination of Ginger Honey - Lemongrass - Green Tea can help with:

The ingredients in Teami Alive have been shown to:
….
- Decreasing [sic] Migraines

(Exhibit 3, portion of Teami Alive product page on the Teami website).

C. Teami Relax Tea

Excerpts from the Teami Relax page of the Teami website; captured on November 6, 2018

Teami Relax
DESCRIPTION
….
Teami Relax contains potassium, calcium and vitamin B which strengthen the immune system, prevent colds, flus and a variety of other illnesses.

. . . .

The ingredients in Teami Relax have been shown to:

. . . .

- Antibacterial effects can help prevent and treat colds

(Exhibit 4, portion of Teami Relax product page on the Teami website).

D. Teami 30 Day Detox Pack

1. Excerpt from the Teami Detox 30 Day Pack product page of the Teami website; captured on November 6, 2018

Teami Detox 30 Days Pack
DESCRIPTION

If you are looking for an amazing detox tea that you can incorporate into your daily routine, this is the one for you! The Teami 30 Day Detox Tea will help you feel better from the inside out! Getting rid of the toxins that your body is holding on to will allow it to function properly, burn the correct amount of calories and have natural energy levels every day!

Our Teami 30 Day Detox Pack includes:
- 30 day supply of our Skinny loose-leaf tea
- 15 colon cleanse tea bags

The ingredients in our 30 Day Detox Program have been show [sic] to:
- Boost your metabolism
- Start burning stored fat

(Exhibit 5, portion of Teami Detox 30 Day Pack page on the Teami website).

2. Excerpts from video of Defendant Halevy appearing on the Detox 30 Day Pack product page of the Teami website; captured on December 13, 2018

Our 30 Day Detox program is made up of two teas, our Teami Skinny which you drink every single day before breakfast, best recommended time, and our Teami Colon which you drink every other night before bed.

The reason why people need to detox is because of the insane amount of processed foods that you're either eating right now or have eaten in the past and believe me I've had a lot of pizza in my life so I needed to detox. What it does is it puts in nutrients and vitamins in the body.

With the Teami Skinny that you drink every single day and then at night time with the Teami Colon, you're actually getting rid of the toxins that are holding your body back from being able to digest food properly, from having low metabolism, from having really, really sluggish energy throughout the day and by doing this program, all you have to do is drink tea and you'll start seeing results right away.

Our 30 Day Detox comes with this little cute calendar. On the inside it actually gives you tips. Over here you actually have a little calendar that reminds you in the morning to drink your Teami Skinny and in the night to drink your Teami Colon. And then we definitely want to make sure that you take before and after pictures because we love to share your successes and to share your Teami transformations.

Here are some frequently asked questions about our 30 Day Detox. How much weight will I lose when I'm doing the 30 day detox? Great question. The first thing to know is that everyone's different. Everybody has a different amount of weight that they need to lose. So not everybody is the same, but the usual average is five to twenty pounds every time you do the detox.

(Exhibit 6).

3. Excerpt from the Weight Loss page of the Teami website; captured on November 6, 2018

<u>Teami Tea Detox for Weight Loss</u>

<u>All what [sic] You Need to Know about Detox Tea</u>

If you [sic] goal is to lose weight quickly, without using any chemicals, 100% natural and safe diet, Reduce bloating, burning stored fat and cleaning your body from inside outside, you are definitely at the right place. … Grean [sic] Tea … has been shown to increase fat burning and boost the metabolic rate.	**teami** **DETOX** **30 DAYS PACK** [pictures of Teami Skinny and Teami Colon and their Nutrition Facts panels] [pull down menu and button to add one or more packs to cart for $49.99 each]

…

<u>What are the detox tea benefits ?</u>

Using detox tea for weight loss makes a lot of sense, especially in a world where so many diets relies [sic] on weight loss unhealthy diet pills and diet shakes.

There are lots of benefits using a detox Teas [sic] as your method for losing weight. …

We have selected some of the benefits you can expect to receive when you use detox tea as part of your weight loss strategy

- Boost your metabolism
- Start burning stored fat
- Suppress appetite and cravings
- Naturally raise energy levels

…

<u>How to lose weight with detox tea ?</u>

Did also You tried [sic] different weight loss methods, but without any result? Moving forward from one diet to another without reaching your goals might be Frustrating!

When our body is full of toxins, it is difficult to losing [sic] weight. While detoxifying your body get rid of those toxins and results [sic] of weight loss are unbelievable.

… Detox teas contain specific blends of natural ingredients which flush these toxins and chemicals we are consuming out of our vital organs. Those herbs are extremely effective for reducing …, body fat, … and help our body losing [sic] weight.
…

<u>How to Detox your Body with Tea ? How to Use Daily Detox Tea for Weight Loss ?</u>

For best slimming results we are highly recommending using our 30 Days detox Pack.

The Teami Detox diet plan includes:

- 30 day supply of our Skinny loose-leaf tea
- 15 colon cleanse tea bags

TeaMi [sic] Detox will completely change how your body looks and feels in just 30 days!

(Exhibit 7, portion of Weight Loss page on the Teami website).

4. Excerpt from the Colon Cleanse page of the Teami website; captured on November 6, 2018

<u>Colon Cleanse Weight Loss Results</u>

Colon Cleansing has quickly become one of the Top Trends all over the world and this is why.

Have you ever started a [sic] dieting, exercising and living a healthier lifestyle but STILL don't see results in your weight?? One of the best health benefits of colon cleansing is seeing rapid weight loss that occurs naturally. The toxins in the body that prevent you from losing weight easily are now removed by the detox tea and your body can FINALLY lose weight on its' [sic] own!

Most people that do cleansing programs or detox tea programs do not change their exercise or diet habits during the program, but see unbelievable results. Below are some Before & After Testimonials from regular people that decided to do a colon cleanse:

[before and after pictures]

(Exhibit 8, portion of Colon Cleanse page on Teami website).

5. **Excerpt from September 5, 2018 Instagram post from the official Teami account, which has one million Instagram followers**

[Before and after photos appearing to depict dramatic weight loss]

teamiblends We're shouting out our girl @qb.love for her amazing #TeamiTransformation 🍵🍃! She's down TWENTY pounds from doing our 30 Day Detox and continues to use it to maintain her weight loss!

(Exhibit 9).

6. **Excerpts from May 7, 2018 Instagram post by Kathlyn Celeste, a lifestyle, family, beauty, and fashion influencer with 187,000 Instagram followers**

kathlynceleste …
I made a commitment to myself to stick to my @teamiblends Detox program everyday for the entire month of May! Every time I'm consistent with it, I lose at least 8 LBS.

(Exhibit 10).

7. **Excerpt from August 15, 2018 Instagram post by Patti Stanger, a reality television personality with 920,000 Instagram followers**

pattistanger As I've gotten older (and much wiser 😉), staying in shape isn't as easy. I love my body, but everyone has problem areas they want to work on. I did some research on the @teamiblends 30 day detox and decided to give it a try, because nothing else I've used throughout the years really worked. I'm two weeks into this detox and I can't believe I'm saying this but I've already lost 8 pounds!

(Exhibit 11).

8. **Excerpt from June 5, 2018 Instagram post by Brittanie Evans, a beauty influencer with 505,000 Instagram followers**

brittanie_evans My summer body is not exactly where I said it would be in Fall...whoops😅. Luckily, I started up my @teamiblends 30 day detox again to help me jumpstart losing a few pounds for summer. This detox is my all time FAVE...especially because I see a difference within like 3 days, and mostly in my tummy area. I take it everywhere with me which makes it super easy and practical for days where I'm crazy busy! I've been drinking it now for a week and I've already lost about 3 pounds...insane.

(Exhibit 12).

9. **Excerpts from June 20, 2018 Instagram post by Rasheeda Buckner, a rapper, television personality, and fashion designer with 8.4 million Instagram followers**

rasheedadabosschick …
@teamiblends 30 day detox is where it's at for kickstarting weight loss. I've only been drinking this detox now for a week and already lost over 5 pounds and my bloating is gone. Paired with my 21 day transformation, I'm feeling amazing and I want you guys to do this detox with me to get right for summer! Trust me, I've tried other products like this and wasted my money and time, this is the real deal.

(Exhibit 13).

10. Excerpt from an October 8, 2018 Instagram post by Molly Hopkins, a reality television personality with 161,000 Instagram followers

liviraebras1 Since becoming a #teamipartner, I can’t shut up about this tea !! Any chance I get to tell people about it, I talk their ear off. I’m honestly addicted, I have it on an automatic renewal😂 I’ve lost almost 40 freaking pounds with @teamiblends 30 day detox ....and this was before I was committed to working out and eating healthier ! I used to struggle with different weightloss techniques and nothing ever seemed to work for my body. I was so bloated after I ate, I was sluggish and believe me, I really tried everything. Obviously, I’m a little more health conscious now, but seems like the only thing that I see REAL results with.

(Exhibit 14).

15. From 2014 through mid-2019, sales of Teami Profit tea, Teami Alive tea, Teami Relax tea, and the Teami 30 Day Detox Pack exceeded $15.2 million.

16. In April 2018, FTC staff wrote to Defendants regarding several Teami product endorsements on Instagram by influencers. FTC staff informed Defendants that any material connections to any endorsers, such as monetary payments, should be clearly and conspicuously disclosed in their endorsements; that to make a disclosure both “clear” and “conspicuous,” endorsers should use unambiguous language and consumers should be able to notice the disclosure easily without having to look for it; and that because consumers viewing posts in their

Instagram feeds typically see only the first few lines of a longer post unless they click "more," endorsers should disclose any material connection above the "more" link. (Exhibit 15).

17. On May 10, 2018, Defendants implemented a social media policy. Defendants assert that they either provided written copies of the policy to paid influencers or included the policy as part of the influencers' contracts with Teami. The policy instructed influencers, "[E]nsure that all posts for which you receive free product or any type of compensation as an inducement to make the post … [u]se hashtags or words that clearly let the public know of the connection between you and Teami" and "DON'T … [m]ake the disclosure below the 'more' button – the disclosure needs to be seen in the first part of your post without clicking anything else."

18. In many instances, paid influencers were contractually required to obtain approval from Teami for their Instagram posts – including the specific text used – before publishing them. Yet, numerous Instagram posts published by paid influencers after May 2018 did not comply with Teami's own social media policy.

19. Defendants did not enforce their requirement that "disclosure[s] need[ed] to be seen in the first part of [a] post without clicking anything else." Between June and late-October 2018, hundreds of Instagram posts were published by well-known influencers whom Defendants paid more than $500 to endorse Teami products. In most cases, consumers viewing these posts in their Instagram feeds would not have seen any text disclosing the influencers' connections to Teami unless the consumers took the extra step of clicking to see "more."

20. In numerous instances after May 2018, well-known influencers paid by Defendants to promote Teami teas and skincare products posted video endorsements on

Instagram that did not disclose any connections between the endorsers and Defendants within the video itself. In many instances, the text accompanying these videos did not include a disclosure in the first two or three lines of text visible to followers of the influencers viewing the posts in their feeds without the need to click "more." Followers who viewed these videos in their Instagram feeds – either because the videos played automatically within the mobile app, or because the followers chose to play the videos – could have viewed the videos without clicking "more." Examples of such endorsements include: a November 23, 2018 post by Cardi B, a rapper with 53.3 million Instagram followers (Exhibit 16.a, b, and c, with almost 20.4 million views); a September 24, 2018 post by Brittany Renner, a fitness model and author with 5.2 million followers (Exhibit 17.a, b, and c, with 984,000 views); an August 16, 2018 post by Katya Elise Henry, a social media fitness trainer with 6.2 million Instagram followers (Exhibit 18.a. b, and c, with 241,000 views); an October 2, 2018 post by Adrienne Eliza Houghton, a singer, actress, and television personality with 4.5 million Instagram followers (Exhibit 19.a, b, and c, with 254,000 views); a July 24, 2018 post by Leyla Milani-Khoshbin, a model, actress, and television host with 1.1 million Instagram followers (Exhibit 20.a and b, with 428,000 views); a July 10, 2018 post by Alexa PenaVega, an actress and singer with 1.6 million Instagram followers (Exhibit 21.a, b, c, and d, with 24,000 likes); and a February 4, 2019 post by Jenicka Lopez, a reality television personality with 810,000 Instagram followers (Exhibit 22.a and b, with 138,000 views). The first page of each exhibit referenced in this paragraph displays the Instagram post as it appears when viewed using a desktop computer's internet browser and *not* viewed as part of a follower's Instagram feed. By contrast, when viewed in a follower's feed, the caption is truncated such that at most three lines of text are visible unless the follower clicks on a link labeled "more." When viewed in an Instagram feed on a mobile phone, the posts would have resembled Exhibits 16.b, 17.b, 18.b, 19.b, and 21.b.

21. In numerous instances after May 2018, Instagram posts published by well-known influencers paid by Defendants to endorse Teami teas and skincare products included an endorsement within the photo itself (by clearly showing a Teami-branded product) or within the first two or three lines of the post's caption, but made any disclosures regarding the connections between the endorsers and Defendants in text located below the third line of the caption. Followers of the influencers viewing the posts in their Instagram feeds would have seen the endorsements but would not have seen any disclosures unless they clicked on an option to see "more." Examples of such endorsements include: an August 28, 2018 post by Jordin Sparks, a singer-songwriter with 1.7 million Instagram followers (Exhibit 23.a and b); a July 30 2018 post by Brittany Renner (Exhibit 24.a and b); a June 15, 2018 post by Princess Mae, an Instagram celebrity with 2.1 million Instagram followers (Exhibit 25.a and b); and an August 21, 2018 post by Darnell Nicole, a reality television personality with 645,000 Instagram followers (Exhibit 26.a and b). The first page of each exhibit referenced in this paragraph displays the Instagram post as it appears when viewed using a desktop computer's internet browser and *not* viewed as part of a follower's Instagram feed. By contrast, when viewed in a follower's feed, the caption is truncated such that at most three lines of text are visible unless the follower clicks on a link labeled "more." When viewed in an Instagram feed on a mobile phone, the posts would have resembled the second page of each exhibit.

22. Based on the facts and violations of law alleged in this Complaint, the FTC has reason to believe that Defendants are violating or are about to violate laws enforced by the

Commission because, among other things, Defendants engaged in their unlawful acts and practices repeatedly over a period of several years and continued their unlawful conduct for many months after they learned that the FTC was investigating them.

VIOLATIONS OF THE FTC ACT

23. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

24. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act. Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of any false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or cosmetics. For the purposes of Section 12 of the FTC Act, 15 U.S.C. § 52, Teami teas, including Teami Profit tea, Teami Alive tea, Teami Relax tea, Teami Skinny tea, and Teami Colon tea, are either "food" or "drugs" as defined in Sections 15(b) and (c) of the FTC Act, 15 U.S.C. §§ 55(b), (c) and Teami skincare products, including Teami Green Tea Blend Detox Mask and Teami Soothe Tea Infused Facial Oil, are "cosmetics" as defined in Section 15(e) of the FTC Act, 15 U.S.C. § 55(e).

COUNT I

FALSE OR UNSUBSTANTIATED EFFICACY CLAIMS

25. Through the means described in Paragraph 14, Defendants have represented, directly or indirectly, expressly or by implication, that:

A. Teami Profit Tea treats cancer;

B. Teami Profit Tea significantly reduces serum cholesterol and unclogs arteries;

C. Teami Alive Tea significantly decreases migraines;

D. Teami Relax Tea prevents and treats colds and prevents flus;

E. Users of the Teami 30 Day Detox lose an average of five to twenty pounds every time they do the thirty-day detox;

F. Users of the Teami 30 Day Detox only have to drink the tea in order to experience substantial weight loss;

G. The Teami 30 Day Detox causes substantial weight loss, including as much as forty pounds;

H. The Teami 30 Day Detox causes rapid and substantial weight loss, including as much as four or more pounds per week; and

I. The Teami 30 Day Detox Pack burns body fat.

26. The representations set forth in Paragraph 25 are false or misleading, or were not substantiated at the time the representations were made.

27. Therefore, the making of the representations as set forth in Paragraph 25 of this Complaint constitutes a deceptive act or practice and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a), 52.

COUNT II

DECEPTIVE FAILURE TO DISCLOSE MATERIAL CONNECTION

28. In connection with the advertising, marketing, promotion, offering for sale, or sale of Teami tea and skincare products, including through the means described in Paragraphs 18

through 21, Defendants have represented, directly or indirectly, expressly or by implication, that social media posts by influencers about Teami products reflected the views of individuals who had used the Teami product.

29. In numerous instances in which Defendants have made the representation set forth in Paragraph 28 of this Complaint, Defendants have failed to disclose adequately to consumers that the influencers were paid to endorse the Teami products. This fact would be material to consumers in evaluating the endorsements of Teami products in connection with a purchase or use decision.

30. Defendants' failure to disclose adequately the material information described in Paragraph 29, above, in light of the representation described in Paragraph 28, above, constitutes a deceptive act or practice and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a), 52.

CONSUMER INJURY

31. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

32. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts,

restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that the Court:

A. Enter a permanent injunction to prevent future violations of the FTC Act by Defendants;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

C. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

Dated: March 5, 2020

____

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FEDERAL TRADE COMMISSION

192-3008

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

SUNDAY RILEY MODERN SKINCARE, LLC,
a limited liability company, and

SUNDAY RILEY,
individually and as an officer of
SUNDAY RILEY MODERN SKINCARE, LLC.

DOCKET NO. C-

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunday Riley Modern Skincare, LLC, a limited liability company, and Sunday Riley, individually and as an officer of Sunday Riley Modern Skincare, LLC (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sunday Riley Modern Skincare, LLC ("Sunday Riley Skincare") is a Texas limited liability company with its principal office or place of business at 4444 Westheimer Road, Suite G305 Houston, Texas 77027-4455.

2. Respondent Sunday Riley is the Chief Executive Officer of Sunday Riley Skincare. Individually or in concert with others, she controlled or had the authority to control or participated in the acts and practices of Sunday Riley Skincare, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Sunday Riley Skincare.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed Sunday Riley brand cosmetic products to consumers, including Luna Sleeping Night Oil, Good Genes All-In-One Lactic Acid Treatment, Blue Moon Tranquility Cleansing Balm, Start Over Active Eye Gel Cream, Bionic Anti-Aging Cream, C.E.O. Rapid Flash Brightening Serum, Effortless Breathable Tinted Primer, Tidal Brightening Facial Cream, Power Couple

Duo: Total Transformation Kit, Martian Mattifying Melting Water-Gel Toner, U.F.O. Ultra-Clarifying Face Oil, Saturn Sulfur Acne Treatment Mask, and the Space Race Kit.

4. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Course of Conduct

5. Respondents have sold their Sunday Riley brand cosmetic products through Sephora, a multinational chain of personal care and beauty stores.

6. Sunday Riley brand cosmetic products sold through Sephora range in price from $22 for a 0.5-ounce jar of Tidal Brightening Facial Cream to $158 for a 1.7-ounce bottle of Good Genes All-In-One Lactic Acid Treatment.

7. Sephora provides consumers the opportunity to leave customer reviews of products sold on its website, www.sephora.com. Reviews provide a forum for sharing authentic feedback about products.

8. On multiple occasions between November 2015 and August 2017, Sunday Riley Skincare managers, including Respondent Sunday Riley, posted reviews of Sunday Riley brand cosmetic products on the Sephora website using fake accounts created just for that purpose or requested that other employees do so.

9. When Sephora removed fake reviews written by Sunday Riley Skincare employees, Sunday Riley Skincare employees suspected this was because Sephora recognized the reviews as coming from Sunday Riley Skincare's IP address. In response, Sunday Riley Skincare obtained, in the words of one manager, "an Express VPN account [to] … allow us to hide our IP address and location when we write reviews." A VPN (Virtual Private Network) is a service that lets users access the Internet privately by routing their connections through a server and hiding their online actions.

10. Calls for employees to write reviews were associated with, but not limited to, the launches of new products. In July 2016, Respondent Sunday Riley wrote to her staff:

> I would like everyone to create 3 accounts on Sephora.com, registered as a different identities.
>
> This is how you do it:
>
> 1. Create a new persona. Choose their name, city, skin type.
> 2. Setup a new email on gmail
> 3. Before going onto Sephora.com, clear your cookie history EACH TIME …
> 4. Connect to the internet ONLY using the VPN. Make sure to choose a city of origin that goes along with where your character lives. …

5. Leave a review – make sure to NOT compare the product to other products, to not use foul language, and to be very enthusiastic without looking like a plant. Always leave 5 stars.
6. Review a few other products as well – no skincare. Only review makeup, color, hair.
7. Leave a review for a different product every other day so you build up history. You can also use this identity on Beauty Board.
8. You will need to clear cookies and use the VPN every time, or your account will be flagged.
9. Focus on Martian, UFO, Tidal, Power Couple, Good Genes, Luna.

The other thing, if you see a negative review – DISLIKE it. After enough dislikes, it is removed. This directly translates to sales!!

Tidal and Good Genes are 4.2 and I would like to see them at 4.8+. UFO and Martian are at 4.9 – let's keep it that way!

11. In December 2016, the Sunday Riley Skincare Account Manager responsible for Sephora wrote to other managers and employees:

> Now that CEO is up, we need to make sure the reviews for clients stay positive. I think someone created a profile yesterday and already wrote a review, only thing is it was a little pre-mature as the product only launched yesterday and wouldn't have arrived same day. **Credibility is key to the reviews!**
>
> If everyone could write *at least* 3 reviews for CEO between Friday and next Tuesday.

12. In August 2017, the Sunday Riley Skincare Account Manager responsible for Sephora wrote to other managers and employees:

> Now that Saturn is up and Space Race coming up next week, we need to make sure the reviews for clients stay positive and help generate and [sic] confidence in the products.
>
> **Credibility is key to the reviews!**
>
> If everyone could write *at least* 3 reviews for Saturn over the next week, and some for Space Race the week after. I would encourage you to create profiles ASAP and write a couple reviews on a makeup, hair or nail product to build a profile history. Please make sure to follow the guidelines for VPN (see below) as this is essential so the reviews don't get traced back to our IP address.
>
> When reviewing Saturn please address things like how cooling it felt, the green color, the non-drying mask effect, radiance boosting, got rid of your acne after a couple uses. The biggest points of difference for this mask and other acne masks

> are how this mask increases radiance and doesn't dry out the skin like all other acne masks do. It helps to make yourself seem relatable – like you know how hard acne is and you've tried everything, and this one actually works or mention things like yes, it's a little more expensive, but works incredible [sic] well compared to the cheaper masks out there. If you need any help with things to come up with to say, feel to ask myself, Sunday, or Addison. As reviews come in, read them too. If you notice someone saying things like I didn't like "x" about it, write a review that says the opposite. The power of reviews is mighty, people look to what others are saying to persuade them and answer potential questions they have.

13. In April 2018, Sunday Riley Skincare managers asked interns to create fake Sephora accounts in order to write reviews of Sunday Riley Skincare products, which they did.

Count I

False or Misleading Endorsement Claims

14. Through the means described in Paragraphs 8 through 13, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products.

15. In fact, numerous reviews of Sunday Riley brand products on the Sephora website did not reflect the independent experiences or opinions of impartial ordinary users of the products because they were written by Sunday Riley and her employees. Therefore, the representations set forth in Paragraph 14 are false or misleading.

Count II

Deceptive Failure to Disclose Material Connections with Endorsers

16. Through the means described in Paragraphs 8 through 13, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of Sunday Riley brand products on the Sephora website reflected the experiences or opinions of users of the products.

17. In numerous instances in which Respondents made the representation set forth in Paragraph 16, they failed to disclose that the online consumer reviews were written by Sunday Riley or her employees. This fact would be material to consumers in evaluating the reviews of Sunday Riley brand products in connection with a purchase or use decision.

19. Respondents' failure to disclose the material information described in Paragraph 17, in light of the representations made in Paragraph 16, is a deceptive act or practice.

Violations of Section 5

21. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this _______ day of _______, 20__, has issued this Complaint against Respondents.

By the Commission.

April J. Tabor
Acting Secretary

SEAL:

Disclosures 101 for Social Media Influencers

Do you work with brands to recommend or endorse products?

If so, you need to comply with the law when making these recommendations.

One key is to make a good disclosure of your relationship to the brand.

This brochure from FTC staff gives tips on when and how to make good disclosures.

The FTC works to stop deceptive ads, and its Endorsement Guides go into detail about how advertisers and endorsers can stay on the right side of the law.

If you endorse a product through social media, your endorsement message should make it obvious when you have a relationship ("material connection") with the brand. A "material connection" to the brand includes a personal, family, or employment relationship or a financial relationship – such as the brand paying you or giving you free or discounted products or services.

Telling your followers about these kinds of relationships is important because it helps keep your recommendations honest and truthful, and it allows people to weigh the value of your endorsements.

As an influencer, it's **your responsibility** to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads. Don't rely on others to do it for you.

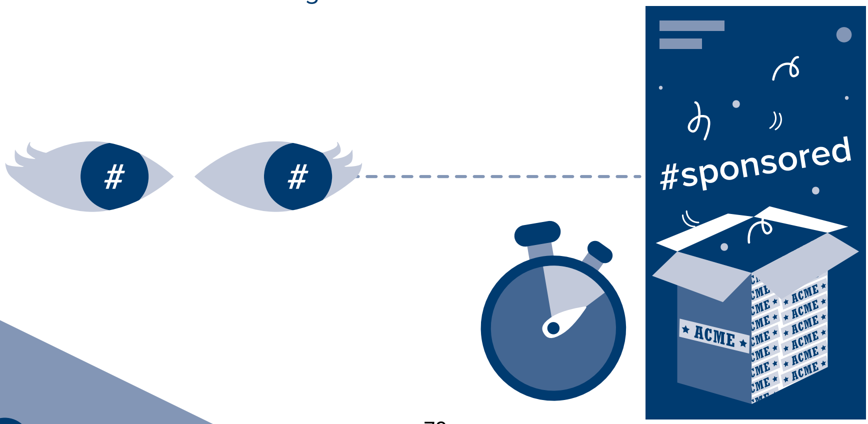
When to Disclose

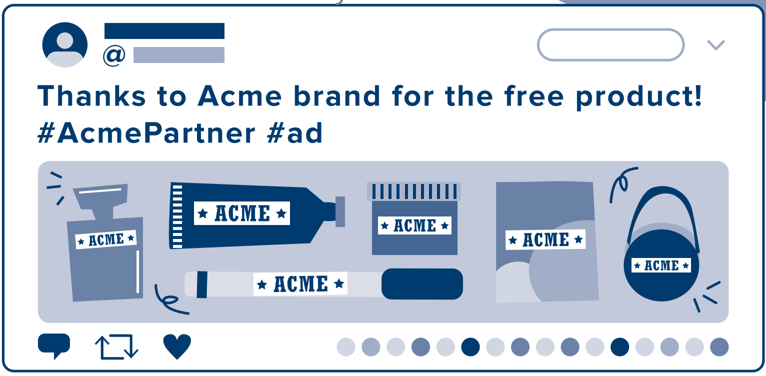
- Disclose when you have any **financial, employment, personal, or family relationship** with a brand.
  - Financial relationships aren't limited to money. Disclose the relationship if you got anything of value to mention a product.
  - If a brand gives you free or discounted products or other perks and then you mention one of its products, make a disclosure even if you weren't asked to mention *that* product.
  - Don't assume your followers already know about your brand relationships.
  - Make disclosures even if you think your evaluations are unbiased.
- Keep in mind that tags, likes, pins, and similar ways of showing you like a brand or product are endorsements.
- If posting from abroad, U.S. law applies if it's reasonably foreseeable that the post will affect U.S. consumers. Foreign laws might also apply.
- If you have no brand relationship and are just telling people about a product you bought and happen to like, you don't need to declare that you **don't** have a brand relationship.

How to Disclose

Make sure people will **see and understand** the disclosure.

- Place it so it's **hard to miss.**
  - The disclosure should be placed with the endorsement message itself.
  - Disclosures are likely to be missed if they appear only on an ABOUT ME or profile page, at the end of posts or videos, or anywhere that requires a person to click MORE.
  - Don't mix your disclosure into a group of hashtags or links.
  - If your endorsement is in a *picture* on a platform like Snapchat and Instagram Stories, superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it.
  - If making an endorsement in a *video*, the disclosure should be in the video and not just in the description uploaded with the video. Viewers are more likely to notice disclosures made in both audio and video. Some viewers may watch without sound and others may not notice superimposed words.
  - If making an endorsement in a *live stream*, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure.





- Use **simple and clear** language.
  - » Simple explanations like "Thanks to Acme brand for the free product" are often enough if placed in a way that is hard to miss.
  - » So are terms like "advertisement," "ad," and "sponsored."
  - » On a space-limited platform like Twitter, the terms "AcmePartner" or "Acme Ambassador" (where Acme is the brand name) are also options.
  - » It's fine (but not necessary) to include a hashtag with the disclosure, such as #ad or #sponsored.
  - » Don't use vague or confusing terms like "sp," "spon," or "collab," or stand-alone terms like "thanks" or "ambassador," and stay away from other abbreviations and shorthand when possible.
- The disclosure should be in the same language as the endorsement itself.
- Don't assume that a platform's disclosure tool is good enough, but consider using it in addition to your own, good disclosure.

What Else to Know

- You can't talk about your experience with a product you haven't tried.
- If you're paid to talk about a product and thought it was terrible, you can't say it's terrific.
- You can't make up claims about a product that would require proof the advertiser doesn't have – such as scientific proof that a product can treat a health condition.

FOR MORE INFORMATION

Have more questions? The FTC's Endorsement Guides: What People Are Asking is an FTC staff publication that answers many questions about the use of endorsements, including in social media, with many helpful examples.

FTC.gov/influencers

FEDERAL TRADE COMMISSION

business.ftc.gov

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Supplementary Materials

Statutes

DMCA

17 U.S. Code § 512.Limitations on liability relating to material online

(a)Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—
(1)the transmission of the material was initiated by or at the direction of a person other than the service provider;
(2)the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
(3)the service provider does not select the recipients of the material except as an automatic response to the request of another person;
(4)no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period

than is reasonably necessary for the transmission, routing, or provision of connections; and
(5)the material is transmitted through the system or network without modification of its content.
(b)System Caching.—
(1)Limitation on liability.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—
(A)the material is made available online by a person other than the service provider;
(B)the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and
(C)the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met.
(2)Conditions.—The conditions referred to in paragraph (1) are that—
(A)the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);
(B)the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in

paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C)the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i)does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii)is consistent with generally accepted industry standard communications protocols; and

(iii)does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D)if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E)if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i)the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii)the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.
(c)Information Residing on Systems or Networks At Direction of Users.—
(1)In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—
(A)
(i)does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
(ii)in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(iii)upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(B)does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C)upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
(2)Designated agent.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A)the name, address, phone number, and electronic mail address of the agent.
(B)other contact information which the Register of Copyrights may deem appropriate.
The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.
(3)Elements of notification.—
(A)To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
(i)A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
(ii)Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
(iii)Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
(iv)Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
(v)A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
(vi)A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
(B)

(i)Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.
(ii)In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).
(d)Information Location Tools.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—
(1)
(A)does not have actual knowledge that the material or activity is infringing;
(B)in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(C)upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(2)does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(3)upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for

purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e)Limitation on Liability of Nonprofit Educational Institutions.—

(1)When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

(A)such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B)the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C)the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2)For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f)Misrepresentations.—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 to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g)Replacement of Removed or Disabled Material and Limitation on Other Liability.—

(1)No liability for taking down generally.—

Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2)Exception.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A)takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B)upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C)replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has

filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.
(3)Contents of counter notification.—To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:
(A)A physical or electronic signature of the subscriber.
(B)Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.
(C)A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.
(D)The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.
(4)Limitation on other liability.—
A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).
(h)Subpoena To Identify Infringer.—
(1)Request.—
A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.
(2)Contents of request.—The request may be made by filing with the clerk—
(A)a copy of a notification described in subsection (c)(3)(A);

(B)a proposed subpoena; and
(C)a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.
(3)Contents of subpoena.—
The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.
(4)Basis for granting subpoena.—
If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.
(5)Actions of service provider receiving subpoena.—
Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.
(6)Rules applicable to subpoena.—
Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.
(i)Conditions for Eligibility.—
(1)Accommodation of technology.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A)has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and
(B)accommodates and does not interfere with standard technical measures.
(2)Definition.—As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and—
(A)have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
(B)are available to any person on reasonable and nondiscriminatory terms; and
(C)do not impose substantial costs on service providers or substantial burdens on their systems or networks.
(j)Injunctions.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:
(1)Scope of relief.—
(A)With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:
(i)An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider’s system or network.
(ii)An order restraining the service provider from providing access to a subscriber or account holder of the service provider’s system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.
(iii)Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted

material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B)If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i)An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii)An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2)Considerations.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A)whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B)the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C)whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D)whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3)Notice and ex parte orders.—

Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders

ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.
(k)Definitions.—
(1)Service provider.—
(A)As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.
(B)As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).
(2)Monetary relief.—
As used in this section, the term "monetary relief" means damages, costs, attorneys' fees, and any other form of monetary payment.
(l)Other Defenses Not Affected.—
The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.
(m)Protection of Privacy.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—
(1)a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or
(2)a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.
(n)Construction.—
Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any

one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

(Added Pub. L. 105–304, title II, § 202(a), Oct. 28, 1998, 112 Stat. 2877; amended Pub. L. 106–44, § 1(d), Aug. 5, 1999, 113 Stat. 222; Pub. L. 111–295, § 3(a), Dec. 9, 2010, 124 Stat. 3180.)

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Communications Decency Act – Section 230

47 U.S. Code § 230.Protection for private blocking and screening of offensive material
U.S. Code

(a)FindingsThe Congress finds the following:
(1)The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
(2)These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
(3)The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4)The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5)Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
(b)PolicyIt is the policy of the United States—
(1)to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2)to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3)to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4)to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
(5)to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
(c)Protection for "Good Samaritan" blocking and screening of offensive material
(1)Treatment of publisher or speaker
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2)Civil liabilityNo provider or user of an interactive computer service shall be held liable on account of—
(A)any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B)any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]
(d)Obligations of interactive computer service
A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e)Effect on other laws
(1)No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2)No effect on intellectual property law
Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3)State law
Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4)No effect on communications privacy law
Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5)No effect on sex trafficking lawNothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—
(A)any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;
(B)any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or
(C)any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.
(f)DefinitionsAs used in this section:
(1)Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2)Interactive computer service
The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3)Information content provider
The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4)Access software provider
The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:
(A)filter, screen, allow, or disallow content;
(B)pick, choose, analyze, or digest content; or
(C)transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.
(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

Cases

Lenz v. Universal Music Corp. – Considerations when sending DMCA takedown notice

801 F.3d 1126 (2015)

(a) Stephanie LENZ, Plaintiff-Appellee/Cross-Appellant,
v.
UNIVERSAL MUSIC CORP.; Universal Music Publishing Inc.; Universal Music Publishing Group Inc., Defendants-Appellants/Cross-Appellees.

Nos. 13-16106, 13-16107.

United States Court of Appeals, Ninth Circuit.

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Before: RICHARD C. TALLMAN, MILAN D. SMITH, JR., and MARY H. MURGUIA, Circuit Judges.

Opinion by Judge TALLMAN; Partial Concurrence and Partial Dissent by Judge MILAN D. SMITH, JR.

2. 1129*1129 OPINION

TALLMAN, Circuit Judge:

Stephanie Lenz filed suit under 17 U.S.C. § 512(f) — part of the Digital Millennium Copyright Act ("DMCA") — against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively "Universal"). She alleges Universal misrepresented in a takedown notification that her 29-second home video (the "video") constituted an infringing use of a portion of a composition by the Artist known as Prince, which Universal insists was unauthorized by the law. Her claim boils down to a question of whether copyright holders have been abusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use. We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law. We affirm the denial of the parties' cross-motions for summary judgment.

3. I

Founded in May 2005, YouTube (now owned by Google) operates a website that hosts user-generated content. *About YouTube,* YouTube.com, https://www.youtube.com/yt/about/ (last visited September 4, 2015). Users upload videos directly to the website. *Id.* On February 7, 2007, Lenz uploaded to YouTube a 29-second home video of her two young children in the family kitchen dancing to the song *Let's Go Crazy* by Prince.[1] Available at https://www.youtube.com/watch?v=N1KfJHFWlh Q (last visited September 4, 2015). She titled the video "`Let's Go Crazy' # 1." About four seconds into the video, Lenz asks her thirteen month-old son "what do you think of the music?" after which he bobs up and down while holding a push toy.

At the time Lenz posted the video, Universal was Prince's publishing administrator responsible for enforcing his copyrights. To accomplish this objective with respect to YouTube, Robert Allen, Universal's head of business affairs, assigned Sean Johnson, an assistant in the legal department, to monitor YouTube on a daily basis. Johnson searched YouTube for Prince's songs and reviewed the video postings returned by his online search query. When reviewing such videos, he evaluated whether they "embodied a Prince composition" by making "significant use of ... the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video." According to Allen, "[t]he general guidelines are that ... we review the video to ensure that the composition was the focus and if it was we then notify YouTube that the video should be removed."

Johnson contrasted videos that met this criteria to those "that may have had a second or less of a Prince song, literally a one line, half line of Prince song" or "were shot in incredibly noisy environments, such as bars, where there could be a Prince song playing deep in the background ... to the point where if there was any Prince composition embodied ... in those videos that it was distorted beyond reasonable recognition." None of the video evaluation guidelines explicitly include consideration of the fair use doctrine.

1130*1130 When Johnson reviewed Lenz's video, he recognized *Let's Go Crazy* immediately. He noted that it played loudly in the background throughout the entire video. Based on these details, the video's title, and Lenz's query during the video asking if her son liked the song, he concluded that Prince's song "was very much the focus of the video." As a result, Johnson decided the video should be included in a takedown notification sent to YouTube that listed more than 200 YouTube videos Universal believed to be making unauthorized use of Prince's songs.[2] The notice included a "good faith belief" statement as required by 17 U.S.C. § 512(c)(3)(A)(v): "We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law."

After receiving the takedown notification, YouTube removed the video and sent Lenz an email on June 5, 2007, notifying her of the removal. On June 7, 2007, Lenz attempted to restore the video by sending a counter-notification to YouTube pursuant to § 512(g)(3). After YouTube provided this counter-notification to Universal per § 512(g)(2)(B), Universal protested the video's reinstatement because Lenz failed to properly acknowledge that her statement was made under penalty of perjury, as required by § 512(g)(3)(C). Universal's protest reiterated that the video constituted infringement because there was no record that "either she or YouTube were ever granted licenses to reproduce, distribute, publicly perform or otherwise exploit the Composition." The protest made no mention of fair use. After obtaining *pro bono* counsel, Lenz sent a second counter-notification on June 27, 2007, which resulted in YouTube's reinstatement of the video in mid-July.

4. II

Lenz filed the instant action on July 24, 2007, and her Amended Complaint on August 15, 2007. After the district court dismissed her tortious interference claim and request for declaratory relief, Lenz filed her Second Amended Complaint on April 18, 2008, alleging only a claim for misrepresentation under § 512(f). The district court denied Universal's motion to dismiss the action.

On February 25, 2010, the district court granted Lenz's partial motion for summary judgment on Universal's six affirmative defenses, including the third affirmative defense that Lenz suffered no damages. Both parties subsequently moved for summary judgment on Lenz's § 512(f) misrepresentation claim. On January 24, 2013, the district court denied both motions in an order that is now before us.

The district court certified its summary judgment order for interlocutory appeal under 28 U.S.C. § 1292(b), and stayed proceedings in district court pending resolution of the appeal. We granted the parties permission to bring an interlocutory appeal.

5. III

We review *de novo* the district court's denial of summary judgment. When doing so, we "must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir.1995). On cross-motions for summary judgment, we evaluate each motion independently, "giving the nonmoving 1131*1131 party in each instance the benefit of all reasonable inferences." *ACLU v. City of Las Vegas,* 333 F.3d 1092, 1097 (9th Cir. 2003).

When evaluating an interlocutory appeal, we "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (emphasis in original) (quotation omitted). We may therefore "address those issues *material* to the order from which appeal has been taken." *In re Cinematronics, Inc.,* 916 F.2d 1444, 1449 (9th Cir.1990) (emphasis in original) (permitting appellate review of a ruling issued prior to the order certified for interlocutory appeal).

6. IV

Effective on October 28, 1998, the DMCA added new sections to existing copyright law by enacting five Titles, only one of which is relevant here: Title II — Online Copyright Infringement Liability Limitation Act — now codified in 17 U.S.C. § 512. Sections 512(c), (f), and (g) are at the heart of the parties' dispute.

7. A

Section 512(c) permits service providers, e.g., YouTube or Google, to avoid copyright infringement liability for storing users' content if — among other requirements — the service provider "expeditiously" removes or disables access to the content after receiving notification from a copyright holder that the content is infringing. 17 U.S.C. § 512(c). Section 512(c)(3)(A) sets forth the elements that such a "takedown notification" must contain. These elements include identification of the copyrighted work, identification of the allegedly infringing material, and, critically, a statement that the copyright holder believes in good faith the infringing material "is not authorized by the copyright owner, its agent, or the law." *Id.* § 512(c)(3)(A). The procedures outlined in § 512(c) are referred to as the DMCA's "takedown procedures."

To avoid liability for disabling or removing content, the service provider must notify the user of the takedown. *Id.* § 512(g)(1)-(2). The user then has the option of restoring the content by sending a counter-notification, which must include a statement of "good faith belief that the material was removed or disabled as a result of mistake or misidentification...." *Id.* § 512(g)(3)(C). Upon receipt of a valid counter-notification, the service provider must inform the copyright holder of the counter-notification and restore the content within "not less than 10, nor more than 14, business days," unless the service provider receives notice that the copyright holder has filed a lawsuit against the user seeking to restrain the user's infringing behavior. *Id.* § 512(g)(2)(B)-(C). The procedures outlined in § 512(g) are referred to as the DMCA's "put-back procedures."

If an entity abuses the DMCA, it may be subject to liability under § 512(f). That section provides: "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...." *Id.* § 512(f). Subsection (1) generally applies to copyright holders and subsection (2) generally applies to users. Only subsection (1) is at issue here.

8. B

We must first determine whether 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before 1132*1132 issuing a takedown notification. Section 512(c)(3)(A)(v) requires a takedown notification to include a "statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." The parties dispute whether fair use is an authorization under the law as contemplated by the statute — which is so far as we know an issue of first impression in any circuit across the nation. "Canons of statutory construction dictate that if the language of a statute is clear, we look no further than that language in determining the statute's meaning.... A court looks to legislative history only if the statute is unclear." *United States v. Lewis,* 67 F.3d 225, 228-29 (9th Cir.1995) (citations omitted). We agree with the district court and hold that the statute unambiguously contemplates fair use as a use authorized by the law.

Fair use is not just excused by the law, it is wholly authorized by the law. In 1976, Congress codified the application of a four-step test for determining the fair use of copyrighted works:

Notwithstanding the provisions of sections 106 and 106A, *the fair use of a copyrighted work,* ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright.* In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (emphasis added). The statute explains that the fair use of a copyrighted work is permissible because it is a non-infringing use.

While Title 17 of the United States Code ("Copyrights") does not define the term "authorize" or "authorized," "[w]hen there is no indication that Congress intended a specific legal meaning for the term, the court may look to sources such as dictionaries for a definition." *United States v. Mohrbacher,* 182 F.3d 1041, 1048 (9th Cir.1999). Black's Law Dictionary defines "authorize" as "1. To give legal authority; to empower" and "2. To formally approve; to sanction." *Authorize,* Black's Law Dictionary (10th ed.2014). Because 17 U.S.C. § 107 both "empowers" and "formally approves" the use of copyrighted material if the use constitutes fair use, fair use is "authorized by the law" within the meaning of § 512(c). *See also* 17 U.S.C. § 108(f)(4) ("Nothing in this section in any way affects the *right* of fair use as provided by section 107...." (emphasis added)).

Universal's sole textual argument is that fair use is not "authorized by the law" because it is an affirmative defense that excuses otherwise infringing conduct. Universal's interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that 1133*1133 fair use does not fall into the latter camp: "[A]nyone who ... makes a fair use of the work is not an infringer of the copyright with respect to such use." *Sony Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417, 433, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer:

Although the traditional approach is to view "fair use" as an affirmative defense,... it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused — this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.

Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n. 22 (11th Cir.1996); *cf.* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?,* 90 Wash. L.Rev. 685, 688 (2015) ("Congress did not intend fair use to be an affirmative defense — a defense, yes, but not an affirmative defense."). Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright, *Practice Management Information Corp. v. American Medical Ass'n,* 121 F.3d 516, 520 (9th Cir. 1997), and laches, *Danjaq LLC v. Sony Corp.,* 263 F.3d 942, 950-51 (9th Cir.2001).

Universal concedes it must give due consideration to other uses authorized by law such as compulsory licenses. The introductory language in 17 U.S.C. § 112 for compulsory licenses closely mirrors that in the fair use statute. *Compare* 17 U.S.C. § 112(a)(1) ("Notwithstanding the provisions of section 106, ... it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work... to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display...."), *with id.* § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work... is not an infringement of copyright."). That fair use may be labeled as an affirmative defense due to the procedural posture of the case is no different than labeling a license an affirmative defense for the same reason. *Compare* *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 573 & n. 3, 590, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (stating that "fair use is an affirmative defense" where the district court converted a motion to dismiss based on fair use into a motion for summary judgment), *with* *A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1025-26 (9th Cir.2001) ("Napster contends that ... the district court improperly rejected valid affirmative defenses of ... implied license...."). Thus, Universal's argument that it need not consider fair use in addition to compulsory licenses rings hollow.

Even if, as Universal urges, fair use is classified as an "*affirmative* defense," we hold — for the purposes of the DMCA — fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses. We conclude 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).

9. 1134*1134 C

We must next determine if a genuine issue of material fact exists as to whether Universal knowingly misrepresented that it had formed a good faith belief the video did not constitute fair use. This inquiry lies not in whether a court would adjudge the video as a fair use, but whether Universal formed a good faith belief that it was not. Contrary to the district court's holding, Lenz may proceed under an actual knowledge theory, but not under a willful blindness theory.

10. 1

Though Lenz argues Universal should have known the video qualifies for fair use as a matter of law, our court has already decided a copyright holder need only form a subjective good faith belief that a use is not authorized. *Rossi v. Motion Picture Ass'n of Am. Inc.,* 391 F.3d 1000 (9th Cir.2004). In *Rossi,* we explicitly held that "the `good faith belief' requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard." *Id.* at 1004. We further held:

In § 512(f), Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner's notification is a knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.

Id. at 1004-05 (citations omitted). Neither of these holdings are dictum. *See* *United States v. Johnson,* 256 F.3d 895, 914 (9th Cir.2001) (en banc) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.").

As a result, Lenz's request to impose a subjective standard only with respect to factual beliefs and an objective standard with respect to legal determinations is untenable. Such a request grafts an objective standard onto § 512(c)(3)(A)(v) directly in contravention to *Rossi.* *See* *Rossi,* 391 F.3d at 1004 ("When enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement."). We therefore judge Universal's actions by the subjective beliefs it formed about the video.

11. 2

Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use. Here, Lenz presented evidence that Universal did not form any subjective belief about the video's fair use — one way or another — because it failed to consider fair use at all, and knew that it failed to do so. Universal nevertheless contends that its procedures, while not formally labeled consideration of fair use, were tantamount to such consideration. Because the DMCA requires consideration of fair use prior to sending a takedown notification, a jury must determine whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof.

To be clear, if a copyright holder ignores or neglects our unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under § 512(f). If, however, a copyright 1135*1135 holder forms a subjective *good faith* belief the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder's belief even if we would have reached the opposite conclusion. A copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability. *Cf.* *Disney Enters., Inc. v. Hotfile Corp.,* No. 11-cv-20427, 2013 WL 6336286, at *48 (S.D.Fla. Sept. 20, 2013) (denying summary judgment of § 512(f) counterclaim due to "sufficient evidence in the record to suggest that [Plaintiff] Warner intentionally targeted files it knew it had no right to remove"); *Rosen v. Hosting Servs., Inc.,* 771 F.Supp.2d 1219, 1223 (C.D.Cal.2010) (denying summary judgment of § 512(f) counterclaim where the takedown notification listed four URL links that did not contain content matching the description of the purportedly infringed material); *Online Policy Grp. v. Diebold, Inc.,* 337 F.Supp.2d 1195, 1204-05 (N.D.Cal.2004) ("[T]here is no genuine issue of fact that Diebold knew — and indeed that it specifically intended — that its letters to OPG and Swarthmore would result in prevention of publication of that content.... The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA's safe harbor provisions — which were designed to protect ISPs, not copyright holders — as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.").

In order to comply with the strictures of § 512(c)(3)(A)(v), a copyright holder's consideration of fair use need not be searching or intensive. We follow *Rossi's* guidance that formation of a subjective good faith belief does not require investigation of the allegedly infringing content. *See* 391 F.3d at 1003, 1005. We are mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age. But that does not excuse a failure to comply with the procedures out-lined by Congress. *Cf. Lenz,* 572 F.Supp.2d at 1155 ("[I]n the majority of cases, a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner's ability to respond rapidly to potential infringements. The DMCA already requires copyright owners to make an initial review of the potentially infringing material prior to sending a takedown notice; indeed, it would be impossible to meet any of the requirements of Section 512(c) without doing so. A consideration of the applicability of the fair use doctrine simply is part of that initial review.").

We note, without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use. *Cf.* *Hotfile,* 2013 WL 6336286, at *47 ("The Court ... is unaware of any decision to date that actually addressed the need for human review, and the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity."). For example, consideration of fair use may be sufficient if copyright holders utilize computer programs that automatically identify for takedown notifications content where: "(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matches the audio track of that same copyrighted work; and (3) nearly the entirety ... is comprised of a single copyrighted work." Brief for The Org. for Transformative Works, Public Knowledge & Int'l Documentary Ass'n as Amici Curiae Supporting Appellee at 29-30 n. 8 (citing the Electronic 1136*1136 Frontier Foundation website (link unavailable)).

Copyright holders could then employ individuals like Johnson to review the minimal remaining content a computer program does not cull. *See* Brief for The Recording Indus. Ass'n of Am. as Amici Curiae Supporting Appellants at 15 ("[T]he RIAA has an entire department dedicated to identifying infringement and issuing takedown requests."); *see also* *Hotfile,* 2013 WL 6336286, at *14. During oral argument Universal explained that service providers now use screening algorithms. However, we need not definitively decide the issue here because Universal did not proffer any evidence that — at the time it sent the takedown notification to Lenz — it used a computer program to identify potentially infringing content.

12. 3

We hold the willful blindness doctrine may be used to determine whether a copyright holder "knowingly materially misrepresent[ed]" that it held a "good faith belief" the offending activity was not a fair use. *See* 17 U.S.C. § 512(c)(3)(A)(v), (f). "[T]he willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA." *Viacom Int'l, Inc. v. YouTube, Inc.,* 676 F.3d 19, 35 (2d Cir.2012) (interpreting how a party can establish the "actual knowledge" — a subjective belief — required by § 512(c)(1)(A)(I)); *see also* *UMG Recordings, Inc. v. Shelter Capital Partners LLC,* 718 F.3d 1006, 1023 (9th Cir.2013) ("Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge." (citing *Viacom,* 676 F.3d at 31)). But, based on the specific facts presented during summary judgment, we reject the district court's conclusion that Lenz may proceed to trial under a willful blindness theory.

To demonstrate willful blindness a plaintiff must establish two factors: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754, 131 S.Ct. 2060, 2070, 179 L.Ed.2d 1167 (2011). "Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* at 2070-71. To meet the *Global-Tech* test, Lenz must demonstrate a genuine issue as to whether — before sending the takedown notification — Universal (1) subjectively believed there was a high probability that the video constituted fair use, and (2) took deliberate actions to avoid learning of this fair use.

On summary judgment Lenz failed to meet a threshold showing of the first factor. To make such a showing, Lenz must provide evidence from which a juror could infer that Universal was aware of a high probability the video constituted fair use. *See* *United States v. Yi,* 704 F.3d 800, 805 (9th Cir.2013). But she failed to provide any such evidence. The district court therefore correctly found that "Lenz does not present evidence suggesting Universal subjectively believed either that there was a high probability any given video might make fair use of a Prince composition or her video in particular made fair use of Prince's song `Let's Go Crazy.'" Yet the district court improperly denied Universal's motion for summary judgment on the willful blindness theory because Universal "has not shown that it *lacked* a subjective belief." By finding blame with Universal's inability to show that it "*lacked* a subjective belief," the district court improperly required Universal 1137*1137 to meet its burden of persuasion, even though Lenz had failed to counter the initial burden of production that Universal successfully carried. *See* *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000). Lenz may not therefore proceed to trial on a willful blindness theory.

13. V

Section 512(f) provides for the recovery of "any damages, including costs and attorneys[`] fees, incurred by the alleged infringer ... 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...." 17 U.S.C. § 512(f). We hold a plaintiff may seek recovery of nominal damages for an injury incurred as a result of a § 512(f) misrepresentation.

Universal incorrectly asserts that Lenz must demonstrate she incurred "actual monetary loss." Section 512(k) provides a definition for "monetary relief" as "damages, costs, attorneys[`] fees, and any other form of monetary payment." The term "monetary relief" appears in § 512(a), (b)(1), (c)(1), and (d), but is notably absent from § 512(f). As a result, the damages an alleged infringer may recover under § 512(f) from "any person" are broader than monetary relief.[3] *Cf.* *United States v. James,* 478 U.S. 597, 605, 106 S.Ct. 3116, 92 L.Ed.2d 483

(1986) ("Congress' choice of the language `*any* damage' ... undercuts a narrow construction."), *abrogated on other grounds by Cent. Green Co. v. United States,* 531 U.S. 425, 121 S.Ct. 1005, 148 L.Ed.2d 919 (2001). Because Congress specified the recovery of "any damages," we reject Universal's contention that Congress did not indicate its intent to depart from the common law presumption that a misrepresentation plaintiff must have suffered a monetary loss. *See Keene Corp. v. United States,* 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).

Lenz may seek recovery of nominal damages due to an unquantifiable harm suffered as a result of Universal's actions.[4] The DMCA is akin to a statutorily created intentional tort whereby an individual may recover nominal damages for a "knowingly material misrepresent[ation] under this section [512]." 17 U.S.C. § 512(f); *cf. Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 305, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." (quotation and citations omitted)).

"In a number of common law actions associated with intentional torts, the violation of the plaintiff's right has generally 1138*1138 been regarded as a kind of legal damage in itself. The plaintiff who proves an intentional physical tort to the person or to property can always recover nominal damages." 3 Dan B. Dobbs et al., *The Law of Torts* § 480 (2d ed.2011). The tort need not be physical in order to recover nominal damages. Defamation, for example, permits the recovery of nominal damages:

A nominal damage award can be justified in a tort action only if there is some reason for awarding a judgment in favor of a claimant who has not proved or does not claim a compensable loss with sufficient certainty to justify a recovery of compensatory or actual damages. There may be such a reason in an action for defamation, since a nominal damage award serves the purpose of vindicating the plaintiff's character by a verdict of the jury that establishes the falsity of the defamatory matter.

W. Page Keeton et al., *Prosser and Keeton on Torts* § 116A, at 845 (5th ed.1984). Also, individuals may recover nominal damages for trespass to land, even though the trespasser's "presence on the land causes no harm to the land [or] its possessor...." Restatement (Second) of Torts § 163 & cmts. d, e (1965).

The district court therefore properly concluded in its 2010 order:

The use of "any damages" suggests strongly Congressional intent that recovery be available for damages even if they do not amount to ... substantial economic damages.... Requiring a plaintiff who can [show that the copyright holder knowingly misrepresented its subjective good faith] to demonstrate in addition not only that she suffered damages but also that those damages were economic and substantial would vitiate the deterrent effect of the statute.

Lenz v. Universal Music Corp., No. C 07-3783 JF, 2010 WL 702466, at *10 (N.D.Cal. Feb. 25, 2010). Relying on this opinion, the Southern District of Florida held the same. *Hotfile,* 2013 WL 6336286, at *48 ("[T]he Court observes that the quantity of economic damages to Hotfile's system is necessarily difficult to measure with precision and has led to much disagreement between the parties and their experts. Notwithstanding this difficulty, the fact of injury has been shown, and Hotfile's expert can provide the jury with a non-speculative basis to assess damages.").

We agree that Lenz may vindicate her statutorily created rights by seeking nominal damages. Because a jury has not yet determined whether Lenz will prevail at trial, we need not decide the scope of recoverable damages, i.e., whether she may recover expenses following the initiation of her § 512(f) suit or *pro bono* costs and attorneys' fees, both of which arose as a result of the injury incurred.

14. VI

Copyright holders cannot shirk their duty to consider — in good faith and prior to sending a takedown notification — whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law. That this step imposes responsibility on copyright holders is not a reason for us to reject it. *Cf.* *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123-24, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) ("[A]ny increased burdens imposed on the Commission as a result of its compliance with [the Consumer Product Safety Act] were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission. Thus, petitioners' claim that the Commission's compliance with the requirements of [the Act] will impose undue burdens on the Commission is properly addressed to Congress, 1139*1139 not to this Court."). We affirm the district court's order denying the parties' cross-motions for summary judgment.

AFFIRMED. Each party shall bear its own costs.

M. SMITH, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment:

I concur in all but Part IV.C of the majority opinion, and concur in the judgment. Because I disagree with the majority's approach to three issues, I respectfully dissent from Part IV.C.

First, I question whether § 512(f) directly prohibits a party from misrepresenting that it has formed a good faith belief that a work is subject to the fair use doctrine. I construe the plain text of the statute to prohibit misrepresentations that a work is infringing, not misrepresentations about the party's diligence in forming its belief that the work is infringing. Second, I disagree that there is any material dispute about whether Universal considered fair use. Because Universal did not consider fair use, it may be held liable for "knowingly" misrepresenting that the video was infringing, if it should be determined that the video is a non-infringing fair use. Universal's misrepresentation, if any, was knowing because Universal knew it had not considered fair use, and therefore knew it lacked a basis to conclude that the video was infringing. Third, I do not believe that the willful blindness doctrine applies where, as here, a party has failed to consider fair use and affirmatively misrepresents that a work is infringing.

I fully agree with the majority's conclusion that § 512(c)(3)(A)(v) requires copyright holders to consider whether potentially infringing material is a fair use before issuing a takedown notice. As the majority opinion explains, a takedown notice must contain "[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." 17 U.S.C. § 512(c)(3)(A)(v). Because fair use of copyrighted material is not an infringement of copyright, such use is "authorized by ... the law." *See id.* § 107. Therefore, in order to form "a good faith belief that use of the material in the manner complained of is not authorized by ... the law," *id.* § 512(c)(3)(A)(v), a party must consider the doctrine of fair use.

Where I part ways with the majority is in the proper analysis of Universal's misrepresentation. The majority concludes that "Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use." An unstated premise of this conclusion is that Universal impliedly represented that it had considered fair use when it certified in its takedown notification that it held a good faith belief that the video was not authorized by the law. Under the majority's approach, Universal's liability depends upon the truth or falsity of its implied assertion that it held a good faith belief about whether the video was a fair use.

However, I do not construe § 512(f) to directly prohibit a party from falsely implying that it has considered fair use. *Cf. Rossi v. Motion Picture Ass'n of Am., Inc.,* 391 F.3d 1000, 1004-05 (9th Cir.2004) (noting that § 512(f) is "an expressly limited cause of action"). Section 512(f) provides that "[a]ny person who *knowingly* materially misrepresents under this section... *that material or activity is infringing*... shall be liable for any damages." (emphases added). The plain text of the statute prohibits parties from misrepresenting that *a work is infringing,* not 1140*1140 from misrepresenting that they have considered fair use.

In my view, the relevant representation in this case is Universal's assertion that the video is infringing. Universal's liability under § 512(f) depends initially on the disputed issue of whether the video is subject to the fair use doctrine. If the video is a fair use, Universal's representation that the video is infringing was false.

This does not end the inquiry, of course, because § 512(f) only applies to "knowing[]" misrepresentations, not to innocent or negligent misrepresentations. The majority approach does not squarely address § 512(f)'s "knowingly" requirement. In *Rossi v. Motion Picture Association of America Inc.,* we observed that "[a] copyright owner cannot be liable [under § 512(f)] simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of *some actual knowledge of misrepresentation* on the part of the copyright owner." 391 F.3d at 1005 (citation omitted) (emphasis added). Universal urges us to construe *Rossi* to mean that a party must subjectively believe that the fact it asserts is false in order to be liable under § 512(f). If this is indeed the meaning of *Rossi,* it is difficult to see how Lenz can possibly prevail.[1]

Section 512(f)'s "knowingly" requirement should not be construed this restrictively. Universal may be held liable for knowingly misrepresenting that the video was infringing if, knowing it had not considered whether the video was a fair use, it erroneously asserted that it was infringing. A party cannot truthfully represent that a work subject to the fair use doctrine is infringing if the party has knowingly failed to consider whether the doctrine applies. Section 107 plainly states that "the fair use of a copyrighted work ... is not an infringement of copyright." The requirement that a party hold a "good faith" belief that "the infringing material is not authorized by the law" would be rendered meaningless if parties could wholly omit to consider whether the material was a fair use, and was therefore not an "infringing material" at all.

This reading of § 512(f) does not conflict with our decision in *Rossi.* A party that knowingly fails to consider fair use before erroneously asserting that a work is infringing has "some actual knowledge of misrepresentation," *Rossi,* 391 F.3d at 1005, because the party knows that, having failed to consider fair use, it lacks a basis to assert that the work is infringing.

This construction of "knowingly" is consistent with common law principles of deceit and fraudulent misrepresentation. Under these principles, a misrepresentation is knowing if the party knows it is ignorant of the truth or falsity of its representation. For example, in *Cooper v. Schlesinger,* 111 U.S. 148, 155, 4 S.Ct. 360, 28 L.Ed. 382 (1884), the Supreme Court stated that "a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule." *See also* *Sovereign Pocohontas Co. v. Bond,* 120 F.2d 39, 39-40 (D.C.Cir. 1941); *Knickerbocker Merch. Co. v. United States,* 13 F.2d 544, 546 (2d Cir.1926); *L J Mueller Furnace Co. v. Cascade Foundry* 1141*1141 *Co.,* 145 F. 596, 600 (3d Cir.1906); *Hindman v. First Nat'l Bank,* 112 F. 931, 944 (6th Cir.1902).

Construing "knowingly" to include assertions made in conscious ignorance of their truth or falsity is also consistent with the principles of the Second Restatement of Torts. The Second Restatement provides that "[a] misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) *knows that he does not have the basis for his representation that he states or implies.*" Restatement (Second) of Torts § 526 (emphasis added).[2] Under these principles, Universal faces liability if it misrepresented that the video was infringing, knowing that it lacked a basis to conclude that the video was not a fair use.

It is undisputed that Universal did not consider fair use before sending the takedown notice. Its policy was to send takedown notices if "the composition was the focus of the video," that is, where "[t]he music [was] prominently featured in the video." I disagree with the majority's conclusion that there is a factual dispute regarding whether applying this policy in this case could have been "sufficient to form a subjective good faith belief about the video's fair use or lack thereof." Section 107 explicitly enumerates the factors to be considered in assessing whether a work is a fair use. 17 U.S.C. § 107. Universal's policy of determining whether "the composition was the focus of the video" simply did not permit it to form an opinion about how the fair use factors applied to the video.[3] Moreover, Universal *knew* it lacked a basis to conclude that the work was infringing, because it knew that if this video was a fair use, it was not infringing. Section 107 states as much explicitly. *Id.*

The sole disputed issue in this case was whether Universal's representation that the video was infringing was false — that is, whether the video was a fair use. Universal knew that a fair use was not infringing, knew that it had not considered fair use, and nonetheless asserted that the video was infringing. Universal may be held to 1142*1142 account if the video was not infringing, because it knew it lacked a basis to assert that it was.

I also have doubts about whether the willful blindness doctrine is relevant to analyzing whether a misrepresentation is "knowing[]" under § 512(f). The doctrine was originally applied to "criminal statutes requir[ing] proof that a defendant acted knowingly or willfully." *See* *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S.Ct. 2060, 2068, 179 L.Ed.2d 1167 (2011). Courts reasoned that defendants could not avoid criminal liability under such statutes "by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances." *Id.* at 2068-69. Federal courts have applied the doctrine to non-criminal statutes that include a requirement that a party have acted knowingly or willfully, including intellectual property statutes. *See id.* at 2068-71 (active inducement of patent infringement under 35 U.S.C. § 271(b)); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34-35 (2d Cir.2012) ("actual knowledge" under 17 U.S.C. § 512(c)'s safe harbor provision); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650-51 (7th Cir.2003) (contributory infringement of copyright); *Dolman v. Agee*, 157 F.3d 708, 714-15 (9th Cir.1998) ("willful" copyright infringement under 17 U.S.C. § 504(c)(2)). It does not necessarily follow, however, that we should apply the doctrine to construe § 512(f). Section 512(f) creates a statutory misrepresentation action, and it is likely Congress intended the action to mirror analogous common law torts like fraud, deceit, and misrepresentation. Therefore, we should examine common law tort principles to construe "knowingly," rather than import a doctrine that developed from the criminal law. As I explain above, common law principles of misrepresentation establish that a misrepresentation is knowing if the party knows it is ignorant of the truth or falsity of its representation.

Because the common law of torts already provides ample insight into what Congress meant by "knowingly," there is no need to also apply the more stringent, and confusing, willful blindness test. To demonstrate willful blindness a plaintiff must establish two factors: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech,* 131 S.Ct. at 2070. It makes little sense in this case to ask whether Universal subjectively believed that there was a high probability the video was a fair use. The evidence was that Universal knowingly failed to form any belief about whether the video was fair use. This suffices to satisfy § 512(f)'s requirement that the misrepresentation be "knowing[]."

In sum, I would hold that parties must individually consider whether a work is a fair use before representing that the work is infringing in a takedown notice. If they do not, and the work is a non-infringing fair use, they are subject to liability for knowingly misrepresenting that the work is infringing.

For the foregoing reasons, I respectfully dissent in part.

[1] YouTube is a for-profit company that generates revenues by selling advertising. If users choose to become "content partners" with YouTube, they share in a portion of the advertising revenue generated. Lenz is not a content partner and no advertisements appear next to the video.

[2] "[T]he parties do not dispute that Lenz used copyrighted material in her video or that Universal is the true owner of Prince's copyrighted

music." *Lenz v. Universal Music Corp.,* 572 F.Supp.2d 1150, 1153-54 (N.D.Cal.2008).

[3] Title I of the DMCA specifies recovery for "actual damages." 17 U.S.C. § 1203(c)(1)(A). If Congress intended to similarly limit the recovery of § 512(f) damages to pecuniary losses, it could have chosen to do so.

[4] Lenz may not recover nominal damages for "impairment of free speech rights." No authority supports the recovery of nominal damages caused by a private actor's chilling of free speech rights. All of the cases Lenz cites address challenges to governmental action.

[1] The majority opinion implies that Universal would be liable if its actions were not sufficient to form a good faith belief about fair use, and that this is a disputed issue for the jury. But if Universal's proposed construction of *Rossi* is correct, Universal would not be liable merely because its actions were not sufficient to form a good faith belief about fair use. Instead, it would only be liable if it *knew* its actions were not sufficient. Otherwise, Universal would not have "knowingly" misrepresented that it had formed a good faith belief about fair use.

[2] The Second Restatement refers to "fraudulent misrepresentation," rather than "knowing" misrepresentation. *See* Restatement (Second) of Torts § 526. However, as the Restatement clarifies, the requirement that a misrepresentation be "fraudulent" "solely" refers to the party's knowledge of misrepresentation. *Compare id.* cmt. a. ("The word `fraudulent' is here used as referring solely to the maker's knowledge of the untrue character of his representation. This element of the defendant's conduct frequently is called `scienter' by the courts."), *with Rossi,* 391 F.3d at 1005 ("[T]here must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner."). It is therefore instructive to examine the Restatement definition of "fraudulent" in construing the meaning of "knowingly."

[3] The majority opinion implies that a copyright holder could form a good faith belief that a work was not a fair use by utilizing computer programs that automatically identify possible infringing content. I agree that such programs may be useful in identifying infringing content. However, the record does not disclose whether these programs are currently capable of analyzing fair use. Section 107 specifically enumerates the factors to be considered in analyzing fair use. These include: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; "the nature of the copyrighted work"; "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. For a copyright holder to rely solely on a computer algorithm to form a good faith belief that a work is infringing, that algorithm must be capable of applying the factors enumerated in § 107.

Fourth Estate v. Wall-Street.com – Copyright registration is a prerequisite to bringing suit

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FOURTH ESTATE PUBLIC BENEFIT CORP. *v.* WALL-STREET.COM, LLC, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–571. Argued January 8, 2019—Decided March 4, 2019

Petitioner Fourth Estate Public Benefit Corporation (Fourth Estate), a news organization, licensed works to respondent Wall-Street.com, LLC (Wall-Street), a news website. Fourth Estate sued Wall-Street and its owner for copyright infringement of news articles that Wall-Street failed to remove from its website after canceling the parties' license agreement. Fourth Estate had filed applications to register the articles with the Copyright Office, but the Register of Copyrights had not acted on those applications. Title 17 U. S. C. §411(a) states that "no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." The District Court dismissed the complaint, and the Eleventh Circuit affirmed, holding that "registration . . . has [not] been made" under §411(a) until the Copyright Office registers a copyright.

Held: Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration. Pp. 3–12.

(a) Under the Copyright Act of 1976, as amended, a copyright author gains "exclusive rights" in her work immediately upon the work's creation. 17 U. S. C. §106. A copyright owner may institute a civil action for infringement of those exclusive rights, §501(b), but generally only after complying with §411(a)'s requirement that "registration . . . has been made." Registration is thus akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights. P. 3.

(b) In limited circumstances, copyright owners may file an infringement suit before undertaking registration. For example, a copyright owner who is preparing to distribute a work of a type vulnerable to predistribution infringement—*e.g.*, a movie or musical composition—may apply to the Copyright Office for preregistration. §408(f)(2). A copyright owner may also sue for infringement of a live broadcast before "registration . . . has been made." §411(c). Outside of statutory exceptions not applicable here, however, §411(a) bars a copyright owner from suing for infringement until "registration . . . has been made." Fourth Estate advances the "application approach" to this provision, arguing that registration occurs when a copyright owner submits a proper application for registration. Wall-Street advocates the "registration approach," urging that registration occurs only when the Copyright Office grants registration of a copyright. The registration approach reflects the only satisfactory reading of §411(a)'s text. Pp. 3–12.

(1) Read together, §411(a)'s first two sentences focus on action by the Copyright Office—namely, its registration or refusal to register a copyright claim. If application alone sufficed to "ma[ke]" registration, §411(a)'s second sentence—which permits a copyright claimant to file suit when the Register has refused her application—would be superfluous. Similarly, §411(a)'s third sentence—which allows the Register to "become a party to the action with respect to the issue of regis-trability of the copyright claim"—would be negated if an infringement suit could be filed and resolved before the Register acted on an application. The registration approach reading of §411(a) is supported by other provisions of the Copyright Act. In particular, §410 confirms that application is discrete from, and precedes, registration, while §408(f)'s preregistration option would have little utility if a completed application sufficed to make registration. Pp. 4–7.

(2) Fourth Estate primarily contends that the Copyright Act uses the phrases "make registration" and "registration has been made" to describe submissions by the copyright owner. Fourth Estate therefore insists that §411(a)'s requirement that "registration . . . has been made in accordance with this title" most likely refers to a copyright owner's compliance with statutory requirements for registration applications. Fourth Estate points to other Copyright Act provisions that appear to use the phrase "make registration" or one of its variants to describe what a copyright claimant does. Fourth Estate acknowledges, however, that determining how the Copyright Act uses the word "registration" in a particular provision requires examining the "specific context" in which the term is used. The "specific context" of §411(a) permits only one sensible reading: The phrase "registration . . . has been made" refers to the Copyright Office's act grant-

ing registration, not to the copyright claimant's request for registration.

Fourth Estate's contrary reading stems in part from its misapprehension of the significance of certain 1976 revisions to the Copyright Act. But in enacting §411(a), Congress both reaffirmed the general rule that registration must precede an infringement suit and added an exception in that provision's second sentence to cover instances in which registration is refused. That exception would have no work to do if Congress intended the 1976 revisions to clarify that a copyright claimant may sue immediately upon applying for registration. Noteworthy, too, in years following the 1976 revisions, Congress resisted efforts to eliminate §411(a), which contains the registration requirement.

Fourth Estate also argues that, because "registration is not a condition of copyright protection," §408(a), §411(a) should not bar a copyright claimant from enforcing that protection in court once she has applied for registration. But the Copyright Act safeguards copyright owners by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward. To recover for such infringement, copyright owners must simply apply for registration and await the Register's decision. Further, Congress has authorized preregistration infringement suits with respect to works vulnerable to predistribution infringement, and Fourth Estate's fear that a copyright owner might lose the ability to enforce her rights entirely is overstated. True, registration processing times have increased from one to two weeks in 1956 to many months today. Delays, in large part, are the result of Copyright Office staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. Unfortunate as the current administrative lag may be, that factor does not allow this Court to revise §411(a)'s congressionally composed text. Pp. 7–12.

856 F. 3d 1338, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 17–571

FOURTH ESTATE PUB~~LIC BENE~~FIT CORPORATION, PETITIONER *v.* WALL-STREET.COM, LLC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 4, 2019]

JUSTICE GINSBURG delivered the opinion of the Court.

Impelling prompt registration of copyright claims, 17 U. S. C. §411(a) states that "no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." The question this case presents: Has "registration . . . been made in accordance with [Title 17]" as soon as the claimant delivers the required application, copies of the work, and fee to the Copyright Office; or has "registration . . . been made" only after the Copyright Office reviews and registers the copyright? We hold, in accord with the United States Court of Appeals for the Eleventh Circuit, that registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration.

Petitioner Fourth Estate Public Benefit Corporation (Fourth Estate) is a news organization producing online journalism. Fourth Estate licensed journalism works to respondent Wall-Street.com, LLC (Wall-Street), a news website. The license agreement required Wall-Street to remove from its website all content produced by Fourth Estate before canceling the agreement. Wall-Street canceled, but continued to display articles produced by Fourth Estate. Fourth Estate sued Wall-Street and its owner, Jerrold Burden, for copyright infringement. The complaint alleged that Fourth Estate had filed "applications to register [the] articles [licensed to Wall-Street] with the Register of Copyrights." App. to Pet. for Cert. 18a.[1] Because the Register had not yet acted on Fourth Estate's applications,[2] the District Court, on Wall-Street and Burden's motion, dismissed the complaint, and the Eleventh Circuit affirmed. 856 F. 3d 1338 (2017). Thereafter, the Register of Copyrights refused registration of the articles Wall-Street had allegedly infringed.[3]

We granted Fourth Estate's petition for certiorari to resolve a division among U. S. Courts of Appeals on when registration occurs in accordance with §411(a). 585 U. S. ___ (2018). Compare, *e.g.,* 856 F. 3d, at 1341 (case below) (registration has been made under §411(a) when the Register of Copyrights registers a copyright), with, *e.g., Cosmetic Ideas, Inc.* v. *IAC/Interactivecorp*, 606 F. 3d 612, 621 (CA9 2010) (registration has been made under §411(a) when the copyright claimant's "complete application" for registration is received by the Copyright Office).

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1 The Register of Copyrights is the "director of the Copyright Office of the Library of Congress" and is appointed by the Librarian of Congress. 17 U. S. C. §701(a). The Copyright Act delegates to the Register "[a]ll administrative functions and duties under [Title 17]." *Ibid.*

2 Consideration of Fourth Estate's filings was initially delayed because the check Fourth Estate sent in payment of the filing fee was rejected by Fourth Estate's bank as uncollectible. App. to Brief for United States as *Amicus Curiae* 1a.

3 The merits of the Copyright Office's decision refusing registration are not at issue in this Court.

I

Under the Copyright Act of 1976, as amended, copyright protection attaches to "original works of authorship"—prominent among them, literary, musical, and dramatic works—"fixed in any tangible medium of expression." 17 U. S. C. §102(a). An author gains "exclusive rights" in her work immediately upon the work's creation, including rights of reproduction, distribution, and display. See §106; *Eldred* v. *Ashcroft*, 537 U. S. 186, 195 (2003) ("[F]ederal copyright protection . . . run[s] from the work's creation."). The Copyright Act entitles a copyright owner to institute a civil action for infringement of those exclusive rights. §501(b).

Before pursuing an infringement claim in court, however, a copyright claimant generally must comply with §411(a)'s requirement that "registration of the copyright claim has been made." §411(a). Therefore, although an owner's rights exist apart from registration, see §408(a), registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights, see Tr. of Oral Arg. 35.

In limited circumstances, copyright owners may file an infringement suit before undertaking registration. If a copyright owner is preparing to distribute a work of a type vulnerable to predistribution infringement—notably, a movie or musical composition—the owner may apply for preregistration. §408(f)(2); 37 CFR §202.16(b)(1) (2018). The Copyright Office will "conduct a limited review" of the application and notify the claimant "[u]pon completion of the preregistration." §202.16(c)(7), (c)(10). Once "preregistration . . . has been made," the copyright claimant may institute a suit for infringement. 17 U. S. C. §411(a). Preregistration, however, serves only as "a preliminary step prior to a full registration." Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42286 (2005). An infringement suit brought in reliance on preregistration risks dismissal unless the copyright owner applies for registration promptly after the preregistered work's publication or infringement. §408(f)(3)–(4). A copyright owner may also sue for infringement of a live broadcast before "registration . . . has been made," but faces dismissal of her suit if she fails to "make registration for the work" within three months of its first transmission. §411(c). Even in these exceptional scenarios, then, the copyright owner must eventually pursue registration in order to maintain a suit for infringement.

II

All parties agree that, outside of statutory exceptions not applicable here, §411(a) bars a copyright owner from suing for infringement until "registration . . . has been made." Fourth Estate and Wall-Street dispute, however, whether "registration . . . has been made" under §411(a) when a copyright owner submits the application, materials, and fee required for registration, or only when the Copyright Office grants registration. Fourth Estate advances the former view—the "application approach"— while Wall-Street urges the latter reading—the "registration approach." The registration approach, we conclude, reflects the only satisfactory reading of §411(a)'s text. We therefore reject Fourth Estate's application approach.

A

Under §411(a), "registration . . . has been made," and a copyright owner may sue for infringement, when the Copyright Office registers a copyright.[4] Section 411(a)'s

[4]Section 411(a) provides, in principal part: "[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringe-

first sentence provides that no civil infringement action "shall be instituted until preregistration or registration of the copyright claim has been made." The section's next sentence sets out an exception to this rule: When the required "deposit, application, and fee . . . have been delivered to the Copyright Office in proper form and registration has been refused," the claimant "[may] institute a civil action, if notice thereof . . . is served on the Register." Read together, §411(a)'s opening sentences focus not on the claimant's act of applying for registration, but on action by the Copyright Office—namely, its registration or refusal to register a copyright claim.

If application alone sufficed to "ma[ke]" registration, §411(a)'s second sentence—allowing suit upon refusal of registration—would be superfluous. What utility would that allowance have if a copyright claimant could sue for infringement immediately after applying for registration without awaiting the Register's decision on her application? Proponents of the application approach urge that §411(a)'s second sentence serves merely to require a copyright claimant to serve "notice [of an infringement suit] . . . on the Register." See Brief for Petitioner 29–32. This reading, however, requires the implausible assumption that Congress gave "registration" different meanings in consecutive, related sentences within a single statutory provision. In §411(a)'s first sentence, "registration" would mean the claimant's act of filing an application, while in the section's second sentence, "registration" would entail the Register's review of an application. We resist this improbable construction. See, *e.g., Mid-Con Freight Systems, Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 440,

ment if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim . . . ."

448 (2005) (declining to read "the same words" in consecutive sentences as "refer[ring] to something totally different").

The third and final sentence of §411(a) further persuades us that the provision requires action by the Register before a copyright claimant may sue for infringement. The sentence allows the Register to "become a party to the action with respect to the issue of registrability of the copyright claim." This allowance would be negated, and the court conducting an infringement suit would lack the benefit of the Register's assessment, if an infringement suit could be filed and resolved before the Register acted on an application.

Other provisions of the Copyright Act support our reading of "registration," as used in §411(a), to mean action by the Register. Section 410 states that, "after examination," if the Register determines that "the material deposited constitutes copyrightable subject matter" and "other legal and formal requirements . . . [are] met, the Register shall register the claim and issue to the applicant a certificate of registration." §410(a). But if the Register determines that the deposited material "does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration." §410(b). Section 410 thus confirms that application is discrete from, and precedes, registration. Section 410(d), furthermore, provides that if the Copyright Office registers a claim, or if a court later determines that a refused claim was registrable, the "effective date of [the work's] copyright registration is the day on which" the copyright owner made a proper submission to the Copyright Office. There would be no need thus to specify the "effective date of a copyright registration" if submission of the required materials qualified as "registration."

Section 408(f)'s preregistration option, too, would have little utility if a completed application constituted registration. Preregistration, as noted *supra,* at 3–4, allows the author of a work vulnerable to predistribution infringement to enforce her exclusive rights in court before obtaining registration or refusal thereof. A copyright owner who fears prepublication infringement would have no reason to apply for preregistration, however, if she could instead simply complete an application for registration and immediately commence an infringement suit. Cf. *TRW Inc.* v. *Andrews*, 534 U. S. 19, 29 (2001) (rejecting an interpretation that "would in practical effect render [a provision] superfluous in all but the most unusual circumstances").

B

Challenging the Eleventh Circuit's judgment, Fourth Estate primarily contends that the Copyright Act uses "the phrase 'make registration' and its passive-voice counterpart 'registration has been made'" to describe submissions by the copyright owner, rather than Copyright Office responses to those submissions. Brief for Petitioner 21. Section 411(a)'s requirement that "registration . . . has been made in accordance with this title," Fourth Estate insists, most likely refers to a copyright owner's compliance with the statutory specifications for registration applications. In support, Fourth Estate points to Copyright Act provisions that appear to use the phrase "make registration" or one of its variants to describe what a copyright claimant does. See *id.*, at 22–26 (citing 17 U. S. C. §§110, 205(c), 408(c)(3), 411(c), 412(2)). Furthermore, Fourth Estate urges that its reading reflects the reality that, eventually, the vast majority of applications are granted. See Brief for Petitioner 41.

Fourth Estate acknowledges, however, that the Copyright Act sometimes uses "registration" to refer to activity by the Copyright Office, not activity undertaken by a copyright claimant. See *id.*, at 27–28 (citing 17 U. S. C. §708(a)). Fourth Estate thus agrees that, to determine how the statute uses the word "registration" in a particular prescription, one must "look to the specific context" in which the term is used. Brief for Petitioner 29. As explained *supra,* at 4–7, the "specific context" of §411(a) permits only one sensible reading: The phrase "registration . . . has been made" refers to the Copyright Office's act granting registration, not to the copyright claimant's request for registration.

Fourth Estate's contrary reading of §411(a) stems in part from its misapprehension of the significance of certain 1976 revisions to the Copyright Act. Before that year, §411(a)'s precursor provided that "[n]o action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with." 17 U. S. C. §13 (1970 ed.). Fourth Estate urges that this provision posed the very question we resolve today—namely, whether a claimant's application alone effects registration. The Second Circuit addressed that question, Fourth Estate observes, in *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F. 2d 637 (1958). Brief for Petitioner 32–34. In that case, in an opinion by Judge Learned Hand, the court held that a copyright owner who completed an application could not sue for infringement immediately upon the Copyright Office's refusal to register. *Vacheron*, 260 F. 3d, at 640–641. Instead, the owner first had to obtain a registration certificate by bringing a mandamus action against the Register. The Second Circuit dissenter would have treated the owner's application as sufficient to permit commencement of an action for infringement. *Id.,* at 645.

Fourth Estate sees Congress' 1976 revision of the registration requirement as an endorsement of the *Vacheron* dissenter's position. Brief for Petitioner 34–36. We disagree. The changes made in 1976 instead indicate Congress' agreement with Judge Hand that it is the Register's action that triggers a copyright owner's entitlement to sue. In enacting 17 U. S. C. §411(a), Congress both reaffirmed the general rule that registration must precede an infringement suit, and added an exception in that provision's second sentence to cover instances in which registration is refused. See H. R. Rep. No. 94-1476, p. 157 (1976). That exception would have no work to do if, as Fourth Estate urges, Congress intended the 1976 revisions to clarify that a copyright claimant may sue immediately upon applying for registration. A copyright claimant would need no statutory authorization to sue after refusal of her application if she could institute suit as soon as she has filed the application.

Noteworthy, too, in years following the 1976 revisions, Congress resisted efforts to eliminate §411(a) and the registration requirement embedded in it. In 1988, Congress removed foreign works from §411(a)'s dominion in order to comply with the Berne Convention for the Protection of Literary and Artistic Works' bar on copyright formalities for such works. See §9(b)(1), 102 Stat. 2859. Despite proposals to repeal §411(a)'s registration requirement entirely, however, see S. Rep. No. 100-352, p. 36 (1988), Congress maintained the requirement for domestic works, see §411(a). Subsequently, in 1993, Congress considered, but declined to adopt, a proposal to allow suit immediately upon submission of a registration application. See H. R. Rep. No. 103–338, p. 4 (1993). And in 2005, Congress made a preregistration option available for works vulnerable to predistribution infringement. See Artists' Rights and Theft Prevention Act of 2005, §104, 119 Stat. 221. See also *supra,* at 3–4. Congress chose that course in face of calls to eliminate registration in cases of predistribution infringement. 70 Fed. Reg. 42286. Time and again, then, Congress has maintained registration as prerequisite to suit, and rejected proposals that would have eliminated registration or tied it to the copyright claimant's application instead of the Register's action.[5]

Fourth Estate additionally argues that, as "registration is not a condition of copyright protection," 17 U. S. C. §408(a), §411(a) should not be read to bar a copyright claimant from enforcing that protection in court once she has submitted a proper application for registration. Brief for Petitioner 37. But as explained *supra,* at 3, the Copyright Act safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward. If infringement occurs before a copyright owner applies for registration, that owner may eventually recover damages for the past infringement, as well as the infringer's profits. §504. She must simply apply for registration and receive the Copyright Office's decision on her application before instituting suit. Once the Register grants or refuses registration, the copyright owner may also seek an injunction barring the infringer from continued violation of her exclusive rights and an order requiring the infringer to destroy infringing materials. §§502, 503(b).

Fourth Estate maintains, however, that if infringement occurs while the Copyright Office is reviewing a registration application, the registration approach will deprive the owner of her rights during the waiting period. Brief for Petitioner 41. See also 1 P. Goldstein, Copyright §3.15,

[5]Fourth Estate asserts that, if a copyright owner encounters a lengthy delay in the Copyright Office, she may be forced to file a mandamus action to compel the Register to rule on her application, the very problem exposed in *Vacheron & Constantin-Le Coultre Watches*, *Inc*. v. *Benrus Watch Co*., 260 F. 2d 637 (CA2 1958), see *supra,* at 8. But Congress' answer to *Vacheron*, codified in §411(a)'s second sentence, was to permit an infringement suit upon refusal of registration, not to eliminate Copyright Office action as the trigger for an infringement suit.

p. 3:154.2 (3d ed. 2018 Supp.) (finding application approach "the better rule"); 2 M. Nimmer & D. Nimmer, Copyright §7.16[B][3][a], [b][ii] (2018) (infringement suit is conditioned on application, while prima facie presumption of validity depends on certificate of registration). The Copyright Act's explicit carveouts from §411(a)'s general registration rule, however, show that Congress adverted to this concern. In the preregistration option, §408(f), Congress provided that owners of works especially susceptible to prepublication infringement should be allowed to institute suit before the Register has granted or refused registration. See §411(a). Congress made the same determination as to live broadcasts. §411(c); see *supra,* at 4.[6] As to all other works, however, §411(a)'s general rule requires owners to await action by the Register before filing suit for infringement.

Fourth Estate raises the specter that a copyright owner may lose the ability to enforce her rights if the Copyright Act's three-year statute of limitations runs out before the Copyright Office acts on her application for registration. Brief for Petitioner 41. Fourth Estate's fear is overstated, as the average processing time for registration applications is currently seven months, leaving ample time to sue after the Register's decision, even for infringement that began before submission of an application. See U. S. Copyright Office, Registration Processing Times (Oct. 2, 2018) (Registration Processing Times), https://www.copyright.gov/registration/docs/processing-times-faqs.pdf (as last visited

[6] Further, in addition to the Act's provisions for preregistration suit, the Copyright Office allows copyright claimants to seek expedited processing of a claim for an additional $800 fee. See U. S. Copyright Office, Special Handling: Circular No. 10, pp. 1–2 (2017). The Copyright Office grants requests for special handling in situations involving, *inter alia*, "[p]ending or prospective litigation," and "make[s] every attempt to examine the application . . . within five working days." Compendium of U. S. Copyright Practices §623.2, 623.4 (3d ed. 2017).

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True, the statutory scheme has not worked as Congress likely envisioned. Registration processing times have increased from one or two weeks in 1956 to many months today. See GAO, Improving Productivity in Copyright Registration 3 (GAO–AFMD–83–13 1982); Registration Processing Times. Delays in Copyright Office processing of applications, it appears, are attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. See 5 W. Patry, Copyright §17:83 (2019). Unfortunate as the current administrative lag may be, that factor does not allow us to revise §411(a)'s congressionally composed text.

* * *

For the reasons stated, we conclude that "registration . . . has been made" within the meaning of 17 U. S. C. §411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application. The judgment of the Court of Appeals for the Eleventh Circuit is accordingly

Affirmed.