[Fordham Intellectual Property, Media and Entertainment Law Journal](https://ir.lawnet.fordham.edu/iplj)

Volume 27 *Volume XXVII*
Number 1

Article 3

2016

GIF Gaffe: How Big Sports Ignored Lenz and Used the DMCA to Chill Free Speech on Twitter

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Recommended Citation

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GIF Gaffe: How Big Sports Ignored Lenz and Used the DMCA to Chill Free Speech on Twitter

Cover Page Footnote

LL.M. Intellectual Property, George Washington University Law School; J.D., Suffolk University Law School; B.S., Boston University College of Communication; Former Legal Associate and NHLPA-Certified Agent, Jay Fee Sports Group, LLC. This Article won first place in the 2016 Marcus B. Finnegan Competition for best essay in any area of intellectual property law by a George Washington University law student. I would like to thank Professor Robert Brauneis for his masterful instruction of copyright law, Professor Meaghan Kent for her wealth of practical knowledge and writing tips, and Professor Dawn Nunziato for her enthusiastic teaching, comments, and encouragement during the development of this Article. I would also like to extend a special thank you to my parents, Jan Trenholm and William Warren, as well as my grandfather, George Warren, for inspiring me to practice law, and my grandmother, Kris, and sister, Alexandra, for their unwavering love and support.

This article is available in Fordham Intellectual Property, Media and Entertainment Law Journal: https://ir.lawnet.fordham.edu/iplj/vol27/iss1/3

GIF Gaffe: How Big Sports Ignored *Lenz* and Used the DMCA to Chill Free Speech on Twitter

Andrew T. Warren*

Many major sports leagues including the National Football League, Major League Baseball, and Ultimate Fighting Championship have consistently used the Digital Millennium Copyright Act ("DMCA") to remove user-created GIFs, Vines, and related content that make use of the leagues' copyrighted broadcast material on Twitter. This Article analyzes Twitter users' right of fair use in the leagues' copyrighted material, while suggesting that sports leagues and their agents may not be following the Ninth Circuit's Lenz v. Universal Music Corp. *decision, which requires copyright owners to consider fair use before submitting DMCA takedown notices. Sports leagues' protocol and actions towards GIFs and Vines on Twitter are the backdrop used to examine Twitter's conflicted role and inconsistent history in complying with an array of DMCA takedown notices across varied forms and industries. On Twitter, the DMCA has not served to successfully strike a balance between the rights of the copyright holder and user. Instead, the law adversely impacts users making fair use of copyrightable material and makes that use fundamentally impractical on a social media service that exists in,*

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I would like to thank Professor Robert Brauneis for his masterful instruction of copyright law, Professor Meaghan Kent for her wealth of practical knowledge and writing tips, and Professor Dawn Nunziato for her enthusiastic teaching, comments, and encouragement during the development of this Article. I would also like to extend a special thank you to my parents, Jan Trenholm and William Warren, as well as my grandfather, George Warren, for inspiring me to practice law, and my grandmother, Kris, and sister, Alexandra, for their unwavering love and support.

and mirrors, the real-time lives of its users. Whether a user posts material that is eventually found to be infringing or not, that material may easily be blocked for a period of time that would make its eventual reinstatement to the service effectively meaningless. Barring a court ruling on the issue of fair use in GIFs, Vines, and similar material, changes should be made to section 512 of the DMCA in order to strike a more equitable balance between copyright owner and fair user. The DMCA must reflect the truth that popular social media platforms, such as Twitter, YouTube, Facebook, and Instagram, are each utilized for distinctive purposes and that the laws that achieve fairness in digital copyright on one service may also serve to suppress free speech and the right of fair use on another.

INTRODUCTION 105
I. TWITTER, BIG SPORTS, AND CENSORSHIP 109
A. Censorship on Twitter 109
B. Twitter's Relationship with Big Sports 112
II. FAIR USE IN GIFS AND VINES 115
A. Big Sports' Copyright Ownership 115
B. Users Rights to Make Fair Use of GIFs and Vines 116
1. Purpose and Character of the Use 117
2. Nature of the Work 120
3. Amount and Substantiality 120
4. Effect of the Use on the Potential Market 122
C. U.K. Fair Dealing 123
III. DMCA SECTION 512 124
A. Notification, Takedown, and Put Back 124
B. DMCA Section 512(i)(1)(A) 125
C. Section 512(f) Misrepresentations and Lenz 127
IV. TWITTER'S DMCA SECTION 512 HISTORY AND STATISTICS 129
A. Twitter's Section 512 DMCA History 129
B. Twitter's DMCA Section 512 Statistics 134
V. SEARCHING FOR SOLUTIONS 137
A. Litigate a GIF or Vine Fair Use Case 138
B. Restructure Section 512 Notice and Takedown Provisions 138
C. Apply Social Pressure to Twitter 141

CONCLUSION 141

INTRODUCTION

On the morning of October 13, 2015, Barstool Sports, which was at the time the number one independent online publication for sports and men's lifestyle for the twenty-one to thirty-four-year-old male demographic, found itself without a Twitter account.[1] A day earlier, Twitter accounts for Deadspin (@Deadspin) and SBNation (@SBNation), two of the most viewed sports commentary websites in the United States, had also been suspended.[2]

The suspensions of three Twitter accounts totaling over one million followers did not go unnoticed; the Internet was quickly flooded with articles discussing takedown requests under section 512 of the Digital Millennium Copyright Act ("DMCA"), fair use, and the chilling effects of deleting free speech from the Internet. Soon it became apparent that five different sports entities had filed DMCA requests with Twitter, leading to the blocking and take-down of the allegedly offending GIFs and Vines along with the suspension of the Twitter accounts of three of the most popular sports commentary websites in the country.[3]

The @Deadspin account was suspended for more than two hours until Gawker Media stepped in to deal with Twitter on its

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[1] *Barstool Sports Enters Exclusive Partnership with Revcontent*, BUS. WIRE (July 22, 2015, 3:04 PM), http://www.businesswire.com/news/home/20150722006313/en/Barstool-Sports-Enters-Exclusive-Partnership-Revcontent [https://perma.cc/NSJ7-7E4D]; David Portnoy, *The Barstool Sports Twitter Account Just Got Shut Down by Roger Goodell*, BARSTOOL SPORTS (Oct. 13, 2015, 10:28 AM), http://www.barstoolsports.com/boston/the-barstool-sports-twitter-account-just-got-shut-down-by-roger-goodell/ [https://perma.cc/56EQ-7NL8].

[2] Nick Statt, *Sports Site's Twitter Account Suspended After NFL Complains About GIFs*, VERGE (Oct. 12, 2015, 8:53 PM), http://www.theverge.com/2015/10/12/9515011/deadspin-twitter-account-suspended-nfl-dmca-copyright [https://perma.cc/XG64-AJ3B].

[3] Nick O'Malley, *Deadspin, SB Nation, Barstool Sports Twitter Accounts Shutdown After NFL Requests Removal of GIFs*, MASSLIVE (Oct. 13, 2015, 11:23 AM), http://blog.masslive.com/patriots/2015/10/deadspin_sb_nation_barstool_sp.html [https://perma.cc/SZW6-UCHN].

subsidiary's behalf.[4] The reinstated account was stripped of GIFs formed from National Football League ("NFL") and Ultimate Fighting Championship ("UFC") highlights.[5] SBNation's GIF-specific account, @SBNationGIF, received similar treatment by complainant copyright holders the Big 12 and the Southeastern Conference ("SEC"), two of the preeminent conferences in college football.[6] A day later, Barstool Sports' Twitter account (@barstoolsports) was the focus of a DMCA takedown notice lodged by Major League Baseball ("MLB") that would lead to the @barstoolsports account being suspended by Twitter for roughly forty days.[7]

Drew Magary, a columnist for Deadspin, called the Twitter account suspension "THE WORST REPRESSION OF FREE SPEECH IN THE HISTORY OF MANKIND."[8] And yes, he used all capital letters for extreme emphasis.[9] David Portnoy, majority owner of Barstool Sports prior to its reported eight-figure sale to the Chernin Digital Group,[10] was more quizzical, saying:

> It's amazing how backwards the NFL and MLB is. Accounts like ours that post 20 second gifs of funny moments and weird shit help grow and spread the game. It helps reach a younger generation who don't consume media the traditional way those idiots in the boardrooms grew up with. Trying to stop gifs and social media from growing is like trying to stop the tides from coming in. . . . The fact they

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4 Daniel Victor, *Twitter Removes Accounts Over Sharing of Sports Videos*, N.Y. TIMES (Oct. 13, 2015), http://www.nytimes.com/2015/10/13/business/media/twitter-removes-accounts-over-sharing-of-sports-videos.html [https://perma.cc/DL8K-ARNX].

5 *Id.*

6 *Id.*

7 E-mail from David Portnoy, Founder, Barstool Sports, to author (Apr. 16, 2016, 9:25 AM EDT) (on file with author).

8 Drew Magary, *So We Got Suspended from Twitter*, DEADSPIN (Oct. 13, 2015, 2:38 PM), http://deadspin.com/so-we-got-suspended-from-twitter-1736299031 [https://perma.cc/9HRE-6GFQ].

9 *Id.*

10 *See* Biz Carson, *Barstool Sports Just Got Bought at a $10 Million to $15 Million Valuation, and Its Founder Is 'Kinda Rich Now,'* BUS. INSIDER (Jan. 7, 2016, 3:00 PM), http://www.businessinsider.com/watch-barstool-sports-bizarre-acquisition-announcement-2016-1 [https://perma.cc/X2YY-67UV].

> can't understand that and their thinking is so backwards is MIND BOGGLING. It's almost like they think print and radio still rule the world. Change is coming whether they like it or not. Adapt or die.[11]

GIF, which stands for "graphic interchange format," was Oxford American Dictionary's word of the year in 2012.[12] A GIF looks "like a short, slightly grainy video file that plays over and over again."[13] In the context of sports, GIFs usually comprise screen captures or live footage of a particular sporting event. Many times GIFs are not simply a recording of a key part of the game, but may show something odd or funny within the game, or even take clips from the game and speed up or slow down part of the game to transform it further.[14] The GIFs may then be uploaded to the Internet, popularly to Twitter. In recent months Twitter has even introduced a "GIF button" to its online and mobile platforms.[15]

Vine, short for "Vignette," is both the name of the video sharing service and the videos that are created through the use of the service.[16] Each Vine is a six-second-long looping video clip that is typically created with a smartphone.[17] The content of a Vine can be similar to that of a GIF, but without the variable length. The capturing and social media display of live and broadcast sports content is a popular subject of Vines, as it is of GIFs. Ironically and notably,

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[11] Portnoy, *supra* note 1.

[12] Charlie Wells, *Oxford American Dictionary Names GIF Word of the Year*, N.Y. DAILY NEWS (Nov. 13, 2012, 7:24 PM), http://www.nydailynews.com/news/national/gif-named-word-year-article-1.1201544 [https://perma.cc/UJT3-3GKD].

[13] *Id.*

[14] *See id.*

[15] Jessica Guynn, *Twitter Rolls Out GIF Button*, USA TODAY (Feb. 17, 2016, 2:32 PM), http://www.usatoday.com/story/tech/news/2016/02/17/twitter-rolls-out-gif-button/80502670/ [https://perma.cc/YB99-3VP8].

[16] Eli Langer, *Six Things You Didn't Know About Twitter's Vine App*, CNBC (June 15, 2013, 3:22 PM), http://www.cnbc.com/id/100807818 [https://perma.cc/5HNQ-HYSM]. During editing of this Article, Vine announced that the company plans to discontinue the mobile application. Vine, *Important News About Vine*, MEDIUM (Oct. 27, 2016), https://medium.com/@vine/important-news-about-vine-909c5f4ae7a7#.efvntj3h3 [https://perma.cc/R9ZX-S28M].

[17] *See id.*

Vine is owned by Twitter and did not successfully launch until after that acquisition took place.[18]

There has been no evidence that the "Big Sports"[19] leagues banded together to assert their copyright ownership rights over the allegedly offending parties' GIFs and Vines, although the timing and the accounts targeted do raise suspicion. The NFL, MLB, and UFC, in particular, have diligently protected their copyrighted material for years,[20] while other major sports leagues such as the National Basketball Association ("NBA")[21] and National Hockey League ("NHL")[22] have policies allowing users to create and distribute GIFs and Vines using copyrighted content. The problems Big Sports now face are online platforms that serve as outlets of creativity for millions of people and companies. Twitter essentially provides its users with their own mini-websites that can be constructed in minutes and have the opportunity to be viewed by a limitless number of people.

While the issue of a few accounts being temporarily suspended, and some short videos being blocked on Twitter may seem trivial to many, digital expression should be as valued as any other form of free speech in the United States. One week after the Big Sports DMCA takedown requests, Twitter CEO Jack Dorsey echoed similar sentiments, stating: "Twitter stands for freedom of expres-

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[18] Peter Kafka & Mike Isaac, *Twitter Buys Vine, a Video Clip Company That Never Launched*, ALLTHINGSD (Oct. 9, 2012, 11:12 AM), http://allthingsd.com/20121009/twitter-buys-vine-a-video-clip-company-that-never-launched/ [https://perma.cc/KV6C-FTNV].

[19] Due to the timing and similarity of the takedown notices, MLB, the NFL, UFC, the Big 12, and the SEC shall be referred to as "Big Sports" for ease of reference throughout this Article.

[20] E-mail from Ian Young, Group Director of Media Buying, Wieden+Kennedy, to author (Apr. 14, 2016, 2:17 PM EDT) (on file with author).

[21] *See* Rick Maese & Cindy Boren, *Sports Video Clips Are Now Ubiquitous on Social Media. Can the NFL Put the Genie Back in the Bottle?*, WASH. POST (Oct. 13, 2015), https://www.washingtonpost.com/sports/sports-video-clips-are-now-ubiquitous-on-social-media-can-the-nfl-put-the-genie-back-in-the-bottle/2015/10/13/e986f34c-71c9-11e5-8248-98e0f5a2e830_story.html [https://perma.cc/D2J3-YVCQ].

[22] *See* Greg Wyshynski, *NHL Refutes Report That It's Banning Fan-Created GIFs*, YAHOO SPORTS: PUCK DADDY (Apr. 12, 2016, 10:32 AM), http://sports.yahoo.com/blogs/nhl-puck-daddy/nhl-refutes-report-that-it-s-banning-fan-created-gifs-143234895.html [https://perma.cc/UY86-6F8X].

sion . . . [and] Twitter stands for speaking truth to power."[23] However, when Twitter has a financial partnership and is tasked to remove an expression by that partner, free speech on the service may be in danger of being suppressed.[24]

This Article discusses the impact of Big Sports' DMCA takedown requests in harming Twitter users' authorized rights of fair use, and considers how Twitter is placed in the unenviable position of having to choose to censor its own users or alienate current or potential corporate partners. Following this introduction, Part I covers censorship on Twitter and Twitter's relationship with Big Sports. Part II analyzes whether GIFs and Vines using Big Sports' copyrightable content have a claim to fair use. Part III dissects DMCA section 512's notice and takedown procedures, and considers the importance of the *Lenz v. Universal Music Corp.*[25] decision in expanding the statute. Part IV discusses Twitter's relevant history and statistics within the scope of section 512. Finally, Part V concludes by presenting potential solutions to these problems, with a goal of achieving fairness between the rights of Big Sports in its copyright and Twitter users' rights of fair use.

I. TWITTER, BIG SPORTS, AND CENSORSHIP

A. Censorship on Twitter

Twitter's CEO Jack Dorsey is not the only individual within Twitter's sphere of influence who believes that Twitter stands for free speech.[26] Its former general counsel called Twitter "the free speech wing of the free speech party,"[27] while former CEO Dick

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[23] Matt Weinberger, *Jack Dorsey: 'Twitter Stands for Freedom of Expression,'* BUS. INSIDER (Oct. 21, 2015, 1:59 PM), http://www.businessinsider.com/twitter-ceo-jack-dorsey-commits-to-free-speech-2015-10 [https://perma.cc/TJX9-W8ST].

[24] Peter Kafka, *More Football Is Coming to Your Twitter Feed, Courtesy of a New Deal with the NFL*, RECODE (Aug. 10, 2015, 7:00 AM), http://www.recode.net/2015/8/10/11615450/more-football-is-coming-to-your-twitter-feed-courtesy-of-a-new-deal [https://perma.cc/QBN3-3VLD?type=image].

[25] 815 F.3d 1145 (9th Cir. 2016).

[26] Weinberger, *supra* note 23.

[27] Marvin Ammori, *The "New"* New York Times*: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2260 (2014).

Costolo labeled the service a "global town square."[28] Benjamin Lee, the Vice President and Deputy General Counsel of Twitter, commented that the "town square" made him think about free expression cases.[29] Just two years ago the service touted that "[t]he [t]weets [m]ust [f]low" and implemented a "church-state divide" to separate content employees from those selling advertising.[30] It seems fair to say that, based upon Twitter's aggressive actions against its users right to fair use, the town square is favoring certain citizens, and there may be some entanglement between the financial goals of Twitter and what content it decides to block or remove.

Twitter has implemented measures over the years in order to live up to its standard of promoting free speech. In 2012, the company took steps to make material available to users around the world, even though that content might be censored in certain territories due to the stricter laws of those countries.[31] Twitter decided that it was better to allow the tweets to be viewed worldwide, outside of the country censoring the user, rather than have them blocked or deleted altogether.[32]

Hisham Almiraat, a Moroccan blogger who formerly managed the anti-censorship website Global Voices Advocacy, referred to Twitter as an ally in October 2013.[33] Almiraat, however, added a foreboding thought, saying: "As soon as Twitter becomes public, it needs to be accountable to its shareholders, and its strategy becomes more short-term. If Twitter, for reasons of greed, or because they are politically compelled, decides to change that core philoso-

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[28] *Id.*; Kalev H. Leetaru, *Who's Doing the Talking on Twitter?*, ATLANTIC (Aug. 27, 2015), http://www.theatlantic.com/international/archive/2015/08/twitter-global-social-media/402415/ [https://perma.cc/N4D7-ANM9].

[29] Ammori, *supra* note 27, at 2260.

[30] *Id.*

[31] *See* Jon Brodkin, *Twitter Uncloaks a Year's Worth of DMCA Takedown Notices, 4,410 in All*, ARS TECHNICA (Jan. 27, 2012, 2:50 PM), http://arstechnica.com/tech-policy/2012/01/twitter-uncloaks-a-years-worth-of-dmca-takedown-notices-4410-in-all [https://perma.cc/QVH8-G4QR].

[32] *Id.*

[33] Gerry Shih, *Insight: At Twitter, Global Growth Tests Free Speech Advocacy*, REUTERS (Oct. 8, 2013, 12:19 PM), http://www.reuters.com/article/us-twitter-ipo-international-insight-idUSBRE99705G20131008 [https://perma.cc/UGS7-ML8W].

phy, then I'll worry."[34] One month later, on November 7, 2013, the seven-year-old company began to trade publicly on the New York Stock Exchange.[35] The stock price opened at $45.10, giving the company a valuation of more than $24 billion when trading began.[36]

Twitter's recent censorship-based criticism has not been linked solely to the blocking of material and suspension of the sports commentary websites' Twitter accounts.[37] In the months since Jack Dorsey rejoined the company, Twitter began to make choices regarding permitted content on the service.[38] In August 2015, Twitter cut access to the Politwoops network of websites that archive the deleted tweets of world politicians.[39] Twitter rationalized this decision by claiming that "deleting a tweet is an expression of the user's voice," and that not being able to do so would be "terrifying."[40] Given that public statements have been archived for hundreds of years worldwide, it is odd that Twitter felt the need to block a network of websites that were archiving tweets, which are public statements. Twitter users have the right and ability to take back a tweet, just as they would a spoken statement, but doing so does not extinguish the reality that there was a tweet and there may be a record of it.

Jack Dorsey appeared on the *Today Show* in March 2016, and responded to Matt Lauer's collective Twitter followers who displayed "an enormous outpouring of questions about censorship."[41] Lauer asked if Twitter censored the content of its users, particularly their social or political comments.[42] Dorsey responded, "absolutely not," but added a caveat by stating that it is Twitter's job

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[34] *Id.*

[35] Victor Luckerson, *LIVE UPDATES: Twitter Goes Public*, TIME (Nov. 7, 2013), http://business.time.com/2013/11/07/live-updates-twitter-goes-public/ [https://perma.cc/8HCU-SZJR].

[36] *Id.*

[37] Statt, *supra* note 2.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Allum Bokhari, *Jack Dorsey Denies Twitter Censors Users*, BREITBART (Mar. 18, 2016), http://www.breitbart.com/tech/2016/03/18/jack-dorsey-denies-twitter-censors-users/ [https://perma.cc/TTX8-YAD4].

[42] *Id.*

"to make sure they see the most important things and the things that'll matter to them,"[43] a quote that in itself suggests censorship.

B. Twitter's Relationship with Big Sports

Twitter currently has more than 300 million active users of its service, which is one-fifth the size of Facebook, and less than Facebook's subsidiary Instagram.[44] While Twitter's revenue is currently rising, it has also been facing multiple challenges on Wall Street.[45] Snapchat is growing and taking users and advertisers from Twitter and other social media websites, and even with half as many users as Twitter, Snapchat has a greater valuation as a company than Twitter.[46]

For 2016, the global advertising revenue that Twitter generates is expected to decrease by an estimated twelve percent from fall 2015 forecasts, and Twitter monetizes per user at almost half the rate of Facebook.[47] Twitter's founder, Jack Dorsey, was rehired as CEO in July 2015 after being terminated from that same position in 2008.[48] However, the company's stock has lost nearly half its value over the nine months since Dorsey's return as CEO.[49]

With Twitter's stock floundering, and the service fighting to catch up with Facebook and stave off Snapchat, Dorsey has looked for ways to increase revenue, such as striking up a partnership with Big Sports.[50] Some of these partnerships began in 2013 with Twitter's "Amplify" program that included sports leagues such as MLB, the PGA Tour, World Wrestling Entertainment, and the NCAA.[51] At the time, social television analytics company Bluefin

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[43] *Id.*

[44] *See* Jessica Guynn, *Twitter's User Growth in the Spotlight: Earnings Preview,* USA TODAY (Apr. 26, 2016, 11:34 AM), http://www.usatoday.com/story/tech/news/2016/04/25/twitter-first-quarter-earnings-preview/83519396/ [https://perma.cc/Q6GA-PZKP].

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] Glenn Brown, *Twitter Amplify Partnerships: Great Content, Great Brands, Great Engagement*, TWITTER BLOG (May 23, 2013), https://blog.twitter.com/2013/twitter-amplify-partnerships-great-content-great-brands-great-engagement [https://perma.cc/8GBV-HWM6].

[51] *Id.*

Labs—which was purchased by Twitter for ninety million dollars earlier that year[52]—reported that ninety-five percent of live television conversation happens on Twitter; so the Amplify program was created to take advantage of this synergy by bringing fans live replays, highlights, and similar content through a second-screen experience.[53] The Amplify program works by allowing the content provider to embed a short video on Twitter, followed by a sponsored ad in which the content provider and Twitter share the revenue.[54] Amplify effectively put Twitter in business with Big Sports and began a partnership to monetize short clips and highlights on the service. While Twitter does not have a relationship with every sports league, it is receiving revenue from many, and presumably does not want to alienate those with whom Twitter would like to forge a relationship in the future. [55]

A few months later, in September 2013 the NFL followed suit by agreeing to bring video highlights and other content to Twitter through Amplify.[56] A year later, NFL Executive Vice President of Media Brian Rolapp revealed that sixty to seventy percent of fans utilize a second device in conjunction with watching an NFL game on television.[57] Soon after Jack Dorsey resumed his duties as Twitter CEO, the NFL renewed its Twitter deal in August 2015 as Twitter attempted to launch a new service feature.[58] Project Lightning, later rebranded Moments, was implemented two months later, allowing users to click a tab and access photos, videos, and tweets related to an event, such as a live NFL game.[59]

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[52] Peter Kafka, *Twitter's New Video Plan: Ads, Brought to You by Ads*, ALLTHINGSD (Apr. 16, 2013, 10:22 AM), http://allthingsd.com/20130416/twitters-new-video-plan-ads-brought-to-you-by-ads/ [https://perma.cc/TNT3-XY2J].

[53] *See* Brown, *supra* note 50.

[54] Kafka, *supra* note 52.

[55] *See* Brown, *supra* note 50.

[56] Peter Kafka, *Twitter Snags the NFL for Another Ad Win*, ALLTHINGSD (Sept. 25, 2013, 3:10 PM), http://allthingsd.com/20130925/twitter-snags-the-nfl-for-another-ad-win/ [https://perma.cc/Y7TD-BVQL].

[57] Taylor Soper, *NFL Exec: 70% of Fans Use Second Screen While Watching Football*, GEEKWIRE (Sept. 3, 2014, 5:56 PM), http://www.geekwire.com/2014/twitter-nfl-digital/ [https://perma.cc/95D7-XTAV].

[58] Kafka, *supra* note 24.

[59] *See* Julia Boorstin, *Twitter's 'Project Lightning' Launches as 'Moments,'* CNBC (Oct. 6, 2015, 9:00 AM), http://www.cnbc.com/2015/10/06/twitters-project-lightning-launches-as-moments.html [https://perma.cc/LW8X-Z4QZ].

However, the deal that would marry Twitter to the NFL, and open the door for potential future deals with other sports leagues, was not reached until 2016.[60]

In April, the NFL announced a partnership with Twitter to live stream all ten *Thursday Night Football* games during the 2016 season.[61] In what the NFL has branded a "Tri-Cast," Thursday night games will be broadcast by either NBC or CBS, simulcast on the NFL Network, and live streamed on Twitter.[62] Facebook (who dropped out in the days preceding the NFL's decision),[63] Verizon Communications, Yahoo, and Amazon also bid on the Thursday night package but the NFL chose Twitter's admittedly lower bid.[64] Twitter is reportedly paying less than ten million dollars for the Thursday night package, while CBS and NBC collectively paid $450 million to broadcast the same games during the upcoming NFL season.[65] Some of Twitter's online broadcast rivals submitted bids in excess of fifteen million dollars,[66] but the NFL's decision may have been a strategic one with an eye toward the future.[67] The NFL's biggest broadcast contracts expire in 2021, and at that time the league will have seen the results of its experiment with Twitter and how it can leverage digital rights into greater revenue for the NFL.[68] A difference of a few million dollars for the NFL during the 2016 season is insignificant if it can grow additional revenue

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60 *National Football League and Twitter Announce Streaming Partnership for* Thursday Night Football, NFL COMM. (Apr. 5, 2016), https://nflcommunications.com/Documents/2016%20Releases/NFL%20TWTR%20TNF.pdf [https://perma.cc/7VWT-TUW2].

61 *Id.*

62 *Id.*

63 Scott Soshnick, Sarah Frier & Scott Moritz, *Facebook Said to Back Off Bid to Stream NFL Thursday Games*, BLOOMBERG TECH. (Apr. 1, 2016, 3:54 PM), http://www.bloomberg.com/news/articles/2016-04-01/facebook-said-to-back-off-bid-to-stream-nfl-thursday-night-games [https://perma.cc/5QD7-5YY9].

64 Scott Soshnick, Sarah Frier & Scott Moritz, *Twitter Gets NFL Thursday Night Games for a Bargain Price*, BLOOMBERG TECH. (Apr. 5, 2016, 7:01 AM), http://www.bloomberg.com/news/articles/2016-04-05/twitter-said-to-win-nfl-deal-for-thursday-night-streaming-rights [https://perma.cc/CS6M-E4Q2].

65 Peter Kafka, *Twitter Beats Amazon, Verizon for Global NFL Streaming Deal*, RECODE (Apr. 5, 2016, 5:37 AM), http://www.recode.net/2016/4/5/11585872/twitter-beats-amazon-verizon-for-global-nfl-streaming-deal [https://perma.cc/SMN4-95KA].

66 *Id.*

67 Soshnick et al., *supra* note 64.

68 *See id.*

streams and feel that Twitter is the appropriate partner to explore that potential.

The logical inference is that, with Twitter suffering on Wall Street[69] and taking advantage of the NFL's preference for its service at a low price,[70] along with burgeoning partnerships with other Big Sports leagues,[71] one might suppose that Twitter has little motivation to refuse to comply with or search for reasons to protect users against section 512 DMCA takedown notices submitted by their financial partners and potential financial partners. The specter of the NFL's deal with Twitter to monetize in-game highlights and clips looms large behind the Big Sports takedown notices,[72] as does the new partnership between Twitter and the NFL and the potential partnerships between Twitter and Big Sports that will surely follow.

II. FAIR USE IN GIFS AND VINES

A. *Big Sports' Copyright Ownership*

The basic requirement for copyright protection is for an original work of authorship to be "fixed in any tangible medium of expression," including audiovisual works such as broadcast sporting events.[73] Fixation of an audiovisual work takes place in a "tangible medium of expression" the moment the work is "being made simultaneously with its transmission."[74] This fixation must be done by the author of the work or with the permission of the author.[75]

Big Sports thus has copyright ownership in its televised broadcasts while enjoying the exclusive rights in those copyrighted

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69 Guynn, *supra* note 44.

70 Soshnick et al., *supra* note 64.

71 *See* Brown, *supra* note 50.

72 *See* Christopher Coble, *Is It Legal to Post Sports GIFs on Twitter?*, FINDLAW: TARNISHED TWENTY (Oct. 14, 2015, 2:55 PM), http://blogs.findlaw.com/tarnished_twenty/2015/10/is-it-legal-to-post-sports-gifs-on-twitter.html [https://perma.cc/9G6C-KX9X].

73 17 U.S.C. § 102 (2012).

74 *Id.* § 101.

75 *Id.*

works.[76] Those exclusive rights include rights to create a derivative work, reproduce a work, and publicly distribute copies of a work.[77] Big Sports also has the right to license or transfer ownership of a copyrighted work.[78] In sum, Big Sports has the right to rebroadcast their games, create a DVD or similar content using footage from those broadcasts, and distribute copies of the broadcast by sale, transfer, or lease as they see fit. Big Sports has also begun finding avenues to monetize its own highlights (and GIFs and Vines), whether they are on its own websites or through partnerships with Twitter.

B. Users Rights to Make Fair Use of GIFs and Vines

Fair use is the major limitation on the exclusive rights that Big Sports enjoys in its copyrighted broadcasts. Fair use allows one who does not have copyright ownership in a work to use that work for certain purposes, including "criticism, comment, and news reporting."[79] Those three purposes are some of the reasons that a Twitter user may claim that his or her allegedly infringing GIF or Vine has been displayed lawfully.[80] The Copyright Act of 1976's provision on fair use provides four factors that must be considered in determining whether a use of a copyrighted work is fair. The factors 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.[81]

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[76] *See id.* § 106.
[77] *Id.*
[78] *See id.* § 201.
[79] *Id.* § 107.
[80] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (noting that parody is a basis for claiming fair use under Section 107).
[81] § 107.

While courts will analyze and balance these four factors against each other, recent decisions have found that the "heart of the inquiry" is the first factor and the determination of how transformative the work is against the secondary user's economic rewards from the use.[82]

Twitter itself may be an example of a social media service that defines fair use. A Twitter user is limited to 140 characters per tweet, and any media uploaded to Twitter will have to be short enough to capture another user's attention before they move on. In many ways Twitter is designed for its users to comment on the world around them, sometimes by asserting the affirmative right of fair use.[83] Therefore, Big Sports may not prevent Twitter users from making fair use of its broadcast material by preempting those transformative markets and attempting to monetize a fair use exclusively for itself.[84]

1. Purpose and Character of the Use

In considering the "purpose and character of the use," courts analyze whether the secondary use adds something new to the original work, with a different purpose or character, including new expression, meaning, or message.[85] The court weighs those factors to decide whether the secondary use is transformative.[86] The fair use doctrine intended to promote this type of transformative activity, in which the original use is a raw material to be transformed by the secondary use.[87] However, the transformative nature of the use must be weighed against the commercial purpose of the use and the economic benefit to the secondary user.[88]

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[82] Cariou v. Prince, 714 F.3d 694, 705–06 (2d Cir. 2013) (citing Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006)).
[83] *See* Lenz v. Universal Music Corp., 815 F.3d 1145, 1151–52 (9th Cir. 2016), *petition for cert. filed*, No. 16-217 (U.S. Aug. 16, 2016).
[84] *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006).
[85] *Cariou*, 714 F.3d at 705–06.
[86] *Id.*
[87] *Id. (*quoting Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998)).
[88] *Id.* at 708.

While most users are not making commercial use of GIFs and Vines uploaded to Twitter, sports blog websites such as Barstool Sports, Deadspin, and SBNation are not most users. Each is a large, for-profit company that seeks to drive viewers to their websites using multiple social media platforms, including Twitter. Still, the revenue gained by those companies through the posting of GIFs or Vines is likely miniscule and is done for the purpose of commentary, which may then intrigue readers enough to visit their website to consume further commentary and content.

Twitter has also become a popular source of news for many people. Not only are print reporters using Twitter as a news outlet, but many users of the service themselves are breaking and commenting on news. Sharing a newsworthy sports clip on Twitter could be considered a productive use in reporting news in the digital age.[89] Despite the blog-style character of the websites, Deadspin, Barstool Sports, and SBNation are viewed not only for entertainment purposes, but also for breaking news or their commentary on news.

Attention must also be paid to whether the GIF or Vine has transformed the original work.[90] David Portnoy, founder of Barstool Sports, contends that his company's GIFs and Vines are posted for the purpose of commentary and, sometimes, parody.[91] He views the commentary added alongside the clip on Twitter to be more important than the GIF or Vine itself.[92] A short GIF or Vine that may change the essence of the broadcast and/or add commentary may include an entirely different character and achieve an entirely different purpose than a multi-hour, continuous broadcast of a sporting event. In general, the transformation of the original broadcast into smaller clips, along with a generally poorer video quality, ensures that the secondary use could never be substituted for the broadcast itself. While there are all sorts of GIFs and Vines that make secondary use of Big Sports' broadcasts, generally, if the clips add commentary and/or fundamentally changes the original footage itself, this should weigh in favor of fair use. Likewise, if the

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[89] Harper & Row Publishers. v. Nation Enters., 471 U.S. 539, 561 (1985).

[90] *See Cariou*, 714 F.3d at 705–06.

[91] E-mail from David Portnoy, *supra* note 7.

[92] *Id.*

commercial aspect of the use does not appear to be directly linked to the use, this may serve to counterbalance GIFs and Vines that are less transformative than others.

Putting aside the general view of GIFs and Vines, it is necessary to note that there are thousands of GIFs and Vines circulating on Twitter and some lean toward being more transformative than others. Each one must be analyzed individually, so while for the purposes of this Article a general view must be taken, the reality is much more complex. On one side of the spectrum is a user who captures a broadcast sporting event as a GIF without changing it at all. The user does not add accompanying commentary, shows large portions of the broadcast instead of only a few seconds, and uploads the GIFs repeatedly so that one viewing the GIFs is essentially viewing the game itself. This type of use is not very transformative and could override the other three fair use factors even if they are in the user's favor.

A middle ground or gray area is a user who uploads a short GIF or Vine to Twitter without changing the nature of the content, but adds commentary in the form of the 140-character maximum allotted by Twitter. In this instance, commentary is included and the copyrighted content is clipped significantly, but is not transformed beyond that. These types of GIFs and Vines are essentially the central battleground where user and Big Sports meet on Twitter.

On the opposite side of the spectrum is a user who creates a short GIF or Vine that changes the original content itself. This could be done by slowing down or speeding up the content, editing in other non-related digital content, or adding external audio that was not part of the original broadcast. Because there are almost infinite forms of sports-related GIFs and Vines it is difficult not to categorize them generally, while at the same time it is dangerous to do so because each one should be properly analyzed individually. This dilemma speaks to the difficulty facing Big Sports and Twitter in monitoring GIFs and Vines, the DMCA in crafting a practical statute that speaks to such secondary use, and courts in eventually setting precedent as to whether a GIF or Vine making secondary use of copyrightable content is infringing that content or not.

2. Nature of the Work

In determining the nature of the original work, courts consider whether the work is creative or factual, and if the work is published or unpublished.[93] In a seminal case involving fair use, the Supreme Court, in *Harper & Row Publishers v. Nation Enterprises,* highlighted that the publication of a portion of President Ford's unpublished manuscript denied him the right of first publication and was a key factor in finding that the defense of fair use did not exist.[94] Copyright assures those who write and publish factual narratives that they "may at least enjoy the right to market the original expression contained therein as just compensation for their investment."[95] Even where a work is found to be more creative than factual, if the secondary use emphasizes the factual aspects of the use instead of the creative, this may limit the importance of the nature of the work.[96]

Here, the nature of the works allegedly infringed by GIFs and Vines are factual. Big Sports enjoys the right of first publication in broadcasting its sporting events, as was the case with President Ford and his manuscript.[97] The allegedly infringing companies only took factual information, not expressive elements, as were present in President Ford's manuscript. Sports highlights, arguably factual information, have been disseminated throughout television freely for decades as news, and this may not change just because technology has evolved. The secondary use of a Twitter user taking factual information for use in conjunction with disseminating news and commentary weighs toward fair use.

3. Amount and Substantiality

The amount and substantiality of what is taken from a copyrighted work is a balancing act that weighs the amount of the material taken against the importance of that material to the work as a

[93] *Cariou*, 714 F.3d at 709 (citing Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006)).
[94] 471 U.S. at 549.
[95] *Id.* at 556–57.
[96] *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006).
[97] *Harper & Row,* 471 U.S. at 549.

whole.[98] In *Harper & Row*, the Court found that "the heart" of President Ford's manuscript had been appropriated, and even though that portion was a relatively short one in comparison to the full manuscript, the substantiality outweighed the amount.[99]

Could a short GIF or Vine of a homerun in a MLB game, or a touchdown in a NFL game—even though they are small portions of the game—be considered "the heart" of the game?[100] While those portions of a game are of great importance, they could never substitute for viewing a game. Watching a sporting event is about the emotion of not knowing what will happen next and experiencing a fluid event as it happens live. The Big Sports' events have already happened, even if just minutes before the secondary use occurs in transforming that copyrighted broadcast into GIFs and Vines. The amount being taken in these GIFs is short, and typically less than would be shown on a newscast or sportscast.

The poor video quality of the GIFs is again worth nothing in relation to the amount being taken. A GIF is analogous to the portion of President Ford's manuscript being written in quasi-illegible handwriting, so the reader had to strain to read the entire passage. A reader may be able to ascertain the relevant information, but it could never substitute for the actual work. The GIF or Vine may also cut off or alter portions of the video that a viewer of the live broadcast would want to see.

UFC has an even stronger argument than the NFL or MLB, as its major events are typically on Pay-Per-View, and the knockout or stoppage is the main focus of viewers going into a fight. Copying and displaying that key portion of a short fight probably would go to "the heart" of the event and would possibly lead a potential viewer not to purchase the fight if they knew they could see the few important moments soon after they occurred.[101]

No GIF or Vine will be able to substitute for an entire sports broadcast, and while some secondary uses may go to the heart of

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98 *See id.* at 560.

99 *Id.* at 564–65.

100 *See generally id.*

101 *See generally id.*

the broadcast, the use is still a small amount, and is not a substantial replacement for watching the event.

4. Effect of the Use on the Potential Market

The final factor in a fair use analysis requires courts to consider the extent of market harm caused by the secondary use and whether similar "unrestricted and widespread conduct" would have an adverse effect on the market for the work and derivatives of the work.[102] The more transformative the GIFs and Vines are, the less likely that they will substitute for the original work.[103]

Users posting and viewing GIFs and Vines may inhabit a similar market for live sports broadcasts, but Twitter gives the users who are posting them a voice to comment almost immediately on the broadcasts. While those creating the GIFs and Vines are obviously watching the games, so are many of the Twitter users through a second-screen experience.[104]

Big Sports is probably not submitting DMCA takedown requests because it fears that viewers will abandon viewing entire games. Instead, Big Sports is likely worried about a new source of income from the monetization of highlights, and even GIFs, on its websites or Twitter accounts.[105] By attaching a fifteen to thirty-second advertisement to a short highlight, Big Sports is able to monetize a derivative work.[106]

Big Sports could make the argument that it owns the copyright in its games, and its highlights can be monetized as a derivative work. Furthermore, Big Sports might claim that the posting of GIFs by competitors like Deadspin damage that market. This argument is counterbalanced by courts finding that a copyright holder cannot claim the fair use of its own copyrighted material for itself.[107] A copyright owner may not "preempt exploitation of transformative markets" in keeping users such as Deadspin, Barstool

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[102] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).
[103] *See id.* at 579.
[104] Soper, *supra* note 57.
[105] E-mail from Ian Young, *supra* note 20.
[106] *See id.*
[107] *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006).

Sports, and SBNation out of the market for making fair use of Big Sports' copyrighted broadcasts.[108]

Labeling a short highlight as a revenue-generating derivative work is an issue for those who scoff at waiting a quarter or half minute to watch a highlight that may be shorter than the advertisement itself. NBA Commissioner Adam Silver guides his league to take a different position than the Big Sports entities, saying: "[T]he way we've looked at it, we've been incredibly protective of our live game rights, but for the most part highlights are also marketing. We have always believed that fans sharing highlights via social media is a great way to drive interest and excitement in the NBA."[109] The economic impact of Silver's thinking is supported in part by the NBA's median viewer age in 2015—thirty-seven years old, ten years younger than the NFL's and sixteen years younger than MLB's.[110]

In 2015, 93 of the 100 highest-rated live television programs were sports broadcasts, compared to 14 of the 100 ten years earlier.[111] Ninety-five percent of all sports viewing is done live, as sports has become the only truly "non-DVR-able" content on television.[112] GIFs and Vines do not harm the market for live broadcast sporting events but are instead a free marketing tool.

C. U.K. Fair Dealing

There has never been a case concerning fair use of GIFs and Vines of sporting events adjudicated in the United States, but there was a case involving the United Kingdom's "fair dealing" in March 2016.[113] U.K. fair dealing differs from U.S. fair use by only considering the "effect of the use on the market" and the "amount

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[108] *Id.* at 614 (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 146 n.11 (2d Cir. 1998)).

[109] Maese & Boren, *supra* note 21.

[110] Matt Goldman, *MLB Strikes Out in Marketing Baseball*, SB NATION (Sept. 26, 2015, 11:08 AM), http://www.beyondtheboxscore.com/2015/9/26/9401185/mlbam-gifs-vines-snapchat-social-media-marketing-baseball-mlb [https://perma.cc/G5ND-4BVW].

[111] E-mail from Ian Young, *supra* note 20.

[112] *Id.*

[113] *See* Ali Qassim, *Cricket Clips Infringed Copyright, UK Court Rules*, 91 PAT. TRADEMARK & COPYRIGHT J., no. 2254, Mar. 24, 2016.

of the work taken."[114] The U.K. High Court found that eight-second clips taken from broadcast cricket matches and reproduced on a sports-based website did not constitute fair dealing.[115] The court also found that the clips were not used for news purposes but for commercial consumption, even though there was commentary added.[116] The United Kingdom's fair dealing approach takes a narrower view than U.S. fair use and does not include fair use's valued importance on transformation of the original work.[117]

III. DMCA SECTION 512

A. *Notification, Takedown, and Put Back*

DMCA section 512 controls "limitations on liability relating to material online."[118] The statute creates safe harbors for intermediary service providers, like Twitter, to avoid liability from both copyright owners and alleged infringers, if the service providers follow the protocol of the statute.[119] Congress intended that section 512 "balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse."[120] Twitter must attempt to straddle the line between eliminating any chance of liability for infringing material on its service, while also ensuring free expression for the millions of users that help Twitter grow in order to be able to secure these lucrative corporate partnerships.

Under the "takedown procedures"[121] of section 512(c), Twitter can avail itself of immunity from copyright infringement liability if it "acts expeditiously" to remove infringing material once it becomes aware of it or receives proper notification from the copyright

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[114] *Exceptions to Copyright*, GOV.UK, https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing [https://perma.cc/UL6Q-NLXV] (last visited Sept. 2, 2016).

[115] *See* Qassim, *supra* note 113.

[116] *See id.*

[117] *See generally id.*

[118] 17 U.S.C. § 512 (2016).

[119] *See id.*

[120] S. REP. NO. 105-190, at 21 (1998).

[121] Lenz v. Universal Music Corp., 815 F.3d 1145, 1151 (9th Cir. 2016), *petition for cert. filed*, No. 16-217 (U.S. Aug. 16, 2016).

holder that allegedly infringing material is on the service.[122] The notification from the copyright holder must meet certain criteria to identify the material and locate it, with the most notable being that the complaining party must include a statement indicating "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."[123]

Once the allegedly infringing material is removed, the user has an opportunity to have that material replaced (put back)[124] if that user submits a proper counter notification under section 512(g).[125] Most importantly, the user must include a statement attesting to a good faith belief, under penalty of perjury, that the material was removed by mistake or misidentification.[126] The subscriber must also consent to a federal district court's jurisdiction in regard to the burgeoning action.[127]

Just as Twitter must follow protocol to avoid liability to the copyright owner, it must do the same for the user.[128] Twitter will not be liable for removing or disabling material so long as it takes reasonable steps to notify the user, provide her with a copy of the notification, and replace the removed or blocked material in ten to fourteen days if the user files a counter notice.[129]

B. DMCA Section 512(i)(1)(A)

The caveat for Twitter to avoid liability is section 512(i)(1)(A), by which Twitter must inform users of a policy that provides for the appropriate termination of users' accounts if users are deemed repeat infringers.[130] Section 512(i)(1)(A) is fundamentally flawed because it does not specify what constitutes a "repeat infringer" or when termination is "appropriate."[131] Nowhere in the 512(c) notice and takedown protocol is there an element requiring or even

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[122] 17 U.S.C. § 512(c)(1).
[123] § 512(c)(3)(A)(v).
[124] *Lenz*, 815 F.3d at 1151.
[125] § 512(g).
[126] § 512(g)(3)(C).
[127] § 512(g)(3)(D).
[128] § 512(g).
[129] § 512(g)(2).
[130] § 512(i)(1).
[131] *Id.*

mentioning termination of the accounts of an accused infringer.[132] Section 512(i)(1)(A) creates potential confusion for both the service provider and user by requiring that the service provider adopt and inform users of a policy of termination that the statute does not even require in its notice and takedown protocol.[133]

The Ninth Circuit spoke to the appropriateness of termination by stating that the service provider has no affirmative duty to police for repeat infringers, but that termination would be appropriate if repeat infringers are identified through the requirements of section 512(c).[134] The court found that a repeat infringer under section 512 is one "who repeatedly or blatantly infringe[s] copyright" using information via takedown notices and not through a court's determination.[135] Fair use is not only an affirmative defense but also a user's right "authorized by the law."[136] A user who "makes a fair use of the work is not an infringer of the copyright with respect to such use."[137] If a Twitter user making fair use of Big Sports' copyrighted material through the creation of a GIF or Vine is not an infringer, then it is counterintuitive to have that user terminated from the service through Twitter's implementation of section 512(i)(1)(A).[138] A user claiming fair use or another copyright defense should not be labeled an infringer for purposes of section 512 until it has been proven that the user infringed the copyright—not because it is claimed in a notification.[139]

Setting aside the arguable failures of section 512(i)(1)(A), which could apply to any service provider, Twitter does seem to be following section 512 appropriately. Twitter's copyright policy gives both copyright owners and users the relevant information on section 512 by providing them with information on filing complaints

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132 § 512(c).

133 § 512(i)(1).

134 Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1111 (9th Cir. 2007).

135 *Id.* at 1109–10.

136 Lenz v. Universal Music Corp., 815 F.3d 1145, 1151 (9th Cir. 2016), *petition for cert. filed*, No. 16-217 (U.S. Aug. 16, 2016).

137 *Id.* (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984)).

138 § 512(i)(1)(A).

139 *Id.*

and counter notices, respectively.[140] Twitter also complies with the aforementioned section 512(i)(1)(A) by providing a clear policy of termination in certain circumstances in its copyright policy.[141]

C. *Section 512(f) Misrepresentations and* Lenz

Section 512(f) provides that anyone who knowingly represents under section 512 of the DMCA "(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification," may be liable for damages, costs, and attorneys' fees.[142] Section 512(f)(1) typically applies to copyright owners and section 512(f)(2) generally applies to users.[143]

Section 512(f) misrepresentation cases have been notoriously difficult to win, partially due to the 2004 ruling in *Rossi v. Motion Picture Association of America*.[144] In *Rossi*, the court found that a copyright holder could not be found liable under section 512(f) even if an unreasonable, unknowing mistake was made and that there must be actual knowledge of a misrepresentation by the copyright owner.[145] The court also held that the good faith belief requirement of a takedown notice in section 512(c)(3)(A)(v) was a subjective standard and not an objective one.[146] Thus, following *Rossi,* a copyright holder need only assert that it had a good faith belief that the takedown was proper even if there is evidence of a gross unknowing mistake in the submission of the takedown notice.

In mid-September 2015, weeks before the Big Sports Twitter takedowns, the Ninth Circuit issued a decision that would reshape Section 512(f) misrepresentation actions.[147] *Lenz v. Universal Music*

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[140] *See Copyright Policy*, TWITTER HELP CTR., https://support.twitter.com/articles/15795 [https://perma.cc/4H4T-9K4A] (last visited Sept. 2, 2016).
[141] *See id.* at *What Happens Next?*.
[142] § 512(f).
[143] Lenz v. Universal Music Corp., 815 F.3d 1145, 1151 (9th Cir. 2016), *petition for cert. filed*, No. 16-217 (U.S. Aug. 16, 2016).
[144] *See* Eric Goldman, *It Takes a Default Judgment to Win a 17 USC 512(f) Case—* Automattic v. Steiner*,* TECH. & MARKETING L. BLOG (Mar. 13, 2015), http://blog.ericgoldman.org/archives/2015/03/it-takes-a-default-judgment-to-win-a-17-usc-512f-case-automattic-v-steiner.htm [https://perma.cc/WD89-4AEP].
[145] Rossi v. Motion Picture Ass'n of Am., Inc., 391 F.3d 1000, 1004–05 (9th Cir. 2004).
[146] *Id.* at 1004.
[147] Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015), *amended by* 815 F.3d 1145 (9th Cir. 2016).

Corp., more popularly known as the "dancing baby" lawsuit, examined the role of fair use in submitting section 512 takedown notices.[148] In *Lenz*, Stephanie Lenz filed suit against Universal Music alleging misrepresentation of a takedown notice due to Universal's failure to consider her fair use in its "good faith belief" statement, as required by section 512(c)(3)(A)(v) regarding notice and takedowns.[149] The takedown notice was in response to a twenty-nine second video Lenz posted on YouTube of her thirteen-month-old son dancing to Prince's song "Lets Go Crazy."[150] Lenz titled the video "'Let's Go Crazy' #1."[151] The Ninth Circuit decided that fair use is not only a defense to copyright infringement but also a right "wholly authorized by the law," although the alleged infringer still has the burden of proving fair use.[152] The court proceeded to interpret the "good faith belief" in a notification takedown to include a consideration of fair use by the copyright holder.[153] Willful blindness could also be used to show that a copyright holder misrepresented that it had a good faith belief that there was no fair use.[154] If the copyright holder does not consider fair use, then damages for a misrepresentation (akin to an intentional tort) under section 512(f) would include nominal damages.[155]

Unfortunately for those making fair use of copyrighted materials, the Ninth Circuit upheld the *Rossi* court's interpretation of section 512(c)(3)(A)(v)—that the copyright holder need only have a subjective good-faith belief that the use was unwarranted—and extended that standard to determining fair use.[156] In his partial dissent, Judge Smith argued that a "belief in infringement formed consciously without considering fair use is no good-faith belief at all."[157] He continued, stating that allowing the copyright holder to

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148 *Id.*; Laura Wagner, *'Dancing Baby' Wins Copyright Case*, NPR (Sept. 14, 2015, 6:56 PM), http://www.npr.org/sections/thetwo-way/2015/09/14/440363919/dancing-baby-wins-copyright-case [https://perma.cc/7Y28-ZBFZ].
149 *See Lenz*, 815 F.3d at 1148.
150 *Id.* at 1149.
151 *Id.*
152 *Id*. at 1151–53.
153 *Id.* at 1153.
154 *Id.* at 1154.
155 *Id.* at 1156.
156 *Id.* at 1153–54.
157 *Id.* at 1160 (Smith, M., concurring in part and dissenting in part).

insulate himself using any subjective belief, even if poorly formed, was insufficient.[158] Universal did not consider fair use because, Judge Smith added, it did not actually consider the factors constituting fair use, leading to a misrepresentation in its takedown notice to Lenz.[159] Finally, Judge Smith noted that, had Universal considered the four elements of fair use, "there is no doubt that it would have concluded that Lenz's use of 'Let's Go Crazy' was fair."[160] The significant difference in *Lenz*, compared to GIFs and Vines made from Big Sports' copyrightable content, is that the use of the Prince song in the background is secondary to the actions of the dancing baby while the actions in the respective games across Big Sports broadcasts are typically central to the GIF or Vine created using that copyrighted content.

IV. TWITTER'S DMCA SECTION 512 HISTORY AND STATISTICS

A. Twitter's Section 512 DMCA History

Twitter will not discuss the events surrounding takedown notices involving individual accounts, beyond acknowledging that section 512 takedown notices were sent by a particular entity (in this case, Big Sports).[161] Since 2012, Twitter has sent takedown notices to Lumen[162] (previously known as Chilling Effects).[163] Lumen offers a publicly searchable database of DMCA takedown notices, so all Big Sports takedown notices are accessible.[164]

One of the issues with Lumen's database is that because so few of Twitter's DMCA notices are appealed with copyright counter

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158 *Id.*
159 *Id.* at 1159–60.
160 *Id.*
161 Mathew Ingram, *Here's Why Deadspin Is Right, and the NFL and Twitter Are Wrong*, FORTUNE (Oct. 13, 2015, 7:59 PM), http://fortune.com/2015/10/13/deadspin-nfl-twitter [https://perma.cc/N7BK-NU5G].
162 LUMEN, https://lumendatabase.org/ [https://perma.cc/7VSC-KEU8] (last visited Sept. 2, 2016).
163 John P. Mello, Jr., *Rights Groups Praise Change in Twitter Takedown Policy*, PCWORLD (Nov. 6, 2012, 3:00 PM), http://www.pcworld.com/article/2013593/rights-groups-praise-change-in-twitter-takedown-policy.html [https://perma.cc/UF2Z-WFJN].
164 *Id.*

notices,[165] it is difficult to know what exactly comprised the allegedly infringing tweets.[166] As a result, one of the only ways to track Twitter's behavior regarding the DMCA is through some of its public actions to various instances involving digital copyright that it has faced throughout the years.

In 2011, Twitter received a DMCA section 512 takedown notice complaining about a tweet that included a link, and proceeded to suspend the user's account.[167] The problem with Twitter's action was that the link led to a blog page, but did not lead to any infringing content.[168] The blog itself also did not link to any infringing content; it linked to official free music releases and iTunes for the purchase of music.[169]

A few months later, in January 2012, Twitter expanded its partnership with Lumen to publish DMCA takedown notices that it received regarding its users.[170] Their partnership included Twitter uncloaking 4410 takedown notices for public viewing through the Lumen database, dating back to 2010.[171] At the time, Facebook was keeping its own notices private, but Twitter sought to "keep content up wherever and whenever we can," and promised to "be transparent with users when we can't."[172]

By November 2012, Twitter had settled a lawsuit with artist Christopher Boffoli over Twitter's refusal to take down copies of his copyrighted artwork that some users had uploaded to the service.[173] Boffoli's photos, which featured miniature figures posing

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[165] *Copyright Notices*, TWITTER TRANSPARENCY REP., https://transparency.twitter.com/en/copyright-notices.html [https://perma.cc/B8Y5-65CL] (last visited Sept. 2, 2016) [hereinafter *Copyright Notices July 2015*].

[166] *See, e.g.*, NetResult Solutions, *DMCA Notice to Twitter*, LUMEN (Oct. 12, 2015), https://www.lumendatabase.org/notices/11311112 [https://perma.cc/LLJ3-U5DS].

[167] Mike Masnick, *Twitter Keeps Suspending Accounts Based on Highly Questionable DMCA Claims*, TECHDIRT (Sept. 1, 2011, 2:11 PM), https://www.techdirt.com/articles/20110825/03485715680/twitter-keeps-suspending-accounts-based-highly-questionable-dmca-claims.shtml [https://perma.cc/YVT7-HZ6U].

[168] *Id.*

[169] *Id.*

[170] Brodkin, *supra* note 31.

[171] *Id.*

[172] *Id.*

[173] Jon Brodkin, *Artist Who Sued Twitter Over Copyright Declares Victory—Via Settlement*, ARS TECHNICA (Nov. 2, 2012, 6:15 PM), http://arstechnica.com/tech-policy/

with types of food, went viral over the previous year, and he had little trouble having his content removed from platforms such as Pinterest, Facebook, and Google within twenty-four hours.[174] Boffoli was not permitted to reveal details of the settlement, except that the case was settled out of court and the pictures were removed by Twitter and replaced with Twitter's new media removal message stating: "This image has been removed in response to a report from the copyright holder."[175] The oddity with Boffoli's case is that while tweets themselves, or GIFs or Vines in a tweet, may have an affirmative fair use defense, that defense is much less likely in the posting of an artist's photograph.

The Boffoli settlement led Twitter to discontinue its practice of removing a Tweet without explanation, and also led it to use media removal messages.[176] When a tweet is blocked, the entry continues to appear as "Tweet withheld,"[177] as part of the removal message.[178] Twitter also continued its use of a media removal message for pictures infringing Boffoli's copyright.[179] Internet rights groups praised Twitter for making a change in its copyright policy.[180] Sherwin Siy—then, the Vice President for Legal Affairs for Public Knowledge in Washington, D.C.—said that Twitter's policy change was important so that "the accused posts are [not] just tossed down the memory hole."[181]

2012/11/artist-who-sued-twitter-over-copyright-declares-victory-via-settlement [https://perma.cc/U85N-AGW6].

174 Jon Brodkin, *Twitter Won't Take Down "Giant Food" Photos, so Artist Sues*, ARS TECHNICA (Sept. 11, 2012, 5:52 PM), http://arstechnica.com/tech-policy/2012/09/twitter-wont-take-down-tiny-food-photos-so-artist-sues/ [https://perma.cc/2F3P-544B].

175 Brodkin, *supra* note 173.

176 Mello, *supra* note 163.

177 Jeremy Kirk, *Twitter Now Posts Takedown Messages for Tweets that Violate Copyrights*, PCWORLD (Nov. 5, 2012, 6:59 AM), http://www.pcworld.com/article/2013523/twitter-now-posts-takedown-messages-for-tweets-that-violate-copyrights.html [https://perma.cc/K95L-QMF8].

178 *See Copyright Policy*, *supra* note 140, at *What Happens Next?*.

179 *See id.*

180 Mello, *supra* note 163.

181 *Id.*

Almost three years later, in July 2015, Twitter was sued again by an artist—photographer Kristen Pierson.[182] Pierson had sent a takedown notice to Twitter's registered DMCA agent in regard to one of her photos that was being shared illegally on the service.[183] Sixteen months later, the infringing photo had not been blocked or removed, even though the Twitter account that posted the photo was no longer active.[184] Pierson's lawsuit was later dismissed—a settlement or dispute agreement the likely outcome.[185]

One month later, in August 2015, Olga Lexell, a freelance writer from Los Angeles, tweeted a twenty-one-word "joke" that was then reposted by other Twitter users as their own.[186] Reposting of the joke—"saw someone spilled their high-end juice cleanse all over the sidewalk and now I know god is on my side"—led to an action by Lexell.[187] She issued a section 512 DMCA takedown notice, and Twitter blocked the allegedly infringing tweets, despite potential copyrightability issues in this "joke," such as size, content, and scenes a faire.[188] Lexell explained to Twitter that she makes her living writing jokes and that "the jokes are my intellectual property, and that the users in question did not have my permission to repost them without giving me credit."[189] In stark contrast to the Boffoli and Pierson cases, where Twitter refused to take down obviously infringing material, Twitter removed material which enjoyed a claim to copyrightability that was dubious at best.

Soon after the "joke" controversy, the suspension of the sports websites' accounts occurred, due to Big Sports' takedown notices

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[182] *See* Ernesto Van der Sar, *Twitter Sued for Failing to Remove Copyrighted Photo,* TORRENTFREAK (Jul. 29, 2015), https://torrentfreak.com/twitter-sued-for-failing-to-remove-copyrighted-photo-150729/ [https://perma.cc/8GGQ-NZEE].

[183] *See id.*

[184] *See id.*

[185] *See* Ernesto Van der Sar, *Twitter Sued for Ignoring DMCA Takedown Requests*, TORRENTFREAK (Jan. 13, 2016), https://torrentfreak.com/twitter-sued-for-ignoring-dmca-takedown-requests-160113/ [https://perma.cc/YY6D-MCCY].

[186] *Id.*

[187] Nicole Martinez, *Can Twitter Really Copyright Your Jokes?*, ART L.J. (Aug. 18, 2015), http://artlawjournal.com/twitter-copyright-jokes/ [https://perma.cc/NJE6-EW7Q].

[188] Dante D'Orazio, *Twitter Is Deleting Stolen Jokes on Copyright Grounds*, VERGE (July 25, 2015, 10:35 AM), http://www.theverge.com/2015/7/25/9039127/twitter-deletes-stolen-joke-dmca-takedown [https://perma.cc/DXY5-TCQN].

[189] *Id.*

involving GIFs and Vines.[190] Now, not only was content blocked or removed, but accounts were suspended, even though there was a legitimate issue of whether the allegedly infringing material actually violated copyright laws.[191]

At the turn of the year in 2016, another artist, Wisconsin-based photographer Jennifer Rondinelli Reilly, sued Twitter.[192] Reilly claimed that Twitter had ignored the bulk of the twenty-eight DMCA takedown notices she sent Twitter in November 2015, while failing to disable or remove fifty of the fifty-six infringing uses of her work.[193] Reilly claimed actual knowledge of the infringing uses, and demanded an injunction against Twitter in regard to the infringing material, as well as actual and statutory damages.[194]

While Twitter faced lawsuits from artists whose material enjoyed copyright protection that could not easily give rise to a fair use defense, Twitter continued to block other types of material. In February 2016, Twitter suspended the popular Twitter account @Dog_rates,[195] which has nearly half a million followers.[196] Matt Nelson, the owner of the @Dog_rates account, was diligent about tagging the sender of each photo that he posted in order to credit the photographer.[197]

Nelson's account was not shut down by a photographer who felt that his work was being infringed, but due to the efforts of a Twitter troll who then began a bizarre email exchange with Nelson.[198] The person admitted to copying Nelson's photos from his corresponding Instagram account, and then threatened that "when

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190 Statt, *supra* note 2.

191 Shan Wang, *Fair Use or Copyright Infringement? Deadspin and SB Nation Get Tossed off Twitter for NFL GIFs*, NIEMAN JOURNALISM LAB (Oct. 13, 2015), http://www.niemanlab.org/2015/10/fair-use-or-copyright-infringement-deadspin-and-sb-nation-get-tossed-off-twitter-for-nfl-gifs/ [https://perma.cc/FVR5-6H3X].

192 *See* Van der Sar, *supra* note 185.

193 *Id.*

194 *Id.*

195 *See* AJ Dellinger, *Bogus DMCA Claim Temporarily Takes Down One of Twitter's Best Dog Feeds,* DAILY DOT (Feb. 10, 2016, 2:17 AM), http://www.dailydot.com/debug/twitter-dog-rates-dmca-takedown/ [https://perma.cc/GQ39-8Q9M].

196 We Rate Dogs (@dog_rates), TWITTER, https://twitter.com/dog_rates [https://perma.cc/PA7M-S6CW] (last visited Sept. 27, 2016).

197 *See* Dellinger, *supra* note 195.

198 *See id.*

i steal enough tweets from you. ur account is gonna be shutdown on twitter. I want all your followers lol [sic]."[199] The impersonator then threatened other Twitter accounts, including @EverythingGoats, stating: "Because you just published this to your followers. I'm going after the goats next. Please let them know."[200] While the fate of the goats is unclear, the fact remained that Nelson's account was temporarily suspended due to a user that had no actual claim of infringement, but instead illegally used the DMCA to toy with Nelson, putting Twitter in the middle.[201]

Big Sports is not immune to issues with takedown notices. Following a UFC super-fight featuring Jon "Bones" Jones on April 23, 2016, media of the fight was blocked on UFC's own Twitter account.[202] While the sender of the notice was listed as "private," the fact remains that UFC's Twitter content was blocked for using UFC's own copyrighted content. Either somebody was trolling UFC, and sent an illegal and incorrect notice to Twitter, or UFC (or its agent) misidentified information and blocked it.

The UFC Twitter account gaffe does not ease the inference that Twitter is not putting sufficient effort into gauging takedown notices against the content complained about on Twitter, and that copyright holders may be sending out so many takedown notices that they cannot even identify their own accounts as one that should be spared a takedown notice.

B. Twitter's DMCA Section 512 Statistics

Twitter's own Transparency Report currently makes public DMCA takedown notice details and statistics for every six-month period, starting with January 1, 2012 through June 30, 2012.[203] The reports track, month by month, the number of copyright takedown

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[199] *Id.*

[200] *Id.*

[201] *See id.*

[202] *UFC 197: Jones vs. Saint Preux*, MMA FIGHTING, http://www.mmafighting.com/fight-card/762/ufc-198 [https://perma.cc/FQ42-GDW3] (last visited Oct. 9, 2016); Timothy Burke, *The Call Is Coming from Inside the House*, DEADSPIN (Apr. 24, 2016, 11:22 AM), http://deadspin.com/the-call-is-coming-from-inside-the-house-1772739636 [https://perma.cc/5T84-7HKQ].

[203] *See Copyright Notices July 2015*, *supra* note 165. The report includes data from Twitter, Vine, and Periscope. *See id.*

notices sent to Twitter, the percentage of reported material that was removed by Twitter, the number of accounts affected, the number of tweets withheld, and the amount of media withheld.[204] DMCA takedown notices have increased significantly since the first six-month period, ending midway through 2012.[205] The first two periods, encompassing 2012, resulted in 6646 total takedown notices, almost evenly split between the two six-month periods.[206] There has been an increase in takedown notices every year since 2012.[207] The year 2013 saw a total of 12,433 notices, 2014 had 25,847, and in 2015 a staggering 53,494 notices were sent to Twitter.[208]

The significant increase in takedown requests from the first half of 2012 to the second half of 2015 has also corresponded with a massive increase in the percentage of material removed by Twitter.[209] The first six-month period in 2012 resulted in only thirty-eight percent of material being removed by Twitter following a DMCA takedown notice.[210] In the six-month period of the second half of 2015, that percentage had risen to an average of seventy-one percent of material being removed by Twitter in response to DMCA takedown notices.[211]

The percentage of material Twitter removed has risen dramatically in conjunction with the spike in DMCA takedown notices lodged against users of its service.[212] This should be of no surprise, given that analyzing the increasing amount of takedown notices involves time, money, energy, and legal manpower; but so does lodging the notices. It is safer for Twitter to proceed following section 512 of the DMCA than to leave itself open to legal liability when it

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204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.*
208 *Copyright Notices July 2015*, *supra* note 165.
209 *Compare Copyright Notices*, TWITTER TRANSPARENCY REP., https://transparency.twitter.com/en/copyright-notices.html#copyright-notices-jan-jun-2012 [https://perma.cc/9CZJ-P9FT] (last visited Sept. 2, 2016) (reporting copyright notices for January through June 2012) [hereinafter *Copyright Notices January 2012*], *with Copyright Notices July 2015*, *supra* note 165 (reporting copyright notices for July through December 2015).
210 *Copyright Notices January 2012*, *supra* note 209.
211 *Copyright Notices July 2015*, *supra* note 165.
212 *Id.*

cannot ensure that the content is not infringing. Still, the subject of whether GIFs and/or Vines infringe copyright has never been adjudicated in a U.S. court of law, so there is no precedent that should frighten Twitter at this juncture.[213]

Of the 35,004 takedown notices Twitter received in the final six months of 2015, only 121 were challenged with a copyright counter notice, which encompassed 0.35% of the notices for that period.[214] Twitter restored 100% of the material in response to those copyright counter notices.[215] Over the past four years of reported DMCA takedown notices sent to Twitter, only one piece of material—in that case, media (picture or video)—has been left unrestored after a copyright counter notice has been lodged against the copyright holder.[216]

Twitter's transparency report also includes statistics on the top copyright reporters.[217] UFC's former parent company, Zuffa, LLC,[218] was the third-biggest copyright reporter to Twitter during the final six months of 2015, accounting for five percent of all Twitter takedown notices for that period.[219] However, the biggest copyright reporter to Twitter was the NFL's own "[I]nternet copyright watchdog," NetResult Solutions.[220] NetResult Solutions filed 10,057 copyright takedown notices from July 1, 2015 to December

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213 Coble, *supra* note 72.

214 *Copyright Notices July 2015*, *supra* note 165.

215 *Id.*

216 *Copyright Notices*, Twitter Transparency Rep., https://transparency.twitter.com/en/copyright-notices.html#copyright-notices-jul-dec-2014 [https://perma.cc/J4GQ-DALH] (last visited Sept. 2, 2016).

217 *Copyright Notices July 2015*, *supra* note 165.

218 *Company Overview of Zuffa, LLC*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=31207841 [https://perma.cc/6MX2-W4LQ] (last visited Sept. 2, 2016). At the time this Article was written, UFC was owned by Zuffa. During editing, Zuffa sold UFC to William Morris Endeavor Entertainment, LLC. For further reading on the sale, see Darren Rovell & Brett Okamoto, *Dana White on $4 Billion UFC Sale: 'Sport Is Going to the Next Level,'* ESPN (July 11, 2016), http://www.espn.com/mma/story/_/id/16970360/ufc-sold-unprecedented-4-billion-dana-white-confirms [https://perma.cc/2LQX-GHEL].

219 *Copyright Notices July 2015*, *supra* note 165.

220 *Id.*; Dan Levy, *Twitter Crackdown on Deadspin and SB Nation Revealed in DMCA Notices*, AWFUL ANNOUNCING (Oct. 13, 2015), http://awfulannouncing.com/2015/twitter-crackdown-deadspin-sb-nation-revealed-dmca-notices.html [https://perma.cc/3H4Y-GAEA].

31, 2015, amounting to twenty-nine percent of all notices to Twitter in that period.[221]

NetResult Solutions' 10,057 copyright takedown notices may seem high, but this number is likely dwarfed by a much larger number, considering that NetResult Solutions has a database that monitors more than 20,000 websites and Internet services.[222] Twitter is just one of the many. NetResult Solutions admittedly uses systems, not people, that screen the "entire Web," to find material infringing its clients' copyrights.[223] Beyond the NFL, NetResult Solutions lists Manchester United, UEFA, the Tour de France, the Australian Open, the Ryder Cup, and FIFA among its many clients.[224] The court in *Lenz*, in its September 2015 decision, found that systems implementing an algorithm could potentially consider fair use.[225] However, in its amended opinion, the *Lenz* court omitted the allowance of systems to consider fair use.[226] Thus, the question remains: Are NetResult Solutions and other agents feasibly able to weigh the four factors that comprise fair use to satisfy "consideration" of that defense under section 512 and *Lenz's* interpretation of the DMCA?

V. SEARCHING FOR SOLUTIONS

There is not necessarily any "bad guy" in the Big Sports GIF war against Twitter users. There is no one person or company to blame for why content is blocked or deleted on Twitter. There is also no single viable solution to the problem. The actions that result in the blocking of GIFs and Vines on Twitter are part of a sort of symbiotic circle in which section 512 of the DMCA is exploited by both copyright holders and non-copyright holders, while giving Twitter a legal reason to block content and protect the interests of

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221 *Copyright Notices July 2015*, *supra* note 165.

222 *How NetResult Works*, NETRESULT SOLUTIONS, http://www.nr-online.com/solutions_how_works.php [https://perma.cc/YW7H-DRFD] (last visited Sept. 2, 2016).

223 *Id.*

224 *Clients*, NETRESULT SOLUTIONS, http://www.nr-online.com/clients.php [https://perma.cc/88P9-2H6G] (last visited Sept. 2, 2016).

225 Lenz v. Universal Music Corp., 801 F.3d 1126, 1135–36 (9th Cir. 2015), *amended by* 815 F.3d 1145 (9th Cir. 2016).

226 *See Lenz,* 815 F.3d at 1155.

their partners and would-be partners without having to answer for the censoring of free speech on its service. The symbiotic circle must be deconstructed one section at a time to create a workable system that achieves the balance between copyright and free speech or fair use that Congress intended in enacting the DMCA to regulate digital copyright.

A. Litigate a GIF or Vine Fair Use Case

Bringing a GIF or Vine-related takedown case through litigation might be the most unlikely practical solution under current digital copyright law. Stephanie Lenz's section 512(f) misrepresentation claim against Universal Music stemmed from a February 2007 clip she uploaded to YouTube and has continued for more than nine years.[227]

The ultimate goal of litigation would be to have a court define whether GIFs, Vines, and similar clipped video content constitute fair use. A finding of fair use in these videos would likely make section 512 takedown notices involving such content *material* misrepresentations under section 512(f), rather than misrepresentations based on failing to examine whether there was fair use. GIFs and Vines of broadcast sporting events generally are and should be found to be fair use, using the four-factor test. The problem remains that so few (0.35%) of these notices are countered by Twitter users[228] that the chances are miniscule that someone within that tiny percentage will actually spend the time, resources, and money to fight Big Sports. First, a balance between copyright holder and user would need to be struck to foster an environment that is not one-sided against the user asserting fair use.

B. Restructure Section 512 Notice and Takedown Provisions

Section 512 works effectively when an entire work—whether it is a photograph, video, or written work—is infringed upon. A swift takedown of obviously infringing material is fair and proper and ensures that the copyright holder retains all of the rights afforded to the holder under the Copyright Act. When the material is an ar-

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[227] *Id.* at 1149.

[228] *Copyright Notices July 2015*, *supra* note 165.

guable fair use of the copyrighted content and is blocked or removed for ten to fourteen days, pending counter notice, there is a measure of fairness between the copyright holder and user. When the material with a claim to fair use is on Twitter, then, in most occasions, the blocking of content creates an unfair balance against the user.

Twitter is a world that lives in real time. Ten to fourteen days after content is blocked, users have moved on. A GIF or Vine is used to express a feeling, idea, or opinion in order to capture a moment in time and connect with other users at that time. A week or two later, users have moved on to the next moment and the next connecting thought or idea. The blocking and removal of content effectively destroys what the GIF or Vine was intended to convey, and silences the person conveying it.

The user implicated in a counter notification must already worry about a potential lawsuit if he or she decides to have the material returned to the service, which is a serious decision to make in regard to the deep-pocketed members of Big Sports. One can draw their own conclusions as to why only 0.35% of Twitter users file a counter notice to have their material replaced, but making a statement under penalty of perjury and consent to the jurisdiction of a federal district court may weigh against a user finding it worthwhile to have a six-second video clip replaced on Twitter.

The best way to reestablish the balance between user and copyright owner is to amend section 512. There are currently an array of heavily trafficked social media services including Twitter, Facebook, YouTube, and Instagram. These services and its users face potential copyright issues unique to each service. The DMCA must attempt to account for those issues and, as best it can, for circumstances that may arise in regard to the next generation of social media services as well. This Article proposes two changes to section 512(c) to strike a more equitable balance between user and copyright owner.

First, the *Lenz* decision should be incorporated into section 512(c)(3)(A)(v) by amending the statute to read that the complaining party's "good faith belief that use of the material in the manner

complained of is not authorized"[229] must include a four-factor section 107 analysis of fair use.

Second, section 512(c)(1)(A)(iii) should be amended so that the service provider, "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material"[230] at the conclusion of a twenty-four hour window after notifying the user of the takedown notification unless the user complies with section 512(g)(3) of this Act. These changes to section 512 would effectively destroy facial misrepresentations of copyright infringement claims (i.e. "copyright trolls"), cut down on weaker copyright claims, and ensure that users are able to enjoy the fair use of content that the Ninth Circuit in *Lenz* established as a right before the material is blocked or removed. The changes to section 512 would also not limit users' option to take advantage of the counter-notice system after the twenty-four-hour window. The window would be provided to give a user an opportunity to avoid censorship, but balance that against the realities included in a DMCA counter notice.

Copyright holders would not have the allegedly infringing material blocked immediately, but this needs to be measured against realities outside of section 512. Twitter, YouTube, Facebook, or any other service provider has the option to block or remove material they believe to be infringing, regardless of section 512. Those services and others are regularly creating and strengthening relationships every day with copyright holders, and they may decide to block content they believe to be infringing. Essentially, in many current situations, as with Twitter, there is a reversal of the situation as in *Viacom International, Inc. v. YouTube, Inc.*, where YouTube was knowingly growing its service on the back of infringing content.[231] Service providers should not be able to now use section 512 as cover. Users' material will still be blocked in a relatively short window unless they want to subject themselves to potential litigation, and service providers retain the discretion to block any material they believe to be infringing outside of the boundaries of section 512.

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229 17 U.S.C. § 512(c)(3)(A)(v) (2012).

230 § 512(c)(1)(A)(iii).

231 *See generally* 676 F.3d 19 (2d Cir. 2012).

Even websites such as Deadspin, SBNation, and Barstool Sports, who have deeper pockets than the average Twitter user, will not likely seek to put the financial future of their companies in the balance by defending against the posting of copyrightable material. Changes to section 512 would not only recalibrate the balance of fairness but would increase the likelihood that a court may eventually decide whether GIFs and Vines constitute fair use.

C. Apply Social Pressure to Twitter

Twitter has already faced some social pressure, due to various forms of censorship applied on the service. In the many articles written in the aftermath of Big Sports takedown notices, the bulk of the discussion seemed to revolve around the ability to copyright GIFs and Vines, along with Big Sports' perceived abuse of the DMCA. Twitter may have escaped some culpability within the public eye on that instance, mainly because it was simply following section 512 of the DMCA.

With or without an amended section 512, Twitter always has a choice in the matter. There are multiple instances where it did not comply with takedown notices submitted by photographers with much clearer claims of infringement than Big Sports had. When Big Sports sent takedown notices to Twitter, the service decided in favor of blocking content, by suspending accounts, and against free speech on the very service that Twitter had touted as a beacon for free speech. Twitter can choose to hide behind section 512, but it does have a choice in the matter, and its users should be aware that they do as well.

There is no doubt that it is easier for Twitter to follow section 512 as currently drafted, instead of asking questions. Until section 512 is amended, and/or another Stephanie Lenz steps forward on the issue of GIFs and Vines, then Twitter may never have to decide whether it will stand up to its new financial partners in order to defend its original partners: the millions of Twitter users.

CONCLUSION

The copyrightability issues of GIFs, Vines, and related content on Twitter and other current and future social media platforms are

not likely to fade away. These forms of expression are increasingly popular on Twitter and the sheer volume of GIF-related media may be impossible to effectively police, especially when taking *Lenz* into consideration.

Big Sports and other broadcast copyright owners may not have the time to conduct a fair use analysis of every GIF or Vine that makes use of its copyrighted broadcast content. Twitter is in the unenviable position of choosing between users or corporate partners, while having a convenient legal excuse to comply with takedown notices, no matter if a takedown notice is appropriate or not. Twitter users who have a right to fair use, are likely to be silenced if a copyright owner submits a takedown notice.

Chances are low that a case involving GIFs and Vines will be adjudicated, and even if one were to be, the countless types of GIFs and Vines that can be created by users might make such a decision difficult to enforce. The courts may not be the answer. While some copyright owners have embraced the free marketing that user-created content provides, many others have rejected that idea. Social pressure on copyright owners and Twitter itself may be helpful, but ultimately may also not be the answer. However, the DMCA is uniquely positioned to implement changes that will recalibrate the balance between Twitter users and copyright owners.

While each GIF or Vine itself may be difficult to police, the protocol for those using that expression on Twitter and other services could be modified so that each user is given the opportunity to defend his or her fair use without being silenced before a determination of whether that use is fair. The Big Sports takedown notices in October 2015 are an example of the uphill battle for those seeking to assert fair use as a defense and the ease with which copyright owners are able to silence that use.