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## "Dancing Baby" Decision Affects DMCA Notice-and-Takedown Provision

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**Ninth Circuit Amends "Dancing Baby" Decision: *Lenz v. Universal Music Corp.*, Nos. 13-16106, 13-16107 (9th Cir. Mar. 17, 2016)**

On Thursday, the Ninth Circuit amended its prior opinion in the famed "Dancing Baby" case, at the same time denying both parties' petitions for panel rehearing and plaintiff Stephanie Lenz's petition for rehearing *en banc*. Though the amended order left intact the court's affirmance of the district court's denial of cross-motions for summary judgment relating to the propriety of Universal Music's takedown notice under the DMCA, the Ninth Circuit panel issued an amended opinion and dissent differing from the originals in significant respects.

First, the Ninth Circuit left intact its original holding that the DMCA's notice-and-takedown provision of 17 U.S.C. § 512(c) "requires copyright holders to consider fair use before sending a takedown notification," but removed the statement that failure to consider fair use "raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law." Instead, the amended opinion now merely states that the facts of the case before it raised such a triable issue. In a footnote, the panel majority explained that "under the circumstances of this case" the relevant question—of whether Universal's inquiry was sufficient to form a subjective good faith belief that Lenz's video infringed Prince's copyright—was appropriate for the jury, rather than the court.

Second, the court eliminated a nearly two-page-long passage from the original opinion discussing the nature of the fair-use inquiry a copyright holder must conduct in order to satisfy the "good faith belief" requirement under 17 U.S.C. § 512(c)(3)(A)(v). The deleted language included the following statements:

- "a copyright holder's consideration of fair use need not be searching or intensive;"
- "formation of a subjective good faith belief does not require investigation of the allegedly infringing content;"
- "the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use;" and

- additional discussion of potentially sufficient algorithms and screening procedures.

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## *Authors*



**Vinita Ferrera**

**PARTNER**

✉ [vinita.ferrera@wilmerhale.com](mailto:vinita.ferrera@wilmerhale.com)

☎ +1 617 526 6208



**Gregory H. Lantier**

**PARTNER**

Chair, Western District of Texas  
Working Group

Co-Chair, Post-Grant  
Proceedings Group

✉ [gregory.lantier@wilmerhale.com](mailto:gregory.lantier@wilmerhale.com)

☎ +1 202 663 6327