

No. 16-217

In the Supreme Court of the United States

STEPHANIE LENZ, PETITIONER

v.

UNIVERSAL MUSIC CORP., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

	JEFFREY B. WALL <i>Acting Solicitor General Counsel of Record</i>
	CHAD A. READLER <i>Acting Assistant Attorney General</i>
SARANG VIJAY DAMLE <i>General Counsel and Associate Register of Copyrights</i>	MALCOLM L. STEWART <i>Deputy Solicitor General</i>
REGAN A. SMITH <i>Deputy General Counsel</i>	BRIAN H. FLETCHER <i>Assistant to the Solicitor General</i>
CINDY P. ABRAMSON <i>Assistant General Counsel</i>	MARK R. FREEMAN SONIA K. MCNEIL THAIS-LYN TRAYER <i>Attorneys</i>
ANDREW P. MOORE <i>Barbara A. Ringer Fellow United States Copyright Office Washington, D.C. 20540</i>	<i>Department of Justice Washington, D.C. 20530-0001 SupremeCtBriefs@usdoj.gov (202) 514-2217</i>

QUESTION PRESENTED

Section 512(c) of Title 17 creates a safe harbor from copyright-infringement liability for website operators and other online service providers that store or host material at the direction of users. To be eligible for the safe harbor, a service provider that receives a “notification of claimed infringement” from a copyright owner must remove material that allegedly infringes a copyright. 17 U.S.C. 512(c)(1)(C). A separate provision allows a user to recover damages from a copyright owner that “knowingly materially misrepresents” in such a notification that material “is infringing.” 17 U.S.C. 512(f). The question presented is as follows:

Whether a copyright owner may be held liable under Section 512(f) for sending a notification of claimed infringement based on a sincere but unreasonable belief that the challenged material is infringing.

TABLE OF CONTENTS

Page

Statement..... 1

Discussion..... 10

 A. A copyright owner is liable under Section 512(f) only if it actually knew that the challenged material was not infringing or was willfully blind to that fact 11

 B. The court of appeals correctly interpreted Section 512(f) to require actual knowledge or willful blindness, but the court erroneously focused on the falsity of the copyright owner’s statement of good-faith belief rather than on the falsity of its allegation of infringement..... 17

 C. The court of appeals’ decision does not warrant this Court’s review 21

Conclusion..... 23

TABLE OF AUTHORITIES

Cases:

Ashcroft v. ACLU, 535 U.S. 564 (2002) 3

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 22

Bryson v. United States, 396 U.S. 64 (1969)..... 12

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) 2

Cooper v. Schlesinger, 111 U.S. 148 (1884) 15

Corsicana Nat’l Bank v. Johnson, 251 U.S. 68 (1919) 12

Cutter v. Wilkinson, 544 U.S. 709 (2005) 22

Elonis v. United States, 135 S. Ct. 2001 (2015) 14

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011)12, 18

IV

Cases—Continued:	Page
<i>Hamilton-Brown Shoe Co. v. Wolf Bros.</i> , 240 U.S. 251 (1916).....	22
<i>Kimber v. Young</i> , 137 F. 744 (8th Cir. 1905)	15
<i>Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.</i> , 545 U.S. 913 (2005)	2, 3
<i>Rossi v. Motion Picture Ass’n of Am. Inc.</i> , 391 F.3d 1000 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005)	7, 9, 17, 18
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	14
<i>Safeco Ins. Co. of Am. v. Burr</i> , 551 U.S. 47 (2007) ...	12, 13
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	2
<i>United States v. Gay</i> , 967 F.2d 322 (9th Cir.), cert. denied, 506 U.S. 929 (1992)	15
<i>United States v. Kennedy</i> , 714 F.3d 951 (6th Cir. 2013)	15
<i>United States v. Yermian</i> , 468 U.S. 63 (1984)	12
<i>Universal Health Servs., Inc. v. United States</i> , 136 S. Ct. 1989 (2016)	16
<i>Yates v. Jones Nat’l Bank</i> , 206 U.S. 158 (1907).....	11

Statutes:

Copyright Act of 1976, 17 U.S.C. 101 <i>et seq.</i>	2
17 U.S.C. 102(a)	2
17 U.S.C. 106.....	2
17 U.S.C. 106(4)	2
17 U.S.C. 107.....	2, 18
17 U.S.C. 108(g)(1)	14
17 U.S.C. 110(1)	14
17 U.S.C. 110(2)	14
17 U.S.C. 501(a)	2

Statutes—Continued:	Page
17 U.S.C. 502-505.....	2
17 U.S.C. 504(c)(2).....	14
17 U.S.C. 506(a)(1)(C).....	14
17 U.S.C. 512(c).....	6, 8, 20
17 U.S.C. 512(c)(1).....	4
17 U.S.C. 512(c)(1)(C).....	4
17 U.S.C. 512(c)(3).....	5
17 U.S.C. 512(c)(3)(A).....	18
17 U.S.C. 512(c)(3)(A)(ii).....	18
17 U.S.C. 512(c)(3)(A)(iii).....	18
17 U.S.C. 512(c)(3)(A)(v).....	8, 9, 10, 18, 19, 22
17 U.S.C. 512(f).....	<i>passim</i>
17 U.S.C. 512(f)(1).....	18
17 U.S.C. 512(f)(2).....	16
17 U.S.C. 512(g).....	5
17 U.S.C. 512(g)(1).....	6
17 U.S.C. 512(g)(2)(A).....	5
17 U.S.C. 512(g)(2)(B).....	5
17 U.S.C. 512(g)(2)(C).....	5
17 U.S.C. 512(g)(3)(C).....	5
17 U.S.C. 512(k)(1).....	4
17 U.S.C. 1009(d)(3).....	14
17 U.S.C. 1202(b)(3).....	13
17 U.S.C. 1203(c)(5)(A).....	13
Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860.....	1
§ 103(a):	
112 Stat. 2872 (17 U.S.C. 1202(b)(3)).....	13
112 Stat. 2876 (17 U.S.C. 1203(c)(5)(A)).....	13
§ 406(a):	
112 Stat. 2903 (28 U.S.C. 4001(a)(1)(A)).....	13

VI

Statutes—Continued:	Page
False Claims Act, 31 U.S.C. 3729 <i>et seq.</i>	13
31 U.S.C. 3729(b)(1)	13
18 U.S.C. 1001	13
28 U.S.C. 1292(b)	8
28 U.S.C. 4001(a)(1)(A)	13
Miscellaneous:	
<i>Black’s Law Dictionary</i> (10th ed. 2014)	11
H.R. Rep. No. 551, 105th Cong., 2d Sess. (1998)	3, 14
Model Penal Code § 2.02(b)(i) (1985).....	11
S. Rep. No. 190, 105th Cong., 2d Sess. Pt. 2 (1998) ...	3, 14
<i>Webster’s Third New International Dictionary</i> (1993)	11

In the Supreme Court of the United States

No. 16-217

STEPHANIE LENZ, PETITIONER

v.

UNIVERSAL MUSIC CORP., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court’s order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860, created a safe harbor from copyright-infringement liability for online service providers that host or store material at the direction of their users. To be eligible for the safe harbor, a service provider must remove allegedly infringing material if it receives a specific notification, commonly known as a “takedown notice,” from a copyright owner. This case concerns the showing required to recover damages under 17 U.S.C. 512(f), which provides a cause of action against a copyright owner

that knowingly misrepresents in a takedown notice that the challenged material is infringing.

a. The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, grants copyright protection to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. 102(a). Copyright protection confers certain exclusive rights, including the rights to copy and to distribute the copyrighted work. 17 U.S.C. 106. Holders of copyrights in audiovisual, musical, and certain other works are also granted the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. 106(4).

“Anyone who violates any of the exclusive rights of the copyright owner * * * is an infringer of the copyright.” 17 U.S.C. 501(a). A copyright infringer may be subject to an injunction and held liable for damages. 17 U.S.C. 502-505. Although the Copyright Act “does not expressly render anyone liable for infringement committed by another,” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984), third parties may be subject to “secondary liability on a theory of contributory or vicarious infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

The Copyright Act specifies that “the fair use of a copyrighted work * * * is not an infringement.” 17 U.S.C. 107. Whether a particular use qualifies as fair use depends on, *inter alia*, “the purpose and character of the use”; “the nature of the copyrighted work”; “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and “the effect of the use upon the potential market for or value of the copyrighted work.” *Ibid.*; see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-578 (1994).

b. The Internet has provided new channels for rapidly and cheaply distributing text, images, sound recordings, and videos to worldwide audiences. Those developments have created new avenues for expression and have allowed copyright holders to share their works with more readers, listeners, and viewers. Cf. *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002). But they have also created new opportunities for copyright infringement, as well as serious obstacles to enforcing the copyright laws against widely dispersed Internet users. See, e.g., *Grokster*, 545 U.S. at 928-931 (describing the enforcement difficulties posed by online file-sharing services). In the 1990s, copyright owners in search of a “practical alternative,” *id.* at 930, began seeking to impose secondary liability on website operators and other online service providers whose services were being used to infringe copyrights. See S. Rep. No. 190, 105th Cong., 2d Sess. 19 & n.20 (1998) (Senate Report).

In 1998, Congress enacted the DMCA to address both the problem of online copyright infringement and the uncertainty created by the threat of secondary liability for online service providers. Congress sought to “balance[] the interests of content owners, on-line and other service providers, and information users in a way that w[ould] foster the continued development of electronic commerce and the growth of the Internet.” H.R. Rep. No. 551, 105th Cong., 2d Sess. Pt. 2, at 21 (1998) (House Report). Rather than attempting to modify the general principles that govern secondary infringement liability, Congress sought to provide certainty to copyright owners and service providers by enacting conditional “safe harbors” from infringement

liability “for certain common activities of service providers.” Senate Report 19.

c. One of the DMCA’s safe harbors limits a service provider’s liability for copyright infringement “by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” 17 U.S.C. 512(c)(1). Service providers potentially eligible for that safe harbor include video-sharing websites like YouTube, and social-media websites like Facebook and Instagram. See 17 U.S.C. 512(k)(1) (defining “service provider”).

To claim the safe harbor, a service provider that receives a “notification of claimed infringement” from a copyright owner must, *inter alia*, “respond[] expeditiously to remove, or disable access to * * * material that is claimed to be infringing.” 17 U.S.C. 512(c)(1)(C). A notification of claimed infringement (commonly known as a “takedown notice”) must contain six elements:

- (i) A physical or electronic signature of a person authorized to act on behalf of the [copyright owner].
- (ii) Identification of the copyrighted work claimed to have been infringed * * * .
- (iii) Identification of the material that is claimed to be infringing * * * .
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party * * * .
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the [copyright owner].

17 U.S.C. 512(c)(3).¹

A service provider that removes allegedly infringing material based on a takedown notice is protected from any liability for the removal so long as it complies with the procedures set forth in Section 512(g). Under that provision, the service provider must “take[] reasonable steps promptly to notify” the user in question “that it has removed or disabled access to the material.” 17 U.S.C. 512(g)(2)(A). The user, in turn, may send a “counter notification” requesting that the service provider restore the material. 17 U.S.C. 512(g)(2)(B). Like a takedown notice, a counter notification must contain specified elements, including a “statement under penalty of perjury that the [user] has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.” 17 U.S.C. 512(g)(3)(C).

A service provider that receives a counter notification must “replace[] the removed material * * * not less than 10, nor more than 14, business days following receipt of the counter notice,” unless it receives notice that the copyright owner has sought a court order restraining the user from engaging in the challenged conduct. 17 U.S.C. 512(g)(2)(C). So long as the service provider follows those procedures, it “shall not be

¹ Although a takedown notice may also be sent by another person authorized to act on the copyright holder’s behalf, we generally refer to the sender of the notice as the copyright holder for simplicity.

liable to any person for any claim based on [its] good faith disabling of access to, or removal of, material or activity,” whether or not “the material or activity is ultimately determined to be infringing.” 17 U.S.C. 512(g)(1).

d. Section 512(f) provides a cause of action for users or copyright owners who are injured by certain misrepresentations in takedown notices and counter notifications. “Any person who knowingly materially misrepresents under this section” that “material or activity is infringing” or “that material or activity was removed or disabled by mistake or misidentification * * * shall be liable for any damages, including costs and attorneys’ fees,” that are incurred by certain injured parties. 17 U.S.C. 512(f). Potential plaintiffs under Section 512(f) include both users (who may be injured by a copyright owner’s misrepresentation that particular material is infringing) and copyright owners (who may be injured by a user’s misrepresentation that the material was wrongly removed). See *ibid.*

2. In 2007, petitioner uploaded to YouTube a 29-second video of her children dancing to the song *Let’s Go Crazy* by the artist Prince. Pet. App. 3a-4a. Respondents, who were authorized to enforce Prince’s copyrights, had assigned a legal assistant to monitor YouTube for videos containing Prince’s copyrighted works. *Id.* at 4a. The assistant evaluated whether particular videos made “significant use” of a copyrighted work, but he did not specifically consider fair use. *Ibid.* The assistant concluded that *Let’s Go Crazy* was the “focus” of petitioner’s video, and he caused a Section 512(c) takedown notice to be sent to YouTube. *Id.* at 5a. YouTube removed the video and notified petitioner of the removal. *Ibid.* Several weeks later,

after petitioner sent a counter notification, YouTube reinstated the video. *Id.* at 6a.

3. Petitioner sued respondents for damages under Section 512(f). Pet. App. 6a. Petitioner argued that, “given [their] procedures for reviewing videos before requesting that they be removed, [respondents] could not have formed a good faith belief that [petitioner’s] video did not constitute fair use.” *Id.* at 41a. Petitioner argued on that basis that the required statement of good-faith belief contained in respondents’ takedown notice was a “knowing, material misrepresentation” giving rise to liability under Section 512(f). *Ibid.*

The district court denied the parties’ cross-motions for summary judgment. Pet. App. 32a-54a. The court interpreted the Ninth Circuit’s decision in *Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000 (2004), cert. denied, 544 U.S. 1018 (2005), to require a Section 512(f) plaintiff to show that the copyright owner “had some actual knowledge that its Takedown Notice contained a material misrepresentation.” Pet. App. 46a. The court held that a showing of willful blindness would also suffice because “[w]illful blindness is tantamount to knowledge.” *Id.* at 47a (citation omitted). The court explained that a defendant is willfully blind if it (1) “subjectively believe[s] that there is a high probability that a fact exists” and (2) “take[s] deliberate action to avoid learning of that fact.” *Ibid.* (citation omitted).

The district court denied petitioner’s motion for summary judgment because it concluded that she had not presented “evidence suggesting that [respondents] subjectively believed either that there was a high probability that any given video might make fair use of a Prince composition or that her video in par-

ticular” was fair use. Pet. App. 48a. The court also denied respondents’ motion for summary judgment, concluding that they had not shown that they lacked such a subjective belief. *Id.* at 49a. The court explained that petitioner would be free to argue at trial “that a reasonable actor in [respondents’] position would have understood that fair use was ‘self-evident,’ and that this circumstance is evidence of * * * willful blindness.” *Ibid.* Conversely, the court stated that respondents could try to persuade the jury that, “whatever the alleged shortcomings of [their] review process might have been, [they] did not act with the subjective intent required by [Section] 512(f).” *Ibid.*

4. The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b), and a divided panel of the court of appeals affirmed. Pet. App. 1a-31a.

a. The court of appeals first held that Section 512(c) “requires copyright holders to consider whether the potentially infringing material is a fair use” before sending a takedown notice. Pet. App. 9a. The court observed that a takedown notice must include a “statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” *Ibid.* (quoting 17 U.S.C. 512(c)(3)(A)(v)). The court concluded that such a statement must reflect consideration of fair use because fair use is “authorized by the law.” *Id.* at 14a.

The court of appeals next reviewed the district court’s holding that genuine issues of material fact precluded a grant of summary judgment to either party. The court framed the dispositive question as “whether [respondents] knowingly misrepresented

that [they] had formed a good faith belief the video did not constitute fair use.” Pet. App. 14a. The court rejected petitioner’s contention that respondents could be held liable if they “should have known” that her video constituted fair use. *Id.* at 15a. Like the district court, the court of appeals interpreted its decision in *Rossi* to hold that “the ‘good faith belief’ requirement in [Section] 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard,” and that a copyright holder “cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake.” *Ibid.* (quoting *Rossi*, 391 F.3d at 1004).

The court of appeals also agreed with the district court that “the willful blindness doctrine may be used to determine whether a copyright holder ‘knowingly materially misrepresented’ that it held a ‘good faith belief’ the offending activity was not a fair use.” Pet. App. 18a (brackets omitted) (quoting 17 U.S.C. 512(c)(3)(A)(v) and (f)). The court held that petitioner could not proceed on a willful-blindness theory in this case, however, because she had failed to offer evidence that respondents believed that there was a high probability that her video was fair use. *Id.* at 18a-19a. Instead, the court held that petitioner could proceed to trial only on an actual-knowledge theory. *Id.* at 19a-20a.

b. Judge Milan Smith concurred in part and dissented in part. Pet. App. 25a-31a. He agreed with the majority that Section 512(c)(3)(A)(v) “requires copyright holders to consider whether potentially infringing material is a fair use before issuing a takedown notice.” *Id.* at 25a. He would have held, however, that because respondents “admittedly did not consider fair use” before sending their takedown notice, they “could

not have formed a good faith belief that [petitioner's] video was infringing, and [their] notification to the contrary was a knowing material misrepresentation" that rendered respondents liable under Section 512(f). *Ibid.*

DISCUSSION

Petitioner contends that a copyright owner's sincere but unreasonable belief that the challenged material is infringing cannot protect it from liability under 17 U.S.C. 512(f) if it sends a takedown notice without first conducting a "fair use" inquiry. The court of appeals correctly held that liability under the DMCA requires actual knowledge or willful blindness, and its interlocutory decision does not conflict with any decision of this Court or another court of appeals.

Even if a question concerning the mental state required for DMCA liability otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. This case has been litigated as a dispute about the meaning of 17 U.S.C. 512(c)(3)(A)(v), which provides that a takedown notice must include a statement that the copyright owner has a "good faith belief" that the challenged conduct is unauthorized. But Section 512(c)(3)(A)(v) does not define the mental state required for liability under Section 512(f). That requirement appears in Section 512(f) itself, which states that a copyright owner is liable only if it "knowingly materially misrepresents under this section * * * that material or activity is infringing." Neither the parties nor the court below have focused on that controlling statutory text. The petition for a writ of certiorari should be denied.

A. A Copyright Owner Is Liable Under Section 512(f) Only If It Actually Knew That The Challenged Material Was Not Infringing Or Was Willfully Blind To That Fact

Section 512(f) imposes liability on “[a]ny person who knowingly materially misrepresents under this section * * * that material or activity is infringing.” By its terms, the statute reaches only a misrepresentation that the challenged material or activity “is infringing.” And because the statute is limited to misrepresentations made “knowingly,” a copyright owner may be held liable only if it knew that the challenged material was not infringing or was willfully blind to that fact. A negligent or unreasonable misrepresentation of infringement is not sufficient.

1. In general, a person acts “knowingly” if he acts “with awareness, deliberateness, or intention.” *Webster’s Third New International Dictionary* 1252 (1993); see, e.g., *Black’s Law Dictionary* 1003 (10th ed. 2014); cf. Model Penal Code § 2.02(b)(i) (1985) (“A person acts knowingly with respect to a material element of an offense * * * involv[ing] the nature of his conduct or the attendant circumstances” if “he is aware that his conduct is of that nature or that such circumstances exist.”). Consistent with that understanding, this Court has interpreted statutes requiring that a person act “knowingly” to require actual knowledge of the relevant facts and to exclude mere negligence. More than a century ago, for example, the Court held that a statute imposing liability on bank officials who “knowingly” violated a prohibition on false statements in bank reports required “something more than negligence”; instead, “the violation must in effect be intentional.” *Yates v. Jones Nat’l Bank*, 206

U.S. 158, 180 (1907); accord *Corsicana Nat'l Bank v. Johnson*, 251 U.S. 68, 71 (1919).

This Court has adhered to that understanding of the word “knowingly” in construing a variety of civil and criminal statutes. The Court has stated, for example, that 18 U.S.C. 1001’s prohibition on “knowingly and willfully” making a false statement in any matter within the jurisdiction of a federal agency requires proof that the defendant had “actual knowledge” of falsity. *United States v. Yermian*, 468 U.S. 63, 75 n.14 (1984); accord *Bryson v. United States*, 396 U.S. 64, 69-70 (1969). The Court has likewise indicated that a civil provision reaching “knowing” violations would not encompass “reckless” or “negligent” violations. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58-59 (2007) (*Safeco*).

This Court recently clarified that a statutory knowledge requirement may be satisfied not only by proof that the defendant had actual knowledge of the relevant facts, but also by proof of the defendant’s willful blindness. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766-770 (2011) (*Global-Tech*). A defendant is willfully blind to a fact if the defendant (1) “subjectively believe[s] that there is a high probability that [the] fact exists” and (2) “take[s] deliberate actions to avoid learning of that fact.” *Id.* at 769. The Court explained that willful blindness is legally equivalent to actual knowledge because a defendant “who takes deliberate actions to avoid confirming a high probability of wrongdoing” is as culpable as one who acts with actual knowledge and indeed “can almost be said to have actually known the critical facts.” *Ibid.*; see *id.* at 766. The Court emphasized, however, that willful blindness has a “limited scope” and “surpasses recklessness and negligence.” *Id.* at 769.

2. The particular statutory context in which the word “knowingly” appears can sometimes justify a departure from the ordinary meaning of that term. Cf. *Safeco*, 551 U.S. at 57-58 (adhering to the “standard civil usage” of the term “willfully” absent a showing that Congress intended to depart from that term’s ordinary meaning).² Here, however, the context and history of Section 512(f) reinforce the natural reading of its text. Thus, under Section 512(f), a copyright owner “knowingly” misrepresents that the challenged material is infringing if he actually knows that the material is not infringing or is willfully blind to that fact.

First, other provisions of the DMCA and the Copyright Act use markedly different language to establish mental-state requirements less demanding than actual knowledge or willful blindness. For example, a DMCA provision bans the distribution of copyrighted works containing altered copyright-management information by a person “knowing, or * * * *having reasonable grounds to know*, that it will induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. 1202(b)(3) (emphasis added) (added by DMCA § 103(a), 112 Stat. 2872). Other DMCA provisions likewise distinguish between actual knowledge of a fact and reason to know of that fact. See 17 U.S.C. 1203(c)(5)(A) (“was not aware and had no reasonable grounds to know”) (added by DMCA § 103(a), 112 Stat. 2876); 28 U.S.C. 4001(a)(1)(A) (“knows or has reason to believe”) (added by DMCA § 406(a), 112 Stat. 2903). Various other provisions of the Copyright Act draw the same distinc-

² Most obviously, Congress could expressly adopt a broader definition, as it did in the False Claims Act, 31 U.S.C. 3729 *et seq.* See 31 U.S.C. 3729(b)(1) (defining “knowingly” to include “reckless disregard” as well as “actual knowledge” and “deliberate ignorance”).

tion.³ Congress’s use of those formulations in other copyright-law provisions counsels strongly against interpreting Section 512(f) to impose liability on a copyright owner that should have known, but did not know, that its allegation of infringement was false. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.”) (brackets and citation omitted).

Second, the legislative history of Section 512(f) reinforces the natural reading of the text. Both the House and Senate Reports explain that Section 512(f) was “intended to deter knowingly false allegations.” House Report 59; see Senate Report 49 (same). An assertion that material is infringing is not “knowingly false” unless it is made with actual knowledge of falsity or its legal equivalent, willful blindness.

3. Petitioner contends (Pet. i, 2, 12, 13, 23, 25) that a copyright holder may be held liable under Section 512(f) if it sends a takedown notice based on an “unreasonable belief” that the challenged material is infringing. But petitioner identifies no basis for construing “knowingly” in Section 512(f) to mean “unreasonably”—a standard akin to negligence. See *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (explaining that an objective “reasonable person” standard “is a negligence standard”). Congress could have imposed liabil-

³ See 17 U.S.C. 108(g)(1) (“is aware or has substantial reason to believe”); 17 U.S.C. 110(1) and (2) (“knew or had reason to believe”); 17 U.S.C. 504(c)(2) (“was not aware and had no reason to believe”); 17 U.S.C. 506(a)(1)(C) (“knew or should have known”); 17 U.S.C. 1009(d)(3) (“was not aware and had no reason to believe”).

ity on a copyright owner that “had reason to know” or “should have known” that the challenged material was not infringing, but it did not do so. Instead, it limited liability to misrepresentations made “knowingly.”

The dissenting judge below suggested that the term “knowingly” could be interpreted to require something less than actual knowledge because “long-settled principles of deceit and fraudulent misrepresentation” establish that “a party need only know that it is ignorant of the truth or falsity of its representation for its misrepresentation to be knowing.” Pet. App. 27a (citing *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884)). That reasoning (which petitioner does not appear to endorse) is incorrect. It is true that, under the common law of fraud, a person could be held liable for defrauding a victim through representations made with reckless indifference as to their truth. See *Cooper*, 111 U.S. at 155; see also *Kimber v. Young*, 137 F. 744, 748 (8th Cir. 1905) (collecting authorities). That principle continues to govern the application of federal fraud statutes: A person acts with intent to defraud when he seeks to deprive another person of property using either knowingly false representations or representations made with reckless indifference to their truth. See, e.g., *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013); *United States v. Gay*, 967 F.2d 322, 326 (9th Cir.), cert. denied, 506 U.S. 929 (1992). But neither the dissenting judge nor petitioner has identified any authority holding that a person acts “knowingly,” within the meaning of a statute that uses that term, simply by engaging in reckless or negligent conduct.

4. Petitioner contends (Pet. 8-26) that Section 512(f) cannot serve as an effective deterrent against abuses of the DMCA notice-and-takedown process unless it imposes liability on a copyright owner that sends a takedown notice based on an unreasonable belief that the challenged material is infringing. Even if that assessment were accurate, it would not justify disregarding Congress’s decision to limit liability to knowing misrepresentations, because “policy arguments cannot supersede the clear statutory text.” *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016). In any event, a damages remedy limited to knowing misrepresentations deters intentional abuses—a category that appears to encompass some of the actual and potential examples of abuse offered by petitioner and her amici (*e.g.*, Pet. 13-18). And Congress reasonably could have concluded that copyright owners—who include individual artists and authors as well as sophisticated entities like respondents—should not face potential damages liability for sending a takedown notice based on a sincere belief that the challenged activity is infringing, even if a court finds that belief to be objectively unreasonable.

Furthermore, Section 512(f) liability is not limited to copyright owners. The statute also imposes liability on any user who “knowingly materially misrepresents” in a counter notification that a service provider has removed material because of a “mistake or misidentification.” 17 U.S.C. 512(f)(2). The statute thus unambiguously imposes the same mental-state requirement in suits against both copyright owners and users. Congress reasonably could have concluded that the risk of damages liability for a sincere but unreasonable

counter notification could deter individual users like petitioner from seeking to restore removed material.

B. The Court Of Appeals Correctly Interpreted Section 512(f) To Require Actual Knowledge Or Willful Blindness, But The Court Erroneously Focused On The Falsity Of The Copyright Owner’s Statement Of Good-Faith Belief Rather Than On The Falsity Of Its Allegation Of Infringement

The court of appeals correctly held that, because Section 512(f) reaches only knowing misrepresentations, it requires a showing of either actual knowledge of falsity or willful blindness. The court erroneously assumed, however, that a copyright owner may be held liable under Section 512(f) for knowingly misrepresenting that it had a “good faith belief” that the challenged material was infringing. In particular, the court’s analysis suggests that a copyright owner who sends a takedown notice without first conducting a “fair use” inquiry may be held liable for that omission alone, whether or not the challenged material actually *is* infringing. That approach cannot be reconciled with the text of Section 512(f), which imposes liability on a copyright owner who “knowingly materially misrepresents” that the challenged “material or activity is infringing.”

1. The court of appeals correctly held that, under the DMCA, “[a] copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake.” Pet. App. 15a (quoting *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005)). Instead, the court explained, “there must be a demonstration of some actual knowledge of misrepresentation.” *Ibid.*

(quoting *Rossi*, 391 F.3d at 1005). Consistent with this Court’s decision in *Global-Tech*, the court also correctly observed that “the willful blindness doctrine may be used” as a substitute for proof of actual knowledge. *Id.* at 18a; see *Global-Tech*, 563 U.S. at 766-770.

2. To trigger the statutory takedown procedures, a copyright owner must send the user a written “notification of claimed infringement.” 17 U.S.C. 512(c)(3)(A). That notification must include, *inter alia*, an “[i]dentification of the copyrighted work claimed to have been infringed,” 17 U.S.C. 512(c)(3)(A)(ii), and an “[i]dentification of the material that is claimed to be infringing,” 17 U.S.C. 512(c)(3)(A)(iii). In addition, a takedown notice must include “[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” 17 U.S.C. 512(c)(3)(A)(v). The takedown notice thus must include separate assertions that particular material infringes the copyright on a particular copyrighted work, and that the copyright owner has a good-faith belief that the user’s conduct is unauthorized.

Under the Copyright Act, “the fair use of a copyrighted work * * * is not an infringement of copyright.” 17 U.S.C. 107. If a copyright owner sends a takedown notice, but the challenged use of the copyrighted material is subsequently determined to be “fair use,” that determination would indicate that the copyright owner has “materially misrepresent[ed] * * * that [the] material or activity is infringing.” 17 U.S.C. 512(f)(1). For purposes of liability under Section 512(f), the crucial question then would be whether the copyright owner made that misrepresentation “knowingly.” At least in some circumstances,

the copyright owner's failure to conduct any "fair use" inquiry before sending its takedown notice might be evidence that the copyright owner acted with willful blindness (and therefore "knowingly") with respect to the material's non-infringing character.

3. The court of appeals performed a different textual analysis, focusing instead on the truth or falsity of the statement of "good faith belief" that Section 512(c)(3)(A)(v) requires. See Pet. App. 14a-20a. The court's analysis logically suggests that a copyright owner could be held liable under Section 512(f) for deliberately misrepresenting its subjective belief concerning the challenged material's infringing character, even if the court determines that the material actually was infringing. Such a result would be inconsistent with the text of Section 512(f), because the copyright owner in that scenario could not reasonably be said to have "misrepresent[ed] * * * that [the] material or activity is infringing."

In particular, the court of appeals stated that respondents "face[] liability if [they] knowingly misrepresented in the takedown notification that [they] had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use." Pet. App. 16a. The court explained that the parties disputed whether respondents had actually considered the fair-use factors before sending the takedown notice. See *ibid.* The court then directed that, "[b]ecause the DMCA requires consideration of fair use prior to sending a takedown notification, a jury must determine whether [respondents'] actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof." *Ibid.* The court also stated that, "if a copyright holder ignores or neglects [the court's]

unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under [Section] 512(f).” *Id.* at 17a.

The court of appeals thus focused on the truth or falsity of respondents’ statement of good-faith belief, not (as Section 512(f) directs) on whether respondents had knowingly misrepresented petitioner’s video to be infringing. The court also appeared to accept petitioner’s argument that respondents’ statement of good-faith belief would be knowingly false if respondents knew that they had not considered fair use. See Pet. App. 16a. The court’s analysis thus suggests that, if the jury finds on remand that respondents failed to consider the fair-use factors before sending their takedown notice, respondents can be held liable for damages under Section 512(f) on that basis alone, *whether or not* the video actually constituted fair use of the copyrighted work.

Petitioner likewise assumes (Pet. 10) that the phrase “misrepresents under this section” in Section 512(f) “includes a misrepresentation that one has formed a good faith belief required under Section 512(c).” *Ibid.* But that is not what the statute says. Although Section 512(c) specifies a number of representations that a takedown notice must contain, the only representation that (if knowingly false) can give rise to liability under Section 512(f) is the representation that the challenged material “is infringing.”⁴ If

⁴ Section 512(f)’s reference to misrepresentations made “under this section” does not suggest otherwise. That phrase performs a *limiting* function, by making clear that misrepresentations of infringement will give rise to damages liability under Section 512(f) only if those misrepresentations are made in Section 512(c) takedown notices. The phrase does not *expand* liability to cover the

petitioner’s video did not actually constitute fair use, respondents’ statement that the video was infringing was not a “misrepresent[ation],” whether or not respondents conducted any fair-use inquiry before sending their takedown notice.

The court of appeals’ analysis thus contains a significant legal error, and one that could give rise to unwarranted Section 512(f) liability in a case where the challenged material actually was infringing. This case does not provide a suitable vehicle for correcting that mistake, however, because the error potentially benefits petitioner and respondents have not sought review of that aspect of the court of appeals’ decision.

C. The Court Of Appeals’ Decision Does Not Warrant This Court’s Review

Petitioner does not contend that the court of appeals’ decision conflicts with any decision of this Court or another court of appeals. In fact, it appears that no other court of appeals has even discussed the showing required to recover under Section 512(f). And petitioner has not cited any decision, by any court, endorsing her view that a sincere but unreasonable belief can give rise to Section 512(f) liability. Two additional features of this case reinforce the conclusion that further review is not warranted.

First, the decision below is interlocutory. The district court denied the parties’ cross-motions for summary judgment, and the court of appeals affirmed. Ordinarily, the absence of a final judgment is “a fact that of itself alone furnishe[s] sufficient ground for the

additional representations that a takedown notice is required to contain.

denial” of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). If petitioner prevails at trial, the argument she seeks to raise now will become moot. And if she does not prevail, she can raise that argument—along with any others she may have—in a single petition for a writ of certiorari following a final judgment.

Second, this case has been litigated on the mistaken assumption that the standard for liability under Section 512(f) is governed by the meaning of the “good faith belief” statement required by Section 512(c)(3)(A)(v). That assumption was an unexamined premise of the court of appeals’ decision, see pp. 17-21, *supra*. It is also incorporated into the question presented and petitioner’s arguments on the merits. See Pet. i, 10, 12. And respondents have not questioned that premise, instead arguing primarily (Br. in Opp. 3-6) that the phrase “good faith belief” denotes a subjective state of mind rather than an objective reasonableness standard.

As a result, neither of the decisions below squarely considered the proper interpretation of the controlling language in Section 512(f). That failure provides sufficient reason to deny the petition because this Court is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And the usual reasons counseling against addressing questions that were not squarely passed upon below have added force where, as here, the parties’ filings in this Court likewise do not focus on the controlling statutory language.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

SARANG VIJAY DAMLE
*General Counsel and
Associate Register of
Copyrights*
REGAN A. SMITH
Deputy General Counsel
CINDY P. ABRAMSON
Assistant General Counsel
ANDREW P. MOORE
*Barbara A. Ringer Fellow
United States Copyright
Office*

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
*Acting Assistant Attorney
General*
MALCOLM L. STEWART
Deputy Solicitor General
BRIAN H. FLETCHER
*Assistant to the Solicitor
General*
MARK R. FREEMAN
SONIA K. MCNEIL
THAIS-LYN TRAYER
Attorneys

MAY 2017