

**SPOILER ALERT!: HOW POSTING PREDICTIVE  
SPOILERS ABOUT TELEVISION SHOWS ON THE INTERNET  
IS COPYRIGHT INFRINGEMENT**

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## I. INTRODUCTION

Today, nothing is sacred. The advent of the Internet, specifically social media sites, has created the perfect avenue for a whole host of people to ruin things for one another. Some things that consistently seem to be spoiled on Facebook, Twitter, and YouTube are the plots of people's favorite television shows. The day, or sometimes even hours, after a popular television show airs, there will be posts on social media about it. When that circumstance arises, steps to avoid finding those spoilers are just not signing into social media that day, but that urge can be hard to resist. But what happens when a person stumbles across a video or a blog post that predicts what is going to happen in next week's episode or the upcoming season? What happens when that person was correct in their analysis and has subsequently ruined the plot of that favorite television show?

Social media users are allowed to speculate about what may or may not happen, but the problem arises when these people become gifted at accurately predicting what will occur and plaster it all over the Internet, thereby spoiling the excitement of watching the television show live. Some television broadcast companies have decided enough is enough and have begun to protect themselves against what they perceive to be copyright infringement.<sup>1</sup>

Recently, television companies have taken very specific actions against these people for spoiling their content by informing them that it must be removed.<sup>2</sup> Companies such as HBO and AMC have sent YouTubers and Bloggers cease-and-desist letters and takedown notifications demanding that the predictive spoiler videos or posts be removed at once or be subject to litigation.<sup>3</sup> These companies have found the authority to send these demands in the Digital Millennium Copyright Act ("DMCA").<sup>4</sup>

Fans of these YouTube channels and blogs have made the counterargument that these big television companies are abusing their

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<sup>1</sup> See generally Shaanee Flowers, *'The Walking Dead' Spoilers: AMC Issues More DMCA Take-Down Notices to Stop Spoilers – Here's What We Know About Season 6 Finale So Far*, INQUISITR (Apr. 3, 2016), <http://www.inquisitr.com/2956885/the-walking-dead-spoilers-amc-issues-more-dmca-take-down-notices-to-stop-spoilers-heres-what-we-know-about-season-6-finale-so-far/>; Rob Price, *HBO is Using Copyright Law to Censor a YouTuber Who Keeps Leaking 'Game of Thrones' Spoilers in Advance*, BUS. INSIDER (May 9, 2016), <http://www.businessinsider.com/spanish-spoiler-hbo-uses-dmca-copyright-law-to-block-leaked-game-of-thrones-spoilers-youtube-frikidoctor-2016-5>.

<sup>2</sup> See generally Flowers, *supra* note 1; Price, *supra* note 1.

<sup>3</sup> See generally Price, *supra* note 1.

<sup>4</sup> See Price, *supra* note 1; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

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status and the DMCA to have these videos and posts removed when they truly are not infringing on any copyrights.<sup>5</sup> These fans believe that HBO and other television companies might be using the DMCA as a means to avoid embarrassment and prevent the commercially damaging effects of having their shows spoiled.<sup>6</sup> Fans feel that they are “gaming the system.”<sup>7</sup> In actuality, these television companies are not abusing the DMCA and are within their rights to have spoiler videos and posts removed from the internet.<sup>8</sup> This Note explores how specific predictive spoilers are a form of copyright infringement and argues that television companies are not abusing the DMCA when attempting to remove these videos and posts from the Internet.

## II. WHAT ARE PREDICTIVE SPOILERS AND ARE THEY INCLUDED IN THE FAIR USE DOCTRINE?

To better understand how television companies decide to issue takedown notifications and cease-and-desist letters to people posting predictive spoilers, predictive spoilers and spoilers after the fact must be distinguished from each other. Additionally, since these predictive spoilers happen before the television show even airs, predictive spoilers are not contemplated under the fair use doctrine of copyright law.

### A. *The Definition of a Predictive Spoiler*

The definition of a spoiler in the scope of television shows is “information about the plot of a motion picture or TV program that can spoil a viewer’s sense of surprise or suspense.”<sup>9</sup> Usually, people encounter spoilers after the television show has aired.<sup>10</sup> These include posts on social media accounts, blogs, or even websites specifically dedicated to spoilers that reveal what has just happened in a television show.<sup>11</sup> If someone does not have the opportunity to watch a television

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<sup>5</sup> Price, *supra* note 1.

<sup>6</sup> Price, *supra* note 1.

<sup>7</sup> Price, *supra* note 1.

<sup>8</sup> Price, *supra* note 1.

<sup>9</sup> *Spoiler*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/spoiler> (last visited May 10, 2018).

<sup>10</sup> See generally Dustin Rowles, *Why Do People Spoil? The Psychology Behind the Spoiler*, PAJIBA (Apr. 15, 2014), [http://www.pajiba.com/think\\_pieces/why-do-people-spoil-the-psychology-behind-the-spoiler.php](http://www.pajiba.com/think_pieces/why-do-people-spoil-the-psychology-behind-the-spoiler.php).

<sup>11</sup> See generally Noam Cohen, *Spoiler Alert: Whodunit? Wikipedia Will Tell You*, N.Y. TIMES (Sept. 17, 2010), <http://www.nytimes.com/2010/09/18/business/media/18spoiler.html?r=1&adxnnl=1&adxnnlx=1284931453-Cougj2fpRsBoD+tJX2gG5g>; see generally Hugh Hart, *Spoiler Wars Heat Up as Lost Returns*, WIRED (Jan. 21, 2009, 12:09 PM), <https://www.wired.com/2009/01/new-lost-season>, see generally *Spoilers*, TV LINE, <http://tvline.com/cate>

show when it first airs, it can be quite upsetting to find out the details of the episode before they have the opportunity to see it for themselves.<sup>12</sup>

The difference between this type of spoiler and a predictive spoiler is that a predictive spoiler is theorizing about what will happen in an upcoming episode or season of a television show rather than posting about something that has already aired.<sup>13</sup> To be predictive means “to declare or indicate in advance; *especially*: foretell on the basis of observation, experience, or scientific reason.”<sup>14</sup> So by combining the definitions of predictive and spoiler, there is an understanding that a predictive spoiler, in regards to television shows, is something that “foretell[s]” or observes based off of “observation [and] experience” “about the plot of a motion picture or TV program that can spoil a viewer’s sense of surprise or suspense.”<sup>15</sup> Television production companies are not worried about are the typical spoilers that come after a show has aired; they are concerned about their content being spoiled before they even have the chance to air it.<sup>16</sup> These production companies believe that when content is predicted so accurately and disseminated before it airs, this constitutes copyright infringement, but does this speculation about what might happen fall under the fair use doctrine?<sup>17</sup>

#### B. What Is the Fair Use Doctrine?

Fair use is judge-made law, which has been devised and refined in decades of case law.<sup>18</sup> Some examples of fair use the courts have considered over the years are:

[q]uotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged

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gory/spoilers/ (last visited May 10, 2018).

<sup>12</sup> Rowles, *supra* note 10.

<sup>13</sup> See generally Aja Romano, *Walking Dead and Game of Thrones Fans Say Networks Are Threatening to Sue Because They’re Too Good at Predicting the Show*, VOX (June 17, 2016, 12:00 PM), <http://www.vox.com/2016/6/17/11934146/amc-bans-spoilers-walking-dead-game-of-thrones>.

<sup>14</sup> *Predict*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/predict> (last visited May 10, 2018).

<sup>15</sup> *Spoiler*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/spoiler> (last visited May 10, 2018).

<sup>16</sup> Flowers, *supra* note 1.

<sup>17</sup> Flowers, *supra* note 1.

<sup>18</sup> H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79.

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copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.<sup>19</sup>

Since fair use is an equitable doctrine, each individual issue must be evaluated on its own.<sup>20</sup> The courts have systematically developed criteria with which to analyze particular fair-use claims.<sup>21</sup> These criteria are now codified in Title 17, Section 107 of the United States Code.<sup>22</sup> When assessing a fair-use defense, courts will consider:

(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.<sup>23</sup>

The facts of any particular case being analyzed for fair use do not have to meet all four of these criteria.<sup>24</sup> These criteria are intended to guide the courts and can be weighed in order to assist the court in deciding if the facts yield to the instance that they can be included under the fair use doctrine.<sup>25</sup> As Robert W. Kastenmeier, a former Representative from Wisconsin, wrote, “Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”<sup>26</sup>

### *C. Copyright Law and the Use of the Fair Use Doctrine*

Before the fair use doctrine can even come into play, the first question is whether the new work infringes on an already established copyright.<sup>27</sup> In order to determine if the predictive spoilers fall under the fair use

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-108).

<sup>23</sup> *Id.* (“Notwithstanding the provisions of sections 106 and 106A [17 USCS §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

<sup>24</sup> See D.R. Jones, *Commerciality and Fair Use*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 620, 621 (2015); see also RONALD S. ROSEN, MUSIC AND COPYRIGHT § 7.02 (2013).

<sup>25</sup> ROSEN, *supra* note 24; H.R. REP. NO. 94-1476, at 66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

<sup>26</sup> H.R. REP. NO. 94-1476, at 66.

<sup>27</sup> OFFICE OF THE GEN. COUNSEL, HARV. UNIV., COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY 1-8 (2016).

doctrine, it is important to understand how television companies have a copyright interest in the content of their television shows.<sup>28</sup>

#### *D. How to Obtain a Copyright*

The intention of a copyright is to “protect[] literary, musical, dramatic, choreographic, pictorial, graphic or sculptural works, motion pictures, and other audiovisual works, sound recordings, and architectural works from being reproduced, distributed, revised, or publicly performed or displayed without the permission of the copyright owner or as otherwise permitted by law.”<sup>29</sup> In order to obtain a copyright, the work must be original.<sup>30</sup> To be considered original, the work must meet two specific requirements.<sup>31</sup> These are independent creation and minimal creativity.<sup>32</sup> First, a work satisfies the independent creation requirement when it is not copied from another work.<sup>33</sup> Second, creativity is defined as “the ability to make new things or think of new ideas.”<sup>34</sup> Thus, “minimal creativity” suggests that the required threshold of creativity is very low and a small amount suffices.<sup>35</sup>

Additionally, the work must be in a fixed medium.<sup>36</sup> Specifically, the work must be “embodied in a copyright or phonorecord, by or under authority of the author, [or] sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>37</sup> These requirements incorrectly indicate that the work must be in writing or be an exact recording of what is being copyrighted.<sup>38</sup> Rather, the work only needs to be “capable of being reproduced . . . with the aid of a machine or device.”<sup>39</sup>

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<sup>28</sup> See generally *Copyright and Television*, JUST TV (July 13, 2007), <https://justtv.wordpress.com/2007/07/13/copyright-and-television/>.

<sup>29</sup> DAVID MIRCHIN, *A PRACTICAL GUIDE TO COPYRIGHT LAW IN THE DIGITAL AGE* (MCLE) § 1 (2002).

<sup>30</sup> STEPHEN FISHMAN, *COPYRIGHT AND THE PUBLIC DOMAIN* § 2.03 (2014) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see, e.g., *Durham Indus., Inc. v. Tommy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980).

<sup>34</sup> *Creativity*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, (11th ed. 2014).

<sup>35</sup> FISHMAN, *supra* note 30 (citing *Feist Publ'ns*, 499 U.S. at 345).

<sup>36</sup> FISHMAN, *supra* note 30, at § 2.02 (citing Douglas Lichtman, *Copyright As a Rule of Evidence*, 52 DUKE L.J. 683, 721 (2003)).

<sup>37</sup> FISHMAN, *supra* note 30, at § 2.02 (citing 17 U.S.C. § 101 (defining “fixed”)).

<sup>38</sup> FISHMAN, *supra* note 30, at § 2.02.

<sup>39</sup> FISHMAN, *supra* note 30, at § 2.02 (citing *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1007 (E.D. IL. 1982), *aff'd* 704 F.2d 1009 (7th Cir. 1982)).

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If a work meets the originality and fixed-medium requirements, it is automatically protected under copyright law.<sup>40</sup> It is not necessary for the creator to register the copyright; it becomes the property of the author once it is in a fixed form.<sup>41</sup> However, if an employee creates the work while under an employment contract, the law considers the employer, not the employee-creator, the author of this work.<sup>42</sup> This would be the case for television shows. The production company, not the writer or creator of the show (or any other artist involved), would own the specific copyright.<sup>43</sup> In order to have full rights to the copyrighted work, the production company would have to require the writer to sign a contract that his or her work is for-hire—a typical occurrence in the entertainment industry.<sup>44</sup>

There is a significant benefit to having a copyright officially registered with the U.S. Copyright Office.<sup>45</sup>

Registration establishes a claim to copyright. . . . Before an infringement suit may be filed in court, registration (or refusal) is necessary for works of U.S. origin. Registration establishes prima facie evidence of the validity of the copyright and facts stated in the certificate when registration is made before or within five years of publication. When registration is made prior to infringement or within three months after publication of a work, a copyright owner is eligible for statutory damages, attorneys' fees, and costs. Registration permits a copyright owner to establish a record with the U.S. Customs and Border Protection (CBP) for protection against the importation of infringing copies.<sup>46</sup>

Production companies like HBO and AMC go through this process to protect themselves from any infringement on their coveted content.<sup>47</sup> Indeed, since these copyrights enable production companies to charge for their content, these copyrights protect the bread and butter of how these companies ensure that they will make money.<sup>48</sup> Production companies are going to do everything and anything to make sure their copyrights are enforced, since that will ultimately take away from their revenue.<sup>49</sup>

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<sup>40</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 2 (2017), <http://www.copyright.gov/circs/circ01.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See generally *id.*; *Copyright and Television*, *supra* note 28.

<sup>44</sup> U.S. COPYRIGHT OFFICE, *supra* note 40, at 2-3.

<sup>45</sup> U.S. COPYRIGHT OFFICE, *supra* note 40, at 4.

<sup>46</sup> U.S. COPYRIGHT OFFICE, *supra* note 40, at 5.

<sup>47</sup> See generally U.S. COPYRIGHT OFFICE, *supra* note 40, at 5; see generally *Copyright and Television*, *supra* note 28.

<sup>48</sup> See generally *Copyright and Television*, *supra* note 28.

<sup>49</sup> See generally *Copyright and Television*, *supra* note 28.

Recently, Paramount Pictures Corporation (“Paramount”) and CBS Studios (“CBS”) took issue with an amateur film that was inspired by the series “Star Trek.”<sup>50</sup> This was the first time the studios ever brought a copyright infringement case against a fan of the series, despite numerous fan-inspired works in the past.<sup>51</sup> Paramount and CBS filed court papers alleging that the fan film “copied many of its copyrighted works, including the Starship Enterprise, Vulcans and the ‘interrelationship between species, planets and alliances.’”<sup>52</sup> This suit also contemplated whether or not the Klingon language is protected by copyright law.<sup>53</sup> The “Star Trek” lawsuit was carried through the federal court system for two years, and the parties ultimately settled.<sup>54</sup> For a successful production company, two years of litigation is not a serious expenditure—it has ample resources at its disposal to pursue a case.

*E. Why Predictive Spoilers Do Not Fall Under the Fair Use Doctrine*

Courts use four different criteria to determine if a work falls under the fair use doctrine.<sup>55</sup> These criteria are balanced to ensure “that the . . . copyrighted work is permissible because it is a non-infringing use.”<sup>56</sup>

Content for a television show can be categorized as literary, due to its script; musical, because of its score; and audiovisual—the actual television show itself.<sup>57</sup> Also, more specifically at issue here, the underlying storyline of a show is covered by copyright.<sup>58</sup> As previously mentioned, a work needs only to be able to be “capable of being reproduced . . . with the aid of a machine or device” for it to be protected by copyright law.<sup>59</sup> As such, when someone creates a predictive spoiler, he or she is infringing upon the idea of the underlying storyline of the television show.<sup>60</sup> These spoilers are created by either a YouTube video, a blog post, or any type of social media post, which are all created through

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<sup>50</sup> Christopher Mele, ‘Star Trek’ Copyright Settlement Allows Fan Film to Proceed, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/movies/star-trek-axanar-fan-film-paramount-cbs-settlement.html>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128).

<sup>56</sup> *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016).

<sup>57</sup> *See generally id.*

<sup>58</sup> *See generally* FISHMAN, *supra* note 30, at § 2.02.

<sup>59</sup> *See* FISHMAN, *supra* note 30, at § 2.02.

<sup>60</sup> *See generally* FISHMAN, *supra* note 30, at § 2.02.

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the use of the internet and a computer, which constitute a machine or device.<sup>61</sup>

But what about fair use? How could something created from one person's imagination be considered copyright infringement? Are these predictive spoilers, which are about shows that have not even hit mainstream television yet, covered by this doctrine? The simple answer is no. If this issue was litigated, courts would apply the four criteria outlined in 17 U.S.C.S. § 107 and determine that fair use is not applicable.<sup>62</sup>

The first criterion requires that courts determine "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>63</sup> Clearly, predictive spoilers are not for nonprofit educational purposes.<sup>64</sup> Indeed, if the creators of predictive spoilers use YouTube to distribute their content, they are potentially receiving revenue from their videos or channels.<sup>65</sup> On the other hand, they may not be receiving any revenue, since these spoilers might be posted on YouTube channels that were created for fun, personal use. As such, there may not be any commercial gain. However, if the creators of these predictive spoilers are making money off their work, then there is a commercial purpose, which weighs in favor of this not being fair use and infringing on a copyright.<sup>66</sup>

The second criterion that courts consider is "the nature of the copyrighted work."<sup>67</sup> This is often a difficult analysis, requiring fact-specific case-by-case examination without predetermined outcomes.<sup>68</sup> This particular criterion "calls for recognition that some works are closer to the core of intended copyright protection than others."<sup>69</sup> If a court finds that a predictive spoiler is infringing upon the specific protection that the copyright is intended for, then the spoiler cannot possibly fall under fair

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<sup>61</sup> See generally FISHMAN, *supra* note 30, at § 2.02.

<sup>62</sup> 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128).

<sup>63</sup> *Id.*

<sup>64</sup> See generally *id.*

<sup>65</sup> *Lesson: Earn Money with YouTube*, YOUTUBE, <https://creatoracademy.youtube.com/page/lesson/revenue-basics#yt-creators-strategies-3> (last visited May 10, 2018).

<sup>66</sup> See generally § 107; see generally H.R. REP. NO. 94-1476, at 65 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5678-79; *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1172 (9th Cir. 2012) ("[T]he Court harkened back to its explanation in *Harper v. Row* that commercial use 'tends to weigh against a finding of fair use,' and said 'but that is all.'").

<sup>67</sup> § 107.

<sup>68</sup> C. T. Drechsler, *Extent of Doctrine of "Fair Use" under Federal Copyright Act*, 23 A.L.R.3d 139, § 29d (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

<sup>69</sup> *Id.* at § 7a.

use.<sup>70</sup> The most common example is a predictive spoiler that infringes upon the plotline of the television show, which is the reason for which the production studio obtained a copyright. Such a spoiler does not fall under the second criterion of the fair use doctrine.<sup>71</sup>

The third criterion is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>72</sup> Here, courts weigh how much of the new work uses material from the original copyrighted work.<sup>73</sup> Generally, “the more of a copyrighted work that is taken, the less likely the use is to be fair.”<sup>74</sup> The plotline is the most coveted portion of a production company’s copyright on its television shows.<sup>75</sup> What keeps people coming back to watch the show live on television is the fact that its plotlines are interesting—and, critically, that they are unknown.<sup>76</sup> When predictive spoilers accurately display the plotline of a show, that unknown element has been obliterated.<sup>77</sup> There is no more surprise as to what might happen, because the spoiler has already mentioned it.<sup>78</sup> Courts may likely determine that, where predictive spoilers accurately predict an entire plotline, or at least a portion of it, then a large part of the copyrighted work has been used without the copyright holder’s permission. This may in turn cause courts to decide that predictive spoilers cannot fall under fair use under the third provision. However, the opposing argument is that because predictive spoilers “guess” what will happen without using actual footage or pieces of the script for the spoiler video or post, they do not use any part of the copyrighted material. Due to the consistent accuracy of these predictive spoilers, courts are likely to be more sympathetic toward production

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<sup>70</sup> *Id.*

<sup>71</sup> *See generally id.*

<sup>72</sup> § 107.

<sup>73</sup> *See generally* Swatch Grp. Mgmt. Servs. v. Bloomberg L.P., 756 F.3d 73, 89 (2d Cir. 2014).

<sup>74</sup> *Id.* (quoting *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998)).

<sup>75</sup> *See generally* Gregory Bernstein, *Understanding Copyright Law: Pitches, Facts, Characters and the Ambiguities of Section 102*, FILMMAKER (Jun. 10, 2015), <https://filmmaker magazine.com/94548-understanding-copyright-law-pitches-facts-characters-and-the-ambiguities-of-section-102/>.

<sup>76</sup> Todd Alcott, *Breaking Bad and the Importance of a Plot*, TODD ALCOTT: WHAT DOES THE PROTAGONIST WANT?, <http://www.toddalcott.com/breaking-bad-and-the-importance-of-plot.html> (last visited May 10, 2018).

<sup>77</sup> Jennifer Richler, *Scientific Explanations for Why Spoilers Are So Horrible*, ATLANTIC (Mar. 21, 2013), <http://www.theatlantic.com/entertainment/archive/2013/03/scientific-explanations-for-why-spoilers-are-so-horrible/274227/>.

<sup>78</sup> *Id.*

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companies, since they are being harmed by these spoilers leaking onto the internet.<sup>79</sup>

The final criterion is “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>80</sup> “[This factor] requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”<sup>81</sup> Arguably, the more people that know about how a show is going to end, the less likely they are to tune in and watch this television show live, if at all.<sup>82</sup> This will have a tremendous effect on the market of that television show if viewership drops.<sup>83</sup> As the audience for a television show declines, the likelihood of its cancellation rises, due to lack of interest from advertisers.<sup>84</sup> This, in turn, causes advertisers to drop out; they will not want to pay for a commercial for a show with smaller viewership.<sup>85</sup> A court looking at this factor would likely find that predictive spoilers do not fall within the confines of the fair use doctrine. The effect on the market for these production companies, who invest a large sum of money in their television content, could be great, which would make it unlikely that the court would find this an acceptable use of the fair use doctrine.

A court will have to balance all four factors of the fair use doctrine in order to decide if predictive spoilers fall under the protection of the fair use doctrine.<sup>86</sup> It seems likely that a court would find that predictive spoilers do not get the protection of the fair use doctrine since there are arguments for all four factors that weigh against the predictive spoilers. The production companies will likely prevail on their argument that predictive spoilers are copyright infringement.

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<sup>79</sup> See generally Price, *supra* note 1.

<sup>80</sup> 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128).

<sup>81</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (internal quotation marks omitted).

<sup>82</sup> See generally Michelle Jaworski, *The Definitive Guide to Muting TV Spoilers*, DAILY DOT (Apr. 14, 2014, 1:54PM), <http://www.dailydot.com/debug/how-to-avoid-spoilers-online>.

<sup>83</sup> See generally *id.*

<sup>84</sup> See Ashton Chan, *Why Do Great Shows Get Cancelled*, HUFFINGTON POST (Dec. 17, 2015, 2:37 PM), <https://www.huffingtonpost.com/ashton-chan/why-do-great-shows-get-cab8826798.htmlz>.

<sup>85</sup> See *id.*

<sup>86</sup> 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128).

## III. THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. *The History of the Digital Millennium Copyright Act and the Scope of How It Can Be Used*

“The DMCA was written in order to strengthen existing federal copyright protections against new threats posed by the Internet and by the democratization of high technology.”<sup>87</sup> Ushered in by the Clinton Administration in 1998, the DMCA made great strides in copyright law by implementing the WIPO Internet Treaties, “which set down international norms aimed at preventing unauthorized access to and use of creative works on the Internet or other digital networks.”<sup>88</sup>

The DMCA was strongly supported by the movie, music, and publishing industries, as well as by many other industries with the potential to be greatly affected by its copyrighted content finding its way onto the internet free of charge.<sup>89</sup> The DMCA created safe harbors for service providers, permitted temporary copies when there was computer maintenance; amended the Copyright Act, and created *sui generis* protection for certain designs.<sup>90</sup>

The DMCA includes a “safe harbor” provision that restricts a service provider from being found liable if one of its users commits copyright infringement.<sup>91</sup> A service provider “shall not be liable for monetary relief; . . . for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . . .”<sup>92</sup> The DMCA works by allowing copyright holders to issue takedown notifications to those they believe are infringing on their copyrighted work.<sup>93</sup>

Takedown notifications have specific requirements under the DMCA to be considered valid.<sup>94</sup> Once the notification meets these elements, then

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<sup>87</sup> *President Bill Clinton Signs the Digital Millennium Copyright Act into Law*, HISTORY, <http://www.history.com/this-day-in-history/president-bill-clinton-signs-the-digital-millennium-copyright-act-into-law> (last visited May 10, 2018).

<sup>88</sup> *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RES. LIBRIES., <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.WCOC5ZMrJ0s> (last visited May 10, 2018); *WIPO Internet Treaties*, WORLD INTERNET PROP. ORG., [http://www.wipo.int/copyright/en/activities/internet\\_treaties.html](http://www.wipo.int/copyright/en/activities/internet_treaties.html) (last visited May 10, 2018).

<sup>89</sup> *President Bill Clinton Signs the Digital Millennium Copyright Act into Law*, *supra* note 87.

<sup>90</sup> See generally Julia C. Blixrud, *Scholarly Communication and Public Policies: The Experience of the Association of Research Libraries*, 51 J. OF LIBR. ADMIN. 543, 543 (2011).

<sup>91</sup> 17 U.S.C.S. § 512(c) (LEXIS through Pub. L. No. 115-128).

<sup>92</sup> *Id.*

<sup>93</sup> See *id.*

<sup>94</sup> § 512(c)(3). The take-down notification must be in a written format and substantially

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the copyright holder will send the notification to the service provider's designated agent, and they will distribute it to the user who is allegedly infringing on a copyright.<sup>95</sup>

There has been great concern that large companies that hold copyrights, such as production companies for television shows and music, abuse the takedown notification process.<sup>96</sup> Though there has been some litigation claiming that these production companies possibly have under the DMCA safe harbor provision, the leading case on the DMCA's scope of authorization for takedown notifications and the doctrine of fair use is *Lenz v. Universal Music Corp.*<sup>97</sup>

Stephanie Lenz filed a lawsuit against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group ("Universal") for misrepresentation in their takedown notification.<sup>98</sup> Universal sent the takedown notification to Lenz alleging that her twenty-nine second YouTube video of her two small children dancing to *Let's Go Crazy* by Prince infringed upon their copyright of that song.<sup>99</sup> Lenz's claim asserted that Universal was abusing its power as a large company by issuing a takedown notification to her without considering if her use of the song fell under the provisions of the fair use doctrine.<sup>100</sup>

Sean Johnson, of Universal's legal department, was specifically assigned to monitor the content of YouTube for any possible infringing material.<sup>101</sup> He would evaluate whether the videos have segments of Prince's songs that were significantly recognizable or if the Prince song was the primary focus of the video.<sup>102</sup> These videos were then contrasted against videos that used only a second or less of a Prince song or where the song was almost indistinguishable.<sup>103</sup> Johnson recognized the Prince song immediately in Lenz's video and even noted that the title of the

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include the elements listed in § 512(c)(3)(A)(i)-(vi). *Id.*

<sup>95</sup> § 512(c).

<sup>96</sup> *See Act Now to Stop DMCA Takedown Abuse*, FIGHT FOR THE FUTURE, <http://www.takedownabuse.org/> (last visited May 10, 2018) ("For years, huge companies like Sony, Disney, and Comcast have been abusing a law called the DMCA to take down enormous swaths of online content, using automated software that ignores fair use rights and frequently misidentifies music and videos as copyrighted. Now these companies are launching a huge lobbying effort to make the DMCA even worse by forcing websites to play copyright cop and systematically take down user-uploaded content.").

<sup>97</sup> 815 F.3d 1145 (9th Cir. 2016).

<sup>98</sup> *Id.* at 1148.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1149.

<sup>102</sup> *Id.*

<sup>103</sup> *Lenz*, 815 F.3d at 1149.

video was “Let’s Go Crazy #1,” clearly indicating the use of the song.<sup>104</sup> Once he flagged Lenz’s video for Prince’s song, and not her dancing children, as the primary focus of her video, he sent YouTube a list of all the videos that needed to be sent a takedown notification—including Lenz’s.<sup>105</sup> As a required provision of the DMCA, the takedown notification identified that it was distributed with a good-faith belief that the content of the video infringed on a copyright.<sup>106</sup> The notification was sent to Lenz immediately and her video was subsequently removed from YouTube.<sup>107</sup>

Lenz attempted to send YouTube a counter-notification, which is allowed under §512(g)(3) of the DMCA, but failed because it did not include all the of the proper requirements.<sup>108</sup> Even though it was an improper counter-notification, Universal still responded by making clear that the video should not be permitted to be put back on YouTube due to the infringing material.<sup>109</sup> Lenz then sent a proper counter-notification and was successful in getting the video put back on YouTube, to the dismay of Universal.<sup>110</sup> She immediately filed an action that claimed misrepresentation by Universal in their takedown notification.<sup>111</sup>

The Ninth Circuit began its analysis by explaining the proper procedures required by a service provider in issuing a takedown notification and the user’s recourse through a counter-notification, all of which was procedurally correct by Universal, YouTube, and Lenz.<sup>112</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1149-50.

<sup>108</sup> *Id.*; 17 U.S.C.S § 512(g)(3) (LEXIS through Pub. L. No. 115-128) (“Contents of counter notification. To be effective under this subsection, a counter notification must be a written communication provided to the service provider’s designated agent that includes substantially the following: (A) A physical or electronic signature of the subscriber; (B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled; (C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; (D) The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.”).

<sup>109</sup> *Lenz*, 815 F.3d at 1149-50.

<sup>110</sup> *Id.* at 1150.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1151.

The court also noted that an entity can be found to abuse DMCA if they materially misrepresent “that the material or activity is infringing.”<sup>113</sup>

The court first addressed the question of whether fair use must be considered by a copyright holder before issuing a takedown notification.<sup>114</sup> Universal argued that fair use is an affirmative defense and thus not “authorized by law.”<sup>115</sup> The Ninth Circuit decided this was not a valid argument because fair use can be seen as a right and not an infringement, which makes it different from other affirmative defenses in copyright law.<sup>116</sup> Fair use is not something that excuses impermissible conduct, which is how it would qualify as an affirmative offense, because it is a permissible act under copyright law.<sup>117</sup> On this issue, the court concluded “that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is ‘authorized by the law’ and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).”<sup>118</sup> The court also stated that, if a copyright holder fails to consider fair use before issuing a takedown notification pursuant to § 512(c), then that copyright holder is liable for damages that are outlined in § 512(f).<sup>119</sup>

The standard for considering whether the material is infringing on a copyright is a subjective rather than objective.<sup>120</sup> It must just be a good-faith belief and the court held that “the willful blindness doctrine may be used to determine whether a copyright holder ‘knowingly materially misrepresent[ed]’ that it held a ‘good faith belief’ the offending activity was not a fair use.”<sup>121</sup> In order to use the willful blindness doctrine, the plaintiff must prove two factors: “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the

<sup>113</sup> *Id.*; § 512(f) (“Any person who knowingly materially misrepresents under this section—(1) that the material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages . . .”).

<sup>114</sup> *Lenz*, 815 F.3d at 1151.

<sup>115</sup> *Id.* at 1152.

<sup>116</sup> *Id.* at 1152-53.

<sup>117</sup> *Id.* at 1152.

<sup>118</sup> *Id.* at 1153.

<sup>119</sup> *Id.* at 1154.

{“IsDistinguishedFolder”:true,“FolderId”:{“\_\_type”:“FolderId:#Exchange”,“Id”:“AAMkAGM2ZTI2ZDZDNILTRkNTItNDE3My1iYzg5LTE3M2VmYWFjZjI5ZAAuAAAAAAAAA8WZShsOnJR7JJaj/Bee7jAQBly3bg+duZSaXo+W4wg+m0AABwELdIAAA=”,“ChangeKey”:“AQAAABYAAABly3bg+duZSaXo+W4wg+m0AALfaA0+”},“DragItemType”:4}

<sup>120</sup> *Lenz*, 815 F.3d at 1154 (citing *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004) (“When enacting the DMCA, Congress could have easily incorporated an objective standard or reasonableness. The fact that it did not do so indicated an intent to adhere to the subjective standard traditionally associated with a good faith requirement . . .”).

<sup>121</sup> *Id.* at 1155 (citing 17 U.S.C.S. § 512(c)(3)(A)(v), (f)).

defendant must take deliberate actions to avoid learning of that fact.”<sup>122</sup> Lenz was unsuccessful in her attempt to prove that Universal did not consider in good faith that her video was fair use.<sup>123</sup> In the court’s closing remarks, it stated, “[c]opyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by law.”<sup>124</sup>

### *B. How HBO and AMC Have Successfully Used the DMCA*

Only recently have big television companies started to go after the people who have created predictive spoilers by claiming copyright infringement.<sup>125</sup> These companies have successfully used the DMCA takedown notifications and cease-and-desist letters to get the infringing material removed from the internet.<sup>126</sup>

HBO had an issue with a YouTuber named Frikidoctor who became known for his “Game of Thrones” predicative spoilers.<sup>127</sup> He is very accurate with what he is predicting and may possibly have an inside source, though it seems he mostly uses his own mind and resources available to him to create his predictive spoilers.<sup>128</sup> He would use snippets of footage from the previous week’s episode and footage that HBO released for the “next week on Game of Thrones” segment to compile his predictions.<sup>129</sup> Some of his videos contained no footage of any kind and would just feature Frikidoctor sitting in front of a camera.<sup>130</sup> Once HBO realized the popularity of Frikidoctor’s videos, the company issued multiple takedown notifications through the authority of the DMCA.<sup>131</sup> They stated “[i]n short—HBO is asserting that these videos are infringing on its copyright by leaking and discussing spoilers, even if the videos don’t contain any actual leaked footage.”<sup>132</sup>

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<sup>122</sup> *Id.* (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1157.

<sup>125</sup> See Price, *supra* note 1; see Flowers, *supra* note 1.

<sup>126</sup> See Flowers, *supra* note 1.

<sup>127</sup> Timothy Geigner, *HBO Abuses the DMCA Process In The Name Of Game Of Thrones Spoilers*, TECHDIRT (May 1, 2016, 8:30 AM), <https://www.techdirt.com/articles/20160510/09181334398/hbo-abuses-dmca-process-name-game-thrones-spoilers.shtml>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Price, *supra* note 1.

<sup>132</sup> Price, *supra* note 1.

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Fans may be upset by this tactic, but that does not mean that HBO is wrong.<sup>133</sup> Dr. Andres Guadamuz of the University of Sussex told Business Insider, “[c]opyright protects an expression of the idea, not an idea itself, and while plot points might be an idea, the expression of that idea is protected. Characters, dialogue, plot twists . . . all of these are protected by copyright.”<sup>134</sup>

AMC used a similar tactic to go after a blog called “The Spoiling Dead.”<sup>135</sup> Again, this blog was targeted because their spoilers of the upcoming episodes of “The Walking Dead” were extremely accurate.<sup>136</sup> When “The Spoiling Dead” announced that they might reveal who Negan killed with his barbwire-covered baseball bat named “Lucille,” AMC used the counsel of Kilpatrick Townsend & Stockton LLP to issue a letter to the site about its copyright infringement under the DMCA.<sup>137</sup> “The Spoiling Dead” would have liked to fight these copyright infringement allegations made by AMC, but the site chose to not put its livelihood at stake and complied with the letter by taking down all of the spoilers.<sup>138</sup> In a Facebook post to their fans, the site said, “AMC has been harassing us for four days now by contacting our homes, our family members and our employers; even posting on this page and personal social media accounts. We are fans of this show just like you and are not a commercial operation that makes profit. We have families and careers to think about . . . . After consultation with our legal counsel, we have responded to AMC that the TSDF staff will not be posting our prediction on who gets ‘Lucilled’ on any of our outlets.”<sup>139</sup>

In the above examples “Game of Thrones” and “The Walking Dead” are based on a book series and a graphic novel, respectively.<sup>140</sup> In season five of “Game of Thrones” the show officially departed from the

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<sup>133</sup> See Price, *supra* note 1.

<sup>134</sup> Price, *supra* note 1.

<sup>135</sup> Flowers, *supra* note 1.

<sup>136</sup> Flowers, *supra* note 1.

<sup>137</sup> Andy, *AMC Threatens Copyright Lawsuit Over Walking Dead Spoiler*, TORRENTFREAK (June 14, 2016), <https://torrentfreak.com/amc-threatens-copyright-lawsuit-over-walking-dead-spoiler-160614/> (quoting The Spoiling Dead Fans (@SpoilingDeadFans), FACEBOOK (June 12, 2016, 1:37 PM), <https://www.facebook.com/SpoilingDeadFans/post/657869551034853>).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Michael Flemming, *HBO turns ‘Fire’ into fantasy series*, VARIETY (Jan. 6, 2007, 6:28 PM), <http://variety.com/2007/scene/markets-festivals/hbo-turns-fire-into-fantasy-series-1117957532/>; Brian Warmoth, *‘Walking Dead’ TV Series to Join ‘Mad Men’ on AMC, ‘Shawshank Redemption’ Director Attached*, MTV (Aug. 12, 2009), <http://www.mtv.com/news/2594806/walking-dead-tv-series-to-join-mad-men-on-amc-shawshank-redemption-director-attached/>.

books.<sup>141</sup> “The Walking Dead” is also dramatically different in its plotline than the comics the show is based on.<sup>142</sup> Noting that “Game of Thrones” deviated from the books in 2015 and that “The Walking Dead” did not track the comics exactly straight from the beginning, these predictive spoilers did not come from the fact that the creators had the books or comics right in front of them.<sup>143</sup> Both AMC and HBO did not begin using the DMCA takedown notifications until 2016.<sup>144</sup>

With the assistance of the DMCA, these production companies were able to successfully have the predictive spoilers removed from the internet.<sup>145</sup> But the question is, had these instances actually have been brought to litigation, would the courts find under these facts that these production companies did not abuse their power by issuing DMCA takedown notifications?

### C. DMCA v. Predictive Spoilers: The DMCA Wins

If either Frikidoctor or “The Spoiling Dead” brought lawsuits against HBO or AMC, the courts would likely go through the same step-by-step process used in *Lenz*.<sup>146</sup>

The first thing that the court will have to consider is whether the predictive spoilers are considered fair use.<sup>147</sup> As Part II-E of this note analyzed, there is a substantial argument that predictive spoilers do not fall under fair use.<sup>148</sup> Predictive spoilers can be interpreted as being used for a commercial gain, that they infringe upon what the core of the copyright is trying to protect, that a substantial portion of the copyrighted material was used in the new work, and that predictive spoilers have an effect on the show’s market.<sup>149</sup> It would be extremely difficult for

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<sup>141</sup> Paul Tassi, *Why ‘Game of Thrones’ Finally Outrunning The Books Is A Good Thing*, FORBES (Apr. 12, 2015, 6:59 PM), <http://www.forbes.com/sites/insertcoin/2015/04/12/why-game-of-thrones-finally-outrunning-the-books-is-a-good-thing/#36ec9c23553a>.

<sup>142</sup> Simon Haworth, *20 Big Differences Between The Walking Dead TV Show and Comics*, PASTE (Nov. 10, 2013, 8:07 PM), <https://www.pastemagazine.com/blogs/lists/2013/11/20-big-differences-between-the-walking-dead-tv-show-and-comics.html>.

<sup>143</sup> Tassi, *supra* note 141; Haworth, *supra* note 142; *see generally* Price, *supra* note 1; *see generally* Flowers, *supra* note 1.

<sup>144</sup> Price, *supra* note 1; Flowers, *supra* note 1.

<sup>145</sup> *See generally* Price, *supra* note 1; *see generally* Flowers, *supra* note 1.

<sup>146</sup> *See* *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150-53 (9th Cir. 2016).

<sup>147</sup> *See id.* at 1151.

<sup>148</sup> *See infra* Section II.E.

<sup>149</sup> *See infra* Section II.E; *see generally* 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128); H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79; *Monge v. Maya Mags., Inc.*, 688 F.3d 1164 (9th Cir. 2012); Drechsler, *supra* note 68; Price *supra* note 1; Chan, *supra* note 84.

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Frikidoctor or “The Spoiling Dead” to prevail on a claim that their predictive spoilers fall squarely under fair use.

In order to protect themselves, HBO and AMC would have to make a good-faith effort to ensure that these predictive spoilers do not fall under fair use.<sup>150</sup> As established in *Lenz*, this is done by ensuring that the production companies are not using the willful blindness doctrine.<sup>151</sup> HBO and AMC would need to recognize that the predictive spoiler is actually a fair use and then send the takedown notice anyway, causing themselves to be “willfully blind” to the fact that the particular predictive spoiler being considered is covered by the fair use doctrine.<sup>152</sup> As previously specified, HBO and AMC would just need to do a quick run through of the four fair use criteria; it would be easy for them to determine that they subjectively and in good faith believe that the predictive spoilers are not fair use, due to the description of how predictive spoilers are not covered by the fair use doctrine in part II-E.<sup>153</sup> Thus, the production companies would not be found to be in violation of § 512(f).<sup>154</sup> HBO and AMC would have a valid claim that the predictive spoilers posted by Frikidoctor and “The Spoiling Dead” are indeed copyright infringement. As long as HBO and AMC followed the DMCA specifications of a valid takedown notification, checked for fair use, and were able to prove their good-faith belief that the predictive spoiler did not constitute unfair use, then they would likely win this litigation.<sup>155</sup>

#### D. Creating A Burden of Proof

The creators of predictive spoilers will not appreciate the argument that their content is not covered by fair use. When a claim is brought against them for copyright infringement, they will want to prove that their content is under fair use. This will be a hard argument to justify for many reasons. To create a fair balance between the production companies and the creators of predictive spoilers, the predictive spoiler should have a burden of proof placed on them that their content is not stolen or fed to them by an inside source. Also, this should only be applied to users who are notorious predictive spoiler creators; i.e., someone who has posted more than three accurate predictive spoilers in a row. There is absolutely

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<sup>150</sup> See *Lenz*, 815 F.3d at 1153-54.

<sup>151</sup> *Id.* at 1155.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see § 107; see generally H.R. REP. NO. 94-1476, at 65; *Monge*, 688 F.3d 1164; Drechsler, *supra* note 68; Price, *supra* note 1; Chan *supra* note 84.

<sup>154</sup> 17 U.S.C.S. § 512(f) (LEXIS through Pub. L. No. 115-128).

<sup>155</sup> § 512(c)(3). The take-down notification must be in a written format and substantially include the elements listed in § 512(c)(3)(A)(i)-(vi). See *Lenz*, 815 F.3d at 1153-56.

a chance that any person could suspect what is going to happen in the next episode of a television series, post it somewhere on social media, and happen to be right. This may be the only time that this person posts a predictive spoiler by taking a wild guess as to the outcome of the plot. These people are not the type of predictive spoiler creators that production companies are targeting for copyright infringement.<sup>156</sup> Three correct predictive spoilers in a row creates a pattern and should be a red flag to production companies that something is awry with this creator. It would be overly burdensome to require production companies to designate someone to find every single predictive spoiler on the internet, as was done in *Lenz*, because some of these predictive spoiler posts are just guesses with no background information whatsoever.<sup>157</sup> Production companies are more concerned with targeting predictive spoiler creators who are notoriously accurate in their predictions week after week.<sup>158</sup> The question then becomes, do these people have inside sources or are they just really good at putting together the pieces of what has already been given to them by the production companies (for instance, the “on next week’s episode” segments)?

As long as the production company has considered fair use before issuing the takedown notification allowed under the DMCA, they should not be found liable for misrepresentation.<sup>159</sup> There should be the opportunity, though, that if the predictive spoiler creators did not have any inside information (which is highly doubtful considering their accuracy), they can prove to the court their thought process for producing the predictive spoiler independent of an inside source. This would create the opportunity for burden shifting and mitigating damages.

The first burden is on the production company to show that they reasonably and in good faith considered whether the predictive spoiler was protected by fair use.<sup>160</sup> As analyzed above, this is an easy point to prove. The production companies simply have to run through the four elements of fair use and make a good-faith showing in each of these categories on how the predictive spoiler is not covered by fair use.<sup>161</sup> The burden would then shift to the creator of the predictive spoiler to prove that they were able to come up with this prediction independent of inside information. The court can give them some deference if there is a trail of their thoughts that does not include inside information. This trail could

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<sup>156</sup> See generally Price, *supra* note 1; Flowers, *supra* note 1.

<sup>157</sup> *Lenz*, 815 F.3d at 1149.

<sup>158</sup> See generally Price, *supra* note 1; see generally Flowers, *supra* note 1.

<sup>159</sup> *Lenz*, 815 F.3d at 1154.

<sup>160</sup> *Id.*

<sup>161</sup> See 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128).

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include an outline of how they created their video, a list of all the sources they used, or the amount of time it took them to create the idea and then subsequently produce the video or blog post. This evidence would show how these spoilers were made with a correct prediction without the help of someone else. These burdens would be implemented for the more sophisticated YouTube user rather than a minor, for instance, who likes these shows and just so happens to guess correctly. This requirement would be established for the savvy adult user that has taken the time to compile a predictive video or blog post that is an accumulation of time and hard work in order to accurately predict what is going to happen in the upcoming episode. It seems unlikely that a child would have the time or patience to devote to a consistent YouTube channel or blog that can delve deeper into the thought process of what is going to happen on these television shows and get the correct answer. This establishes a very high standard for these sophisticated users, as there would need to be a hefty paper trail in proving that the spoiler was just a very accurate guess and that they were just lucky.

If predictive spoiler creators are committed to their work (some make a living by creating spoilers), they would have some sort of outlined thought process of how they came to their conclusions. Most creators of predictive spoilers correctly guess the plotlines of these shows on a consistent basis.<sup>162</sup> They are not just making one spoiler video and getting it correct. Since copyright law tries, in some sense, to promote creativity as opposed to stifling it, the courts might be more lenient towards a predictive spoiler creator that can prove beyond a reasonable doubt that he or she came up with the prediction independently.<sup>163</sup>

It would still seem likely though that the creator of a predictive spoiler would not win on a claim of fair use. This creation of a burden to prove beyond a reasonable doubt that they created this predictive spoiler on their own without the assistance of an inside source might make the courts be inclined to be a little more lenient in their holding for damages.<sup>164</sup>

#### IV. CONCLUSION

Predictive spoilers are a brand-new form of copyright infringement that is just being brought to the public's eye.<sup>165</sup> Up until the middle of 2016, television production companies had not targeted these spoilers,

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<sup>162</sup> See generally Price, *supra* note 1; see generally Flowers, *supra* note 1.

<sup>163</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>164</sup> 17 U.S.C.S. § 504(c)(2) (LEXIS through Pub. L. No. 115-128).

<sup>165</sup> See generally Price, *supra* note 1; Flowers *supra*, note 1.

until they decided that it was time to stand up for their copyrights.<sup>166</sup> The DMCA allowed this.<sup>167</sup> Through the use of takedown notifications, production companies were successfully able to remove these predictive spoilers from the internet.<sup>168</sup>

The four different sections of the fair use doctrine do not seem to apply to these predictive spoilers.<sup>169</sup> The spoilers are creating too much of a burden on the production companies, who rightfully bought the copyrights to these shows allowing them to be the first ones to distribute the content.<sup>170</sup> As long as the production companies follow what is required of them in their DMCA takedown notification, as discussed in *Lenz*, they will not be liable for misrepresentation and will have a good-faith belief that the predictive spoiler is not under fair use.<sup>171</sup> In order to try to mitigate their damages, the creator of predictive spoilers could attempt to show their thought process in regards to how they created their predictive spoilers. In conclusion, predictive spoilers are a form of copyright infringement and the production companies are not abusing their power by sending DMCA takedown notifications.

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<sup>166</sup> See generally Price, *supra* note 1; Flowers, *supra* note 1.

<sup>167</sup> 17 U.S.C.S. § 512(c) (LEXIS through Pub. L. No. 115-128).

<sup>168</sup> See generally Price, *supra* note 1; see generally Flowers, *supra* note 1.

<sup>169</sup> See 17 U.S.C.S. § 107 (LEXIS through Pub. L. No. 115-128).

<sup>170</sup> Stephanie Palmer, *How to Copyright and Protect Your Ideas*, GOOD IN A ROOM (June 26, 2013), <http://goodinaroom.com/blog/how-to-copyright-protect-your-ideas/>.

<sup>171</sup> See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016).