UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Rapid Relief Team (RRT) Ltd., Plaintiff and Counterclaim-Defendant, vs. Cheryl Bawtinheimer, Defendant and Counterclaim-Plaintiff, vs. Brown Rudnick LLP, Katy-Jade Church, and Michael Graif, Counterclaim-Defendants.	Civil Action No. 1:26-cv-07423-GHW **CHERYL BAWTINHEIMER'S RESPONSE TO COUNTERCLAIM-DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM COUNT ONE**

PRELIMINARY STATEMENT

The Court asked whether Second Circuit law changes anything about the motion to dismiss Count One. It does. The Second Circuit has not adopted the *Rossi*[1] or *Lenz*[2] decisions, and this Court should not do so. However, even under those decisions, dismissal is not warranted.

ARGUMENT

1.0 NO SECOND CIRCUIT CASE ADOPTS *ROSSI* OR *LENZ*

The Second Circuit has issued no opinion on 17 U.S.C. § 512(f). However, it *has* discussed, in the context of § 512(c), the key concept in this case – knowledge, and what that means under the DMCA. In *Viacom Int'l, Inc. v. YouTube, Inc.*, the Second Circuit held, uncontroversially, that

[1] *Rossi v. Motion Picture Association of America Inc*. 391 F.3d 1000 (9th Cir. 2004)
[2] *Lenz v. Universal Music Corp*., 815 F.3d 1145 (9th Cir. 2016)

willful blindness is knowledge under the DMCA. 676 F.3d 19, 34-35 (2d Cir. 2012). Sections 512(c) and (f) should be read *in pari materia*. "The use of similar language, let alone identical language, in two different provisions of the same statute is a strong indication that [the two provisions] should be interpreted pari passu. This principle of statutory construction holds true unless there is strong evidence that Congress did not intend the language to be used uniformly. *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54, 66 (2d Cir. 2006) (cleaned up). The *Viacom* knowledge standard under section 512(c) should, therefore, govern section 512(f).

Rossi, on the other hand, chose to redefine "knowingly" in a novel way that other circuits have not, requiring proof of actual subjective knowledge of a misrepresentation. 391 F.3d 1000, 1004-05. Essentially, without a confession by the defendant, section 512(f) has no effect in the Ninth Circuit. Outside the Ninth Circuit, only the Eleventh Circuit has approached the subject and it disagreed. *Alper Auto., Inc. v. Day to Day Imps., Inc*., 2022 U.S. App. LEXIS 22808, at *8 (11th Cir. Aug. 17, 2022). Applying the willful-blindness standard, it affirmed § 512(f) liability, noting that the court applies willful blindness to "show knowledge in other intellectual property cases." *Id.* at *9; *cf. Johnson v. New Destiny Christian Ctr. Church*, 826 F. App'x 766, 772 (11th Cir. 2020) (asking whether sender "had a *reasonable* good faith belief" (emphasis added)). While *Viacom* was not specifically a § 512(f) case, its recognition of "willful blindness" in the DMCA context should control here, and not *Rossi's* flawed analysis which is no more binding than *Alper* or *Johnson*.

Bawtinheimer acknowledges that other district courts here fell in line with *Rossi*/*Lenz*. But every decision cited in ECF No. 99 leads back to *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 44 (S.D.N.Y. 2017), which is not binding, and cited *Lenz* and *Rossi* in a single sentence without

analysis. None of those cases asked what "knowingly" means, how § 512(f) fits with the other knowledge provisions of § 512, or whether *Rossi* can be squared with *Viacom*.

2.0 THE SECOND CIRCUIT READS THE DMCA'S KNOWLEDGE TERMS AS CONGRESS WROTE THEM. *ROSSI* DID NOT

Section 512 describes state of mind three times. A service provider loses its safe harbor if it has "actual knowledge" of infringement, 17 U.S.C. §§ 512(c)(1)(A)(i), (d)(1)(A), or if it is "aware of facts or circumstances from which infringing activity is apparent," *id.* §§ 512(c)(1)(A)(ii), (d)(1)(B). A person who sends a takedown notice is liable if he "knowingly materially misrepresents…that material or activity is infringing." *Id.* § 512(f)(1). *Viacom* understood the differences in those terms. *Viacom* held that the DMCA leaves the common law of knowledge intact, so that willful blindness applies "to demonstrate knowledge or awareness of specific instances of infringement under the DMCA." *Viacom*, 676 F.3d at 35. "The principle that willful blindness is tantamount to knowledge is hardly novel. Willful blindness is knowledge… A person is willfully blind or engages in conscious avoidance amounting to knowledge where the person was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *Id.* at 34-35 (cleaned up).

Rossi hardly engaged with § 512(f) at all. The question in *Rossi* was what § 512(c)(3)(A)(v) means when it requires a notice to state a "good faith belief." The court held that *that* belief need only be subjective, then "[j]uxtapos[ed]" that provision with § 512(f) and concluded that "there must be a demonstration of some actual knowledge of misrepresentation." 391 F.3d 1000, 1004–05 (9th Cir. 2004). But "actual knowledge" appears nowhere in § 512(f), and that reading of it is inconsistent with Second Circuit law and Congressional intent. Congress used the phrase "actual knowledge" twice in the same section but chose a different word in § 512(f). In *Viacom*, the Second Circuit recognized that the choice of words in § 512 was deliberate. The Ninth Circuit ignores that.

A Second Circuit panel reading § 512 would disagree with *Rossi*, else it would have to overrule *Viacom*. *Rossi* departs from both the language of § 512(f) and its intent. The dissent in *Lenz* concurs. It warned that *Lenz* "eviscerates § 512(f) and leaves it toothless against frivolous takedown notices." 815 F.3d 1145, 1160 (9th Cir. 2016) (M. Smith, J., dissenting in part). It makes no sense that Congress intended to pass a meaningless 512(f). Nimmer observed that *Rossi* never decided whether § 512(f) is subjective or objective. It decided that question only under § 512(c), and *Lenz* then borrowed the answer for § 512(f) without asking whether it fit there. 4 Nimmer on Copyright § 12B.08. That house of cards would not stand in this Circuit.

Read the way the Second Circuit reads *the rest* of § 512, the misrepresentation provision asks whether the sender knew, or was willfully blind to, facts that made its claim of infringement false. Nothing in § 512(f) displaces the rule that willful blindness is knowledge, and under *Viacom* the Second Circuit would not invent such displacement. Fair use "is not an infringement of copyright." 17 U.S.C. § 107. Counterclaim-Defendants knew, or deliberately avoided knowing, facts that made it clear that Bawtinheimer's use was fair. Nothing more is needed to state a claim.[3]

3.0 WILLFUL BLINDNESS IS KNOWLEDGE IN THE SECOND CIRCUIT

This Circuit's treatment of willful blindness is a distinction that makes a difference. Under *Viacom*, willful blindness is knowledge for purposes of the DMCA. 676 F.3d at 35. Judge Karas in this District applied that rule to a § 512(f) claim. *Shaffer v. Kavarnos*, No. 23-CV-10059 (KMK),

[3] Brown Rudnick LLP, a Counterclaim-Defendant here, made this very argument in *Channel 781*, where it represents a § 512(f) plaintiff. It asked that court to "reject the Ninth Circuit's incorrect holding that Section 512(f) liability turns on subjective knowledge," argued that *Rossi*'s "statutory interpretation is also incorrect," and contended that "having knowledge of facts that are significant to fair use and failing to apply them is a form of willful blindness, which is tantamount to a knowing misrepresentation." *Channel 781 News v. Waltham Cmty. Access Corp.*, No. 24-cv-11927-PBS (D. Mass.), ECF No. 24 at 15–16; ECF No. 48 at 14. Brown Rudnick was right then. Ms. Bawtinheimer agrees with what Brown Rudnick argued, and undoubtedly will continue to argue to the First Circuit, when it was not the one being sued.

2025 U.S. Dist. LEXIS 153176, at *7–8 (S.D.N.Y. Aug. 7, 2025). This Court would not be blazing new ground by holding the same. Although the Ninth Circuit accepts willful blindness in principle, *Lenz*, 815 F.3d at 1155, its subjective test in practice protects senders who parrot "I considered fair use" whether or not anyone could believe it. This Circuit's law is incompatible with that view. In *Shaffer*, the sender was a YouTuber with no legal training, whose browser history showed she had read up on fair use before sending her notices. 2025 U.S. Dist. LEXIS 153176, at *7–8. She really tried, but she got it wrong, as a layperson. And it was a close call at trial. *Shaffer v. Kavarnos*, No. 23-CV-10059 (KMK), 2026 U.S. Dist. LEXIS 154733, at *13 (S.D.N.Y. July 8, 2026). Here, there is a different level of knowledge, as every sender was a sophisticated player. They knew better, and if that is not apparent from the existing facts, Bawtinheimer expects to prove it to a jury. ECF No. 26 ¶¶ 18–19. The Counterclaim pleads willful blindness, *id.* ¶ 75, and alleges facts in support. That is enough under *Viacom* and *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). *Shaffer* confirms that the question is answered by a trier of fact, not on a motion to dismiss.

4.0 EVEN UNDER *ROSSI* AND *LENZ*, THE COMPLAINT IS ADEQUATELY PLED

If the Court follows *Rossi* and *Lenz* (it should not), no distinctions matter. Judge Tigar already wrote why he found the Counterclaim sufficient. It alleges a campaign to silence criticism, a deliberate effort to trigger YouTube's repeat-infringer policy, notices signed by lawyers who know fair use well, and knowledge that the use was fair. ECF No. 66-1 at 7–9 (citing ECF No. 26 ¶¶ 14–15, 18–19, 74, 78). Nothing in Second Circuit law would challenge that outcome.

Courts in this District deny motions to dismiss § 512(f) claims that allege facts from which knowledge can be inferred. *White v. UMG Recordings, Inc.*, No. 20 Civ. 9971 (AT), 2021 U.S. Dist. LEXIS 243464, at *6 (S.D.N.Y. Dec. 21, 2021) (allegations "allow the Court to infer" sender knew posts were not infringing); *Paul Rudolph Found. v. Paul Rudolph Heritage Found.*, No. 20

Civ. 8180 (CM), 2021 U.S. Dist. LEXIS 188648, at *39 (S.D.N.Y. Sept. 30, 2021) (allegations of knowledge "sufficient as stated to survive a motion to dismiss"); *Distribuidora de Discos Karen C. por A. v. Seijas*, No. 13 Civ. 5200 (NRB), 2015 U.S. Dist. LEXIS 42636, at *22 (S.D.N.Y. Mar. 26, 2015) (claim against attorney who sent notice; parties directed to "proceed to discovery"); *see also Biosafe-One, Inc. v. Hawks*, 524 F. Supp. 2d 452, 469 (S.D.N.Y. 2007) (Chin, J.) (claimant "need only prove plaintiffs knew defendants were not infringing"). The choice between competing inferences is not a 12(b)(6) issue. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185-86 (2d Cir. 2012). Whether Counterclaim-Defendants actually believed what they told YouTube is a question for a jury, as *Lenz* itself recognizes. 815 F.3d at 1154 & n.3.

5.0 COUNTERCLAIM-DEFENDANTS' DISTINCTIONS ARE ERRONEOUS

The only Circuit distinction that Counterclaim Defendants identify in ECF No. 99 is that courts here "repeatedly dismiss[]" § 512(f) claims "at the pleading stage" when they rest "on a disagreement over fair use." ECF No. 99 at 2. Not so. *Hosseinzadeh* and *Stern v. Lavender*, 319 F. Supp. 3d 650, 683–84 (S.D.N.Y. 2018), were decided on summary judgment, and *Shaffer* after discovery and a trial the court called "close." *Shaffer*, 2026 U.S. Dist. LEXIS 154733, at *13. The only cases dismissed on the pleadings were when the complaint failed to plead knowledge. *Nat'l Acad. of TV Arts & Scis., Inc. v. Multimedia Sys. Design*, 551 F. Supp. 3d 408, 433 (S.D.N.Y. 2021); *Ningbo Mizhihe I&E v. Does 1-200*, 2020 U.S. Dist. LEXIS 76724, at *8 (S.D.N.Y. Apr. 30, 2020); *Cabell v. Zimmerman*, 2010 U.S. Dist. LEXIS 25486, at *4 (S.D.N.Y. Mar. 12, 2010).

Hughes v. Benjamin actually cuts in favor of Ms. Bawtinheimer. The court in *Hughes* decided fair use on the pleadings (it was fair use) and dismissed a § 512(f) claim (against the alleged infringer) because the counter-notice was "legally accurate." 437 F. Supp. 3d 382, 395 (S.D.N.Y. 2020). The same reasoning runs in reverse here. If Ms. Bawtinheimer's uses are fair,

seven sworn representations that they were "infringing" were legally inaccurate, so then we ask what the people who made them knew and when they knew it.

No court in this District has ruled against a claimant on the pleadings where the claimant alleged facts supporting knowledge. Brown Rudnick knows how these cases ordinarily proceed. It represented the § 512(f) plaintiff in *Channel 781 News v. Waltham Cmty. Access Corp.*, 761 F. Supp. 3d 371 (D. Mass. 2025), where the same claim on less egregious facts survived a motion to dismiss and was resolved only at summary judgment, after discovery. The summary-judgment ruling is now on appeal to the First Circuit. ECF No. 26 ¶ 18; *Channel 781 News v. Waltham Cmty. Access Corp.*, No. 24-cv-11927-PBS, 2026 U.S. Dist. LEXIS 184790 (D. Mass. Aug. 18, 2026), *appeal docketed*, No. 26-2099 (1st Cir. 2026). And in resolving that appeal, if Brown Rudnick is successful there, the First Circuit will also correctly pronounce that *Rossi/Lenz* is wrong.

CONCLUSION

The motion to dismiss Count One should be denied. *Rossi* and *Lenz* are flawed and nonbinding. The Court should read § 512(f) *in pari materia* with the way the Second Circuit reads the rest of § 512, and hold that it means what it says. A person who knowingly misrepresents that material is infringing, or who is willfully blind to the facts that make it false, is liable. But at the very least, even under *Rossi*/*Lenz*, the claim is properly pled.

Dated: October 29, 2026.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2026, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served on all appearing parties via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jay M. Wolman
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