

No. 16-217

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**In the Supreme Court of the United States**

STEPHANIE LENZ,

*Petitioner,*

v.

UNIVERSAL MUSIC CORP., UNIVERSAL  
MUSIC PUBLISHING, INC. and UNIVERSAL  
MUSIC PUBLISHING GROUP,

*Respondents.*

On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**BRIEF OF THE ORGANIZATION FOR  
TRANSFORMATIVE WORKS AND PUBLIC  
KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF  
THE PETITION**

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**Other Sources**

Andy, *Reddit Working on a Copyright Takedown Transparency Report*, TorrentFreak (Apr. 1, 2016), <https://torrentfreak.com/reddit-working-on-a-copyright-takedown-transparency-report-160401/> . . . . . 19

Comments of the Organization for Transformative Works, *Section 512 Study*, 80 Fed. Reg. 81862 (Copyright Office Apr. 1, 2016), available at <https://www.regulations.gov/document?D=COLC-2015-0013-86027> . . . . . 16

Ctr. for Democracy & Tech., *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (2010), available at [https://www.cdt.org/files/pdfs/copyright\\_takedowns.pdf](https://www.cdt.org/files/pdfs/copyright_takedowns.pdf) . . . . . 22

Tim Cushing, *Total Wipes Decides the Word 'Download' Means Infringement, Issues DMCA Takedown Loaded with Non-Infringing URLs*, Techdirt (Feb. 23, 2015), <https://www.techdirt.com/articles/20150222/12492130106/total-wipes-decides-word-download-means-infringement-issues-dmca-takedown-loaded-with-non-infringing-urls.shtml> . . . . . 19

Peter Kafka, *Veoh Finally Calls It Quits: Layoffs Yesterday, Bankruptcy Filing Soon*, CNet (Feb. 11, 2010), <http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/> . . . . . 6

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