

1 Jason Schultz (SBN 212600)
jason@eff.org
2 Corynne McSherry (SBN 221504)
corynne@eff.org
3 ELECTRONIC FRONTIER FOUNDATION
4 454 Shotwell Street
5 San Francisco, CA 94110
6 Telephone: (415) 436-9333 x112
7 Facsimile: (415) 436-9993

8 Attorneys for Plaintiff
9 KYLE MACHULIS

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 KYLE MACHULIS,)
13)
14 Plaintiff,) **COMPLAINT**
15 v.) **DEMAND FOR JURY TRIAL**
16 RICHARD SILVER,)
17)
18 Defendant.)
19)
20)
21)
22)
23)

24 1. This is a civil action seeking injunctive relief and damages for misrepresentation of
25 copyright claims under the Digital Millennium Copyright Act (“DMCA”); and for declaratory
26 relief.

27 2. This case arises out of a legal threat of copyright infringement issued by the
28 Defendant. The threat has successfully induced the removal of Plaintiff’s original work of
videography from the popular Internet media website YouTube.

29 **PARTIES**

30 3. Plaintiff Kyle Machulis (“Machulis”) is an individual residing in Berkeley, CA.

31 4. On information and belief, Defendant Richard Silver (“Silver”) is an individual
32 residing in Groton, Connecticut.

33 **JURISDICTION AND VENUE**

34 5. This Court has subject matter jurisdiction over this claim pursuant to the Copyright

1 Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338, and the Declaratory Judgment Act (28
2 U.S.C. § 2291).

3 6. Plaintiff is informed, believes and thereon alleges that Defendant has sufficient
4 contacts with this district generally and, in particular, with the events herein alleged, that he is
5 subject to the exercise of jurisdiction of this Court.

6 **VENUE AND INTRADISTRICT ASSIGNMENT**

7 7. Venue is proper in this district under 28 U.S.C. § 1391.

8 8. Assignment to the San Francisco/Oakland division is proper pursuant to Local Rule 3-
9 2(c) and (d) because a substantial portion of the events giving rise to this action occurred in this
10 district and division.

11 **FACTUAL ALLEGATIONS**

12 9. On January 20, 2007, Machulis attended a concert performance by the band Sublevel 3
13 in San Francisco, California. During the performance, he videotaped the audience, capturing
14 various scenes of the band, the crowd, and the goings-on that occurred around him. As part of the
15 five-minute long video, Machulis captured several concert-goers performing various improvised
16 informal dance steps, including one group performing a set of line-dancing steps for just over ten
17 seconds. He later transferred the video onto his computer and saved it as a video computer file
18 (“Sublevel 3 Video”).

19 10. On January 27, 2007, Machulis uploaded the Sublevel 3 Video from his computer to a
20 popular website on the Internet known as “YouTube” and available at the web address
21 www.youtube.com. YouTube is a video-sharing site where millions of Internet users can post
22 videos and make them available to others for viewing. These videos range from traditional home
23 videos of personal events, to news reports, to advertisements and television programs.

24 11. Richard Silver is an individual who claims to have invented the dance steps for “The
25 Electric” also known as “The Electric Slide,” a popular line dance from the 1970s and 1980s. He
26 also allegedly holds a copyright registration for a single video performance of the dance (“Silver
27 Video”). He maintains a website, <http://the-electricslidedance.com>, where he posts various
28 information about his career in dance and his choreography.

1 12. On January 29, 2007, Silver demanded that YouTube remove the Sublevel 3 Video
2 pursuant to the DMCA, 17 U.S.C. § 512. *See* Exhibit A. Specifically, Silver attested under penalty
3 of perjury that the notice of infringement was accurate and that he was authorized to make the
4 copyright infringement claim as owner of the choreography of the Electric Slide.

5 13. On January 29, 2007, YouTube sent Machulis an email notifying him that it had
6 removed his video pursuant to third party notification from <http://the-electricslidedance.com> that
7 the material was infringing. *See* Exhibit B. The email also warned Machulis that repeated
8 incidents of copyright infringement could lead to the deletion of his YouTube account.

9 **COUNT I: 17 U.S.C. 512(F) MISREPRESENTATION**

10 14. Plaintiff repeats and incorporates herein by reference the allegations in the preceding
11 paragraphs of this Complaint.

12 15. Upon information and belief, the Sublevel 3 Video does not infringe any copyright
13 owned by Silver due to Silver's failure to properly register his copyright, the uncopyrightability of
14 the "Electric Slide" dance steps, the lack of similarity between the Silver Video and the Sublevel 3
15 Video, and/or the fact that any similarity between the two videos would be non-infringing self-
16 evident fair use under 17 U.S.C. § 107.

17 16. Upon information and belief, Silver knew or should have known that the Sublevel 3
18 Video did not infringe any of his copyrights on the date he sent his DMCA complaint to YouTube.

19 17. Accordingly, Silver violated 17 U.S.C. § 512(f) by knowingly materially
20 misrepresenting that the Sublevel 3 Video infringed his copyright.

21 18. As a direct and proximate result of Silver's actions, Plaintiff has been injured
22 substantially and irreparably. Such injuries include but are not limited to the financial and personal
23 expenses associated with responding the complaint and the harm to his free speech rights under the
24 First Amendment.

25 **COUNT II: DECLARATORY RELIEF OF NON-INFRINGEMENT**

26 19. Plaintiff repeats and incorporates herein by reference the allegations in the preceding
27 paragraphs of this complaint.

28 20. There is a real and actual controversy between Machulis and Silver regarding whether

1 the Sublevel 3 Video constitutes infringement of a copyright lawfully owned by Silver.

2 21. Machulis contends that, consistent with the Copyright Act of the United States of
3 America, including those laws prohibiting direct, contributory or vicarious infringement, laws
4 protecting fair use and the First Amendment to the United States Constitution, and judicial
5 decisions construing such laws, doctrines, and provisions, posting of his footage was and is lawful;

6 22. Wherefore, Machulis requests that the Court determine and adjudge that each and
7 every one of the above-stated propositions states the law applicable to the facts involved in this
8 action.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, the Plaintiff prays for judgment as follows:

- 11 1. A declaratory judgment that the Sublevel 3 Video posted by Plaintiff does not
12 infringe any copyright owned by Defendant;
- 13 2. Injunctive relief restraining the Defendant, his agents, servants, employees,
14 successors and assigns, and all others in concert and privity with him, from bringing
15 any lawsuit or threat against Plaintiff for copyright infringement in connection with
16 the Sublevel 3 Video, including but not limited to its publication, distribution,
17 performance, display, licensing, or the ability to host it online or link to it from any
18 website;
- 19 3. Damages according to proof;
- 20 4. Attorneys fees pursuant to 17 U.S.C. § 512(f), other portions of the Copyright Act
21 including Section 505, on a Private Attorney General basis, or otherwise as allowed
22 by law;
- 23 6. Plaintiff's costs and disbursements; and
- 24 7. Such other and further relief as the Court shall find just and proper.

25 Plaintiff hereby requests a jury trial for all issues triable by jury including, but not limited
26 to, those issues and claims set forth in any amended complaint or consolidated action.

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DATED: March 1, 2007

By _____

Jason M. Schultz, Esq.
Corynne McSherry, Esq.
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x112
Facsimile: (415) 436-9993

Attorneys for Plaintiff
KYLE MACHULIS