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9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA

12 STEPHANIE LENZ,  
 13 Plaintiff,

14 vs.

15 UNIVERSAL MUSIC CORP.,  
 16 UNIVERSAL MUSIC PUBLISHING,  
 INC., and UNIVERSAL MUSIC  
 17 PUBLISHING GROUP,  
 18 Defendants.

CASE NO. CV 07-03783

REPLY IN SUPPORT OF MOTION TO  
 DISMISS PLAINTIFFS' SECOND  
 AMENDED COMPLAINT

[Supplemental Request for Judicial Notice filed  
 concurrently herewith]

Judge: Honorable Jeremy Fogel  
 Date: July 18, 2008  
 Time: 9:00 a.m.  
 Courtroom: 3

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1 **I. INTRODUCTION**

2 Claiming that the applicable law is “uncertain,” Plaintiff asserts that the Court should be  
3 “particularly hesitant to dismiss” her claim. Opp. at 15 (citing this Court’s decision in *Google*  
4 *Inc. v. American Blind & Wallpaper Factory, Inc.*, 2005 WL 832938 at \*5 (N.D. Cal. Mar. 30,  
5 2005)). However, the legal standards that apply to this motion are not at all unclear. As this  
6 Court held on the prior motion, *Rossi v. MPAA*, 391 F.3d 1000 (9th Cir. 2004), clearly holds that  
7 Plaintiff has to plead facts that show a “*knowing misrepresentation* on the part of the copyright  
8 owner.” Order, Apr. 8, 2008 at 5 (emphasis added). Plaintiff has failed to do this, and her  
9 complaint should be dismissed with prejudice for at least the following reasons:<sup>1</sup>

10 ***Plaintiff Has Failed To Plead That Universal Misrepresented Her Posting Infringed:***

11 Plaintiff’s exclusive reliance on the affirmative defense of fair use necessarily establishes that  
12 Universal’s statement that her use was infringing was true. For there to be a “fair use,” there first  
13 must be an infringing use. Plaintiff’s arguments that her use could be a “fair use” without  
14 infringing, or that Universal must be deemed to have impliedly represented that her use was not  
15 “fair,” are contrary to the Copyright Act and controlling case law.

16 ***Plaintiff Fails To Plead That Universal Knew It Was Making A Misrepresentation:***

17 Even if Universal’s notice somehow could be construed to make a representation about whether  
18 Plaintiff’s use would be excused as “fair,” Plaintiff has not demonstrated, as she must, that it is  
19 plausible to believe that Universal *knew* it was making a misrepresentation about fair use.  
20 Plaintiff’s argument that Universal may be charged with recognizing her use as “self-evidently”  
21 fair use is mistaken for the simple reason that there is no such thing as “self-evident” fair use, and  
22 Plaintiff to this day has not cited any authority showing that there is. Plaintiff’s own analysis of  
23 the four fair use factors under Section 107 confirms that her claim of “self-evident” fair use  
24 cannot substitute for pleading actual knowledge. Plaintiff is alleging that Universal *should have*

25 \_\_\_\_\_  
26 <sup>1</sup> It is clear from the face of Universal’s notice, SAC Ex. A, that Universal did not send its notice  
27 pursuant to the DMCA. Plaintiff is wrong that the Court must accept her allegation that  
28 Universal’s notice was sent pursuant to the DMCA. Whether YouTube is subject to Section  
512(c) of the DMCA, and whether Section 512(f) applies to notices sent to YouTube, are legal  
conclusions that are not affected by Plaintiff’s pleading. In any event, Plaintiff’s Section 512(f)  
claim fails for all of the other reasons discussed in the text.

1 *known* that her use was fair based on a *post hoc* inquiry into what she and her lawyers believe is  
2 an objectively reasonable fair use defense. What Plaintiff and the EFF think is “self-evident”  
3 about copyright law and the fair use doctrine is not even consistent with the governing case law;  
4 those views certainly cannot be imputed to Universal to plead its knowledge.

5 ***Plaintiff Fails To Plead Cognizable Damages Under Section 512(f)***: Even if there was a  
6 misrepresentation (which there was not), and even if Plaintiff pleaded actual knowledge (which  
7 she has not), Plaintiff’s claim still fails because she does not and cannot plead any cognizable  
8 damages.

9 Plaintiff’s inability to state a claim is not surprising. She has no claim, and never came  
10 close to alleging one. It is time for Plaintiff to heed the Ninth Circuit’s ruling in *Rossi*, and it is  
11 time for this case to be over.

## 12 **II. ARGUMENT**

### 13 **A. Plaintiff Has Failed To Plead An Actionable Misrepresentation: Universal’s** 14 **Representation That It Had A Good Faith Belief Plaintiff’s YouTube Posting** 15 **Was Infringing Was Indisputably True**

16 Plaintiff’s entire claim is based on Universal’s one-sentence assertion that it had “a good  
17 faith belief that the above-described activity is not authorized by the copyright owner, its agent, or  
18 the law.” SAC Ex. A. Plaintiff’s complaint and her opposition confirm that this statement was  
19 true. Unlike in *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), where  
20 the notice sender failed to identify any copyrighted content, *id.* at 1203, or *Rossi*, where the  
21 website operator claimed that no movies could be downloaded through his site, 391 F.3d at 1003,  
22 it is undisputed here that Plaintiff’s YouTube posting infringed a valid copyright. Plaintiff  
23 concedes that “Let’s Go Crazy” is an original work of authorship protected by copyright. *See* 17  
24 U.S.C. § 102. She concedes that the copyright holder has the exclusive “right to control the  
25 synchronization of musical compositions with the content of audiovisual works[.]” *Leadsinger,*  
26 *Inc v. BMG Music Publishing*, 512 F.3d 522, 527 (9th Cir. 2008). And she concedes that her  
27 YouTube posting *did* use “Let’s Go Crazy” in timed relation with the video images, Opp. at 3,  
28 which means that she infringed the exclusive synchronization right.

1 Based on these facts, and based on the fact that Plaintiff stakes her entire defense to “fair  
2 use” – an affirmative defense that presupposes a use that otherwise infringes – Plaintiff has  
3 conceded that Universal’s representation that Plaintiff’s YouTube posting infringed “Let’s Go  
4 Crazy” was *true*. Plaintiff makes two arguments to try to get around these inconvenient facts.  
5 Neither argument has merit.

6 **1. There Is No Support For Plaintiff’s Argument That A Fair Use**  
7 **Defense Exists Independent Of A Use That Otherwise Infringes**  
8 **Copyright**

9 Plaintiff first says that it is “[n]onsense” for Universal to argue that her exclusive reliance  
10 on the fair use defense implicitly concedes the truth of Universal’s representation that her use  
11 infringed the synchronization right. Opp. at 8. Plaintiff argues that the fact that fair use is raised  
12 as an affirmative defense is just a “procedural vehicle,” and she insists that a use can be “fair” and  
13 non-infringing without regard to whether it violates one of the exclusive rights under copyright.

14 Plaintiff’s argument is belied by the very “plain language” of Section 107 that she cites in  
15 her brief. See Opp. at 8. The preamble to Section 107 confirms that a use that is determined to be  
16 “fair” under the statute’s multi-factor balancing test is excused “[n]otwithstanding the provisions  
17 of [§] 106,” 17 U.S.C. § 107 (emphasis added), *i.e.*, *notwithstanding that the use otherwise*  
18 *infringes*. It is not surprising, therefore that the Supreme Court has expressly held that Congress  
19 “structured [Section 107] as an affirmative defense[,]” *Harper & Row, Publishers, Inc. v. Nation*  
20 *Enters.*, 471 U.S. 539, 561 (1985) (emphasis added), a holding the Court has reaffirmed.  
21 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).<sup>2</sup> It also is not surprising that  
22 courts have repeatedly made it clear that a fair use does not exist independent of an otherwise  
23 infringing use. See *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (“A fair-use analysis bears  
24 relevance *only when a challenged use violates a right protected by the Copyright Act.*”)

25 <sup>2</sup> Given the Supreme Court’s binding construction of the nature of Section 107 as an affirmative  
26 defense, Plaintiff’s footnote analogy to the law of libel for the proposition that a copyright  
27 claimant’s case includes an implied element of “not a fair use,” see Opp. at 9 n.2, falls flat. The  
28 analogy fails for other reasons as well. The truth or falsity of a statement is an objective fact.  
Whether a use is fair involves balancing mixed questions of law and fact. It is hardly surprising,  
therefore, that the law requires someone making an infringing use to plead the defense and to bear  
the burden of proving it.

1 (emphasis added)<sup>3</sup>; *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 573-74 (3d Cir. 2003)  
2 (“Fair use assumes that the defendant used the copyrighted material, but *provides a limited*  
3 *excuse.*”) (emphasis added).

4 Plaintiff’s reliance on *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417  
5 (1984), for her contrary argument, *Opp.* at 9, is misplaced. In *Sony*, it was undisputed that the  
6 unauthorized copying of copyrighted television programs *would* violate the copyright owners’  
7 exclusive reproduction rights under Section 106. That fact “notwithstanding,” however the  
8 majority (by a 5-4 vote, reversing the Ninth Circuit’s opposite conclusion) concluded that the use  
9 was “fair” under the multi-factor test of Section 107. 464 U.S. at 447-56. Even if *Sony* were  
10 ambiguous on the question whether fair use exists independent of infringing use, the Court’s  
11 decisions in *Harper & Row* and *Campbell* both post-date *Sony*, and those cases make clear that  
12 fair use is an affirmative defense. By relying exclusively on that affirmative defense, Plaintiff  
13 concedes the truth of Universal’s representation that her use infringed.

## 14 **2. Nothing In The DMCA Requires The Sender Of A Takedown Notice** 15 **To Make An *Ex Ante* Determination Of Fair Use**

16 Next, Plaintiff argues that even if Universal’s express representation was true, Universal  
17 should be deemed to have made an implied representation that she claims was false. Specifically,  
18 Plaintiff claims that Universal’s notice “necessarily embodied a corollary representation that her  
19 use was not a fair use.” *Opp.* at 9. This is so, Plaintiff argues, because “a DMCA notice sender  
20 must consider fair use prior to sending a DMCA notice.” *Opp.* at 16.

21 These are “necessar[y] embod[iments]” and statutory requirements entirely of Plaintiff’s  
22 imagination. Nothing in the DMCA, 17 U.S.C. § 512(c)(3), or YouTube’s Terms of Use, SAC  
23 Ex. B, requires the sender of a takedown notice to make an *ex ante* determination whether a use  
24 would be deemed to be “fair,” much less to make a representation about that determination under  
25 penalty of perjury. As the Ninth Circuit has emphasized, the DMCA is quite detailed in setting  
26 out what has to be in a compliant notice. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112  
27 (9th Cir. 2007). But the statute says not one word about the sender making determinations or

28 <sup>3</sup> Plaintiff herself relies on *Bond* in support of a different argument. *See Opp.* at 20.

1 representations regarding fair use. Under the principle of statutory construction *expressio unius*  
2 *est exclusio alterius*, the absence of a requirement to make a fair use determination means that  
3 one should not be implied.<sup>4</sup>

4 The legislative history and overall structure of Section 512 confirm that Congress did not  
5 intend to require copyright owners and senders of takedown notices to make *ex ante* fair use  
6 determinations. As Universal demonstrated in its opening brief, Mot. at 16-17, the DMCA's  
7 notice procedures "balance the need for rapid response to potential infringement with the end-  
8 users' legitimate interests in not having material removed without recourse." Sen. Rep. No. 105-  
9 190 at 21 (1998). In service of those ends, the statute includes not only a notification procedure,  
10 but a counter-notification procedure, which Plaintiff herself claims to have invoked. The counter-  
11 notification procedure, in particular, shows that, to the extent Congress intended for copyright  
12 holders to consider at all the possible merits of a fair use defense as part of the Section 512  
13 process, Congress intended that to be done at the counter-notification stage. It is at the point of  
14 the counter-notification that the copyright holder has a short time-fuse (14 days) to evaluate any  
15 asserted defenses to its good-faith belief of infringement and either file an infringement suit or let  
16 the online service re-post the material. 17 U.S.C. § 512(g)(2)(c). If a fair use defense has been  
17 asserted in the counter-notification, the copyright holder then has to consider the potential merits  
18 of that defense and decide whether to proceed to litigation. It is far more reasonable to believe  
19 that Congress intended for fair use to be considered (if at all) at the counter-notification stage,  
20 rather than *ex ante*, at the time an infringing use is discovered and a takedown notice is sent. This  
21 reading of the statutory structure makes sense, given the indeterminate nature of the fair use  
22 defense, and the implausibility that Congress intended to subject notice senders to liability for  
23 guessing incorrectly how that defense (were it to be raised at all) might be resolved.<sup>5</sup>

24 \_\_\_\_\_  
25 <sup>4</sup> In contrast, EFF's proposed "Fair Use Principles for User Generated Video Content" *would*  
26 require copyright owners to make such determinations prior to sending out notices. *See*  
Universal's RJN Ex. 6 at p.2. This simply underscores the fact that this litigation is an attempt to  
engraft onto the DMCA requirements that Congress did not see fit to adopt.

27 <sup>5</sup> Tellingly, Plaintiff fails to respond at all to Universal's argument regarding the significance of  
28 the counter-notification procedure. Plaintiff claims that the structure of Section 512(f) supports  
her proposed requirement of an *ex ante* fair use determination because "[i]f 512(f) liability were  
only available *after* an infringement action, there would be no point to the 512 process." Opp. at

1 Finally, nothing in the case law requires a copyright holder to conduct an *ex ante* fair use  
2 analysis before sending a takedown notice. Plaintiff’s argument that *Rossi* implicitly adopts such  
3 a rule is unfounded and wrong. As Universal explained in its opening brief, *see* Mot. at 17, *Rossi*  
4 rejected the argument that the notice sender has a duty to look for material rebutting its subjective  
5 belief of infringement. 391 F.3d at 1004. Plaintiff claims that the Ninth Circuit’s description of  
6 the facts known to the MPAA demonstrate that the Ninth Circuit actually did recognize a duty to  
7 investigate. *Opp.* at 15. The facts known to the MPAA were relevant, however, only because the  
8 website operator claimed there was no infringing content available through his site. 391 F.3d at  
9 1003. Of course, Plaintiff cannot make this argument since she admittedly made an unauthorized  
10 use of “Let’s Go Crazy.” Plaintiff’s claim that Universal had to go beyond asserting this  
11 (indisputably true) fact, to consider a fair use defense that was not raised until this lawsuit was  
12 filed, finds no support in *Rossi*.<sup>6</sup>

13 All available guides for statutory construction – text, structure, legislative history and case  
14 law – show there is no basis for construing Section 512 to require the notice sender to investigate  
15 and make a representation regarding a possible fair use defense. Universal’s notice accurately  
16 stated that Plaintiff’s use was unauthorized and infringing. Plaintiff fails to plead any  
17 misrepresentation, and her complaint can and should be dismissed on this ground alone.

18 **B. Plaintiff Fails To Support Her Claim That There Is Such A Thing As A “Self-  
19 Evident Non-Infringing Fair Use”**

20 Even if Universal’s notice can be construed to make the implied representation that  
21 Universal did not believe Plaintiff’s use would be deemed a fair use, Plaintiff’s claim still fails  
22 because she pleads no facts that make it plausible to believe Universal knew this implied  
23 representation was false.<sup>7</sup>

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24 19. Plaintiff’s all-or-nothing dichotomy between the 512 notice and an infringement lawsuit  
completely ignores the significance of the counter-notification procedure.

25 <sup>6</sup> Plaintiff also asserts that this Court’s decision in *Diebold* holds that a notice sender has an *ex*  
26 *ante* obligation to evaluate a possible fair use claim and make a representation about it. *Opp.* at  
27 17-18 (citing *Diebold*, 337 F. Supp. 2d at 1204). *Diebold* says no such thing. Had it said there  
was an obligation *ex ante* to consider and evaluate a possible fair use claim, that portion of the  
Court’s holding (like the portion adopting a “knew or should have known” standard of  
knowledge) would not have survived *Rossi*.

28 <sup>7</sup> Plaintiff erroneously suggests that requiring her to plead facts that make an inference of

1 Plaintiff continues to claim that her YouTube posting was so self-evidently “fair” that  
2 Universal must be deemed to have known it was fair use just by looking at it. Universal first  
3 pointed out nine months ago that there is no such thing as a fair use that is so “self-evident” as to  
4 be instantly and subjectively recognized as such by a copyright holder. In the intervening time,  
5 including in her opposition to the instant motion, Plaintiff has never cited a case for the  
6 proposition that such a creature exists in the law. The materials that Plaintiff does rely on  
7 confirm that “self-evident” fair use is a non-existent standard.

8 *First*, Plaintiff cites cases for the unsurprising proposition that courts have resolved fair  
9 use in the context of a motion to dismiss. Opp. at 19 (citing *Burnett v. Twentieth Century Fox*  
10 *Film Corp.*, 491 F. Supp. 2d 962, 975 (C.D. Cal. 2007); *Leadsinger*, 512 F.3d at 532-33).  
11 Plaintiff’s assertion that these cases are relevant is based on her mischaracterizing Universal’s  
12 position as one that fair use cannot “be assessed before discovery and trial[.]” *Id.* What  
13 Universal actually said is that the party claiming that its use is “fair use” has to raise that defense  
14 and then support it. *See* Mot. at 9. In the motion to dismiss cases, the defense was pleaded and  
15 litigated. In this case, fair use was not raised until Plaintiff filed this lawsuit – and the supposed  
16 elements that support the claim were not even articulated until Plaintiff filed her Second  
17 Amended Complaint. The motion to dismiss cases do not establish there is such a thing as a  
18 “self-evident” fair use.

19 *Second*, Plaintiff recycles (from her opposition to the first motion to dismiss) her reliance  
20 on cases awarding attorneys’ fees under 17 U.S.C. § 505. As Universal previously pointed out  
21 (and Plaintiff ignores), those cases are inapposite to Section 512(f), because they expressly  
22 inquire into “*the objective reasonableness* of the legal and factual positions advanced[.]” *Bond*,  
23 317 F.3d at 397 (emphasis added) (quotations omitted). Section 512(f), in contrast, turns on the  
24 notice sender’s “actual knowledge.” *Rossi*, 391 F.3d at 1005.<sup>8</sup>

25 knowledge “plausible” erroneously imposes upon her a heightened pleading obligation, in  
26 violation of Rule 9(b). *See* Opp. at 14 n.3. There is no merit to this argument. *Bell Atlantic v.*  
27 *Twombly*, 127 S. Ct. 1955 (2007), establishes the baseline pleading requirements for Rule 8,  
including knowledge. *Twombly* sets the applicable standard for Plaintiff’s claim of knowledge.

28 <sup>8</sup> As Universal also demonstrated, the attorneys’ fees cases that Plaintiff cites also are inapposite  
because in each the fee award was based on multiple factors, including the copyright claimant’s

1           Third, Plaintiff claims that the concept of “self-evident” and “unclouded” fair use was  
2 purportedly accepted in connection with a Section 512(f) complaint filed by EFF on behalf of  
3 “MoveOn.Org” against Viacom. Opp. at 20. Obviously, EFF’s self-serving press releases (*see*  
4 *also id.* at 17 n.5) do not have the force of legal precedent. This is especially true in the case of  
5 *MoveOn.Org v. Viacom*, where (1) the complaint alleging a “self-evident non-infringing fair use”  
6 was almost instantly dismissed, (2) no court ever considered the merits of the “self-evident” fair  
7 use claim, and (3) Viacom’s own correspondence to EFF makes it clear that Viacom’s  
8 determinations about not challenging certain uses of its content are made “[r]egardless of the law  
9 of fair use.”<sup>9</sup>

10           In sum, there is no such thing as a “self-evident” fair use. Even under her analysis of the  
11 law, Plaintiff was required to plead facts making it plausible to believe that Universal subjectively  
12 knew that Plaintiff would raise a fair use defense and that the defense would prevail. This  
13 Plaintiff has not done – nor could she ever.

14           **C. Plaintiff Fails To Plead Facts Showing That Universal Must Have Known**  
15           **That Her YouTube Posting Would Be Adjudicated To Be A Fair Use**

16           Plaintiff’s opposition confirms that her threadbare allegations of Universal’s supposed  
17 knowledge fails to satisfy *Rossi*. In fact, Plaintiff’s entire tack on the elements of Universal’s  
18 supposed knowledge show that Plaintiff once again is asserting liability based on an objective  
19 standard. In particular, Plaintiff attempts to divorce the two elements – knowledge and

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20 improper motivations that bear no resemblance to Plaintiff’s unauthorized posting that  
21 incorporated indisputably copyrighted music. *See Bond*, 317 F.3d at 397-98 (plaintiff had  
22 claimed copyright infringement when his spouse’s ex-husband attempted to introduce plaintiff’s  
23 manuscript into evidence in a child-custody case; court found fee award proper because “it was  
24 unreasonable for Bond to use a copyright infringement action to attempt to bar introduction of  
25 facts disclosed in the work as admissions against his interest, particularly when the information  
26 was relevant to child-custody issues”); *Video-Cinema Films, Inc. v. CNN*, 2003 WL 1701904 at  
27 \*3 (S.D.N.Y. Mar. 31, 2003) (finding that plaintiff’s stated propositions of law in opposition to  
28 major news networks’ fair use defense for broadcasting excerpted film footage of Robert  
Mitchum after the actor’s death were “objectively unreasonable”); *Religious Tech. Ctr. v. Lerma*,  
908 F. Supp. 1362, 1365-68 (E.D. Va. 1995) (infringement claim against *Washington Post* based  
on newspaper’s publication of quotations (obtained from copies in court records) of Scientology  
documents; Court expressed “serious reservations” about whether the documents at issue were  
“properly copyrighted,” and found that “the motivation of plaintiff in filing this lawsuit against  
*The Post* is reprehensible”).

<sup>9</sup> *See* Apr. 17, 2007 Letter from Mark C. Morril to Fred von Lohmann, available at  
[www.eff.org/cases/moveon-brave-new-films-v-viacom](http://www.eff.org/cases/moveon-brave-new-films-v-viacom) (Supp. RJN Ex. A).

1 misrepresentation – that are part of the single element she has to plead under *Rossi* and this  
2 Court’s prior Order, *i.e.*, a “*knowing misrepresentation.*” Order at 5 (emphasis added). First,  
3 Plaintiff argues that her allegations are sufficient to raise a disputed issue of fair use, and thus her  
4 claim of a misrepresentation should survive a Rule 12(b)(6) motion on misrepresentation. *See*  
5 *Opp.* at 10-13. Then, in a separate portion of her brief, Plaintiff claims to satisfy an entirely  
6 separate knowledge element by alleging that Universal is a “sophisticated” music company with  
7 “extensive experience with copyright law,” SAC ¶ 19, and that it must have recognized the merits  
8 of her defense. *Opp.* at 16-23.

9 Plaintiff’s approach reflects a fundamental misreading of *Rossi*, this Court’s Order and  
10 Section 512(f). All of those authorities required Plaintiff to plead that Universal *knew* it was  
11 making a *misrepresentation*. By decoupling the allegations of Universal’s knowledge from the  
12 allegations about what Universal supposedly misrepresented, Plaintiff attempts to transform the  
13 standard into one of objective reasonableness. If Plaintiff’s view were the law, a Section 512(f)  
14 claimant could always get past a Rule 12(b)(6) motion (at least whenever a “sophisticated”  
15 copyright owner is the defendant – which will be often) simply by alleging that the claimant’s use  
16 *could* be deemed to be a fair use. *Rossi*, this Court’s Order and Section 512(f) all require that the  
17 claimant’s allegations make it plausible to believe the defendant knew the use *would* be deemed  
18 to be a fair use.

19 Plaintiff’s allegations do not make it at all plausible to believe that Universal knew not  
20 only that a fair use defense would be raised, but that if raised a court would resolve the defense in  
21 Plaintiff’s favor. Each of Plaintiff’s fair use allegations rests upon either facts that (if true) were  
22 known exclusively to Plaintiff; idiosyncratic (and erroneous) interpretations of the law of fair use  
23 advocated by Plaintiff’s lawyers but not accepted by the courts; or both.

#### 24 **1. Plaintiff’s Purposes For Her Use Were Known Only To Her**

25 As demonstrated in Universal’s opening brief, Plaintiff’s alleged justifications for posting  
26 her “Let’s Go Crazy” video were known exclusively to her. *Mot.* at 11-12. Specifically, Plaintiff  
27 alleges in her Second Amended Complaint that she wanted her “friends and family” – and in  
28 particular her mother, who is alleged to have “difficulty downloading email files but knows how

1 to access the YouTube website” – to be able to view the video. SAC ¶¶ 12, 16. Leaving aside the  
2 absurdity of this allegation, there is no way that Universal could have known any of these alleged  
3 purposes.

4 In response to Universal’s motion, Plaintiff simply tries to ignore what she has pleaded.  
5 Without mentioning her friends or her mother (or her mother’s alleged difficulty downloading  
6 videos), Plaintiff flatly asserts that “Universal does not dispute ... that the video was made  
7 available on YouTube for noncommercial purposes,” and that it must be deemed to be  
8 “transformative,” because it adds Holden’s dancing to Prince’s song. Opp. at 10.

9 Contrary to Plaintiff’s *ipse dixit*, Universal *does* dispute that when it sent the notice, it  
10 “must have known” that Plaintiff’s purposes were noncommercial, because Plaintiff has not  
11 alleged any facts showing that Universal must have known this to be true. Likewise, Plaintiff’s  
12 self-serving declaration that her use was “transformative” does not make it so. For purposes of  
13 Section 512(f), Plaintiff’s calling her use transformative does not make it plausible to believe that  
14 Universal must have known that a court would deem her use to be transformative. The use, it  
15 must be emphasized, was not the making of a “home movie.” It is the use of the music in a  
16 YouTube posting, which anyone in the world with a computer can access and play (as has been  
17 done now more than 493,000 times, and counting). That use does not on its face does not fit  
18 within any of the examples of fair use recognized in the preamble to Section 107 – not even close.  
19 And while the preamble is not exhaustive of uses that may be fair, Plaintiff’s use also does not fit  
20 within any recognized purpose for fair use that has been recognized in the case law, such as  
21 parody. Indeed, Plaintiff does not cite a single case that holds that the use of copyrighted music  
22 in a posting on a user generated website is transformative. It is not plausible to believe that  
23 Universal – a company that generates revenue from authorized uses of its copyrighted music in  
24 music videos – would know that such a use in a YouTube posting available to a mass audience is  
25 transformative.

26 Plaintiff’s allegations fail to establish that Universal knew Plaintiff’s posting would be  
27 deemed to satisfy the first fair use factor as a matter of law.  
28

1                   **2. Plaintiff Attempts To Dismiss The Second Factor’s Significance**  
2                   **Without Support In Copyright Law**

3                   Because she could not plead any facts regarding the second fair use factor (“the nature of  
4                   the copyrighted work,” 17 U.S.C. § 107(2)), Plaintiff just ignored this factor in her complaint.  
5                   See Mot. at 13. Having been called out on that omission, Plaintiff now attempts to sidestep this  
6                   factor by claiming that it is “not ... terribly significant in the overall fair use balancing.” Opp. at  
7                   11 (quoting *Mattel Inc. v. Walking Mountains Prods.*, 353 F.3d 792, 803 (9th Cir. 2003)). In fact,  
8                   the case that Plaintiff cites (*Mattel*), in accordance with Supreme Court precedent, shows that the  
9                   second factor is not “terribly significant” in *parody* cases. See *Mattel*, 353 F.3d at 803. Accord  
10                  *Campbell*, 510 U.S. at 586 (“This fact, however, is not much help in this case, or ever likely to  
11                  help much in separating the fair use sheep from the infringing goats *in a parody case*, since  
12                  parodies almost invariably copy publicly known, expressive works.”) (emphasis added).  
13                  Plaintiff’s YouTube posting, of course, is not a parody. Plaintiff did not use “Let’s Go Crazy” so  
14                  that she could comment on the song or Prince. She used it for a globally accessible web posting  
15                  that takes the song’s title and that makes prominent use of the music by synchronizing its words  
16                  and lyrics (“C’mon baby, Let’s get nuts”) with the video images. Expediency is not parody.  
17                  Nothing “invariably” required that Plaintiff use copyrighted music in her posting (or that she title  
18                  the video “Let’s Go Crazy #1”).<sup>10</sup>

19                  For purposes of drawing inferences about Universal’s knowledge (which is the relevant  
20                  inquiry), the significance of the second factor cannot be brushed aside, and it certainly cannot be  
21                  ignored based on Plaintiff’s incorrect view of the law. This factor makes it implausible to believe  
22                  that Universal knew Plaintiff’s use would be deemed to be a fair use.

23                   **3. Plaintiff’s Allegations Regarding The Third Factor Do Not Make It**  
24                   **“Clear” That Universal Knew This Factor Would Support Plaintiff**

25                  Plaintiff insists that “[t]he reasons this [third] factor favors Lenz ... are all clear to anyone  
26                  who views the video[.]” Opp. at 22. These purportedly “clear” “reasons” are that the song is

27                  <sup>10</sup> In fact, YouTube’s published copyright policy expressly informed Plaintiff *not* to use  
28                  copyrighted music in her posting. See RJN Ex. 4 (“if you use an audio track of a sound recording  
owned by a record label without that record label’s permission, your video is infringing the  
copyrights of others, and we will take it down as soon as we become aware of it.”).

1 mixed with background noise of children playing, that Lenz says she used “only” 20 seconds of  
2 the song, and that it is “the necessary background of the almost equally brief video.” *Id.* at 11.

3 As Universal showed in its motion, the “reasons” that factor three must have been seen to  
4 favor Plaintiff are anything but “clear.” Mot. at 13-14. Plaintiff’s claim that Universal *must* have  
5 recognized that “Let’s Go Crazy” was mere background music is contradicted by the facts (which  
6 are apparent from the posting) that (1) the posting is titled “Let’s Go Crazy #1,” (2) Plaintiff says  
7 to her child, “what do you think of the music?,” (3) the posting incorporates the lyrical verse,  
8 “C’mon baby, Let’s get nuts,” and (4) the claimed background noise in fact is the song’s frenetic  
9 guitar solo, which plays simultaneously with the images of Plaintiff’s children running around the  
10 kitchen. The actual facts, as opposed to Plaintiff’s *post hoc* rationalizations, do not provide any  
11 basis for inferring that Universal knew this fair use factor would favor Plaintiff.<sup>11</sup>

#### 12 4. Plaintiff’s Allegations Regarding The Fourth Fair Use Factor Reflect 13 Legal Error, Not Factual Disagreement

14 Plaintiff tries to create a non-existent fact issue by claiming that Universal “takes issue”  
15 with her allegations on factor four “because Universal disagrees with the facts as pled.” Opp. at  
16 12. Not so. Universal pointed out that Plaintiff’s allegation on factor four was based on an  
17 incorrect *legal* standard. Specifically, Plaintiff’s allegations focus solely on the potential effect of  
18 *her use, standing alone, see* SAC ¶ 18, whereas the Supreme Court has held that factor four asks  
19 “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would  
20 result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510  
21 U.S. at 590 (quotation omitted).

22 In response, Plaintiff tries to define the relevant class of unrestricted uses as narrowly as  
23 she can – she describes it as a potential market for “recordings as incidental background music in  
24 home videos” – and then urges the Court to let her take discovery on the potential impact on *that*  
25 narrow market. Opp. at 12-13. Plaintiff’s argument is too cute by half. Again, it must be  
26 emphasized that Plaintiff’s use is no mere “home video,” but rather a posting to YouTube, where

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27 <sup>11</sup> While Plaintiff’s claimed purpose – that her friends and family would enjoy *seeing* Holden’s  
28 new ability to dance, SAC ¶ 16 – could not have been known to Universal, it must be noted that  
Plaintiff could have achieved this purported purpose *without* the sound of “Let’s Go Crazy.”

1 anyone in the world can (and where nearly a half-million people have) played Plaintiff's video on  
2 demand. To get past a Rule 12(b)(6) motion and burden Universal with discovery, Plaintiff is  
3 required to plead facts that make it plausible to believe that Universal must have known this  
4 factor would be weighed against it. Plaintiff does not meet this burden by adopting an  
5 exceedingly narrow and inaccurate description of the class of uses implicated by her posting, and  
6 then insisting that it is plausible to believe Universal may have accepted this crabbed definition.

7 None of Plaintiff's fair use allegations make it plausible to believe that Universal knew  
8 that Plaintiff's fair use contentions would be raised or that a court would credit them. Plaintiff  
9 has failed entirely to plead the required element that Universal actually knew it was making a  
10 misrepresentation about whether Plaintiff's use was fair.

11 **D. Plaintiff Fails To Allege Any Cognizable Damages Under Section 512(f)**

12 Plaintiff does not (because she cannot) dispute that she is required to plead damages are an  
13 element of her Section 512(f). Plaintiff instead claims that she adequately pleads damages. She  
14 is wrong on every score.

15 *First*, Plaintiff asserts that she "spen[t] her limited time" reacting to Universal's notice and  
16 preparing her five-paragraph email response. Opp. at 23. Plaintiff does not suggest how, absent  
17 some concrete loss, her "limited time" spent reading and typing emails constitutes compensable  
18 damages. It does not.

19 *Second*, Plaintiff asserts that she was damaged by the supposed "depriv[ation] of  
20 YouTube's video hosting services" for her posting. Opp. at 23. This did not "damage" Plaintiff,  
21 because she pays nothing for YouTube's "hosting services."<sup>12</sup> Plaintiff's speculation about what  
22 her damages *might* have looked like had she paid an alternative service to host this posting is a  
23 *non sequitur*; Plaintiff does not allege that she spent a cent on such a service. Plaintiff's footnote

24  
25 <sup>12</sup> Plaintiff's claim of damage in this regard undermines her claimed purpose (known, if at all, to  
26 her) that she posted the video solely so her family and friends could see it. By Plaintiff's own  
27 admission, her posting was on YouTube for four months before Universal sent its notice, and her  
28 friends and family had ample opportunity to view it. See Opp. at 21 n.7; SAC ¶¶ 12, 21.  
Plaintiff's assertion that she was damaged when access was blocked after four months indicates a  
purpose to have the posting played (as it has been) by a significantly larger audience of  
unaffiliated persons.

1 suggestion that her supposed lost access improperly denied her valuable “consideration” under  
2 her purported “contract” with YouTube, *id.* at 23 n.11, is a red herring. Plaintiff continued to  
3 have full access to YouTube for multiple of her other postings. *See* Klaus Supp. Decl. Ex. E in  
4 Support of First Motion to Dismiss, Dec. 3, 2007 (Docket No. 29). And her supposed “contract”  
5 (YouTube’s Terms of Use) expressly provides for what happened here: a notice, a temporary  
6 takedown, a counter-notice, and a re-posting. Even assuming there was a contract, Plaintiff  
7 cannot claim as damages a loss of “consideration” when there was no breach.

8 *Third*, while admitting that Universal is not subject to the First Amendment, Plaintiff  
9 nevertheless bizarrely asserts that Universal damaged her “free speech” rights. *Opp.* at 23-24.  
10 The disconnect in Plaintiff’s logic is manifest. Plaintiff cannot claim First Amendment damages  
11 when she has no First Amendment claim.

12 *Fourth*, Plaintiff claims that her damages include EFF’s costs in *pursuing this litigation*.  
13 What counts under the statute, however, are damages that Plaintiff “incurred” because of the  
14 notice. *Opp.* at 24. While the prevailing party in litigation under Section 512(f) can recover its  
15 attorney’s fees and costs, Plaintiff cannot bootstrap those fees and costs into her claimed  
16 underlying “injury” under Section 512(f) . *Cf. Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d  
17 950, 959 (9th Cir. 2007) (damage element is distinct from award of attorney’s fees Clayton Act,  
18 15 U.S.C. § 15(a) ).

19 *Fifth*, and finally, Plaintiff does not even attempt to defend her request for injunctive  
20 relief, which Section 512(f) does not authorize.

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**III. CONCLUSION**

Plaintiff's Second Amended Complaint should be dismissed with prejudice.

DATED: July 3, 2008

MUNGER, TOLLES & OLSON LLP

By:                   /s/ Kelly M. Klaus                    
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