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9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

11
 12 STEPHANIE LENZ,
 13 Plaintiff,
 14
 15 vs.
 16 UNIVERSAL MUSIC CORP.,
 UNIVERSAL MUSIC PUBLISHING,
 17 INC., and UNIVERSAL MUSIC
 PUBLISHING GROUP,
 18 Defendants.

CASE NO. CV 07-03783

NOTICE OF MOTION AND MOTION TO
 DISMISS PLAINTIFFS' SECOND
 AMENDED COMPLAINT PURSUANT TO
 FED. R. CIV. PROC. 12(B)(6);
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF

(Request for Judicial Notice and Proposed
 Order filed concurrently herewith)

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

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on July 18, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 3 of the above-captioned Court, located at 280 South First Street, San Jose, California, 95113, Defendants Universal Music Corp., Universal Music Publishing, Inc. and Universal Music Publishing Group (“Defendants” or “Universal”) will and hereby do move the Court for an Order dismissing with prejudice Plaintiff’s Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the Second Amended Complaint fails to state a claim upon which the Court may grant Plaintiff relief.

This Motion is based upon this Notice of Motion and Motion; the Memorandum of Points and Authorities and Request for Judicial Notice and all exhibits thereto that are being filed concurrently with this Motion; all pleadings and documents on file in this action; and such other materials or argument as the Court may properly consider prior to deciding this Motion.

DATED: May 23, 2008

MUNGER, TOLLES & OLSON LLP

By: /s/ Kelly M. Klaus
KELLY M. KLAUS

Attorneys for Defendants
UNIVERSAL MUSIC CORP.,
UNIVERSAL MUSIC PUBLISHING, INC.,
AND UNIVERSAL MUSIC PUBLISHING
GROUP

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Continuing their quest to rewrite both the Copyright Act and controlling Ninth Circuit
4 law, Plaintiff and the Electronic Frontier Foundation (“EFF”) have filed an amended complaint,
5 again alleging that Universal Music Corp., Universal Music Publishing, Inc. and Universal Music
6 Publishing Group (collectively, “Universal”)¹ violated 17 U.S.C. § 512(f) by notifying YouTube
7 of a video posting that made an admittedly unauthorized use of the Prince song “Let’s Go Crazy.”
8 This Court, in dismissing Plaintiff’s prior complaint held that, under *Rossi v. MPAA*, 391 F.3d
9 1000 (9th Cir. 2004), “there must be a showing of a knowing misrepresentation on the part of the
10 copyright owner.” Order at 5. The Court also held that Plaintiff’s complaint – which predicated
11 Section 512(f) liability on the claim that Universal “knew or should have known” that her posting
12 was a “self-evident non-infringing fair use” – failed to allege any “facts from which such a
13 misrepresentation may be inferred.” *Id.* at 3, 5.

14 There are two threshold issues that are fatal to Plaintiff’s revised Section 512(f) claim.
15 First, Universal’s notice, which Plaintiff attaches to her amended complaint, makes it very clear
16 that Universal did not send YouTube a notice pursuant to Section 512. In fact, Universal sent the
17 notice pursuant to YouTube’s Terms of Use and expressly disclaimed any reliance on Section
18 512. Therefore, that statute cannot support a claim against Universal – whether or not Plaintiff
19 can allege a knowing misrepresentation. Second, because fair use is a defense to an otherwise
20 infringing use, Universal could not – under any analysis – have made any misrepresentations
21 (knowing or otherwise) when it notified YouTube that Plaintiff had incorporated “Let’s Go
22 Crazy” into her video without authorization from the copyright owner. By raising fair use as a
23 defense, Plaintiff necessarily has to admit those facts.

24 But even on the assumption that Section 512 does apply, Plaintiff’s amended complaint,
25 like its predecessor, is still defective since it fails to allege facts that justify an inference of actual

26
27 ¹ As Universal noted in the prior motion, Universal Music Publishing Group does not exist as a
28 legal entity and Universal Music Publishing, Inc. does not own or administer the copyright at
issue in this case. Thus, neither one should even be a defendant.

1 knowledge. Incredibly, Plaintiff continues to claim that Universal may be liable on the ground
2 that it “should have known, if [it] acted with reasonable care or diligence,” that her posting was a
3 “self-evident non-infringing fair use under 17 U.S.C. § 107.” Second Amended Complaint
4 (“SAC”) ¶¶ 34, 36. “Should have known” and “reasonable care or diligence” are objective
5 standards of reasonableness that fail under this Court’s Order and *Rossi*. Moreover, there is not,
6 and never has been, such a thing as a “self-evident non-infringing fair use.” That is a standard
7 that finds no support in the law. The reason that standard has no support is very simple:
8 “[u]sually, fair use determinations are so clouded that one has no sure idea how they will fare
9 until the matter is litigated.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*
10 § 12B.08 at 12B-93 n.16 (2007). *Rossi* and Section 512 make it clear that copyright owners do
11 not have to engage in such conjecture in order to avoid a Section 512(f) damages claim.²

12 Plaintiff does not cure her pleading shortcomings by making the conclusory allegation (on
13 “information and belief” no less) that Universal had actual knowledge that its notice
14 misrepresented that Plaintiffs video was infringing (SAC ¶ 35), particularly since this allegation is
15 based on the same “self-evident” fair use standard that just does not exist. Plaintiff was required
16 to plead facts supporting her allegation that Universal had actual knowledge that it was making a
17 knowing misrepresentation. A made-up legal standard is not a substitute for facts.

18 Finally, Plaintiff’s misconstruction of Section 512 is not limited to the definitions of
19 knowledge or misrepresentation, but also extends to the relief the statute allows. Section 512(f)
20 allows only those damages that a user incurs “as a result of” the internet service provider taking
21 material down in response to a knowing misrepresentation. Yet, Plaintiff has not alleged any
22 such damages, nor could she since the sum total of her effort to respond to Universal’s notice was
23 a five-paragraph email asking that the video be re-posted (as it has been). SAC ¶ 27; Request for
24

25 ² Plaintiff’s handful of allegations in support of her fair use contention only confirm why that
26 defense is never “self-evident,” and certainly why it is not “self-evident” in this case. Plaintiff
27 claims that her purpose in posting “Let’s Go Crazy” to YouTube was so that her mother, who
28 “has difficulty downloading email files but knows how to access the YouTube website,” could
see her grandchild dancing. SAC ¶ 16. Even if this was a legitimate purpose to justify the
infringing posting (and it is not), there is no conceivable way Universal could have known that
this was Plaintiff’s purpose.

1 Judicial Notice (“RJN”) Ex. 1. Instead, Plaintiff seeks damages for “harm to her free speech
2 rights under the First Amendment” (SAC ¶ 38) and an injunction enjoining Universal from
3 “bringing any lawsuit” against Plaintiff in connection with the video. Plaintiff ignores the fact
4 that neither Universal nor YouTube is a state actor; thus, there can be no First Amendment
5 violation. And Plaintiff’s demand for injunctive relief also fails since the statute does not even
6 allow for an injunction.

7 Having been given a chance to re-plead, Plaintiff has confirmed that she has no actionable
8 claim against Universal under Section 512(f). Plaintiff’s second amended complaint should be
9 dismissed with prejudice.

10 II. FACTUAL BACKGROUND

11 A. Plaintiff’s Concededly Infringing Use Of “Let’s Go Crazy”

12 This case arises from Plaintiff’s posting on YouTube of a video that makes an admittedly
13 unauthorized use of the musical composition, “Let’s Go Crazy,” by the artist professionally
14 known as Prince. Universal administers the copyright to the “Let’s Go Crazy” composition, as
15 well as a number of other of Prince’s compositions.³ Order at 2.

16 Plaintiff entitled the video, “‘Let’s Go Crazy’ #1,” and, it is the first result listed when one
17 types “Let’s Go Crazy” into YouTube’s search engine.⁴ The video shows Plaintiff’s child
18 dancing to the song, Prince’s “Let’s Go Crazy.” The use of the music is central to Plaintiff’s
19 posting, as is obvious from both the title and the content of the video. Plaintiff says that the video
20 “includes only a few words of the lyrics.” SAC ¶ 14. In fact, the lyrics incorporated into the
21 video are, “C’mon baby, Let’s get nuts.” Plaintiff says to her child, “what do you think of the
22 music?,” and the song’s frenetic guitar solo plays in time with the images of Plaintiff’s children
23 running around the kitchen.

24
25 _____
26 ³ The copyright in the “Let’s Go Crazy” composition is separate and distinct from the copyright
27 in the sound recording that embodies that composition. *See Newton v. Diamond*, 388 F.3d 1189,
28 1191 (9th Cir. 2004). This case concerns the composition copyright.

⁴ A current print out of the web page where the video appears is attached as Exhibit 2 to
Universal’s RJN.

1 In making her posting, Plaintiff infringed the “Let’s Go Crazy” copyright, a point she
2 must concede by staking her defense entirely on fair use, which is an affirmative defense to an
3 otherwise infringing use. Specifically, Plaintiff’s unauthorized use violated the synchronization
4 right, which is the “right to control the synchronization of musical compositions with the content
5 of audiovisual works[.]” *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 527 (9th Cir.
6 2008). This right derives from the copyright owner’s exclusive right to reproduce the copyrighted
7 work. *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 63 n.4 (2d Cir. 1996).⁵

8 On June 4, 2007, Universal sent YouTube a notice requesting that YouTube remove or
9 disable access to Plaintiff’s video and nearly 200 other postings that also made unauthorized uses
10 of Prince’s compositions. Order at 2; SAC Ex. A at 3 (Universal Notice). In accordance with
11 YouTube’s posted Terms of Use, Universal declared that it had “a good faith belief that the
12 above-described activity is not authorized by the copyright owner, its agent, or the law.” SAC
13 Ex. A at 6; SAC Ex. B at 3 (YouTube Terms of Use). YouTube removed the video and sent
14 Plaintiff an email notifying her that it had done so. Order at 2. On June 7, 2007, Plaintiff sent
15 YouTube a counter-notification demanding that her video be re-posted because, according to her,
16 the video did not infringe Universal’s copyright. Order at 2; RJN Ex. 1. After receiving
17 Plaintiff’s counter-notice, YouTube restored Plaintiff’s video to the site, where it remains. *Id.* As
18 of the date this motion is being submitted, Plaintiff’s video has been viewed on YouTube *more*
19 *than 485,000 times*. RJN Ex. 2.

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23 ⁵ Plaintiff violated not only the copyright to “Let’s Go Crazy,” but also YouTube’s Terms of Use,
24 which state that users must “not submit material that is copyrighted ... unless you are the owner of
25 such rights or have permission from their rightful owner to post the material and to grant
26 YouTube all of the license rights granted herein.” RJN Ex. 3. Plaintiff also ignored YouTube’s
27 Copyright Tips: “How To Make Sure Your Video Does Not Infringe Someone Else’s
28 Copyrights: The way to ensure that your video doesn’t infringe someone else’s copyright is to
use your skills and imagination to create something completely original. ... *Be sure that all
components of your video are your original creation – even the audio portion. For example, 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.*” RJN Ex. 4 (emphasis added).

1 **B. Plaintiff's Original Complaint**

2 Plaintiff's First Amended Complaint ("FAC"), filed August 15, 2007, alleged three
3 claims: (1) that Universal violated Section 512(f) of the Digital Millennium Copyright Act
4 ("DMCA") in sending the notice to YouTube, because Plaintiff's use of "Let's Go Crazy" was a
5 "self-evident" fair use; (2) that Universal tortiously interfered with Plaintiff's purported contract
6 with YouTube; and (3) that Plaintiff was entitled to a declaration that her use of "Let's Go Crazy"
7 is a fair use protected from any claim of infringement.

8 Simultaneous with the filing of this lawsuit, Plaintiff and the EFF, the advocacy
9 organization representing her, launched a public relations offensive.⁶ EFF's statements make it
10 clear that it wants to use this case to rewrite the copyright laws that Congress has enacted in order
11 to promote EFF's own views about making content freely available online. EFF linked this suit
12 to its self-declared effort "to develop a set of 'best practices' for proper takedowns under the
13 Digital Millennium Copyright Act." RJN Ex. 5. EFF's proposed "best practices" may make for
14 good reading for the self-described "free culture" crowd, but they are nowhere to be found in the
15 DMCA or the Copyright Act. *See* EFF's "Fair Use Principles for User Generated Video Content"
16 at 2 ¶ 1, RJN Ex. 6.

17 **C. The Court's Order Granting Universal's Motion To Dismiss**

18 Universal moved to dismiss the FAC. On April 8, 2008, the Court entered an Order
19 dismissing all three of Plaintiff's claims. First, with respect to Plaintiff's Section 512(f) claim,
20 the Court held that, under the Ninth Circuit's controlling decision in *Rossi*, "there must be a
21 showing of a knowing misrepresentation on the part of the copyright owner." Order at 5. The
22 Court held that Plaintiff had "fail[ed] to allege facts from which such a misrepresentation may be
23 inferred." *Id.* The Court also observed that Plaintiff had failed to allege any facts that would
24 substantiate her allegation that her use could be deemed to be "a 'self-evident' fair use." *Id.*
25 Second, the Court held that Plaintiff's state law tortious interference claim failed on the ground
26 that it was preempted by the Copyright Act. *Id.* at 7. Third, the Court held that it lacked subject

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28 ⁶ *See, e.g.*, RJN Ex. 5 (EFF web page devoted to publicizing case); Ex. 7 (Washington Post
interview of Plaintiff); Ex. 8 (Good Morning America profile of Plaintiff).

1 matter jurisdiction over Plaintiff's declaratory relief claim because there was no active case or
2 controversy between Universal and Plaintiff. *Id.* at 7-8.

3 The Court dismissed Plaintiff's declaratory relief claim with prejudice and gave Plaintiff
4 leave to amend her Section 512(f) and state law claims. In her SAC, Plaintiff has now abandoned
5 her state law claim, and asserts only a claim under Section 512(f). Much of the SAC has been
6 copied from the prior version of the complaint. The handful of additional paragraphs that
7 Plaintiff has tacked on do nothing to cure the deficiencies in Plaintiff's prior complaint.

8 **III. ARGUMENT**

9 A complaint must be dismissed under Rule 12(b)(6) if it fails to plead "enough facts to
10 state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.
11 1955, 1974 (2007). That is the case here. The sole claim in Plaintiff's SAC is that Universal
12 violated Section 512(f) of the DMCA when it sent its notice to YouTube. However, the SAC
13 fails to allege any facts that make it plausible to believe that Universal actually knew it was
14 misrepresenting that Plaintiff's video posting made an infringing use of the "Let's Go Crazy"
15 composition when it sent its notice. But the Court does not even need to reach that issue in order
16 to dismiss the SAC. Plaintiff's Section 512(f) claim is premised entirely on her allegation that
17 Universal sent YouTube a DMCA notice (*i.e.* a notice "under this section," 17 U.S.C. § 512 (f)).
18 Try as she might, Plaintiff cannot convert Universal's notice into something that it is not by mis-
19 characterizing that notice in her SAC. Universal sent its notice pursuant to YouTube's Terms of
20 Use and expressly stated in that notice that its "use of this form, as required by YouTube, is
21 meant to facilitate YouTube's removal of the infringing material listed above and *is not meant to*
22 *suggest or imply that YouTube's activities and services are within the scope of the DMCA safe*
23 *harbor."* SAC Ex. A at 6 (emphasis added). Universal was explicit on this point because
24 Universal does not agree that YouTube is eligible for protection under the DMCA's "safe
25 harbors," or that Universal has to send notices "under" the DMCA in order to insist on the
26 removal of infringing material.

1 Because Universal did not send a DMCA notice, the predicate for Plaintiff's claim is
2 missing. But even if the Court takes Plaintiff's characterization of Universal's notice as true for
3 purposes of this motion, Plaintiff's Section 512(f) claim still fails.

4 **A. There Is No Liability Under Section 512(f) Except For A "Knowing
5 Misrepresentation"**

6 Section 512(f) of the Copyright Act provides that:

7 Any person who ***knowingly materially misrepresents*** under this section ... that
8 material or activity is infringing ... shall be liable for any damages, including costs
9 and attorneys' fees, incurred by the alleged infringer ... as the result of the service
10 provider relying upon such misrepresentation in removing or disabling access to
11 the material or activity claimed to be infringing[.] 17 U.S.C. § 512 (f) (emphasis
12 added).

13 The Ninth Circuit has made it very clear that this Section applies only where the party
14 sending a notice has the *subjective* mental state of "actual knowledge" that it is making a material
15 misrepresentation. *Rossi*, 391 F.3d at 1004-05. In affirming summary judgment for the MPAA,
16 the court held that the "interpretive case law and the statutory structure [of the DMCA] support
17 the conclusion that the 'good faith belief' requirement ... *encompasses a subjective, rather than*
18 *objective, standard.*" *Id.* at 1004 (emphasis added). To reach this conclusion, the Ninth Circuit
19 had to construe "knowingly" in Section 512(f), and determined that the DMCA did not impose
20 upon a copyright holder any obligation to verify the accuracy of an allegation of infringement so
21 long as the copyright holder did not have actual knowledge that it was making a material
22 misrepresentation:

23 *In § 512 (f), Congress included an expressly limited cause of action for improper
24 infringement notifications, imposing liability only if the copyright owner's
25 notification is a knowing misrepresentation. A copyright owner cannot be liable
26 simply because an unknowing mistake is made, even if the copyright owner acted
27 unreasonably in making the mistake. Rather, there must be a demonstration of
28 some actual knowledge of misrepresentation on the part of the copyright owner.*

29 Juxtaposing the "good faith" proviso of the DMCA with the "knowing
30 misrepresentation" provision of that same statute reveals an apparent statutory
31 structure that predicated the imposition of liability upon copyright owners only for
32 knowing misrepresentations regarding allegedly infringing websites. Measuring
33 compliance with a lesser "objective reasonableness" standard would be
34 inconsistent with Congress's apparent intent that the statute protect potential
35 violators from subjectively improper actions by copyright owners.

1 *Id.* at 1004-1005 (emphasis added) (underscored emphasis in original) (citations omitted).

2 *Accord Dudnikov v. MGA Entm't., Inc.*, 410 F. Supp. 2d 1010, 1012 (D. Colo. 2005) (following
3 *Rossi* standard).

4 There can be no doubt that *Rossi* specifically rejected an “objective standard” for
5 determining knowledge. Yet, in her SAC, Plaintiff again alleges that Universal is liable under a
6 “should have known” standard. SAC ¶ 36. Plaintiff also asserts that Universal “would have no
7 substantial doubt” that Plaintiff’s use was a fair use, had Universal “been acting in good faith.” *Id.*
8 The latter allegation, of course, is just another way of alleging what Plaintiff claims Universal
9 should have known rather than what Universal *did* know. Plaintiff’s “should have known” and
10 “would have no substantial doubt” allegations are both lifted directly from the portion of this
11 Court’s pre-*Rossi* definition of “knowing” that incorporated objective rather than subjective
12 standards. *See Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004).⁷
13 Plaintiff’s continued reliance on the objective standards ignores this Court’s explanation for why
14 a conflict did not necessarily exist between *Diebold* and the Ninth Circuit’s later ruling in *Rossi*.
15 It is not because *Diebold*’s objective standards are reconcilable with *Rossi*’s actual knowledge
16 standard – they are not – but rather because “*Diebold* is distinguishable based on its *facts*.” Order
17 at 5 (emphasis added). In *Diebold*, the defendant’s notice listed “hundreds of emails,” but “the
18 defendant failed to identify any specific emails containing copyrighted content”; moreover, the
19 defendant “appeared to *acknowledge* that at least some of the emails were subject to the fair use
20 doctrine.” *Id.* (emphasis added). As a result, based on its facts, *Diebold* satisfied the *Rossi*
21 standard requiring that the plaintiff show that the defendant had actual, subjective knowledge it
22 was making a misrepresentation. In contrast, here, Universal has not admitted it made a
23 misrepresentation, much less that it had actual knowledge that it was making a misrepresentation
24 at the time it sent the notice to YouTube. Indeed, as this Court explained, “it is undisputed that
25 the song ‘Let’s Go Crazy’ is copyrighted, and Universal does not concede that the posting is a fair
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27 ⁷ *Diebold* also said “knowingly” meant “that a party actually knew ... that it was making
28 misrepresentations,” which is the sole standard that *Rossi* adopted. *See Diebold*, 337 F. Supp. 2d
at 1204.

1 use.” *Id.* Accordingly, *Diebold* provides no support for Plaintiff’s flawed attempt to reassert the
2 standard of objective knowledge that the Court already rejected on the last motion to dismiss.

3 Although Plaintiff does assert “[o]n information and belief” that Universal had “actual
4 subjective knowledge” that Plaintiff’s posting was non-infringing, SAC ¶ 35, Plaintiff fails to
5 back up this conclusory averment with any allegations that justify an inference of actual
6 knowledge. Instead, Plaintiff again alleges, just as she did in her prior complaint, that her
7 concededly unauthorized use of “Let’s Go Crazy” is “a self-evident non-infringing fair use under
8 17 U.S.C. § 107.” *Id.* ¶ 34. The “self-evident non-infringing fair use” claim does not make it
9 plausible that Universal had actual knowledge it was making a material misrepresentation; in fact,
10 that allegation undermines Plaintiff’s contention of actual knowledge. By relying exclusively on
11 fair use as a defense, Plaintiff necessarily concedes that her use *does infringe* copyright – which
12 means that everything in Universal’s notice was true. Fair use is an *affirmative defense* to
13 conduct that otherwise infringes one or more of the exclusive rights of copyright under Section
14 106. Supreme Court and Ninth Circuit precedent both make clear that a court does not reach the
15 question of fair use under Section 107 until the court *first* concludes the use infringes under
16 Section 106. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *Perfect 10,*
17 *Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007). Given Plaintiff’s concession that
18 her use of “Let’s Go Crazy” in her posting *does* infringe, Plaintiff cannot plausibly contend that
19 Universal knew it was making a material misrepresentation in its notice.

20 **B. Fair Use Is Never Self Evident**

21 Plaintiff’s reliance on a supposed “self-evident” fair use defense also fails because there is
22 no such thing. It is a concept that is not found in any statute or case law. Whether a use does or
23 does not amount to a fair use is never “self-evident,” but is reached only after a defendant first
24 affirmatively pleads it and then proves it after an intense equitable balancing of multiple factors,
25 including the four factors set out in the text of Section 107.⁸

26 ⁸ The statutory factors are: “(1) the purpose and character of the use, including whether such use
27 is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the
28 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.” 17 U.S.C. § 107.

1 The Supreme Court has made it clear that fair use does not lend itself to “bright-line rules,
2 for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell*, 510
3 U.S. at 577. The Court has instructed that all of the statutory factors “are to be explored, and the
4 results weighed together, in light of the purposes of copyright.” *Id.* at 578. “Since the doctrine is
5 an equitable rule of reason, no generally applicable definition is possible, and *each case raising*
6 *the question must be decided on its own facts.*” *Harper & Row, Publishers, Inc. v. Nation*
7 *Enters.*, 471 U.S. 539, 560 (1985) (emphasis added) (quotation and alteration omitted). As
8 Professor Nimmer observes in his leading copyright treatise, each of the Supreme Court’s three
9 landmark fair use decisions was “overturned at each level of review, two of them by split
10 opinions at the Supreme Court level”; Professor Nimmer points to this divergence on whether a
11 use is fair or not – even on the same facts, within the same litigation – as proof of “[t]he
12 malleability” of the fair use inquiry. 4 *Nimmer on Copyright* § 13.05 at 13-156 (footnotes
13 omitted).⁹ See also *Perfect 10*, 508 F.3d at 1168 (Ninth Circuit held defendants’ use of thumbnail
14 images *was* fair use, whereas district court, based on same facts, held it was not).

15 Professor Nimmer also makes it clear that an assertion of fair use will not support a claim
16 of misrepresentation under Section 512(f). In the portion of his treatise addressing Section
17 512(f), Professor Nimmer specifically discusses the type of claim that Plaintiff advances here,
18 namely, a use that is asserted in a notice to an internet service to be unauthorized and infringing
19 but that the user claims is protected by fair use. Professor Nimmer explains that, “[u]sually, fair
20 use determinations are so clouded that one has no sure idea how they will fare until the matter is
21 litigated.” 3 *Nimmer on Copyright* § 12B.08 at 12B-93 n.16. Professor Nimmer also states that,
22 when a copyright holder and end user disagree over the assertion that content is infringing, “it
23 may not be obviously apparent who is wrong,” and “[i]n the case of a fair use defense, it might
24 even take successive reversals at every level of review, up to and including the Supreme Court,
25 before the winner’s identity is established.” *Id.* at 12B-91 & n.1 (emphasis added).¹⁰

26 _____
27 ⁹ The Supreme Court cases that Professor Nimmer cites are *Campbell*, *Harper & Row* and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

28 ¹⁰ Even the EFF, in its “Fair Use Principles,” concedes that “the precise contours of the fair use doctrine can be difficult for non-lawyers to discern[.]” RJN Ex. 6. It is hard to reconcile this

1 Given the inherently fact-specific, equitable nature of fair use, Plaintiff's reliance on a
2 concept of "self-evident" fair use is oxymoronic. If courts can (and often do) disagree about
3 whether the same factual record does or does not excuse a use as "fair" under Section 107, a
4 plaintiff under Section 512(f) cannot premise a defendant's "actual knowledge" based on its
5 failure to recognize a use as "self-evidently" fair. Plaintiff's Section 512(f) claim cannot be
6 premised on a claim that her use is "self-evidently" a fair use under Section 107.

7 **C. Plaintiff Cannot Establish That Universal Must Have Known Her Use Would**
8 **Be Adjudicated To Be A Fair Use**

9 Even on the counter-factual assumption that there can be such a thing as a "self-evident"
10 fair use, Plaintiff's use is not that. While Plaintiff offers a handful of factual allegations that she
11 says support her contention that her use was "self-evidently" a fair use, in reality these allegations
12 reflect facts that (assuming they are true) would have been known only to her, or that rest on
13 misconceptions of the governing fair use standards.¹¹

14 **1. Plaintiff's Contentions Regarding The Purpose Of Her Use Are Based**
15 **On Facts Known Only To Her**

16 The first statutory fair use factor is "the purpose and character of the use, including
17 whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C.
18 § 107(1). As the Supreme Court has explained, "[t]he enquiry here may be guided by the
19 examples given in the preamble to § 107, looking to whether the use is for criticism, or comment,
20 or news reporting, and the like[.]" *Campbell*, 510 U.S. at 578-79.

21 The central purpose of this investigation is to see ... whether the new work merely
22 supersedes the objects of the original creation, or instead adds something new,
23 with a further purpose or different character, altering the first with new expression,
24 meaning, or message; it asks, in other words, whether and to what extent the new
25 work is transformative.

26 *Id.* at 579 (quotations and alterations omitted). *Accord Perfect 10*, 508 F.3d at 1164.

27 concession with the complaint filed by the EFF in this action.

28 ¹¹ It must be emphasized that the issue here is *not* whether Plaintiff's allegations, if true, could support a defense of fair use in a hypothetical infringement suit. The question instead is whether Plaintiff's factual contentions, if true, justify the inferences that Universal made a *knowing* determination that Plaintiff would raise a fair use defense to a charge of infringement, *and* that Universal *knew* that a court would hold that Plaintiff had carried her burden to establish fair use as a matter of law. Plaintiff's allegations fail to justify these necessary inferences.

1 Plaintiff claims that her posting of the video to YouTube is a non-commercial
2 transformation of the work, SAC ¶ 34, but the facts she alleges in support of this allegation could
3 not have been known to Universal. Among other things, Plaintiff alleges that she posted the
4 video, incorporating “Let’s Go Crazy,” to YouTube, because “Holden had recently heard Prince
5 perform on television during the Super Bowl halftime show[.]” because Plaintiff “thought her
6 friends and family, particularly her mother in California, would enjoy seeing Holden’s new ability
7 to dance[.]” and because Plaintiff’s “mother has difficulty downloading email files but knows
8 how to access the YouTube website.” *Id.* ¶¶ 12, 16.

9 There is no possibility that Universal could have known any of these things from viewing
10 the video on YouTube. Plaintiff’s posting was made under an anonymous user name (“edenza”),
11 and provided no details about her alleged purposes in making the posting. The facts that *are*
12 apparent from the video posting are

- 13 • That it does not fit within any of the examples in the preamble to Section
14 107, which the Supreme Court said may “guide” the fair use inquiry,
15 *Campbell*, 510 U.S. at 578. *See* 17 U.S.C. § 107 (“for purposes such as
16 criticism, comment, news reporting, teaching (including multiple copies for
17 classroom use), scholarship, or research”); *Leadsinger*, 512 F.3d at 530
(commencing fair use analysis with observation that fair use claimant’s use
18 was not even alleged to fit within any of the purposes set forth in the
19 preamble to Section 107; fair use defense rejected by Ninth Circuit).
- 20 • That it incorporates the “Let’s Go Crazy” composition, and adopts that title
21 (along with “#1”) as the title for the video, thereby guaranteeing higher hits
when “Let’s Go Crazy” is entered into YouTube’s search engine.
- 22 • That the video is available for unlimited viewing by anyone with access to
the internet, a point that is underscored by the fact the video has been
23 played nearly a half-million times to date.

22 Notwithstanding all of these facts, Plaintiff insists that Universal *must* have known her
23 posting was “transformative,” because it “bears all the hallmarks of a family home movie[.]”
24 SAC ¶ 13. It is not clear if Plaintiff is contending that everything that looks like a family home
25 movie is exempt from the copyright laws, or just this one. Regardless, while Plaintiff’s video
26 may have made for good viewing within her home, the fact is that *Plaintiff’s posting it on*
27 *YouTube goes far beyond the traditional home movie*. Plaintiff’s YouTube posting makes the
28 video, including its incorporation of “Let’s Go Crazy,” available for unlimited performances by

1 anyone in the world with access to the internet. *That* use does not “transform” the musical
2 composition into something new or different. It appropriates the work into a format for which
3 Universal and numerous other copyright holders can and do receive remuneration every day.

4 **2. Musical Compositions Lie At The Heart Of The Creative Expression** 5 **That The Copyright Act Protects**

6 Plaintiff does not even bother to allege any facts that would purport to show Universal
7 knew it would lose the second fair use factor, “the nature of the copyrighted work.” 17 U.S.C.
8 § 107(2). The law is clear that a musical composition is “a work of creative expression, as
9 opposed to an informational work[.]” *Leadsinger*, 512 F.3d at 531. “Let’s Go Crazy” thus “is
10 precisely the sort of expression that the copyright law aims to protect.” *Id.* (citing, among other
11 sources, 4 Nimmer on Copyright § 13.05 [A][2][a] (“*[T]he more creative a work, the more*
12 *protection it should be accorded from copying; correlatively, the more informational or functional*
13 *the plaintiff’s work, the broader should be the scope of the fair use defense.”)). That this factor
14 weighs so clearly against any assertion of fair use squarely undercuts Plaintiff’s allegation that
15 Universal must have known a fair use defense would be raised and would be adjudicated in
16 Plaintiff’s favor.*

17 **3. Plaintiff Fails To Allege Facts Showing Universal Must Have Known** 18 **Her Taking Was Insubstantial**

19 Plaintiff’s allegations regarding the third fair use factor – “the amount and substantiality of
20 the portion used in relation to the copyrighted work as a whole,” 17 U.S.C. § 107(3) – also fail to
21 support her claim of actual knowledge. Plaintiff alleges that this factor supports her assertion of a
22 “self-evident” fair use because the song “can *only* be heard in the background for approximately
23 20 seconds” of a three-and-a-half minute song, the portion used “is near the song’s end and
24 includes only a few words of the lyrics.” SAC ¶¶ 14, 18 (emphasis added).

25 Plaintiff’s allegation that taking 20 seconds of a three-and-a-half minute composition must
26 have been recognized to be fair under factor three is flatly inconsistent with fair use precedent.
27 The Supreme Court, quoting Judge Learned Hand, has held that “no plagiarist can excuse the
28 wrong by showing how much of his work he did not pirate.” *Harper & Row*, 471 U.S. at 565
(quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)). The Court in

1 *Harper & Row* made clear that the relevant question on factor three is not the absolute quantity of
2 content taken from the original work, but rather the qualitative importance of that content. *Id.*
3 *See also Roy Export Co. Establishment v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137,
4 1145 (S.D.N.Y. 1980) (cited with approval by the Supreme Court in *Harper & Row* for the
5 proposition that “taking of 55 seconds out of 1 hour and 29-minute film deemed qualitatively
6 substantial,” 471 U.S. at 565).

7 Plaintiff notably fails to allege any facts suggesting that Universal must have known that
8 her posting reproduced a qualitatively insignificant portion of the work. Her allegation that “[t]he
9 portion of the song used is near the song’s end and includes only a few words of the lyrics[,]”
10 SAC ¶ 14, is not sufficient on this score. This is because Plaintiff’s video posting makes it clear
11 that the portion of the song Plaintiff reproduced in her posting is very substantial. Specifically,
12 the “few words” incorporated into her posting are, “C’mon baby, Let’s get nuts,” and the music
13 that is incorporated is the electric guitar solo that embodies the “craziness” that the song is
14 famous for. Plaintiff took precisely those portions of the song that were most consistent with, as
15 she describes it, a scene of “commotion and laughter.” SAC ¶ 13. It would be entirely
16 reasonable for Universal to have believed that this factor would have weighed against a fair use
17 defense. *See Kramer v. Thomas*, 2006 WL 4729242 at *10 (C.D. Cal. Sept. 28, 2006) (defendant
18 took 10 seconds of a composition, but it was plaintiff’s “best selling” and “most recognizable
19 composition, “the musical compositions included were chosen for this very reason[,]” and
20 “[t]herefore, the third factor weighs against a finding of fair use”) (internal quotations omitted).

21 **4. Plaintiff’s Contention Regarding The Fourth Fair Use Factor Ignores**
22 **The Supreme Court’s Controlling Test**

23 Factor four is “the effect of the use upon the potential market for or value of the
24 copyrighted work.” 17 U.S.C. § 107(4). In alleging that Universal must have known this factor
25 would weigh in favor of fair use, Plaintiff focuses solely on the potential effect of *her use*,
26 *standing alone*. Specifically, she alleges: “the content of the Holden Dance Video did not and
27 could not substitute for the original song or inflict any harm to the market for the original song.”
28 SAC ¶ 18.

1 The test under the fourth fair use factor, however, is never limited just to the claimant's
2 use. An infringer could always say that its use had only a trivial effect on the copyright holder's
3 actual or potential market. The Supreme Court has held that the Court must make a broader
4 inquiry, to consider the potential impact of widespread use:

5 [The fourth fair use factor] requires courts to consider *not only* the
6 extent of market harm caused by the particular actions of the
7 alleged infringer, *but also* “*whether unrestricted and widespread*
8 *conduct of the sort engaged in by the defendant ... would result in a*
9 *substantially adverse impact on the potential market*” for the
10 *original*. The enquiry “must take account not only of harm to the
11 original but also of harm to the market for derivative works.”

12 *Campbell*, 510 U.S. at 590 (emphasis added) (quoting 4 *Nimmer on Copyright* § 13.05 [A][4] at
13 13-102.61, and *Harper & Row*, 471 U.S. at 568). In addition, because “fair use is an affirmative
14 defense, its proponent would have difficulty carrying the burden of demonstrating fair use
15 without favorable evidence about relevant markets.” *Id.*

16 Plaintiff fails completely to allege any facts about the impact on the potential market for
17 the “Let’s Go Crazy” composition were similar uses made of that work made on an “unrestricted
18 and widespread” scale. The omission is explained by the fact that such “unrestricted and
19 widespread” use would completely undermine any market for allowing authorized use of that
20 work in synchronization with visual images. Plaintiff may believe that her posting, in isolation, is
21 innocuous. But a fair use analysis of factor four requires the consideration of potentially
22 thousands (or more) users of YouTube or other user-generated content services helping
23 themselves to portions of the copyrighted work for their postings. This could include not only
24 parents of dancing toddlers, but bands or other musical performers creating unauthorized
25 derivative works and posting them to YouTube. Allowing all such users to appropriate the
26 underlying work under the claim of fair use threatens to eliminate a potentially significant market.
27 At the very least, Universal would have been reasonable to believe that this potential for harm
28 would weigh against the fourth fair use factor, were such a defense to be asserted. Plaintiff, who
as the fair use proponent bears the burden on this factor, notably fails to allege any facts
concerning the potential effect on such markets.

1 **D. Plaintiff's Theory That Universal Should Be Liable Based On Its Claimed**
2 **Failure To Acquire Knowledge About Whether Plaintiff's Use Would Be**
3 **"Fair Use" Is Inconsistent With Section 512 and with *Rossi***

4 Plaintiff's alternative theory of a knowing misrepresentation is premised not on Universal
5 recognizing Plaintiff's posting to be a fair use, but rather on Universal *refraining* from conducting
6 such an analysis. Pointing to a statement by Universal in response to Plaintiff's public relations
7 blitz that "Prince believes it is wrong for YouTube, or any other user-generated site, to
8 appropriate his music without his consent[,] SAC Ex. F, Plaintiff contends that "Universal sent
9 the DMCA notice at Prince's behest, based not on the particular characteristics of the Holden
10 Video or any good-faith belief that it actually infringed a copyright but on its belief that, 'as a
11 matter of principle,' Prince 'has the right to have his music removed.'" SAC ¶ 31. In short,
12 Plaintiff contends that, because Universal did not conduct a fair use analysis, the Court should
13 impute to Universal knowledge that it was misrepresenting that Plaintiff's posting infringed.

14 Plaintiff's theory of imputation is that the copyright owner or administrator is obliged –
15 under possible penalty of a Section 512(f) violation – to speculate whether an online poster would
16 assert fair use as a defense to a hypothetical infringement claim, and whether a court would find
17 that the poster would carry its burden of proving that defense. This is exactly the type of
18 obligation that EFF wants to pin on copyright holders as part of EFF's "Fair Use Principles for
19 User Generated Video Content." RJN Ex. 6. But it is not an obligation that can be squared with
20 the DMCA or with the Ninth Circuit's controlling construction of Section 512(f) of that statute.

21 A rule requiring a copyright holder to undertake an *ex ante* analysis of the multi-faceted
22 and often indeterminate question whether an infringing use of its work would be subject to a fair
23 use defense would directly contradict the purpose and structure of the DMCA. The DMCA was
24 designed to provide a summary procedure through which a copyright right holder could protect its
25 works without having to resort to filing an infringement action in federal court. Congress made
26 clear that Section 512 was intended to "balance *the need for rapid response to potential*
27 *infringement* with the end-users' legitimate interests in not having material removed without
28 recourse." Sen. Rep. No. 105-190 at 21 (1998) (emphasis added) (quoted in *Rossi*, 391 F.3d at
1003). Even Plaintiff, in her prior briefing, recognized this was the purpose of the DMCA's

1 notice and takedown regime. Pltfs' Opp. to Mot. to Dismiss, filed Nov. 13, 2007, at 7 (“*Section*
2 *512 was enacted by Congress to allow for rapid responses to potential copyright infringement.*”)
3 (emphasis added).

4 If copyright holders were required to make *ex ante* predictions about fair use – and to be at
5 risk of a Section 512(f) suit for guessing incorrectly – the inevitable effect would be to deter them
6 from sending takedown notices. That may be the policy result that EFF wants, but that is not the
7 statute that Congress legislated. The statute actually shows a contrary intent. Specifically, the
8 statute provides that the person whose material is removed may send a counter-notification if he
9 or she believes their use is not infringing. 17 U.S.C. § 512(g)(3). The counter-notification then
10 starts a 14-day clock for the copyright owner to evaluate the assertion of non-infringement, and
11 either file an infringement suit or see the online service re-post the material. This flexible system
12 shows that Congress believed a copyright holder needs to consider the relative balance of a fair
13 use assertion, and how that might play out in possible litigation, only after the individual posting
14 the material indicates they believe they would have a fair use defense. The system that Congress
15 enacted is inconsistent with the regime of *ex ante* speculation and conjecture that EFF wants to
16 foist upon copyright owners.

17 Plaintiff's assertion that a copyright holder must conduct a fair use analysis to test its
18 belief that material is infringing also is contrary to *Rossi*. In that case, the copyright holders'
19 representative did not attempt to download any movies, click on any links, or take any other steps
20 to verify its belief that the plaintiff's website contained infringing material. 391 F.3d at 1002, n.2.
21 The court nevertheless determined that the defendant complied with the DMCA because it
22 subjectively believed based on reviewing plaintiff's website that it contained infringing material,
23 and Section 512(f) imposes liability on copyright holders only for subjectively improper actions.
24 *Id.* at 1005. In reaching this conclusion, the court rejected the plaintiff's argument that the
25 DMCA imposes a duty upon copyright holders to investigate the accuracy of their subjective
26 belief of infringement. *Id.* at 1004.

27 *Rossi* is entirely inconsistent with Plaintiff and EFF's proposed rule requiring an *ex ante*
28 fair use analysis. If a copyright owner or administrator cannot have actual knowledge imputed to

1 it where it does not take the final step of verifying that a site actually has infringing material,
2 there is no way to hold such an actor liable where it determines (correctly) that material is
3 infringing, but does not go on to determine whether the affirmative defense of fair use would be
4 raised and would prevail.

5 **E. Plaintiff Fails To Allege Damages Of The Type That Section 512(f)**
6 **Authorizes**

7 Plaintiff not only fails to allege a plausible claim that Universal made a knowing
8 misrepresentation, but her SAC seeks damages that are not recognized by Section 512(f). Under
9 the statute, a plaintiff may seek damages incurred “as the result of” the internet service provider
10 taking material down in response to a knowing misrepresentation. 17 U.S.C. § 512(f). Plaintiff
11 alleges that as a result of Universal’s actions she has suffered injury including “the financial and
12 personal expenses associated with responding to the claim of infringement and harm to her free
13 speech rights under the First Amendment.” SAC ¶ 38. But Plaintiff’s response to Universal’s
14 notice was a five-paragraph email message she sent to YouTube as her counter-notice. SAC ¶ 27;
15 RJN Ex. 1. The SAC provides no plausible basis for believing that Plaintiff incurred any
16 “financial and personal expenses” in drafting this half-page email. Moreover, Plaintiff’s claim
17 that she suffered First Amendment injury is baseless: Universal is a private entity, not a state
18 actor, and therefore is not subject to the First Amendment. *Lloyd Corp., Limited v. Tanner*, 407
19 U.S. 551, 567 (1972) (“the First and Fourteenth Amendments safeguard the rights of free speech
20 . . . by limitations on state action.”).

21 Plaintiff further claims she found Universal’s notice “intimidating” and has not posted “a
22 single video” on YouTube out of fear that someone might construe some portion of a new video
23 to infringe a copyright. SAC ¶ 38. But Plaintiff acknowledges that Universal did not send its
24 notice to her; rather, she alleges that Universal sent its notice to YouTube and YouTube contacted
25 Plaintiff. *Id.* ¶¶ 22, 25. Plaintiff does not allege that YouTube forwarded Universal’s notice or
26 that Plaintiff otherwise saw Universal’s notice before she sued Universal. Thus, it is unclear on
27 what basis Plaintiff claims that Universal’s notice “intimidat[ed]” her. *Id.* ¶ 38. In any event,
28

