

1 KELLY M. KLAUS (SBN 161091)  
Kelly.Klaus@mto.com  
2 MELINDA E. LEMOINE (SBN 235670)  
Melinda.LeMoine@mto.com  
3 MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue  
4 Thirty-Fifth Floor  
Los Angeles, CA 90071-1560  
5 Telephone: (213) 683-9100  
Facsimile: (213) 687-3702  
6

Attorneys for Defendants  
7 UNIVERSAL MUSIC CORP., UNIVERSAL  
MUSIC PUBLISHING, INC. and UNIVERSAL  
8 MUSIC PUBLISHING GROUP

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

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

CASE NO. C-07-03783 JF (HRL)

**PUBLIC REDACTED VERSION**

**DEFENDANTS' REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

Judge: Hon. Jeremy Fogel  
Date: October 16, 2012  
Time: 3:00 P.M.  
Ctrm: 3, Fifth Floor

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
I. INTRODUCTION .....	1
II. RESPONSE TO PLAINTIFF’S FACTUAL SUMMARY .....	2
III. PLAINTIFF’S EVIDENTIARY OBJECTIONS ARE MERITLESS .....	2
IV. ARGUMENT .....	3
A. Plaintiff Has No Evidence that Universal Made a Knowing Misrepresentation that Her Posting Was Infringing .....	3
B. Universal Gave Proper Consideration of Fair Use to Plaintiff’s Posting .....	4
1. Universal Has Never Admitted that it Did Not Consider Fair Use.....	4
2. Universal Properly Considered Fair Use Under any Standard that May Reasonably and Feasibly be Applied.....	5
a. Plaintiff’s Claim that Universal Failed to Consider Fair Use Is Meritless .....	6
b. Universal’s Guidelines Did Not Serve to Identify Mere De Minimis Uses .....	8
3. Plaintiff’s Claim that Universal Could Not Have Considered Fair Use Because “Let’s Go Crazy #1” Obviously was Fair Use is Wrong.....	9
a. The Purpose and Character of “Let’s Go Crazy #1” Was Not Obviously Non-Commercial or Transformative .....	10
b. The Nature of the Work Weighs Against Fair Use .....	10
c. The Amount of Plaintiff’s Use Was Not Minor.....	11
d. Universal Was Not Bound to Find the Effect on the Potential Market Weighed Against Sending the Request .....	12
C. Plaintiff Has No Evidence of Actual Damages.....	13
V. CONCLUSION.....	15

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**FEDERAL CASES**

*A&M Records, Inc. v. Napster, Inc.*,  
239 F.3d 1004 (9th Cir. 2001)..... 5

*Campbell v. Acuff-Rose Music, Inc.*,  
510 U.S. 569 (1994)..... 9, 10, 13

*Castle Rock Entm’t, Inc. v. Carol Publishing Group, Inc.*,  
150 F.3d 132 (2d Cir. 1998)..... 11

*Elvis Presley Enters., Inc. v. Passport Video*,  
349 F.3d 622 (9th Cir. 2003)..... 11

*Fisher v. Dees*,  
794 F.2d 432 (9th Cir. 1986)..... 9

*Higgins v. Detroit Educational Television Found.*,  
4 F. Supp. 2d 701 (E.D. Mich. 1998)..... 6, 9

*Jackson v. Warner Bros., Inc.*,  
993 F. Supp. 585 (E.D. Mich. 1997)..... 6, 9

*Leadsinger, Inc. v. BMG Music Publishing*,  
512 F.3d 522 (9th Cir. 2008)..... 10

*Lennon v. Premise Media Corp., L.P.*,  
556 F. Supp. 2d 310 (S.D.N.Y. 2008)..... 11

*Lenz v. Universal Music Corp.*,  
572 F. Supp. 2d 1150 (N.D. Cal. 2008) ..... 1, 7

*Mattel Inc. v. Walking Mountain Prods.*,  
353 F.3d 792 (9th Cir. 2003)..... 9, 11

*Monge v. Maya Magazines, Inc.*,  
688 F.3d 1164 (9th Cir. 2012)..... passim

*Ouellette v. Viacom Int’l, Inc.*,  
2012 WL 850921 (D. Mont. Mar. 13, 2012)..... 4

*Perfect 10, Inc. v. Amazon.com, Inc.*,  
508 F.3d 1146 (9th Cir. 2007)..... 9

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Phelps-Roper v. City of Manchester</i> , 738 F. Supp. 2d 947 (E.D. Mo. 2010), <i>aff'd</i> , 658 F.3d 813 (8th Cir. 2011) .....	15
<i>Ringgold v. Black Entm't Television, Inc.</i> , 126 F.3d 70 (2d Cir. 1997).....	6, 9
<i>Rossi v. MPAA</i> , 391 F.3d 1000 (9th Cir. 2004).....	1, 4, 7
<i>Salinger v. Random House</i> , 811 F.2d 90 (2d Cir. 1987).....	6, 11, 12
<i>Swirsky v. Carey</i> , 376 F.3d 841 (9th Cir. 2004).....	8
<i>Worldwide Church of God v. Philadelphia Church of God, Inc.</i> , 227 F.3d 1110 (9th Cir. 2000).....	6, 12
<b>FEDERAL STATUTES</b>	
17 U.S.C. § 107 .....	5, 10
17 U.S.C. § 512 .....	5, 7, 8, 15
17 U.S.C. § 512(c)(3)(A)(v).....	3
17 U.S.C. § 512(f).....	passim
<b>FEDERAL RULES</b>	
Fed. R. Evid. 402 .....	3
Fed. R. Evid. 403 .....	3
Fed. R. Evid. 803(3).....	3
<b>LEGISLATIVE MATERIALS</b>	
S. Rep. No. 105–190 (1998) .....	7, 15
<b>TREATISES</b>	
Restatement (Second) of Torts §§ 525, 549 (1977) .....	13

1 **I. INTRODUCTION**

2 Plaintiff has no evidence from which any fact-finder could conclude that Universal made a  
 3 “*knowing*[ ] material[ ] misrepresent[ation] . . . that [the “Let’s Go Crazy #1” posting] [wa]s  
 4 infringing.” 17 U.S.C. § 512(f) (emphasis added). There is no evidence—none—that Universal  
 5 had “*actual knowledge*” that it was making any such falsehood. *Rossi v. MPAA*, 391 F.3d 1000,  
 6 1005 (9th Cir. 2004) (emphasis added). Plaintiff’s opposition instead argues that a fact-finder  
 7 could conclude that Universal did not “properly consider” fair use before emailing YouTube.  
 8 *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008). Failing to consider  
 9 fair use is not knowingly misrepresenting that a use infringes. But even if the Court holds that  
 10 “proper consideration” of fair use is required to avoid § 512(f) liability, the undisputed facts show  
 11 that Universal’s review properly considered fair use in this case, regardless of whether Universal  
 12 used those magic words to describe its review. Plaintiff’s arguments fail to show otherwise.

13 *First*, Plaintiff is wrong that Universal admitted that it knew it did not consider fair use.  
 14 Universal made no such admission, which is unsurprising given that no statute or case defines  
 15 what proper consideration is. The facts show that Universal’s review—including guidelines  
 16 accounting for all facts relevant to analyzing claimed “incidental” fair uses; a human review of  
 17 Plaintiff’s posting that concluded “Let’s Go Crazy” was a significant focus of “Let’s Go Crazy  
 18 #1”; and the determination, based on a review of all relevant facts Universal could have known  
 19 (which Plaintiff does not dispute, Opp. at 9 n.10<sup>1</sup>), that Plaintiff’s posting was unauthorized—  
 20 satisfied any standard of “properly considering” fair use that reasonably may be required.

21 *Second*, Plaintiff is wrong that Universal was required to have an individual trained in fair  
 22 use review Plaintiff’s posting (and all postings) individually and make an individualized fair use  
 23 determination. That is unfeasible and inconsistent with *Rossi* (where the investigator *did not*  
 24 *actually review* the postings claimed to be infringing) and this Court’s Orders, which say that a  
 25 “full investigation” of fair use is not required. *Lenz*, 572 F. Supp. 2d at 1155-56; D.N. 53 at 4.

26 \_\_\_\_\_  
 27 <sup>1</sup> Cites to “Opp.” are to Plaintiff’s Opposition to Universal’s Motion; to “Universal Opp.” are to  
 28 Universal’s Opposition to Plaintiff’s Motion; to “Klaus Decl.” are to the Klaus Declaration filed  
 with Universal’s Motion; to “Klaus Opp. Decl.” are to the Klaus Declaration filed with  
 Universal’s Opposition; and to “Klaus Reply Decl.” are to the Declaration filed herewith.

1           *Third*, Plaintiff is wrong that the only conclusion that Universal could have reached after  
 2 properly considering fair use was that “Let’s Go Crazy #1” was a “self-evident” fair use of “Let’s  
 3 Go Crazy.” This claim cannot be squared with Plaintiff’s fully admissible admissions that  
 4 “[m]ine’s not a ‘fair use’ case at all,” Klaus Decl. Ex. 1 at 2, and that someone looking at her  
 5 posting would not inexorably have to believe it to be fair use. *Id.* Ex. 14A at 173:1-16, 194:24-  
 6 195:2, 271:19-25, 276:23-277:6. And Plaintiff’s arguments on this issue are not based on facts  
 7 known to Universal on June 4, 2007, or clearly established fair use law; but rather on facts (such  
 8 as Plaintiff’s claimed purpose) that Plaintiff admits Universal did not and could not know, Opp. at  
 9 13 n.12, and on aggressive and expansive interpretations of fair use law that are not binding on  
 10 anyone, including Universal, in sending a takedown request.

11           Plaintiff fails to show any evidence of actual damages. Plaintiff’s primary category of  
 12 claimed damages—EFF’s fees and costs for working on Plaintiff’s put-back request—is not  
 13 compensable under § 512(f) because [REDACTED]  
 14 [REDACTED]. Universal’s motion should be granted.

## 15       **II.     RESPONSE TO PLAINTIFF’S FACTUAL SUMMARY**

16           Plaintiff’s statement is taken nearly verbatim from her affirmative motion. Universal  
 17 pointed out the inaccuracies and irrelevancies in this summary in opposing that motion.  
 18 Universal Opp. at 2-4. Universal incorporates that discussion and all of Universal’s objections.

## 19       **III.    PLAINTIFF’S EVIDENTIARY OBJECTIONS ARE MERITLESS**

20           The evidence that Plaintiff moves to exclude is directly relevant to *Plaintiff’s* contention  
 21 that Universal had to have known, from all the information available to it on June 4, 2007, that  
 22 the “Let’s Go Crazy” posting was a fair use. Opp. at 13-20. Plaintiff insists that only “what  
 23 *Universal* believed” on June 4 is relevant. Opp. at 6:21-23. What Universal actually knew on  
 24 June 4 *should* be the only knowledge that matters. But Plaintiff’s “self-evident” fair use  
 25 argument is *not* based on what Universal actually knew, but what Plaintiff says Universal would  
 26 have had to have known if it properly considered fair use. That Plaintiff—a writer/editor who  
 27 said she was “sensitive to” and knowledgeable about copyright in June 2007—said “[m]ine’s not  
 28 a ‘fair use’ case at all”; and that she testified *repeatedly* that her posting does not inevitably have

1 to be viewed as fair use, directly undermine Plaintiff's current argument. *See* Klaus Decl. Ex. 1 at  
 2 1-2; *id.* Ex. 14A at 173:1-16, 194:24-195:2, 271:19-25, 276:23-277:6; *id.* Ex. 14B at 375:16-23.

3 The same goes for statements made by Theryn Fleming, Plaintiff's trusted advisor on legal issues,  
 4 *see id.* Ex. 20 at 2 (Fleming's belief that "using copyrighted music as background music is  
 5 copyright infringement, unless you have obtained permission"), and EFF's telling Plaintiff that  
 6 [REDACTED] *Id.* Ex. 4.

7 The "Richard Z" statement is relevant because that is what Plaintiff responded to when she said,  
 8 "[y]ou're right Richard. Mine's not a "fair use" case at all. Nor is it a parody. It's something  
 9 different." *Id.* Ex. 1 at 1-2 (emphasis added). Plaintiff's Rule 402 and 403 objections fail.

10 Nor are the Fleming and Richard Z statements hearsay or improper lay opinion. Opp. at  
 11 7:3-7. Universal does not offer the statements to prove the truth of what either said, or to elicit  
 12 opinion testimony. The statements show (in Fleming's case) the belief of someone to whom  
 13 Plaintiff looked for expert legal analysis regarding whether the posting infringed copyright, *see*  
 14 Fed. R. Evid. 803(3); and (in Richard Z's case) the context for Plaintiff's admission.

#### 15 **IV. ARGUMENT**

##### 16 **A. Plaintiff Has No Evidence that Universal Made a Knowing Misrepresentation** 17 **that Her Posting Was Infringing**

18 Despite claiming at the 12(b)(6) stage that Universal knew her posting was a non-  
 19 infringing fair use but requested that YouTube remove it anyway, SAC ¶¶ 31, 35, Plaintiff has *no*  
 20 evidence that Universal knowingly misrepresented that the "Let's Go Crazy #1" posting was  
 21 infringing. Plaintiff also has abandoned her attempt to impute actual knowledge to Universal  
 22 based on "willful blindness." Plaintiff's failure of proof of actual knowledge should end her case.

23 Plaintiff now claims that Universal knew that it did not have a good faith belief that  
 24 Plaintiff's posting lacked authorization by "the law." 17 U.S.C. § 512(c)(3)(A)(v). As Universal  
 25 has demonstrated (and does so again below), Plaintiff's contention that Universal knew *that*  
 26 statement to be false has no evidentiary support. But Plaintiff's argument fails for the more  
 27 fundamental reason that, *even if* a party has not considered fair use, that party does not necessarily  
 28 actually know that its claim of infringement is false. If a party believes the material infringes but

1 has not evaluated the applicability of a fair use defense that is later found applicable, the most that  
 2 can be said is that the party made an unknowing mistake, which is not actionable. *Rossi*, 391  
 3 F.3d at 1005. That explains why even case law citing this Court’s Order construes it to mean that  
 4 “a misrepresentation exists where a copyright owner issues a takedown notice even though the  
 5 owner knows that another person’s use of copyrighted material clearly qualifies as ‘fair use’”  
 6 (*i.e.*, Plaintiff’s original claim), but *not* where a plaintiff has no evidence that the owner “actually  
 7 knew [the user] made fair use of its copyrighted material.” *Ouellette v. Viacom Int’l, Inc.*, 2012  
 8 WL 850921, at \*4 (D. Mont. Mar. 13, 2012). Plaintiff has no evidence that Universal actually  
 9 knew that Plaintiff’s posting was a fair use (or that it did not infringe for any reason) but decided  
 10 to request its removal anyway. This failure of proof also should end Plaintiff’s case.

11 **B. Universal Gave Proper Consideration of Fair Use to Plaintiff’s Posting**

12 *Even if* a party may be liable under § 512(f) if it fails to “properly consider” fair use,<sup>2</sup> the  
 13 undisputed facts show that the entirety of Universal’s review considered the facts that Universal  
 14 knew and that would be relevant to assessing a claimed “incidental” fair use—and Universal  
 15 nevertheless concluded that Plaintiff’s posting was unauthorized and included it in the email to  
 16 YouTube. Plaintiff makes three arguments to get around this result, but none of them has merit.

17 **1. Universal Has Never Admitted that it Did Not Consider Fair Use**

18 Plaintiff is wrong that Robert Allen, as a 30(b)(6) witness, admitted Universal did not  
 19 make any consideration of fair use. *Opp.* at 8:7-9:4. On the contrary, in response to Plaintiff’s  
 20 question, [REDACTED]

21 [REDACTED] Allen testified:

22 [REDACTED]  
 23 [REDACTED]  
 24 Klaus *Opp. Decl. Ex. 3* at 56:16-24 (emphasis added). Allen’s testimony thus referred to one of  
 25 the key elements in Universal’s guidelines, namely, whether the composition was a focus of a  
 26

27 <sup>2</sup> Universal incorporates its prior arguments that a failure to consider fair use is not a basis for  
 28 § 512(f) liability from the dismissal stage and from Universal’s opposition to Plaintiff’s summary  
 judgment motion (discussing *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012)).



1 YouTube posting. If the answer to that question was yes, then for that reason and because of  
2 numerous other facts incorporated in Universal’s policy (Section 2, *infra*), the posting was listed.

3 Plaintiff argues that Allen testified that “the allegation that the Video was unauthorized  
4 was based solely on a consideration of whether it was licensed (by contract, compulsory license,  
5 or by Prince himself).” Opp. at 8:7-9. But this ignores Allen’s testimony, quoted above, as well  
6 as the multiple objections that Universal raised to Plaintiff’s questions in the cited portion of the  
7 transcript (p. 76).<sup>3</sup> Plaintiff also cites Allen’s testimony at pp. 87-89, but the testimony there was  
8 *not* about the June 4 email (which is at issue in this case) but Alina Moffat’s June 15 email  
9 (responding to Plaintiff’s email to YouTube), which is not the basis for Plaintiff’s claim.

10 Neither Sean Johnson nor Moffat “admitted” that Universal did not consider fair use.  
11 Neither of them was responsible for Universal’s overall guidelines. Each simply performed work  
12 in implementing the guidelines. Johnson reviewed postings to determine if a Prince composition  
13 was a significant focus—an important part of the guidelines, but not the only fact that Universal  
14 considered that is relevant to fair use. Klaus Opp. Decl. Ex. 3 at 57:1–13. Moffat sent the email  
15 including the list of postings on June 4, and she did so only because the person who normally had  
16 the job was out of the office that day. *Id.* Ex. 6 at 17:19–21. It is the overall guidelines, and not  
17 one particular piece of their application, that shows Universal properly considered fair use.

## 18 2. Universal Properly Considered Fair Use Under any Standard that 19 May Reasonably and Feasibly be Applied

20 Universal requested the removal of “Let’s Go Crazy #1” based on a careful review in  
21 accordance with guidelines that considered facts relevant to all four fair use factors, including:

- 22 • The posting appeared on YouTube, a commercial, ad-driven site, Allen Decl.  
23 ¶¶ 10-12 (RJN Ex. 3); Klaus Decl. Ex. 6B at 60:15–61:6, 156:16-157:22, which is  
24 directly relevant to factor one. 17 U.S.C. § 107(1); *Monge*, 688 F.3d at 1176-77;  
25 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).
- Universal concluded “Let’s Go Crazy” was a significant focus of the posting,  
based on the title (“Let’s Go Crazy #1”), the fact that the music played loudly and

26 <sup>3</sup> Universal’s counsel objected specifically to the vagueness and ambiguity of this line of  
27 questioning; counsel also objected because the questions inherently implicated the legal  
28 conclusion of what it means to “properly consider” fair use for purposes of § 512. Miksch Decl.  
Ex. Q at 76. Plaintiff’s counsel made no attempt to clear up ambiguity or to focus the questioning  
on Universal’s consideration with respect to Plaintiff’s posting.

1 continuously throughout, and that a voice specifically asked the child what he  
 2 thought of the music, Klaus Decl. Ex. 6B at 62:6–19; *id.* Ex. 8B at 76:3–81:16.  
 3 All this is directly relevant to fair use analysis of a claimed “incidental” fair use,  
 4 including whether the use is “transformative” (factor one), the nature of the work  
 5 (factor two), and the amount and substantiality of the use (factor three). *Ringgold*  
*v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997); *Higgins v. Detroit*  
*Educational Television Found.*, 4 F. Supp. 2d 701, 707 (E.D. Mich. 1998);  
*Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585, 590 (E.D. Mich. 1997).

- 6 • Universal’s review further accounted for the fact that the [REDACTED]

7 [REDACTED]  
 8 [REDACTED] These facts are relevant to the fourth fair use factor. *Monge*, 688 F.3d at 1181;  
 9 *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110,  
 10 1119 (9th Cir. 2000); *Salinger v. Random House*, 811 F.2d 90, 99 (2d Cir. 1987).

11 Plaintiff ***does not dispute*** that Universal considered all of these facts prior to sending its  
 12 June 4, 2007 request. Opp. at 9 n.10. Plaintiff’s arguments as to why Universal’s consideration  
 13 nevertheless was insufficient fail.

14 a. **Plaintiff’s Claim that Universal Failed to Consider Fair Use Is Meritless**

15 Plaintiff asserts that, notwithstanding Universal’s admitted consideration of all of the facts  
 16 above, Universal did not “consider” fair use because it did not consider “*the legal import of those*  
 17 *facts to [the fair use] inquiry.*” Opp. at 9:10. This is the centerpiece of Plaintiff’s opposition. It  
 18 has two dimensions, both of which are wrong.

19 Plaintiff first asserts that Universal did no more than glance at the various facts relevant to  
 20 the guidelines but did not use those facts to reach an ultimate decision on whether the use was  
 21 fair. *Id.* at 9:16-17. This is contrary to the evidence. Universal considered all of the above facts  
 22 in deciding whether a posting was unauthorized and should be included in a request to YouTube.  
 23 If a posting was within the guidelines, then Universal listed it; if not, then not. Klaus Decl. Ex.  
 24 6B at 60:15–61:6, 64:2–17, 120:25–121:11, 122:4–124:20, 125:10–127:22; *id.* Ex. 8B at 60:17-  
 25 22, 62:4-12. Hence, Universal made the decision whether to include the postings in the request to  
 26 YouTube based on the guidelines’ application, which incorporated elements related to an  
 27 evaluation of a claimed “incidental” fair use. The fact that Universal did not use the magic words  
 28

1 “fair use” to describe what the guidelines considered and what result followed from that  
2 consideration does not change the *substance* of what Universal considered.

3 Plaintiff’s broader claim is that Universal did not “consider” fair use because no single  
4 individual sat down and made a deliberative decision how all of the fair use factors weighed with  
5 respect to Plaintiff’s individual posting. *See* Opp. at 11:2-5. In a different litigation, the same  
6 EFF lawyers representing Plaintiff here have argued that this Court’s dismissal Order stands for  
7 the proposition that, if a human being has not personally reviewed the material and made an  
8 individualized fair use determination prior to sending a notice, then this is a per se violation of  
9 § 512(f). *See* Klaus Reply Decl. Ex. 1 at 7-8. That argument cannot be squared with *Rossi*, the  
10 Court’s dismissal Order or any rational administration of the notice-and-takedown system that  
11 Congress intended. In *Rossi*, the MPAA’s pre-notice review did not actually view any movies  
12 from Rossi’s site or its accompanying links. *Rossi*, 391 F.3d at 1002 n.2. Rossi claimed that, if  
13 the MPAA had pressed the links, it would have found no downloadable movies. *Id.* at 1003. By  
14 definition, the review there did not make an individualized fair use determination of any posting.  
15 The Ninth Circuit nevertheless held as a matter of law that Rossi’s claims against the MPAA  
16 were inconsistent with § 512’s good faith standard. Given that holding on those facts, § 512  
17 cannot be read to require the individualized fair use review for which Plaintiff argues.

18 Reading the statute to require such a review also would be inconsistent with this Court’s  
19 dismissal Order, which was clear that the type of review the Court contemplated would “not be so  
20 complicated as to jeopardize a copyright owner’s ability to respond rapidly to potential  
21 infringements.” *Lenz*, 572 F. Supp. 2d at 1155. *See also* D.N. 53 at 4 (“The Court did not hold  
22 that every takedown notice must be preceded by a full fair use investigation.”). It is impractical  
23 and an unreasonable reading of the statute to require that a party sending a notice first “check the  
24 box” on each statutory factor and have personnel trained in the highly technical and complicated  
25 legal doctrine of fair use balance all the factors to determine if every particular use is fair. One of  
26 the key purposes behind the DMCA’s notice and takedown provision was to provide copyright  
27 owners the ability to respond rapidly to potential infringement. *See* S. Rep. No. 105–190, at 21  
28 (1998). The need for rapid response—particularly given the ease with which infringement may

1 increase exponentially through re-linking or re-embedding tools—is dramatically illustrated by  
2 the undisputed facts here. Over a period of several months, [REDACTED]  
3 [REDACTED]. Klaus Decl. Ex. 6B at 99:19–100:9, 199:3–  
4 201:3. These represent just a small fraction of the takedown notices sent annually by rights  
5 holders. *See* Klaus Opp. Decl. Ex. 7 (reflecting 5,670,181 URLs requested to be removed by  
6 Google in a month). While Plaintiff and her counsel like to trumpet a handful of inadvertent  
7 errors in the takedown process, these isolated examples are dwarfed by the massive amount of  
8 infringing uses that are the subject of tremendous numbers of takedown notices. It is impractical  
9 and inconsistent with the statutory scheme to require individualized evaluation and balancing of  
10 the four fair use factors by individuals trained in complex fair use doctrine. Given all this—and  
11 the § 512 “put back” procedure that safeguards third parties who believe in good faith that a  
12 takedown notice was sent in error—“proper consideration” cannot require as a prerequisite to  
13 sending a takedown notice that an individual analyze and weigh all of the fair use factors  
14 applicable to each individual posting. In this case, Universal’s guidelines set out various  
15 parameters for evaluating postings, Universal personnel reviewed individual postings to see  
16 whether an important element (focus of the posting) was satisfied, and Universal included  
17 postings within the guidelines based on the entirety of Universal’s review. Under any reasonable  
18 definition of “properly considering” fair use, Universal’s review was sufficient.

19                   **b. Universal’s Guidelines Did Not Serve to Identify Mere *De***  
20                   ***Minimis* Uses**

21           Plaintiff also is wrong that Universal’s guidelines at most identified *de minimis*, and not  
22 fair uses. Opp. at 1:12, 10:1-14. Plaintiff is ignoring the fact that the “focus” issue was not the  
23 only factor that Universal considered in sending takedown requests to YouTube. Universal’s  
24 guidelines also factored in the commercial nature of postings to YouTube and the fact that the  
25 copyright owner did not want to authorize his work to be synched with YouTube videos (which  
26 helped to preserve the value of synch licenses). Moreover, the guidelines’ consideration of the  
27 “focus” issue was not a *de minimis* inquiry. The *de minimis* inquiry asks whether the use is  
28 “trivial,” as in using only a handful of notes from a composition. *Swirsky v. Carey*, 376 F.3d 841,

1 852 (9th Cir. 2004) (“It cannot be said as a matter of law that seven notes is too short a length to  
 2 garner copyright protection.”). Universal’s review did not ask whether postings made use of only  
 3 a fleeting set of notes. Johnson testified that he understood the review for “focus” to [REDACTED]

4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 Klaus Decl. Ex. 8B at 64:4–10. And Plaintiff’s posting did not use a few notes; rather, the music  
 8 played loudly and throughout the nearly 30-second posting. *See id.* at 75:15-76:7. Universal’s  
 9 guidelines were fully consistent with cases on claimed “incidental” fair uses, which make clear  
 10 that whether the underlying work is a focus of the secondary use is a critical issue. *See Ringgold*,  
 11 126 F.3d at 80; *Higgins*, 4 F. Supp. 2d at 707; *Jackson*, 993 F. Supp. at 590.

12 Plaintiff claims that these cases are beside the point, because some uses deemed to be fair  
 13 make the original work a significant focus. Opp. at 10:9-22. But Plaintiff’s cited cases involve  
 14 parodies. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (2 Live Crew parody of  
 15 “Oh, Pretty Woman”); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 802 (9th Cir. 2003)  
 16 (photos of nude Barbies parodying original and “everything Mattel’s doll has come to signify”);  
 17 *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (“When Sonny Sniffs Glue”). Plaintiff’s use is not a  
 18 parody, as Plaintiff admitted within days of YouTube’s removal of her posting. Klaus Decl. Ex. 1  
 19 at 2 (“Mine’s not a ‘fair use’ case at all. Nor is it a parody.”).

20 **3. Plaintiff’s Claim that Universal Could Not Have Considered Fair Use**  
 21 **Because “Let’s Go Crazy #1” Obviously was Fair Use is Wrong**

22 Finally, Plaintiff argues that if Universal actually was considering fair use, then the only  
 23 conclusion it could have reached—not a likely conclusion, or the most likely conclusion, but the  
 24 only one—is that Plaintiff’s posting was a fair use. Because Plaintiff is making the affirmative  
 25 claim and is claiming fair use, Plaintiff has the burden to establish that, even if there is such a  
 26 thing as “self-evident” fair use (which there is not), “Let’s Go Crazy #1” is that. *Monge*, 688  
 27 F.3d at 1170; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007).

28 Plaintiff’s argument that her use was self-evidently fair fails at the outset because [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 Klaus Decl. Ex. 14B at 375:13–23, 376:11–15, 384:2–17; *id.* Ex. 4; *id.* Ex. 12; *id.* Ex. 20 at 2;  
4 Klaus Opp. Decl. Ex. 17 at 165:3–166:4. And Plaintiff admitted repeatedly at her deposition that  
5 someone could look at her posting and reasonably conclude that it was *not* a fair use. Klaus Decl.  
6 Ex. 14A at 173:1–16, 194:24–195:2, 271:19–25, 276:23–277:6. Plaintiff’s one-sided, inaccurate  
7 analysis of the individual factors fails to establish that Universal was bound to find the use fair.

8 a. **The Purpose and Character of “Let’s Go Crazy #1” Was Not**  
9 **Obviously Non-Commercial or Transformative**

10 The first fair use factor analyzes whether Plaintiff’s posting falls within the statutory  
11 preamble of illustrative uses (it does not), whether the use is of a commercial nature, and whether  
12 the use was transformative. 17 U.S.C. § 107(1); *Monge*, 688 F.3d at 1173-1177. Universal was  
13 entitled to conclude that YouTube postings are inherently commercial, for reasons Universal has  
14 explained at length and incorporates by reference. *See* Universal Opp. at 9-12.

15 Contrary to Plaintiff’s claim, Universal was *not* bound to recognize her posting as a  
16 transformative “home movie.” Opp. at 13:15. It was not a home movie, but a video synched  
17 with Prince’s composition and posted to YouTube. A synched soundtrack for “Let’s Go Crazy  
18 #1” is not inherently transformative, but the exercise of a right specifically reserved to the  
19 composition owner. *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 527 (9th Cir.  
20 2008). “[T]he ‘heart’ of a claim for transformative use is ‘the use of some elements of a prior  
21 author’s composition to create a new one that, at least in part, comments on that author’s work.’”  
22 *Monge*, 688 F.3d at 1175 (quoting *Campbell*, 510 U.S. at 580). Plaintiff does not assert that her  
23 posting provided any commentary or critical analysis of “Let’s Go Crazy.” Asking the child what  
24 he “thinks of the music,” Opp. at 14-15, is not commentary; it just confirms that “Let’s Go  
25 Crazy” is a focus of the posting. Klaus Decl. Ex. 8B at 79:7–22.

26 b. **The Nature of the Work Weighs Against Fair Use**

27 Plaintiff concedes, as she must, that this factor cuts against fair use. *See Leadsinger*, 512  
28 F.3d at 531 (musical compositions are “precisely the sort of expression that the copyright law

1 aims to protect”). Plaintiff’s claim that this factor is not “terribly significant,” Opp. at 15, may be  
2 true in cases involving parody or criticism. *See Mattel*, 353 F.3d at 802 (parody of Barbie).  
3 Where, as here, “the secondary use is at best minimally transformative,” “the fictional nature of  
4 the copyrighted work remains significant.” *Castle Rock Entm’t, Inc. v. Carol Publishing Group, Inc.*,  
5 150 F.3d 132, 144 (2d Cir. 1998). Plaintiff also claims that this factor carries little weight  
6 because “Let’s Go Crazy” was already published. Opp. at 15:11-12. That, too, is an overreach.  
7 Proving fair use for distributing an unpublished work is even harder than proving fair use for  
8 distributing a published work, because the copyright owner has the right to control the work’s  
9 first public appearance. *See Monge*, 688 F.3d at 1177-78. But that does not mean that if a work  
10 has been published, then this factor “should carry little weight, if any.” Opp. at 13. Plaintiff  
11 relies on *Lennon v. Premise Media Corp., L.P.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008), but that  
12 case said only that, because “Imagine” had been widely published, the second factor “weighs a  
13 *bit* in favor of fair use,” “but *not strongly*,” and fair use was found there because the second work  
14 “comment[ed] on the ‘social and aesthetic meaning’ of the original, rather than ‘exploiting its  
15 creative virtues.’” *Id.* at 325 (emphases added). That has no relevance to Plaintiff’s use.

16 c. **The Amount of Plaintiff’s Use Was Not Minor**

17 Plaintiff’s claim that “Let’s Go Crazy” is used for 20 of 29 seconds is contrary to the  
18 testimony of the Universal employee who reviewed the posting and said the music played  
19 throughout. Klaus Decl. Ex. 8B at 76:3–6. Hence, the appropriation was more than 10% of the  
20 original, which is more than enough objectively to be considered a qualitatively substantial  
21 taking. *See, e.g., Salinger*, 811 F.2d at 98–99 (use of 10–30% of archived copyrighted letters  
22 unfair). Plaintiff tries to minimize this factor by claiming no one would use Plaintiff’s posting  
23 rather than the original to listen to “Let’s Go Crazy.” Opp. at 19:22-26. The “heart of the work”  
24 analysis, however, looks to the value of what was taken, not the value of the secondary use. *See*  
25 *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003) (“Plaintiffs are in  
26 the business of licensing these copyrights. Taking key portions extracts the most valuable part of  
27 Plaintiffs’ copyrighted works.”). Plaintiff also says that this factor weighs in her favor because  
28 she only took what was necessary for her purported purpose, *i.e.*, to capture her son learning how

1 to walk in her kitchen. Opp. at 16:21-23. However, as Plaintiff admits elsewhere in her  
 2 opposition, Universal did not know *and could not have known* what Plaintiff's purpose was in  
 3 making the posting. *Id.* at 13 n.12. Universal was not obligated to weigh this factor for fair use.

4 d. **Universal Was Not Bound to Find the Effect on the Potential  
 5 Market Weighed Against Sending the Request**

6 Plaintiff also is wrong that Universal was bound to recognize that “[t]here is no potential  
 7 licensing market for uses like Ms. Lenz’s,” and so “no market to be harmed.” Opp. at 18:8-20.  
 8 In making this argument, Plaintiff repeatedly (and deliberately) confuses YouTube postings with  
 9 “home videos.” *Id.* at 17-19. A license allowing YouTube and its users to post user-generated  
 10 videos synched with Prince compositions is *not* the same thing as a license for the showing of a  
 11 family video in the confines of the home. The fair use issue here involves the former type of  
 12 license. A license to YouTube is a broad synch license for the performance of compositions to  
 13 potentially millions of users. Universal knew that [REDACTED]

14 [REDACTED]  
 15 [REDACTED] Allen Decl. ¶ 6; Klaus Decl. Ex. 6B at  
 16 135:7-136:8. Universal was entitled to and did take that fact into account in formulating the  
 17 guidelines, and in Universal’s application of the guidelines to Plaintiff’s posting.<sup>4</sup>

18 Plaintiff’s argument also fails to rebut that the copyright owner has the right to change his  
 19 mind about whether or not to license. *Monge*, 688 F.3d at 1181 (re-affirming *Worldwide Church*  
 20 *of God*, 227 F.3d at 1119); *Salinger*, 811 F.2d at 99. The only authority in this line that Plaintiff  
 21 even bothers to discuss is *Salinger*, but her arguments on that case reveal why her position on  
 22 “self-evident” fair use is meritless. Plaintiff says that *Salinger* is distinguishable because the  
 23 market for J.D. Salinger to license his unpublished letters was “traditional” and “potential,”  
 24 whereas Plaintiff says the market for Prince to license his compositions for YouTube postings  
 25 was “entirely hypothetical and highly unlikely.” Opp. at 19:9-12. The fact is that J.D. Salinger

26 <sup>4</sup> Plaintiff’s claims about Universal supposedly conceding Prince would not license postings like  
 27 Plaintiff’s except for “exorbitant” amounts, *see, e.g.*, Opp. at 18:12, are not based on testimony  
 28 about Plaintiff’s posting, but rather on deposition testimony and an email concerning a lip-synch  
 video. *See* Klaus Opp. Decl. Ex. 2 at 153:21–154:21; *id.* Ex. 3 at 165:16–166:16; Klaus Opp.  
 Decl. Ex. 4. (Plaintiff’s excerpts on this issue included only pages 166-67, and not 153-54, which  
 make it clear that Allen was testifying about a lip-synch video, and not Plaintiff’s posting).



1 never agreed to license his unpublished letters, but the Second Circuit still said he had the right to  
2 change his mind. The possibility of Prince changing his mind about licensing his compositions  
3 for use on UGC sites is at least as likely a potential market as that for Salinger's letters. And that  
4 is the potential market that Universal (administering Prince's compositions) was entitled to and  
5 did factor into the guidelines.

6 Plaintiff also argues that the *Salinger* court was concerned about secondary uses  
7 substituting for originals, whereas no one who wanted the original "Let's Go Crazy" would use  
8 Plaintiff's posting as a substitute. *Id.* at 19:12-26. But the relevant substitution issue for factor  
9 four is *not* the isolated instance of Plaintiff's posting being substituted for the original. Rather,  
10 the question on the fourth fair use factor is "'whether unrestricted and widespread conduct of the  
11 sort engaged in by [Lenz] . . . would result in a substantially adverse impact on the potential  
12 market' for the original." *Campbell*, 510 U.S. at 590 (internal citation omitted). Universal was  
13 entitled to and did consider in its guidelines that widespread synchronizations of Prince music as  
14 background music for YouTube postings would interfere with the value of that music in a  
15 potential synch licensing market. Allen Decl. ¶ 6; Klaus Decl. Ex. 6B at 135:7-136:8.

### 16 C. Plaintiff Has No Evidence of Actual Damages

17 Universal is not seeking to "re-litigate[]" the damage issue decided at summary judgment.  
18 Opp. at 21. The summary judgment ruling was based on an equitable affirmative defense to  
19 Plaintiff's injunction claim. The issue here is Plaintiff's affirmative burden to show that she  
20 incurred actual economic loss. *See* Restatement (Second) of Torts §§ 525, 549 (1977) (pecuniary  
21 loss is an element of a claim for misrepresentation).

22 Plaintiff says that her lawyers at EFF incurred costs in getting her posting restored to  
23 YouTube. That claim for damages fails, however, because all of the alleged fees and costs were  
24 inextricably intertwined with EFF's work on the litigation. The Court held that fees and costs for  
25 prosecuting a § 512(f) case are not "damages" under § 512(f); were it otherwise, a plaintiff could  
26 satisfy a required element of a claim merely by filing a claim. D.N. 250 at 15-16. The  
27 undisputed facts make it clear that Plaintiff and her lawyers at EFF *always* viewed the process of  
28 getting "Let's Go Crazy #1" restored as part-and-parcel of this litigation. [REDACTED]

- 1 [REDACTED]
- 2 [REDACTED]
- 3 • On June 14, 2007, following Plaintiff's first telephone call with EFF's Marcia Hoffman, Plaintiff wrote: "I spoke w/ a lawyer from EFF today about the YouTube/Universal thing. *I can't say much but there may be a publicity blitz and/or a lawsuit against Universal.*" Klaus Decl. Ex. 36 (emphasis added). See Klaus Opp. Dec. Ex. 14 at 387:21-390:6.
- 4
- 5
- 6 • Plaintiff's email correspondence with EFF on the same day—June 14, 2007—shows that Hoffman (who is alleged to have incurred the fees related to the restoration of the video posting) told Plaintiff: [REDACTED]
- 7
- 8 [REDACTED]
- 9 [REDACTED] *Id.* Ex. 38 (emphasis added).
- 10 • That same day—June 14—Plaintiff wrote that EFF was "very, very interested in the case. . . . She [Hoffman] said that Universal Music Group is creating a trend of just going all over the web claiming copyright infringement left & right & that they're breaking laws and such to do it. *So EFF is pretty well salivating over getting their teeth into UMG yet again.*" *Id.* Ex. 40 (emphasis added).
- 11
- 12
- 13 • On July 18, 2007 (six days before the complaint was filed), Plaintiff wrote: [REDACTED]
- 14 [REDACTED] *Id.* Ex. 35 (emphasis added).
- 15 • On Friday, July 20, 2007, YouTube restored Plaintiff's posting. Hubbard Affidavit (attached at Ex. V to Miksch Decl.) Ex. E.
- 16
- 17 • On Tuesday, July 24, EFF filed Plaintiff's complaint. D.N. 1. EFF's press release, posted to EFF's website the same day, included a link to the restored posting. See Decl. of Kelly M. Klaus in Supp. of Mot. to Dismiss Compl. (D.N. 12) Ex. J at 1-2.
- 18
- 19 • On July 27, 2007, Plaintiff and McSherry appeared on the "O'Reilly Factor," publicizing Plaintiff's lawsuit. Plaintiff's photographs of herself watching the taped show on television show a copy of the YouTube posting playing during the segment. *Id.* Ex. G. This was just one item in Plaintiff's publicity "blitz."
- 20
- 21

22 The evidence thus shows that EFF's services related to the restoration of the posting were not unrelated to EFF's work on the litigation, but instead [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 Notably, Plaintiff's Opposition does not respond to Universal's argument at all on this point. The undisputed facts are undeniable. Plaintiff's claimed fees and costs related to the restoration are intertwined with her admittedly unrecoverable litigation fees and costs.

26

27

28

1 Plaintiff's remaining two categories of claimed damages involve no actual economic loss.  
 2 Plaintiff says that she lost the "freedom to express herself and enjoyment in doing so." Opp. at  
 3 22:4. The claim is contrary to the undisputed facts showing that Plaintiff's free expression was  
 4 not diminished. Klaus Decl. Exs. 3, 21, 27-28. It also is legally insupportable. Plaintiff says that  
 5 "nominal damages" may be awarded for her purported loss of First Amendment rights. *But there*  
 6 *is no state action in this case.* Plaintiff's reliance on *Phelps-Roper v. City of Manchester*, 738 F.  
 7 Supp. 2d 947 (E.D. Mo. 2010), *aff'd*, 658 F.3d 813 (8th Cir. 2011), where the defendant *was a*  
 8 state actor, is thus entirely inapposite. YouTube and Universal are not state actors.

9 Finally, Plaintiff's attempt to impute the minimum wage value of her claimed lost time  
 10 fails because Plaintiff admitted that she did not actually lose *any* wages. Klaus Decl. Ex. 14A at  
 11 28:18-20, 315:2-24.

## 12 V. CONCLUSION

13 After years of litigation, Plaintiff has not produced any evidence that Universal knowingly  
 14 misrepresented her posting was infringing or that she incurred even a penny's worth of actual  
 15 damages. While Plaintiff again appeals (as she throughout this case) to § 512(f)'s purpose to  
 16 deter actual knowing misrepresentations, § 512 also is about ensuring an efficient and expeditious  
 17 notice-and-takedown procedure. *See* S. Rep. No. 105-190, at 21, 44-45. Allowing Plaintiff to  
 18 proceed to trial where she has no evidence to support the core elements of her claim undermines  
 19 that important purpose. Universal's motion should be granted.

20 DATED: September 26, 2012

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

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

25 Attorneys for Defendants