

1 KELLY M. KLAUS (SBN 161091)
Kelly.Klaus@mto.com
2 AMY C. TOVAR (SBN 230370)
Amy.Tovar@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

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

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 STEPHANIE LENZ,

13 Plaintiff,

14 vs.

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

18 Defendants.
19
20
21
22
23
24
25
26
27
28

CASE NO. CV 07-03783-JF

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION [1] TO CERTIFY AUGUST 20,
2008 ORDER FOR INTERLOCUTORY
APPEAL PURSUANT TO 28 U.S.C.
§ 1292(b) AND [2] TO STAY PENDING
RESOLUTION OF § 1292(b)
PROCEEDINGS**

Date: N/A [For submission on papers,
per Stipulation and [Proposed]
Order]

Judge: Honorable Jeremy Fogel

Courtroom: 3

1 **I. INTRODUCTION**

2 Plaintiff insists that there is no possibility of prejudice to Universal from having to await
3 final judgment because at that point Universal “may then seek appellate review of this Court’s
4 decision.” Opp. at 1. That result is by no means guaranteed. If the Court denies certification,
5 and if its “considerable doubt” about Plaintiff’s ability to prevail is confirmed, Order at 8:17-18,
6 then Universal will not have the automatic right to seek appellate review of the Court’s
7 construction of the DMCA. The rules of appellate jurisdiction preclude a prevailing party from
8 appealing adverse legal conclusions bound up in an otherwise favorable judgment. Federal
9 appellate courts “review[] judgments, not statements in opinions.” *Black v. Cutter Labs.*, 351
10 U.S. 292, 297 (1956). There is no appellate jurisdiction “where a party does not seek reversal of
11 the judgment but asks only for review of unfavorable findings.” *Penda Corp. v. United States*, 44
12 F.3d 967, 972 (Fed. Cir. 1994). For this reason, even if it wins the case, Universal will not
13 necessarily be able to seek appellate review of the Court’s Order, which undoubtedly will
14 continue to be cited in § 512(f) cases as controlling on the meaning of the DMCA. That result
15 may suit the litigating strategy of Plaintiff’s counsel but it does not promote clarity in legal
16 standards that are of considerable legal and practical importance for numerous copyright holders
17 and service providers based in the Ninth Circuit.

18 This is a clear-cut case for § 1292(b) certification. The issue the Court resolved is purely
19 legal and does not depend on any factual development; the question is one of first impression and,
20 with respect to the Court (and notwithstanding Plaintiff’s arguments), there are substantial
21 grounds for a difference of opinion with the Court’s resolution; and a contrary ruling from the
22 Ninth Circuit will resolve this lawsuit, as well as § 512(f) cases based on the same premise as this
23 case that otherwise could be before this Court and others. Considerations of efficiency and
24 economy, and the absence of any prejudice to Plaintiff, all weigh in favor of a stay pending the
25 § 1292(b) appeal.¹

26 _____
27 ¹ Pursuant to the parties’ Stipulation and Order entered September 4, 2008, this certification
28 motion may be resolved on the papers following the submission of this reply brief, unless the
Court would prefer to hear argument. If the Court has not resolved this motion by September 23,
Universal respectfully requests that the Court extend Universal’s time to answer, which currently

1 **II. ARGUMENT**

2 **A. The Court's Order Satisfies All Three Criteria For § 1292(b) Certification**

3 **1. Plaintiff Concedes The First § 1292(b) Factor Is Satisfied**

4 Plaintiff does not – because she cannot – dispute that the Order meets the first criterion for
5 § 1292(b), namely, that the Order “involves a controlling question of law[.]” 28 U.S.C.
6 § 1292(b).

7 **2. The Court's Construction Of § 512(c)(3)(A)(v) Is Subject To A
8 Difference Of Opinion**

9 Plaintiff asserts that there is no “substantial ground for difference of opinion” with the
10 Court's Order, Opp. at 2-6, but her arguments on this score confirm that the question presented is
11 novel and that there are substantial arguments for a contrary result.

12 Plaintiff asserts that the issue in this case is decided by “unambiguous statutory language
13 and clear case law.” *Id.* at 3. With respect, Universal submits that statutory language and
14 structure and court precedent do not by any means make it obvious that 17 U.S.C.
15 § 512(c)(3)(A)(v) requires a party sending a DMCA takedown notice to evaluate whether the
16 material complained of makes a “fair use” of the copyright. Universal has already pointed out
17 why the statute's plain language and structure point to a contrary result, *see* Mot. at 3-6. Plaintiff
18 largely ignores Universal's arguments, and Universal will not repeat them here.²

19 Plaintiff also ignores (or distorts) legal precedent. She continues to cite *Sony Corp. of Am.*
20 *v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), for the incorrect proposition (not even
21 adopted by that case) that fair use is a right affirmatively granted by the Copyright Act, while
22 is set at September 30, 2008.

23 ² One notable exception is Plaintiff's *ipse dixit* that the counter-notice procedure “does not suffice
24 to protect fair use and there is no record to suggest that Congress thought it would.” Opp. at 3.
25 The relevant question is not whether the counter-notice procedure “protects fair use” as
26 vigorously as Plaintiff would like. The question instead is whether the existence of that
27 procedure is consistent with a system where copyright owners are required to evaluate the relative
28 merits of the affirmative defense of fair use before *or after* knowing whether such a defense even
will be raised. We submit that the procedure is much more consistent with the time for evaluating
the affirmative defense of fair use. Plaintiffs' assertion that “there is no record to suggest that
Congress thought” the counter-notice procedure would protect fair use is a red herring: the
legislative history of Section 512(f) does not say one word about fair use, an omission that,
Universal submits, is more consistent with the conclusion that the statute does not require an *ex
ante* fair use evaluation.

1 ignoring the subsequent Supreme Court cases that make clear fair use is an affirmative defense.
2 *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); *Campbell v. Acuff-*
3 *Rose Music, Inc.*, 510 U.S. 569, 590 (1994). Plaintiff also continues to distort *Rossi v. MPAA*,
4 391 F.3d 1000 (9th Cir. 2004), the Ninth Circuit’s leading decision on § 512(f). *Rossi* did not
5 simply hold that a copyright owner can send a takedown notice without making “*a full*
6 *investigation* into the material in question.” *Opp.* at 4 (emphasis added). *Rossi* actually decided
7 that the notice sender was not liable even if it failed to look at the material in question. 391 F.3d
8 at 1003. *Rossi* cannot be read as consistent with an affirmative duty to review the material, much
9 less a duty to analyze whether the material is subject to a defense as malleable as fair use.

10 As Universal also pointed out, the indeterminacy of the fair use defense is inconsistent
11 with the type of *post hoc* reasonableness inquiry that Plaintiff’s § 512(f) claim sets up. *Mot.* at 5-
12 6. Plaintiff responds by saying that “there are many ways in which a copyright owner can show
13 ‘proper consideration’ that do not require a *post hoc* assessment of reasonableness” – and then
14 promptly lists as examples hypothetical “showings” that inevitably turn on after-the-fact
15 reasonableness review, such as “*how*” someone “considered” the fair use factors before sending a
16 notice, and “*efforts to educate* agents as to the fair use factors[.]” *Opp.* at 4 (emphasis added).
17 Topping that off, Plaintiff then says that she does not even concede that the examples she gives to
18 purportedly illuminate an inquiry based on subjective knowledge would be sufficient. *Id.* at 5 n.1.
19 All this simply serves to confirm that Plaintiff’s claim leads to an objective, not a subjective,
20 inquiry, and that is inconsistent with *Rossi*.

21 For purposes of § 1292(b), the Court’s construction of the DMCA presents a difficult
22 question that is a matter of first impression. The Order satisfies the second criterion for
23 interlocutory appeal.

24 **3. An Immediate Appeal Obviously May Terminate This Litigation**

25 Plaintiff purports to dispute whether the third factor applies, but her argument on this
26 factor changes the statutory test and ignores the procedural posture of this case. According to
27 Plaintiff, the third § 1292(b) factor is not satisfied if there is a possibility that the District Court
28 and Ninth Circuit may both be expending judicial resources on the case at the same time. *See*

1 Opp. at 6. That is not the test under § 1292(b); if that were the test, certification would never be
 2 granted because there always is a possibility of the District Court and the Court of Appeals both
 3 handling the case simultaneously. The applicable test – stated directly in the statute – is whether
 4 “an immediate appeal from the order may materially advance the ultimate termination of the
 5 litigation[.]” 28 U.S.C. § 1292(b). This test indisputably is satisfied: If the Ninth Circuit decides
 6 that the phrase “authorized by law” in 17 U.S.C. § 512(c)(3)(A)(v) does *not* require an *ex ante*
 7 fair use evaluation, then Plaintiff’s case is over. The way to deal with Plaintiff’s professed
 8 concern about conserving judicial effort and party resources is to stay proceedings in this Court, a
 9 result that makes tremendous practical sense and that will not prejudice Plaintiff in the slightest.³

10 4. Section 1292(b) Is Not Limited To “Antitrust” And Other Big Cases

11 Plaintiff’s final argument against certification dredges up dictum from a 1966 case for the
 12 proposition that § 1292(b) appeals should be limited to “protracted or expensive litigation, such
 13 as antitrust and similar protracted cases.” Opp. at 7 (quoting *U.S. Rubber v. Wright*, 359 F.2d
 14 784, 785 (9th Cir. 1966)). In the nearly 40 years since this statement appeared, the Ninth Circuit
 15 and other courts have considered § 1292(b) appeals in cases that satisfied the statutory criteria but
 16 were not “big” or expensive litigation. See 16 Wright, Miller & Cooper, *Federal Practice and*
 17 *Procedure* § 3929, at 368 (“[E]ven a casual survey of the hundreds of appeals decided under
 18 § 1292(b) suggests that it is often used in cases that do not meet the ‘exceptional’ test.”) (2d ed.
 19 1966). According to the leading treatise on federal practice:

20 The flexible approach to § 1292(b) is far superior to blind adherence to a
 21 supposed need to construe strictly any permission to depart from the final
 22 judgment rule. The statute is not limited by its language to “exceptional” cases.
 23 Flexibility is justified in part because the statute itself was suggested and drafted
 24 by judges who were concerned with avoiding the rigors of the final judgment rule.
 25 Such judge-inspired legislation should be subject to development by judges in

24 ³ In the cases that Plaintiff cites, see Opp. at 6, discovery and pretrial proceedings were well
 25 underway when the Court was asked to rule on certification. See *Shurance v. Planning Control*
 26 *Int’l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (order denying interlocutory appeal decided in
 27 February 1988, where trial was scheduled to begin July 1988); *Cortez v. MTD Prods., Inc.*, 927
 28 F. Supp. 386, 394 (N.D. Cal. 1996) (Brazil, Mag. J.) (denying certification where “[v]irtually all
 pretrial preparation” was about to be completed and case was scheduled to go to trial “less than
 two months” from the date of the court’s order). Here, in contrast, the Court has not entered a
 scheduling order or set a trial date, and neither side has served any discovery.

1 light of their own perceptions of need, and their ability to control a potentially
2 explosive source of appeals.

3 *Id.* at 370.

4 Plaintiff admits that the issue the Court's Order resolves is "important," Opp. at 1, and it
5 obviously is. It is an important issue for major copyright holders, many of whom are located in
6 the Ninth Circuit. The issue also affects the sending and receipt of takedown notices to service
7 providers, many of whom also are located within the Ninth Circuit. Plaintiffs' counsel has made
8 plain its eagerness to file more suits under § 512(f) based on the Court's construction of the
9 DMCA, a point that Plaintiff's opposition brief does not dispute but instead urges that this Court
10 to ignore. *Id.* at 6. The issue does not require any factual development. The importance of the
11 issue and its suitability for § 1292(b) certification are not lessened because Plaintiff has no
12 damages or because this is not "big case" litigation. The Order satisfies all three criteria under
13 § 1292(b), and the Court should certify it.

14 **B. A Stay Of Proceedings Will Not Prejudice Plaintiff At All And Will Conserve
15 Judicial And Party Resources**

16 The equities of a stay are straightforward, clear, and all weigh in favor of staying this case
17 until the Ninth Circuit resolves the § 1292(b) petition. If the Court certifies its Order, then the
18 statute requires Universal to file its request for certification within 10 days. 28 U.S.C. § 1292(b).
19 A Ninth Circuit motions panel must then decide whether to accept the certification. That process
20 will be completed within a matter of weeks, not years. If the Ninth Circuit accepts certification of
21 the appeal, that means that Court will agree that the issue is important and has the potential to
22 resolve the litigation, in which case Plaintiff cannot plausibly contend that a stay is unwarranted.
23 If the Ninth Circuit declines certification, then there will have been only a short pause in trial
24 court proceedings, where discovery has not even commenced. In either case, granting a stay to
25 allow the Ninth Circuit to consider the § 1292(b) petition makes good sense and poses no risk of
26 prejudice to Plaintiff.

27 Plaintiff's argument against a stay is based on an incorrect legal standard and an
28 exaggerated characterization of the relative equities. In the first place, the standard for staying
proceedings on a § 1292(b) appeal is *not* the same as the standard for obtaining a preliminary

1 injunction. The preliminary injunction standard applies when a district court is deciding *whether*
 2 *to stay the effect of one of its orders pending appeal.*⁴ The issue here, however, is not whether the
 3 Court should stay the effect of any order but rather whether the Court should stay proceedings
 4 pending the Ninth Circuit’s resolution of the § 1292(b) appeal. It is well established that a
 5 District Court “possesses the inherent power to control its own docket and calendar.” *Eaton v.*
 6 *Siemens*, 2007 WL 2318538, at *2 (E.D. Cal. Aug. 10, 2007). As the Ninth Circuit has explained:
 7 “A district court has inherent power to control the disposition of the causes on its docket in a
 8 manner which will promote economy of time and effort for itself, for counsel, and for litigants.”
 9 *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972). In deciding how to control its own
 10 docket pending a § 1292(b) appeal, the District Court is not constrained by the four-factor
 11 preliminary injunction standard, but instead has flexibility to stay proceedings based on
 12 considerations of conserving judicial and party resources. Unsurprisingly, District Courts have
 13 often found these factors weigh in favor of a stay, as they do here.⁵

14 A stay obviously will conserve judicial and party resources. Notwithstanding her
 15 acknowledgement in the Joint Case Management Conference Statement that the parties disagree
 16 about multiple issues, *see* Joint Case Management Conference Statement (“C.M. Stmt.”) (Docket
 17 No. 43) (July 8, 2008) at 3, Plaintiff now claims that the cost of litigating the case “should be
 18 comparatively small.” *Opp.* at 9. The litigation will not be costless, however, and there is no

19 _____
 20 ⁴ *See Abbassi v. I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998) (seeking stay of order of deportation
 21 pending review of order denying asylum); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)
 22 (seeking partial stay of preliminary injunction order pending appeal), *rev’d in part on other*
 23 *grounds*, 463 U.S. 1328 (1983); *Comm. on The Judiciary U.S. House of Representative v. Miers*,
 24 2008 WL 3906419, *1 (D.D.C. Aug. 26, 2008) (seeking stay of court order).

25 ⁵ *See Jones v. Henry*, 2007 WL 781509, at *1 (E.D. Cal. Mar. 13, 2007) (stay warranted because
 26 “the issue before the Ninth Circuit may be dispositive of this action” and a stay “will promote
 27 economy of time and effort for both the parties and the court”) (order vacated after Ninth Circuit
 28 denied permission to appeal, 2007 WL 1412046, at *1 (E.D. Cal. May 11, 2007)); *Eaton*, 2007
 WL 2318538, at *4 (“Because a reversal of this court’s Order by the Ninth Circuit could resolve
 this case . . . the court stays this action in its entirety pending resolution of defendants’ appeal of
 the Order.”); *Watson v. Yolo County Flood Control and Water Conservation District*, 2007 WL
 4107539, at *4 (E.D. Cal. Nov. 16, 2007) (“a reversal of this court’s Order by the Ninth Circuit
 could materially affect this case and advance the ultimate termination of litigation”); *Advanced*
Analogic Technologies v. Linear Technology Corp., 2006 WL 2850017, at *3 (N.D. Cal. Oct. 4,
 2006) (“The Court finds the stay requested . . . will conserve the resources of the parties and the
 Court[.]”).

1 guarantee it will live up to Plaintiff's sunny surmise. Plaintiff notably does *not* deny that she still
2 intends to litigate issues far beyond her one YouTube posting, and that she continues to think
3 herself entitled to discover all of Universal's policies and practices regarding takedown notices
4 going back to January 2005. C.M. Stmt. at 3-4. Continuing with the discovery disputes, the
5 document production, the depositions and the motions makes no sense if the Ninth Circuit has
6 before it a question that may moot the entire lawsuit.

7 On the other side of the balance, there is no possible hardship to Plaintiff. Notably,
8 Plaintiff does not dispute Universal's showing, based on Plaintiff's own sworn declaration, that
9 she has no damages.⁶ *See* Opp. at 10, n.6. Plaintiff's claim that she must proceed full steam with
10 her litigation in order to preserve "relevant, admissible evidence," *id.* at 10, is a non sequitur.
11 Concerns about evidence disappearing and memories fading are relevant where there are multiple
12 transactions and many witnesses who may have differing or inconsistent recollections. This case
13 concerns a single YouTube posting and a single notice sent to YouTube. There is no reason to
14 believe that discovery in this litigation – which avowedly is being pursued by Plaintiff and her
15 counsel to vindicate principle and to establish favorable precedent – will be impaired or
16 compromised if the case is stayed to allow the Ninth Circuit to consider an immediate appeal.

17
18
19
20
21
22
23
24
25
26
27 ⁶ The absence of damages, of course, is contrary to Plaintiff's counsel's representation to the
28 Court that Plaintiff *did* have damages – a representation the Court accepted in holding Plaintiff
had pleaded the damages element of her claim. *See* Order at 9.

