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8  
9 **UNITED STATES DISTRICT COURT**  
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN JOSE DIVISION**

12 STEPHANIE LENZ, )  
13 )  
14 ) Plaintiff, )  
15 )  
16 ) v. )  
17 ) UNIVERSAL MUSIC CORP., UNIVERSAL )  
18 ) MUSIC PUBLISHING, INC., and UNIVERSAL )  
19 ) MUSIC PUBLISHING GROUP, )  
20 )  
21 ) Defendants. )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

No. C 07-03783-JF  
**OPPOSITION TO DEFENDANTS’  
MOTION TO CERTIFY AUGUST 20,  
2008 ORDER FOR INTERLOCUTORY  
APPEAL AND TO STAY PENDING  
RESOLUTION OF 1292(b)  
PROCEEDINGS**  
DATE: N/A [For submission on papers, per  
Stipulation and Order]  
CTRM: 3 (Hon. Jeremy Fogel)

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**I. INTRODUCTION**

1  
2 Plaintiff Stephanie Lenz respectfully urges this Court to deny the motion of Defendants  
3 Universal Music Corp., Universal Music Publishing, Inc. and Universal Music Publishing Group  
4 (collectively “Universal”) for interlocutory appeal certification and a stay of the case. Last month,  
5 this Court correctly rejected Universal’s claim that content owners do not have to consider whether  
6 there is an actual infringement before sending a takedown notice under section 512 of the Digital  
7 Millennium Copyright Act (“DMCA”). Specifically, the Court held that a copyright owner must  
8 consider fair use before alleging that online material is “not authorized by law.” As the Court  
9 indicated, the decision was an important but straightforward ruling—the plain meaning of the  
10 statute is unambiguous, and there is no question that fair uses are “authorized by law.”

11 Universal disagrees with the Court’s decision, and wants a chance to appeal to the Ninth  
12 Circuit. It also wants to avoid responding to discovery and motion practice in the meantime. But  
13 here, too, the law is unambiguous: mere disagreement with a Court’s decision is not sufficient to  
14 justify the extraordinary remedy of immediate interlocutory appeal, much less a delay of all  
15 proceedings until the Ninth Circuit weighs in (if it chooses to do so). Further, a stay would be  
16 particularly inappropriate given that proceeding with the case will not result in irreparable, or even  
17 significant, harm to Universal, but additional delay may impose substantial hardship on Ms. Lenz.

18 It has been over a year since Ms. Lenz first sought her day in court. Ms. Lenz respectfully  
19 asks to move on to discovery so that this case may proceed towards a final judgment. The  
20 discovery process should be neither lengthy nor arduous, and the path to final judgment should be  
21 swift. Universal would not be prejudiced, since it may then seek appellate review of this Court’s  
22 decision. Moreover, that court will be able to perform its review, as appropriate, in the context of a  
23 developed factual record.  
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1 Accordingly, Ms. Lenz respectfully requests that this Court deny Universal's Motion in its  
2 entirety.

## 3 II. ARGUMENT

### 4 A. Certification of Immediate Appeal Should Be Denied Because Universal 5 Cannot Meet Its Burden of Showing Extraordinary Circumstances

6 The Ninth Circuit has cautioned that section 1292(b) "is to be applied sparingly and only in  
7 exceptional cases." *U.S. v. Woodbury*, 263 F.2d 784, 799 n.11 (9th Cir. 1959); *see also James v.*  
8 *Price Stern Sloan, Inc.* 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (interlocutory appeals are limited  
9 to "rare circumstances."). It is Universal's burden to show that this Court's August 20 Order  
10 ("Order") creates such an exceptional case, *i.e.*, that it involves a controlling question of law, that  
11 there is a substantial ground for difference of opinion with respect to that question, *and* that an  
12 immediate appeal may materially advance the termination of this litigation. *See* 28 U.S.C. §  
13 1292(b); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (party seeking certification of  
14 an interlocutory appeal has the burden to show the presence of exceptional circumstances); *see also*  
15 *Mateo v. M/S Kiso*, 805 F. Supp. 792, 800 (N.D. Cal. 1992) (interlocutory appeal "exists for those  
16 exceptional circumstances where considerations of judicial economy and fairness demand  
17 interlocutory review" and the party seeking certification has the burden to show such  
18 circumstances exist). Universal cannot meet that burden. First, there is no substantial ground for a  
19 difference of opinion as to the central question addressed by this Court's ruling: whether the sender  
20 of a takedown notice must consider whether a use is fair—and therefore authorized by section 107  
21 of the Copyright Act—before it sends a notice alleging that the use is not "authorized by law."  
22 Second, an appeal now will not materially advance the termination of this litigation.

#### 23 1. There Is No Substantial Ground For Difference of Opinion As to Whether a 24 Fair Use Is Authorized By Law

25 Attempting to manufacture a substantial ground for difference of opinion, Universal re-  
26 hashes the same arguments set out in its prior pleadings: that fair use is a defense and, therefore,  
27 infringing until a court finds otherwise; that Congress intended fair uses to be handled solely  
28 through the counter-notice procedure; that it is too hard for content owners to form a good faith  
belief as to whether a use is fair; and that *Rossi v. Motion Picture Ass'n of Am.*, 391 F.3d 1000 (9th

1 Cir. 2004), forbids requiring them to form such a belief. *See* Defendants’ Mot. to Certify August  
2 20, 2008 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Pending  
3 Resolution of § 1292(b) Proceedings (“Appeal/Stay Mot.”) at 3-6. This Court has already rejected  
4 these arguments. *See* Order Denying Motion to Dismiss (“Order”), Dkt No. 45, at 4-8.

5 Universal disagrees with the Court’s conclusions, but that disagreement does not justify the  
6 extraordinary remedy Universal seeks. *Mateo*, 805 F. Supp. at 800 (“a party’s strong disagreement  
7 with the Court’s ruling is not sufficient for there to be ‘a substantial ground for difference of  
8 opinion;’ the proponent of an appeal must make some greater showing.”); *see also* *Judicial Watch,*  
9 *Inc. v. Nat’l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (same). Instead,  
10 Universal must demonstrate the existence of “genuine doubt as to the correct legal standard.”  
11 *Cardona v. General Motors Corp.*, 939 F. Supp. 351, 353 (D.N.J. 1996).

12 There is no such genuine doubt here, just unambiguous statutory language and clear case  
13 law. The meaning of sections 106, 107, and 512 of the Copyright Act is plain and reinforced by  
14 numerous appellate and district court decisions. Section 512 requires a copyright owner to  
15 affirmatively represent that the use to which it objects is *not* authorized by law. 17 U.S.C. §  
16 512(c)(3). A fair use is a lawful use, *i.e.*, a use authorized by law. *See* Order at 5-6; *see also, e.g.*,  
17 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (“Any individual may  
18 reproduce a copyrighted work for a ‘fair use;’ the copyright owner does not possess the exclusive  
19 right to such a use . . . [thus] anyone who makes fair use of the work is not an infringer with respect  
20 to such use.”); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1200 (N.D. Cal. 2004)  
21 (“a fair use is not infringement of a copyright.”) (citations omitted); *see also* *Assoc. of Am. Med.*  
22 *Colleges v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (“[i]t has long been recognized that certain  
23 unauthorized but ‘fair’ uses of copyrighted material do not constitute copyright infringement.”).  
24 Therefore, a copyright owner must consider whether a given use might be fair before representing  
25 that the use is not “authorized by law.” *See* Order at 5-6.

26 Universal’s invocation of the counter-notice procedure is inapposite: the counter-notice  
27 procedure does not suffice to protect fair use and there is no record to suggest that Congress  
28 thought it would. Unlike 512(f), it does not help *deter* abusive takedown notices, but merely

1 provides a means of ameliorating the ill effects of such takedowns after the fact. *See* Order at 7-8;  
2 *see also* S. Rep. No. 105-190 at 59 (1998) (section 512(f) “is intended to deter knowingly false  
3 allegations to service providers in recognition that such misrepresentations are detrimental to rights  
4 holders, service providers, and Internet users.”).

5 As for the burden on content owners, a consideration of fair use is simply part of the initial  
6 review that is already required under the DMCA. *See* Order at 7. In most cases, a consideration of  
7 fair use is straightforward and should not hamper a copyright owner’s ability to efficiently enforce  
8 its rights. *Id.* In the rare case where it is less obvious, any additional burden is more than justified  
9 by the countervailing importance of balancing “the need for rapid response . . . with end-users’  
10 legitimate interest in not having material removed without recourse.” S. Rep. No. 105-190 at 21.

11 Finally, the Court’s Order is easily reconciled with *Rossi*. As the Court observes, *Rossi*  
12 held that content owners must form a subjective good faith belief as to the legality of the use before  
13 sending a takedown notice and that belief need not depend on a full investigation into the material  
14 in question. *See* Order at 4-5; *Rossi*, 391 F.3d at 1003-04. The *Rossi* court did *not* hold that an  
15 owner need not give due consideration to whether a use is authorized by the Copyright Act—by  
16 Section 107 or some other provision—in the process of forming that subjective good faith belief.  
17 Indeed, such a holding would reward willful blindness on the part of copyright owners. *See, e.g.*  
18 *U.S. v. Real Property at 2659 Roundhill Dr., Alamo, Cal.*, 194 F.3d 1020, 1028 (9th Cir. 1999)  
19 (“An owner cannot deliberately avoid actual knowledge through ‘willful blindness’”); *L.W. v.*  
20 *Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996) (finding of “deliberate indifference” to civil rights  
21 violation may rest on “deliberate indifference to a known, or so obvious as to imply knowledge of,  
22 danger, by a supervisor who participated in creating the danger”).

23 Moreover, contrary to Universal’s assertion, Appeal/Stay Mot. at 5, there are many ways in  
24 which a copyright owner can show “proper consideration” that do not require a *post hoc*  
25 assessment of reasonableness. For example, witnesses might testify that they were aware of the  
26 fair use factors and explain how they considered them before sending the takedown. A copyright  
27 owner might document its efforts to educate agents as to the fair use factors and its policies  
28

1 regarding takedowns of possible fair uses.<sup>1</sup> Following *Rossi* and this Court’s Order, a copyright  
2 owner might use such evidence to demonstrate the basis for its subjective good faith belief,  
3 including that it considered fair use.<sup>2</sup> What the owner may not do is ignore fair use altogether.

4 Universal’s further protestation that the issue is one of first impression is equally  
5 unavailing. As the Second Circuit has counseled, and numerous courts in this circuit have  
6 acknowledged, the “mere presence of a disputed issue that is question of first impression, standing  
7 alone, is insufficient . . . rather, [the court must] ‘analyze the strength of arguments in opposition to  
8 the challenged ruling when deciding whether . . . there is *substantial* ground for dispute.’” *In re*  
9 *Flor*, 79 F.3d 281, 284 (2d. Cir 1996) (quoting *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280,  
10 283 (E.D. Pa. 1983) (italics in original)); *see also In re Conseco Life Ins. Cost of Ins. Litig.*, 2005  
11 WL 5678841 \*2 (C.D. Cal. May 31, 2005) (same, citing *In re Flor*); *Valdovinos v. McGrath*, 2007  
12 WL 2023505, \*3 (N.D. Cal. July 12, 2007) (lack of case law in controlling jurisdiction applying  
13 recent Supreme Court ruling did not establish substantial ground for difference of opinion where  
14 moving party could not identify conflicting opinions in other jurisdictions); *see also* 16 Charles  
15 Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure*, § 3930  
16 (2008) (“District court judges have not been bashful about refusing to find substantial reason to  
17 question a ruling of law, even in matters of first impression;” collecting cases).

18 Moreover, courts have squarely rejected the “issue of first impression” argument where, as  
19 here, the issue is only “new” because it is unfounded. *See, e.g., Gagan v. Sharer*, 2006 WL  
20 3736057, \*3 (D. Ariz. Nov. 6, 2006) (denying certification where issue of first impression—  
21 whether collection efforts qualified as an “action” under Arizona law—“scarcely present[ed] “a  
22 substantial ground for difference of opinion.”); *FDIC v. First Nat’l Bank*, 604 F. Supp. 616, 622  
23 (E.D. Wis. 1985) (“[T]he apparent lack of clear authority on private rights of action under the  
24 numerous federal banking laws invoked by the plaintiff suggests that any difference of opinion on  
25 this issue might prove more spurious than real.”).

26 \_\_\_\_\_  
27 <sup>1</sup> Ms. Lenz does not concede that any of these examples, taken alone, might suffice to establish  
28 such proper consideration.

<sup>2</sup> Indeed, a full factual record in this regard would materially assist consideration of the legal  
questions should a party later choose to appeal final judgment.

1 In sum, there is no substantial ground for difference of opinion on the merits of the Court's  
2 ruling. The motion should be denied for this reason alone.

3 2. Immediate Appeal Will Neither Advance the Litigation Nor Promote  
4 Judicial Economy

5 Nor will immediate appeal materially advance the litigation or promote judicial economy.  
6 According to the most recent numbers available (2007), the Ninth Circuit takes an average of one  
7 and a half years to dispose of appeals.<sup>3</sup> Thus a final judgment could be reached in this case well  
8 before that court had a chance to decide Universal's proposed interlocutory appeal. *See Shurance*  
9 *v. Planning Control Int'l.* 839 F.2d 1347, 1348 (9th Cir. 1988) (refusing to hear certified appeal in  
10 part because decision of Ninth Circuit might come after scheduled trial date); *Cortez v. MTD*  
11 *Prods. Inc.*, 927 F. Supp. 386, 394 (N.D. Cal. 1996) (denying motion for interlocutory review  
12 where, *inter alia*, case had been pending for over a year and was due to be completed in a few  
13 months and parties could then seek appellate review); *see also Singh v. Daimler-Benz. A.G.*, 800 F.  
14 Supp. 260, 263 (E.D. Pa. 1992) (denying certification for interlocutory appeal on jurisdictional  
15 issue where, *inter alia*, litigation materially advanced only if appellate court ruled for plaintiff; if  
16 not "the litigation will not be advanced, but instead will be considerably delayed.").

17 Finally, Universal's claim that this Court's Order will prompt a "wave" of new 512(f)  
18 lawsuits in California, Appeal/Stay Mot. at 1, is neither reasonable nor logical. As an initial  
19 matter, this assertion is unrelated to this lawsuit, as there is no suggestion that Ms. Lenz will  
20 institute further litigation against Universal. Moreover, as the Order makes clear, and as Ms. Lenz  
21 has always maintained, only in exceptional cases will an instance of fair use be so clear that a  
22 copyright owner's assertion to the contrary meets the requisite standard of bad faith under section  
23 512(f). *See Order at 6-7.*

24 3. Interlocutory Appeals Should Not Be Permitted Where, As Here, the  
25 Underlying Case is "Ordinary Litigation"

26 Taking its cue from the legislative history of the Interlocutory Appeals Act, the Ninth

27 <sup>3</sup> *See U.S. Courts of Appeals—Median Time Interval in Months for Merit Terminations of Appeals*  
28 *Arising from the U.S. District Courts, by Circuit*,  
<http://www.uscourts.gov/judbus2007/appendices/B04ASep07.pdf>.

1 Circuit has stressed that section 1292(b) ““should and will be used only in exceptional cases where  
2 immediate appeal might help avoid protracted or expensive litigation, such as antitrust and similar  
3 protracted cases.”” *U.S. Rubber v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (quoting  
4 S.Rep.No.2434 as reprinted in 1958 U.S.C.C.A.N., pp. 5255, 5260). Thus, ““it is not thought that  
5 district judges would grant the certificate in ordinary litigation which could otherwise be promptly  
6 disposed of or that mere question as to the correctness of the ruling would prompt the granting of  
7 the certificate.”” *Id*; see also *Mateo*, 805 F.Supp. at 800.

8 While the rights Ms. Lenz seeks to vindicate are important, there is nothing exceptional  
9 about the course of this litigation. As set forth in the Joint Case Management statement, the parties  
10 concur that discovery in this case will be relatively limited. Joint Case Management Conference  
11 Statement (“CMC Stmt.”), Dkt. No. 43 at 4. The parties have proposed a schedule for completion  
12 of discovery within approximately ten months. CMC Stmt. at 6. Both parties anticipate moving  
13 for summary judgment shortly after discovery closes. It is very possible that these motions will  
14 decide the case and, therefore, that a final judgment could be reached in just over one year. The  
15 losing party has the option to appeal that final judgment, giving the Ninth Circuit the opportunity to  
16 consider the legal issues in light of a full factual record. *Cf. Google Inc. v. Am. Blind & Wallpaper*  
17 *Factory, Inc.*, 2005 WL 832398, \*5-6 (N.D. Cal. March 30, 2005) (denying motion to dismiss  
18 because, *inter alia*, given the “importance of this case to the parties and others similarly situated, ...  
19 resolution of the novel legal questions presented . . . should await the development of a full factual  
20 record.”).<sup>4</sup>

21 Interlocutory appeal was never intended for a case, like this one, that involves an important  
22 legal question but is otherwise straightforward. *U.S. Rubber*, 359 F.2d at 785 (Section 1292(b)  
23 “was not intended merely to provide review of difficult rulings in hard cases.”); see also *Bobolakis*  
24 *v. Compania Panamena Maritima San Gerassimo, S.A.*, 168 F. Supp. 236, 239-40 (S.D.N.Y. 1958)

25 \_\_\_\_\_  
26 <sup>4</sup> Indeed, the leading Section 512(f) cases all decided the related questions on summary judgment,  
27 or an appeal thereto, after the parties had had an opportunity to develop their evidence. See, e.g.  
28 *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000 (9th Cir. 2004); *Online Policy Group v.*  
*Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), *UMG v. Augusto*, 558 F. Supp. 2d 1055 (C.D.  
Cal., 2008).

1 (denying request for certification where there was nothing exceptional about case, other than that it  
2 involved an important legal question, and litigation would not involve “unusual” expenditure of  
3 time and money; noting section 1292(b) was not “akin to a ‘certiorari’ policy for the Courts of  
4 Appeals whereby ‘important’ cases would receive special appellate treatment.”). Universal  
5 requests an extraordinary remedy for its ordinary disagreement with an adverse ruling. That  
6 request should be denied, and Ms. Lenz should be allowed to pursue her claims without the added  
7 burden of responding to a premature appeal.

8 **B. Universal Cannot Meet the Legal Standard For a Stay Pending Appeal**

9 Universal’s request for a stay of proceedings while it pursues the proposed appeal should be  
10 denied because Universal cannot meet its burden of justifying such a stay.

11 To obtain the remedy it seeks, Universal has to meet the same standard required for a  
12 preliminary injunction. *See Abbassi v. I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998); *Lopez v. Heckler*,  
13 713 F.2d 1432, 1435 (9th Cir. 1983), rev’d in part on other grounds, 463 U.S. 1328 (1983). Thus,  
14 Universal must show either (1) that it faces irreparable harm if the action goes forward and that is  
15 likely to succeed on the merits or its appeal; or (2) that the balance of hardships favors a stay and  
16 that “serious questions” are raised. *See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*,  
17 204 F.3d 867, 874 (9th Cir. 2000); *accord, Republic of the Phil. v. Marcos*, 862 F.2d 1355, 1362  
18 (9th Cir. 1988) (*en banc*). These tests are “not separate” but rather represent “the outer reaches ‘of  
19 a single continuum’” that, in essence, imposes on the court a “duty to balance the interests of all  
20 parties and weigh the damage to each, mindful of the moving party’s burden to show the possibility  
21 of irreparable injury to itself and the probability of success on the merits.” *Los Angeles Mem.*  
22 *Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1201, 1203 (9th Cir. 1980). *Id.* at  
23 1203. Finally, hardship and probability of success stand in reciprocal relationship. *See Sun*  
24 *Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999), (citing *Nat’l Ctr. for*  
25 *Immigrants Rights v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984)). Thus, where the relative hardship  
26 is greater for the non-moving party, the party seeking a stay must show a higher probability of  
27 success on the merits, and vice versa.

28 Universal has done none of the above. It has not shown that it will be significantly harmed

1 (much less irreparably harmed) if a stay does not issue, nor that it is likely to persuade a higher  
2 court of the merits of its position. Instead, it has simply complained that going forward will “cost  
3 real money” and insisted that Lenz will not be damaged by further delay because this case is all  
4 about “principle.” Appeal/Stay Mot. at 8-9. In fact, there is a very real possibility that Ms. Lenz  
5 will be prejudiced by a delay of eighteen months or more while an appeal is pending, as relevant  
6 witnesses may move on to new employers, memories may fade, and relevant records may be lost or  
7 destroyed.

8 Accordingly, Ms. Lenz respectfully requests that this Court deny Universal’s stay request.

9 1. Universal Can Show Neither Irreparable Harm Nor Probable Success

10 The central issue in determining whether a stay is appropriate is whether the movant has  
11 demonstrated “a significant threat of irreparable injury.” *Oakland Tribune, Inc. v. Chronicle*  
12 *Publ’g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (citations omitted). No such threat exists here.  
13 Indeed, Universal fails to identify any special inconvenience that could qualify as “irreparable  
14 harm.” Instead, Universal simply notes that “[t]he costs associated with marching ahead with this  
15 litigation will be significant.” Appeal/Stay Motion at p.8.

16 Litigation costs – even if “significant” – do not constitute irreparable harm. *Renegotiation*  
17 *Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974) (“Mere litigation expense, even substantial  
18 and unrecoupable cost, does not constitute irreparable injury.”); *accord U.S. v. City of Los Angeles*,  
19 595 F.2d 1386, 1391 (9th Cir. 1979); *State of Cal. ex rel. Christensen v. F.T.C.*, 549 F.2d 1321,  
20 1323 (9th Cir. 1977). Moreover, the litigation costs of this case should be comparatively small.  
21 Universal has already conceded that discovery in this case would likely be “relatively focused.”  
22 CMC Stmt. at 4. And while there may be some dispute as to the scope of discovery, Universal has  
23 not identified (nor is there reason to anticipate) unusual or excessive motion practice.

24 As for the merits, for the reasons explained above, the Ninth Circuit is no more likely than  
25 this Court has been to favor Universal’s radical view of its obligations under the DMCA. *See*  
26 Section III.A.1, *supra*. This Court has already considered and rejected Universal’s arguments in  
27 light of the plain language of the Copyright Act and relevant precedents. Universal does not,  
28 because it cannot, offer any persuasive argument that the Ninth Circuit would overturn this Court’s

1 opinion.

2 In essence, Universal’s basis for seeking a stay pending appeal “boils down to a claim that  
3 the underlying issue is important. But that is beside the point and does not demonstrate a  
4 likelihood of success on the merits. Simply calling an issue important . . . does not transform the []  
5 arguments into a likelihood of success . . . .” *Comm. on The Judiciary U.S. House of*  
6 *Representatives v. Miers*, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 3906419, \*2 (D.D.C. Aug. 26, 2008)  
7 (denying request for stay pending appeal).<sup>5</sup>

8 2. The Balance of Hardships Weighs Heavily in Lenz’s Favor and Universal  
9 Has Not Raised a Serious Question Sufficient to Merit a Stay

10 The “relative hardship to the parties” is a “critical element” in deciding whether a stay is  
11 justified. *See Benda v. Grand Lodge of Int’l Assoc. of Machinists and Aerospace Workers*, 584  
12 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Here, that element weighs  
13 heavily in Ms. Lenz’s favor.

14 First, Universal has not shown that allowing this case to proceed would cause it to suffer  
15 *any* significant hardship. As noted above, the scope of discovery in this case is likely to be  
16 comparatively narrow. CMC Stmt. at p.4. While it may disagree with Lenz over the precise scope  
17 of that discovery, Universal offers nothing to indicate that responding to it would prove to be  
18 unusually burdensome, only that it would “cost real money.” Appeal/Stay Mot. at 8. Universal is  
19 surely capable of mustering the resources to handle normal discovery, even if it costs some “real  
20 money.” It is equally capable of handling normal motion practice and, if necessary, defending  
21 itself at trial.

22 However, a stay *would* impose a significant hardship on Ms. Lenz. Prompt discovery will  
23 help safeguard Ms. Lenz’s ability to obtain relevant, admissible evidence to support her claim.<sup>6</sup> A  
24 delay, by contrast, will increase the chances that potentially critical documents will be lost, witness

25 <sup>5</sup> The Court of Appeals for the District of Columbia subsequently ordered a temporary  
26 administrative stay of the order the defendant sought to appeal, pending further briefing on  
27 appellate jurisdiction over the proposed appeal. *Comm. on The Judiciary U.S. House of*  
*Representatives v. Miers*, No. 08-5357, slip op. (D.C. Cir. Sept. 4, 2008). The court did not rule on  
the merits of the motion for stay pending appeal. *Id.*

28 <sup>6</sup> Universal implies that stay cannot prejudice a party unless she has incurred substantial monetary  
damages. Universal offers no legal support for this position, for there is none.

1 memories will fade, and witnesses will become unavailable. *See Grand Canyon Trust v. Tucson*  
2 *Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004) (“Evidentiary prejudice includes such things as  
3 lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died.”);  
4 *Pagtaluna v. Malaza*, 291 F.3d 639 (9th Cir. 2002) (“Unnecessary delay inherently increases the  
5 risk that witnesses’ memories will fade and evidence will become stale.”). The danger is especially  
6 acute where, as here, the beliefs and impressions of key figures (*e.g.*, Universal employee Alina  
7 Moffat, who sent the notice that caused the takedown of Ms. Lenz’s video) may be central to case.

8 Universal also fails to demonstrate that its Motion raises “serious questions,” particularly  
9 given the substantial hardship that a stay would impose on Lenz. “[S]erious questions’ refers to  
10 questions which cannot be resolved one way or the other at the hearing ... and as to which the  
11 court perceives a need to preserve the status quo lest one side prevent resolution of the questions or  
12 execution of any judgment by altering the status quo. Serious question are ‘substantial, difficult  
13 and doubtful, as to make them a fair ground for litigation and thus for more deliberative  
14 investigation.’” *Republic of the Phil.*, 862 F.2d at 1362 (quoting *Hamilton Watch Co. v. Benrus*  
15 *Watch Co.*, 206 F.2d 738, 740 (2d Cir.1952)).

16 The question Universal raises meets none of these criteria. This Court has resolved the  
17 question, after extensive briefing and a hearing on the issue, taking guidance from clear statutory  
18 law and the relevant precedents. Universal has offered nothing new to explain why the Court’s  
19 determination is so “doubtful” that more “deliberative investigation” is required. There is no risk  
20 that one side will prevent resolution of the question or execution of any judgment. There is only  
21 Universal’s hope that a different court will come to a different conclusion. Many defendants who  
22 lose motions to dismiss doubtless share a similar hope and similarly want to avoid discovery, but  
23 this has never been sufficient for a stay.

### 24 3. The Public Interest Weighs Against a Stay.

25 In cases such as this one, “the public interest is a factor to be strongly considered.” *Lopez*,  
26 713 F.2d at 1435; *see also Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir.  
27 1977). Here, the public interest surely favors allowing Lenz to proceed with her effort to vindicate  
28 her claims. At a minimum, the public has an overriding interest in “the just, speedy, and

1 inexpensive determination of every action.” *Travis v. Folsom Cordova Unified School Dist.*, 2007  
2 WL 1821465, \*2 (E.D. Cal. June 25, 2007) (quoting Fed. R. Civ. P. 1). Thus, “orderly and  
3 expeditious resolution of disputes is a matter of great importance to the rule of law. By the same  
4 token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in  
5 money, memory, manageability, and confidence in the process.” *Id.*, (citing *Allen v. Bayer Corp.*  
6 (*In re Phenylpropanolamine (ppa) Prods. Liab. Litig.*), 460 F.3d 1217, 1228 (9th Cir. 2006)).

7 Further, the public interest particularly favors prompt resolution of cases, such as this one,  
8 that implicate free speech rights. *See Dorsey v. Nat’l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir.  
9 1992) (“Because unnecessarily protracted litigation would have a chilling effect upon the exercise  
10 of First Amendment rights, speedy resolution of cases involving free speech is desirable.”)  
11 (quoting *Good Gov’t Group of Seal Beach, Inc. v. Super. Ct.*, 22 Cal. 3d 672 (1978), *cert denied*,  
12 441 U.S. 961 (1979)). Fair use is an essential guarantee of “breathing space” for free speech  
13 “within the confines of copyright.” *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994);  
14 *accord A&M Records, Inc. v. Napster*, 114 F. Supp. 2d 896, 922 (N.D. Cal. 2000) (“free speech  
15 concerns ‘are protected by and coextensive with the fair use doctrine.’”), *aff’d in part, rev’d in part*  
16 *on other grounds by A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Section  
17 512(f) was designed to ensure, *inter alia*, that the DMCA takedown process does not unduly  
18 impinge on that breathing space. *See Order at 7-8; S. Rep. No. 105-190 at 59 (1998)*. Thus, the  
19 public interest in free expression strongly favors allowing an action that seeks to enforce section  
20 512(f) rights based on fair use to go forward promptly.

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**III. CONCLUSION**

The Court and the parties have already invested ample time and resources in litigating the preliminary matters in this case. Ms. Lenz would like to proceed with the limited discovery required to establish the factual record necessary to reach a final judgment. Universal would like to try again with another court and avoid its discovery obligations in the meantime. However, Universal has not and cannot shoulder its heavy burden to show the extraordinary circumstances that could justify granting either request.

Ms. Lenz respectfully requests that the Court deny Universal's Motion in its entirety.

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By */s/*  
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