

1 ELECTRONIC FRONTIER FOUNDATION
CINDY COHN - #145997
2 cindy@eff.org
CORYNNE MCSHERRY - #221504
3 corynne@eff.org
KURT OPSAHL - #191303
4 kurt@eff.org
JULIE SAMUELS - *pro hac vice*
5 julie@eff.org
454 Shotwell Street
6 San Francisco, CA 94110
Telephone: (415) 436-9333
7 Facsimile: (415) 436-9993

8 KEKER & VAN NEST LLP
ASHOK RAMANI - # 200020
9 aramani@kvn.com
MICHAEL S. KWUN - # 198945
10 mkwun@kvn.com
MELISSA J. MIKSCH - # 249805
11 mmiksch@kvn.com
633 Battery Street
12 San Francisco, CA 94111-1809
Telephone: (415) 391 5400
13 Facsimile: (415) 397 7188

14 Attorneys for Plaintiff
STEPHANIE LENZ

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 STEPHANIE LENZ,
19 Plaintiff,

20 v.

21 UNIVERSAL MUSIC CORP.,
22 UNIVERSAL MUSIC PUBLISHING, INC.
23 and UNIVERSAL MUSIC PUBLISHING
GROUP,

24 Defendants.

Case No. C-07-03783-JF (HRL)

**PLAINTIFF'S RENEWED MOTION FOR
SUMMARY JUDGMENT**

Date: October 17, 2012
Time: 10:00 a.m.
Courtroom: 3, 5th Floor
Judge: The Hon. Jeremy Fogel

REDACTED

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NOTICE OF RENEWED MOTION AND STATEMENT OF RELIEF SOUGHT:

PLEASE TAKE NOTICE that on October 17, 2012, at 10:00 a.m., or at such other time as the Court may direct, before the Honorable Jeremy Fogel, United States District Court, 280 South First Street, San Jose, California, 95113, Plaintiff Stephanie Lenz will, and hereby does, move the Court for entry of summary judgment.

This Renewed Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the Declarations of Stephanie Lenz, Marcia Hofmann and Melissa Miksch (Volumes I-III) that are being filed herewith, and such other and further papers, evidence and argument as may be submitted to the Court in connection with the hearing on this motion.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Every day, parents take pictures and make videos of their kids doing all sorts of things. Many of those pictures and videos incorporate copyrighted works in myriad ways—a child may be wearing a t-shirt with a copyrighted character on it, or she may be standing in front of a copyrighted sculpture, or there may be copyrighted music playing in the background. This activity doesn't make the parents of America copyright scofflaws—even if the copyrighted work is, in some sense, the “focus” of the picture or video. For example, sending a picture of someone in a (copyrighted) Disney t-shirt with the note, “My son went to Disneyland and all I got was this Mickey Mouse t-shirt,” does not violate copyright law. And everyone versed in copyright law (such as a major music publisher) knows *why*: because these examples are fair uses.

To come to that conclusion, however, a person must perform one simple task: consider whether the fair use doctrine applies. *See Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154-55 (N.D. Cal. 2008). This is exactly what Universal¹ failed to do when it looked at the blurry 29-second home video at issue in this case (the “Video”).

See id. at 1154 (“[T]he plain meaning of ‘authorized by law’ is unambiguous. . . . [F]air use is a lawful use of a copyright.”).

This is precisely the type of improper practice that Congress meant to deter when it enacted Section 512(f) of the Digital Millennium Copyright Act (“DMCA”). Congress knew that Section 512’s expedited “notice and takedown” provisions could be abused to take down lawful uses of copyrighted works, chilling free speech online. In order to curb such abuse, Congress included an important deterrent, Section 512(f), which allows lawful users to hold copyright

¹ “Universal” is used herein to refer collectively to the defendants in this case, Universal Music Corporation, Universal Music Publishing, Inc., and Universal Music Publishing Group.

1 owners accountable if they send takedown notices without a good faith belief that the material in
2 question actually infringes copyright. Ms. Lenz brought this lawsuit in order to do just that: hold
3 Universal accountable for a highly improper takedown of her 29-second home video.

4 Faced with this Court's ruling that the DMCA requires a fair use consideration, *id.* at
5 1154-55, Universal has done its best to try to recast its takedown practices as incorporating that
6 consideration. But it cannot avoid the undisputed facts. If Sean Johnson, the only Universal
7 employee who actually reviewed the Video prior to the takedown, [REDACTED]
8 [REDACTED] he could not helped but to have realized, based solely on looking at the Video, that
9 Ms. Lenz's use of the Prince song was a classic example of a non-infringing fair use. But
10 Mr. Johnson could not come to that realization because [REDACTED]

11 [REDACTED] Indeed, Mr. Johnson's supervisor testified that
12 [REDACTED] even though he was
13 acting as a copyright enforcement agent on behalf of a major record label well-versed in
14 copyright law.

15 Simply put, there is no genuine issue of material fact that Universal did not form *and*
16 *could not have formed* the requisite good faith belief that the Video was infringing prior to
17 sending the takedown notice. Universal is liable under Section 512(f) of the DMCA.

18 II. STATEMENT OF UNDISPUTED FACTS

19 Plaintiff Stephanie Lenz is a mother, wife, writer and editor. Declaration of Stephanie
20 Lenz ("Lenz Decl.") ¶ 2. She and her husband have two children. *Id.* In early February 2007,
21 Ms. Lenz's children were playing in the family's kitchen and listening to a Prince CD. *Id.* ¶ 3.
22 Ms. Lenz had recently noticed that her youngest child, who was still learning to walk at the time
23 and using a push-toy, would pause with his toy in front of the CD player and "dance," particularly
24 if he heard her say the word "music." *Id.* Using her digital camera, Ms. Lenz decided to capture
25 the moment on film, especially her son's "dance." *Id.* Turning on her camera, and prompting her
26 son by asking him what he thought of the "music," she created a 29-second video recording of the
27
28

1 children's activities. *Id.*; Exh.² A (electronic video file, Depo. Exh. 2)³; Exh. B (Lenz Depo.) at
 2 40:15–25 (authenticating). The Video bears all the hallmarks of a family home movie—it is
 3 somewhat blurry, the sound quality is poor, and it focuses on documenting the child's "dance
 4 moves" in a kitchen, against a background of normal household activity, commotion and laughter.
 5 *See* Exh. A. Due to the noise and commotion made by the children, the song "Let's Go Crazy"
 6 can only be heard in the background for approximately 20 seconds of the 29-second Video and
 7 even then not all that clearly. *See id.*

8 Ms. Lenz's son was just learning to walk when Ms. Lenz made the Video. Lenz Decl. ¶ 3.
 9 Ms. Lenz thought her mother, who lives across the country in California, would enjoy seeing her
 10 son's new ability to dance as well. *Id.* ¶ 4. Ms. Lenz's mother had told her she had difficulty
 11 downloading video files sent via email. *Id.*; Exh. C (Morgan Depo.) at 41:4–42:8, 58:2–61:20;
 12 Exh. D (Depo. Exh. 61). In early February 2007, Ms. Lenz uploaded the Video from her
 13 computer to the YouTube⁴ website for her family and friends to enjoy. Lenz Decl. ¶ 4.

14 Universal represents Prince and administers various copyrights on his behalf. Exh. Q
 15 (Allen Depo.) at 84:15–24, 175:25–176:20 & Exh. U (Depo. Exh. 83). [REDACTED]

17 ² Unless otherwise indicated, all citations to Exhibits are to Exhibits to the Declaration of Melissa
 18 Miksch (Vol. I-III), submitted herewith. Exhibit A is attached to Volume I of the Miksch
 19 Declaration, manually filed herewith. Exhibits B-P are attached to Volume II of the Miksch
 20 Declaration, electronically filed herewith. Exhibits Q-AA are attached to Volume III of the
 21 Miksch Declaration, submitted herewith along with an administrative motion to seal.

22 ³ The cited CD-ROM includes a copy of the video file uploaded by Ms. Lenz to YouTube. The
 23 video can also be viewed on the YouTube site, at
 24 <<http://www.youtube.com/watch?v=N1KfJHFWlhQ>>; *see also* Exh. E (screen capture of the
 25 "view" page for the video on YouTube, taken shortly after this lawsuit was filed and previously
 26 submitted by Universal in support of its initial motion to dismiss (*see* 9/21/2007 Declaration of
 27 Kelly M. Klaus, Exh. B)).

28 ⁴ YouTube, LLC is a Delaware limited liability company with its principal place of business in
 San Bruno, California, and is a wholly owned subsidiary of Google Inc., a Delaware
 corporation with its principal place of business in Mountain View, California (collectively
 "YouTube"). Exh. V (Hubbard Aff.) ¶ 3. YouTube hosts (i.e., provides storage of and access
 to) videos provided by its users. *Id.* ¶ 4. At their direction (i.e., upon their decision to post their
 videos to the YouTube system), YouTube stores those videos on its servers, and allows others
 to access to them according to the choices made by the users posting those videos. *Id.*
 YouTube has registered a designated agent to receive notification of claimed infringement with
 the United States Copyright Office. *Id.* ¶ 5.

1 [REDACTED] Exh. Q (Allen Depo.) at 234:13–235:8.
 2 Universal believes [REDACTED]
 3 [REDACTED]
 4 [REDACTED] See *id.* at 165:16–166:16; Exh. H at 13:9–15:8 (Universal’s Supp.
 5 Resp. To Request for Admission Nos. 32 & 33). Universal also believes that [REDACTED]
 6 [REDACTED] Exh. Q (Allen
 7 Depo.) at 61:24–63:1. As Universal put it in response to a media inquiry in connection with this
 8 case:

9 Prince believes it is wrong for YouTube, or any other user-generated site, to
 10 appropriate his music without his consent. . . . *That position has nothing to do*
 11 *with any particular video that uses his songs.* It’s simply a matter of principle.
 12 And legally, he has the right to have his music removed. We support him and this
 13 important principle. That’s why, over the last few months, we have asked
 YouTube to remove thousands of different videos that use Prince music without
 his permission.

14 Exh. I (Exh. F to Second Amended Complaint (Depo. Exh. 110)) (emphasis added); *see also*
 15 Exh. J (Lofrumento Depo. at 47:18–49:11) (authenticating).

16 Therefore, Universal’s takedown guidelines mandated [REDACTED]
 17 [REDACTED] Exh. Q (Allen Depo.) at 62:1–4. In other
 18 words, Universal would send a takedown notice for [REDACTED]
 19 [REDACTED] *Id.* at 62:8–19.⁵ Indeed, it
 20 is Universal’s general policy, [REDACTED]
 21 [REDACTED]
 22 [REDACTED] *Id.* at 60:15–61:6; *see also* Exhs. X-
 23 X (Depo. Exhs. 91, 92, 97).⁶ [REDACTED]
 24 [REDACTED] See Exh. R (Johnson Depo.) at

25
 26 ⁵ [REDACTED] See,
 27 e.g., Exh. Q (Allen Depo.) at 177:9–182:14; Exh. T (Depo. Exh. 85).

28 ⁶ See also Exh. Q (Allen Depo.) at 195:20–196:15, 199:3–16, 240:19–241:4 (authenticating exhibits).

60:7–22.

Id. at 75:4–76:7. Mr. Johnson had only a vague understanding of fair use. *See id.* at 12:12–13:8.

See Exh. Q (Allen Depo.) at 130:7–131:4; *see also* Exh. H at 17:14–23:7 (Universal’s Supp. Resp. to RFA Nos. 41–43). Alina Moffatt, the attorney who actually sent the notice that led to this case, did not consider whether the Video might be a fair use – indeed, she had never had occasion to consider whether any given use of material was fair in the entire course of her work for Universal. Exh. F (Moffat Depo.) at 54:17–55:1.

Exh. R (Johnson Depo.) at 35:17–36:1; Exh. S (Depo. Exh. 77). Less than two hours later, at the direction of her superior, Mr. Allen, Ms. Moffat sent the list to YouTube embodied in the aforementioned notice. *See* Exh. F (Moffat Depo.) at 14:16–15:25, 17:3–10, 30:25–31:6; Exh. P (Depo. Exh. 70); Exh. S (Depo. Exh. 77). Neither Ms. Moffat nor Mr. Allen reviewed the Video before Ms. Moffat sent the notice. Exh. F (Moffat Depo.) at 19:23–25; Exh. Q (Allen Depo.) at 26:15–19, 55:15–20. The sole basis for Ms. Moffat’s asserted belief that the listed videos were infringing was that she was instructed to send the notice. Exh. F (Moffat Depo.) at 22:16–24; *see also id.* at 22:25–27:22.

Exh. Q (Allen Depo.) at 57:15–20.

Id. at 60:11–14.

Universal sent this notice to the address designated by YouTube for DMCA notices. Exh. V (Hubbard Aff.) ¶¶ 7-11 & Exh. B (to the Hubbard Aff.), intending to cause YouTube to take it down. Exh. H at 8:23–9:10 (Universal’s Supp. Resp. to RFA No. 4). The notice precisely tracked the language specified for a notice of claimed infringement under Section 512(c)(3) of the DMCA. On June 4, 2007, YouTube disabled public access to the Video due to the accusation of infringement. Exh. V (Hubbard Aff.) ¶ 11. YouTube also sent Ms. Lenz an email notifying her

1 that it had done so in response to Universal's accusation of copyright infringement, and warning
 2 her that repeated incidents of copyright infringement could lead to the deletion of her account and
 3 all her videos. Lenz Decl. ¶ 5; Exh. G (Depo. Exh. 9); Exh. B (Lenz Depo.) at 110:3–6
 4 (authenticating).

5 On June 7, 2007, Ms. Lenz sent a counternotice that did not comply with all of the
 6 particulars of Section 512(g) of the DMCA. Lenz Decl. ¶ 6; Exh. K (Depo. Exh. 11); Exh. B
 7 (Lenz Depo.) at 116:10–20 (authenticating). [REDACTED]
 8 [REDACTED]. Exh. W (Depo. Exh. 72); Exh. F (Moffat
 9 Depo.) at 32:13–19. Ms. Moffat reviewed the counternotice and concluded that the use must be
 10 infringing because it was unlicensed. See Exh. F (Moffat Depo.) at 41:3-25, 45:15–46:6, 46:24–
 11 47:8. Ms. Moffat wrote back to YouTube to insist that the Video was infringing and note that the
 12 counternotice was invalid because it did not comply with the particulars of Section 512(g). See
 13 Exh. W (Depo. Exh. 72). With the assistance of counsel, Ms. Lenz then sent YouTube a second
 14 DMCA counternotice on June 27, 2007, demanding that the Video be reposted because it did not
 15 infringe Universal's copyrights. Lenz Decl. ¶ 7. The Video was restored in mid-July,
 16 approximately six weeks after it had been disabled. *Id.* ¶ 8.

17 III. LEGAL STANDARD

18 A court may grant summary judgment when the submissions in the record “show that
 19 there is no genuine issue as to any material fact and that the movant is entitled to judgment as a
 20 matter of law.” Fed. R. Civ. P. 56(a)(2). A “genuine issue” of material fact means that there is
 21 sufficient evidence in favor of the non-moving party to allow a jury to return a verdict in its favor.
 22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The burden is on the non- moving
 23 party to designate specific facts showing a genuine issue for trial. See *Celotex Corp. v. Catrett*,
 24 477 U.S. 317, 322 (1986). However, a mere “scintilla” of evidence will not suffice to meet that
 25 burden. *Anderson*, 477 U.S. at 252. Nor is it enough for the non-moving party to show that there
 26 is some “metaphysical doubt as to the material facts,” provided that any inferences from the
 27 underlying facts are viewed in the light most favorable to the non-moving party. *Matsushita Elec.*
 28 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

IV. ARGUMENT

Ms. Lenz seeks summary judgment that Universal has violated 17 U.S.C. § 512(f). Section 512(f) provides,

Any person who knowingly materially misrepresents under this section . . . that material or activity is infringing . . . shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer . . . who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing

17 U.S.C. § 512(f). A party is liable under Section 512(f) if it fails to form a good faith belief that the targeted material is not authorized by the copyright owner or by law prior to making a misrepresentation to the contrary. *See Lenz*, 572 F. Supp. 2d at 1155. "In order for a copyright owner to proceed under the DMCA" with the requisite good faith belief, "the owner must evaluate whether the material makes fair use of the copyright." *Id.* at 1154; *see also Shropshire v. Canning*, 809 F. Supp. 2d 1139, 1148 n.3 (N.D. Cal 2011) (same; citing *Lenz*); *Ouellette v. Viacom Int'l, Inc.*, 2012 WL 1435703, at *2 (D. Mont. April 25, 2012) (same; citing *Lenz*); Order Denying Mot. to Certify Interlocutory Appeal (Dkt. No. 53) at 4. Assuming a copyright owner does make a "determination that a particular use is not fair use," this Court has held that a Section 512(f) plaintiff must show that that determination was made with "subjective bad faith." *See Lenz*, 572 F. Supp. 2d at 1156 (citing *Rossi v. Motion Picture Ass'n of America*, 391 F.3d 1000, 1004 (9th. Cir. 2004)).⁷

As set forth below, Ms. Lenz has made that showing. The undisputed evidence demonstrates that Universal could not have formed a good faith belief that the Video was infringing because it never did what Section 512(f) requires as a predicate for such a belief: consider, *inter alia*, whether her Video was a fair use and therefore authorized by law. *See Lenz*,

⁷ As set forth in detail in the briefing on Universal's first motion to dismiss, the parties dispute whether a subjective standard applies solely to the factual basis for the DMCA notice or to the legal basis as well. *Lenz* contends that *Rossi*, 391 F.3d 1000, sets out an "actual knowledge" standard for belief as to the *facts* regarding the use in question, while this Court's holding in *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004) presents the appropriate and controlling standard for belief as to whether the use is authorized by law. Opp'n to Mot. to Dismiss and Special Mot. to Strike (Dkt No. 21) at 4. Ms. Lenz reserves the right to re-raise this issue on appeal, if necessary.

1 572 F. Supp. 2d at 1154-55. The evidence also demonstrates that any determination Universal
 2 may have made as to the legal status of the Video was made with subjective bad faith because
 3 Universal willfully blinded itself to facts that would have made clear that her Video was a fair
 4 use. Universal has violated Section 512(f), and the Court should therefore grant summary
 5 judgment in Ms. Lenz's favor.

6 **A. Universal did not believe in good faith that the Video was infringing.**

7 Based on its own admissions, it is abundantly clear that Universal made no effort to
 8 comply with its obligation to at least consider whether Ms. Lenz's video was authorized by law.
 9 Therefore, it cannot have formed a good faith belief to the contrary.

10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED] Exh. Q (Allen Depo.) at 76:8-11. [REDACTED]
 14 [REDACTED]
 15 [REDACTED] *Id.* at 76:14-19, 77:12. [REDACTED]
 16 [REDACTED] *Id.* at 77:13-25. [REDACTED]
 17 [REDACTED] Indeed, Mr. Allen claimed not to
 18 even know whether a fair use would be one that would be "authorized by law." *Id.* at 18:25-
 19 19:18.
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 *Id.* at 61:1-6. [REDACTED] *Id.* at

1 61:22–62:4.

2 [REDACTED] whether the use was
 3 noncommercial or transformative.⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–
 4 579 (1994). [REDACTED] whether the original work was creative
 5 or unpublished. [REDACTED] the amount and substantiality of the
 6 use, [REDACTED]

7 [REDACTED] Exh. Q (Allen Depo.) at 62:14–19. [REDACTED]

8 [REDACTED] market harm. See also *id.* at 64:19–23.

9 Instead, [REDACTED]
 10 [REDACTED]. *Id.* at 56:20–24. Of course, any number of fair uses might fall within this
 11 rubric. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 n.8 (9th Cir. 2003)
 12 (“[E]ntire verbatim reproductions are justifiable where the purpose of the work differs from the
 13 original.”); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (finding “When Sonny Sniffs Glue,” a
 14 29-second parody of “When Sunny Gets Blue” that altered the original lyric line and borrowed
 15 six bars of the song, to be noninfringing fair use).

16 Simply put, [REDACTED]
 17 [REDACTED] See, e.g., *Ringgold v. Black*
 18 *Entm’t Television, Inc.*, 126 F.3d 70, 75–76 (2d Cir. 1997) (“Though the concept of *de minimis* is
 19 useful in insulating trivial types of copying from liability . . . the concept is an inappropriate one
 20 to be enlisted in a fair use analysis.”). Forming a good faith belief regarding [REDACTED]
 21 [REDACTED] is not the same as forming a good faith belief that a video’s use of a song is not
 22 authorized by law, and thus cannot pass muster under the Section 512(f) standard.

23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 ⁸ The statutory fair use factors are set forth at 17 U.S.C. § 107.

Exh. R (Johnson Depo.) at 60:17–22.

Id. at 62:4-10; 63:3–15. whether a given

use was transformative, noncommercial, or likely to cause market harm. *See id.* at 63:16–17.

whether the video maker might have used more or less than necessary to achieve a transformative purpose. *See id.*

Id. at 75:16–76:7, 79:7–20.

Indeed, Universal finally admitted that Mr. Johnson was never told that a fair use was not infringing (and therefore not an appropriate candidate for takedown), and that he was never instructed to consider nor did he consider whether Ms. Lenz's use was fair. *See* Exh. H at 17:14–23:7 (Universal's Supp. Resp. to RFA Nos. 41–43). Hoping to soften the effect of its admission, Universal paired it with a half-baked assertion that some of the facts Mr. Johnson supposedly considered *might* bear on fair use, specifically:

1. The facts identified above that ;
2. *For-Profit Website*: That the Video was posted on YouTube, a for-profit entity;

3. *License*: That the use had not been authorized by Prince or Universal;

4. *Significant Work*: That “Let’s Go Crazy” is a “significant musical composition” and a popular song.

Exh. H at 9:11–11:22 (Universal’s Supp. Resp. to RFA No. 16); Exh. L at 6:4–17 (Universal’s Supp. Resp. to Interrog. No. 17).

Universal’s attempt to manufacture a fair use consideration by Mr. Johnson after the fact fails for at least two reasons. First, [REDACTED]

[REDACTED] Exh. Q (Allen Depo.) at 76:8–77:25, 87:1–89:23. Second, considering the facts Universal has identified falls far short of a

consideration of *fair use*. Taking each in turn:

1. [REDACTED]

[REDACTED] Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Prot. Sys. for Access Control Techs. 52 (June 11, 2010) (*available at* <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>) (“Rulemaking Report”).

2. ***For-Profit Website***: YouTube’s for-profit nature has no bearing on whether a given video is commercial or noncommercial. “The crux of the profit/non-profit distinction is . . . whether *the user* stands to profit from exploitation of the copyrighted material without paying the customary price.” *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998) (emphasis added) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)). Indeed, in 2010 the Register of Copyrights expressly rejected a similar argument. Opponents of an exemption to the DMCA’s prohibition on breaking

1 technical protection measures for purposes of making fanvids suggested that
 2 videos placed on YouTube were necessarily commercial because YouTube
 3 collects advertising revenue. Rejecting the claim, the Register observed that the
 4 opponents did not “show why a vidder stands in the shoes of the website rendering
 5 the works for purposes of the underlying fair use analysis.” Rulemaking Report at
 6 39 n.144.

7 3. **License:** Whether the use is licensed also does not illuminate the question, because
 8 (a) if the use is licensed, it is irrelevant whether the use is fair; and (b) if a use is
 9 fair, no license is needed.

10 4. **Significant work:** At best, the “significance” of the song might allude to the fact
 11 that “Let’s Go Crazy” is a widely published creative work, which is relevant to
 12 analysis of the second fair use factor. That is also true of any number of songs,
 13 however, and recognizing that a work is creative cannot substitute for an actual
 14 consideration of whether it has been fairly used. *See generally Campbell*, 510 U.S.
 15 at 578 (no single statutory factor determinative). After all, courts have found uses
 16 of any number of significant creative works to be fair, *see, e.g., id* (use of “Pretty
 17 Woman” held fair); *Lennon v. Premise Media*, 556 F. Supp. 2d 310, 325 (S.D.N.Y.
 18 2008) (use of “Imagine” held fair; wide publication of famous song “weighs a bit
 19 in favor of fair use”), *declined to follow on other grounds by Salinger v. Colting*,
 20 607 F.3d 68, 77 (2d. Cir. 2010).

21 In sum, a consideration of these facts does not amount to even the most cursory fair use
 22 assessment.

23 As for the attorney who actually sent the notice, Alina Moffat, she did not even review the
 24 Video, much less attempt to consider whether it was a fair use. Exh. F (Moffat Depo.) at 19:23–
 25 25. According to Ms. Moffat, the sole basis for her belief that the listed videos were infringing
 26 was that she was instructed to send the notice. *Id.* at 22:16–24; *see also id.* at 22:25–27:22.
 27 Indeed, given a second opportunity to consider the matter (when Ms. Lenz counternoticed) it *still*
 28 did not occur to Ms. Moffat to explore, however briefly, whether the Video might be sheltered by

1 the fair use doctrine. Instead, Ms. Moffat considered only whether the use was licensed and,
2 because it was not, [REDACTED]

3 [REDACTED]
4 [REDACTED] See Exh. W (Depo. Exh. 72) at
5 UMC-0000212. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 Thus, the undisputed evidence demonstrates that Universal was interested in only two
9 things: [REDACTED]

10 There was simply no room in its rubric to assess whether the fair use doctrine applied to *any*
11 video, much less Ms. Lenz's video.

12 **B. The Video is a fair use.**

13 Based on nothing more than its review of the Video, Universal could not have believed, [REDACTED]
14 [REDACTED], that Ms. Lenz's use was anything other than fair. See 17 U.S.C.
15 § 107. It certainly did not have a sufficient basis to form a good faith belief that it was infringing.

16 **First, the purpose and character of the use was obviously both noncommercial and**
17 **transformative.** There was no reason—none—to imagine that Ms. Lenz's blurry 29-second
18 home video was created for any commercial purpose. See *Campbell*, 510 U.S. at 578. The Video
19 bears all the hallmarks of a family home movie: like many such videos, it is blurry and somewhat
20 shaky, with poor sound quality, and documents nothing more or less than a brief moment in the
21 everyday chaos of a family life with young children. See Exh. A. There were no ads attached to
22 it.⁹ In other words, the Video looked and sounded exactly like the personal, noncommercial
23 home movie that it was. Indeed, Universal has never attempted to suggest that it actually thought
24 Ms. Lenz had any commercial purpose. See Exh. M at 7:3–8:2 (Universal's Resp. to Interrog.
25 No. 3). It has merely asserted that the video was placed in a “commercial, for-profit” setting.

26 ⁹ Indeed, YouTube did not even start to run ads with videos until 2009. Associated Press,
27 *YouTube Videos To Feature 'Overlay' Ads*, CBS News (February 11, 2009), available at
28 <http://www.cbsnews.com/stories/2007/08/22/tech/main3193384.shtml> (last visited July 12, 2012).

1 Exh. H at 9:11–11:22 (Universal’s Supp. Resp. to RFA No. 16); Exh. L at 6:4–17 (Universal’s
 2 Supp. Resp. to Interrog. No. 17). On that theory, the first factor could weigh against every video
 3 on YouTube. But that is not the law: “[t]he crux of the profit/non-profit distinction is . . . whether
 4 *the user* stands to profit from exploitation of the copyrighted material without paying the
 5 customary price.” *L.A. News Serv.*, 149 F.3d at 994 (quoting *Harper & Row*, 471 U.S. at 562).

6 Ms. Lenz’s use was obviously transformative in that it made a use of the work—a use in
 7 the genre of family home videos—that was distinct and separate from its original context and
 8 added additional creative elements, such as a voice talking over the music and children dancing
 9 and running around. See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir.
 10 2001) (transformative works are those which do not “merely supplant” the original work but
 11 rather add “a further purpose or different character”); *Campbell*, 510 U.S. at 579 (transformative
 12 works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines
 13 of copyright . . .”). A transformative work “is the very type of activity that the fair use doctrine
 14 intends to protect for the enrichment of society.” *Castle Rock Entm’t, Inc. v. Carol Pub. Grp.,*
 15 *Inc.*, 150 F.3d 132, 142 (2d Cir. 1998). Again, the transformative aspect of the use was readily
 16 apparent to Universal from the Video itself, namely, that the use of Prince’s composition was not
 17 for its own sake, but as what happened to be the background catalyst for some children to dance,
 18 run and bop around in a kitchen.

19 **Second, while the nature of the original work is indisputably creative, this factor**
 20 **tends to carry the least weight in the fair use analysis.** Indeed where, as here, the use is
 21 transformative, the nature of the work is “not . . . terribly significant in the overall fair use
 22 balancing.” *Mattel*, 353 F.3d at 803 (finding fair use of the Barbie doll, a clearly creative work,
 23 when the incorporation of the original work is necessary for the secondary use). Moreover, there
 24 is no question that the original work was published many years ago, which means the composer
 25 has already been amply compensated and this factor carries even less weight. *Kelly v. Arriba Soft*
 26 *Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“Published works are more likely to qualify as fair use
 27 because the first appearance of the artist’s expression has already occurred.”); *Blanch v. Koons*,
 28 467 F.3d 244, 256 (2d Cir. 2006) (second factor turns on (1) “whether the work is expressive or

creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational,” and (2) “whether the work is published or unpublished, with the scope of fair use involving unpublished works being considerably narrower.”) (quoting 2 Howard B. Abrams, *The Law of Copyright* § 15:52 (2006)); *see also Lennon*, 556 F. Supp. 2d at 325 (wide publication of John Lennon’s song “Imagine” weighed in favor of fair use). Given that it administers the copyrights to “Let’s Go Crazy,” Universal is better positioned than most to evaluate this factor, and cannot claim it lacked the information necessary to assess it.

Third, the amount and substantiality of the use is minor. While Universal claims the song was prominently featured, the entire Video is less than 30 seconds long. *See* Exh. A. In fact, due to the noise and commotion made by the children, the song “Let’s Go Crazy” can only be heard in the background for approximately 20 seconds of the 29-second video and even then not all that clearly. *See id.* Universal is also best positioned to be aware that this amount was minimal—[REDACTED]. Exh. AA at 12:1–9 (Universal’s Resp. to RFA No. 12); *see generally Harper & Row*, 471 U.S. at 564 (“[T]he Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”). Moreover, Universal cannot dispute that Ms. Lenz used no more than necessary to fulfill her purpose: a video of her newly-walking son “dancing” to music in her kitchen. “If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.” *Kelly*, 336 F.3d at 820–21.

Universal has tried to suggest that Mr. Johnson was struck by the “frenetic guitar solo” that happened to coincide with the “frenetic” children. *See* Exh. M at 7:27–28 (Universal’s Resp. to Interrog. No. 3). In other words, Universal posits that Mr. Johnson might have imagined that the home video was not a spontaneous recording but rather a carefully orchestrated production that deliberately took “the heart of the work.” But Mr. [REDACTED] *See* Exh. R (Johnson Depo.) at 75:16–76:781:16. Moreover, a “heart of the work” theory makes no sense in this context. The heart of the work doctrine is rooted in the notion that even a small taking might not be fair if it nonetheless

effectively supplants the original work by taking the most valuable aspects -- i.e., the portion taken is precisely what an audience will value, with the effect being that audiences will ignore the original work in favor of the secondary one. *See generally Harper & Row*, 471 U.S. at 565-66. Here, no one who was remotely interested in Prince's music or his guitar solos would ever look to Ms. Lenz's video rather than the original Prince song—no matter what portion she happened to capture.

Fourth, there is no remotely plausible *market harm*. As the entity responsible for licensing "Let's Go Crazy," Universal knew that the snippet of the composition that plays in the background (not dubbed as a soundtrack) of the Video could not substitute for the original Prince song in any conceivable market, *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986), given the brief use of the work, the low audio quality of the ordinary digital video camera Ms. Lenz used, the household noises, laughter and talking that partially obscure the music, and the sounds made by the toys that Ms. Lenz's children are pushing around the kitchen during the Video. All of these facts are apparent on the face of the Video. Moreover, because Ms. Lenz's use was noncommercial and transformative, market harm cannot be presumed and is in fact unlikely. *Campbell*, 510 U.S. at 591 ("No 'presumption' or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes."); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003) ("The more transformative the new work, the less likely the new work's use of copyrighted materials will affect the market for the materials."), *overruling recognized on other grounds by Flexible Lifeline Sys. V. Precision Lift, Inc.*, 654 F.3d 989, 994-95 (9th Cir. 2011).

Indeed, Universal has not tried seriously to contend that the Video itself could have a demonstrable effect on an actual market for "Let's Go Crazy." Universal itself declares that the only relevant market is the "synchronization license" market for this specific song, and concedes that it has never issued a synch license for the home video market. Exh. H at 11:23–12:19 (Universal's Supp. Resp. to RFA No. 26). Moreover, Universal has admitted that [REDACTED] Exh. X (Depo. Exh. 91); *see Mattel*, 353 F.3d at 806 (no market harm where copyright owner would not enter the relevant market).

1 [REDACTED]
 2 [REDACTED] it is preposterous to imagine that any parent would –or should—seek such a license in
 3 order to share a video of her children playing in the kitchen. Indeed, court after court has rejected
 4 similar attempts to manufacture market harm where there was no *likely* market for the challenged
 5 use of the copyrighted works. *Id.*; see also *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d
 6 Cir. 1991) (affirming district court’s finding of no reasonable likelihood of injury to alleged
 7 market where, inter alia, alleged potential market was “highly improbable”); *Princeton Univ.*
 8 *Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (“Only ‘traditional,
 9 reasonable, or likely to be developed markets’ are to be considered in this connection, and even
 10 the availability of an existing system for collecting licensing fees will not be conclusive.”
 11 (citation omitted)); *Castle Rock*, 150 F.3d at 145 (copyright owners may not preempt exploitation
 12 of transformative markets, which they would not “in general develop or license others to
 13 develop,” by actually developing or licensing others to develop those markets); *Kane v. Comedy*
 14 *Partners*, No. 00 Civ. 158 (GBD), 2003 WL 22383387, at *7 (S.D.N.Y. Oct. 16, 2003) (to avoid
 15 danger of circularity, copyright owner not entitled to license fees for uses that otherwise qualify
 16 as fair uses); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4]
 17 (2005) (“it is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that
 18 potential is defined as the theoretical market for licensing the very use at bar.”).

19 Universal has also tried to suggest that this factor turns on consideration of all of the
 20 possible effects of “unrestricted and widespread” uses like the Video. Exh. M at 8:24-9:16
 21 (Universal’s Resp. to Interrog. No. 5). Courts have rejected similar efforts to ignore the key issue
 22 of substitution, particularly where the copyrighted work is embedded in another, transformative
 23 work. In *Kramer v. Thomas*, No. CV 05-8381 AG (CTx), 2006 WL 4729242 (C.D. Cal. Sept. 28,
 24 2006), for example, the court found that there was no market harm where a composition was
 25 embedded in a DVD collection, and specifically rejected the plaintiff’s “unrestricted and
 26 widespread” use theory:

27 Nobody who wanted to listen to the compositions would choose to do so by paying
 28 \$65 for a 12-hour 3-DVD set in which sonically limited portions of the

compositions are anonymously nested in less than 1% of the work.... Unrestricted and wide-spread collection of these DVD's would not result in a substantially adverse impact on the potential market for the original composition.

Id. at *11. Similarly, unrestricted and widespread use of "Let's Go Crazy" as incidental background music in 30-second home videos could not possibly harm any market for Prince's works.

Universal had all the facts it needed to recognize that Ms. Lenz's use was lawful [REDACTED]

C. At a minimum, Universal was willfully blind to whether the Video was a fair use.

1. Universal did not form the required good faith belief because it rendered itself willful blind to whether *any* given use was authorized by law.

Universal is liable under Section 512(f) for yet another reason: it could not possibly have formed a good faith belief that the Video infringed copyright because it [REDACTED] ensured it would be willfully blind to facts showing that a given use (including Ms. Lenz's use) is in fact authorized by law.

Under copyright law, as with any other body of law,¹⁰ proof of willful blindness will suffice to establish knowledge and, therefore, bad faith. "Willful blindness is knowledge, in copyright law . . . as it is in the law generally." *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003). In *Dolman v. Agee*, 157 F.3d 708 (9th Cir. 1998), for example, a record producer was found to have willfully infringed where it continued to produce and market a song collection "despite knowing that *someone* owned the copyrights in the music, and being presented with evidence regarding [plaintiff]'s claim of ownership." *Id.* at 715 (emphasis in original). In other words, the producer was charged with knowledge when it was shown that he knew certain facts but actively disregarded their implications.

Moreover, the Second Circuit Court of Appeals recently assessed the specific relationship between willful blindness and the DMCA. In that case, the court concluded that actual knowledge

¹⁰ See, e.g., *U.S v. Real Property at 2659 Roundhill Dr., Alamo, Cal.*, 194 F.3d 1020, 1028 (9th Cir. 1999) ("An owner cannot deliberately avoid actual knowledge through 'willful blindness.'").

1 sufficient to potentially remove the protection of the Section 512 safe harbors could be shown via
2 proof of willful blindness:

3 As a general matter, we interpret a statute to abrogate a common law principle
4 only if the statute “speak[s] directly to the question addressed by the common
5 law.” *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir.2009) (internal quotation marks
6 omitted). . . . Because the statute does not “speak[] directly” to the willful
7 blindness doctrine, § 512(m) limits—but does not abrogate—the doctrine.
Accordingly, we hold that the willful blindness doctrine may be applied, in
appropriate circumstances, to demonstrate knowledge or awareness of specific
instances of infringement under the DMCA.

8 *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012). Citing *Aimster*, the Court
9 remanded for consideration of whether the defendants had made a “deliberate effort to avoid
10 guilty knowledge.” *Id.* The analysis is no different for Section 512(f).

11 Even under what may well be the most rigorous knowledge standard in U.S. law, the
12 “actual malice” standard applicable to defamation claims against public figures, knowledge may
13 be inferred from circumstance. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see St.*
14 *Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“[R]ecklessness may be found where there are
15 obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”). The
16 Ninth Circuit has held that a plaintiff may show actual malice by showing that despite obvious
17 reasons to doubt the truth of an author’s statements, the “publisher failed to take reasonable steps
18 to dispel those doubts.” *Masson v. New Yorker*, 960 F.2d 896, 900 (9th Cir. 1992); *see also Hunt*
19 *v. Liberty Lobby*, 720 F.2d 631, 643-44 (11th Cir 1983) (“[E]vidence which shows that the
20 statement was inherently implausible or that there were obvious reasons to doubt the veracity of
21 the informant is relevant to establishing actual malice.” (citing cases)). Thus, a defendant “cannot
22 feign ignorance or profess good faith when there are clear indications present which bring into
23 question the truth or falsity of defamatory statements.” *Gertz v. Welch*, 680 F.2d 527, 538 (7th
24 Cir. 1982) (emphasis added). Moreover, “the purposeful avoidance of the truth” can establish
25 actual malice. *See Harte-Hanks v. Connaughton*, 491 U.S. 657, 692 (1989) (likelihood that a
26 newspaper made “a deliberate decision not to acquire knowledge of facts that might confirm the
27 probable falsity” of facts in its story supported a finding of actual malice).

28 In varying ways, each of these doctrines recognizes the injustice of absolving malfeasors

1 who took steps to avoid gaining actual knowledge of their improper acts. Such injustice would be
 2 particularly improper here, given that the entire purpose of Section 512(f) is to help carry out
 3 Congress's intent to facilitate the growth of the Internet as a platform for free speech. *See* Sen.
 4 Rep. No. 105-190 at 21 (1998 ("The Committee was acutely concerned that it provide all end-
 5 users . . . with appropriate procedural protections to ensure that material is not disabled without
 6 proper justification. The provisions in the bill balance the need for rapid response to potential
 7 infringement with the end-users' legitimate interests in not having material removed without
 8 recourse.")). Adopting a rule that gives credence to willful blindness as a strategy to avoid
 9 liability under Section 512(f) would eviscerate the protections Congress intended to create.
 10 Indeed, it would encourage all copyright holders to develop systems designed to ensure ignorance
 11 as a means of excusing improper takedowns, creating the opposite policy result.

12 **2. Universal's takedown practices ensured it would be blind to noninfringing**
 13 **fair uses, as it was in this case.**

14 Based on its own admissions, it is abundantly clear that Universal purposefully avoided
 15 acquiring the knowledge it needed to form a genuine good faith belief that the Video was
 16 infringing, *i.e.*, that it was not authorized by law. It [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

26 In short, Universal was confronted with actual facts establishing fair use (and thus non-
 27 infringement). It willfully ignored those facts—indeed, it set up a takedown system that would
 28 inevitably *require* ignoring those facts—and, therefore, rendered itself incapable of forming a good

1 faith belief that Ms. Lenz's video, or any other video, was not authorized by law. Such a system
2 cannot, and does not, pass muster under the DMCA.

3 **D. Universal sent the takedown pursuant to Section 512(f).**

4 The remaining elements of a Section 512(f) claim can be addressed quickly. There is no
5 dispute that Universal asserted that the Video was not authorized by a copyright holder or the law.
6 See Exh. P (Depo. Exh. 70) at UMC-0000625. That misrepresentation was material: YouTube
7 removed the Video in response to Universal's notice, as Universal intended. Exh. H at 8:23-9:10
8 (Universal's Supp. Resp. to RFA No. 4); Exh. V (Hubbard Aff.) ¶ 11; *Online Policy Group v.*
9 *Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) ("'[m]aterial' means that the
10 misrepresentation affected the ISP's response to a DMCA letter.")

11 If Universal nonetheless insists that its Notice of Infringement was not made pursuant to
12 Section 512 of the DMCA, that claim can be dismissed as a matter of law. First, Universal sent
13 its notice to the email address "copyright@youtube.com," see Exh. P (Depo. Exh. 70), the address
14 designated by YouTube for receipt of DMCA notices.¹¹ Obviously, it intended to take advantage
15 of the DMCA process.

16 Second, the Notice carefully tracks *every requirement* of a Section 512 notice: It is (1) a
17 written communication; (2) provided to the designated agent of a service provider; (3) signed;
18 (4) identifying a work claimed to be infringed; (5) identifying allegedly infringing material;
19 including the submitter's contact information; (6) alleging a good faith belief that the alleged
20 infringement is not authorized by the copyright owner or by the law; and (7) stating that the
21 information in the notification is accurate and that the complaint is authorized by the copyright
22 holder. Compare Exh. P (Depo Exh. 70) with 17 U.S.C. § 512(c)(3)(A).

23 Third, Universal cannot dispute that YouTube is a service provider as defined by the
24 DMCA. See 17 U.S.C. § 512(c)(1) & (k)(1)(B); Exh. V (Hubbard Aff.) ¶¶ 4-5. The Second
25 Circuit Court of Appeals has determined that YouTube was such a provider for all relevant
26 purposes. See *Viacom Intern., Inc. v. YouTube Inc.*, 676 F.3d 19, 39 (2d Cir. 2012)

27 ¹¹ Indeed, YouTube's Terms of Service specify that "only DMCA notices" should be sent to this
28 address. See Exh. N (Depo. Exh. 5) § 8; Exh. B (Lenz Depo.) at 51:14-23 (authenticating).

1 Finally, everyone involved in the takedown process—Universal, YouTube, and
 2 Ms. Lenz—treated the notice as a Section 512 notice. YouTube advised Ms. Lenz of her right to
 3 counternotice, and directed her to its help-center, which explains how to draft a DMCA-compliant
 4 counternotice. *See* Exh. G (Depo. Exh. 9). When Ms. Lenz did counternotice, [REDACTED]
 5 [REDACTED]
 6 [REDACTED] Exh. C to Exh. V (Hubbard
 7 Aff.) at YT00001236-37. [REDACTED]
 8 [REDACTED]

9 [REDACTED] Ms. Lenz then submitted a fully DMCA-compliant notice and the material was restored
 10 following a second waiting period. *See* Exh. E to Exh. V (Hubbard Aff.).

11 Having obtained the benefits of a takedown notice mapped to the requirements of the
 12 DMCA—including delayed restoration when Ms. Lenz submitted a noncompliant
 13 counternotice—Universal cannot avoid its concomitant obligations under Section 512(f) by
 14 claiming that the notice was not sent pursuant to that statute.

15 **E. Ms. Lenz was damaged by Universal’s improper takedown.**

16 There can be no dispute that Ms. Lenz was damaged by Universal’s action; the Court has
 17 already held as much. Exh. O (2/25/2010 Order Granting Partial Summary Judgment) at 16:19–
 18 21 (“Accordingly, because there is no genuine issue of material fact as to whether Ms. Lenz
 19 incurred *some* damages as defined under the statute, Ms. Lenz’s motion will be granted as to
 20 Universal’s affirmative defense of no damages.”)

21 First, Ms. Lenz’s video was unavailable on YouTube for many weeks as a result of
 22 Universal’s takedown notice, and her sense of her freedom to express herself, including
 23 expressing herself by making home videos, making particular kinds of videos as opposed to other
 24 kinds, and sharing home videos with her friends and family, was diminished as a result of
 25 Universal’s takedown notice. Lenz Decl. ¶ 10. As with other kinds of speech harms, however,
 26 these losses are difficult to translate into economic numbers. Thus, Ms. Lenz seeks only an award
 27 of nominal damages for these harms. *See generally Yniguez v. Arizonans for Official English*, 69
 28 F.3d 920, 949 (9th Cir.1995) (*en banc*), *vacated on other grounds*, 520 U.S. 43 (1997) (holding

1 employee entitled to nominal damages for free speech violation); *Phelps-Roper v. City of*
 2 *Manchester, Mo.*, 738 F. Supp. 2d 947, 960 (E.D. Mo. Sept. 8, 2010) (awarding nominal damages
 3 of \$1 for violations of free speech rights).

4 Second, Ms. Lenz was forced to expend time and resources to get her video restored. She
 5 spent at least ten hours before filing this lawsuit on tasks such as obtaining counsel, determining
 6 how to send a counternotice, sending the counternotice, sending a revised counternotice after
 7 Universal objected to the first counternotice, and ensuring that access to her video had been
 8 restored. Lenz Decl. ¶ 9. Ms. Lenz's time can be valued at the Pennsylvania minimum wage at
 9 the time, which was \$6.25/hour. 34 Pa. Code § 231.101(2). For her time, Ms. Lenz therefore
 10 claims an amount of \$62.50 for her time prior to filing this lawsuit. Ms. Lenz also expended
 11 resources on her pre-lawsuit efforts, including the use of her computer, Lenz Decl. ¶ 9, but seeks
 12 only nominal damages for her pre-lawsuit expenditure of these resources.

13 Finally, Ms. Lenz retained attorneys, acting *pro bono*, to advise her in connection with
 14 ensuring access to her video was restored. Lenz Decl. ¶ 7; *see also* Exh. O (2/25/2010 Order
 15 Granting Partial Summary Judgment) at 15:26–16:1 (“any fees incurred for work in responding to
 16 the takedown notice and prior to the institution of suit under § 512(f) are recoverable under that
 17 provision”). Specifically, Ms. Lenz seeks compensation for Ms. Hofmann's time in the amount
 18 of \$1,275. *See* Declaration of Marcia Hofmann ¶¶ 1–7.¹²

19 In sum, Ms. Lenz seeks damages in the amount of \$1,337.50, plus nominal damages for
 20 the harm to her speech rights and her expenditure of personal resources in connection with
 21 ensuring restoration of the Video on YouTube.

22
 23
 24
 25 ¹² Ms. Lenz contends that time and resources attributable to efforts spent on this litigation are
 26 recoverable as damages under Section 512(f). Ms. Lenz recognizes that the Court has held that
 27 “any fees incurred for work in responding to the takedown notice and prior to the institution of
 28 suit under § 512(f) are recoverable under that provision, [but] recovery of any other costs and fees
 is governed by § 505.” Exh. O (2/25/2010 Order Granting Partial Summary Judgment) 15:26-
 16:1. Ms. Lenz reserves the right to challenge the latter aspect of this holding on appeal.

V. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in Ms. Lenz's favor.

Dated: July 13 2012

Respectfully Submitted,

KEKER & VAN NEST LLP

/s/ Ashok Ramani

By: ASHOK RAMANI
MICHAEL S. KWUN
MELISSA J. MIKSCH

Attorneys for Plaintiff
STEPHANIE LENZ