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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

CASE NO. CV 07-03783-JF

**DEFENDANTS' 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**

**[Declaration of Kelly M. Klaus and  
[Proposed] Order filed concurrently;  
Stipulation and [Proposed] Order on  
Shortened-Time Briefing Schedule also filed  
concurrently]**

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

Judge: Honorable Jeremy Fogel

Courtroom: 3



**MEMORANDUM OF POINTS AND AUTHORITIES**

1  
2 Defendants Universal Music Corp., Universal Music Publishing, Inc. and Universal Music  
3 Publishing Group (“Defendants” or “Universal”) move for an Order [1] certifying the Court’s  
4 August 20, 2008 Order (“Order”) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and  
5 [2] staying proceedings in this Court pending the Ninth Circuit’s resolution of the § 1292(b)  
6 appeal. The Order recognizes that the following legal question controls Plaintiff’s ability to  
7 proceed with her suit under 17 U.S.C. § 512(f):

8 [W]hether 17 U.S.C. § 512(c)(3)(A)(v) requires a copyright owner to consider the  
9 fair use doctrine in formulating a good faith belief that “use of the material in the  
10 manner complained of is not authorized by the copyright owner, its agent, or the  
11 law.”

12 Order at 4:25-28.

13 This question is clearly appropriate for immediate appeal under § 1292(b): it is purely a  
14 legal question involving the construction of a federal statute, and thus does not depend upon the  
15 development of any facts in this case; the question, as the Court held, is one of “first impression,”  
16 *id.* at 5:16, and there are substantial grounds for disagreeing with the Court’s resolution of it; and  
17 if the Ninth Circuit answers the question differently, then Plaintiff’s case is over, and the courts in  
18 this Circuit (and this District, in particular) may not have to deal with a wave of new § 512(f)  
19 cases that Plaintiff’s counsel have indicated no hesitation to file.

20 A stay pending the § 1292(b) appeal will conserve both the parties’ and the Court’s  
21 resources. A stay will avoid costly discovery and motion practice, all of which may be mooted by  
22 a contrary ruling from the Ninth Circuit. And a stay will not prejudice Plaintiff one bit. Plaintiff  
23 has made clear that she is suing for principle – the same principle, in fact, that an interlocutory  
24 appeal will put before the Ninth Circuit – not for money damages (Plaintiff has none) or to restore  
25 her video posting (which is still online).  
26  
27  
28

**ARGUMENT**

**I. THE COURT SHOULD CERTIFY ITS ORDER FOR APPEAL UNDER § 1292(b)**

An Order is appropriate for interlocutory appeal under 28 U.S.C. § 1292(b) if:

- The Order “involves a controlling question of law”;
- There is “substantial ground for difference of opinion” as to that question; and
- “[A]n immediate appeal from the order may materially advance the ultimate termination of the litigation[.]”

*See* 28 U.S.C. § 1292(b).<sup>1</sup> The Court’s Order easily satisfies all three criteria.

**A. Whether The DMCA Requires A Copyright Owner To Evaluate Fair Use Before Sending A Takedown Notice Is A Purely Legal Question Of Statutory Construction**

The question that the Order answers, and that Universal seeks to appeal immediately, is purely legal: whether the term “authorized by law” in 17 U.S.C. § 512(c)(3)(A)(v) requires a party sending a DMCA takedown notice to evaluate whether the material complained of makes a “fair use” of the copyright under 17 U.S.C. § 107. That question requires the interpretation of a federal statute, a task that by definition does not depend on the development of any facts in this case.

That legal question also is controlling. A question is “controlling” if “resolution of the issue on appeal could materially affect the outcome of litigation in the district court.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). If the Ninth Circuit decides that “authorized by law” does *not* encompass fair use, then Plaintiff’s case is over. It is undisputed that, unless excused by the fair use defense, Plaintiff’s posting infringes the copyright to “Let’s

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<sup>1</sup> Section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

1 Go Crazy.” If § 512(c)(3)(A)(v) does not require an *ex ante* fair use evaluation, then Universal’s  
 2 statement that it had “a good faith belief that the above-described activity is not authorized by the  
 3 copyright owner, its agent, or the law” was true as a matter of law, and Plaintiff has no § 512(f)  
 4 claim.

5 **B. There Exist Substantial Grounds For Difference Of Opinion With The**  
 6 **Court’s Resolution Of The Question**

7 There is “a substantial ground for difference of opinion” when a controlling legal question  
 8 “is difficult and of first impression.” *Marsall v. City of Portland*, 2004 U.S. Dist. LEXIS 15976  
 9 at \*20 (D. Or. Aug. 9, 2004) (quotation omitted). *See also Kersh v. General Council of the*  
 10 *Assemblies of God*, 535 F. Supp. 494, 498 (N.D. Cal. 1982) (finding substantial grounds on  
 11 “difficult questions of first impression in this Circuit”), overruled on other grounds, *Hollinger v.*  
 12 *Titan Capital Corp.*, 914 F.2d 1564, 1575 (9th Cir. 1990); *Klinghoffer v. Achille Lauro Lines*, 921  
 13 F.2d 21, 25 (2d Cir. 1990) (“substantial grounds for difference of opinion” when the “issues are  
 14 difficult and of first impression”).

15 The Court’s resolution of the controlling question of law is both difficult and a matter of  
 16 first impression. The Order expressly finds that the question “[w]hether fair use qualifies as a use  
 17 ‘authorized by law’” is one of “first impression.” Order at 5:15-16. That question also is a  
 18 “difficult” one for purposes of § 1292(b). The Court concludes that “[a]n activity or behavior  
 19 ‘authorized by law’ is one permitted by law or not contrary to law.” *Id.* at 5:26-27. Based on this  
 20 construction, the Court holds that, even if “fair use only *excuses* infringement, the fact remains  
 21 that fair use is a lawful use[,]” and therefore is use “authorized by law” within the meaning of  
 22 § 512(c)(3)(A)(v). *Id.* at 6:1-2. With respect, Universal submits that the text and structure of  
 23 § 512, the Ninth Circuit’s controlling case under § 512(f), and the nature of the fair use defense  
 24 all provide substantial grounds for an opposite answer: namely, that because fair use is not a right  
 25 that the copyright law affirmatively grants, but rather a defense that the infringer must raise and  
 26 prove, fair use is not use “authorized by law” within the meaning of § 512(c)(3)(A)(v).

27 First, the statutory text provides substantial support for Universal’s position.  
 28 “Authorized” means “endowed with authority” or “sanctioned by authority: APPROVED,”

1 Webster's Third New International Dictionary 147 (1968), meanings that are consistent with the  
2 law affirmatively granting a right, rather than providing a defense to a violation of someone else's  
3 right. Reading "authorized by law" in § 512(c)(3)(A)(v) to encompass rights rather than defenses  
4 allows the statute to have full meaning, because copyright law *does* affirmatively grant rights of  
5 use, such as the compulsory license to make and distribute copies of sound recordings that  
6 embody musical compositions. *See* 17 U.S.C. § 115. Fair use, however, is *not* one of these  
7 rights. Fair use instead is an affirmative defense, as repeated holdings from the Supreme Court  
8 and legislative history to § 107 make clear. *See Harper & Row, Publishers, Inc. v. Nation*  
9 *Enters.*, 471 U.S. 539, 561 (1985) (Congress "structured [Section 107] as an affirmative  
10 defense"); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (same); H.R. Rep. 102-  
11 836 at 3 n.3 (1992), 102d Cong., 2d Sess. (report on 1992 amendment to § 107) ("the burden of  
12 proving fair use is always on the party asserting the defense").

13 Second, the structure of § 512 also supports Universal's argument. Congress knew how to  
14 refer to defenses to infringement in § 512. *See* 17 U.S.C. § 512(l) (providing that service  
15 provider's "defense[s]" to infringement "under this title," which includes fair use, unaffected by  
16 defenses under § 512(a)-(d)). The fact that Congress did not incorporate defenses of any kind,  
17 whether fair use or otherwise, into the required certification under § 512(c)(3)(A)(v), is consistent  
18 with reading "authorized by law" not to include "subject to a defense under law." In addition,  
19 Congress built into § 512 a specific counter-notification procedure, § 512(g)(2)(c), which allows  
20 the party affected by a notice to raise affirmative defenses (including fair use), and at that point  
21 gives the party sending the notice two weeks to evaluate any defense so asserted in considering  
22 whether to file suit (or else see the service re-post the material). Plaintiff's suggestion, credited  
23 by the Court, that the counter-notification procedure "does not sufficiently address" the potential  
24 harm where "time-sensitive or controversial subjects are involved[.]" Order at 8:1-2, is not well  
25 founded. This case, as well as others filed by Plaintiff's counsel under § 512(f) (such as *Doe v.*  
26 *Geller*, 533 F. Supp. 2d 996 (N.D. Cal. 2008), involving a takedown notice for a video concerning  
27 a spoon-bending "paranormalist"), provide no reason to believe that takedown notices are likely  
28 to be used as devices for abuse within two weeks of an election. In any event, the relevant

1 question is whether the structure of the counter-notification procedure is more consistent with  
2 Congress's intent to require an evaluation of fair use, if at all, only when the infringer raises the  
3 defense, rather than an intent to make the copyright holder engage (under threat of a § 512(f) suit)  
4 in a speculative *ex ante* inquiry into the merits of a fair use defense. Universal submits that the  
5 counter-notification procedure, along with the rest of the text and structure of § 512, support the  
6 former reading of the statute.

7 Third, Universal's reading of the statute finds substantial support in the Ninth Circuit's  
8 leading case on § 512(f), *Rossi v. MPAA*, 391 F.3d 1000 (9th Cir. 2004), whose standard for  
9 liability is inconsistent with requiring an *ex ante* inquiry into a defense as malleable and  
10 indeterminate as fair use. *Rossi* holds that there must be "some actual knowledge of  
11 misrepresentation on the part of the copyright owner" for there to be liability. *Id.* at 1005. The  
12 Court's Order, however, holds that a copyright owner must make a "*proper* consideration of the  
13 fair use doctrine." Order at 6:7 (emphasis added). An inquiry into the propriety of a party's  
14 consideration of fair use inevitably will lead to calls (as Plaintiff makes in this case) for a *post hoc*  
15 assessment of the *reasonableness* of the copyright owner's "evaluat[ion] whether the material  
16 makes fair use of the copyright[.]" *id.* at 6:5-6, an assessment that is contrary to *Rossi*. While the  
17 Court says that "[o]ne might imagine a case in which" the use "unequivocally qualifies as fair  
18 use," *id.* at 7 n.5, there is no such thing as "unequivocal" fair use.<sup>2</sup> Balancing the four fair use  
19 factors is a notoriously indeterminate exercise, a point that Professor Nimmer has made not only  
20 in discussing the fair use cases decided by the Supreme Court, *see 4 Nimmer on Copyright*  
21 § 13.05 at 13-156 (2008) (all cases were "overturned at each level of review, two of them by split  
22 opinions at the Supreme Court level," which exemplifies "[t]he malleability of fair use"), but in  
23 large numbers of cases decided by the Courts of Appeals and District Courts. *See* David Nimmer,

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24 <sup>2</sup> The Court cites its pre-*Rossi* opinion in *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195  
25 (N.D. Cal. 2004), as a possible example of such "unequivocal" fair use. Order at 7 n.5. But, as  
26 the Court recognized in its Order on the first motion to dismiss in this case, the defendant in  
27 *Diebold* "failed to identify any specific emails containing copyrighted content[.]" Apr. 8, 2008  
28 Order Granting Mot. to Dismiss at 5:8. A representation that identifies a copyrighted work  
claimed to be infringed – unlike a representation about whether the infringing use is fair use – is  
an express requirement of a DMCA takedown notice. *See* 17 U.S.C. § 512(c)(3)(A)(ii). *Diebold*  
is inapposite.

1 “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 Law & Contemporary Problems  
2 263, 269-80 (2003) (analyzing courts’ analysis of § 107 factors in 60 cases and concluding that  
3 “had Congress legislated a dartboard rather than the particular four fair use factors embodied in  
4 the Copyright Act, it appears that the upshot would be the same”).

5 Given the indeterminacy of the fair use inquiry, it is impossible to see how a court can  
6 determine whether a copyright holder has made a “proper consideration of the fair use doctrine”  
7 without adjudicating the *reasonableness* of how that party balanced the fair use factors. A  
8 § 512(f) defendant never is going to say that it recognized an infringing use to be a fair use, and a  
9 § 512(f) plaintiff always is going to claim that the defendant *should have* recognized the use to be  
10 fair. The Court need look no further than the briefing on the motions to dismiss to see why this  
11 inevitably will be the case. Plaintiff’s allegations about why her posting is fair use all depend  
12 upon Universal’s claimed failure to recognize and agree with the four fair use factors as Plaintiff  
13 and her counsel would interpret those factors. *Compare* Mot. to Dismiss (Docket No. 38) at 11-  
14 15 *with* Opp. to Mot. to Dismiss (Docket No. 39) at 10-13. The standard the Court adopts will  
15 inevitably lead to calls for an inquiry into the reasonableness of Universal’s (and other copyright  
16 owners’) fair use evaluation, but *Rossi* makes clear that reasonableness is not the test. Under  
17 § 1292(b), the Ninth Circuit can and should have the opportunity now to determine whether this  
18 Court’s standard is consistent with *Rossi*.<sup>3</sup>

19 Universal recognizes that the Court found that the text and structure of § 512 and the  
20 Ninth Circuit’s decision in *Rossi* lead to a different reading of the statute than the one Universal  
21 advocates. The question under § 1292(b), however, is whether Universal’s argument provides  
22 “substantial grounds” for a different result. Universal respectfully submits the answer to that  
23 question is yes, and that this question of first impression merits interlocutory review.

24  
25 <sup>3</sup> The objective-subjective dichotomy is not the only area where this Court’s Order is in apparent  
26 tension with *Rossi*. The Order also holds that “it would be impossible to meet any of the  
27 requirements of Section 512(c) without” engaging in “an initial review of the potentially  
28 infringing material prior to sending a takedown notice.” Order at 7:15-17. *Rossi*, in fact, held  
there was no violation of § 512(f) even though the copyright holders’ representative did not  
attempt to download any movies, click on any links, or take any other steps to verify its belief that  
the plaintiff’s website contained infringing material. *Rossi*, 391 F.3d at 1002, n.2.



1           **C. An Interlocutory Appeal May Materially Speed The Termination Of This**  
 2           **Litigation**

3           The Ninth Circuit’s resolution of the question whether “authorized by law” requires *ex*  
 4           *ante* evaluation of fair use obviously has the potential not only to “materially advance,” but to  
 5           require the “termination of the litigation[.]” 28 U.S.C. § 1292(b). As discussed above, if the  
 6           Ninth Circuit holds that “authorized by law” does not require an *ex ante* fair use evaluation, then  
 7           Plaintiff’s case is over, because she cannot point to any false statement in Universal’s notice.

8           An immediate appeal not only will resolve a dispositive question in this case but also  
 9           determine the limits (if any) on the filing of future § 512(f) cases in the federal courts, and in  
 10          particular the Northern District of California.<sup>4</sup> Although the Court states that it “has considerable  
 11          doubt that Lenz will be able to prove that Universal acted with the subjective bad faith required  
 12          by *Rossi*,” Order at 8:17-19, EFF has not indicated any reticence about its willingness to file more  
 13          suits under § 512(f). EFF’s press release announcing the Court’s Order concludes with the  
 14          ominous warning to copyright owners, “ignore fair use at your peril!” Klaus Decl. Ex. A (EFF  
 15          Press Release, Aug. 20, 2008). More recently, EFF posted an open letter, on behalf of itself and  
 16          the ACLU of Northern California, telling “ISPs and Content Owners” to “Do Your Part to Protect  
 17          Political Speech,” and “urg[ing] users to contact us if they feel that their political speech has been  
 18          improperly censored.” *Id.* Ex. B (EFF Press Release, Aug. 25, 2008). Giving the Ninth Circuit  
 19          the opportunity to address now, not later, whether copyright owners are obligated to evaluate fair  
 20          use before sending takedown notices will allow the Circuit to settle the law on this important  
 21          issue.

22           **II. THE COURT SHOULD STAY THE CASE PENDING THE § 1292(b) APPEAL**

23           If the Court certifies the Order for a § 1292(b) appeal, the case should be stayed in this  
 24           Court until the Ninth Circuit resolves that appeal. A stay will not change the status quo in this  
 25           

26           

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 27           <sup>4</sup> The Northern District has been the Electronic Frontier Foundation’s (“EFF”) forum of choice  
 28           for § 512(f) litigation. EFF filed not only this case and *Diebold* in this District, but also *Doe v.*  
*Geller*, 533 F. Supp. 2d 996 (N.D. Cal. 2008), which the Court dismissed for lack of personal  
 jurisdiction, because the defendants were in located in England.

1 litigation. The Court has not issued a case management order, and the parties are only just now at  
2 the point of preparing to serve discovery.

3 If the Ninth Circuit holds that copyright owners are not required to evaluate fair use before  
4 sending a takedown notice, then this case will be over and the stay will have saved the parties,  
5 and the Court, from the time and expense of needless discovery and motion practice. The costs  
6 associated with marching ahead with this litigation will be significant. As discussed in the Joint  
7 Case Management Statement (Docket No. 43) (July 8, 2008), the parties disagree about (and can  
8 be expected to seek discovery and possibly file motions directed to) numerous issues, including  
9 the threshold question whether Universal's notice was sent pursuant to the DMCA (and thus  
10 whether § 512(f) even applies to it), as well as questions related to Plaintiff's claim that her use of  
11 "Let's Go Crazy" was a "self-evident" fair use. *Id.* at 3. Discovery into these and other issues  
12 will require document production and depositions, which will cost real money and which could be  
13 completely unnecessary. The Joint Case Management Statement also identifies sharp  
14 disagreements over the scope of discovery. For example, Plaintiff contends that her claim puts in  
15 issue all of Universal's policies and practices regarding takedown notices going back to January  
16 of 2005. *Id.* at 3-4. While Universal strenuously disagrees that Plaintiff's claim implicates such a  
17 broad scope of discovery, that disagreement only portends discovery motions on this issue and  
18 others, all of which will tax not only the parties' resources but the Court's time. A stay will defer,  
19 and potentially moot, all of this burden and expense.

20 In contrast, there is no prejudice to Plaintiff from a stay. Plaintiff claims to be suing over  
21 principle, not lost money. An immediate appeal will put the principle she claims to be fighting  
22 for before the Ninth Circuit and give that Court the opportunity to issue a definitive ruling on the  
23 law of the Circuit. Plaintiff is not out-of-pocket any money in connection with this suit, so a stay  
24 will not cost her anything. Although Plaintiff's counsel suggested in argument (and without  
25 elaboration) that Plaintiff may have incurred some out-of-pocket expense in responding to the  
26 takedown notice, Order at 9:4-6, this suggestion is not supported by a declaration that Plaintiff  
27 filed earlier in this case. Specifically, in opposition to Universal's anti-SLAPP motion, Plaintiff  
28 submitted a declaration attesting to the elements of her claim for tortious interference with

1 contract, including the element of that claim requiring actual damages caused by the alleged  
2 interference. In her declaration, Plaintiff identified *no* alleged monetary loss whatsoever resulting  
3 from the notice that Universal sent to YouTube. *See* Lenz Decl. (Docket No. 23) (Nov. 13, 2007)  
4 (attached as Ex. C to Klaus Decl.). A stay pending the results of an immediate interlocutory  
5 appeal also will not interfere with Plaintiff's posting: it remains on YouTube and, as the Court  
6 noted, has been viewed there more than a half-million times. Order at 2:22.

7 **III. CONCLUSION**

8 For the foregoing reasons, Universal respectfully submits that the Court's Order presents a  
9 clear case for immediate interlocutory review, and that all considerations of case management and  
10 equity weigh in favor of a stay. Universal has submitted a proposed order with this motion.

11 DATED: August 29, 2008

MUNGER, TOLLES & OLSON LLP

14 By:                   /s/ Kelly M. Klaus                    
15 **KELLY M. KLAUS**

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