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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 SAN JOSE DIVISION

STEPHANIE LENZ, Plaintiff, v. UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC. and UNIVERSAL MUSIC PUBLISHING GROUP, Defendants.	Case No. C-07-03783-JF (HRL) **REPLY IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT** Date: October 16, 2012 Time: 3:00 p.m. Courtroom: 3, 5th Floor Judge: The Hon. Jeremy Fogel **PUBLIC REDACTED VERSION**

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I. INTRODUCTION

Throughout this litigation, Universal has done its level best to distract the Court from one simple fact: it never considered whether [redacted] the video Ms. Lenz posted of her young son dancing in her kitchen ("the Video"), or any other video. Universal's Opposition repeats this approach. First, Universal insists, yet again, that the Court should reconsider its previous rulings on the Section 512(f) good faith standard and on damages. Then it attempts to manufacture a factual dispute by cataloguing various facts it claims to have noted before sending the takedown notice for Ms. Lenz's video and explaining how those facts could relate to the doctrine of fair use. But Universal does not, because it cannot, claim (let alone proffer evidence sufficient to raise a factual dispute) that it made any effort to connect the dots, i.e., to actually consider whether Ms. Lenz's video, or any other video listed in its June 4 notice, [redacted]. Grasping at straws, Universal finally argues that the DMCA does not apply to its takedown notice – a claim it had wisely relegated to footnotes until now.

This is all sound and fury signifying nothing. The only outstanding question in this case is a legal one and, based on Universal's own admissions, it must be resolved in Ms. Lenz's favor. Congress meant it when it required a copyright owner sending a takedown notice to have a good faith belief that the targeted work was not authorized by law. Thus, to pass muster under 512(f), a copyright owner "*must* evaluate whether the material *makes fair use of the copyright*" before sending a takedown notice in order to form the good faith belief required by Section 512(c)(3)(A)(v) and avoid liability under Section 512(f). *Lenz v. Universal,* 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (emphasis added); Order Denying Mot. to Certify Interlocutory Appeal (Dkt. No. 53) at 4. The facts show that Universal [redacted] and that it actively avoided [redacted] It is time to hold the company accountable for that failure.

II. UNDISPUTED FACTS

Universal's rhetoric aside, there is no genuine dispute about the content of its takedown guidelines or the actions performed during the process that led to the takedown of Ms. Lenz's Video. Universal's only concrete complaint is that Ms. Lenz "omit[ted]" the incorporation of the

guidelines into Mr. Johnson's review. Opp. at 4. Ms. Lenz did not "omit" this. *See* Mot. at 5:2. Universal then criticizes Ms. Lenz for reviewing each point in its takedown process "in isolation." Opp. at 9. But nowhere in that section (or anywhere) does Universal ever present any evidence contradicting, or even disputing, what Ms. Lenz said, based on Universal's own admissions, about *what* its guidelines were or what any of the participants in the June 4 takedown actually *did*.

It is therefore **undisputed** that:

1) Universal's takedown guidelines for Prince works as of June 4, 2007 required the removal of any video that "focuse[d] on a Prince composition," and "focused" meant that the composition is not merely [REDACTED];"[1,2]

2) Sean Johnson was the only person at Universal who had watched the Video when Universal sent the takedown email;[3] and

3) Alina Moffat, who sent the actual takedown email, had no basis for stating in that email that the listed videos were "not authorized . . . by law" other than that she had been instructed to send a takedown notice for them.[4]

The sole basis for Universal's representations in the June 4, 2007 takedown that Ms. Lenz's Video was "infringing" and "not authorized . . . by law" was, therefore, that Mr. Johnson believed

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[1] Miksch Decl. Exh. Q (Allen Depo.) at 62:1-19. In its motion, Universal said it would not take down videos meeting this guideline if the use was subject to a compulsory license or authorized by Prince or his agent. *See* Defendants' Motion for Summary Judgment ("Universal's MSJ") (Dkt. No. 395) at 6-7, citing the Declaration of Robert Allen ("Allen Decl.") at ¶¶ 8-9 (Dkt. No. 397-3). Mr. Allen, testifying as Universal's Rule 30(b)(6) witness on the "basis for the representations made in the June 4 [takedown notice]," (Topic 7) admitted that Universal [REDACTED]. *See* Klaus Opp. Decl. Exh. 13 at 1, 8 (designating Mr. Allen for topic 7); Exh. Q (Allen Depo.) at 75:8-77:25. Universal's insinuation that Plaintiff misrepresented that Mr. Allen's testimony was made as a Rule 30(b)(6) designee, Opp. at 15-16, is baseless. Mr. Allen may not have been designated on related topics 3 and 6, but he *was* designated on topic 7.

[2] Unless otherwise specified, all citations to exhibits refer to exhibits to the Miksch Declaration in Support of Plaintiff's Renewed Motion for Summary Judgment (Volumes I-III filed with Plaintiff's Motion (Dkt. Nos. 394, 398, and 402, respectively) and Volume IV filed herewith).

[3] Exh. F (Moffat Depo.) at 19:23–25; Exh. Q (Allen Depo.) at 26:15–19, 55:15–20.

[4] Exh. F (Moffat Depo.) at 22:16–24; *see also id.* at 22:25–27:22. Universal also complains that Ms. Lenz failed to mention that Ms. Moffat, who signed her name to the takedown notice, did so purely as an "administrative task" while filling in for someone else. Opp. at 4, 9. The fact that Universal treated sending DMCA notices a mere "administrative task" simply underscores the cursory nature of Universal's takedown process.

1 that it fell within Universal's guidelines—that is, that "Let's Go Crazy" was the "focus."
2 Universal also takes issue with the proposition that Ms. Lenz's Video is a home video.
3 Universal argues that YouTube postings are not "video[s] recorded by an individual using readily
4 available consumer recording equipment, for personal noncommercial use" because they are
5 posted "to a commercial service available for anyone in the world to view without limit." Opp. at
6 3. Such protests do not amount to a factual dispute, however: there is no question that the Video
7 itself is a home video as described, or that YouTube is a for-profit website.

8 **III. EVIDENTIARY OBJECTIONS**

9 As Universal concedes, its own knowledge when it sent the June 4, 2007 takedown is the
10 "only liability issue in this case." Opp. at 2. Consequently, the Court should exclude, as
11 irrelevant, the evidence offered by Universal of what anyone other than Universal may or may not
12 have believed about Ms. Lenz's Video or copyright law in general under Fed. R. Evid. 402, 403.
13 *See* Opp. at 17 (citing Klaus Opp. Decl. Ex. 14 at 375:13–23, 376:11–15, 384:2–17; Ex. 15; Ex.
14 16; Ex. 17 at 165:3–166:4, 173:1-16, 194:24-195:2; 271:19-25; 276:23-277:6; Ex. 18 at 2).
15 In addition, the Court should reject Universal's objections to Ms. Lenz's evidence, for
16 failure to comply with the Local Rules. *See* Civ. L.R. 7-3(a) (requiring that evidentiary
17 objections be contained "within the brief or memorandum"). And in any case, they lack merit.
18 For example, Universal argues that the Hofmann Declaration (Dkt. No. 393) is inadmissible
19 because portions are redacted. But it cannot dispute that Ms. Hofmann's time was "in connection
20 with the restoration of Ms. Lenz's video to YouTube"—Universal argues only that the time may
21 also have served an *additional* purpose. Regardless, Ms. Lenz is entitled to damages for Ms.
22 Hofmann's time remediating the very harm caused by Universal's false takedown notice—
23 ensuring that her video was restored to YouTube.[5].
24 Ms. Lenz reserves all other evidentiary objections for trial, should trial be necessary.
25
26

27 [5] Even if the Court were to sustain Universal's objection to Ms. Hofmann's declaration, that at
most affects the amount of damages to which she is entitled. The Court should, at a minimum,
28 grant Ms. Lenz summary judgment on the issue of Universal's liability.

IV. ARGUMENT

The facts and law of this case are simple and clear. Universal was required to consider fair use as part of its review process, in order to form the good faith belief to which it attested in its takedown notice. Exh. P. Universal did not do so. At best, it noted some facts that could have been relevant to a fair use consideration, [REDACTED]. That does not and cannot suffice if Section 512(f) is to fulfill its purpose of protecting lawful speech. Universal is liable under the DMCA.

A. *Monge v. Maya Magazines, Inc.* does not warrant last-minute reconsideration of this Court's determination that a copyright owner must consider fair use before sending a takedown notice under Section 512.

The Court should firmly reject Universal's misguided plea to once again revisit its 2008 holding that copyright owners must at least consider whether a use is authorized by law before compelling its removal by sending a takedown notice. Even if Universal's request were not procedurally improper, Civ. L.R. 7-9(a), nothing in *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012) supports reconsideration.

Simply put, *Monge* is not, as Universal claims, "intervening authority." Opp. at 6. The opinion says nothing whatsoever about the DMCA, let alone Section 512(f), nor is it inconsistent with this Court's ruling. Instead, it is a straightforward fair use decision. The decision notes that fair use analyses can be complex, which is consistent with the Court's statement that "[u]ndoubtedly, some evaluations of fair use will be more complicated than others." August 20, 2008 Order Denying Motion to Dismiss (Dkt. No. 45) at 7:12. That does not mean there cannot be "a case in which an alleged infringer uses copyrighted material in a manner that unequivocally qualifies as fair use." *Id*. at 7 n.5. Accordingly, this Court found that **1)** in *some* cases "fair use may be so obvious that a copyright owner could not reasonably believe that actionable infringement was taking place," Dkt. No. 53 at 4:13-15; and **2)** in the "majority of cases, a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner's ability to respond rapidly to potential infringements," *Lenz*, 572 F.Supp.2d at 1155. Therefore, this Court held that "[a] consideration of the applicability of the fair use doctrine simply [be] part of [the] initial review" of the suspect material that the DMCA

1 already requires. *Id.* at 1155.

2 Equally wrongheaded is Universal's effort to imply that *Ouellette v. Viacom Int'l Inc*., No.
3 CV 10-133, 2012 WL 850921 (D. Mont. Mar. 13, 2012) suggests that a copyright owner can
4 avoid Section 512(f) liability by deliberately failing to form a belief, in all instances, as to
5 whether a given use is fair. Opp. at 6: 13-15. In fact, the *Ouellette* court explicitly adopted this
6 Court's 2008 ruling – including its holding that "the fair use doctrine…must be considered in
7 assessing whether a copyright infringement exists." 2012 WL 850921 at *3. On Universal's
8 theory, Section 512(f) would be essentially meaningless, for it would provide a cause of action
9 only where a copyright owner sent a takedown *knowing* that a given use was *licensed*. Such a
10 narrow reading is flatly inconsistent with Congress's intent to facilitate the growth of the Internet
11 as a platform for free speech. *See* S. Rep. No. 105-190 at 21 (1998) ("The Committee was
12 acutely concerned that it provide all end-users . . . with appropriate procedural protections to
13 ensure that material is not disabled without proper justification. The provisions in the bill balance
14 the need for rapid response to potential infringement with the end-users' legitimate interests in
15 not having material removed without recourse."). It is also inconsistent with the statute, for it
16 effectively reads out the statutory language requiring a belief about "authorization by *law*."

17 Nor should Universal be permitted to resurrect its claim that fair use need not be
18 considered *ex ante* because it is procedurally raised as an affirmative defense. Opp. at 7. This
19 argument has been raised and rejected, the law on the issue has not changed, and no
20 "reconsideration" is warranted. *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.1988)
21 ("Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue
22 previously decided by the same court, or a higher court, in the same case.").

23 Universal may not like the Court's holding, but that is an issue for appeal, not eleventh
24 hour protests.

25 **B. Universal did not form and could not have formed the requisite good faith**
26 **belief that the Video was infringing prior to sending the takedown notice.**

27 Universal hangs its principal defense on the assertion that it considered some facts that
28 might pertain to a fair use analysis. *See* Opp. at 6. That argument fails for two reasons: (1)

Universal did not consider most of the pivotal "facts" Universal invokes; and (2) neither Mr. Johnson nor anyone else at Universal made any effort to consider whether

1. Universal never considered "facts" it claims were part of its "Guidelines."

Universal slips into its brief several new and wholly unsupported claims about what it considered. It now maintains, without evidence, that it did consider whether Ms. Lenz's use was commercial, the nature of the work in question, and the likely effect of uses like Ms. Lenz's on the market for that work. Opp. at 17, 13.

Sean Johnson, the only person who watched the Video before the takedown, never testified that he thought about any of these newly-asserted considerations when he decided to submit Ms. Lenz's Video for takedown. *See* Exh. R2 (Johnson Depo.) at 75:16-83:21. And Ms. Moffat, who sent the takedown notice, did not consider anything about the Video at all when deciding to send it – for her, targeting hundreds of videos for takedown was a mere "administrative task." Opp. at 9 n.4; *see* Exh. F (Moffat Depo.) at 22:16–24; *see also id.* at 22:25–27:22.

The only evidence Universal offers to support its new claims about what it considered are general statements and opinions made by Robert Allen,[6] Exh. Q (Allen Depo) at 26:15-19. Mr. Allen's testimony *See* Opp. at 9 (citing Allen Depo. 60:15-61:6, 157:3-22); 13 (citing Allen Depo. 96:9-97:22; 135:24-136:4); 14 (citing Allen Depo. 96:9-97:22, 135:7-136:8). Universal's theory seems to be that it "considered" something if its guidelines "incorporated" or "accounted for" it,

[6] Universal does include a citation to Mr. Johnson's testimony when asserting that its review "indisputably took the artistic nature of the work into account," Opp. at 13; Klaus Opp. Decl. Exh. 1 at 64:4-10.

1 and that its guidelines "incorporated" and "accounted for" the various opinions that Mr. Allen
2 expressed in his deposition. But Universal does not contend that Mr. Allen (or anyone) *actually*
3 considered these opinions [REDACTED] the "guidelines"
4 fall far short of even a rudimentary fair use consideration.
5 With respect to commerciality, Universal now says that it was "entitled to, **and did**,
6 consider [Ms. Lenz's] use to be commercial, because the work was placed on YouTube, a
7 commercial service." Opp. at 17 (emphasis added). But Universal does not, because it cannot,
8 claim that it actually drew a conclusion about the nature of Ms. Lenz's use *in particular* from the
9 fact that YouTube is a commercial service (and indeed, when given the chance in discovery, it
10 has declined to suggest that it actually thought *Ms. Lenz* had any commercial purpose).[7] *See*
11 Exh. M at 7:3-8:2 (resp. to Interrog. No. 3); Exh. AA at 9:25-10:18 (resp. to RFA No. 8). Mr.
12 Johnson [REDACTED]
13 [REDACTED] Exh. R2 (Johnson Depo.) at
14 75:16-83:21.
15 As for the nature of the work, Universal now says that its "**review indisputably took the**
16 **artistic nature of the work into account**." Opp. at 13 (emphasis added). But the cited evidence
17 shows nothing of the sort. The two cited passages from Robert Allen's deposition [REDACTED]
18 [REDACTED] but have nothing to do with Universal's review process, and the cited
19 passage of Johnson's deposition refers to his assessment of whether the work was the "focus" of
20 the video and says nothing about the artistic nature. *See* Opp. at 13 (citing Klaus Opp. Decl. Ex.
21 3 (Allen Depo.) at 96:9–97:22, 135:25–136:4; Ex. 1 (Johnson Depo.) at 64:4–10). In its own
22 motion, Universal said only that its "review assessed how publicly posted videos incorporated
23 Prince's musical compositions, which indisputably are core works of artistic expression."
24
25 [7] Universal never claims that it saw any advertisements next to Ms. Lenz's Video, and it could
26 not have seen any there: YouTube did not begin to display ads on video pages until nearly two
years later. Associated Press, *YouTube Videos To Feature 'Overlay' Ads*, CBS News (February
27 11, 2009), available at http://www.cbsnews.com/stories/2007/08/22/tech/main3193384.shtml (last
visited August 21, 2012). There still are no ads next to her Video.
28 http://www.youtube.com/watch?v=N1KfJHFWlhQ).

Universal's MSJ at 19.

Regarding market harm (as well as the other fair use factors), Universal now says that it "was entitled to consider, **as it did**, that synchs of that music with YouTube postings usurped that core purpose for the music." Opp. at 13 (emphasis added). The only identifiable basis for this assertion is that (according to Universal) ""[t]he guidelines **incorporated** the consideration that the right to synch Prince's music as video soundtracks was a significant use of those works, Opp. at 13 (emphasis added), and Opp. at 14 (emphasis added). But for each of these claims, Universal cites only Robert Allen's deposition testimony where *See* Opp. at 13 & 14 (citing Klaus Opp. Decl. Ex. 3 (Allen Depo.) at 96:9-97:22; 135:7-136:8). Universal does not offer any evidence that this speculation actually played any role in , let alone in its review of Ms. Lenz's video.

2. Universal never considered the of the available facts.

Even had Universal actually observed all of the facts it claims to have observed—a conclusion unsupported by the record—its review remained woefully inadequate because it did not do one key thing: .

Universal insists that "[n]o more can be required than that the party sending the notice consider…*facts* that would be relevant to a fair use inquiry." Opp. at 8. In short, Universal's theory is that as long as a copyright owner merely observes some potentially relevant facts, it need do nothing more before sending the takedown notice. Accordingly, Universal repeatedly says that it considered facts that *would be* relevant to fair use, but does not, because it cannot, claim that it *See, e.g.,* Opp. at 1 ("the *substance* of Universal's review considered those *facts* that Universal could know and that would be relevant to considering a defense of 'incidental, background' fair use") (second emphasis added).

Universal is wrong. Fair use is a "*legal* judgment." *Monge*, 688 F.3d at 1183 (emphasis added). It follows that even the most cursory fair use consideration must require more than observing a few potentially relevant facts. Noting facts involves no thinking, no analysis, no assessment of whether, given those facts, a given use might be authorized by law.

Indeed, treating mere *observation* as equivalent to *consideration* would render Section 512(f)'s protections essentially meaningless, at least for fair uses. As this Court has stated in 2008, the purpose of Section 512(f) is to prevent the abuse of takedown notices. *Lenz*, 572 F.Supp.2d at 1155. If copyright owners need do nothing more that observe certain facts prior to sending a takedown notice, such abuse would be all too easy. A copyright owner could avoid liability for even the most egregiously improper takedown by simply insisting that, for example, it had noted that the work used was creative or that the secondary work was posted on a commercial service--both facts that would be true of many fair uses. *Lenz*, 572 F.2d at 1154-55 (requiring "proper consideration" of fair use "furthers both the purposes of the DMCA itself and copyright law in general."); *see also* S. Rep. No. 105-190 at 21 (1998) ("provisions in the [DMCA] balance the need for rapid response to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse."

By designing a review process that [REDACTED] Universal ensured that it [REDACTED]. Ms. Lenz is entitled to hold Universal accountable for its knowing, material misrepresentation.

3. Universal deliberately closed its eyes to its own wrongdoing

Universal has failed to raise a dispute as to a second fact: that it rendered itself willfully blind to whether Ms. Lenz's video, or any other video, was lawful.

Universal's effort to avoid a finding of willful blindness rests entirely on a narrow reading of *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060 (2011). Such a narrow reading of *Global-Tech's* teachings, and Universal's own obligations, cannot stand.

Contrary to Universal's claim, *Global-Tech* does not stand for the principle that knowledge required for Section 512(f) liability cannot be established by willful blindness without

a showing that a copyright owner subjectively knew a given video was likely noninfringing. If that were true, there would be little meaningful distinction between actual knowledge and willful blindness. *Global-Tech* simply clarified that garden-variety recklessness and/or negligence do not suffice to establish willful blindness, and that willful blindness can apply in the patent context. *Id.* at 2070-71. Thus, "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.*

A recent Fifth Circuit decision interpreting *Global-Tech* in the criminal context is instructive. In that case, involving a challenge to a jury instruction on willful blindness, the court found that both prongs were satisfied where the instruction provided that the defendant needed to have "deliberately closed his eyes," and "deliberately blinded himself to the existence of a fact." *United States v. Brooks*, 681 F.3d 678, 703 (5th Cir. 2012). Again, that is precisely what the undisputed facts show that Universal did. The fact that some of the user videos posted to YouTube are [REDACTED] Universal was well-versed in the fair use doctrine – as a leading media company and one that has been involved in several significant fair uses cases, it had to be (*see, e.g., Bridgeport v. UMG*, 585 F.3d 267 (2009)). Universal was therefore well-positioned to know that there was a high probability that at least some of the videos containing Prince compositions it targeted for takedown would be protected fair uses. When it sent its notice, Universal knew that the only person who had reviewed Ms. Lenz's Video was a low-level employee [REDACTED]. It also knew that it had not given that employee any guidance on how to determine whether a video might be authorized by law, e.g., [REDACTED]. It then deliberately sent takedown notices claiming to have formed a good faith belief that those videos were not authorized by law, though it knew it could not have formed such a belief. Universal thus systematically closed its eyes to its own wrongdoing.

Indeed, the facts of *Global-Tech* are consonant with the undisputed facts here. In that case, the defendant bought a competitor's product, which was made for foreign sale and therefore lacked US patent markings, copied everything except cosmetic features, and then retained an

1 attorney to conduct a right-to-use study without telling him it had copied the design. The
2 Supreme Court concluded that defendant had deliberately manufactured a claim of plausible
3 deniability – just as Universal did. 131 S.Ct. at 2071.

4 **C. Ms. Lenz's Video was a fair use.**

5 Universal misstates Ms. Lenz's obligations as a Section 512(f) plaintiff. Opp. at 16.
6 While the outcome of this case will have significant impact on the future of fair use online, the
7 central issue under Section 512(f) is not fair use but misrepresentation. To prove up her case, Ms.
8 Lenz must show that Universal sent its takedown notice without forming the requisite good faith
9 belief that her video infringed copyright, which she has done.

10 That said, there can be no real dispute that the video was a lawful fair use, and certainly
11 Universal has been unable to manufacture one.

12 **1. Transformative noncommercial purpose.**

13 **a. Ms. Lenz's use was noncommercial.**

14 Universal suggests, without any legal support, that using YouTube to share one's video
15 suffices to render that video "commercial" for purposes of a fair use analysis. Nonsense. As
16 explained in her Motion, Ms. Lenz's use was noncommercial and none of the cases Universal
17 cites suggest otherwise. Rather, most of the cases upon which Universal relies simply examined
18 the context of the use to determine the commercial intent (or lack thereof) of the user. In *A&M*
19 *Records, Inc. v. Napster, Inc.*, for example, the Ninth Circuit found that "[i]n the record before us,
20 commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies
21 of copyrighted works were made to save the expense of purchasing authorized copies." 239 F.3d
22 1004, 1015 (9th Cir. 2001). In other words, the court was concerned with whether the user stood
23 to profit from the unauthorized use by avoiding the expense of purchasing the songs in question.
24 It certainly did *not* suggest that *Napster's* commercial purpose could be ascribed to its users,
25 which is the rule Universal advocates here. And, of course, there is no credible suggestion that
26 Ms. Lenz gained any economic advantage from her use.

27 Moreover, there is no indication in the record that YouTube's profit motive so much as
28 crossed the mind of the only Universal employee who actually reviewed the video, nor that that

1 motive informed Universal's "guidelines" for removal.

2 Simply put, the Video looks and sounds exactly like the personal, noncommercial home
3 movie that it is, and even when given opportunities, Universal has repeatedly declined to claim,
4 nor is there a smidgen of evidence to suggest, that it actually believed otherwise. *See* Exh. M at
5 7:3-8:2 (resp. to Interrog. No. 3); Exh. AA at 9:25-10:18 (resp. to RFA No. 8).

6 **b. Ms. Lenz's use was transformative.**

7 The "central purpose" of this factor is to assess "whether the new work merely supersedes
8 the objects of the original creation or instead *adds something new*, with a further purpose or
9 different character, altering the first with new expression, meaning, or message." *Campbell v.*
10 *Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal citation and quotation marks omitted;
11 emphasis added). Universal states that "synchronizing music to video is not inherently
12 transformative" and that "re-casting the work in a different medium (here, a YouTube posting) is
13 not transformative." Opp. at 18 (internal quotation marks and citations omitted). But Ms. Lenz
14 did not simply "sychroniz[e] music to video" or "re-cast" Prince's composition in a YouTube
15 posting, she added something "new": principally, placing the snippet in the entirely new setting of
16 children dancing around a kitchen and responding to the music. Her transformation of the work,
17 apparent from the Video itself, was substantial *Cf. Monge*, 688 F.3d at 1176 (Maya's use was "at
18 best minimally transformative" because it was nothing more than "wholesale copying sprinkled
19 with written commentary.").

20 **2. Nature of the copyrighted work.**

21 No one disputes that Prince's composition is a creative work. As explained in Ms. Lenz's
22 opening brief, however, this factor carries little weight because the work has been published and
23 because Ms. Lenz's use was transformative. *See e.g., Kelly v. Arriba Soft. Corp.*, 336 F.3d 811,
24 820 (9th Cir. 2003) ("Published works are more likely to qualify as fair use because the first
25 appearance of the artist's expression has already occurred."). The fact that the Video is not a
26 parody does not change the analysis.

27 **3. The amount & substantiality of the copyrighted work used.**

28 This factor favors fair use, even indulging Universal's assertion that Prince's work was

1 "audible" throughout Ms. Lenz's entire Video. First, the test for this factor is *not* how much of
2 Ms. Lenz's work used Prince's work, but how much of *Prince's* work she used. *See* 17 U.S.C.
3 § 107(3). She used very little, and only as necessary to accomplish her purpose of capturing her
4 toddler dancing. *See* Exh. AA at 12:1–9 (Universal's Resp. to RFA No. 12) [REDACTED]
5 [REDACTED].

6 **4. Effect on the market for the "Let's Go Crazy" composition.**

7 Universal argues that Ms. Lenz "has not introduced any evidence showing that there is a
8 'home video market.'" Opp. at 21. This is exactly the point: there *is* no such market (actual or
9 potential) for use of Prince's composition, and thus there is no market to be harmed by the use of
10 "Let's Go Crazy" in home videos. *See, e.g., Cambridge University Press v. Becker et al.*, __ F.
11 Supp. 2d __, 2012 WL 1835696 (N.D.Ga. May 11, 2012), ("factor four weighs in Defendants'
12 favor when . . . permissions are not readily available.")

13 As for the market for synchronization of Prince's compositions in general, the relevant
14 question is whether Ms. Lenz's transformative use (even if "widespread") would serve as a
15 replacement for the composition itself. A brief viewing of Ms. Lenz's Video makes clear that
16 under no circumstance could it be considered a replacement for Prince' composition. *Cf. Monge*,
17 688 F.3d at 1182 ("Maya's un-authorized "'first and exclusive' publication of the images
18 substantially harmed the potential market because the publication directly competed with, and
19 completely usurped, the couple's potential market for first publication of the photos.").

20 A recent fair use decision, *Cambridge University Press v. Becker* underscores the point.
21 In that case, the court considered whether Georgia State University's repeated uses of 10% of a
22 copyrighted work caused market harm. The answer was no, "because the 10% excerpt would not
23 substitute for the original, no matter how many copies were made." 2012 WL 1835696 at *34.
24 Similarly, Ms. Lenz's use, no matter how oft-repeated by others, could not and would not
25 substitute for "Let's Go Crazy" or harm the market for Prince's work.

26 [REDACTED]
27 [REDACTED] there must be a
28 "traditional, reasonable or likely to be developed market" in which the copyright owner declines

1 to participate. *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4]
2 (2005); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 82 (2d Cir. 1997). When the
3 Ninth Circuit found market harm in *Monge*, for example, it made clear that
4
5
6 **D. Universal sent its takedown under the DMCA.**
7 Grasping at straws, Universal finally insists that the DMCA does not apply to its notice.
8 Opp. at 23-24. But the applicability of the DMCA cannot seriously be disputed. Universal
9 cannot dispute that the contents of its notice track the requirements of Section 512, or that
10 YouTube would not have taken the video down had it not met those requirements. *Compare* Exh.
11 P (Depo Exh. 70) *with* 17 U.S.C. § 512(c)(3)(A); Exh. N (Depo. Exh. 5) § 8; Exh. B (Lenz
12 Depo.) at 51:14-23 (authenticating) ("If you are a copyright owner or an agent thereof and believe
13 that any User Submission…infringes upon your copyrights, you may submit a notification
14 *pursuant to the Digital Millennium Copyright Act* ("DMCA")…(see 17 U.S.C 512(c)(3) for
15 further detail)." While Universal
16 therefore, had no means to compel removal of the
17 Video other than to avail itself of the DMCA takedown process. *See* Exh. FF (Depo. Exh. 82)
18 (highlighting added), Exh. Q2
19 (Allen Depo.) at 172:4-24 (authenticating); see also Exh. Q2 (Allen Depo.) at 72:4-13
20 Finally, as noted in Ms. Lenz's
21 opening brief, it was certainly willing to insist on adherence to the letter of the statute with
22 respect to Ms. Lenz's counter-notice. Having obtained the benefits of the DMCA, it should not
23 be permitted to run away from its requirements. *Cf. Booth Fisheries Co. v. Indus. Comm'n of*
24 *Wisconsin*, 271 U.S. 208, 211 (1926) ("[H]aving elected to accept the provisions of the law, and
25 such benefits and immunities as it gives," a party "may not escape its burdens by asserting that it
26 is unconstitutional. The election is a waiver and estops such complaint.").
27 The only cognizable dispute here is legal, not factual: whether YouTube qualifies for a
28 DMCA safe harbor. Opp. at 3, 23. A federal appeals court has concluded that it does. *Viacom*

1 *Intern., Inc. v. YouTube Inc*., 676 F.3d 19, 39 (2d Cir. 2012). That should end the matter.[8]

2 **E. Ms. Lenz incurred damages.**

3 This Court has already determined that Ms. Lenz was damaged, but, as with several other
4 rulings in this case, Universal simply refuses to accept that determination. *See* Exh. O (2/25/2010
5 Order Granting Partial Summary Judgment, Dkt. No. 250) at 16:19–21. Again, Universal may
6 not like the ruling but the time for arguing the issue has passed. *See* Civ. L.R. 7-9(a).

7 Universal's other arguments are equally specious. The fact that Universal is not a state
8 actor, Opp. at 25, does not mean it cannot be held accountable for impinging on Ms. Lenz's
9 speech. Indeed, protection of online free speech was of paramount importance to the drafters of
10 Section 512. *See Batzel v. Smith*, 333 F.3d 1018, 1031 n. 9 (9th Cir. 2003) (DMCA procedures
11 "carefully balance the First Amendment rights of users with the rights of a potentially injured
12 copyright holder."). And Universal's claim that Ms. Lenz "has no obligation to pay her attorneys
13 a dime for any pre-litigation work they have done," Opp at 25, is wrong. Ms. Lenz's retainer
14 agreement requires her to assign whatever she recovers "up to and including the full amount of
15 any fees [] and expenses incurred by the Attorneys . . . for *all purposes* related to complaints filed
16 against [her] by Universal Music Group with regard to the video "Let's Go Crazy #1," . . .."
17 Klaus Opp. Decl. Exh. 34 (Depo Ex. 23). at 3, 1 (emphasis added).

18 **V. CONCLUSION**

19 For above reasons stated, the Court should grant summary judgment to Ms. Lenz.

20 Dated: September 26, 2012

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21

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27

28 [8] The fact that Universal is a party to *UMG Recordings v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) has no bearing, as YouTube is not a defendant in that case.