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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEPHANIE LENZ, Plaintiff, vs. UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC., and UNIVERSAL MUSIC PUBLISHING GROUP, Defendants.	CASE NO. CV 07-03783 NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. PROC. 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (Request for Judicial Notice and Proposed Order filed concurrently herewith) Judge: Honorable Jeremy Fogel Date: July 18, 2008 Time: 9:00 a.m. Courtroom: 3

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on July 18, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 3 of the above-captioned Court, located at 280 South First Street, San Jose, California, 95113, Defendants Universal Music Corp., Universal Music Publishing, Inc. and Universal Music Publishing Group ("Defendants" or "Universal") will and hereby do move the Court for an Order dismissing with prejudice Plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the Second Amended Complaint fails to state a claim upon which the Court may grant Plaintiff relief.

This Motion is based upon this Notice of Motion and Motion; the Memorandum of Points and Authorities and Request for Judicial Notice and all exhibits thereto that are being filed concurrently with this Motion; all pleadings and documents on file in this action; and such other materials or argument as the Court may properly consider prior to deciding this Motion.

DATED: May 23, 2008

MUNGER, TOLLES & OLSON LLP

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

Attorneys for Defendants
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UNIVERSAL MUSIC PUBLISHING, INC.,
AND UNIVERSAL MUSIC PUBLISHING GROUP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Continuing their quest to rewrite both the Copyright Act and controlling Ninth Circuit law, Plaintiff and the Electronic Frontier Foundation ("EFF") have filed an amended complaint, again alleging that Universal Music Corp., Universal Music Publishing, Inc. and Universal Music Publishing Group (collectively, "Universal")[1] violated 17 U.S.C. § 512(f) by notifying YouTube of a video posting that made an admittedly unauthorized use of the Prince song "Let's Go Crazy." This Court, in dismissing Plaintiff's prior complaint held that, under *Rossi v. MPAA*, 391 F.3d 1000 (9th Cir. 2004), "there must be a showing of a knowing misrepresentation on the part of the copyright owner." Order at 5. The Court also held that Plaintiff's complaint – which predicated Section 512(f) liability on the claim that Universal "knew or should have known" that her posting was a "self-evident non-infringing fair use" – failed to allege any "facts from which such a misrepresentation may be inferred." *Id.* at 3, 5.

There are two threshold issues that are fatal to Plaintiff's revised Section 512(f) claim. First, Universal's notice, which Plaintiff attaches to her amended complaint, makes it very clear that Universal did not send YouTube a notice pursuant to Section 512. In fact, Universal sent the notice pursuant to YouTube's Terms of Use and expressly disclaimed any reliance on Section 512. Therefore, that statute cannot support a claim against Universal – whether or not Plaintiff can allege a knowing misrepresentation. Second, because fair use is a defense to an otherwise infringing use, Universal could not – under any analysis – have made any misrepresentations (knowing or otherwise) when it notified YouTube that Plaintiff had incorporated "Let's Go Crazy" into her video without authorization from the copyright owner. By raising fair use as a defense, Plaintiff necessarily has to admit those facts.

But even on the assumption that Section 512 does apply, Plaintiff's amended complaint, like its predecessor, is still defective since it fails to allege facts that justify an inference of actual

[1] As Universal noted in the prior motion, Universal Music Publishing Group does not exist as a legal entity and Universal Music Publishing, Inc. does not own or administer the copyright at issue in this case. Thus, neither one should even be a defendant.

knowledge. Incredibly, Plaintiff continues to claim that Universal may be liable on the ground that it "should have known, if [it] acted with reasonable care or diligence," that her posting was a "self-evident non-infringing fair use under 17 U.S.C. § 107." Second Amended Complaint ("SAC") ¶¶ 34, 36. "Should have known" and "reasonable care or diligence" are objective standards of reasonableness that fail under this Court's Order and *Rossi*. Moreover, there is not, and never has been, such a thing as a "self-evident non-infringing fair use." That is a standard that finds no support in the law. The reason that standard has no support is very simple: "[u]sually, fair use determinations are so clouded that one has no sure idea how they will fare until the matter is litigated." 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.08 at 12B-93 n.16 (2007). *Rossi* and Section 512 make it clear that copyright owners do not have to engage in such conjecture in order to avoid a Section 512(f) damages claim.[2]

Plaintiff does not cure her pleading shortcomings by making the conclusory allegation (on "information and belief" no less) that Universal had actual knowledge that its notice misrepresented that Plaintiffs video was infringing (SAC ¶ 35), particularly since this allegation is based on the same "self-evident" fair use standard that just does not exist. Plaintiff was required to plead facts supporting her allegation that Universal had actual knowledge that it was making a knowing misrepresentation. A made-up legal standard is not a substitute for facts.

Finally, Plaintiff's misconstruction of Section 512 is not limited to the definitions of knowledge or misrepresentation, but also extends to the relief the statute allows. Section 512(f) allows only those damages that a user incurs "as a result of" the internet service provider taking material down in response to a knowing misrepresentation. Yet, Plaintiff has not alleged any such damages, nor could she since the sum total of her effort to respond to Universal's notice was a five-paragraph email asking that the video be re-posted (as it has been). SAC ¶ 27; Request for

[2] Plaintiff's handful of allegations in support of her fair use contention only confirm why that defense is never "self-evident," and certainly why it is not "self-evident" in this case. Plaintiff claims that her purpose in posting "Let's Go Crazy" to YouTube was so that her mother, who "has difficulty downloading email files but knows how to access the YouTube website," could see her grandchild dancing. SAC ¶ 16. Even if this was a legitimate purpose to justify the infringing posting (and it is not), there is no conceivable way Universal could have known that this was Plaintiff's purpose.

Judicial Notice ("RJN") Ex. 1. Instead, Plaintiff seeks damages for "harm to her free speech rights under the First Amendment" (SAC ¶ 38) and an injunction enjoining Universal from "bringing any lawsuit" against Plaintiff in connection with the video. Plaintiff ignores the fact that neither Universal nor YouTube is a state actor; thus, there can be no First Amendment violation. And Plaintiff's demand for injunctive relief also fails since the statute does not even allow for an injunction.

Having been given a chance to re-plead, Plaintiff has confirmed that she has no actionable claim against Universal under Section 512(f). Plaintiff's second amended complaint should be dismissed with prejudice.

II. FACTUAL BACKGROUND

A. Plaintiff's Concededly Infringing Use Of "Let's Go Crazy"

This case arises from Plaintiff's posting on YouTube of a video that makes an admittedly unauthorized use of the musical composition, "Let's Go Crazy," by the artist professionally known as Prince. Universal administers the copyright to the "Let's Go Crazy" composition, as well as a number of other of Prince's compositions.[3] Order at 2.

Plaintiff entitled the video, "'Let's Go Crazy' #1," and, it is the first result listed when one types "Let's Go Crazy" into YouTube's search engine.[4] The video shows Plaintiff's child dancing to the song, Prince's "Let's Go Crazy." The use of the music is central to Plaintiff's posting, as is obvious from both the title and the content of the video. Plaintiff says that the video "includes only a few words of the lyrics." SAC ¶ 14. In fact, the lyrics incorporated into the video are, "C'mon baby, Let's get nuts." Plaintiff says to her child, "what do you think of the music?," and the song's frenetic guitar solo plays in time with the images of Plaintiff's children running around the kitchen.

[3] The copyright in the "Let's Go Crazy" composition is separate and distinct from the copyright in the sound recording that embodies that composition. *See Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004). This case concerns the composition copyright.

[4] A current print out of the web page where the video appears is attached as Exhibit 2 to Universal's RJN.

In making her posting, Plaintiff infringed the "Let's Go Crazy" copyright, a point she must concede by staking her defense entirely on fair use, which is an affirmative defense to an otherwise infringing use. Specifically, Plaintiff's unauthorized use violated the synchronization right, which is the "right to control the synchronization of musical compositions with the content of audiovisual works[.]" *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 527 (9th Cir. 2008). This right derives from the copyright owner's exclusive right to reproduce the copyrighted work. *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 63 n.4 (2d Cir. 1996).[5]

On June 4, 2007, Universal sent YouTube a notice requesting that YouTube remove or disable access to Plaintiff's video and nearly 200 other postings that also made unauthorized uses of Prince's compositions. Order at 2; SAC Ex. A at 3 (Universal Notice). In accordance with YouTube's posted Terms of Use, Universal declared that it had "a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law." SAC Ex. A at 6; SAC Ex. B at 3 (YouTube Terms of Use). YouTube removed the video and sent Plaintiff an email notifying her that it had done so. Order at 2. On June 7, 2007, Plaintiff sent YouTube a counter-notification demanding that her video be re-posted because, according to her, the video did not infringe Universal's copyright. Order at 2; RJN Ex. 1. After receiving Plaintiff's counter-notice, YouTube restored Plaintiff's video to the site, where it remains. *Id.* As of the date this motion is being submitted, Plaintiff's video has been viewed on YouTube *more than 485,000 times*. RJN Ex. 2.

[5] Plaintiff violated not only the copyright to "Let's Go Crazy," but also YouTube's Terms of Use, which state that users must "not submit material that is copyrighted ... unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein." RJN Ex. 3. Plaintiff also ignored YouTube's Copyright Tips: "How To Make Sure Your Video Does Not Infringe Someone Else's Copyrights: The way to ensure that your video doesn't infringe someone else's copyright is to use your skills and imagination to create something completely original. ... *Be sure that all components of your video are your original creation – even the audio portion. For example, if you use an audio track of a sound recording owned by a record label without that record label's permission, your video is infringing the copyrights of others, and we will take it down as soon as we become aware of it.*" RJN Ex. 4 (emphasis added).

B. Plaintiff's Original Complaint

Plaintiff's First Amended Complaint ("FAC"), filed August 15, 2007, alleged three claims: (1) that Universal violated Section 512(f) of the Digital Millennium Copyright Act ("DMCA") in sending the notice to YouTube, because Plaintiff's use of "Let's Go Crazy" was a "self-evident" fair use; (2) that Universal tortiously interfered with Plaintiff's purported contract with YouTube; and (3) that Plaintiff was entitled to a declaration that her use of "Let's Go Crazy" is a fair use protected from any claim of infringement.

Simultaneous with the filing of this lawsuit, Plaintiff and the EFF, the advocacy organization representing her, launched a public relations offensive.[6] EFF's statements make it clear that it wants to use this case to rewrite the copyright laws that Congress has enacted in order to promote EFF's own views about making content freely available online. EFF linked this suit to its self-declared effort "to develop a set of 'best practices' for proper takedowns under the Digital Millennium Copyright Act." RJN Ex. 5. EFF's proposed "best practices" may make for good reading for the self-described "free culture" crowd, but they are nowhere to found in the DMCA or the Copyright Act. *See* EFF's "Fair Use Principles for User Generated Video Content" at 2 ¶ 1, RJN Ex. 6.

C. The Court's Order Granting Universal's Motion To Dismiss

Universal moved to dismiss the FAC. On April 8, 2008, the Court entered an Order dismissing all three of Plaintiff's claims. First, with respect to Plaintiff's Section 512(f) claim, the Court held that, under the Ninth Circuit's controlling decision in *Rossi*, "there must be a showing of a knowing misrepresentation on the part of the copyright owner." Order at 5. The Court held that Plaintiff had "fail[ed] to allege facts from which such a misrepresentation may be inferred." *Id.* The Court also observed that Plaintiff had failed to allege any facts that would substantiate her allegation that her use could be deemed to be "a 'self-evident' fair use." *Id.* Second, the Court held that Plaintiff's state law tortious interference claim failed on the ground that it was preempted by the Copyright Act. *Id.* at 7. Third, the Court held that it lacked subject

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[6] *See, e.g.*, RJN Ex. 5 (EFF web page devoted to publicizing case); Ex. 7 (Washington Post interview of Plaintiff); Ex. 8 (Good Morning America profile of Plaintiff).