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INTRODUCTION

Universal’s hyperbole notwithstanding, this case is still about a 29-second home video of a toddler dancing in a kitchen. Stephanie Lenz made this video (featuring her son Holden) and then posted it on an Internet video hosting site, YouTube.com, so that her friends and family could easily see it. Four months later, Universal demanded that YouTube remove the video, accusing Lenz of copyright infringement, despite the video’s clear non-infringing nature. Lenz seeks to hold Defendants accountable for this knowing misrepresentation. This Court has granted her leave to amend her Complaint to allege further specific facts regarding this misrepresentation and from which Defendants’ knowledge of the misrepresentation may be inferred. Lenz has done so, filing a Second Amended Complaint containing a wealth of additional and well-supported factual allegations that provide ample basis for such an inference.

Defendants have moved once again to dismiss Lenz’s suit, and once again offer a series of factual arguments beyond the scope of the Complaint. Yet they *still* cannot deny, on a motion to dismiss, any of Lenz’s fundamental allegations. They cannot deny that they sent the takedown notice accusing her of copyright infringement. They cannot deny that the video is noncommercial and just 29 seconds long and contains, at best, an indistinct version of their copyrighted song in the background. They cannot deny that, much like a documentary film, Lenz’s blurry amateur video simply records the actual experience of her son dancing—a moment she hoped to share with family and friends via the medium of online digital video. And they cannot deny that they sent their takedown notice at Prince’s behest, based not on the particular characteristics of the video or any good-faith belief that it actually infringed a copyright but rather on a belief that, as “a matter of principle,” Prince “has the right to have his music removed.”

Instead, Defendants’ Motion attempts to sidestep their liability by focusing attention on irrelevant facts, misstatements of law, and summary judgment-level arguments. More broadly, Defendants attempt via their motion to completely eviscerate *any* statutory protection for fair use under the Digital Millennium Copyright Act (“DMCA”), an interpretation that flies directly in the face of both Congressional intent, this Court’s decision in *Diebold*, and common sense.

1 Specifically, they insist that despite an express obligation under the statute to only send DMCA
2 takedown notices *after* forming a good-faith belief that a particular use of their copyrighted
3 material is infringing, they have no obligation to consider whether the use is a fair use and thus
4 non-infringing before sending a DMCA notice.

5 Defendants' position is antithetical to controlling case law and the purpose and structure of
6 Section 512. Under Defendants' theory, all the sender of a DMCA notice must ask herself before
7 sending a notice is, "*Is there any chance I could win a copyright infringement lawsuit for this*
8 *use?*" But that is not the relevant question. Rather, a sender of a notice must ask, "*Does this use*
9 *infringe my copyrights?*" If the answer is "no"—either because the work does not actually use the
10 sender's copyrighted work or because the use is plainly a fair use and, therefore, non-infringing by
11 definition, or for some other reason—sending a DMCA notice constitutes a misrepresentation
12 under the statute. And if that misrepresentation is made knowingly, the notice violates Section
13 512(f), whether or not a lawsuit is ever filed or contemplated.

14 Finally, Defendants misconstrue the relevant analytical standard to be applied at this stage.
15 Defendants ask the Court to dismiss this case based on an extensive fact analysis, with inferences
16 in Defendants' favor instead of Lenz's. This is both inaccurate and inappropriate on a motion to
17 dismiss. Lenz has alleged ample facts to support her claim, based on the information available to
18 her prior to discovery. Taking Lenz's allegations to be true and with all reasonable inferences in
19 her favor, Lenz has more than shown why she should be permitted to develop evidence to
20 substantiate those allegations and vindicate her rights.

21 **FACTUAL AND PROCEDURAL HISTORY**

22 Plaintiff Stephanie Lenz is a mother, wife, writer and editor. She and her husband have two
23 children, Zoe (age 4) and Holden (age 2). Second Am. Cmplnt. ("SAC") ¶11. On or about
24 February 7, 2007, Lenz's children were playing in the family's kitchen when Holden, who was still
25 learning to walk at the time, began dancing to the Prince song "Let's Go Crazy." *Id.* ¶¶12, 16. Zoe
26 and Holden had recently heard the song on television during the Super Bowl halftime show. *Id.*
27 ¶12. Using her digital camera, Lenz decided to capture the moment on film, creating a 29-second
28 video recording of the children's activities, which consisted primarily of Holden's dance (the

1 “Holden Video”). *Id.* The video bears all the hallmarks of a family home movie—it is somewhat
2 blurry; the sound quality is poor; it was filmed with an ordinary digital video camera; and it
3 focuses on documenting Holden’s “dance moves” against a background of normal household
4 activity, commotion and laughter. *Id.* ¶13. Due to the noise and commotion made by the children,
5 the song “Let’s Go Crazy” can only be heard in the background for approximately 20 seconds of
6 the 29-second video and even then not all that clearly. *Id.* ¶14. The portion of the song used is
7 near the song’s end and includes only a few words of the lyrics. *Id.*

8 Holden was just learning to walk when Lenz made the video. *Id.* ¶16. Lenz thought her
9 friends and family, particularly her mother in California, would enjoy seeing Holden’s new ability
10 to dance as well. *Id.* Lenz’s mother has difficulty downloading email files but knows how to
11 access the YouTube website. *Id.* On or about February 8, 2007, Lenz uploaded the Holden Video
12 from her computer to the YouTube website for her family and friends to enjoy. *Id.* ¶17. The video
13 was publicly available at <<http://www.youtube.com/watch?v=N1KfJHFWhQ>>. *Id.*

14 Defendants Universal Music Corp., Universal Music Publishing, Inc. and Universal Music
15 Publishing Group (collectively, “Universal”), are sophisticated music industry companies that have
16 extensive experience with copyright law, and employ staff who are familiar with the Digital
17 Millennium Copyright Act (including the Section 512 “good faith” requirements and the obligation
18 to submit Section 512 notices under penalty of perjury), as well as the principles and application of
19 the fair use doctrine. *Id.* ¶19.

20 Universal represents Prince and polices various copyrights on his behalf. *Id.* ¶10.
21 Universal’s client is notorious for his efforts to control all uses of his material on and off the
22 Internet. Prince has threatened to sue several Internet service providers for copyright infringement
23 as part of an effort “to reclaim his art on the internet.” *Id.* ¶28. He has publicly stated that he
24 “strongly believes that artists as creators and owners of their music need to reclaim their art.” *Id.*
25 ¶29.

26 Between February and June 2007, Defendants, and/or their representatives, viewed the
27 Holden Video and decided to issue a DMCA takedown notice. *Id.* ¶20. Therefore, on or around
28 June 4, 2007, Universal sent the notice, demanding that YouTube remove the Holden Video

1 because of unspecified copyright violations. *Id.* ¶21 and Ex. A thereto. Universal sent this notice
2 to the address designated by YouTube exclusively for DMCA notices. *Id.* ¶22 and Ex. B thereto.
3 The notice precisely tracked the language specified for a notice of claimed infringement under
4 Section 512(c)(3) of the DMCA. 17 U.S.C. § 512; SAC ¶23. YouTube promptly removed the
5 video and sent Lenz an email notifying her that it had done so in response to Universal's accusation
6 of copyright infringement and warning her that repeated incidents of copyright infringement could
7 lead to the deletion of her account and all her videos. SAC ¶¶24-25 and Ex. C thereto.

8 In a response to a request for comment regarding the take down of the Holden Dance
9 Video, Universal released the following statement to ABC News:

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

16 *Id.* ¶30 (emphasis added) and Ex. F thereto. Thus, Universal has admitted that it sent the DMCA
17 notice at Prince's behest, based not on the particular characteristics of the Holden Video or any
18 good-faith belief that it actually infringed a copyright but on its belief that, as "a matter of
19 principle," Prince "has the right to have his music removed." *Id.* ¶31.

20 YouTube's June 5 email advised Lenz that she was entitled to submit a counter-notice and
21 directed her to webpages that explained the procedures for a counter-notice pursuant to Section
22 512(g) of the DMCA. *Id.* ¶26 and Ex. D thereto. On June 27, 2007, Lenz sent YouTube a DMCA
23 counter-notification pursuant to 17 U.S.C. § 512(g), demanding that her video be reposted because
24 it did not infringe Universal's copyrights. *Id.* ¶27. Nonetheless, the Holden Video was unavailable
25 on YouTube for over six weeks. *Id.*

26 On July 24, 2007, Lenz filed a Complaint seeking redress for Universal's misuse of the
27 DMCA takedown process, its accusation of copyright infringement, and its intentional interference
28 with her contractual use of YouTube's hosting services. *See* Dkt No. 1. On August 15, pursuant to
discussions with Universal's counsel, Lenz amended her Complaint to revise the named
defendants. *See* Dkt No. 5. On September 21, Universal moved to dismiss the Complaint and to

1 strike the interference claim. *See* Dkt No. 10.

2 On April 8, 2008, 2008, this Court granted the motion to dismiss with leave to amend, and
3 denied the motion to strike. *Lenz v. Universal Music Corp.*, 2008 WL 962102 (N.D.Cal. Apr. 08,
4 2008). The Court held that Lenz had failed to allege facts sufficient to infer a knowing
5 misrepresentation, and failed to allege “why her use of ‘Let’s Go Crazy’ was a self-evident fair
6 use.” *Id.* at *3. On April 18, 2008, Lenz filed a Second Amended Complaint, replete with detailed
7 factual allegations to support her claim that Universal knew her video did not infringe any
8 copyrights it owned or controlled. *See* Dkt No. 34. Five weeks later, Universal moved once again
9 to dismiss Lenz’s Complaint. *See* Dkt No. 38.

10 ARGUMENT

11 **I. STANDARD OF REVIEW**

12 “For purposes of a motion to dismiss, the plaintiff’s allegations are taken as true, and the
13 Court must construe the complaint in the light most favorable to the plaintiff.” *Lenz*, 2008 WL
14 962102 at *1 (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). To defeat such a motion,
15 the factual allegations must simply be “enough to raise a right to relief above the speculative
16 level...on the assumption that all the allegations in the complaint are true (even if doubtful in
17 fact).” *Bell Atlantic Corp. v. Twombly*, __U.S.__, 127 S.Ct. 1955, 1965 (2007) (quoting 5 Charles
18 Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004)). Further,
19 the court must draw all reasonable inferences in the plaintiff’s favor, *Doe v. United States*, 419
20 F.3d 1058, 1062 (9th Cir. 2005), and presume that general allegations embrace those specific facts
21 that are necessary to support the claim,” *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 889 (1990).
22 Thus, factual disputes are properly resolved only on summary judgment or at trial, not on a motion
23 to dismiss. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

24 **II. A KNOWING MISREPRESENTATION THAT A FAIR USE IS INFRINGING** 25 **VIOLATES SECTION 512(F) OF THE DMCA**

26 In order to plead a proper 512(f) claim, a plaintiff must allege that (a) the defendant
27 represented that certain online material infringed its copyright; (b) that representation was
28 inaccurate (e.g., the material was actually non-infringing); (c) the misrepresentation was material;

