

1 KELLY M. KLAUS (SBN 161091)
Kelly.Klaus@mto.com
2 AMY C. TOVAR (SBN 230370)
Amy.Tovar@mto.com
3 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
4 Thirty-Fifth Floor
Los Angeles, CA 90071-1560
5 Telephone: (213) 683-9100
Facsimile: (213) 687-3702
6

Attorneys for Defendants
7 UNIVERSAL MUSIC CORP.,
UNIVERSAL MUSIC PUBLISHING, INC.,
8 AND UNIVERSAL MUSIC PUBLISHING GROUP

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.

CASE NO. CV 07-03783

REPLY IN SUPPORT OF MOTION TO
DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT

[Supplemental Request for Judicial Notice filed
concurrently herewith]

Judge: Honorable Jeremy Fogel
Date: July 18, 2008
Time: 9:00 a.m.
Courtroom: 3

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1 **I. INTRODUCTION**

2 Claiming that the applicable law is “uncertain,” Plaintiff asserts that the Court should be
3 “particularly hesitant to dismiss” her claim. Opp. at 15 (citing this Court’s decision in *Google*
4 *Inc. v. American Blind & Wallpaper Factory, Inc.*, 2005 WL 832938 at *5 (N.D. Cal. Mar. 30,
5 2005)). However, the legal standards that apply to this motion are not at all unclear. As this
6 Court held on the prior motion, *Rossi v. MPAA*, 391 F.3d 1000 (9th Cir. 2004), clearly holds that
7 Plaintiff has to plead facts that show a “*knowing misrepresentation* on the part of the copyright
8 owner.” Order, Apr. 8, 2008 at 5 (emphasis added). Plaintiff has failed to do this, and her
9 complaint should be dismissed with prejudice for at least the following reasons:¹

10 ***Plaintiff Has Failed To Plead That Universal Misrepresented Her Posting Infringed:***

11 Plaintiff’s exclusive reliance on the affirmative defense of fair use necessarily establishes that
12 Universal’s statement that her use was infringing was true. For there to be a “fair use,” there first
13 must be an infringing use. Plaintiff’s arguments that her use could be a “fair use” without
14 infringing, or that Universal must be deemed to have impliedly represented that her use was not
15 “fair,” are contrary to the Copyright Act and controlling case law.

16 ***Plaintiff Fails To Plead That Universal Knew It Was Making A Misrepresentation:***

17 Even if Universal’s notice somehow could be construed to make a representation about whether
18 Plaintiff’s use would be excused as “fair,” Plaintiff has not demonstrated, as she must, that it is
19 plausible to believe that Universal *knew* it was making a misrepresentation about fair use.
20 Plaintiff’s argument that Universal may be charged with recognizing her use as “self-evidently”
21 fair use is mistaken for the simple reason that there is no such thing as “self-evident” fair use, and
22 Plaintiff to this day has not cited any authority showing that there is. Plaintiff’s own analysis of
23 the four fair use factors under Section 107 confirms that her claim of “self-evident” fair use
24 cannot substitute for pleading actual knowledge. Plaintiff is alleging that Universal *should have*

25 _____
26 ¹ It is clear from the face of Universal’s notice, SAC Ex. A, that Universal did not send its notice
27 pursuant to the DMCA. Plaintiff is wrong that the Court must accept her allegation that
28 Universal’s notice was sent pursuant to the DMCA. Whether YouTube is subject to Section
512(c) of the DMCA, and whether Section 512(f) applies to notices sent to YouTube, are legal
conclusions that are not affected by Plaintiff’s pleading. In any event, Plaintiff’s Section 512(f)
claim fails for all of the other reasons discussed in the text.

1 *known* that her use was fair based on a *post hoc* inquiry into what she and her lawyers believe is
2 an objectively reasonable fair use defense. What Plaintiff and the EFF think is “self-evident”
3 about copyright law and the fair use doctrine is not even consistent with the governing case law;
4 those views certainly cannot be imputed to Universal to plead its knowledge.

5 ***Plaintiff Fails To Plead Cognizable Damages Under Section 512(f)***: Even if there was a
6 misrepresentation (which there was not), and even if Plaintiff pleaded actual knowledge (which
7 she has not), Plaintiff’s claim still fails because she does not and cannot plead any cognizable
8 damages.

9 Plaintiff’s inability to state a claim is not surprising. She has no claim, and never came
10 close to alleging one. It is time for Plaintiff to heed the Ninth Circuit’s ruling in *Rossi*, and it is
11 time for this case to be over.

12 **II. ARGUMENT**

13 **A. Plaintiff Has Failed To Plead An Actionable Misrepresentation: Universal’s** 14 **Representation That It Had A Good Faith Belief Plaintiff’s YouTube Posting** 15 **Was Infringing Was Indisputably True**

16 Plaintiff’s entire claim is based on Universal’s one-sentence assertion that it had “a good
17 faith belief that the above-described activity is not authorized by the copyright owner, its agent, or
18 the law.” SAC Ex. A. Plaintiff’s complaint and her opposition confirm that this statement was
19 true. Unlike in *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), where
20 the notice sender failed to identify any copyrighted content, *id.* at 1203, or *Rossi*, where the
21 website operator claimed that no movies could be downloaded through his site, 391 F.3d at 1003,
22 it is undisputed here that Plaintiff’s YouTube posting infringed a valid copyright. Plaintiff
23 concedes that “Let’s Go Crazy” is an original work of authorship protected by copyright. *See* 17
24 U.S.C. § 102. She concedes that the copyright holder has the exclusive “right to control the
25 synchronization of musical compositions with the content of audiovisual works[.]” *Leadsinger,*
26 *Inc v. BMG Music Publishing*, 512 F.3d 522, 527 (9th Cir. 2008). And she concedes that her
27 YouTube posting *did* use “Let’s Go Crazy” in timed relation with the video images, Opp. at 3,
28 which means that she infringed the exclusive synchronization right.

1 Based on these facts, and based on the fact that Plaintiff stakes her entire defense to “fair
2 use” – an affirmative defense that presupposes a use that otherwise infringes – Plaintiff has
3 conceded that Universal’s representation that Plaintiff’s YouTube posting infringed “Let’s Go
4 Crazy” was *true*. Plaintiff makes two arguments to try to get around these inconvenient facts.
5 Neither argument has merit.

6 **1. There Is No Support For Plaintiff’s Argument That A Fair Use**
7 **Defense Exists Independent Of A Use That Otherwise Infringes**
8 **Copyright**

9 Plaintiff first says that it is “[n]onsense” for Universal to argue that her exclusive reliance
10 on the fair use defense implicitly concedes the truth of Universal’s representation that her use
11 infringed the synchronization right. Opp. at 8. Plaintiff argues that the fact that fair use is raised
12 as an affirmative defense is just a “procedural vehicle,” and she insists that a use can be “fair” and
13 non-infringing without regard to whether it violates one of the exclusive rights under copyright.

14 Plaintiff’s argument is belied by the very “plain language” of Section 107 that she cites in
15 her brief. See Opp. at 8. The preamble to Section 107 confirms that a use that is determined to be
16 “fair” under the statute’s multi-factor balancing test is excused “[n]otwithstanding the provisions
17 of [§] 106,” 17 U.S.C. § 107 (emphasis added), *i.e.*, *notwithstanding that the use otherwise*
18 *infringes*. It is not surprising, therefore that the Supreme Court has expressly held that Congress
19 “structured [Section 107] as an affirmative defense[,]” *Harper & Row, Publishers, Inc. v. Nation*
20 *Enters.*, 471 U.S. 539, 561 (1985) (emphasis added), a holding the Court has reaffirmed.
21 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).² It also is not surprising that
22 courts have repeatedly made it clear that a fair use does not exist independent of an otherwise
23 infringing use. See *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (“A fair-use analysis bears
24 relevance *only when a challenged use violates a right protected by the Copyright Act.*”)

25 ² Given the Supreme Court’s binding construction of the nature of Section 107 as an affirmative
26 defense, Plaintiff’s footnote analogy to the law of libel for the proposition that a copyright
27 claimant’s case includes an implied element of “not a fair use,” see Opp. at 9 n.2, falls flat. The
28 analogy fails for other reasons as well. The truth or falsity of a statement is an objective fact.
Whether a use is fair involves balancing mixed questions of law and fact. It is hardly surprising,
therefore, that the law requires someone making an infringing use to plead the defense and to bear
the burden of proving it.

1 (emphasis added)³; *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 573-74 (3d Cir. 2003)
2 (“Fair use assumes that the defendant used the copyrighted material, but *provides a limited*
3 *excuse.*”) (emphasis added).

4 Plaintiff’s reliance on *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417
5 (1984), for her contrary argument, Opp. at 9, is misplaced. In *Sony*, it was undisputed that the
6 unauthorized copying of copyrighted television programs *would* violate the copyright owners’
7 exclusive reproduction rights under Section 106. That fact “notwithstanding,” however the
8 majority (by a 5-4 vote, reversing the Ninth Circuit’s opposite conclusion) concluded that the use
9 was “fair” under the multi-factor test of Section 107. 464 U.S. at 447-56. Even if *Sony* were
10 ambiguous on the question whether fair use exists independent of infringing use, the Court’s
11 decisions in *Harper & Row* and *Campbell* both post-date *Sony*, and those cases make clear that
12 fair use is an affirmative defense. By relying exclusively on that affirmative defense, Plaintiff
13 concedes the truth of Universal’s representation that her use infringed.

14 **2. Nothing In The DMCA Requires The Sender Of A Takedown Notice**
15 **To Make An *Ex Ante* Determination Of Fair Use**

16 Next, Plaintiff argues that even if Universal’s express representation was true, Universal
17 should be deemed to have made an implied representation that she claims was false. Specifically,
18 Plaintiff claims that Universal’s notice “necessarily embodied a corollary representation that her
19 use was not a fair use.” Opp. at 9. This is so, Plaintiff argues, because “a DMCA notice sender
20 must consider fair use prior to sending a DMCA notice.” Opp. at 16.

21 These are “necessar[y] embod[iments]” and statutory requirements entirely of Plaintiff’s
22 imagination. Nothing in the DMCA, 17 U.S.C. § 512(c)(3), or YouTube’s Terms of Use, SAC
23 Ex. B, requires the sender of a takedown notice to make an *ex ante* determination whether a use
24 would be deemed to be “fair,” much less to make a representation about that determination under
25 penalty of perjury. As the Ninth Circuit has emphasized, the DMCA is quite detailed in setting
26 out what has to be in a compliant notice. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112
27 (9th Cir. 2007). But the statute says not one word about the sender making determinations or

28 ³ Plaintiff herself relies on *Bond* in support of a different argument. See Opp. at 20.

1 representations regarding fair use. Under the principle of statutory construction *expressio unius*
2 *est exclusio alterius*, the absence of a requirement to make a fair use determination means that
3 one should not be implied.⁴

4 The legislative history and overall structure of Section 512 confirm that Congress did not
5 intend to require copyright owners and senders of takedown notices to make *ex ante* fair use
6 determinations. As Universal demonstrated in its opening brief, Mot. at 16-17, the DMCA's
7 notice procedures "balance the need for rapid response to potential infringement with the end-
8 users' legitimate interests in not having material removed without recourse." Sen. Rep. No. 105-
9 190 at 21 (1998). In service of those ends, the statute includes not only a notification procedure,
10 but a counter-notification procedure, which Plaintiff herself claims to have invoked. The counter-
11 notification procedure, in particular, shows that, to the extent Congress intended for copyright
12 holders to consider at all the possible merits of a fair use defense as part of the Section 512
13 process, Congress intended that to be done at the counter-notification stage. It is at the point of
14 the counter-notification that the copyright holder has a short time-fuse (14 days) to evaluate any
15 asserted defenses to its good-faith belief of infringement and either file an infringement suit or let
16 the online service re-post the material. 17 U.S.C. § 512(g)(2)(c). If a fair use defense has been
17 asserted in the counter-notification, the copyright holder then has to consider the potential merits
18 of that defense and decide whether to proceed to litigation. It is far more reasonable to believe
19 that Congress intended for fair use to be considered (if at all) at the counter-notification stage,
20 rather than *ex ante*, at the time an infringing use is discovered and a takedown notice is sent. This
21 reading of the statutory structure makes sense, given the indeterminate nature of the fair use
22 defense, and the implausibility that Congress intended to subject notice senders to liability for
23 guessing incorrectly how that defense (were it to be raised at all) might be resolved.⁵

24 _____
25 ⁴ In contrast, EFF's proposed "Fair Use Principles for User Generated Video Content" *would*
26 require copyright owners to make such determinations prior to sending out notices. *See*
Universal's RJN Ex. 6 at p.2. This simply underscores the fact that this litigation is an attempt to
engraft onto the DMCA requirements that Congress did not see fit to adopt.

27 ⁵ Tellingly, Plaintiff fails to respond at all to Universal's argument regarding the significance of
28 the counter-notification procedure. Plaintiff claims that the structure of Section 512(f) supports
her proposed requirement of an *ex ante* fair use determination because "[i]f 512(f) liability were
only available *after* an infringement action, there would be no point to the 512 process." Opp. at

1 Finally, nothing in the case law requires a copyright holder to conduct an *ex ante* fair use
2 analysis before sending a takedown notice. Plaintiff's argument that *Rossi* implicitly adopts such
3 a rule is unfounded and wrong. As Universal explained in its opening brief, *see* Mot. at 17, *Rossi*
4 rejected the argument that the notice sender has a duty to look for material rebutting its subjective
5 belief of infringement. 391 F.3d at 1004. Plaintiff claims that the Ninth Circuit's description of
6 the facts known to the MPAA demonstrate that the Ninth Circuit actually did recognize a duty to
7 investigate. Opp. at 15. The facts known to the MPAA were relevant, however, only because the
8 website operator claimed there was no infringing content available through his site. 391 F.3d at
9 1003. Of course, Plaintiff cannot make this argument since she admittedly made an unauthorized
10 use of "Let's Go Crazy." Plaintiff's claim that Universal had to go beyond asserting this
11 (indisputably true) fact, to consider a fair use defense that was not raised until this lawsuit was
12 filed, finds no support in *Rossi*.⁶

13 All available guides for statutory construction – text, structure, legislative history and case
14 law – show there is no basis for construing Section 512 to require the notice sender to investigate
15 and make a representation regarding a possible fair use defense. Universal's notice accurately
16 stated that Plaintiff's use was unauthorized and infringing. Plaintiff fails to plead any
17 misrepresentation, and her complaint can and should be dismissed on this ground alone.

18 **B. Plaintiff Fails To Support Her Claim That There Is Such A Thing As A "Self-
19 Evident Non-Infringing Fair Use"**

20 Even if Universal's notice can be construed to make the implied representation that
21 Universal did not believe Plaintiff's use would be deemed a fair use, Plaintiff's claim still fails
22 because she pleads no facts that make it plausible to believe Universal knew this implied
23 representation was false.⁷

24 19. Plaintiff's all-or-nothing dichotomy between the 512 notice and an infringement lawsuit
completely ignores the significance of the counter-notification procedure.

25 ⁶ Plaintiff also asserts that this Court's decision in *Diebold* holds that a notice sender has an *ex*
26 *ante* obligation to evaluate a possible fair use claim and make a representation about it. Opp. at
27 17-18 (citing *Diebold*, 337 F. Supp. 2d at 1204). *Diebold* says no such thing. Had it said there
was an obligation *ex ante* to consider and evaluate a possible fair use claim, that portion of the
Court's holding (like the portion adopting a "knew or should have known" standard of
knowledge) would not have survived *Rossi*.

28 ⁷ Plaintiff erroneously suggests that requiring her to plead facts that make an inference of

