1 ELECTRONIC FRONTIER FOUNDATION
CINDY COHN – #145997
2 cindy@eff.org
CORYNNE MCSHERRY – #221504
3 corynne@eff.org
KURT OPSAHL – #191303
4 kurt@eff.org
JULIE SAMUELS – *pro hac vice*
5 julie@eff.org
454 Shotwell Street
6 San Francisco, CA 94110
Telephone: (415) 436-9333
7 Facsimile: (415) 436-9993

8 KEKER & VAN NEST LLP
ASHOK RAMANI - # 200020
9 aramani@kvn.com
MICHAEL S. KWUN - # 198945
10 mkwun@kvn.com
MELISSA J. MIKSCH - # 249805
11 mmiksch@kvn.com
633 Battery Street
12 San Francisco, CA 94111-1809
Telephone: (415) 391 5400
13 Facsimile: (415) 397 7188

14 Attorneys for Plaintiff
STEPHANIE LENZ

15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 SAN JOSE DIVISION

19 STEPHANIE LENZ, 20 Plaintiff, 21 v. 22 UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC. and UNIVERSAL MUSIC PUBLISHING 23 GROUP, 24 Defendants.	Case No. C-07-03783-JF (HRL) **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: October 16, 2012 Time: 3:00 P.M. Courtroom: 3, 5th Floor Judge: Hon. Jeremy Fogel

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26 **PUBLIC REDACTED VERSION**

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TABLE OF AUTHORITIES

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Federal Cases

Campbell v. Acuff-Rose Music, Inc.
510 U.S. 569 (1994) 10, 12, 13, 16, 17

Castle Rock Enter., Inc. v. Carol Pub. Group, Inc.
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Elvis Presley Enters., Inc. v. Passport Video
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Fisher v. Dees
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Harper & Row Publishers, Inc. v. Nation Enters.
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Jackson v. Warner Bros.
993 F. Supp. 585 (E.D. Mich. 1997) 10

Kane v. Comedy Partners
No. 00 Civ. 158 (GBD), 2003 WL 22383387 (S.D.N.Y. Oct. 16, 2003) 19

Kelly v. Arriba Soft Corp.
336 F.3d 811 (9th Cir. 2002) 16

Kramer v. Thomas
No. CV 05-8381 AG, 2006 WL 4729242 (C.D. Cal. Sept. 28, 2006) 17

Lennon v. Premise Media Corp.
556 F. Supp. 2d 310 (S.D.N.Y. 2008) 15

Lenz v. Universal
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Los Angeles News Serv. v. Reuters Television Int'l, Ltd.
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Mattel, Inc. v. Walking Mountain Prods.
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Online Policy Group v. Diebold, Inc.
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Phelps-Roper v. City of Manchester, Mo.
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Princeton Univ. Press v. Mich. Document Servs., Inc.
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Salinger v. Random House, Inc.
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Sandoval v. New Line Cinema
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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 On June 4, 2007, Universal sent YouTube a notice claiming that hundreds of videos
3 posted on YouTube, including a video posted by Plaintiff Stephanie Lenz (the "Video"), infringed
4 copyrights in Prince's musical compositions. In that notice, Universal stated that it had a good
5 faith belief that the videos were not authorized by Prince, his agent, or "the law."

6 When it sent its notice, Universal knew that the
7 It also knew that it had not
8
9 In fact,
10
11
12

13 Thus, when Universal sent that notice, it *had not* formed a good faith belief that Ms.
14 Lenz's Video was not authorized by law. It simply could not have done so because it had not
15 formed a good faith belief
16 Moreover, it *knew* it had not formed such a good faith belief because it knew that the process it
17 employed And Universal's shoddy review practices had
18 real consequences for Ms. Lenz, who lost access to the Video for six weeks, and doubtless for
19 many other YouTube users who lack the resources to challenge improper takedowns.

20 For these reasons, not only should the Court *deny* Universal's motion, it should *grant* Ms.
21 Lenz's motion for summary judgment. As the Court explained three years ago, "[i]n enacting the
22 [Digital Millennium Copyright Act ('DMCA')], Congress noted that the 'provisions in the bill
23 balance the need for rapid response to potential infringement with the end-users [sic] legitimate
24 interests in not having material removed without recourse.'" *Lenz v. Universal,* 572 F. Supp. 2d
25 1150, 1155 (N.D. Cal. 2008) (quoting Sen. Rep. No. 105-190 at 21 (1998)). Section 512(f) in
26 particular was included in recognition of the "significant injury to the public" that can be caused
27 by "the unnecessary removal of non-infringing material"—injury that is not sufficiently addressed
28 by the DCMA's counternotification procedure. *Id.* at 1156. "A good faith consideration of

whether a particular use is fair use is consistent with the purpose of the statute." *Id.*

By designing a review process that did not take [REDACTED] into consideration, Universal *knew* that it could not and would not form a good faith belief that [REDACTED] Nonetheless, Universal again and again represented to YouTube that it *had* formed a good faith belief that the videos in its takedown notices were not authorized by law. Ms. Lenz is entitled to hold Universal accountable for its knowing, material misrepresentation. The Court should deny Universal's motion, and grant Ms. Lenz's motion.

II. FACTUAL SUMMARY

Plaintiff Stephanie Lenz is a mother, wife, writer, and editor. Declaration of Stephanie Lenz ("Lenz Decl.") (Dkt. 392) ¶ 2. She and her husband have two children. *Id.* In early February 2007, Ms. Lenz's children were playing in the family's kitchen and listening to a Prince CD. *Id.* ¶ 3. As the children played, Ms. Lenz noticed that her youngest child, who was still learning to walk at the time and using a push-toy, would pause with his toy in front of the CD player and "dance," particularly if he heard her say the word "music." *Id.* Using her digital camera, Ms. Lenz decided to capture the moment on film, especially her son's "dance." *Id.* Turning on her camera, and prompting her son by asking him what he thought of the "music," she created a 29-second video recording of the children's activities. *Id.*; Exh. A[1] (electronic video file, Depo. Exh. 2)[2]; Ex. B (Lenz Depo.) at 40:15-41:1 (authenticating). The Video bears all the hallmarks of a family home movie—it is somewhat blurry, the sound quality is poor, and it focuses on documenting the child's "dance moves" in a kitchen, against a background of normal household activity, commotion, and laughter. *See* Exh. A. Due to the noise and commotion made by the children, the song "Let's Go Crazy" can only be heard in the background, indistinctly, for

[1] Unless otherwise indicated, all citations to Exhibits are to Exhibits to the Declaration of Melissa Miksch (Vol. I-III), filed on July 13, 2012 (Dkts. 394, 398, 402) in connection with Ms. Lenz's motion for summary judgment.

[2] The cited CD-ROM includes a copy of the video file uploaded by Ms. Lenz to YouTube. The video can also be viewed on the YouTube site, at <http://www.youtube.com/watch?v=N1KfJHFWlhQ>; *see also* Ex. E (screen capture of the "view" page for the video on YouTube, taken shortly after this lawsuit was filed and previously submitted by Universal in support of its initial motion to dismiss (*see* 9/21/2007 Declaration of Kelly M. Klaus, Ex. B) (Dkt. No. [])).

1 approximately 20 seconds of the 29-second Video. *See id.*

2 Ms. Lenz's son was just learning to walk when Ms. Lenz made the Video. Lenz Decl. ¶ 3.
3 Ms. Lenz thought her mother, who lives across the country in California, would enjoy seeing her
4 son's new ability to dance as well. *Id.* ¶ 4. Ms. Lenz's mother had told her she had difficulty
5 downloading video files sent via email. *Id.*; Exh. C (Morgan Depo.) at 41:4-42:8, 58:2-61:20;
6 Exh. D (Depo. Ex. 61). In early February 2007, Ms. Lenz uploaded the Video from her computer
7 to the YouTube[3] website for her family and friends to enjoy. Lenz Decl. ¶ 4.

8 In 2007, Universal represented Prince and administered various copyrights on his behalf.
9 Exh. Q (Allen Depo.) at 84:15-24, 175:25-176:20 & Ex. U (Depo. Ex. 83). [REDACTED]
10 [REDACTED] Exh. Q (Allen Depo.) at 234:13-235:8.
11 Universal believed [REDACTED]
12 [REDACTED]
13 [REDACTED] *See id.* at 165:16-166:16; Exh. H at 13:9-15:8 (supplemental
14 responses to Request for Admission Nos. 33 & 34). Universal also believed that [REDACTED]
15 [REDACTED] Ex. Q (Allen
16 Depo.) at 61:22-62:1. As Universal put it in response to a media inquiry in connection with this
17 case:

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

22 Exh. I (Exh. F to Second Amended Complaint (Depo. Exh. 110)) (emphasis added); *see also*

23

24 [3] YouTube, LLC is a Delaware limited liability company with its principal place of business in
San Bruno, California, and is a wholly owned subsidiary of Google Inc., a Delaware corporation
25 with its principal place of business in Mountain View, California (collectively "YouTube").
Exh. V (Hubbard Aff.) ¶ 3. YouTube hosts (i.e., provides storage of and access to) videos
26 provided by its users. *Id.* ¶ 4. At their direction (i.e., upon their decision to post their videos to
the YouTube system), YouTube stores those videos on its servers, and allows others to access to
27 them according to the choices made by the users posting those videos. *Id.* YouTube has
registered a designated agent to receive notification of claimed infringement with the United
28 States Copyright Office. *Id.* ¶ 5.

Exh. J (Lofrumento Depo. at 47:18-49:11) (authenticating).

Therefore, Universal's takedown guidelines for Prince-related works [REDACTED] Exh. Q (Allen Depo.) at 62:1-4. In other words, Universal would send a takedown notice for [REDACTED] *Id.* at 62:8-19.[4] Indeed, it is Universal's general policy that [REDACTED] *Id.* at 60:15-61:6; *see also* Exhs. X-Z (Depo. Exhs. 91, 92, 97); *see also* Exh. Q (Allen Depo.) at 195:20-196:15, 199:3-16, 240:19-241:4, 258:6-18 (authenticating exhibits). According to Universal, it also would not request that a video be taken down 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).

Sean Johnson, [REDACTED] *See* Exh. R (Johnson Depo.) at 60:7-22; Universal's MSJ at 7-8. Mr. Johnson had only a vague understanding of fair use. *See* Exh. R (Johnson Depo.). at 12:12-13:8. Mr. Johnson's boss, Robert Allen, [REDACTED] Exh. Q (Allen Depo.) at 130:7-131:4; *see also* Exh. H at 17:14-23:7 (supp. resps. to RFA Nos. 41-43). Alina Moffatt, the attorney who actually sent the notice that led to this case, had never had occasion in the course of her work for Universal to consider whether a given use of material was fair. Exh. F (Moffat Depo.) at 54:17-55:1.

[REDACTED]

[4] [REDACTED] *See, e.g.,* Exh. Q (Allen Depo.) at 177:9-182:14; Exh. T (Depo. Ex. 85).

1 [REDACTED]
2 Exh. R (Johnson Depo.) at 35:17-36:1; Exh. S (Depo. Exh. 77). Less than two hours later, at the
3 direction of her superior, Mr. Allen, Ms. Moffat sent the list embodied in the aforementioned
4 notice to YouTube. *See* Exh. F (Moffat Depo.) at 14:16-15:25, 17:3-10, 30:25-31:6; Exh. P
5 (Depo. Exh. 70); Exh. S (Depo. Exh. 77). Neither Ms. Moffat nor Mr. Allen reviewed the Video
6 before Ms. Moffat sent the notice. Exh. F (Moffat Depo.) at 19:23-25; Ex. Q (Allen Depo.) at
7 26:15-19, 55:15-20. She did not review any of the videos listed. Rather, the sole basis for Ms.
8 Moffat's asserted belief that the listed videos were infringing was that she was instructed to send
9 the notice. Exh. F (Moffat Depo.) at 22:16-24; *see also id.* at 22:25-27:22. Mr. Allen testified
10 [REDACTED]
11 [REDACTED] Exh. Q (Allen Depo.) at 57:15-20. [REDACTED]
12 [REDACTED] *Id.* at 60:11-14.
13 Universal sent this notice to the address designated by YouTube for DMCA notices. Exh.
14 V (Hubbard Aff.) ¶¶ 7-11 & Exh. B (to the Hubbard Aff.), intending to cause YouTube to take it
15 down. Exh. H at 8:23-9:10 (supp. resp. to RFA No. 4). The notice precisely tracked the language
16 specified for a notice of claimed infringement under Section 512(c)(3) of the DMCA. On June 4,
17 2007, YouTube disabled public access to the Video due to the accusation of infringement. Exh.
18 V (Hubbard Aff.) ¶ 11. YouTube also sent Ms. Lenz an email notifying her that it had done so in
19 response to Universal's accusation of copyright infringement, and warning her that repeated
20 incidents of copyright infringement could lead to the deletion of her account and all her videos.
21 Lenz Decl. ¶ 5; Exh. G (Depo. Exh. 9); Exh. B (Lenz Depo.) at 110:3-6 (authenticating).
22 On June 7, 2007, Ms. Lenz sent a counternotice that did not comply with all of the
23 particulars of Section 512(g) of the DMCA. Lenz Decl. ¶ 6; Exh. K (Depo. Ex. 11); Ex. B (Lenz
24 Depo.) at 116:10-20 (authenticating). [REDACTED]
25 [REDACTED] Exh. W (Depo. Exh. 72); Exh. F (Moffat Depo.) at
26 32:13-19. Ms. Moffat reviewed the counternotice and concluded that the use must be infringing
27 because it was unlicensed. *See id.* (Moffat Depo.) at 41:3-25, 45:15-46:6, 46:24-47:8. Ms.
28 Moffat wrote back to YouTube to insist that the Video was infringing and note that the

counternotice was invalid because it did not comply with the particulars of Section 512(g). *See* Exh. W (Depo. Ex. 72). In response to Ms. Moffat's email, YouTube declined to restore Ms. Lenz's Video and asked her to revise her first counternotice. Exh. V (Hubbard Aff. Exh. G). With the assistance of counsel, Ms. Lenz then sent YouTube a second DMCA counternotice on June 27, 2007, demanding that the Video be reposted because it did not infringe Universal's copyrights. Lenz Decl. ¶ 7; Declaration of Michael S. Kwun ("Kwun Decl."), Exh. BB (Depo. Exh. 25) & Exh. CC (Lenz Depo.) at 228:19-24 (authenticating). The Video was restored in mid-July, approximately six weeks after it had been disabled. Lenz Decl. ¶ 8. Around the same time, Alina Moffat contacted Ms. Lenz directly, and Ms. Lenz gave Ms. Moffat contact information for her attorneys. Kwun Decl, Exh. DD (Moffat Depo.) at 59:22-60:21.

III. EVIDENTIARY OBJECTIONS

The Court should exclude, as irrelevant, evidence of what anyone other than Universal may or may not have believed about whether Ms. Lenz's video was a fair use *See* Universal's MSJ at 10-12. Specifically, this Court should exclude evidence of:

(1) Ms. Lenz's correspondence with her friend, Theryn Fleming,[5]

(2) the comment by "Richard Z" on Ms. Lenz's blog, and her response thereto,[6]

(3) Ms. Lenz's statement that she and her attorneys "came to the conclusion that [she] did not infringe the copyright [in "Let's Go Crazy"],[7] and

(4) Ms. Lenz's views as to what "anyone," "someone," or even a "reasonable person" might think of her video.[8]

This evidence is irrelevant under Federal Rules of Evidence 402 and 403. At this juncture, the only issue before the Court is what *Universal* believed about Ms. Lenz's Video when it sent its takedown notice. If Universal's representation in that notice that it had a good faith belief that

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[5] Klaus Declaration, Exhs. 14A at 162:25-164:4 and 20 at 2, cited on p. 10-11 of Universal's MSJ.

[6] *Id.* Exhs. 1 and 14 at 283:6-14, cited on p. 11 of Universal's MSJ.

[7] *Id.* Exhs. 2 and 22 ¶ 7, cited on pp. 11-12 of Universal's MSJ.

[8] *Id.* Exhs. 14A at 271:19-25, 173:1-16, 194:24-195:2, 276:23-277:6 and 14B at 424:2-8 and 384:2-17, cited on pp. 11-12 of Universal's MSJ.

her Video infringed copyright was false (and it was), then Universal is liable no matter what anyone else might have thought about the Video.

Ms. Fleming's views about the legal status of background music, and "Richard Z's" thoughts about Ms. Lenz's Video, should also be excluded under Rules 802 and 701 for the independent reasons that they are hearsay and also improper opinion testimony by lay witnesses.[9] Universal has presented no evidence that either Ms. Fleming or "Richard Z" has any special qualification to opine about copyright law.

Ms. Lenz reserves all other evidentiary objections for trial.

IV. ARGUMENT

A. Ms. Lenz, not Universal, is entitled to summary judgment because the undisputed facts show that Universal's takedown of Ms. Lenz's Video did not comply with the requirements of Section 512.

In an email dated June 4, 2007, Universal represented to YouTube that Ms. Lenz's Video infringed copyright, claiming to have a "good faith belief that [the Video's use of Prince's composition] is not authorized by the copyright owner, its agent, or the law." Exh. P (Depo. Exh. 70) at UMC-0000625. Universal had no such good faith belief, and Universal knew it. More specifically, Universal knew it had not [REDACTED] Universal's misrepresentation was material, because YouTube would not have disabled access to Ms. Lenz's Video if Universal had not represented that it had the good faith belief required by Section 512. For these reasons—explained in more detail below—Ms. Lenz, not Universal, is entitled to summary judgment.

1. Section 512 *requires* a fair use consideration.

Addressing Universal's motion to dismiss Ms. Lenz's second amended complaint, this Court over three years ago explained that "the question in this case is whether 17 U.S.C. § 512(c)(3)(A)(v) requires a copyright owner to consider the fair use doctrine in formulating a

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[9] Ms. Fleming does hold a law degree, and Ms. Lenz, in the (mistaken) belief that Ms. Fleming was therefore a lawyer, consulted with her when the Video was removed in June 2007 and on occasion thereafter. Ms. Lenz claimed privilege over their communications, and Universal strenuously opposed her privilege claim on the ground that Ms. Fleming was not *actually* an attorney. Dkt. No. 84 (Defendants' Motion to Compel). Magistrate Judge Seeborg agreed with Universal. *See* Dkt. No. 150 (August 5, 2009 Order on Motions to Compel).

good faith belief that 'use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.'" *Lenz*, 572 F. Supp. 2d at 1154. Recognizing that "fair use is a lawful use of a copyright," the Court held that in order to form the good faith belief required by Section 512(c)(3)(A)(v), a copyright owner "*must* evaluate whether the material makes fair use of the copyright." *Id.* (emphasis added).

2. Universal *did not*

Universal's Rule 30(b)(6) witness testified that the allegation that the Video was unauthorized Exh. Q (Allen Depo.) at 76:8-25, 87:1-89:23. That admission resolves the question of whether Universal

For his part, Mr. Johnson— Exh. R at 75:16-76:7, 79:7-20.

The attorney who actually sent the notice, Alina Moffat, did not even review the Video, much less attempt to consider whether it was a lawful fair use. Exh. F (Moffat Depo.) at 19:23-25. According to Ms. Moffat, the sole basis for her belief that the listed videos were infringing was that she was instructed to send the notice. *Id.* at 22:16-24; *see also id.* at 22:25-27:22. Indeed, given a second opportunity to consider the matter (when Ms. Lenz submitted her first counternotice), Ms. Moffat still did not explore, however briefly, whether the fair use doctrine might apply. In fact, Ms. Moffat does not even recall whether or not she troubled to watch the Video at that time. Exh. F (Moffat Depo.) at 41:11-20. Instead, Ms. Moffat considered only whether the use was licensed and, because it was not, told YouTube that

See Exh. W (Depo. Ex. 72) at UMC-0000212. Ms. Moffat's *only* basis for this second representation that that Ms. Lenz's Video was "infringing" was that the Video had been included in the original takedown notice. Exh. F (Moffat Depo.) at 41:11-25.

Universal nonetheless asks this Court to rule that considering whether the composition was the focus of, or recognizable during, the Video and whether it was licensed was enough to meet any obligation to form a good faith belief that a use is not authorized by law. Nonsense.

Universal's proposal is inconsistent with both common sense *and* the Court's ruling. Universal proposes that it should at most be required to consider the facts available to it that would be relevant to a fair use inquiry, *but not the legal import of those facts to that inquiry.* If Universal literally means it only need consider the facts available to it but not what relevance those facts have under a fair use analysis, then its proposal is flatly inconsistent with the Court's prior order. This Court has held that *fair use* must be considered, *Lenz*, 572 F.Supp.2d at 1154, not that it is enough to consider only available *facts* relevant to fair use.[10]

Universal is forced to advance its proposal—which ignores the "fair use" part of "consider fair use"—because, as it well knows, it

If Universal's stated practices were enough to amount to a fair use consideration, Section 512(f) would be a dead letter for all but *de minimis* and licensed uses, which do not exhaust the category of uses "authorized by law." That result would be contrary to Congress's stated intent. *Lenz,* 572 F. Supp. 2d at 1156 ("A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute. Requiring owners to consider fair use will help 'ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand' without compromising 'the movies, music, software and literary works that are the fruit of American creative genius.'") (quoting Sen. Rep. No. 105-190 at 2 (1998)).

[10] Ms. Lenz does not concede that Universal did in fact consider all of the pertinent facts available to it, but accepts Universal's claim to have done so as true for the purposes of this motion only.

1 What Universal *did* consider—whether a use is "recognizable" or licensed—does not
2 show whether the use in question was fair use. *Ringgold v. Black Entm't Television, Inc.*, 126
3 F.3d 70, 75-76 (2d Cir. 1997) ("though the concept of de minimis is useful in insulating trivial
4 types of copyright from liability . . . the concept is an inappropriate one to be enlisted in a fair
5 use analysis"). Indeed, the cases Universal itself cites show that a consideration of whether the
6 composition was the focus or recognizable is a merely a small part of what a person might
7 consider in determining whether a use was fair. *See e.g., id.* at 78-82; *Jackson v. Warner Bros.*,
8 993 F. Supp. 585 (E.D. Mich. 1997) (considering extent of use along with purpose, market harm
9 and nature of work). Moreover, there are any number of fair uses in which the underlying work is
10 recognizable or even the focus. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792,
11 803-04 n.8 (9th Cir. 2003) ("entire verbatim reproductions are justifiable where the purpose of the
12 work differs from the original"); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) ("When Sonny
13 Sniffs Glue," a 29-second parody of "When Sunny Gets Blue" that altered the original lyric line
14 and borrowed six bars of the song found to be noninfringing fair use).
15 Universal studiously avoids claiming that it ever actually formed a good faith belief that
16 Ms. Lenz's Video infringed copyright.[11] Universal argues that when Mr. Johnson reviewed the
17 Video, he formed "a good faith belief that Prince's composition was a central part of the posting."
18 *See* Universal's MSJ at 2:15; *see also id.* at 7:26-28 (Mr. Johnson considered whether each video
19 he reviewed "embodied a Prince composition to such a degree that the composition was the focal
20 point of the posting.") But Universal cites no case equating centrality with infringement, because
21 there is no such case. Fair uses regularly are "central" to perfectly lawful (and thus
22 noninfringing) works. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
23 Because Mr. Johnson's review could not and did not allow him to form a good faith belief
24
25 [11] Universal argues in its motion that it "implemented a process of thoughtful review" and sent takedown notices only if "it had convinced itself that a video embodied a Prince composition to
26 such a degree as to constitute an unauthorized or infringing use." Universal's MSJ at 7:15-18. But the sole citation in support of this attorney argument is to paragraph 11 of the Allen
27 Declaration, which refers [REDACTED] *See* Allen Decl. ¶ 11. And when Mr. Allen referred to [REDACTED]
28 [REDACTED] Exh. Q (Allen Depo.) at 77:13-25, 88:13-89:23.

1 that a use was not authorized by law, it is irrelevant whether the review was done twice or was
2 "thoughtful." Whether Mr. Johnson reviewed a video once, twice, or eight times, and whether his
3 review was thoughtful or haphazard,
4
5 Similarly, because Mr. Johnson was not
6 , it is irrelevant whether his supervisor, Mr. Allen, was available
7 for questions or follow-up, because nothing in Universal's review procedure suggested to Mr.
8 Johnson that he follow up with Mr. Allen about

9 **3. Universal *knew* that it did not**

10 Universal knew full well that it did not It knew
11 this because the improper procedure for taking down Ms. Lenz's Video was no anomaly. Rather,
12 it was entirely in keeping with Universal's normal practice. No one at Universal—from the
13 employee identifying targets for takedown, to the attorney who sent the notice demanding
14 takedown, to the attorney who supervised the entire operation—bothered to
15 prior to sending a takedown notice.

16 Universal's explicit policy is to .
17
18 Exh. Q (Allen Depo.) at 61:1-4; Universal's MSJ at 7 ("to decide
19 whether to include a posting [in a takedown notice], Johnson considered whether it embodied a
20 Prince composition to such a degree that the composition was the focal point of the posting." i.e.,
21 whether "the song was recognizable, was in a significant portion of the video, or was the focus of
22 the video.").

23 In keeping with this policy, the only videos Mr. Johnson would not target for takedown
24 were those that
25
26
27 Exh. R (Johnson Depo.) at 62:4-63:15. He
28 gave no consideration to

1 [REDACTED] *See id.* at 63:16-17. Nor did he consider whether [REDACTED]
2 [REDACTED] *See id.*
3 In sum, Universal was, and knew that it was, interested in only [REDACTED]
4 [REDACTED]
5 [REDACTED] much less Ms. Lenz's
6 Video.

7 **B. Universal's statement that it had a good faith belief that Ms. Lenz's Video**
8 **was not authorized by law was a knowing and material misrepresentation.**

9 Section 512(f) imposes liability on "[a]ny person who knowingly materially misrepresents
10 under this section [(i.e., under Section 512)] (1) that material or activity is infringing." 17 U.S.C.
11 § 512(f). Section 512(c)(3)(A) sets forth five requirements for making a claim that material or
12 activity infringes copyright. The fifth enumerated requirement is a statement that the complainant
13 "has a good faith belief that use of the material in the manner complained of is not authorized by
14 the copyright owner, its agent, or the law." *Id.* § 512(c)(3)(A)(v). The statute refers to a notice
15 satisfying the five requirements as a "notification of claimed infringement." *Id.* § 512(c)(3)(A).

16 Universal included just such a statement in its notice of claimed infringement, stating that
17 "[w]e [i.e. Universal] have a good faith belief that the above-described activity is not authorized
18 by the copyright owner, its agent, *or the law*." Exh. P (Depo. Exh. 70) at UMC-0000625
19 (emphasis added). But although Universal claims to have considered at least whether videos were
20 authorized under the law by virtue of the Copyright Act's compulsory licensing scheme,
21 Universal did *not* consider whether [REDACTED]
22 [REDACTED], and Universal *knew* it did not consider [REDACTED]. Universal's statement in
23 its notice of claimed infringement that it had formed the good faith belief required under Section
24 512 was, therefore, a misrepresentation, and a knowing one.

25 Finally, Universal's knowing misrepresentation was *material,* because as a result of
26 Universal's email, YouTube disabled access to Ms. Lenz's Video for over six weeks. Exh. V
27 (Hubbard Aff. ¶ 11); Lenz Decl. ¶ 8. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195,
28 1204 (N.D. Cal. 2004) ("'Material' means that the misrepresentation affected the ISP's response

to a DMCA letter.").

C. The undisputed facts show that Universal had all the information it needed to recognize that Ms. Lenz's use was fair.

Moreover, Universal could not, from the facts readily available to it when watching the Video, have concluded in good faith that Ms. Lenz's Video is not a fair use.[12] Thus, even supposing Universal *had* considered [REDACTED] it could not have formed a good faith belief that Ms. Lenz's use was not authorized by law.

a. Factor One: Purpose and character of the use.

The "central purpose" of the analysis of this factor is "to see . . . whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579 (internal citation and quotation marks omitted). Ms. Lenz's transformative, noncommercial purpose is apparent from the Video itself. The Video displays on its face all the classic indicia of a family home movie: Like many such videos, it is blurry and somewhat shaky, with poor sound quality. It adds something "new" and different to the composition: principally, the activity of a small child in what is (and appears to be) a casual family setting. *See* Exh. A. It is apparent, merely from watching it, that the Video transforms the fraction of "Let's Go Crazy" it uses from an ordinary musical composition into nothing more or less than the background setting for a brief moment in the everyday chaos of a family life with young children. Simply put, the Video looks and sounds exactly like the personal, noncommercial home movie that it is, and Universal has never once claimed that it actually believed otherwise. *See* Exh. M at 7:3-8:2 (resp. to Interrog. No. 3); Exh. AA at 9:25-10:18 (resp.

[12] Universal argues that it could not have known certain details about Ms. Lenz's creation and posting of her Video when it reviewed the Video in 2007. Universal's MSJ at 10. That is true, as far as it goes—which is nowhere. It does not matter whether there were additional facts behind the Video that Universal did not know; the point is that—whatever Universal knew or did not know—it never thought about whether [REDACTED] and therefore could not and did not form a good faith belief that the Video was not authorized by law.

to RFA No. 8).

Against the undisputable facts apparent from the Video itself, Universal claims that it considered two things. First, it contends that "the use in question" is "not making a home video," but "incorporating the copyrighted work in a posting to YouTube," and then says it determined that Ms. Lenz's Video was posted in a "commercial setting"—i.e. that YouTube is operated by a commercial entity. Universal's MSJ at 4:19-20 (emphasis omitted), 18:3-6. But Universal's notice accused *Ms. Lenz* of infringement, and thus it is *her* use that matters, not YouTube's. "The crux of the profit/non-profit distinction is . . . whether *the user* stands to profit from exploitation of the copyrighted material without paying the customary price." *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998) (emphasis added) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)). Universal has never attempted to suggest that it actually thought *Ms. Lenz* had any commercial purpose in creating the Video or posting it to YouTube,[13] *see* Exh. M at 7:3-8:2 (resp. to Interrog. No. 3); Exh. AA at 9:25-10:18 (resp. to RFA No. 8), and does not do so now.

Second, Universal claims that by considering whether the composition was a focus of the Video, it considered the first factor. But even assuming that "Let's Go Crazy" can be seen as the "focus" of Ms. Lenz's Video,[14] Universal could not in good faith have believed, based on that reason alone, that the purpose and character of the Video was anything other than transformative. The camera follows a toddler as he makes his way around a corner and then bobs up and down,

[13] Universal points to the fact that "even videos of cute children playing in domestic settings sometimes appear . . . with explicit advertising appearing alongside the posting," Universal's MSJ at 4:25-26, but never claims that it saw any advertisements next to Ms. Lenz's Video. That is because there were no advertisements on the YouTube page where Ms. Lenz's Video appears at the time of Universal's review—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 11, 2009), available at http://www.cbsnews.com/stories/2007/08/22/tech/main3193384.shtml (last visited August 21, 2012). Nor are any there now. (http://www.youtube.com/watch?v=N1KfJHFWlhQ).

[14] Ms. Lenz does not agree that the "Let's Go Crazy" composition was the focus of her Video or even could reasonably have been perceived as such. But because, for the reasons explained herein, neither the first fair use factor nor the ultimate question of fair use turns on this question, *e.g.*, *Mattel*, 353 F.3d at 803-04 n.8 (purpose of even "entire verbatim reproductions" can differ from the purpose of the original), this dispute is not a dispute of material fact.

1 keeping him in the center of the frame at all times other than a brief gesture capturing the face of
2 another child dashing past. The only words spoken during the entire Video ask the dancing boy
3 what he "thinks of the music." The portions of the composition audible during the Video are
4 muffled and distorted by background noise. Universal simply could not have believed in good
5 faith that the purpose of the Video was similar to Prince's original purpose in creating the
6 composition used. The Video itself evinces only an intent to capture the response that
7 composition helped inspire in the child.

8 **b. Factor Two: Nature of the copyrighted work.**

9 Universal does not assert that it actually considered this factor, but simply observes that
10 Prince's music is a "core work of artistic expression." Ms. Lenz has never claimed that it is not.
11 But there is no question that the original work was published many years ago, which means that
12 Ms. Lenz's use did not compromise Prince's right to control the first appearance of his work.
13 Thus, this factor therefore should carry little weight, if any. *Harper & Row*, 431 U.S. at 564
14 (noting that the scope of fair use is narrower with respect to unpublished works because the
15 author's right to control the first public appearance of his work weighs against the use of his work
16 before its release.); *see also Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y.
17 2008) (wide publication of John Lennon's song "Imagine" weighed in favor of fair use). Given
18 that it administers the copyrights to "Let's Go Crazy," Universal knew this was so—or would
19 have if it had thought about it. Moreover, this factor is "not . . . terribly significant in the overall
20 fair use analysis" where, as here, the use is transformative. *Mattel,* 353 F.3d at 803.

21 **c. Factor Three: Amount and substantiality of the portion used.**

22 Universal claims to have met its obligation to consider this factor by doing two things:
23 (1) observing that the composition played throughout the Video, and (2) noting that the song was
24 immediately recognizable. Universal's MSJ at 19-20. With respect to the first observation,
25 Universal's purported consideration of this factor is misdirected. Universal improperly focuses
26 only on how much of Ms. Lenz's Video was made while "Let's Go Crazy" was playing, paying
27 no attention to how much of the composition plays in the Video. But the third factor actually asks
28 whether "the amount and substantiality of the portion used *in relation to the copyrighted work as*

a whole . . ." are reasonable in relation to the purpose of the copying. 17 U.S.C. § 107(3) (emphasis added). Thus, the question does not turn on how much of the secondary work incorporates the original work, but rather on how much of the original work was used, and whether that amount was more than what was necessary to accomplish the second user's purpose. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21 (9th Cir. 2002).

Harper & Row, which Universal cites, is not to the contrary. Universal presumably relies on *Harper & Row*'s recognition that whether a "substantial portion of the infringing work was copied verbatim" from the original, 471 U.S. at 565, is a relevant question to a fair use inquiry. That question is relevant because it may provide "evidence of the qualitative value of the copied material," *id.*, or, as the Supreme Court explained in its later decision in *Campbell*, "reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth," 510 U.S. at 587. Here, though, there is no dispute that "Let's Go Crazy" has qualitative value,[15] and the fact that "Let's Go Crazy" played "throughout" Ms. Lenz's Video could not cause anyone as familiar with copyright law as Universal to question the transformative purpose of her use (discussed above) or the lack of market harm (discussed below).

In this case, the entire Video is less than 30 seconds long. *See* Exh. A. In fact, due to the noise and commotion made by the children, the song "Let's Go Crazy" can only be *heard* in the background for approximately 20 seconds of the 29-second Video and even then not particularly clearly. *See id.* Thus the amount used was also minimal—less than ten percent of the original work. Exh. AA at 12:1-9 (resp. to RFA No. 12). And Universal cannot dispute that Ms. Lenz used no more than necessary to fulfill her purpose: capturing her newly-walking son "dancing" to music in her kitchen. "If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her." *Kelly*, 336 F.3d at 820-21.

[15] Universal does not claim in its motion that the particular segment of "Let's Go Crazy" appearing in Ms. Lenz's Video has any more value than any other part of the work.

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d. Factor Four: Effect of the use on the market for the copyrighted work.

Universal claims "widespread" uses such as Ms. Lenz's use would harm the market, whether actual or potential, for synchronization of Prince's works. But for a derivative work such as Ms. Lenz's, "the only harm to derivatives that need concern us . . . is the harm of market substitution." *Campbell*, 510 U.S. at 593.

Ms. Lenz's video is noncommercial and makes a transformative use of Prince's composition; therefore, market harm cannot be presumed and is in fact unlikely. *Campbell*, 510 U.S. at 591 ("No 'presumption' or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes."); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003) ("The more transformative the new work, the less likely the new work's use of copyrighted materials will affect the market for the materials.").

Use of "Let's Go Crazy" as incidental background music in home videos—even those posted on YouTube, and even if "unrestricted" and "widespread"—could not possibly create the harm of market substitution relevant to this factor for any *actual* market for Prince's work. There is no actual market for uses like Ms. Lenz's and Universal knew that there was no such market when it sent its takedown notice. Kwun Decl., Exh. EE (Allen Depo.) at 150:4-151:5. As for the actual markets that *do* exist for the composition, no one who might otherwise have purchased or licensed "Let's Go Crazy" for any purpose would elect not to do so because he or she could instead use the fuzzy snippets of the composition available through such videos. In *Kramer v. Thomas*, No. CV 05-8381 AG (CTx), 2006 WL 4729242 (C.D. Cal. Sept. 28, 2006), for example, the court found that there was no market harm where a composition was embedded in a DVD collection documenting the career of the composer and specifically rejected the plaintiff's "unrestricted and wide-spread" use theory:

> [N]obody who wanted to listen to the compositions would choose to do so by paying $65 for a 12-hour 3-DVD set in which sonically limited portions of the compositions are anonymously nested in less than 1% of the work. . . . Unrestricted and wide-spread collection of these DVD's would not result in a substantially adverse impact on the potential market for the original composition.

Id. at *11. *See also Sandoval v. New Line Cinema*, 973 F. Supp. 409, 414 (S.D.N.Y. 1997) (brief

use of photograph in movie set did not affect market: "defendants fleeting and obscured use of the Photographs as part of the background to a movie scene cannot be considered a substitute for the Photographs by any stretch of the imagination . . . [e]ven widespread uses of [the photographs] in such a fleeting, obscured and out of focus manner could not begin to encroach on the potential market for his work").

Universal argues that "unrestricted and widespread" use like Ms. Lenz's would harm the "*potential* market for the synchronization of 'Let's Go Crazy.'" Universal's MSJ at 20 (emphasis added). There is no potential licensing market for uses like Ms. Lenz's, and Universal knew that, too, when it sent its takedown notice. [REDACTED] Kwun Decl, Exh. EE (Allen Depo.) at 157:23-159:3 & 165:16-166:16; Exh. FF (Depo. Ex. 79). Universal makes much of the fact that Prince has the right to refuse to grant synchronization licenses for his works, but that is not the point. The question is not whether Prince has a right to refuse to grant synch licenses—of course he does. The question is whether there is a "traditional, reasonable or likely to be developed market" in licensing songs to parents who make short home videos of scenes in which those songs figure in the background (whether posted on YouTube or not). 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4] (2005); *Ringgold,* 126 F.3d at 82.

If there is no conceivable market in the first place, there is no market to be harmed. That is why court after court has rejected similar attempts to manufacture market harm where there was no *likely* market for the challenged use of the copyrighted works. *See Mattel*, 353 F.3d at 806 ("Forsythe's work could only reasonably substitute for a work in the market for adult-oriented artistic photographs of Barbie. We think it safe to assume that Mattel will not enter such a market or license others to do so."); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996) ("Only 'traditional, reasonable, or likely to be developed markets' are to be considered in this connection, and even the availability of an existing system for collecting licensing fees will not be conclusive." (citation omitted)); *see also Castle Rock*

Enter., Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 145 (2d Cir. 1998) (copyright owners may not preempt exploitation of transformative markets, which they would not "in general develop or license others to develop," by actually developing or licensing others to develop those markets (citation omitted)); *Kane v. Comedy Partners*, No. 00 Civ. 158 (GBD), 2003 WL 22383387, at *7 (S.D.N.Y. Oct. 16, 2003) (to avoid danger of circularity, copyright owner not entitled to license fees for uses that otherwise qualify as fair uses); *Nimmer on Copyright* § 13.05[A][4] ("it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar").

Salinger v. Random House, Inc., 811 F. 2d 90 (2d Cir. 1987) does not support Universal's position. First, unlike Universal's entirely hypothetical and highly unlikely home video licensing market, the market at issue in that case was a traditional potential market—the market for reclusive author J.D. Salinger's unpublished letters. Second, the court's analysis turned, as it should, on the potential for market substitution. Although it stated that the biography would not *displace* the market for the letters, the court found that the book might partially substitute for them:

> [S]ome readers of the book will gain the impression that they are learning from Hamilton what Salinger has written. Hamilton frequently laces his paraphrasing with phrases such as "he wrote" . . . . For at least some appreciable number of persons, these phrases will convey the impression that they have read Salinger's words, perhaps not quoted verbatim, but paraphrased so closely as *to diminish interest in purchasing the originals*.

Id. at 99 (emphasis added and footnote omitted). In other words, the court was concerned about whether the secondary use would reveal crucial information such that readers might not purchase the originals, i.e., that the secondary might at least partially substitute for the originals. Here, though, even indulging the supposition that there might be a home video licensing market to be exploited, Ms. Lenz's use would not substitute for the original composition in that market: no parent who wanted to use "Let's Go Crazy" in a home video would choose to use the blurry approximately 20 seconds audible in Ms. Lenz's video rather than the composition itself.

D. Universal cannot avoid liability by claiming that it could not be *certain* that the Video was a fair use.

The fact that Universal did not know *all* the facts and circumstances surrounding Ms.

Lenz's video at the time it reviewed it does not mean that it was free to ignore the question of whether or not, given the facts it *did* know, Ms. Lenz's video fell under the legal rubric of fair use. A notice of claimed infringement under Section 512 *requires a statement of an affirmative good faith belief that a use is not authorized by law.* Universal did not merely represent that it could not be certain that Ms. Lenz's use was authorized by law. Nor did Universal state only that Ms. Lenz's use *might* not be authorized by law. Universal represented—falsely—that it *had* a good faith belief that Ms. Lenz's use *was not* authorized by law.

E. Universal's attempt to point the finger elsewhere is unavailing.

The Court should give short shrift to Universal's effort to divert attention from the undisputed facts to the subjective mental state of anyone but Universal.[16] For example, Universal points to a comment Ms. Lenz made on her blog on June 12, 2007, stating that her case is "not a 'fair use' case at all. . . . It's something different." Universal's MSJ at 11. Ms. Lenz's case *is* something different. While fair use is certainly an important issue in this case, Ms. Lenz's cause of action is asserted under 17 U.S.C. § 512(f), based on Universal's misrepresentation in its takedown notice. The core question is whether *Universal* made a knowing misrepresentation that it believed in good faith that Ms. Lenz's video was infringing. Thus, while what Ms. Lenz said is correct, it also has nothing to do with her allegations.[17]

Similarly, Ms. Lenz's beliefs about what "anyone," "somebody," or even a "reasonable person" might think about her video are irrelevant.[18] *Cf.* Universal's MSJ at 12. This case is not about what "anybody" might think upon viewing Ms. Lenz's video. It's about what *Universal* thought when it saw her video. Unlike "somebody," Universal is a multi-million dollar music industry giant, with lawyers on staff who are well-versed in copyright law, including the fair use doctrine—although the evidence shows that those people did not work in the "takedown" department. Whether "anyone" would think the Video was a fair use, whether "somebody" could

[16] Ms. Lenz has objected in Section III, *supra*, to the evidence Universal uses for this purpose.

[17] In any event, Ms. Lenz has testified that she believes her Video was and is a fair use. Kwun Decl., Exh. CC (Lenz Depo.) at 75:6-9; *see also id.* at 75:10-17, 271:1-11.

[18] Ms. Lenz has objected to the evidence Universal uses for this purpose as well.

have thought it wasn't a fair use, and whether "reasonable people" could disagree on this point—and certainly what Ms. Lenz's view is on those questions—simply have no relevance at this juncture.

Finally, a vanilla statement that a layperson discussed an allegation of infringement with a lawyer and concluded that the allegation was false, [19] *cf.* Universal's MSJ 16-17, hardly shows that the conclusion was difficult to reach.

Universal itself insists that the question is not what the EFF or Plaintiff or even this Court thought, but what Universal thought. Universal's MSJ at 19:11-13. Only Universal's own statements can possibly "end the matter." As it happens, they do—but in Ms. Lenz's favor.

F. Ms. Lenz was damaged by Universal's misrepresentation.

Ms. Lenz seeks to recover for loss of access to YouTube, the time and resources she has expended in restoring access to her video, and the time spent by her attorneys helping her respond to Universal's takedown. With respect to the latter, Ms. Lenz seeks compensation in the amount of $1,275. *See* Hofmann Decl. (Dkt. 393) ¶¶ 1-7; *see also* Exh. O (2/25/2010 Order Granting Partial Summary Judgment) at 15:26-16:1 ("any fees incurred for work in responding to the takedown notice and prior to the institution of suit under § 512(f) are recoverable under that provision"). Ms. Lenz seeks total damages in the amount of $1,337.50, plus nominal damages for the harm to her speech rights and her expenditure of personal resources in connection with ensuring restoration of the Video on YouTube.

The entire basis for Universal's challenge to Ms. Lenz's damages claim is that it disagrees with the Court's holding that that Ms. Lenz need not prove economic loss. Exh. O (2/25/2010 Order Granting Partial Summary Judgment) at 14:8-11. ("Requiring a [successful 512(f) plaintiff] to demonstrate in addition not only that she suffered damages but also that those damages were economic and substantial would vitiate the deterrent" effect of 512(f)). That is an issue for appeal, if necessary. Having been raised, thoroughly briefed and decided, the issue need not be re-litigated now.

[19] Ms. Lenz has also objected to the evidence Universal uses for this purpose.

1 With respect to the loss of access to YouTube, there is no disagreement that Ms. Lenz's
2 Video was unavailable on YouTube for many weeks as a result of Universal's takedown notice.
3 Lenz Decl. ¶ 10; Exh. AA at 9:1-24 (Universal's Resp. to RFAs Nos. 6 and 7). Ms. Lenz's sense
4 of freedom to express herself and enjoyment in doing so, including expressing herself by making
5 home videos, making particular kinds of videos as opposed to other kinds, and sharing home
6 videos with her friends and family, was diminished as a result of Universal's acts. Lenz Decl.
7 ¶ 10. As with other kinds of speech harms, however, these losses are difficult to translate into
8 economic numbers, which is why Ms. Lenz seeks only an award of nominal damages for these
9 harms. *See Phelps-Roper v. City of Manchester, Mo.*, 738 F. Supp. 2d 947, 960 (E.D. Mo. 2010)
10 *aff'd Phelps-Roper v. City of Manchester,* 658 F.3d 813 (8th Cir. 2011) (awarding nominal
11 damages of $1 for violations of free speech rights). As for Ms. Lenz's statement that if YouTube
12 didn't *want* to host her Video, that was YouTube's business, Universal's MSJ at 24, nothing in
13 that statement refers to (much less relinquishes) any claim against *Universal* for invoking a
14 procedure designed to *compel* YouTube not to do so upon penalty of legal liability.
15 Neither can Universal credibly disagree that Ms. Lenz was forced to expend time and
16 resources to get the Video restored. She spent at least ten hours before filing this lawsuit on tasks
17 such as obtaining counsel, determining how to send a counternotice, sending the counternotice,
18 sending a revised counternotice after Universal objected to the first counternotice, and ensuring
19 that access to the Video had been restored. Lenz Decl. ¶ 9. Not only has Ms. Lenz so testified,
20 but her time is documented, in part, by the contemporaneous emails Ms. Lenz exchanged with
21 YouTube. Exh. K (Depo. Ex. 11); Exh. V (Hubbard Aff., Exh. G); Exh. G (Depo. Exh. 9). Ms.
22 Lenz does not claim to have lost any wages (she was a fulltime homemaker when the takedown
23 occurred, and therefore not receiving monetary compensation). However, the fact that Ms. Lenz
24 is not paid money for her time does not mean it is without value, which should surely be
25 equivalent to at least the Pennsylvania minimum wage at the time ($6.25/hour). 34 Pa. Code §
26 231.101(2). Ms. Lenz therefore claims an amount of $62.50 for her time prior to filing this
27 lawsuit. Ms. Lenz also expended resources on her pre-lawsuit efforts, including the use of her
28 computer, Lenz Decl. ¶ 9, but seeks only nominal damages for her pre-lawsuit expenditure of

these resources.

Grasping at straws, Universal finally contends that Ms. Lenz had no contingent obligation to her counsel for pre-litigation activity. But that contention is belied by Universal's own "evidence." Universal points to the "litigation fees" section of the retainer agreement between Ms. Lenz and EFF, and insists that it means that Ms. Lenz only incurs a contingent obligation to "pay her lawyers for their work *on this litigation*." Universal's MSJ at 24 (emphasis in original).[20] But in the very next sentence, the retainer agreement states that "if no amount or an inadequate amount of fees and expenses are recovered, you also assign to the Attorneys all right, title, and interest you may have to the recovery of any monetary damages by way of any legal claim.... up to and including the full amount of fees (pursuant to the hourly rates below) and expenses incurred by the Attorneys that are not fully reimbursed from other sources." Klaus Decl. (Dkt. 400), Exh. 34 (Depo. Ex. 23) at 3. In other words, Ms. Lenz has a non-contingent obligation to assign *any* recovery to EFF—including the damages this Court has recognized as such: attorney work undertaken prior to the institution of the lawsuit. Exh. O (2/25/2010 Order Granting Partial Summary Judgment) at 15:26-16:1. Had Ms. Lenz recovered any money without having to resort to this lawsuit, she would have had to give that money to EFF.

V. CONCLUSION

For the foregoing reasons, the Court should deny Universal's motion for summary judgment, and grant Ms. Lenz's motion for summary judgment.

Dated: August 24, 2012

KEKER & VAN NEST LLP

By: */s/ Michael S. Kwun*
MICHAEL S. KWUN

Attorneys for Plaintiff
STEPHANIE LENZ

[20] Not surprisingly, Universal agrees with the portion of the court's order finding that litigation fees do not qualify as damages for purposes of Section 512(f). Exh. O (2/25/2010 Order Granting Partial Summary Judgment) 15:26-16:1. Ms. Lenz respectfully disagrees with the Court's determination of this question and reserves all rights to raise the question on appeal.