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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STEPHANIE LENZ, Plaintiff, v. UNIVERSAL MUSIC CORP., UNIVERSAL MUSIC PUBLISHING, INC., and UNIVERSAL MUSIC PUBLISHING GROUP, Defendants.	Case Number C 07-3783 JF ORDER DENYING MOTION TO DISMISS [re: docket no. 38]

Defendants Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively, "Universal") move to dismiss the instant case for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). The Court has read the moving papers and has considered the oral arguments of counsel. For the reasons set forth below, the motion will be DENIED.

I. BACKGROUND

On February 7, 2007, Plaintiff Stephanie Lenz ("Lenz") videotaped her young children dancing in her family's kitchen. The song "Let's Go Crazy" by the artist professionally known as Prince ("Prince") played in the background. The video is twenty-nine seconds in length, and

"Let's Go Crazy" can be heard for approximately twenty seconds, albeit with difficulty given the poor sound quality of the video. The audible portion of the song includes the lyrics, "C'mon baby let's get nuts" and the song's distinctive guitar solo. Lenz is heard asking her son, "what do you think of the music?" On February 8, 2007, Lenz titled the video "Let's Go Crazy #1" and uploaded it to YouTube.com ("YouTube"), a popular Internet video hosting site, for the alleged purpose of sharing her son's dancing with friends and family.[1] YouTube provides "video sharing" or "user generated content." The video was available to the public at http://www.youtube.com/watch?v=N1KfJHFW1hQ.

Universal owns the copyright to "Let's Go Crazy." On June 4, 2007, Universal sent YouTube a takedown notice pursuant to Title II of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512 (2000). The notice was sent to YouTube's designated address for receiving DMCA notices, "copyright@youtube.com," and demanded that YouTube remove Lenz's video from the site because of a copyright violation. YouTube removed the video the following day and sent Lenz an email notifying her that it had done so in response to Universal's accusation of copyright infringement. YouTube's email also advised Lenz of the DMCA's counter-notification procedures and warned her that any repeated incidents of copyright infringement could lead to the deletion of her account and all of her videos. After conducting research and consulting counsel, Lenz sent YouTube a DMCA counter-notification pursuant to 17 U.S.C. § 512(g) on June 27, 2007. Lenz asserted that her video constituted fair use of "Let's Go Crazy" and thus did not infringe Universal's copyrights. Lenz demanded that the video be re-posted. YouTube re-posted the video on its website about six weeks later. As of the date of this order, the "Let's Go Crazy #1" video has been viewed on YouTube more than 593,000 times.

In September 2007, Prince spoke publicly about his efforts "to reclaim his art on the internet" and threatened to sue several internet service providers for alleged infringement of his

[1] Lenz has posted other home videos on YouTube, allegedly for the same purpose. These additional videos are not at issue in this action.

music copyrights.[2] Lenz alleges that Universal issued the removal notice only to appease Prince because Prince "is notorious for his efforts to control all uses of his material on and off the Internet." Lenz's Opposition Brief at 3. In an October 2007 statement to ABC News, Universal made the following comment:

> Prince believes it is wrong for YouTube, or any other user-generated site, to 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 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 YouTube to remove thousands of different videos that use Prince music without his permission. [3]

Second Amended Complaint ("SAC"), ¶ 30; *see also* J. Aliva et al., *The Home Video Prince Doesn't Want You to See*, ABC NEWS, Oct. 26, 2007, http://abcnews.go.com/print?id+3777651 (last viewed July 23, 2008). Lenz asserts in her complaint that "Prince himself demanded that Universal seek the removal of the ["Let's Go Crazy #1"] video . . . [and that] Universal sent the DMCA 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 on its belief that, as 'a matter of principle' Prince 'has the right to have his music removed.'" SAC ¶ 31.

On July 24, 2007, Lenz filed suit against Universal alleging misrepresentation pursuant to 17 U.S.C. § 512(f) and tortious interference with her contract with YouTube. She also sought a declaratory judgment of non-infringement. Universal filed a motion to dismiss, which the Court granted on April 8, 2008. Lenz was given leave to amend her complaint to replead her first and second claims for relief. On April 18, 2008, Lenz filed the operative SAC, alleging only a claim for misrepresentation pursuant to 17 U.S.C. § 512(f). On May 23, 2008, Universal filed the instant motion.

II. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a

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[2] *See, e.g.,* M. Collett-White, *Prince to Sue YouTube, eBay Over Music Use*, REUTERS, Sept. 13, 2007, http://www.reuters.com/article/internetNew/idUSL1364328420070914?feedtype=RSS&feedName_InternetNews&rpc=22&sp=true (last visited July 23, 2008).

[3] Lenz has dubbed this alleged pattern of activity the "Prince Policy."

cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir. 2008). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted).

III. DISCUSSION

The DMCA requires that copyright owners provide the following information in a takedown notice:

> (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
>
> (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
>
> (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
>
> (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
>
> (v) *A statement that the complaining party has a 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.*
>
> (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

17 U.S.C. § 512(c)(3)(A) (emphasis added). Here, the parties do not dispute that Lenz used copyrighted material in her video or that Universal is the true owner of Prince's copyrighted music. Thus 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 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."

Universal contends that copyright owners cannot be required to evaluate the question of fair use prior to sending a takedown notice because fair use is merely an *excused* infringement of a copyright rather than a use *authorized* by the copyright owner or by law. Universal emphasizes that Section 512(c)(3)(A) does not even mention fair use, let alone require a good faith belief that a given use of copyrighted material is not fair use. Universal also contends that even if a copyright owner were required by the DMCA to evaluate fair use with respect to allegedly infringing material, any such duty would arise only *after* a copyright owner receives a counter-notice and considers filing suit. *See* 17 U.S.C. § 512(g)(2)(C).

Lenz argues that fair use *is* an authorized use of copyrighted material, noting that the fair use doctrine itself is an express component of copyright law. Indeed, Section 107 of the Copyright Act of 1976 provides that "[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107. Lenz asserts in essence that copyright owners cannot represent in good faith that material infringes a copyright without considering all authorized uses of the material, including fair use.

Whether fair use qualifies as a use "authorized by law" in connection with a takedown notice pursuant to the DMCA appears to be an issue of first impression. Though it has been discussed in several other actions, no published case actually has adjudicated the merits of the issue. *See, e.g.*, *Doe v. Geller*, 533 F. Supp. 2d 996, 1001 (N.D. Cal. 2008) (granting motion to dismiss for lack of personal jurisdiction).

A. Fair Use and 17 U.S.C. § 512(c)(3)(A)(v).

When interpreting a statute, a court must begin "with the language of the statute and ask whether Congress has spoken on the subject before [it]." *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991). If "Congress has made its intent clear, [the court] must give effect to that intent." *Miller v. French*, 530 U.S. 327, 336 (2000) (internal quotation marks and citation omitted). Here, the Court concludes that the plain meaning of "authorized by law" is unambiguous. An activity or behavior "authorized by law" is one permitted by law or not contrary to law. Though Congress did not expressly mention the fair use doctrine in the DMCA, the Copyright Act provides explicitly that "the fair use of a copyrighted

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