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8
9
10 Attorneys for Plaintiff
STEPHANIE LENZ

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14 STEPHANIE LENZ,

15)
16) Plaintiff,

17 v.

18 UNIVERSAL MUSIC CORP., UNIVERSAL
19 MUSIC PUBLISHING, INC.,

20 and

21 UNIVERSAL MUSIC PUBLISHING GROUP,

22)
23) Defendants.
24)
25)
26)
27)
28)

No. C 07-03783-JF

DECLARATION OF CORYNNE
MCSHERRY IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO MOTION
TO DISMISS AND SPECIAL MOTION TO
STRIKE

DATE: December 7, 2007

TIME: 9:00 a.m.

CTRM: 3 (Hon. Jeremy Fogel)

I, Corynne McSherry, declare as follows:

1. I am an attorney at law duly admitted to practice before this Court. I am a staff attorney at the Electronic Frontier Foundation, counsel of record for Plaintiff Stephanie Lenz. I submit this declaration in support of the attached Opposition to Defendants' Motion to Dismiss and

1 where otherwise stated. If called upon to testify thereto I could and would competently do so.

2 2. On November 12, 2007, I accessed the YouTube website and reviewed records
3 available there, (specifically located at
4 http://www.youtube.com/comment_servlet?all_comments&v=N1KfJHFWlhQ&fromurl=/watch%3Fv%3DN1KfJHFWlhQ) of the earliest comments posted to that website site regarding the Holden
5 Video, in chronological order. According to those records, only one comment was posted to the
6 site prior to July 2007. Attached hereto as Exhibit A is a true and correct copy of the first two
7 pages from that site, showing the oldest comments made regarding the video.
8

9 3. On November 12, 2007, I accessed the TechSmith.com website and reviewed their
10 plans for media hosting services and the bandwidth associated with transferring media files, which
11 range from \$6.95 to \$24.95 per month. A true and correct copy of the pages outlining the costs of
12 these plans, located at <http://www.techsmith.com/purchase/default.asp> is attached hereto as Exhibit
13 B.

14 4. On November 12, 2007, I accessed the Videohost.com website and reviewed their
15 plans for media hosting services and the bandwidth associated with transferring media files, which
16 are priced at \$39.00 per month. A true and correct copy of the webpage outlining VideoHost's
17 minimum prices, located at <https://www.videohost.com/pages/pricing.html>, is attached hereto as
18 Exhibit C.

19 5. On November 12, 2007, I accessed the Streamhoster.com website and reviewed their
20 plans for similar service, which are priced at \$15.00 and \$25.00 per month. A true and correct
21 copy of the webpage describing Stream Hosters' prices, located at <http://streamhoster.com>, is
22 attached hereto as Exhibit D.

23 6. On November 7, 2008, I access the ABC News Website and printed out a copy of a
24 news article concerning the instant case. A true and correct copy of that article is attached hereto
25 as Exhibit E.

26
27 //

1 I declare under penalty of perjury that the foregoing is true and correct and that this
2 document was executed in San Francisco, California.

3
4 DATED: November 13, 2007

5 By _____ /s/
6 Corynne McSherry

EXHIBIT A

Videos

Categories

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"Let's Go Crazy" #1

00:29

Added: 9 months ago

From: [edenza](#)

Views: 371,378

All Comments (780 total)

[Post a new comment](#)

Show: average (-5 or better) [Help](#)

Pages: [1](#) [2](#) ... [Newest](#)

[Next](#)

[pekahia](#) (5 months ago)

+1

[\(Reply\)](#)

lol

[kaptinkle](#) (3 months ago)

0

[\(Reply\)](#)

Dont buy Universal music products kids!

[christofu88](#) (3 months ago)

+1

[\(Reply\)](#)

319 views... something tells me this ones about to get famous lol

[shurekosta](#) (3 months ago) [Show](#)

-10

[kevinphoenix2007](#) (3 months ago)

+4

[\(Reply\)](#)

Why don't you grow up and stop pointlessly bashing these people? It's nice, it's cute. And so what if edenza posts this? It's her right. That's what YouTube is for. Stop being a prick about it.

[kaptinkle](#) (3 months ago)

-4

[\(Reply\)](#)

prince is a talentless homo :)

[Ramrod65897](#) (3 months ago)

+2

[\(Reply\)](#)

Whether Prince is talented or not is a matter of opinion. Using the word homo is derogatory and homophobic. I thought we'd got past all that shit.

[kaptinkle](#) (3 months ago)

-2

[\(Reply\)](#)

hehehe u said homo .. seriously I cant argue on this level without getting stupid. its all just ridiculous, thus my ridiculous comments. Its simply insane. I'm pointing my fingers from my forehead and making silly noises right now.

[16309470](#) (3 months ago)

+1

[\(Reply\)](#)

haha i hate prince but fight the power i cant believe they wuld whinge about this, the music is barely audible and its just a cute kid havin fun. shurekosta man or lady or whatever you are, other than a prick, lighten up.

[littleboybrandon](#) (3 months ago)

0

[\(Reply\)](#)

there is nothing wrong with this video. Universal Music is acting "crazy" about their music being aired. It is just in the background. Maybe they will sue us if we ever sing their songs in the "bathroom". What if I will fart to the tune of their copyrighted music, hmmm I am wondering what Universal would do.

[newcastlemusic](#) (3 months ago)

+2

(Reply)

What's next ... General Motors suing because the kid's name is Holden?

[ozhog](#) (3 months ago)

+2

(Reply)

Hey , never thought of that one, hold on while I ring the lawyers.

[apfelpie](#) (3 months ago)

+1

(Reply)

Kudos for putting this one back up!

[ozhog](#) (3 months ago)

+2

(Reply)

When I first heard it it was just background music the kid was bopping to, now I've heard it a few times I recognise what it is, TOTAL CRAP. (the music, not the video)

[AFAWCETT16770](#) (3 months ago)

+3

(Reply)

How come Prince's heavies are so precious when he gave his latest CD to people for free in a newspaper? Good on you guys for posting a family video...the music isn't even that easy to hear.

[scottylvans](#) (3 months ago)

+1

(Reply)

Why are you stealing this music from poor companies and musicians like Universal Music and Prince, you are a thief and there needs to be justice, please for the sake of your children and the freedom of America if not the world, take down the video and apologise to the world before it's too late.

[ProlongedSunlight](#) (3 months ago)

0

(Reply)

Ha ha ha ha.

[Dirk0333](#) (3 months ago)

-2

(Reply)

Strange people, Americans!

[serverfest](#) (3 months ago)

+2

(Reply)

They don't have sarcasm in the Netherlands? :D

[Dirk0333](#) (3 months ago)

0

(Reply)

Yes, of course we have sarcasm here. But, hypocrite like nipplegate... no not in the Neteherlands. So many examples of issues in America what I think the American people over react on. I suprires me everytime again.

[meatpopsic1e](#) (3 months ago)

0

(Reply)

Ford FTW

[Intervene](#) (3 months ago)

+2

(Reply)

Universal can go get stuffed.

[grendelmum](#) (3 months ago)

+2

EXHIBIT B



Language: **English** Deutsch Français 한국어 日本語

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EXHIBIT C



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VideoHost.com takes the guesswork out of budgeting for hosting services with our easy flat rate pricing. At just \$39.00 per month for each 100 MB of media file storage, and with no additional charges for bandwidth transfer, our hosting packages offer predictable pricing along with outstanding value.

Use the calculator below to determine your hosting cost for total storage requirements of up to 2000 MB. Please [contact us](#) directly to get discounted pricing when hosting more than 2000 MB, or for assistance if your media is not yet encoded.

Our media hosting service offers the following for all hosting package levels:

- Streaming media storage in the format of your choice: Windows Media, Flash, QuickTime, Real, Mp3, or Mp4.
- No additional charges for bandwidth transfer for the vast majority of our clients.
- In-house network administration center for increased reliability.
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- Windows 2003 platforms for unparalleled stability.
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HOSTING COST CALCULATOR

Input the number of megabytes you would like hosted

Total monthly cost based on your input: \$



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EXHIBIT D



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TRUE STREAMING SYSTEM
WINDOWS-QUICKTIME-REAL
FULL LENGTH EVENTS

LEVEL 1

- 500MB of Video Storage
- 5,000MB Transfer
- Media Stats
- Month to Month Billing



\$15/month

LEVEL 2

- 1,500MB of Video Storage
- 12,000MB Transfer
- Media Stats
- Month to Month Billing



\$25/month

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TURNKEY - WE DO IT ALL
SEND IN YOUR DVD
INCLUDES SCENES



starting at
\$49 per event

Your full length video available anytime, anywhere.
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-- The Stream Hoster Team

Stream Hoster infrastructure utilizes:



EXHIBIT E



The Home Video Prince Doesn't Want You to See

Pa. Mom Fights Back With Lawsuit Against Music Company

By JIM AVILA, CHRIS FRANCESCANI and MARY HARRIS
ABC News Law & Justice Unit

Oct. 26, 2007 —

A bouncing YouTube baby has be-bopped his way right into the legal cross-hairs of the pop star Prince, sparking a lawsuit that could test the boundaries of U.S. copyright law.

Holden Lenz, 18 months old, is the pajama-clad star of a 29-second home movie shot by his mother in the family's rural Pennsylvania kitchen and posted last February on the popular video site YouTube.

In the video, the child is seen bouncing and swaying for the camera, as, faintly, the Prince hit "Let's Go Crazy" plays on a CD player in the background.

Twenty eight people, mostly friends and family, had viewed the YouTube video by June, when mom Stephanie Lenz said she received an e-mail from YouTube informing her that her video had been removed from the site at the request of Universal Music Publishing Group, the recording industry's largest label, and warning her that future copyright infringements on her part could force the Web site to cancel her account.

'Frightened, Then Angry'

"All of my [YouTube] videos are home videos, so I thought it was some kind of scam," Lenz told ABC News' Law & Justice Unit. When she realized YouTube had actually taken her video down, she said she was shocked.

"At first it frightened me, because I saw who had filed" the takedown notice, she said.

"It was Universal Music Publishing Group, and I was afraid that ... they might come after me. ... And the more afraid I got, the angrier I got. ... I was afraid that the recording industry might come after me the way they've come after other people for downloading music or file sharing.

"I thought even though I didn't do anything wrong that they might want to file some kind of suit against me, take my house, come after me.

"And I didn't like feeling afraid," she continued. "I didn't like feeling that I could get in trouble for something as simple as posting a home video for my friends and family to see."

Lenz filed a "counter-notice" with YouTube, and the Web site put her video back up about six weeks later.

What Constitutes a Ripoff of an Artist's Work?

But Lenz was angry, and she said she wasn't ready to let it go.

She contacted a leading cyber rights legal organization called the Electronic Frontier Foundation, and filed a **civil lawsuit** against the music publisher, claiming they were abusing the Digital Millennium Copyright Act by sending out reams of what are known in the industry as "take down notices" to Web sites like YouTube, claiming their artists' copyrights had been infringed upon -- when in fact, sometimes they may not have been at all.

Universal Music Publishing Group has filed a motion to dismiss the complaint, a spokesman said.

File-sharing and illegally downloading of music has devastated a once-booming music industry. Some observers say the industry is just trying to protect itself.

"I think the large copyright holders believe that if they do not police every single use of their copyrighted work -- no matter how benign -- that somehow that will open the floodgates to massive piracy," said Gigi Sohn of the Washington think-tank Public Knowledge.

"The problem with that is that viewers, Internet users, consumers, have rights under copyright law as well, and one of those rights is the ability to make fair, lawful uses of copyrighted work, for a variety of reasons," she said.

"The 'Let's Go Crazy baby?'" she asked rhetorically. "When you look at the facts, it's obvious that a take down notice should never have been sent. ... I mean, nobody downloads a video from YouTube with a song on it -- particularly 29 seconds of a song and says, 'OK, I don't have to buy the song' -- so clearly this was a type of use that didn't violate copyright."

Source: Prince 'Scours the Internet' Looking for Violations

For its part, Universal said it was simply acting at the behest of one of its top artists.

"Prince believes it is wrong for YouTube, or any user-generated site, to appropriate his music without his consent," the company said in a statement released to ABC News Thursday. "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 is why, over the last few months, we have asked YouTube to remove thousands of different videos that use Prince music without his permission."

A well-placed source directly involved in the situation confirmed to ABC News that Prince was directly involved in seeking the takedown of Lenz's video.

"This guy scours the Internet," the source said of the legendary artist, who once changed his name to an unpronounceable symbol and wrote the word "Slave" on his cheek until he won back the rights to his music from another publishing company.

"He's really intense about this stuff," the source said, adding that Lenz's video "happened to be one of

many" that artist apparently located online and demanded be taken down.

A publicist for Prince directed ABC News to the artist's personal assistant's cell phone. The assistant did not return a call for comment.

The case is part of what some cyber rights advocates says is an alarming trend in aggressive copyright protection that can sometimes go too far. Entire companies have sprung up to troll the Internet and send thousands of take down notices, warning of legal action if videos that could be deemed to violate a copyright are not immediately removed.

"This is the first major case that we've seen where someone like a housewife is being targeted by a major recording company, but we're starting to see more and more of these kinds of abuses," said Jason Schultz, an attorney with the Electronic Frontier Foundation.

"Because of the way the law is set up, it's very easy for people to send copyright complaints to any Web site and demand that videos come down or music comes down, and a lot of providers can't verify.

"What's going on here is that people like Universal are abusing the copyright law in order to censor, take down videos they frankly don't like, but aren't actually infringing copyright," Schultz said.

"They aren't violating copyright law. So here Stephanie Lenz posted a video of her kids dancing," Schultz said. "It's just a home video. She wanted her friends and family to see it, and Universal had no right to [have it] take[n] down. And by sending an abusive copyright complaint, they really abused the law."

Lenz and E.F.F. are seeking unspecified damages from the music company.

"I'd like to see [Universal] say that I wasn't a copyright infringer," Lenz said.

By Law, YouTube Honors Takedown Notices -- and Counter-Notices

A YouTube spokesman told ABC News that under the provisions of the Digital Millennium Copyright Act, hosting platforms like YouTube are legally obligated to take both the original takedown notices and the counter-notices at face-value, and to honor them.

"This litigation doesn't involve us," Ricardo Reyes, a spokesman for YouTube said.

"We are what the DMCA call a hosting platform," he said. "We provide a platform for people to post their content and share it. When we're notified that something is infringing, we take that [content] down. To not take it down would put us in violation of the DMCA. What we have to do is take them at face value. What you are saying under penalty of law is saying you are the owner. If you say you are the owner and you're not, you can be sued."

Conversely, Reyes said, "When we're counter notified, we basically have to take the counter notice at face value too. Our responsibility is to abide by the notices or counter notices."

Caught to some extent in the middle of the takedown notice wars, Reyes declined to address the Prince controversy directly, but said YouTube had been down this road before.

He cited the case of a North Carolina school board council candidate, Christopher Knight, who produced a daffy commercial in which he donned a "Star Wars"-like light saber and promised to protect the school district's students from a metaphorical Death Star.

The VH1 cable television show "Best Week Ever," which highlights amusing online content, featured a clip of the video on their show.

Knight "thought that was so cool he put up the VH1 clip up on his channel on YouTube," Reyes said. "And VH1 sent us a take down notice." (To view Knight's video, go to YouTube and search "Christopher Knight.")

Lenz, a blogger and fiction writer, said she's sympathetic to the plight of the music industry and its artists.

"I do understand where the record industry is coming from," she said. "They should go after people who infringe on their copyrights. Artists and musicians are owed the money for the product that they create, but I didn't take their product. I bought my CD at my local record store and I played it for my kids, and I wasn't trying to make any money or pass it off as anything other than a home movie of my child."

But the legal controversy has changed the way Lenz thinks, she said, every time she picks up her digital camera. "I'm constantly thinking about what's going on in the background, what's on the TV, what's on the CD player, the characters on my kids' clothes, the characters on the toys that they are playing with," she said.

"I'm cognizant of what's going on at every step, instead of focusing on my kids, which is where my attention should be."

As for Holden, the toddler has moved on to punk music.

"He loves music," his mother said. "He likes all kind of music. At the time [of the video] he liked anything that was funk or anything that was R & B, and Prince fit perfectly in with that.

"I haven't played Prince for him lately," she said, laughing. "But he's getting a little bit more into punk now, so I'm trying to turn him on to Nirvana."

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