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**\*E-FILED: March 1, 2012\***

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NOT FOR CITATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN JOSE DIVISION

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STEPHANIE LENZ,

No. C07-03783 JF (HRL)

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Plaintiff,

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO FIND PLAINTIFF IN  
CONTEMPT, TO COMPEL  
COMPLIANCE AND IN CAMERA  
REVIEW, AND FOR SANCTIONS**

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v.

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UNIVERSAL MUSIC CORP.; UNIVERSAL  
MUSIC PUBLISHING, INC.; and UNIVERSAL  
MUSIC PUBLISHING GROUP,**[Re: Docket No. 365]**

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Defendants.

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## BACKGROUND

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On defendants' prior motion to compel, Magistrate Judge Trumbull issued a discovery order finding that plaintiff Stephanie Lenz waived the attorney-client privilege with respect to certain matters. (Dkt. No. 334). Lenz, who is represented by the Electronic Frontier Foundation (EFF),<sup>1</sup> was ordered to produce documents and to provide deposition testimony accordingly. Plaintiff objected to that ruling. Judge Fogel overruled Lenz's objections (Dkt. No. 351), and Judge Trumbull's order stands.

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The parties subsequently presented to this court<sup>2</sup> a dispute over the intent and meaning of Judge Trumbull's order. Specifically, the parties take divergent (and sometimes very

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<sup>1</sup> Lenz has also been represented by various law firms throughout these proceedings.

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<sup>2</sup> Judge Trumbull has since retired, and the undersigned eventually was assigned to the case to address all discovery matters.

1 nuanced) views as to whether Lenz has fully complied with her obligations to produce attorney-  
2 client communications falling within three categories: (1) communications re motives for  
3 pursuing this litigation; (2) those concerning the Ninth Circuit’s decision in *Rossi v. Motion*  
4 *Picture Ass’n of America, Inc.*, 391 F.3d 1000 (9th Cir. 2004); and (3) communications re  
5 Lenz’s factual allegations. Defendants claim that Lenz has taken an unreasonably narrow view  
6 of her court-ordered obligations and that she has improperly withheld documents and redacted  
7 information. Additionally, they claim that Lenz has failed to conduct a reasonable search for  
8 documents to be produced. Plaintiff argues that defendants are stretching Judge Trumbull’s  
9 rulings well beyond their intended limits and that defendants are, in any event, now seeking  
10 from this court different or additional relief that was not sought (or even at issue) in their  
11 underlying motion to compel.

12 Pursuant to Fed. R. Civ. P. 37(b), defendants move for an order finding plaintiff in  
13 contempt and imposing sanctions. They also request an order directing plaintiff to produce all  
14 documents they contend are required for full compliance with Judge Trumbull’s order. Upon  
15 consideration of the moving and responding papers, as well as the arguments of counsel, this  
16 court denies the request for a finding of contempt and sanctions. Nevertheless, plaintiff will be  
17 required to conduct a further search for documents, as discussed more fully below.

#### 18 LEGAL STANDARD

19 A court may sanction a party for failing to obey a discovery order and may treat the  
20 failure as contempt of court. FED. R. CIV. P. 37(b)(2)(A)(vii). Civil contempt<sup>3</sup> “consists of a  
21 party’s disobedience to a specific and definite court order by failure to take all reasonable steps  
22 within the party’s power to comply.” In re Dual-Deck Video Cassette Recorder Antitrust Litig.,  
23 10 F.3d 693, 695 (9th Cir. 1993). “The contempt ‘need not be willful,’ and there is no good  
24 faith exception to the requirement of obedience to a court order.” Id. (quoting In re Crystal  
25 Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987)). “But a person should not be

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27 <sup>3</sup> “Where the purpose of contempt is ‘remedial, i.e., to compensate for the costs  
28 of the contemptuous conduct or to coerce future compliance with the court’s order, the  
contempt order is civil.” Reno Air Racing Ass’n, Inc. v. McCord, 452 F.3d 1126, 1130 n.5  
(9th Cir. 2006) (quoting Portland Feminist Women’s Health Ctr. v. Advocates for Life, Inc.,  
877 F.3d 787, 790 (9th Cir. 1989)).

1 held in contempt if his action appears to be based on a good faith and reasonable interpretation  
2 of the court’s order.” Id. (internal quotations and citations omitted). “The party alleging civil  
3 contempt must demonstrate that the alleged contemnor violated the court’s order by ‘clear and  
4 convincing evidence,’ not merely a preponderance of the evidence.” Id. (quoting Vertex  
5 Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982)).

6 DISCUSSION

7 A. Communications re Motives for Pursuing Litigation

8 Based on statements Lenz made to third parties, Judge Trumbull found a waiver of the  
9 attorney-client privilege as to motives for pursuing this action. (Dkt. No. 334 at 5). Among the  
10 statements giving rise to that waiver is an email in which Lenz mentioned that EFF was  
11 planning a “publicity blitz and/or a lawsuit against Universal.” (Dkt. 334 at 4). Plaintiff says  
12 that she has produced all publicity-related communications that reflect her or her counsel’s  
13 motives for filing suit—namely, communications (without any limitation as to when the  
14 documents were generated or dated) concerning the *initial* publicity that occurred in the several  
15 weeks after this lawsuit was filed. However, she has not produced publicity-related  
16 communications that she says do not reflect motives for filing suit—e.g., communications in  
17 which her attorneys advised her how to answer media questions without waiving the privilege.  
18 Defendants contend that, in order to fully comply with Judge Trumbull’s order, Lenz must  
19 produce all communications having anything to do with *any* publicity about this case.

20 Defendants’ interpretation of Judge Trumbull’s ruling sweeps too broadly. Judge  
21 Trumbull’s order, as this court reads it, found a waiver as to communications about the possible  
22 motives for bringing this action, and not as to any “publicity blitz” per se. This court also  
23 rejects defendants’ contention that Judge Fogel, in overruling plaintiff’s objection to Judge  
24 Trumbull’s order, held that “publicity” and “motives” are so intertwined that they must be  
25 treated as one and the same. Instead, it appears that Judge Fogel was addressing the parties’  
26 disagreement whether the waiver applied only to Lenz’s motives to sue, or whether it also  
27 encompassed EFF’s motivations for representing her. (He concluded that Judge Trumbull’s  
28 order applied to both plaintiff and her counsel.) (Dkt. 351 at 4).

1           Nevertheless, the court agrees that publicity-related documents reflecting plaintiff's or  
2 her counsel's motives may not be limited to those concerning the initial publicity after the  
3 complaint was filed. As defendants point out, this case has received, and continues to receive,  
4 considerable media attention. Accordingly, to the extent she has not already done so, plaintiff  
5 shall conduct a diligent inquiry and reasonable search and produce all publicity-related  
6 communications that reflect her or her counsel's motives for pursuing this litigation, including  
7 any such communications pertaining to publicity that occurred later in the litigation. Lenz's  
8 further search for responsive documents shall be conducted in compliance with this court's  
9 order, as set out below in Section E. Additional responsive documents, if any, shall be  
10 produced within 14 days from the date of this order.

11       B.     Communications re the Rossi Decision

12           Judge Trumbull found that Lenz waived the attorney-client privilege with respect to  
13 certain legal issues, including communications about “the clarification of the *Rossi* decision.”  
14 (Dkt. No. 334 at 6). Plaintiff says that she has produced all communications about *Rossi*,  
15 including documents about the legal standard in that case, without any temporal limitation.  
16 Defendants accept plaintiff's representation, and it appears that this issue is largely moot. The  
17 only remaining dispute concerns the sufficiency of plaintiff's search for documents, which is  
18 discussed below.

19       C.     Communications re Plaintiff's Factual Allegations

20           Judge Trumbull found that Lenz waived the attorney-client privilege based on  
21 (1) statements plaintiff made to third parties in Gmail chats and blog comments and  
22 (2) Lenz's own deposition testimony in which she stated that, at the time she made a particular  
23 blog comment, she may have misunderstood what her counsel told her. Defendants contend  
24 that Judge Trumbull found a broad waiver as to the subject matter of those statements. In their  
25 view, plaintiff is obliged to produce all communications that relate to, reference, or reflect  
26 issues of infringement or non-infringement. Lenz argues that Judge Trumbull's order is limited  
27 to attorney-client communications about the specific statements forming the basis for the  
28 waiver. Plaintiff says that she has produced (1) all communications with her counsel about the

1 conclusion they reached early on about noninfringement; (2) all of her communications with  
2 counsel or counsel’s employees prior to the blog comment that Lenz testified about in  
3 deposition; and (3) all communications about that blog comment. Lenz also says that she did  
4 not have any particular attorney-client communications in mind when she testified about  
5 possibly misunderstanding what counsel told her. (Lenz Decl. ¶ 10).

6 Judge Trumbull’s order states that plaintiff waived the privilege “on this subject matter,”  
7 which would seem to suggest that defendants are correct. But, her order then goes on to say  
8 that defendant is entitled to obtain attorney-client communications “as to the specific factual  
9 allegations set forth above.” (Dkt. No. 334 at 7). The only “specific factual allegations”  
10 preceding this language in the order are those specific statements Lenz made to third parties and  
11 in deposition. Nowhere in her order does Judge Trumbull say that plaintiff waived the privilege  
12 as to all communications concerning infringement or noninfringement generally. Moreover, as  
13 plaintiff points out, defendants’ proposed order on their underlying discovery motion sought  
14 only those communications about “how Plaintiff and her counsel *came to conclude* . . . that her  
15 posting was not an infringement of copyright.” (Kwun Decl., Ex. H at 1:20-22) (emphasis  
16 added). This court therefore declines to read Judge Trumbull’s order as broadly as defendants  
17 urge. Except for any issues about the sufficiency of plaintiff’s search for documents (see  
18 below), defendants’ motion as to this category of communications is denied.

19 D. Redactions

20 Defendants complain that roughly half of the documents plaintiff produced in response  
21 to Judge Trumbull’s order have been redacted, including information in the middle of sentences.  
22 Lenz says that the redacted information concerns matters that are not covered by Judge  
23 Trumbull’s rulings. Asserting that her communications with counsel cover multiple subjects  
24 (including within single sentences), Lenz contends that she has done nothing wrong.  
25 Defendants remain skeptical and request that this court conduct an *in camera* review of  
26 plaintiff’s production to confirm the propriety of the redactions.

27 Defendants’ skepticism evidently stems from certain documents that Lenz produced and  
28 then agreed, during meet-and-confer negotiations, to unredact in part (without conceding that

1 the redactions were improper). Defendants have filed examples of those unredacted  
2 communications under seal. Having reviewed them, this court finds the unredacted information  
3 is largely mundane. Some of the unredacted information, however, does appear to fall within  
4 the ambit of Judge Trumbull’s order, as affirmed by Judge Fogel, and as now construed by this  
5 court. So, although the undersigned is underwhelmed by the need for an *in camera* review to  
6 confirm the propriety of her redactions, this court will conduct one in the interest of putting this  
7 issue to rest. Within 14 days from the date of this order, plaintiff shall lodge unredacted  
8 versions of her document production with the undersigned’s chambers, clearly indicating (e.g.,  
9 by highlighting) precisely what information has been redacted.

10 E. Sufficiency of Plaintiff’s Search for and Production of Documents

11 Finally, defendants take issue with the quality of plaintiff’s search for documents. Lenz  
12 admittedly searched only her files, and not those of her attorneys, when looking for  
13 communications to be produced pursuant to Judge Trumbull’s order. One of plaintiff’s  
14 attorneys, Corynne McSherry, says that she conducted a spot check of her own files for  
15 documents covered by the waiver ruling. McSherry acknowledges, however, that she “did not  
16 engage in the sort of full search one might perform for a full document review.” (McSherry  
17 Decl. ¶ 11). Plaintiff contends that searching her attorneys’ files will be entirely duplicative,  
18 and therefore burdensome and unnecessary. Here, Lenz says that she has kept all  
19 communications to and from her attorneys. But, her declaration merely attests that she has a  
20 practice of doing so (see Lenz Decl. ¶ 4), which is less than an unqualified affirmation that all  
21 such communications have been saved. Moreover, Lenz did not satisfactorily explain why  
22 certain communications called for by Judge Trumbull’s order were not produced or included on  
23 her privilege log (that is, until defendants pointed out the discrepancy).

24 Accordingly, plaintiff’s attorneys shall conduct a reasonable search of their own files for  
25 communications with plaintiff that are subject to Judge Trumbull’s waiver rulings. Plaintiff’s  
26 counsel need not, however, produce communications that are duplicative of those that have  
27 already been produced.

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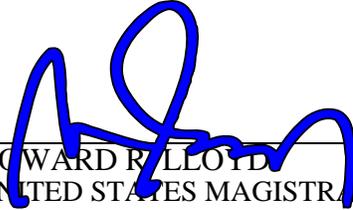
1 This court also declines defendants' invitation to rule, in a vacuum, that Judge  
2 Trumbull's order requires plaintiff's counsel to produce claimed work product (e.g., notes,  
3 memoranda, and other such documents) that reflect their discussions with Lenz. The fact that  
4 Judge Trumbull found that Lenz waived the attorney-client privilege does not necessarily mean  
5 that protection of the work product doctrine was also waived. See Handguards, Inc. v. Johnson  
6 & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("The work product doctrine is an  
7 independent source of immunity from discovery, separate and distinct from the attorney-client  
8 privilege. . . . [W]aiver of the privilege does not necessary mean that the protection afforded by  
9 the work product doctrine is also breached."). In any event, the work product doctrine was not  
10 an issue briefed on defendants' prior motion to compel before Judge Trumbull.

11 ORDER

12 Based on the foregoing, defendants' motion for contempt and for sanctions is granted in  
13 part and denied in part. Plaintiff shall search for and produce any additional documents, in  
14 compliance with the rulings above, within 14 days from the date of this order. Additionally,  
15 within 14 days from the date of this order, plaintiff shall submit documents for this court's *in*  
16 *camera* review as discussed above. Nevertheless, defendants' request for a finding of contempt  
17 and for sanctions is denied. Defendants' arguments sometimes depended on very nuanced  
18 interpretations of Judge Trumbull's rulings, and were also, at times, overreaching. Defendants  
19 have not carried their burden of establishing by clear and convincing evidence that plaintiff's  
20 conduct was not the product of a good faith or reasonable interpretation of Judge Trumbull's  
21 order. Accordingly, except as specifically set out above, defendants' motion is denied in all  
22 other respects.

23 SO ORDERED.

24 Dated: March 1, 2012

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27 HOWARD R. LLOYD  
28 UNITED STATES MAGISTRATE JUDGE

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