

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MOONBUG ENTERTAINMENT  
LIMITED, et al.,

Plaintiffs,

v.

BABYBUS (FUJIAN) NETWORK  
TECHNOLOGY CO., LTD,

Defendant.

Case No. [21-cv-06536-EMC](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOONBUG’S  
MOTION TO STRIKE AMENDED  
ANSWER AND DISMISS AMENDED  
COUNTERCLAIMS**

Docket No. 40

Plaintiff-Counter Defendant Moonbug Entertainment (“Moonbug”) operates the CoComelon channel, the top-ranked Kids YouTube channel, featuring animated videos of a child character named JJ and his family. Docket No. 1 (Compl.) ¶ 2, 16. Defendant-Counter Plaintiff Babybus Network Technology Co. (“Babybus”) runs a competitor YouTube channel with videos featuring a character named Super JoJo and his family. Plaintiff alleges that Babybus’s Super JoJo videos infringe on its copyrights, filed take-down requests with YouTube regarding at least 70 videos, and filed the instant copyright infringement action. Compl. ¶ 4. Defendant asserts affirmative defenses of fair use and copyright misuse. Additionally, Defendant alleges counterclaims under § 512(f) of the Copyright Act, that Plaintiff made knowing misrepresentations in its take-down requests to YouTube, and tort claims under California law.

Now pending is Plaintiff’s motion to strike Defendant’s answer and affirmative defenses and to dismiss Defendant’s counterclaims. Docket No. 40. For the following reasons, the Court **GRANTS in part** and **DENIES in part** Plaintiff’s motion.

**I. BACKGROUND**

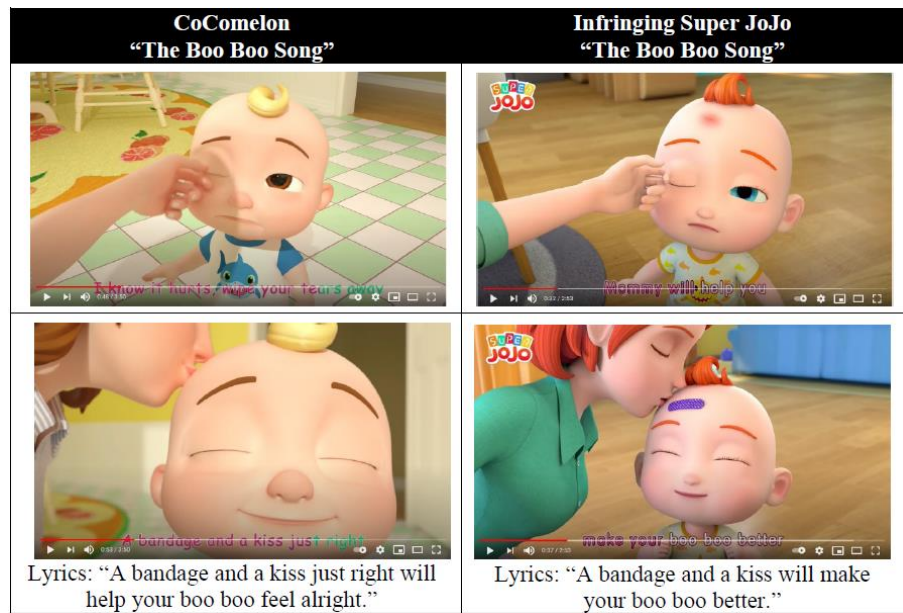
A. Relevant Factual Allegations

1. Moonbug’s Complaint and Allegations of Copyright Infringement

Plaintiff Moonbug’s rights include registered copyrights in the CoComelon 3-D animated characters: baby JJ and his mom, dad, brother TomTom, and sister YoYo. Compl. ¶¶ 15, 20(a). These characters were introduced on YouTube in 2017. *Id.* ¶ 18. Moonbug also owns copyrights in hundreds of original CoComelon videos, songs, and images on YouTube and elsewhere, all featuring the CoComelon family of characters. *Id.* ¶¶ 15, 20(c).

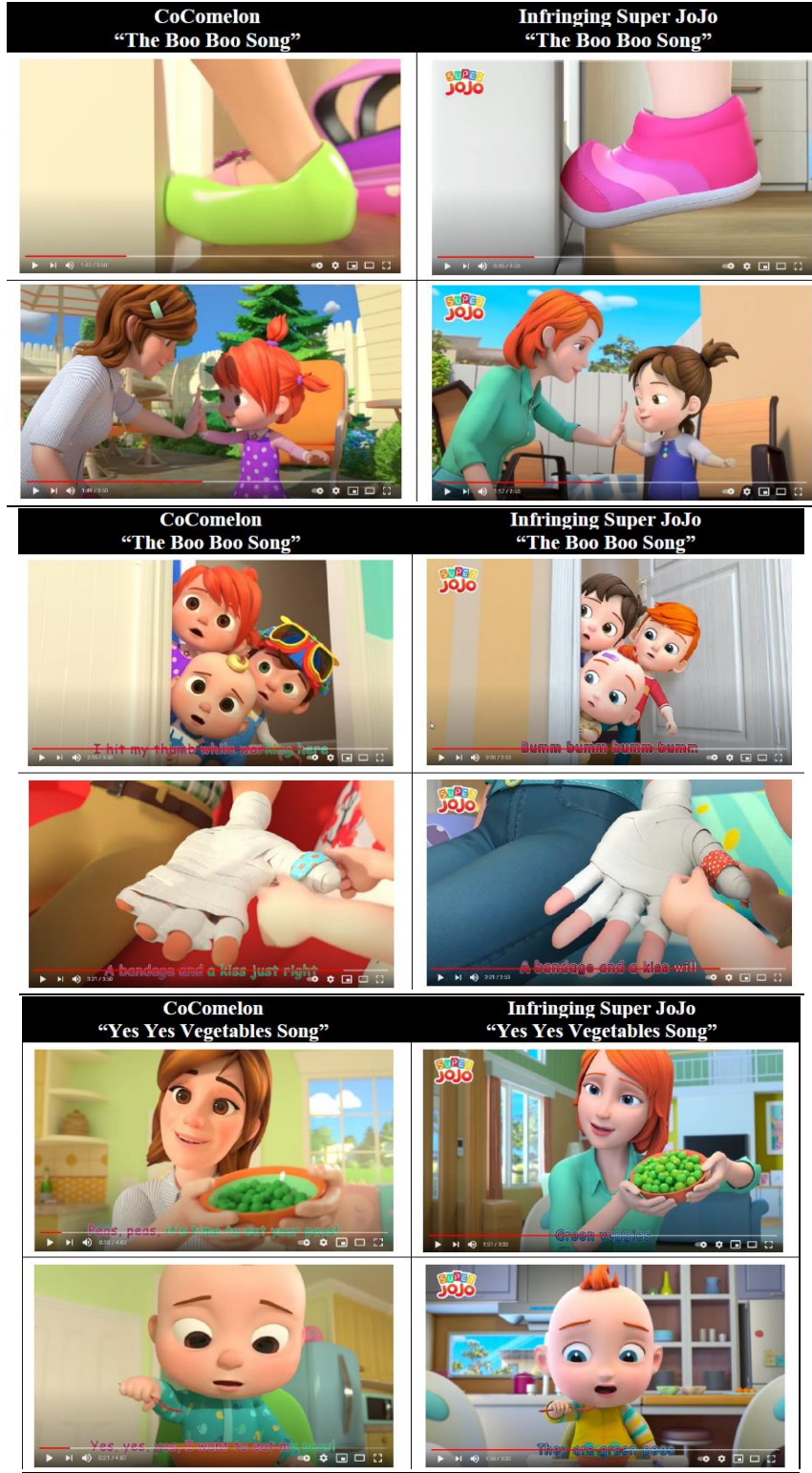
Moonbug alleges that Defendant Babybus offers several for-profit YouTube channels under its “Super JoJo” brand, built on pervasive copying of Moonbug’s CoComelon franchise. *See* Compl. ¶¶ 22–58; Docket No. 36 (“Am. Countercl.”) ¶¶ 20, 37. Moonbug alleges that Babybus’s channels began with copies of CoComelon videos, copying CoComelon’s “plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.” *See* Compl. ¶ 52. Many of Defendant’s earliest videos, are allegedly frame-by-frame copies of CoComelon videos. *Id.* ¶¶ 8, 32–52; *see* Am. Countercl. ¶ 41.

As examples, Moonbug’s complaint contains screenshots depicting side-by-side comparisons of the companies’ respective videos:



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Northern District of California

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Compl. ¶¶ 37-50.

1           2.       Moonbug’s YouTube Copyright Notices

2           Before filing this complaint on August 24, 2021, and during the pendency of this action,  
3 Moonbug, through outside counsel, submitted several Digital Millennium Copyright Act (DMCA)  
4 notices to YouTube identifying Defendant’s infringing videos and requesting that YouTube take  
5 them down. Am. Countercl. ¶ 24; Compl. ¶ 4. The notices identified representative lists of  
6 infringed Moonbug works. *See, e.g.*, Docket No. 41 (“McHale Decl.”) ¶¶ 2–7, Exhs. 1–4.  
7 Elaborating on the representative information in the webform notices, Moonbug’s counsel sent a  
8 17-page letter in connection with its DMCA notices to YouTube and Defendant, detailing  
9 Moonbug’s alleged infringement in 80 pages of exhibits.<sup>1</sup> *See* Mchale Decl. ¶ 8, Ex. 5; *see* Am.  
10 Countercl. ¶ 32.

11           Within hours of receiving Moonbug’s letter to YouTube, Babybus allegedly disabled  
12 public access to over 100 of its infringing videos on YouTube. Compl. ¶¶ 61-62. YouTube took  
13 down other videos identified in Moonbug’s DMCA notices. *See* Compl. ¶¶ 62, 69; Am Countercl.  
14 ¶¶ 25–26; *see also* Mchale Decl. ¶¶ 19–20, Exhs. 12-13. Defendant responded with DMCA  
15 counter notices for some, but not all of Moonbug’s notices. *See* Am. Countercl. ¶ 25.

16           Defendant initially did not provide counter notices to several of Moonbug’s DMCA notices  
17 and YouTube temporarily disabled Defendant’s English-language Super JoJo channel around  
18 August 26, 2021. *See* Am. Countercl. ¶¶ 36; *see also* Mchale Decl. ¶¶ 16, 19–20, Exhs. 10, 12–  
19 13. By that date, YouTube had taken down nine videos in response to nine of Moonbug’s DMCA  
20 notices. Am. Countercl. ¶¶ 26, 36; Compl. ¶ 4. More than four weeks after YouTube removed the  
21 nine videos and over two weeks after suspension of Defendant’s channel, Defendant submitted  
22 counter notifications to YouTube requesting the channel’s restoration. Am. Countercl. ¶ 25; *see*  
23 Mchale Decl. ¶ 16, Ex. 10.

24 \_\_\_\_\_  
25 <sup>1</sup> On a motion to dismiss, the Court may consider materials that Defendant references or  
26 incorporates in the counterclaims. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998  
27 (9th Cir. 2018). The Court may consider Moonbug’s Complaint, Docket. No. 1, YouTube’s terms  
28 and policies, Mchale Decl, Exhs. 11–15, and Moonbug’s DMCA notices and letters to YouTube  
(as described in Mchale Decl. ¶¶ 2–12; *id.* Exhs. 1–9), because Defendant’s counterclaims invoke  
them. *See Khoja*, 899 F.3d at 1002, 1004–05 (considering documents “incorporated by reference”  
when complaint referred to them and they formed a basis of the claims). Defendant does not  
contest Plaintiff’s references to these exhibits.

1           3.       Babybus’s Answer and Counterclaims

2           In its amended answer, affirmative defenses and counterclaims, Babybus denies  
3 infringement, and alleges affirmative defenses of fair use and copyright misuse. Docket No. 36  
4 (Am. Def.) ¶¶ 1, 4. Babybus counterclaims that Moonbug violated § 512(f) of the Copyright Act  
5 by materially misrepresenting its infringement allegations included in the DMCA notices it sent to  
6 YouTube because Moonbug did not consider the doctrine of fair use and alleged infringement  
7 based on elements that were not protectable in copyright such as generic traits of children’s  
8 characters. Am. Countercl. ¶¶ 32-33. Defendant also alleged three counterclaims under California  
9 law under the unfair competition law (that Moonbug’s DMCA notices were an incipient violation  
10 of the antitrust laws), and for intentional interference with economic relationships and contractual  
11 relations. *Id.* ¶¶ 48-62.

12       B.       Procedural Background

13           Plaintiff Moonbug filed this action on August 24, 2021. Compl. On September 28, 2021,  
14 Defendant filed an answer, counterclaims and motion for temporary restraining order based on its  
15 allegation that Moonbug misrepresented infringement in its DMCA notices. Docket Nos. 20, 22.  
16 Defendant withdrew its request for TRO on October 6, 2021. Docket No. 30. Moonbug moved to  
17 dismiss or strike Babybus’s counterclaims. Docket No. 40. Moonbug’s motion was mooted by  
18 Babybus’s filing of an amended answer and counterclaims. Docket No. 36 (“Am. Answer”).

19           Currently pending is Moonbug’s motion to strike or dismiss Babybus’s amended  
20 affirmative defenses and amended counterclaims. Docket No. 40 (“Motion”). The Court heard  
21 argument on Moonbug’s motion on January 6, 2022. Docket No. 62. At the hearing, the Court  
22 directed Babybus to file a submission indicating three videos that are illustrative of its arguments  
23 of non-infringement, and allowed Moonbug to submit a response. *Id.* After the parties submitted  
24 supplemental filings, Docket Nos. 56, 60, the Court ordered Babybus to “clarify whether the three  
25 videos it identified in its supplemental filing. . . were the subjects of DMCA takedown notices  
26 submitted by Moonbug to YouTube,” and, if not, to identify three videos that were the subject of  
27 DMCA takedown notices. Docket No. 61. The parties submitted responsive filings. Docket Nos.  
28 63-65.

1 **II. STANDARD OF REVIEW**

2 A. Failure to State a Claim (Rule 12(b)(6))

3 Federal Rule of Civil Procedure 8(a)(2) requires a “pleading that states a claim for relief”  
 4 to include “a short and plain statement of the claim showing that the pleader is entitled to relief.”  
 5 Fed. R. Civ. P. 8(a)(2). A pleading that fails to meet this standard may be dismissed pursuant to  
 6 Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after  
 7 the Supreme Court’s decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic*  
 8 *Corporation v. Twombly*, 550 U.S. 544 (2007), a plaintiff’s “factual allegations [in the pleading]  
 9 ‘must . . . suggest that the claim has at least a plausible chance of success.’” *Levitt v. Yelp! Inc.*,  
 10 765 F.3d 1123, 1135 (9th Cir. 2014). The court “accept[s] factual allegations in the [pleading] as  
 11 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*  
 12 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a  
 13 [pleading] . . . may not simply recite the elements of a cause of action [and] must contain  
 14 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to  
 15 defend itself effectively.” *Levitt*, 765 F.3d at 1135 (quoting *Eclectic Props. E., LLC v. Marcus &*  
 16 *Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)). “A claim has facial plausibility when the  
 17 Plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
 18 Defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility  
 19 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that  
 20 a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

21 B. Motion to Strike (Rule 12(f))

22 Before responding to a pleading, a party may move to strike from a pleading any  
 23 “redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The essential  
 24 function of a Rule 12(f) motion is to “avoid the expenditure of time and money that must arise  
 25 from litigating spurious issues by dispensing with those issues prior to the trial.” *Wang v. OCZ*  
 26 *Tech. Grp., Inc.*, 276 F.R.D. 618, 624 (N.D. Cal. Oct. 14, 2011) (quoting *Whittlestone, Inc. v.*  
 27 *Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)). Motions to strike are generally disfavored.  
 28 *See Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 879 (N.D. Cal. 2011); *Platte*

1 *Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004). A motion to strike  
 2 should only be granted if the matter sought to be stricken clearly has no possible bearing on the  
 3 subject matter of the litigation. *See Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339  
 4 (N.D. Cal. 1991); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other*  
 5 *grounds, Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (“‘Immaterial matter’ is that which has no  
 6 essential or important relationship to the claim for relief or the defenses being pleaded.”).  
 7 Statements that do not pertain to, and are not necessary to resolve, the issues in question are  
 8 impertinent. *Id.* If there is any doubt whether the portion to be stricken might bear on an issue in  
 9 the litigation, the court should deny the motion to strike. *Platte Anchor Bolt*, 352 F. Supp. 2d at  
 10 1057. Just as with a motion to dismiss, the court should view the pleading sought to be struck in  
 11 the light most favorable to the nonmoving party. *Id.*

### 12 **III. DISCUSSION**

#### 13 A. Timeliness of Defendant’s Amended Answer and Affirmative Defenses

14 Moonbug argues that Babybus’s amended answer and affirmative defenses in response to  
 15 Moonbug’s initial motion to dismiss or strike should be stricken as untimely under Fed. R. Civ. P.  
 16 15(a) because the amended answer was filed in response to Moonbug’s initial motion to dismiss or  
 17 strike *counterclaims*, and thus Babybus’s needed to seek leave of the court to amend its *answer*  
 18 and *affirmative defenses*. Motion at 10-11.

19 Moonbug’s position lacks merit. Rule 15 allows a party to amend its pleading as a matter  
 20 of course within the earlier of “21 days after service of a motion under Rule 12(b), (e), or (f)”—or  
 21 “21 days after service of a responsive pleading” “if the pleading is one to which a responsive  
 22 pleading is required.” Fed. R. Civ. P. 15(a)(1)(B). Babybus filed its original Answer and  
 23 Counterclaims on September 28, 2021. Docket No. 20. Moonbug did not serve a responsive  
 24 pleading, but moved to dismiss under Rule 12(b) on October 19. Docket No. 31. Babybus timely  
 25 filed its First Amended Answer and Counterclaims on November 9, as permitted by Rule  
 26 15(a)(1)(B). Docket No. 36.

27 There is no basis to Moonbug’s argument that Babybus was *only* entitled to amend its  
 28 *counterclaims* but *not* its answer in response to Moonbug’s motion to strike or dismiss. An

1 answer and counterclaim are *one pleading*, not *separate pleadings*. See, e.g., *Koga-Smith v.*  
 2 *MetLife*, No. C-12-4050 EMC, 2013 WL 894780, at \*1 (N.D. Cal. Mar. 8, 2013) (“As a  
 3 preliminary matter, the Court notes that a crossclaim or counterclaim is not an independent  
 4 pleading but rather is part of the answer. See Fed. R. Civ. P. 7 (enumerating pleadings allowed,  
 5 none of which is specifically identified as a crossclaim or counterclaim).”). A *counterclaim* is a  
 6 pleading to which a response is required. Fed. R. Civ. P. 12(a)(1)(B) (“A party must serve an  
 7 answer to a counterclaim . . .”). Accordingly, Babybus’ answer and counterclaims were a single  
 8 pleading to which a response was required and, thus, within the ambit of Rule 15(a)(1)(B).

9 Moonbug’s motion to strike Babybus’s answer and affirmative defenses as untimely is,  
 10 therefore, denied.

11 B. Plausibility of Defendant’s Affirmative Defenses

12 Moonbug moves to strike Babybus’s fair use and copyright misuse affirmative defenses  
 13 because they are not plausible. Motion at 14. Rule 12(f) provides that the “court may strike from  
 14 a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous  
 15 matter.” Fed. R. Civ. P. 12(f); see also *Oracle Am., Inc. v. NEC Corp. of Am.*, No. 21-CV-05270-  
 16 CRB, 2021 WL 5037678, at \*4 (N.D. Cal. Oct. 29, 2021) (striking copyright misuse affirmative  
 17 defense as implausible under Rules 8(c) and 12(f)); *Erickson Prods., Inc. v. Kast*, No. 5:13-CV-  
 18 05472 HRL, 2014 WL 1652478, at \*4 (N.D. Cal. Apr. 23, 2014) (striking fair use defense as  
 19 implausible). “[A] defense need not include extensive factual allegations in order to give fair  
 20 notice, [however] bare statements reciting mere legal conclusions may not be sufficient.”  
 21 *Hernandez v. Dutch Goose, Inc.*, No. C 13-03537 LB, 2013 WL 5781476, at \*4 (N.D. Cal. Oct.  
 22 25, 2013) (citations omitted).

23 1. Fair Use

24 Fair use is an affirmative defense that “presumes that unauthorized copying has occurred,  
 25 and is instead aimed at whether the defendant's use was fair.” *Monge v. Maya Magazine, Inc.*, 688  
 26 F.3d 1164, 1170 (9th Cir. 2012). The doctrine is codified at section 107 of the Copyright Act,  
 27 which provides:

28 In determining whether the use made of a work in any particular



case is a fair use the factors to be considered shall include

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. The determination whether the fair use doctrine applies “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 577 (1994). The factors “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.” *Id.* at 578.

On the first factor, Babybus’s allegation that its works are educational in nature, Am. Def. ¶ 4, is inapposite because the factor favors “nonprofit educational purposes,” and Babybus admits that the videos are for commercial use. Am. Answer ¶ 8 (admitting \$100 million earnings in 2020); Am. Countercl. ¶ 37 (claiming losses up to \$500,000 per month when channel taken down).

On the second factor, Babybus makes no allegations as to why the nature of Moonbug’s copyrighted works weighs in favor of finding fair use.

On the third factor, Babybus alleges that that “Moonbug’s allegations of similarities between its works and Babybus’s works are based on ideas and expressions that are not protectable in copyright,” such as “anatomical features of human babies,” “the composition of a traditional nuclear family as found in family-friendly and children’s media,” and “abstract lessons learned by children while they grow up.” Am. Def. ¶ 4. But Babybus’s assertion that Moonbug’s works are not “protectable in copyright” is an argument that Moonbug fails to prove its infringement claim – *not* the basis for an affirmative defense of fair use, which “presumes that unauthorized copying has occurred, and is instead aimed at whether the defendant's use was fair.” *Monge v. Maya Magazine, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012).<sup>2</sup>

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<sup>2</sup> Moreover, Babybus’s argument that the alleged similarities are not protectable in copyright is implausible when analyzed in context with Moonbug’s 17-page letter to YouTube filed along with its DMCA notices that alleges frame-by-frame copying of Moonbug’s copyrighted videos and pervasive copying of thumbnail art, copying of the plot, setting, pace and sequence of events of

1           Babybus further asserts that to the extent there are any similarities between its works and  
2 Moonbug’s, “the similarities are so minor that they do not make up a substantial portion” of the  
3 copyrighted works. Am. Def. ¶ 4. But, Babybus has not addressed, let alone refuted, Moonbug’s  
4 allegations and examples of frame-by-frame copying, copying of thumbnail art, copying of plot,  
5 setting, pace and sequence of events – allegations and examples that, on their face, clearly  
6 demonstrate the similarities make up a substantial portion of the copyrighted works. *Hernandez*,  
7 2013 WL 5781476, at \*4; *see also Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir.  
8 2016) (“the burden of proving fair use is always on the putative infringer”) (citations omitted).

9           Finally, Babybus asserts support for the fourth factor on its assertion that “Moonbug is  
10 unable to demonstrate any diminishment in the value of its own works in the marketplace.”  
11 Docket No. 43 (“Opp.”) at 9. This assertion lacks factual underpinning. Such a bare conclusion  
12 cannot support a fair use defense, and conflicts with Defendant’s own assertion that the parties  
13 compete in a highly profitable market. *See Kast*, 2014 WL 1652478, at \*4 (rejecting a conclusory  
14 allegation regarding market value and dismissing fair use defense); Am. Def. ¶ 1; Am. Countercl.  
15 ¶ 37.

16           In sum, none of the four fair use factors tip in Babybus’s favor. Indeed, the first, second  
17 and fourth factors weigh decisively against Babybus. And, as to the third factor, despite the fact  
18 that Babybus already amended its affirmative defenses once *and* the Court provided Babybus with  
19 two opportunities to supplement the record with examples of videos that support its fair use  
20 defense *after* this motion was fully briefed and argued, Babybus *still* has not presented any

21 \_\_\_\_\_  
22 other CoComelon videos,” and 80 pages of exhibits containing dozens of illustrative frame-by-  
23 frame screenshots and reference to numerous of Moonbug’s registered copyrights. McHale Decl.,  
24 Exh. 5 at 5-15, 30-108. The similarities are numerous and detailed and transcend the basic  
elements of *e.g.*, “anatomical features of human babies,” and thus cannot sustain a fair use  
defense.

25           At the hearing, Babybus’s counsel argued, for the first time, that Moonbug’s allegations of  
26 specific copying applied to only *some* of Babybus’s videos, but not to all of them. Babybus  
submitted supplemental filings of six of its videos for the Court’s consideration in support of  
27 Babybus’s affirmative defenses and § 512(f) counterclaim. Docket Nos. 56, 63. But these  
submissions do not support Babybus’s *fair use defense*. In submitting these filings, Babybus *only*  
28 argues non-infringement: these videos “share no protectable similarities with Moonbug’s  
catalogue,” Docket Nos. 56 at 2, 63 at 3. However, again, this argument does not support a fair  
use defense, which “presumes that unauthorized copying has occurred.” *Monge*, 688 F.3d at 1170.

1 arguments and allegations that tip the third factor in its favor. Even if the Court were to overlook  
2 Babybus’s failure to do so despite multiple opportunities, and assumed *arguendo* that Babybus  
3 could allege facts indicating that its copying was insubstantial, that would merely demonstrate one  
4 factor tips towards Babybus. Any such hypothetical showing would still be outweighed by the  
5 fact that the other three factors weigh conclusively against Babybus. Accordingly, the Court  
6 strikes Babybus’s fair use defense because it is implausible.<sup>3</sup>

## 7 2. Copyright Misuse

8 “Copyright misuse is a judicially crafted affirmative defense to copyright infringement. ...”  
9 *Apple, Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). The “purpose of the defense” is  
10 to “prevent[ ] holders of copyrights ‘from leveraging their limited monopoly to allow them control  
11 of areas *outside the monopoly.*’” *Id.* (quoting *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026  
12 (9th Cir. 2001)) (emphasis added). The doctrine “does not prohibit using conditions to control use  
13 of copyrighted material, but it does prevent copyright holders from using the conditions to stifle  
14 competition.” *Id.* at 1159. The Ninth Circuit has “applied the doctrine sparingly.” *Id.* at 1157.<sup>4</sup>

15 Babybus’ copyright misuse defense reads as follows:

16 Moonbug’s claims are barred by the doctrine of copyright misuse,  
17 including because Moonbug has knowingly asserted copyright  
18 monopolies that violate copyright laws and public policy. Moonbug  
19 is attempting to use expand whatever monopoly it may own (if any)  
20 over its own copyrighted works into areas not protectable in  
21 copyright; that constitutes copyright misuse. Moonbug has  
22 accomplished this misuse by transmitting false and/or misleading  
23 Digital Millennium Copyright Act (“DMCA”) takedown notices to  
24 YouTube, for the purpose of enticing YouTube to take down

22 <sup>3</sup> Babybus’ citation to *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148-49 (9th Cir. 2016) is  
23 misplaced. *Lenz* involved a situation where the facts demonstrated that the takedown procedure  
24 did not call for consideration of fair use, and the work at issue – a 29-second home video of  
25 children dancing to a song fragment – was likely fair use. *Id.* The facts of *Lenz* are unlike those  
26 here where Moonbug’s letter to YouTube catalogs facts that show Babybus’s use was not fair use.  
27 McHale Decl. Exh. 5 at 1, 16 (detailing *commercial* copycat nature of infringing work), 1–5  
28 (describing the originality of Moonbug’s works), 2–16 (describing pervasive infringement), 16–17  
(describing *commercial* harm to Moonbug).

26 <sup>4</sup> See e.g., *Psystar Corp.*, 658 F.3d at 1157 (“[The Ninth Circuit’s decision] in *Practice*  
27 *Management [Info. Corp. v. Am. Med. Ass’n]*, 121 F.3d, 516 (9th Cir. 1997)] is the only case in  
28 which [the Ninth Circuit] upheld a copyright misuse defense. [The Ninth Circuit] did so because  
the copyright licensor in that case prevented the licensee from using any other competing  
product.”).

1 Babybus videos that do not infringe Moonbug's copyrights.  
 2 Additionally, Moonbug's assertion of improper copyright claims  
 3 against Babybus, a competitor in the children's entertainment  
 4 marketplace, represents an attempt to force its competitor out of the  
 5 market entirely. Moonbug's transmission of multiple, improper  
 6 DMCA takedown notices through the YouTube platform and  
 7 continued maintenance of those claims despite action taken by  
 8 Babybus to address Moonbug's concerns show that Moonbug's  
 9 interest is not the protection of its alleged copyrights, but harming  
 10 Babybus, a competitor in the same marketplace. Moonbug's  
 11 assertion of unprotectable copyright features of its character JJ and  
 12 tropes regarding family structure or topics common in children's  
 13 media represents Moonbug's attempt to secure a monopoly over the  
 14 uncopyrightable features of its works.

15 Am. Def. ¶ 1. Much of the paragraph focuses on assertions of Moonbug's motive for asserting its  
 16 copyrights through DMCA takedown notices to YouTube. But Babybus concedes that copyright  
 17 "misuse is quite distinct from the legitimate invocation of one's own copyright even though  
 18 prompted by ulterior motives." Opp. at 17 (citing *Religious Tech. Ctr. v. Lerma*, No. CIV.A. 95-  
 19 1107-A, 1996 WL 633131, at \*12 (E.D. Va. Oct. 4, 1996)). Here, there is no dispute that  
 20 Moonbug holds and asserted its registered copyrights for baby JJ, related family characters, and  
 21 videos depicting those characters, thus rendering Babybus's allegations of Moonbug's "ulterior  
 22 motives" insufficient to support a misuse defense. See Docket Nos. 41-1 ("JJ," Reg. No.  
 23 VAu001379978, "Unpublished Family Characters 2017", Reg. No. VAu001322038), 41-4 at 23-  
 24 29 ("Boo Boo Song" (U.S. Copyright No. PA0002181622), "Yes Yes Vegetable Song" (U.S.  
 25 Copyright No. PA0002159137), "Bath Song" (U.S. Copyright No. PA0002146326), "Car Wash  
 26 Song" (U.S. Copyright No. PA0002191424), "Yes Yes Playground Song" (U.S. Copyright No.  
 27 PA0002145951), "Yes Yes Bedtime Song" (U.S. Copyright No. PA0002177791), "No No Play  
 28 Safe Song (U.S. Copyright Nos. PA 0002177782, SRu001317776)); see also *Religious Tech. Ctr.*,  
 1996 WL 633131, at \*12 ("Even assuming *arguendo* that such [ulterior] motivations were part of  
 RTC's litigation strategy, that does not constitute misuse of copyright. Misuse of copyright  
 applies where the copyright owner tries to extend the copyright beyond its intended reach, thereby  
 augmenting the physical scope of copyright protection. It typically arises in situations where it is  
 alleged that the copyright owner projected his unique rights in a work onto other, unrelated  
 products or services. . . [M]isuse concerns the wrongful use of the copyright powers themselves in  
 ways violative of the Constitution or public policy.").

1           Thus, the portion of Babybus’s defense that is relevant to the misuse analysis of whether  
2 Moonbug leveraged its copyrights to gain “control of areas outside the monopoly” of its  
3 copyrights is the final sentence alleging Moonbug’s assertion of “unprotectable copyright  
4 features” related to “JJ and tropes regarding family structure or topics common in children’s  
5 media.” Am. Def. ¶ 1. Here, again, Babybus’s assertion is not plausible because it selectively  
6 characterizes Moonbug’s DMCA notices as focusing *only* on broad, generic features. But these  
7 aspects were component parts, links in an extensive and detailed chain of allegations which  
8 Moonbug put forward in support of its DMCA notices. Moonbug’s allegations that Babybus  
9 copied the conceptual foundations Moonbug’s copyrighted works are integral to Moonbug’s  
10 specific allegations of “copying of the plot, setting, pace and sequence of events,” “frame-by-  
11 frame copying,” and “near-identical thumbnail art.” *See* McHale Decl., Exh. 5, 5-15, 30-108.  
12 Babybus’s copyright misuse affirmative defense is further undercut by Babybus’s admission that it  
13 removed from public view over 100 of its allegedly infringing videos within one day of Moonbug  
14 filing DMCA notices and accompanying letter with YouTube. Compl. ¶ 65; Am. Answer ¶ 65.

15           Moreover, Babybus’s supplemental filings of six exemplary videos do not salvage its  
16 copyright misuse defense. Docket Nos. 56, 63. Each of those videos contain characters and/or  
17 plots, images, and sequences that Moonbug argues infringe its registered copyrights. *See* Docket  
18 Nos. 60, 65. Babybus, again, relies on its contention that Moonbug asserts features of its  
19 copyrights that are not protectable, but this argument does not support an *affirmative* defense of  
20 copyright misuse. *See King.com Ltd. v. 6 Waves, LLC*, No. C-13-3977 MMC, 2014 WL  
21 12704998, at \*1 (N.D. Cal. July 11, 2014) (striking copyright misuse affirmative defense because  
22 “the allegation that elements of plaintiff’s [works] are not protected by copyright . . . is not  
23 affirmative in nature but, rather, constitutes an assertion that plaintiff has not met its burden of  
24 proof.”) (citation omitted).

25           Thus, because Babybus’s copyright misuse defense turns on its incomplete and implausible  
26 characterization of the bases of Moonbug’s DMCA notices, the Court strikes the defense.

27 C. Defendant’s § 512(f) Counterclaim

28           Babybus alleges a counterclaim that Moonbug violated 17 U.S.C. § 512(f) by knowingly

1 misrepresenting its copyrights when asserting its DMCA takedown notices. Am. Countercl. ¶¶  
 2 43-47. Moonbug moves to dismiss the § 512(f) counterclaim for failure to state a claim.

3 1. Legal Framework

4 17 U.S.C. § 512(f) provides that “[a]ny person who knowingly materially misrepresents ...  
 5 that material or activity is infringing ... shall be liable for any damages ... incurred by the alleged  
 6 infringer ... who is injured by such misrepresentation, as the result of the service provider relying  
 7 upon such misrepresentation in removing or disabling access to the material or activity claimed to  
 8 be infringing.”

9 The Ninth Circuit has observed that because “Congress included an expressly limited  
 10 cause of action for improper infringement notifications, imposing liability only if the copyright  
 11 owner's notification is a knowing misrepresentation,” a copyright owner “cannot be liable simply  
 12 because an unknowing mistake is made, even if the copyright owner acted unreasonably in making  
 13 the mistake.” *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1004–05 (9th Cir. 2004).  
 14 “Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part  
 15 of the copyright owner.” *Id.* “Congress could have easily incorporated an objective standard of  
 16 reasonableness,” so the “fact that it did not do so indicates an intent to adhere to the subjective  
 17 standard traditionally associated with a good faith requirement.” *Id.* at 1004.

18 Thus, to state a § 512(f) claim, Defendant must allege (1) a material misrepresentation in a  
 19 takedown notice that led to a takedown, and (2) that the takedown notice was submitted in  
 20 subjective bad faith. *Ningbo Mizhihe I&E Co. v. Does 1-200*, No. 19 CIV. 6655 (AKH), 2020 WL  
 21 2086216, at \*3 (S.D.N.Y. Apr. 30, 2020); *see also Rossi v. Motion Picture Ass'n of Am. Inc.*, 391  
 22 F.3d 1000, 1005 (9th Cir. 2004) (“Juxtaposing the ‘good faith’ proviso of the DMCA with the  
 23 ‘knowing misrepresentation’ provision of that same statute reveals an apparent statutory structure  
 24 that predicated the imposition of liability upon copyright owners only for knowing  
 25 misrepresentations regarding allegedly infringing websites.” (citations omitted)).

26 2. Material Misrepresentation

27 Babybus fails to plausibly allege that Moonbug made material misrepresentations in its  
 28 DMCA takedown notices.

1 First, Babybus alleges material misrepresentation because the “Moonbug notices that  
2 resulted in removals relied almost exclusively on Moonbug’s copyright in its JJ character and  
3 relied on false and/or misleading allegations of character ‘copying’ to demand that YouTube take  
4 down entire videos.” Am. Countercl. ¶ 26. “For example, Moonbug’s first two improper DMCA  
5 takedown notices claimed that two Babybus works allegedly infringed Copyright Reg. No.  
6 VAu001379978, which only covers a 2-D artwork titled ‘JJ’... as well as Copyright Reg. No.  
7 VAu001322038, which is for 2-D artwork titled ‘Unpublished Family Characters.’” *Id.*

8 The allegation that Moonbug’s claims were based “almost exclusively” on claimed  
9 infringement of 2-D artworks is not plausible because it is belied by the DMCA takedown notices  
10 and accompanying letter that Moonbug sent to YouTube that clearly demonstrate otherwise (and  
11 which are incorporated by reference to the Amended Counterclaims). For example, other  
12 Moonbug notices—that Babybus does not mention—identified other representative copyrighted  
13 works, including specific videos. Different takedown notices were directed to specific and  
14 different videos, *see, e.g.*, Docket Nos. 32-1, 32-2, and the letter accompanying the takedown  
15 notice listed additional videos for which individual takedown notices were not submitted as  
16 evidence. *See, e.g.*, McHale Decl. Exh. 2 (DMCA notice asserting infringement of "Title of  
17 original video: Finger Family + More Nursery Rhymes & Kids Songs - CoComelon"); Exh. 3  
18 (DMCA notice asserting infringement of "Title of original video: Yes Yes Playground Song |  
19 CoComelon Nursery Rhymes & Kids Songs"); Exh. 4 at 23-29 (Letter to YouTube asserting  
20 infringement of registered copyrighted works including "The Boo Boo Song," "Yes Yes Vegetable  
21 Song," "Bath Song," "Car Wash Song," "Yes Yes Bedtime Song," and "No No Play Safe Song").  
22 Additionally, YouTube’s process for submitting a DMCA notice conforms to § 512 by stating that  
23 the “the law allows” a complainant to submit “a representative list” of infringed copyrighted  
24 works, meaning the reference to the 2D artwork was not exhaustive. *Id.*, Exh. 14; *see also* 17  
25 U.S.C. § 512(c)(3)(A)(ii) (“[A] notification of claimed infringement must be a written  
26 communication provided to the designated agent of a service provider that includes substantially  
27 the following. . . Identification of the copyrighted work claimed to have been infringed, or, if  
28 multiple copyrighted works at a single online site are covered by a single notification, a

1 representative list of such works at that site.”). Here, Moonbug’s DMCA notices to YouTube  
2 were accompanied by a 17-page letter along with 80-pages of exhibits providing a detailed list of  
3 infringed works, references to at least four additional copyright registrations, and analysis and  
4 examples of copying, including allegations of frame-by-frame copying, near-identical thumbnail  
5 art, copying of two series of original songs (including the same titles, melodies, lyrics and stories),  
6 and “copying of the plot, setting, pace and sequence of events of other CoComelon videos.” *See*  
7 *McHale Decl.*, Exh. 5, 5-15, 30-108. Thus, Babybus’ allegation that Moonbug’s notices were  
8 based “almost exclusively” on infringement of two registrations for 2D art is simply belied by the  
9 undisputed record and hence not plausible.

10 Babybus’s second basis for alleging material misrepresentations by Moonbug is that  
11 Moonbug has “focused on alleged similarities in the face of its character JJ and Babybus’s  
12 character JoJo – but the ‘similarities’ are limited to naturally occurring features of all infants.”  
13 *Am. Countercl.* ¶ 28. Babybus alleges that Moonbug’s infringement claims are based on depicting  
14 an infant with a single tuft of hair, thin eyebrows, big eyes and colorful clothing, which are all  
15 features “common to both fictional and non-fictional babies.” *Id.* Further, Babybus argues that  
16 Moonbug’s DMCA notices were “frivolous” because Moonbug seeks to keep Babybus from  
17 depicting “depicting curious children” or “traditional ‘nuclear’ families.” *Id.* ¶¶ 29-30. But, as  
18 explained above, Babybus’s allegations rely on selective references to just one, out-of-context  
19 portion of Moonbug’s infringement allegations submitted to YouTube. Viewed in their entirety, it  
20 is clear that the take down notices are based on much broader allegations of copying of details that  
21 is far beyond the generic elements Defendant describes. As noted above, Babybus’s assertion that  
22 the DMCA notices were “frivolous” is also undercut by Babybus’s admission that it removed from  
23 public view over 100 of its allegedly infringing videos within one day of Moonbug filing notices  
24 and accompanying letter with YouTube. *Compl.* ¶ 65; *Am. Answer* ¶ 65.

25 Moreover, Babybus’s allegations focus on the copyright protectability of individual  
26 features of Moonbug’s artworks and characters in isolation, but fail to consider that a copyright  
27 infringement claim can be based on a selection, arrangement, or combination of such features.  
28 The Ninth Circuit has acknowledged that even where individual similarities might be



1 unprotectable, such as generic or *scenes a faire* elements, “[a] combination of unprotectable  
2 elements” can support an infringement claim “if those elements are numerous enough and their  
3 selection and arrangement original enough that their combination constitutes an original work of  
4 authorship.” *Malibu Textiles, Inc. v. Label Lane Int’l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019). As  
5 Moonbug extensively alleged in its letter to YouTube accompanying its DMCA notices, its  
6 infringement allegations did not simply target JoJo’s large head, positivity and curiosity or family  
7 structure. Rather, it examined Babybus’s duplication of a wide collection of features of the  
8 CoComelon characters and videos, as well as other recognizable features of the CoComelon  
9 franchise such as conceptual qualities like family dynamics, character animation styles and  
10 movement, and video plots, pace, themes, moods, and settings, as visible from screenshots and  
11 videos. *See, e.g., supra* Background § A(1); McHale Decl., Exh. 5 at 6-10 (collecting side-by-side  
12 comparisons of alleged copying of images), 10-14 (detailing allegations of copying of plot and  
13 sequences of events of Moonbug’s “The Boo Boo Song,” “Yes Yes Vegetables Song,” “Colors  
14 Song,” “Clean Up Trash Song,” “Bath Song,” and “Car Wash Song”). Babybus’s attempt to  
15 isolate, focus only on certain aspects of Moonbug’s infringement allegations, and recast those  
16 allegations at a high degree of generality does not accurately describe the bases of the DMCA  
17 notices that Moonbug submitted. *Cf. Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002)  
18 (“protectable expression includes the specific details of an author’s rendering of ideas, or the  
19 actual concrete elements that make up the total sequence of events and the relationships between  
20 the major characters”) (citations omitted), *overruled in part on other grounds by Skidmore v. Led*  
21 *Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No.  
22 2:15-CV-09938-RGK-E, 2017 WL 83506, at \*5 (C.D. Cal. Jan. 3, 2017) (“Although each of these  
23 elements may not be individually original and copyright protectable, they are ‘numerous enough  
24 and their selection and arrangement original enough that their combination constitutes an original  
25 work of authorship,’ especially when combined with the costumes and fictional characters”); *Dr.*  
26 *Seuss Enters., Ltd. P’ship v. ComicMix Ltd. Liab. Co.*, 983 F.3d 443, 456 n.5 (9th Cir. 2020) (“We  
27 are cautious not to overzealously decompose visual expression into its abstract, and thus  
28 unprotectable, units, because that would mean that any amount of taking by ComicMix would be

1 permissible.”).

2 Babybus fails to allege any specific misrepresentations in Moonbug’s DMCA takedown  
3 notices in its supplemental filings and identification of six exemplary videos. *Cf.* Docket No. 56,  
4 63. It simply relies on the argument that Moonbug’s DMCA notices fail on the merits of their  
5 assertions of infringement because “there are no protectable similarities in protectable elements  
6 between these videos and the videos in Moonbug’s catalogue.” Docket No. 63 at 3. The claims of  
7 copyright infringement were not frivolous. Thus, Babybus’s allegations do not plausibly  
8 demonstrate the first element of its § 512(f) counterclaim -- that Moonbug made *material*  
9 *misrepresentations* in its DMCA takedown notices filed with YouTube.

10 3. Subjective Bad Faith

11 Babybus’s § 512(f) counterclaim is also lacking because Babybus fails to plausibly allege  
12 facts sufficient to state the second element of its counterclaim: that Moonbug acted in subjective  
13 bad faith and with actual knowledge that it was making a material misrepresentation. *See* 17  
14 U.S.C § 512(f); *Rossi*, 391 F.3d at 1004.

15 On this element, Babybus alleges, (1) Moonbug “did not consider whether it was alleging  
16 copyright protection for elements of its works that are not protectable in copyright,” (2) Moonbug  
17 “did not consider the doctrine of fair use,” (3) Moonbug “rendered itself willfully blind by  
18 purposefully avoiding any in-depth reasoned analysis regarding any similarities between Moonbug  
19 and Babybus’s works,” and (4) Moonbug intended to exploit YouTube’s system for removing  
20 Babybus’s channels by accumulating copyright strikes against Babybus. *Am. Countercl.* ¶¶ 32-35.

21 Babybus fails to allege a plausible factual basis for any of these allegations. Babybus’s  
22 first two allegations are contradicted by Moonbug’s 17-page letter and 80-pages of exhibits  
23 carefully and extensively laying out the bases for its claims of copyright infringement underlying  
24 its DMCA notices. *McHale Decl.*, Exh. 5. As noted above, Plaintiff’s takedown letters and  
25 supporting document establish facially plausible claims of infringement, and Babybus does not  
26 allege a plausible basis for a fair use defense. Notably, Babybus itself never raised a fair use  
27 defense in its original answer and counterclaim, its TRO application, nor even in its counternotices  
28 filed with YouTube. *See* Docket Nos. 20, 22; *McHale Decl.*, Exh. 10. Further, in light of

1 Moonbug’s detailed submission to YouTube, Babybus has no basis to allege that Moonbug “did  
2 not consider” the nature of its copyrights or the fair use doctrine. In any event, to plausibly allege  
3 this element, Babybus must do more than show Moonbug was *mistaken* or *unreasonable* in its  
4 assertion of DMCA notices – it must allege that Moonbug had “actual knowledge of  
5 misrepresentation.” *Rossi*, 391 F.3d at 1005; *see also id.* (“A copyright owner cannot be liable  
6 simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in  
7 making the mistake.”).

8 As to Babybus’s argument that Moonbug was “willfully blind” to material  
9 misrepresentations, Babybus must allege that Moonbug (1) subjectively believed there was a high  
10 probability that a fact existed, and (2) took deliberate actions to avoid learning the fact. *See Lenz*,  
11 815 F.3d at 1155. Babybus alleges no factual support on either prong. Babybus makes a  
12 conclusory allegation that Moonbug “avoid[ed] an in-depth reasoned analysis” of its infringement  
13 allegations, which is contradicted by Moonbug’s extensive letter to YouTube detailing the bases  
14 for its DMCA notices.

15 Finally, assuming the truth of Babybus’s assertion that Moonbug intended to exploit  
16 YouTube’s “copyright strikes” policy in order to disable Babybus’ *non*-infringing channels, this  
17 allegation may demonstrate a potential bad-faith *motive* of Moonbug, but it does not establish that  
18 Moonbug “knowingly materially misrepresent[ed]. . . that material or activity is infringing.” 17  
19 U.S.C. § 512(f). Put differently, § 512(f) protects against bad-faith misrepresentations of  
20 copyright infringement *not* against a desire to see negative downstream consequences from  
21 properly-filed claims of copyright infringement.

22 Thus, because Babybus fails to plausibly allege facts on either prong of its § 512(f)  
23 counterclaim, it fails to state a claim. The Court dismisses Babybus’s § 512(f) counterclaim.

24 D. Applicability of California’s Anti-SLAPP Statute to Defendant’s State Law Counterclaims

25 Moonbug argues that Babybus’ amended state law counterclaims – intentional interference  
26 with economic expectations, intentional interference with contractual relations, and unfair  
27 competition, Am. Countercl. ¶¶ 48-64 – violate California’s anti-SLAPP statute and should,  
28 therefore, be stricken. Motion at 23.

1           1.       Legal Framework

2           California's anti-SLAPP Statute allows for pre-trial dismissal of “SLAPPs” (“Strategic  
3           Lawsuits against Public Participation”). Cal. Civ. Proc. Code § 425.16; *Metabolife Int'l, Inc. v.*  
4           *Wornick*, 264 F.3d 832, 839 (9th Cir. 2001). The statute aims to identify, early in the litigation  
5           process, “meritless first amendment cases aimed at chilling expression through costly, time-  
6           consuming litigation.” *Metabolife*, 264 F.3d at 839.

7           “A court considering a motion to strike under the anti-SLAPP statute must engage in a  
8           two-part inquiry.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003).

9           First, the defendant must “make an initial prima facie showing that the plaintiff's suit arises  
10          from an act [by the defendant] in furtherance of the defendant's rights of petition or free speech.”  
11          *Id.* (citation omitted). As § 425.16 provides:

12                           [An] act in furtherance of a person's right of petition or free speech  
13                           under the United States or California Constitution in connection  
                              with a public issue includes:

- 14                           (1) any written or oral statement or writing made before a  
15                           legislative, executive, or judicial proceeding, or any other official  
16                           proceeding authorized by law;  
17                           (2) any written or oral statement or writing made in connection with  
18                           an issue under consideration or review by a legislative, executive, or  
19                           judicial body, or any other official proceeding authorized by law;  
20                           (3) any written or oral statement or writing made in a place open to  
                              the public or a public forum in connection with an issue of public  
                              interest; or  
                              (4) any other conduct in furtherance of the exercise of the  
                              constitutional right of petition or the constitutional right of free  
                              speech in connection with a public issue or an issue of public  
                              interest.

21          Cal. Civ. Proc. Code § 425.16(e).

22          Second, where a defendant makes the required prima facie showing, “the burden shifts to  
23          the plaintiff to demonstrate a probability of prevailing on the challenged claims.” *Vess*, 317 F.3d  
24          at 1110. In other words, the plaintiff must demonstrate that the challenged claims are “legally  
25          sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the  
26          evidence submitted by plaintiff is credited.” *Metabolife*, 264 F.3d at 840 (quoting *Wilcox v.*  
27          *Superior Court*, 27 Cal. App. 4th 809, 823, 33 Cal. Rptr. 2d 446 (1994)) (internal quotation marks  
28          omitted).

1 The Ninth Circuit has clarified that anti-SLAPP motions are evaluated under different  
 2 standards depending on the basis for the motion. *Planned Parenthood Fed'n of Am., Inc. v. Ctr.*  
 3 *for Med. Progress*, 890 F.3d 828, 833 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018). "If a  
 4 defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the  
 5 analysis is made under Fed. R. Civ. P. 8 and 12 standards" and "Plaintiffs [are] not required to  
 6 present prima facie evidence supporting Plaintiffs' claims." *Id.* "If a defendant makes a special  
 7 motion to strike based on alleged deficiencies in the plaintiff's complaint, the motion must be  
 8 treated in the same manner as a motion under Rule 12(b)(6)." *Id.* at 834. Here, Moonbug's  
 9 arguments on founded on purely legal arguments, so Babybus is not required to submit additional  
 10 factual evidence to support its claim; Babybus must defend only the legal sufficiency of its claims.  
 11 *Id.*

12 2. Step One: State Law Counterclaims Arise from Acts in Furtherance of Moonbug's  
 13 Rights of Petition or Free Speech

14 Babybus' state law counterclaims focus on Moonbug's submission of "DMCA takedown  
 15 notices to YouTube" which alleged that Babybus's "videos were infringing on Moonbug's  
 16 copyrights." Am. Countercl. ¶¶ 50 (count 2), 56 (count 3), 61 (count 4). Moonbug contends that  
 17 the filing of the DMCA takedown notices is covered by 425.16(e)(1) and (e)(2) because they  
 18 constitute prelitigation complaints made in anticipating or during the litigation. *Digerati*  
 19 *Holdings, LLC v. Young Money Entm't, LLC*, 194 Cal. App. 4th 873, 886–87 (2011). The DMCA  
 20 takedown process enables litigation by requiring as a predicate an alleged infringer to submit to  
 21 the jurisdiction of U.S. courts when submitting a DMCA counter notification and requiring a  
 22 copyright owner provide notice that it filed a lawsuit within ten business days of a counter-  
 23 notification to keep taken-down materials from being reinstated. *See* 17 U.S.C. § 512(g)(2)(C),  
 24 (g)(3)(D); *Comstock v. Aber*, 212 Cal. App. 4th 931, 947 (2012) (prelitigation complaints  
 25 protected under §§ 425.16(e)(1), (e)(2)).

26 Additionally, Moonbug contends Babybus's state law counterclaims fall under §  
 27 425.16(e)(4), as courts have found the filing DMCA notices constitutes an exercise of free speech  
 28 in connection with an issue of public interest where the notice refers to works with numerous

1 potential audience member – including in cases, like this one, where the DMCA notice refers to a  
 2 video on YouTube. *See Lenz v. Universal Music Corp.*, No. C 07-03783, 2008 WL 962102, at \*4  
 3 (N.D. Cal. 2008) (filing of DMCA takedown notice constitutes free speech); *Complex Media, Inc.*  
 4 *v. X17, Inc.*, No. CV1807588SJOAGR, 2019 WL 2896117, at \*4 (C.D. Cal. Mar. 4, 2019)  
 5 (submitting DMCA notice is free speech under (e)(4) and is an issue of public interest where the  
 6 “videos containing allegedly infringing content” were on Plaintiff’s YouTube channel with 2.4  
 7 million subscribers).

8 Moonbug is thus on strong footing in arguing that Babybus’s state law counterclaims are  
 9 covered by § 425.16(e)(1), (2) and/or (4). Babybus does not dispute Moonbug’s specifics  
 10 arguments about the applicability of each subsection, but, rather, argues that the anti-SLAPP  
 11 statute does not apply at all because Babybus’s claims fit under the commercial speech exception  
 12 under § 425.17. *Opp.* at 26.

13 Babybus’s position lacks support. Babybus has not identified any cases holding that the  
 14 anti-SLAPP statute does not apply to DMCA takedown notices. Courts have held to the contrary.  
 15 *See, e.g., Complex Media, Inc. v. X17, Inc.*, No. CV1807588SJOAGR, 2019 WL 2896117, at \*5  
 16 (C.D. Cal. Mar. 4, 2019). As Judge Orrick recently observed:

17 A cause of action arising from commercial speech falls under this  
 18 exemption when:

- 19 (1) the cause of action is against a person primarily engaged in the  
 20 business of selling or leasing goods or services;  
 21 (2) the cause of action arises from a statement or conduct by that  
 22 person consisting of representations of fact about that person's or a  
 23 business competitor's business operations, goods, or services;  
 24 (3) the statement or conduct was made either for the purpose of  
 25 obtaining approval for, promoting, or securing sales or leases of, or  
 26 commercial transactions in, the person's goods or services or in the  
 27 course of delivering the person's goods or services; **and**  
 28 (4) the intended audience for the statement or conduct meets the  
 definition set forth in section 425.17(c)(2) [an actual or potential  
 buyer or customer, or a personal likely to repeat the statement to, or  
 otherwise influence, and actual or potential buyer or customer].

26 *UCP Int'l Co. Ltd. v. Balsam Brands Inc.*, No. 3:18-CV-07579-WHO, 2019 WL 1995768, at \*3  
 27 (N.D. Cal. May 6, 2019) (quoting *Simpson Strong-Tie Co. v. Gore*, 49 Cal. 4th 12, 30 (2010))  
 28 (emphasis added).

1           Babybus does not allege facts that establish each of the four elements. Prong 1 does not  
2 apply here because Moonbug is not engaged in “the business of selling or leasing goods or  
3 services” but, rather, is the creator of expressive works of art – animated video productions. As  
4 Judge Seeborg noted in *Forsyth v. Motion Picture Ass'n of Am., Inc.*, No. 16-CV-00935-RS, 2016  
5 WL 6650059, at \*3–4 (N.D. Cal. Nov. 10, 2016), “[T]he underlying “product”—films—are not  
6 mere commercial products, but are expressive works implicating anti-SLAPP concerns and plainly  
7 entitled to full First Amendment protection. Moreover, with respect to anti-SLAPP, the statute  
8 itself expressly recognizes the distinction. While the legislature amended the law so that it  
9 generally would not apply to claims arising from commercial advertising (Cal. Code Civ. P §  
10 425.17(c)), it provided a carve-out for “[a]ny action against any person or entity based upon the  
11 creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic,  
12 literary, musical, political, or artistic work, including, but not limited to, a motion picture or  
13 television program.”

14           Moonbug’s DMCA notices do not satisfy prong 2 because they are not “representations of  
15 fact” that disparage the quality of Babybus’s goods (videos); instead they assert legal claims of  
16 copyright infringement. Additionally, Moonbug’s DMCA notices do not satisfy prong 3 because  
17 they alleged infringement by *Babybus* – the notices did not “promot[e]” *Moonbug’s* goods.  
18 Finally, prong 4 is not satisfied because the intended audience of the DMCA notices was  
19 YouTube’s legal department, which is not “actual or potential buyer or customer” of Babybus’s,  
20 but a distribution platform operator. *See* McHale Decl. Ex. 11 at 1 (YouTube terms explain that it  
21 is a “distribution platform for original content creators and advertisers large and small”).

22           Babybus’s citation to two inapposite cases is of no help. In *Weiland Sliding Doors &*  
23 *Windows, Inc. v. Panda Windows & Doors, LLC*, the court applied the commercial speech  
24 exemption to Weiland’s public press release, distributed to thousands of customers, vendors and  
25 trade publications, where the Defendant conceded that the contents of the release included  
26 representations of fact about Weiland’s products. 814 F.Supp. 2d 1033, 1038 (S.D. Cal. 2011).  
27 Similarly, in *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, the court applied the  
28 commercial speech exemptions to representations and statements about United Tactical’s

1 affiliation with another brand and disparagement of Real Action; the representations were  
 2 published on United Tactical’s website, which promoted its own products. 143 F.Supp. 3d 982,  
 3 1021 (N.D. Cal. 2015). Unlike those cases involving public statements to buyers and potential  
 4 buyers of commercial products to promote the speaker’s sales over that of its competitors, here  
 5 Moonbug’s DMCA notices were filed privately with a non-customer third-party, YouTube, and it  
 6 was done so to assert Moonbug’s legal rights over its expressive artworks. The commercial  
 7 speech exemption does not apply here.

8 Accordingly, Moonbug has made an “initial prima facie showing that the [Babybus’s state  
 9 law counterclaims] arises from an act [by Moonbug]” – filing DMCA notices with YouTube “in  
 10 furtherance of the [Moonbug’s] rights of petition or free speech” under § 425.16(e)(1), (2) and (4).  
 11 *Vess*, 317 F.3d at 1110.

12 3. Step Two: Babybus is Unlikely to Prevail on the Merits of its State Law Claims

13 At step two of the anti-SLAPP analysis, Moonbug argues that Babybus is unlikely to  
 14 prevail on the merits of its state law claims because (a) Babybus’s state law counterclaims are  
 15 preempted by the Copyright Act, (b) barred by the litigation privilege, and (c) Babybus fails to  
 16 state claims. It is sufficient for the Court to decide this question on Moonbug’s first argument:  
 17 Moonbug is correct – Babybus’s state law counterclaims are preempted.

18 “Numerous courts within the 9th Circuit have held that 17 U.S.C. § 512(f) of the DMCA  
 19 preempts state law claims based on DMCA takedown notifications.” *Complex Media, Inc. v. X17,*  
 20 *Inc.*, No. CV1807588SJOAGR, 2019 WL 2896117, at \*5 (C.D. Cal. Mar. 4, 2019) (citing  
 21 *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004); *see Lenz*, 2008 WL  
 22 962102, at \*4; *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. C 10-05696, 2011 WL  
 23 2690437, at \*4 (N.D. Cal. 2011)).

24 Applying the doctrine of conflict preemption, the *Diebold* court found:

25 Even if a copyright holder does not intend to cause anything other  
 26 than the removal of allegedly infringing material, compliance with  
 27 the DMCA’s procedures nonetheless may result in disruption of a  
 28 contractual relationship: by sending a letter, the copyright holder can  
 effectuate the disruption of ISP service to clients. If adherence to the  
 DMCA’s provisions simultaneously subjects the copyright holder to  
 state tort law liability, there is an irreconcilable conflict between



1 state and federal law. To the extent that Plaintiffs argue that there is  
 2 no conflict because Diebold's use of the DMCA in this case was  
 3 based on misrepresentation of Diebold's rights, their argument is  
 4 undercut by the provisions of the statute itself. In section 512(f),  
 Congress provides an express remedy for misuse of the DMCA's  
 safe harbor provisions. It appears that Congress carefully balanced  
 the competing interests of copyright holders, ISPs, and the public,  
 by providing immunity subject to relief for any misuse of the statute.

5 *Diebold*, 337 F.Supp. 2d at 1205-06. Accordingly, the court in *Diebold* dismissed the state law  
 6 claims as preempted. *Id.* at 1206. Likewise, the court in *Lenz* noted, “[g]iven that a special  
 7 provision of the Copyright Act itself regulates misrepresentation in such notifications, that  
 8 provision constitutes the sole remedy for a customer who objects to its contents and their effects.”  
 9 *Lenz*, 2008 WL 962102, at \*4 (quoting 1 Melville B. Nimmer & David Nimmer, 1 *Nimmer on*  
 10 *Copyright* § 1.18[A][1] (2019).

11 Babybus does not dispute that the Copyright Act preempts state law claims based on  
 12 DMCA takedown notifications. Instead, it argues that the Copyright Act does not apply here  
 13 because Babybus’ state law claims pertain only to “overseas subscribers” and “overseas viewers”  
 14 and the Copyright Act does not preempt causes of action premised upon possible extraterritorial  
 15 infringement. *Opp.* at 26-27. Babybus cites to the extraterritorial focus of its state law  
 16 counterclaims:

- 17 • “Babybus has an economic relationship with the overseas  
 18 subscribers of its foreign language YouTube channels,  
 including but not limited to the 4.57 million subscribers of  
 Babybus’s Indonesian channel.” *Am. Countercl.* ¶ 48.
- 19 • “Moonbug specifically identified Babybus’s foreign  
 20 language channels in a July 20, 2021 letter that Moonbug  
 sent to YouTube.” *Id.* ¶ 49.
- 21 • “Moonbug intentionally interfered with Babybus’s economic  
 22 relationship with its overseas subscribers by sending false  
 23 and/or misleading DMCA takedown notices to YouTube,  
 which falsely alleged that Babybus’s foreign language videos  
 24 were infringing on Moonbug’s copyrights.” *Id.* ¶ 50. *See*  
 25 *also id.* ¶¶ 56 (“As alleged above, the takedowns included  
 foreign language videos aimed at overseas subscribed to  
 26 Babybus’s YouTube channels.”), 61 (“sending false  
 and/misleading DMCA notices for the purposes of driving  
 27 out a competitor for overseas viewers of foreign language  
 28 videos.”).

1           Babybus’s attempt to sidestep the applicability of the Copyright Act is not persuasive.  
2           That foreign viewers might watch the videos does not divest Moonbug of the right to use DMCA  
3           procedures to address foreign language videos *that are indisputable accessible in the U.S. to*  
4           *domestic viewers*. Importantly, Babybus does not challenge the fact that its foreign language  
5           channels are available in the U.S. and that Moonbug had the right to address that U.S.-based  
6           infringement, even if the material is in a foreign language. Babybus does not dispute that  
7           Moonbug’s DMCA notices assert domestic, not overseas, infringement. *See* Compl; McHale  
8           Decl. Exhs. 1-4 (DMCA notices confirmations indicate that Moonbug noted that the country  
9           where the asserted copyright applies is the U.S.). The DMCA notices expressly concern  
10          Defendant’s uploading of infringing videos onto U.S. servers and making them accessible to U.S.  
11          users. *Id.*, Exh. 5 at 21-28 (exhibits to letter to YouTube lists allegedly infringing videos which all  
12          use YouTube URLs that are accessible in the United States).

13          Babybus bears the burden to make out a prima facie case of the legal sufficiency of the  
14          merits of its state law counterclaims. *See Ctr. For Med Progress*, 890 F.3d at 834 (“we hold that,  
15          on the one hand, when an anti-SLAPP motion to strike challenges only the legal sufficiency of a  
16          claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and  
17          consider whether a claim is properly stated.”). Babybus fails to show that Moonbug sought to  
18          enforce the Copyright Right Act extraterritorially through its DMCA notices. Thus, the Copyright  
19          Act preempts Babybus’s state law counterclaims. Accordingly, Babybus has not shown a  
20          likelihood of prevailing on those claims.

21          The Court strikes the state law counterclaims under California’s anti-SLAPP statute, and  
22          finds that Moonbug is entitled to attorneys’ fees. It will have the opportunity to file a motion for  
23          reasonable attorneys’ fees in bringing this motion to strike those state law counterclaims.  
24          *Complex Media, Inc. v. X17, Inc*, No. CV1807588SJOAGR, 2019 WL 2896117, at \*6 (C.D. Cal.  
25          Mar. 4, 2019) (“California law is unambiguous that “a prevailing defendant on a special motion to  
26          strike shall be entitled to recover his or her attorney's fees and costs. . . Nor does voluntary  
27          dismissal of the claim absolve the Plaintiff of liability for fees and costs incurred by Defendant  
28          striking the claim.”).




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- Moonbug’s motion to dismiss all of Babybus’s amended counterclaims (Count 1 - § 512(f); Counts 2-4 – state law claims) is **GRANTED**. Babybus’s amended counterclaims are dismissed with prejudice.

This order disposes of Docket No. 40.

**IT IS SO ORDERED.**

Dated: February 25, 2022



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EDWARD M. CHEN  
United States District Judge