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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 ULTRA INTERNATIONAL MUSIC
PUBLISHING, LLC and ULTRA
12 RECORDS, LLC,

13 Plaintiffs,

14 v.

15 MICHELLE PHAN,

16 Defendant.

17 _____
MICHELLE PHAN,

18 Counterclaimant,
19

20 v.

21 ULTRA INTERNATIONAL MUSIC
PUBLISHING, LLC and ULTRA
22 RECORDS, LLC,

23 Counterdefendants
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) Case No. 2:14-cv-05533-MMM-AGR

) **DEFENDANT AND
COUNTERCLAIMANT
MICHELLE PHAN'S
COUNTERCLAIM**

) **DEMAND FOR JURY TRIAL**

1 Counterclaimant Michelle Phan (“Phan”), as and for her counterclaims against
2 Ultra International Music Publishing, LLC and Ultra Records, LLC (collectively
3 “Ultra”), alleges as follows:
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5 **JURISDICTION AND VENUE**

- 6 1. The Court has jurisdiction over this Counterclaim pursuant to 28 U.S.C.
7 § 1367(a).
8 2. Venue is proper in this judicial district pursuant to principles of ancillary
9 venue.
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11 **THE PARTIES**

- 12 3. Phan is an individual residing in Los Angeles, California.
13 4. Phan is informed and believes, and thereon alleges, that
14 Counterdefendant Ultra International Music Publishing, LLC is a New York limited
15 liability company with its principal place of business in New York, New York.
16 5. Phan is informed and believes, and thereon alleges, that
17 Counterdefendant Ultra Records, LLC is a Delaware limited liability company with its
18 principal place of business in New York, New York.
19 6. Phan is informed and believes, and thereon alleges, that at all times
20 relevant hereto and in doing all that is alleged herein, each Counterdefendant was an
21 agent or employee of the other Counterdefendants, acting within the scope of such
22 agency or employment, directing, ratifying, or condoning the acts or omissions of
23 these Counterdefendants alleged herein, and with the knowledge of each
24 Counterdefendant attributable to the other Counterdefendant.
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26 **GENERAL ALLEGATIONS**

- 27 7. Phan is a beauty and lifestyle celebrity and entrepreneur with a global
28 audience. She has approximately seven million subscribers to her YouTube channel,

1 placing her in the top 1% globally on this social media platform. Phan receives
2 income from YouTube derived from, among other things, advertisements that appear
3 in association with her videos.

4 8. Phan's YouTube videos feature demonstrations of make-up techniques
5 and other beauty and lifestyle tips. Her videos typically incorporate a broad range of
6 music in the background for texture only; the music is never the focus of the video.

7 9. Phan's videos are so popular, and her fan base is so dedicated, that she
8 has been able to build a significant business through advertisements that appear in and
9 around her videos, and through large-scale partnerships with major media companies
10 and brand advertisers.

11 10. For example, Phan has a contract with Endemol Beyond, a wholly-owned
12 division of Endemol North America, part of the second largest independent television
13 company in the world. Phan also has a contract with L'Oreal Cosmetics, one of the
14 world's largest cosmetics manufacturers. These partnerships and others represent
15 significant monetary commitments from Phan's partners and significant revenue to
16 Phan. They rely on Phan's ability to reach millions of potential consumers through
17 her active YouTube channel, and depend upon Phan's YouTube channel remaining
18 active and unencumbered.

19 11. Due to the popularity of Phan's videos, record labels have paid Phan to
20 use their artists' music as background in her YouTube videos and to include in the
21 video a link to the iTunes store (which allows consumers to purchase the artist's music
22 immediately). Incorporating this iTunes link drives significant awareness of the
23 artist's music, and significant traffic to the iTunes store. Additionally, because
24 rankings on the influential Billboard charts are based, in part, on data from YouTube
25 (in addition to other sources), the significant viewership of Phan's videos helps record
26 labels in their efforts to see their music rise up in the charts.

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1 12. Phan is informed and believes, and thereon alleges, that, like other record
2 labels, Ultra too wanted Phan to use the music of artists on its label as background
3 music in her YouTube videos along with an iTunes link.

4 13. Beginning in July of 2009, Phan contacted Jason Kilgore, Ultra's Senior
5 New Media Manager, and asked him for permission to use the music of Kaskade, one
6 of Ultra's artists, in her YouTube videos. In her electronic communication to Kilgore,
7 Phan pointed out that she has several videos with more than 1,000,000 views (and
8 some with over 2,000,000 views) and offered, in consideration for the right to use
9 Kaskade's music in her videos, to credit the musician and include an iTunes purchase
10 link in the video to make it easier for her subscribers to purchase Ultra's music.

11 14. Kilgore wrote in response that he was aware of Phan, that Ultra was
12 "really happy to see you supporting Kaskade," and that Ultra was "more than happy to
13 let [Phan] use this content."

14 15. Phan and Kilgore then began to discuss in writing how this agreement
15 would work in connection with YouTube's "Content ID System." The way
16 YouTube's Content ID System worked was as follows: Owners of copyrighted
17 content (including record companies) would enter into an agreement with YouTube to
18 use its Content ID System. Phan is informed and believes, and thereon alleges, that
19 Ultra entered into such a contract. The owner of the content would then input all of its
20 copyrighted material (in Ultra's case, songs) into YouTube's Content ID System,
21 which would then search YouTube for matching content. Every time the Content ID
22 System identified a video containing content that matched the copyrighted material
23 uploaded by a content owner, YouTube would put a "claim" on the YouTube video
24 that contained matching content.

25 16. In 2009, content owners had varying arrangements with YouTube
26 regarding their recourse when the Content ID System triggered a claim based on a
27 video containing copyrighted material uploaded by the owner. For some owners,
28 whenever the Content ID System triggered a claim, they would automatically receive a

1 specified share of any advertising revenue generated by the “claimed” video. Phan is
2 informed and believes, and thereon alleges, that Ultra had such an arrangement with
3 YouTube.

4 17. As further confirmation that Ultra agreed to allow Phan to use its music
5 (in consideration for her crediting the musician and including an iTunes purchase
6 link), Kilgore promised Phan in writing that whenever YouTube made a claim on one
7 of Phan’s videos using a Kaskade song controlled by Ultra, he would release that
8 claim.

9 18. Kilgore then offered to send, and did send, to Phan a promotional
10 package of Ultra CDs featuring Kaskade and other artists. He said he was sending the
11 CDs “to show [Ultra’s] thanks” for Phan using Kaskade’s music in her YouTube
12 videos. Kilgore went on to say in an electronic communication sent a few days later
13 that if there was *any other* music by Ultra artists that Phan liked, she should just let
14 him know and he would send it to her.

15 19. Only a few days later, Kilgore again thanked Phan for using another of
16 Kaskade’s songs in one of her YouTube videos and further stated:

17 especially thanks for including the iTunes buy link in the
18 description and a title bar at the beginning. *This is the*
19 *perfect way to incorporate any of our videos.*

20 (Emphasis added.)

21 20. In August 2009, Phan and Kilgore further communicated regarding
22 Phan’s use of music by Ultra artists (including but not limited to Kaskade) in her
23 YouTube videos. Part of this came in the context of Phan asking Kilgore to release
24 “claims” made by YouTube on behalf of Ultra in connection with Phan’s use of music

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1 by Ultra artists as background music in her videos. On August 11, 2009, Kilgore
2 stated the following to Phan:

3 Also just let me know if this happens again in the future and
4 you need me to release a claim. This process happens
5 automatically on youtube's back end, but I can release
6 *whatever you may need.*

7 (Emphasis added.)

8 21. The agreement between Ultra and Phan covered not only Kaskade, but all
9 Ultra artists, as shown by Kilgore's January 2010 electronic communication to Phan in
10 which he stated: "If you use Ultra content please let me know when the video goes
11 live so that I can make sure it doesn't get claimed." Phan is informed and believes,
12 and thereon alleges, that Kilgore had express and/or implied authorization to enter into
13 this agreement on behalf of Ultra and/or that the agreement was ratified by Ultra.

14 22. Over the next four years, Phan – relying on her agreement with Kilgore –
15 continued to use master recordings and compositions of Ultra artists as background
16 music in her videos and, whenever YouTube indicated that Ultra had made a claim,
17 she would contact Kilgore or others at Ultra who would immediately release the claim
18 (whether it related to music by Kaskade or any other Ultra artist). This happened on
19 multiple occasions.

20 23. During this four year period, Ultra representatives offered suggestions to
21 Phan as to particular tracks by Ultra artists that she should use as background music in
22 her videos. A number of Ultra representatives, including Ultra's Senior Director of
23 Marketing and PR and Senior Manager of Interactive Marketing wrote to Phan that
24 they loved what she was doing with the music by Ultra's artists. Other Ultra
25 representatives sent Phan music tracks by Ultra artists that they suggested that she use
26 in her YouTube videos, asking only that she post a link to purchase for her
27 subscribers. Ultra representatives posted comments to Phan's YouTube videos
28 thanking Phan for helping to support Ultra artists.

1 24. Consistent with her agreement with Ultra, whenever Phan incorporated
2 music from Ultra artists in her videos, she credited the artist and included an iTunes
3 purchase link. Phan is informed and believes, and thereon alleges, that during the time
4 her videos have been posted on YouTube, Ultra has received substantial financial
5 benefit from purchases of music by Ultra artists through the iTunes link included by
6 Phan in her videos.

7 25. Phan has received tremendous support for her videos from Ultra artists,
8 including Kaskade and Late Night Alumni. These artists encouraged Phan and gave
9 her permission – sometimes directly and sometimes through her representatives – to
10 use their compositions and master recordings as background music in Phan’s
11 YouTube videos because the videos provided substantial and valuable publicity for
12 them. These artists sometimes provided Phan with digital copies of their songs to be
13 used by Phan in her YouTube videos.

14 26. On March 18, 2014, Ultra’s General Counsel wrote to Phan and insisted
15 for the first time that any use by Phan of music by Ultra’s artists (including all the
16 songs that Ultra had allowed Phan to use and which Phan had used for several years
17 with Ultra’s knowledge and approval) was “unauthorized” and demanded that she
18 cease and desist from using any music from Ultra’s artists.

19 27. Phan is informed and believes, and thereon alleges, that in June and July
20 of 2014, Ultra on three separate occasions, sent to YouTube takedown notices under
21 the Digital Millennium Copyright Act (“DMCA”) for twelve of Phan’s videos
22 containing music by Ultra artists even though Ultra had previously agreed that Phan
23 could use music by Ultra artists in those videos. In each of the cases, when Ultra sent
24 the takedown notice, YouTube removed the challenged video, thereby cutting off any
25 advertising revenue to Phan. One of the videos subject to Ultra’s takedown notice is a
26 video that, years earlier, had been claimed by Ultra and then specifically released by
27 Ultra once Phan notified Kilgore about it.
28

1 considerable fan base, and a clearly posted and valuable link to iTunes, from where
2 the viewer could immediately purchase the music); and (5) accordingly, under
3 controlling law, Ultra cannot revoke its consent.

4 33. There is an actual and substantial controversy between Plaintiff and
5 Defendant as to whether Ultra has irrevocably licensed its music for the Authorized
6 Videos.

7
8 **SECOND CLAIM FOR RELIEF**

9 (Violation of Section 512(f) of Digital Millennium Copyright Act)

10 [Against All Counterdefendants]

11 34. Phan hereby realleges and incorporates by reference the allegations of
12 Paragraphs 1 through 28 and 30 of this Counterclaim as if fully set forth herein.

13 35. Phan is informed and believes, and thereon alleges, that the takedown
14 notices sent to YouTube by Ultra were prepared and sent in bad faith, given Ultra's
15 express and/or implied agreement with Phan that she could use Ultra's music in her
16 videos in exchange for Phan's promotion of the Ultra music by using it as background
17 in her videos, crediting the artist, and including an iTunes purchase link.

18 36. Phan is informed and believes, and thereon alleges, that Ultra has
19 knowingly materially misrepresented that Phan's use of compositions and master
20 recordings by Ultra artists in Phan's videos is infringing, within the meaning of
21 17 U.S.C. § 512(f).

22 37. As a direct and proximate result of Ultra's bad faith actions, Phan has
23 been damaged in an amount to be proven at trial. In addition, Phan is entitled to her
24 reasonable attorney's fees prosecuting this claim.

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THIRD CLAIM FOR RELIEF

(Intentional Interference With Contract)

[Against All Counterdefendants]

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4 38. Phan hereby realleges and incorporates by reference the allegations of
5 Paragraphs 1 through 28, 30, and 35 through 36 of this Counterclaim as if fully set
6 forth herein.

7 39. Phan has a valid contract with YouTube, by which she has a YouTube
8 channel, participates in the YouTube Partners program, and receives substantial sums
9 of revenue related to YouTube-sold advertisements that appear on her YouTube
10 channel.

11 40. Phan is informed and believes, and thereon alleges, that Ultra is aware of
12 Phan's contractual relationship with YouTube.

13 41. Phan is informed and believes, and thereon alleges, that Ultra's bad faith
14 conduct, as alleged above, was designed to disrupt, and has in fact disrupted, Phan's
15 contractual relationship with YouTube.

16 42. As a direct and proximate result of Ultra's bad faith actions, Phan has
17 been damaged in an amount to be proven at trial.

18 43. Phan is informed and believes, and thereon alleges, that Ultra's actions
19 were taken with fraud, oppression, and malice. Punitive damages in an amount
20 according to proof therefore should be awarded to Phan and against Ultra.

21
22 WHEREFORE, Counterclaimant prays as follows:

- 23 1. For a declaratory judgment that:
24 A. Ultra issued a non-revocable license to Phan for the Authorized
25 Videos;
26 B. The Authorized Videos do not infringe on any Ultra copyright.
27 2. For damages according to proof;
28 3. For punitive damages according to proof;

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- 4. For costs and attorney's fees incurred herein;
- 5. For such other and further relief as the Court deems just and proper.

Dated: September 17, 2014

GRODSKY & OLECKI LLP
Allen B. Grodsky

By // Allen B. Grodsky //
 Allen B. Grodsky

Attorneys for Defendant and
Counterclaimant Michelle Phan

DEMAND FOR JURY TRIAL

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Counterclaimant Michelle Phan hereby demands trial by jury of this matter.

Dated: September 17, 2014

GRODSKY & OLECKI LLP
Allen B. Grodsky

By // Allen B. Grodsky //
Allen B. Grodsky

Attorneys for Defendant and
Counterclaimant Michelle Phan