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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

MARIA SCHNEIDER, UNIGLOBE ENTERTAINMENT, LLC, and AST PUBLISHING, LTD., individually and on behalf of all others similarly situated, Plaintiffs, v. YOUTUBE, LLC and GOOGLE LLC, Defendants.	Case No. 3:20-cv-04423-JD **PLAINTIFFS AND COUNTERCLAIM DEFENDANTS' TRIAL BRIEF** Judge: Hon. James Donato Date: June 12, 2023 Time: 9:00 a.m
YOUTUBE, LLC and GOOGLE LLC, Counterclaimants, v. PIRATE MONITOR LTD., et al., Counterclaim Defendants.	

Pursuant to Paragraph 4 of this Court's Standing Order for Civil Jury Trials, Plaintiffs Maria Schneider, Uniglobe Entertainment, LLC ("Uniglobe"), and AST Publishing, Ltd. ("AST") hereby submit this Trial Brief "specifying each cause of action and defense remaining to be tried along with a statement of the applicable legal standard." Standing Order for Civil Jury Trials ¶ 4.

PROCEDURAL HISTORY

Plaintiffs assert claims against Defendants for violations of the Copyright Act, including direct copyright infringement (Cause of Action I), contributory copyright infringement (Cause of Action III), vicarious copyright infringement (Cause of Action IV), and violations of 17 U.S.C. § 1202, which prohibits the removal of copyright management information or the distribution of copies of copyrighted works with knowledge that copyright management information had been removed (Cause of Action V).

Plaintiffs bring their claims against Defendants on behalf of themselves and four proposed classes: (1) the Registered Works Infringement Class; (2) the Foreign Unregistered Works Infringement Class; (3) the ISRC Class; and (4) the CLFN Class. [*See* ECF 245 at 3–4.] Plaintiffs' motion for class certification remains pending before the Court.

Defendants assert that they cannot be held liable for Plaintiffs' copyright infringement claims because (1) they are eligible for the protections of the safe harbor provisions of the Digital Millennium Copyright Act (DMCA)[1]; (2) the alleged copyright violations were authorized by express licenses of the works; (3) the alleged infringements constitute fair use; and (4) some of the alleged infringements are outside of the applicable limitations period.

The Court issued a Summary Judgment Order on January 5, 2023 [ECF 222], granting Defendants' partial summary judgment motion against Ms. Schneider "with respect to (1) all infringement claims based on the 27 works for which Schneider failed to identify an infringement;

[1] On May 4, 2023, Defendants informed Plaintiffs that they will seek not to pursue a defense under the safe harbor provisions of the DMCA if neither of the putative infringement classes is certified. Plaintiffs oppose their attempt to unilaterally amend their pleadings to withdraw this defense which has been vigorously litigated for three years. Plaintiffs filed an administrative motion on May 5, 2023, bringing this issue to the Court's attention and requesting further argument or briefing on its impact on class certification issues. [ECF 309.]

(2) direct infringement claims based on the 15 works that were uploaded to YouTube by Schneider or with her permission; and (3) the 121 alleged infringements that Ms. Schneider had actual knowledge of more than one year before filing suit." [*Id.* at 22.] As a result, Ms. Schneider's claims are limited to infringements for which she did not have actual knowledge more than one year before filing suit. Further, Ms. Schneider's direct infringement claims are limited to those works that were not licensed to YouTube through upload. Ms. Schneider's indirect infringement claims were not affected by the Summary Judgment Order. Uniglobe and AST eliminated claims of direct infringement for their works that were uploaded to YouTube, and claims for any instances of infringement of which they had actual knowledge more than one year before the commencement of this action, consistent with that Order.

On March 3, 2023, Plaintiffs submitted a partial motion for summary judgment as to whether Defendants are eligible for the safe harbor provisions of the Digital Millennium Copyright Act ("DMCA"). [ECF 265]. That motion set forth sufficient, but not comprehensive, reasons why that issue should be resolved in favor of Plaintiffs—specifically because YouTube prevents copyright holders from seeing search results for the huge number of videos that are private or unlisted. Plaintiffs' partial motion for summary judgment remains pending before the Court.

Defendants also bring a counterclaim against Pirate Monitor Ltd. (formerly a Plaintiff but which voluntarily dismissed its claims [ECF 66]) and Gabor Csupo under 17 U.S.C. 512(f) for allegedly submitting false takedown notices in 2019 that caused videos to be removed from YouTube.[2] Defendants cannot carry their burden of proof as to these counterclaims. Pirate Monitor Ltd. was dormant at the time the alleged violations occurred, and the takedown notices in question were submitted by agents or sub-agents of another company, Intellectual Property LLC, for which Mr. Csupo is not liable. [*See* ECF 260 at 9–10, 16–18.] Mr. Csupo and Pirate Monitor Ltd. assert affirmative defenses of unclean hands and *in pari delicto*.

[2] Defendants purport to bring counterclaims against Pirate Monitor LLC, a non-existent entity

I. COPYRIGHT ACT VIOLATIONS

A. Direct Copyright Infringement

In the Ninth Circuit, a *prima facie* case of direct copyright infringement requires that the plaintiff show (1) "ownership of the allegedly infringed material," (2) that "the alleged infringers violated at least one exclusive right granted to copyright holders under 17 U.S.C. § 106," and (3) "causation (also referred to as 'volitional conduct') by the defendant." *Perfect 10 v. Giganews*, 847 F.3d 657, 666 (9th Cir. 2017).

A plaintiff bears the burden of proving copyright ownership, which is a threshold question in copyright infringement actions. *See Fleischer Studios v. A.V.E.L.A.*, 654 F.3d 958, 962 (9th Cir. 2011) (citing *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984)). "To prove ownership, Plaintiff must establish either that it authored the asserted work, or that there has been a 'transfer of rights or other relationship between the author and the plaintiff so as to constitute the plaintiff as the valid copyright claimant.'" *Art of Living Found. v. Does 1-10*, 2012 WL 1565281, at *8 (N.D. Cal. May 1, 2012) (quoting 4-13 Nimmer on Copyright § 13.01). A copyright registration certificate is "prima facie evidence of the validity of the copyright and the facts stated in the certificate." *United Fabrics Int'l. v. C&J Wear.*, 630 F.3d 1255, 1257 (9th Cir. 2011).

The following exclusive rights attach to the Plaintiffs' copyrighted works:

> "(1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C § 106.

Pursuant to 17 U.S.C. § 501, a plaintiff has standing to sue if he or she has "a legal or beneficial interest in at least one of the exclusive rights described in § 106." *Silvers v. Sony*

"*Direct* liability must be premised on conduct that can reasonably be described as the *direct cause* of the infringement 'with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.'" *Perfect 10. v. Giganews*, 2014 WL 8628034, at *7 (C.D. Cal. Nov. 14, 2014) (quoting *Costar Group v. Loopnet*, 373 F.3d 544, 550 (4th Cir. 2004). The issue of direct infringement for an internet service provider like YouTube thus turns on whether the defendant: (1) exercised control over the infringing act; (2) selected the infringing material; or (3) instigated any copying, storage, or distribution. *See Giganews*, 847 F.3d at 670.

Plaintiffs bring claims for infringements of United States works and foreign works. A "United States work" is a work that is "first published—(A) in the United States; (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States." 17 U.S.C. §101 (omitting subparts not relevant). Under 17 U.S.C. § 411(a) and (c), no action for infringement may be brought for a "United States work" unless the work is registered prior to infringement or within three months of its first transmission.

A "foreign work" is any work that is not a "United States work" in 17 U.S.C. § 101. Foreign works are exempt from the registration requirements of the Copyright Act. *See TVB Holdings USA. v. Enom.*, 2014 WL 12581778, at *4 (C.D. Cal. Jan. 6, 2014) ("[R]egistration is not a prerequisite to bringing suit over a copyrighted work originating outside the United States.").

B. Contributory Copyright Infringement

"A party engages in contributory copyright infringement when it (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement." *Erickson Productions v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019) (citation omitted). "Contributory liability requires that the secondary infringer 'know or have reason to know' of direct infringement." *A&M Recs. v. Napster*, 239 F.3d 1004, 1020 (9th Cir. 2001). "There is no dispute that a proper takedown notice under the DMCA would confer [the defendant] with actual knowledge of the specific acts of infringement identified in the notice." *Perfect 10 v. Giganews*, 2014 WL 8628031, at *8 (C.D. Cal. Nov. 14, 2014). The element of material contribution is

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