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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARIA SCHNEIDER, et al.,  
Plaintiffs,  
v.  
YOUTUBE, LLC, et al.,  
Defendants.

Case No. 20-cv-04423-JD

**ORDER RE MOTIONS TO CERTIFY  
CLASS AND EXCLUDE EXPERTS**

United States District Court  
Northern District of California

In this copyright dispute, named plaintiffs Maria Schneider, Uniglobe Entertainment, and AST Publishing have asked to certify four classes under Federal Rule of Civil Procedure 23(b)(3), or, in the alternative, an issues class under Rule 23(c)(4). Dkt. No. 243-1. Defendants YouTube and Google (YouTube) oppose certification and have asked to strike the testimony of two of plaintiffs’ experts. Dkt. Nos. 261-1, 268. Certification is denied across the board, and the motion to strike is terminated without prejudice to renewal, as circumstances might warrant.

**BACKGROUND**

The summary judgment order provides a wealth of background on this litigation, and is incorporated here. *See* Dkt. No. 222. In pertinent part, the gravamen of plaintiffs’ case is that YouTube is a known hotbed of copyright piracy but denies most copyright owners access to its premier anti-piracy tool, known as Content ID. *See* Dkt. No. 99 ¶¶ 1-2. Content ID is “a digital fingerprint tool that compares videos being uploaded on YouTube to a catalogue of copyrighted material submitted by those entities permitted access to the tool.” *Id.* ¶ 2. According to plaintiffs, only a select group of “powerful” copyright owners are permitted to use Content ID, which allows them to readily identify infringing works and pursue anti-piracy measures. *Id.* ¶¶ 1, 56. Plaintiffs

1 relegated to vastly inferior and time-consuming manual means” of searching for infringing videos  
2 on the massive YouTube platform. *Id.* ¶¶ 1, 9. Plaintiffs allege that this two-tiered system has  
3 allowed repeated infringement of their works. Specifically, plaintiffs say that after they submitted  
4 a takedown notice and YouTube removed the challenged video, “the same person or another  
5 person has subsequently re-uploaded Plaintiffs’ copyrighted feature-length films, music  
6 recordings, or books.” *Id.* ¶ 79.

7 In effect, plaintiffs allege that YouTube has violated the copyright laws by withholding  
8 broad access to Content ID. *See id.* ¶ 80 (“[C]opyright holders should not be forced to *repeatedly*  
9 demand that the *same* platform take down infringing uses of the *same* copyrighted work, while  
10 other rights holders are provided access to standard digital fingerprinting and blocking tools.”)  
11 (emphasis in original). Plaintiffs also allege that YouTube automatically strips metadata out of  
12 uploaded videos, including copyright management information (CMI), which makes it harder to  
13 catch infringing conduct. *Id.* ¶¶ 83-86. The first amended complaint (FAC) presents claims for  
14 direct, contributory, and vicarious copyright infringement, and violations of Section 1202(b) of the  
15 Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202(b)(1)-(3), for removal of CMI and  
16 distribution of works with CMI removed.

17 A number of developments have changed the litigation terrain since the filing of the  
18 complaint. In the original complaint, plaintiff Pirate Monitor, a British Virgin Islands company  
19 that owns copyrights to foreign films, alleged that YouTube denied it access to Content ID and  
20 restricted the number of takedown notices it could submit in a day. Dkt. No. 1 ¶¶ 17, 65-74.  
21 Discovery indicated that Pirate Monitor may have uploaded thousands of videos and then  
22 submitted corresponding takedown notices under the DMCA to bolster its infringement claims.  
23 *See, e.g.*, Dkt. No. 268-42 at 11 (YouTube interrogatory response stating that “[t]he facts that  
24 YouTube has learned based on its investigation to date leave little doubt that Pirate Monitor [and  
25 its agents] were responsible both for uploading clips of certain of the works-in-suit (and other  
26 related content) to YouTube in the first place and then for misusing the DMCA process to request  
27 the removal of those clips by YouTube”). YouTube filed counterclaims against Pirate Monitor

1 YouTube with prejudice. Dkt. Nos. 34, 66. Pirate Monitor remains in the case as a counterclaim  
2 defendant and has filed a motion for summary judgment on the counterclaims. *See* Dkt. Nos. 160,  
3 260.

4 Another significant development was the Court’s order on YouTube’s summary judgment  
5 motion against Schneider. *See* Dkt. No. 222. YouTube fired a blunderbuss of defenses at  
6 Schneider’s infringement claims, *see* Dkt. No. 163-10, but its main argument was that it held a  
7 “blanket catalog license” to all 76 of the musical compositions that Schneider asserted as works-  
8 in-suit. Dkt. No. 222 at 5; *see also* *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1110 (9th  
9 Cir. 2019) (licensee is not liable for copyright infringement “if the challenged use of the work falls  
10 within the scope of a valid license”).

11 The parties submitted reams of evidence on this issue, which established that there were  
12 substantial disputes of material facts. The disputes centered on a chain of contracts and  
13 agreements for Schneider’s works. In 2008, Schneider appointed her management company,  
14 ArtistShare Music Publishing (AMP), as the “sole and exclusive Administrator” of her musical  
15 compositions via a Music Publishing Administration Agreement (AA). Dkt. No. 164-7 § 6. The  
16 AA gave AMP “the exclusive right to administer the Compositions” and “to execute in  
17 [Schneider’s] name any licenses and agreements affecting the Compositions.” *Id.* AMP assigned  
18 “all its duties” under the AA to Modern Works Music Publishing (MWP), which was a 50% co-  
19 owner of AMP. Dkt. No. 164-6 ¶¶ 2-4. In 2014, MWP granted YouTube a broad license to  
20 compositions “owned or controlled” by MWP via a Publishing License Agreement (PLA). Dkt.  
21 No. 163-3 at 11, § 2(a). The PLA was said to be the “blanket” license that covered Schneider’s  
22 musical compositions.

23 The factual conflicts concerned Schneider’s knowledge and authorization of these  
24 arrangements. Schneider stated that she had not been advised about the assignment from AMP to  
25 MWP or the existence of the PLA, and that MWP has never been her publisher. *See* Dkt. No. 222  
26 at 6. For its part, YouTube proffered emails indicating that MWP “supplied” some of Schneider’s  
27 songs to YouTube, and royalty summaries showing that Schneider had received payments from

1 between MWP's president and Schneider to show that Schneider knew about the PLA and knew  
 2 that MWP used Content ID to monitor her works. *Id.* Schneider stated that the communications  
 3 and royalty statements did not disclose to her the existence of the PLA or MWP's licensing  
 4 activities. *Id.*

5 Another subject of intense disagreement between the parties was the validity of the PLA in  
 6 light of a consent provision in the AA between Schneider and AMP. *Id.* at 7-8. Section 7 of the  
 7 AA required advance notice and written consent by Schneider for a license of her works. *See* Dkt.  
 8 No. 164-7 § 7 ("Notwithstanding anything to the contrary expressed or implied herein, we must  
 9 notify you and obtain your prior written approval for any license we grant on your behalf.").  
 10 There was no evidence on summary judgment that AMP or MWP notified Schneider or obtained  
 11 her written consent before MWP executed the PLA with YouTube. Dkt. No. 222 at 8.

12 Schneider contended that this was fatal to the PLA because under New York law, which  
 13 governed the AA, Section 7 was a condition precedent to AMP's, and therefore MWP's, power to  
 14 grant a license to YouTube. *Id.* In Schneider's view, a failure to satisfy the condition precedent  
 15 negated any licenses ostensibly granted by the PLA. *Id.* YouTube argued that Section 7 was a  
 16 covenant and not a condition precedent, and so a failure to notify Schneider and obtain her consent  
 17 might have breached the AA, but did not invalidate the PLA. *Id.* The distinction was critical  
 18 because the failure to satisfy a condition precedent would mean that "any use by the licensee is  
 19 without authority from the licensor and may therefore, constitute an infringement of copyright,"  
 20 but the breach of a covenant would give rise only to "a cause of action for breach of contract, not  
 21 copyright infringement." *Sohm v. Scholastic, Inc.*, 959 F.3d 39, 45 (2d Cir. 2020) (internal  
 22 quotations omitted).

23 Determining whether Section 7 was a condition precedent or a covenant required a detailed  
 24 analysis of other provisions in the AA, comparisons to other contractual terms that have been  
 25 deemed conditions precedent under New York law, and consideration of the policy goals of  
 26 federal copyright law. *See* Dkt. No. 222 at 9-12; *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*,  
 27 971 F.3d 1042, 1051 (9th Cir. 2020) ("A copyright license must be construed in accordance with  
 28 the purpose underlying federal copyright law") (internal quotation omitted). On the facts in the

1 record, the Court concluded that Section 7 was a covenant because it did not contain  
2 “unmistakable language” in the “linguistic conventions of condition.” Dkt. No. 222 at 9  
3 (quoting *Sohm*, 959 F.3d at 46). Consequently, a failure to satisfy the notice and consent  
4 provision in Section 7 of the AA would not nullify the PLA.

5 In the end, a multiplicity of disputes of fact about Schneider’s contractual arrangements  
6 and licenses, and related issues, precluded summary judgment. Dkt. No. 222 at 7. A jury will  
7 need to resolve these disputes.

8 YouTube raised another license defense on summary judgment based on its Terms of  
9 Service (TOS). *Id.* at 13. The TOS grant a broad license to YouTube for content uploaded by  
10 users, and the record established that users must agree to the TOS when creating an account or  
11 uploading a video. *Id.*; Dkt. No. 164-5 § 6(C). YouTube argued it was entitled to summary  
12 judgment on more than 100 of Schneider’s infringement claims because she and her agents  
13 uploaded several of her works-in-suit to YouTube. Dkt. No. 222 at 13.

14 This question was properly resolved on summary judgment because the record established  
15 that Schneider created a YouTube account in 2012, and that at least 15 of her works-in-suit were  
16 included in videos that she and third parties acting with her permission uploaded to YouTube. *Id.*  
17 at 13-15. Summary judgment was granted in favor of YouTube for Schneider’s direct  
18 infringement claims based on those works. *Id.* at 15.

19 YouTube also asked for summary judgment on the grounds that many of the alleged  
20 infringing videos Schneider identified were time-barred by a one-year limitations period in the  
21 TOS. *Id.*; Dkt. No. 164-5 § 14. The record did not support Schneider’s suggestion that the  
22 contractual limitations period was unconscionable, and her interrogatory responses established that  
23 she had actual knowledge of 121 alleged infringing videos more than one year before she filed  
24 suit. *See* Dkt. No. 222 at 16-20. Summary judgment was granted for YouTube on the 121  
25 untimely alleged infringements. *Id.* at 20. The parties agreed that Schneider had not identified  
26 any infringements of 27 of her works-in-suit, and so summary judgment was granted in favor of  
27 YouTube for those works. *Id.* at 4 n.2.

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