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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**

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 say that they and other “ordinary” copyright owners who do not have access to Content ID “are

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
28 based on the alleged scheme, and Pirate Monitor subsequently dismissed all of its claims against

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
28 YouTube for several of her works. *Id.* at 7. YouTube also submitted email communications

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 purposes 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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1 Material disputes of fact again precluded summary judgment on Schneider’s claims with
2 respect to CMI under Section 1202(b) of the DMCA. The parties presented conflicting evidence
3 on whether Schneider had identified any works-in-suit for which CMI had been removed, whether
4 she and her agents use CMI to monitor infringement, and whether she had adduced evidence of
5 scienter as required by the statute. *See id.* at 21-22.

6 Although the claims of plaintiffs Uniglobe and AST were not challenged on summary
7 judgment, the parties’ filings indicate that they have their own factual disputes about ownership
8 and licenses akin to Schneider’s. The FAC alleges that Uniglobe owns copyrights to motion
9 pictures, *see* Dkt. No. 99 ¶¶ 66-69, but Uniglobe subsequently stated the allegations were “not
10 entirely correct” because the copyright registrations were for dramatic works and screenplays.
11 Dkt. No. 268-35 at 54:4-57:11, 66:5-20 (deposition testimony of Uniglobe’s CEO). Uniglobe also
12 stated that it owns its works-in-suit through transfers of ownership rights and work-for-hire
13 agreements. Dkt. No. 268-33 at ECF p. 5 (Uniglobe’s amended interrogatory responses).
14 Although the takedown notices that Uniglobe submitted to YouTube identified “Uniglobe
15 Entertainment” as the owner of the works, Uniglobe’s representative could not say whether the
16 plaintiff entity, Uniglobe Entertainment LLC (Wyoming), or the separate entity Uniglobe
17 Entertainment LLC (Delaware), owned the works. *See* Dkt. No. 268-35 at 77:6-10, 93:6-94:16;
18 *see also* Dkt. No. 248-22 (takedown notice identifying “Uniglobe Entertainment” as the copyright
19 owner). Uniglobe identified more than 60 YouTube videos uploaded by Uniglobe or its agents
20 that contain parts of its works-in-suit, and more than 50 licensing agreements that cover its works-
21 in-suit, including multiple licenses that permit sub-licensing. Dkt. No. 268-33 at ECF pp. 9-14,
22 Ex. A.

23 AST’s situation is similarly convoluted. AST originally asserted infringement claims for
24 print and audio books, Dkt. No. 99 ¶¶ 75-76, but stated later that “only the audiobook versions of
25 the Works in Suit are at issue.” Dkt. No. 268-34 at ECF p. 5 (letter clarifying AST’s interrogatory
26 responses). AST also said that it obtained ownership of its works-in-suit through “agreements
27 with the authors and/or agents of the authors,” and that it uploaded and authorized others to upload
28 clips of its works-in-suit to YouTube. Dkt. No. 268-37 at 4, 7 (AST’s interrogatory responses).

1 Plaintiffs ask to certify four classes under Rule 23(b)(3). *See* Dkt. No. 243-1. The first
2 proposed class is a “Registered Works Infringement Class” (Registered Works class), to be
3 represented by Uniglobe and Schneider. *Id.* at 3. It is defined as “[a]ll persons who own
4 copyrights in one or more works: 1) registered with the United States Copyright Office; 2)
5 contained or used in a video that was displayed on YouTube and then removed from YouTube due
6 to a successful Takedown Notice; and 3) contained or used in a video that was displayed on
7 YouTube subsequent to the first successful Takedown Notice and then removed from YouTube as
8 a result of either a second successful Takedown Notice made on or after July 2, 2019, or an
9 allegation of infringement made in a court of law on or after July 2, 2019.” *Id.*

10 The second proposed class is a “Foreign Unregistered Works Infringement Class” (Foreign
11 Works class), to be represented by Uniglobe and AST. *Id.* It is defined as “[a]ll persons who own
12 copyrights in one or more works: 1) first published outside the United States; 2) contained or used
13 in a video that was displayed on YouTube and then removed from YouTube due to a successful
14 Takedown Notice; and 3) contained or used in a video that was displayed on YouTube subsequent
15 to the first successful Takedown Notice and then removed from YouTube as a result of either a
16 second successful Takedown Notice made on or after July 2, 2019, or an allegation of
17 infringement made in a court of law on or after July 2, 2019.” *Id.*

18 The third proposed class is an “International Standard Recording Code Class” (ISRC
19 class), to be represented by Schneider. *Id.* It is defined as “[a]ll persons who own copyrights in
20 one or more digital form sound recordings of musical works that: 1) has been assigned an
21 International Standard Recording Code (‘ISRC’); and 2) was a component of a video that was
22 uploaded to YouTube that (a) did not include the assigned ISRC and (b) was removed from
23 YouTube as a result of either a successful Takedown Notice made on or after July 2, 2019, or an
24 allegation of infringement made in a court of law on or after July 2, 2019.” *Id.* at 3-4.

25 The fourth proposed class is a “Clip Filename Class” (CLFN class), again to be
26 represented by Schneider. *Id.* at 4. It is defined as “[a]ll persons who own copyrights in one or
27 more works that: (1) had an associated Clip Filename (‘CLFN’) field populated with copyright
28 management information (‘CMI’) and (2) was contained in a video uploaded to YouTube (a)

1 either without the associated CMI metadata or with the CMI metadata altered and (b) that was
2 removed from YouTube as a result of either a successful Takedown Notice made on or after July
3 2, 2019, or an allegation of infringement made in a court of law on or after July 2, 2019.” *Id.* at 4.

4 DISCUSSION

5 I. LEGAL STANDARDS

6 The overall goal of Rule 23 is “to select the method best suited to adjudication of the
7 controversy fairly and efficiently.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455,
8 460 (2013) (cleaned up). “The class action is ‘an exception to the usual rule that litigation is
9 conducted by and on behalf of the individual named parties only.’” *Comcast Corp. v. Behrend*,
10 569 U.S. 27, 33 (2013) (citation omitted).

11 Plaintiffs bear the burden of proving by a preponderance of the evidence that the proposed
12 classes satisfy all four requirements of Rule 23(a) and at least one of the subsections of Rule
13 23(b). *Id.*; *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664-65
14 (9th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 424 (2022). The Court’s analysis “must be
15 rigorous and may entail some overlap with the merits of the plaintiff’s underlying claim,” but the
16 merits are to be considered only to the extent that they are “relevant to determining whether the
17 Rule 23 prerequisites for class certification are satisfied.” *Amgen*, 568 U.S. at 465-66 (internal
18 quotations and citations omitted). The class certification procedure is decidedly not an alternative
19 form of summary judgment or an occasion to hold a mini-trial on the merits. *Alcantar v. Hobart*
20 *Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015). The decision of whether to certify a class is entrusted
21 to the sound discretion of the district court. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186
22 (9th Cir. 2001).

23 Under Rule 23(b)(3), a class is appropriate when “questions of law or fact common to class
24 members predominate over any questions affecting only individual members,” and a class action is
25 “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed.
26 R. Civ. P. 23(b)(3). Each of the four required elements of Rule 23(a) -- numerosity, commonality,
27 typicality, and adequacy -- must also be established.

1 The commonality requirement of Rule 23(a)(2) is satisfied when there are “questions of
2 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Because “any competently crafted
3 class complaint literally raises common questions,” the Court’s task is to look for a common
4 contention “capable of classwide resolution -- which means that determination of its truth or
5 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
6 *Alcantar*, 800 F.3d at 1052 (internal quotations omitted). What matters is the “capacity of a class-
7 wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-*
8 *Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations omitted) (emphasis in
9 original). This does not require total uniformity across a class. “The existence of shared legal
10 issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled
11 with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019
12 (9th Cir. 1998), *overruled on other grounds by Dukes*, 564 U.S. 338. The commonality standard
13 imposed by Rule 23(a)(2) is “rigorous.” *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir.
14 2013).

15 Rule 23(b)(3) sets out the related but nonetheless distinct requirement that common
16 questions of law or fact predominate over individual ones. Fed. R. Civ. P. 23(b)(3). This inquiry
17 focuses on “whether the common, aggregation-enabling, issues in the case are more prevalent or
18 important than the non-common, aggregation-defeating, individual issues.” *Olean*, 31 F.4th at
19 664 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). Each element of a
20 claim need not be susceptible to classwide proof, *Amgen*, 568 U.S. at 468-69, and the “important
21 questions apt to drive the resolution of the litigation are given more weight in the predominance
22 analysis over individualized questions which are of considerably less significance to the claims of
23 the class.” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule 23(b)(3)
24 permits certification when “one or more of the central issues in the action are common to the class
25 and can be said to predominate,” even if “other important matters will have to be tried separately,
26 such as damages or some affirmative defenses particular to some individual class members.”
27 *Tyson Foods*, 577 U.S. at 453 (internal quotations omitted).

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1 “Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a),”
 2 *Comcast*, 569 U.S. at 34. “If the defendant provides evidence that a valid defense -- affirmative or
 3 otherwise -- will bar recovery on some claims,” then the Court must “determine, based on the
 4 particular facts of the case, ‘whether individualized questions ... will overwhelm common ones
 5 and render class certification inappropriate under Rule 23(b)(3).’” *Van v. LLR, Inc.*, 61 F.4th
 6 1053, 1067 (9th Cir. 2023) (quoting *Olean*, 31 F.4th at 669). “The question is not whether a great
 7 number of plaintiffs will win or lose at trial on the individualized issue.” *Id.* at 1067 n.11. Rather,
 8 the Court “must assess the necessity and manageability of the potential class-member-by-class
 9 member discovery process and trial.” *Id.* Individualized issues “weigh heavy in the predominance
 10 balancing” if discovery and trial “must assess thousands of claims one claim at a time.” *Id.*; *see*
 11 *also Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 458, 469 (9th Cir. 2023) (decertifying class
 12 where trial of individualized issues would be “prohibitively cumbersome,” and plaintiffs did not
 13 prove that class issues predominated).

14 The “requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a)” and
 15 “courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis.”
 16 *Olean*, 31 F.4th at 664. The Court finds it appropriate to assess commonality and predominance in
 17 tandem, with a careful eye toward ensuring that the specific requirements of each are fully
 18 satisfied. *See, e.g., Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-21 (9th Cir. 2017).

19 It has been said that “copyright claims are poor candidates for class-action treatment,” and
 20 for good reason. *Football Ass’n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65
 21 (S.D.N.Y. 2013). Every copyright claim turns “upon facts which are particular to that single claim
 22 of infringement, and separate from all the other claims.” *Id.* at 66. Every copyright claim is also
 23 subject to defenses that require their own individualized inquiries. *See, e.g., Kihn v. Bill Graham*
 24 *Archives LLC*, No. 20-17397, 2022 WL 18935, at *2 (9th Cir. Jan. 3, 2022) (unpublished)
 25 (reversing certification of a copyright class action because “individual issues of license and
 26 consent would predominate for the absent class members, who have not yet had the opportunity
 27 Plaintiffs had to sift through their claims and exclude those that lack merit”). A claim of copyright
 28 infringement typically entails a fact-specific evaluation of “the objective similarities of specific

1 expressive elements in the two works” that distinguishes “between the protected and unprotected
2 material in a plaintiff’s work,” and tests “for similarity of expression from the standpoint of the
3 ordinary reasonable observer, with no expert assistance.” *Skidmore as Tr. for Randy Craig Wolfe*
4 *Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc) (internal quotations omitted).

5 This is not to say that certification of a copyright infringement class is per se impossible.
6 The Court certainly does not hold that here. But these factors underscore the challenges that
7 plaintiffs face in seeking to obtain class certification.

8 **II. THE REGISTERED WORKS AND FOREIGN WORKS CLASSES**

9 The usual approach to class certification is to march through the Rule 23 factors in
10 statutory order, starting with the requirements of Rule 23(a). A different organization is warranted
11 for this copyright case. Plaintiffs face overwhelming problems with commonality and
12 predominance that in themselves bar certification. Consequently, it makes sense to start the
13 analysis with these dispositive issues. The other Rule 23 factors will be discussed in closing. *See*
14 *McCarty v. SMG Holdings, I, LLC*, No. 17-cv-06232-JD, 2022 WL 913092, at *7 (N.D. Cal. Mar.
15 29, 2022) (“Because the factors the Court has discussed are sufficient to support the denial of the
16 pending class certification request in its entirety, the Court declines to discuss the remaining Rule
17 23 factors.”); *see also Waite v. UMG Recordings, Inc.*, No. 19-CV-01091 (LAK), 2023 WL
18 1069690 (S.D.N.Y. Jan. 27, 2023) (denying certification of a putative copyright class action on
19 commonality and predominance grounds alone).

20 All of the class definitions proposed by plaintiffs, including those with respect to CMI, are
21 based on a shared element: persons who own copyrights in one or more works. Dkt. No. 243-1 at
22 3-4. Ownership of a copyright is an essential predicate for these claims, *see Feist Publ’ns, Inc. v.*
23 *Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991), just as the existence of a license or other
24 permission to use the works is an essential defense against them, *Great Minds*, 945 F.3d at 1110;
25 *see also* 17 U.S.C. § 1202(b) (prohibiting removal or alteration of CMI “without the authority of
26 the copyright owner or the law,” or distribution of such works).

27 Consequently, all of the proposed classes may be evaluated for Rule 23 purposes on the
28 threshold question of whether plaintiffs can demonstrate copyright ownership on a classwide

1 basis, or whether issues of ownership and licenses will entail individualized proof that precludes
 2 certification. YouTube’s main argument against certification of each of the proposed classes is
 3 that proof of ownership and licensing will necessarily require individualized evidence for each
 4 claimant, as the named plaintiffs’ own circumstances indicate. *See* Dkt. No. 268 at 7-21.
 5 Plaintiffs say these questions can be answered on a classwide basis by leveraging takedown
 6 notices and other evidence in YouTube’s possession. *See* Dkt. No. 243-1.

7 The proposed infringement classes are a bellwether test of certification, and so will be
 8 taken up first. “Considering whether ‘questions of law or fact common to class members
 9 predominate’ begins, of course, with the elements of the underlying cause of action.” *Erica P.*
 10 *John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). The elements of direct copyright
 11 infringement are “(1) ownership of a valid copyright, and (2) copying of constituent elements of
 12 the work that are original.” *Feist Publ’ns*, 499 U.S. at 361.

13 For a claim of contributory copyright infringement, a plaintiff “must establish that there
 14 has been direct infringement by third parties” as a threshold matter. *Perfect 10, Inc. v.*
 15 *Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007). Liability for contributory infringement
 16 also requires proof that a defendant ““(1) has knowledge of another’s infringement and (2) either
 17 (a) materially contributes to or (b) induces that infringement.”” *VHT, Inc. v. Zillow Grp., Inc.*, 918
 18 F.3d 723, 745 (9th Cir. 2019) (quoting *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795
 19 (9th Cir. 2007)). In the online context, material contribution means the defendant ““has *actual*
 20 knowledge that *specific* infringing material is available using its system, and can take simple
 21 measures to prevent further damage to copyrighted works, yet continues to provide access to
 22 infringing works.”” *Id.* (quoting *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671 (9th Cir.
 23 2017)) (emphasis in original). “Inducement liability requires evidence of ‘active steps ... taken to
 24 encourage direct infringement,’” such as ““advertising an infringing use or instructing how to
 25 engage in an infringing use.”” *Id.* (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,
 26 545 U.S. 913, 936 (2005)).

27 Vicarious copyright infringement also requires a gateway showing of direct infringement
 28 by a third party. *See Amazon*, 508 F.3d at 1173. In addition, a plaintiff must demonstrate that a

1 defendant: “has (1) the right and ability to supervise the infringing conduct and (2) a direct
2 financial interest in the infringing activity.” *VHT*, 918 F.3d at 746 (quoting *Giganews*, 847 F.3d
3 at 673). A key component of vicarious liability is evidence that the defendant had the practical
4 and technical ability to identify or screen out infringing material, but did not do so. *Id.* A failure
5 to change operations to avoid distribution of infringing content “is not the same as declining to
6 exercise a right and ability” to stop direct infringement by others. *Id.* (quoting *Amazon*, 508 F.3d
7 at 1175).

8 **A. The DMCA Takedown Procedures Do Not Supply Classwide Proof.**

9 For the proposed Registered Works and Foreign Works classes, plaintiffs say that “nearly
10 every element of every claim and affirmative defense will be established through common
11 evidence.” Dkt. No. 243-1 at 5. This common evidence is said to be “successful” takedown
12 notices, meaning a takedown notice under the DMCA that resulted in the removal of the allegedly
13 infringing content by YouTube, or the blocking of access to it. *See* 17 U.S.C. § 512(c)(3); Dkt.
14 No. 243-1 at 10. Plaintiffs say a takedown establishes copyright ownership, registration,
15 infringement, and the absence of affirmative defenses, “because YouTube admits it reviews such
16 notices to ensure they are complete and valid and relies on them to remove content and issue
17 copyright strikes.” Dkt. No. 243-1 at 7.¹

18 The problem with this approach is that the takedown of content in response to a DMCA
19 notice is miles away from substantive proof of copyright ownership or infringement. The
20 takedown procedure is part of the safe harbor provisions that Congress established in the DMCA
21 to allow online service providers like YouTube to manage their risks with respect to infringing
22 materials posted by users. *See* 17 U.S.C. § 512(a)-(d); *Ventura Content, Ltd. v. Motherless, Inc.*,
23 885 F.3d 597, 603-04 (9th Cir. 2018). A service provider may avoid infringement liability if it
24 “responds expeditiously to remove, or disable access to, the material that is claimed to be
25 infringing or to be the subject of infringing activity,” upon receipt of a valid takedown notice that
26 makes a claim of infringement pursuant to the DMCA’s procedural requirements. 17 U.S.C.

27 _____
28 ¹ This is in some tension with the FAC, which expressly criticized YouTube’s “rudimentary tools”
with respect to “the takedown notification process.” Dkt. No. 99 ¶ 14.

1 § 512(c)(1)(C); *see also* *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016)
2 (same).² A failure to promptly remove or disable access in response to a valid takedown notice
3 forfeits the protection of the safe harbor. *Ventura Content*, 885 F.3d at 604 (“[T]he service
4 provider, to maintain its shield, must respond expeditiously and effectively to the policing.”);
5 *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37 (2d Cir. 2012) (service provider “who receives
6 a takedown notice from a copyright holder is *required* to ‘remove, or disable access to, the
7 material’ in order to claim the benefit of the safe harbor”) (citation omitted) (emphasis in original).

8 To preserve the protections of the safe harbor, a service provider must also give the user an
9 opportunity to respond to a takedown under the DMCA’s “put-back procedures.” *Lenz*, 815 F.3d
10 at 1151. These procedures are codified in Section 512(g) of the DMCA and require the service
11 provider to give notice of the takedown to the user, and allow the user an opportunity to restore the
12 content by sending a counternotification to the effect that the takedown was in error. *See* 17
13 U.S.C. § 512(g); *Lenz*, 815 F.3d at 1151. When a valid counternotification is received, the service
14 provider must then advise the copyright holder of the response, and must restore the content “not
15 less than 10, nor more than 14 business days” thereafter, unless the service provider is given
16 notice that the copyright holder has filed an infringement lawsuit in court against the user. *Lenz*,
17 815 F.3d at 1151 (quoting 17 U.S.C. § 512(g)(2)(B)-(C)).

18 As these plainly worded statutory provisions demonstrate, the DMCA does not
19 contemplate that a takedown of content is a substantive determination of copyright ownership or
20 infringement. An adjudication of those questions is expressly reserved for the courts in a lawsuit
21 filed by the copyright claimant, with the attendant judicial scrutiny of ownership and “the
22 objective similarities of specific expressive elements in the two works” to determine infringement
23 liability. *Skidmore*, 952 F.3d at 1064. Irrespective of the takedown procedures, a copyright holder
24 always retains the burden of establishing infringement. *See UMG Recordings, Inc. v. Shelter Cap.*
25 *Partners, LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013). A service provider retains all defenses to
26 infringement, even if it did not act in a manner to preserve the benefits of the safe harbor. *See* 17

27 _____
28 ² A valid notice must be signed under penalty of perjury, identify the copyrighted work and the
alleged infringing use, and provide other information as stated in 17 U.S.C. § 512(c)(3).

1 U.S.C. § 512(l) (“The failure of a service provider’s conduct to qualify for limitation of liability
2 under this section shall not bear adversely upon the consideration of a defense by the service
3 provider that the service provider’s conduct is not infringing under this title or any other
4 defense.”); *see also* 4 Nimmer on Copyright § 12B.04 (the “penalty” for failing to remove or
5 disable access to material in response to a takedown notice “is not automatic liability -- instead,
6 the service provider simply loses the benefit of the safe harbor that Section 512 affords.”)
7 (citations omitted).

8 Consequently, a takedown under the DMCA indicates only an allegation of infringement.
9 The allegation may be a strong one, *see UMG*, 718 F.3d at 1020, but in the end it is “only a *claim*
10 of infringement,” *id.* at 1020 n.12 (emphasis in original); *see also* 17 U.S.C. § 512(c)(3)(ii)
11 (takedown notice must identify “the copyrighted work *claimed* to have been infringed”) (emphasis
12 added). The claim is subject to termination by operation of the statute unless the copyright
13 claimant files a lawsuit in court to stop the restoration of access to the accused use. It is true that a
14 takedown notice must be made under penalty of perjury, 17 U.S.C. § 512(c)(3)(vi), but that does
15 not make it more than an allegation, just as the requirement that a counternotification must be
16 made under penalty of perjury does not make it dispositive of non-infringement, *id.*
17 § 512(g)(3)(C). It bears mention that Congress anticipated the possibility of fraudulent takedown
18 notices by providing for an award of damages and attorneys’ fees to a user who was wrongly
19 accused of infringement. *Id.* § 512(f).

20 Plaintiffs try to overcome the provisional nature of takedowns by contending that YouTube
21 “vets” every takedown notice to ensure “the Takedown Notice author’s rights are superior to the
22 uploader’s rights” before removing a video. Dkt. No. 243-1 at 10. In effect, plaintiffs suggest that
23 YouTube actually adjudicates copyright claims in response to a takedown notice, and expresses a
24 substantive conclusion about ownership, infringement, and defenses every time it removes or
25 blocks access to a video.

26 The record demonstrates otherwise. YouTube receives millions of DMCA takedown
27 notices annually. *See* Dkt. No. 248-8 at 5 (YouTube Copyright Transparency Report showing that
28 approximately two million removal requests were submitted via YouTube’s webform in the first

1 half of 2022); Dkt. No. 325 at 23:11-24 (certification hearing transcript). To handle this volume,
 2 YouTube relies primarily on an automated process in the first instance to review notices for
 3 conformance to the DMCA’s procedural requirements. *See, e.g.*, Dkt. No. 243-12 at 45:10-13,
 4 46:11-24 (YouTube copyright review manager testifying that an automated “classifier” assesses
 5 takedown notices for “completeness on the basis of the DMCA statutory requirements”); *see also*
 6 Dkt. No. 268-2 ¶¶ 2-3 (YouTube declaration stating that “YouTube uses a largely automated
 7 process to review each notice to determine whether they contain the information and
 8 representations required for a DMCA notice”).

9 YouTube’s copyright operations team and contractors manually review takedown notices
 10 in limited situations. *See, e.g.*, Dkt. No. 243-12 at 46:22-24 (“[I]f the classifier is uncertain that
 11 one of these requirements has been met, then it will route it for a human to take a look at.”).
 12 Human review typically is reserved for checking whether the notices contain the information
 13 required by the DMCA and screening out suspicious and facially invalid notices. *Id.* at 47:8-10.

14 On occasion, YouTube may contact the sender of a takedown notice and engage
 15 YouTube’s legal counsel on questions of fair use and the like. *Id.* at 62:18-25, 63:4-5 (YouTube
 16 may “ask the claimants to consider fair use and respond back to us with more detail about why
 17 they believe the content that they are targeting for removal does not qualify under a copyright
 18 exception such as fair use”). Contacts with legal counsel are infrequent in light of the volume of
 19 takedown notices. *Id.* at 60:4-21 (estimating approximately 50 to 100 monthly contacts with legal
 20 counsel about fair use).

21 Overall, this record demonstrates that YouTube “vets” takedown notices to ensure that
 22 they comply with the DMCA’s procedural requirements, but does not make a substantive
 23 determination of copyright ownership, infringement, or defenses. For the most part, YouTube
 24 uses an automated process to handle DMCA notices. To the extent follow-up work is pursued, it
 25 is limited to a fraction of the notices received and involves inquiries into highly individualized
 26 issues like fair use. The same goes for YouTube’s handling of counternotifications from users
 27 contesting a takedown. *See id.* at 111:18-24 (“So when the YouTube review team -- copyright ops
 28 review team reviews the counter-notification, we are checking to see whether the counter is valid

1 on its face and meets the requirements of the DMCA and otherwise would be fine to forward to
2 the claimant to -- to initiate the counter process which is described by statute.”).

3 There are other reasons why takedowns are doubtful sources of classwide proof. Consider
4 the situation of plaintiff AST. YouTube noted that none of the takedown notices submitted for
5 works ostensibly owned by AST actually identified or even mentioned AST. *See* Dkt. Nos. 244-
6 17, 244-18, 244-19, 244-20, 244-21 (identifying a Russian name “АЗАПИ”). Plaintiffs say this is
7 “misleading” because АЗАПИ is AZAPI in English, and other documents show that AZAPI was
8 authorized to submit notices on AST’s behalf through YouTube’s content verification program.
9 *See* Dkt. No. 271-1 at 5 n.4. Even if that were the case, the salient point is that it took plaintiffs
10 multiple steps through language translation and documents to get to their ownership claim on
11 behalf of a named plaintiff. Plaintiffs have not demonstrated that anything less will be required
12 for the claims of absent class members.

13 Consequently, reliance on takedown procedures will not provide classwide proof of
14 copyright ownership, infringement, or defenses. Plaintiffs have not demonstrated that these
15 “central issues in the action” are subject to common evidence, and so the Registered Works and
16 Foreign Works classes cannot be certified.³ *Tyson Foods*, 577 U.S. at 453 (internal quotation
17 omitted). This conclusion applies to all of the infringement claims, whether direct or indirect. *See*
18 *Amazon*, 508 F.3d at 1169 (contributory and vicarious copyright infringement liability require
19 proof of an underlying act of direct infringement as a threshold matter).

20 Plaintiffs’ mention of two cases that certified copyright classes does not lead to a different
21 outcome. In *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-5693 PSG (RZx), 2015 WL
22 4776932 (C.D. Cal. May 27, 2015), a copyright class was certified where the defendant admitted
23 that it had used the works “without first seeking licenses or paying royalties,” and the record did
24 not demonstrate that “contentious ownership inquiries” would arise. *Id.* at *11-12. In *In re*
25 *Napster, Inc. Copyright Litig.*, Nos. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611

26 _____
27 ³ This conclusion also relates to plaintiffs’ lengthy discussion in their brief that YouTube’s
28 affirmative defenses, including eligibility for the DMCA safe harbor in 17 U.S.C. § 512, may be
established with common evidence. *See* Dkt. No. 243-1 at 16-20. The absence of common proof
of liability makes the question of common proof of defenses beside the point.

1 (N.D. Cal. June 1, 2005), a class was certified for a single notice of infringement on behalf of
2 copyright owners who retained a single agent as their “common licensing and collection agent.”
3 *Id.* at *4-5. The streamlined circumstances that gave rise to certification in those cases are a far
4 cry from the factually contested issues of ownership and licensing here, and so the cases do not
5 offer a basis for certification of the classes plaintiffs propose.

6 **B. Individualized Questions Predominate.**

7 Without a viable method of classwide proof, plaintiffs’ infringement claims will
8 necessarily require highly individualized inquiries into the merits. The question of a license is a
9 good example of this. There can be no infringement of a copyrighted work if the challenged use
10 falls within the scope of a valid license. *Great Minds*, 945 F.3d at 1110. Consequently, whether
11 YouTube has a license for a particular work will be a matter of intense inquiry at trial.

12 As the record for plaintiff Schneider demonstrates, the answer to this inquiry will depend
13 upon facts and circumstances unique to each work and copyright claimant. YouTube’s assertion
14 of a license on summary judgment raised a flurry of factual and legal disputes about whether
15 Schneider had actually granted licensing authority to a publisher. *See* Dkt. No. 222 at 4-13. The
16 disputes prompted the filing of a mountain of evidence and arguments by the parties, and
17 necessitated a close reading of multiple contracts. *Id.* Even then, the Court concluded that the
18 license defense entailed disputes of material fact that a jury will need to decide. *Id.* at 7.

19 So too for plaintiffs Uniglobe and AST, who have their own factual complications with
20 respect to whether YouTube has a license under the TOS or otherwise to works these plaintiffs
21 uploaded themselves. *See, e.g.*, Dkt. No. 268-33 at ECF pp. 9-14, Ex. A (Uniglobe granted
22 approximately 60 licenses for its works-in-suit, and uploaded or authorized its agents to upload
23 some of its works-in-suit to YouTube); Dkt. No. 268-37 at 7 (AST and its authorized agents
24 uploaded portions of audiobooks to YouTube, including its works-in-suit).

25 As other courts have aptly concluded, such “individual issues of license” in themselves
26 typically preclude certification of copyright class actions under Rule 23(b)(3). *Kihn*, 2022 WL
27 18935, at *2; *see also Palmer Kane LLC v. Scholastic Corp.*, No. 11 Civ. 7456(KBF), 2012 WL
28 2952898, at *7 (S.D.N.Y. July 16, 2012). Plaintiffs have not demonstrated otherwise here.

1 Plaintiffs suggest that YouTube “can cross-reference the ISRCs and other required CMI in
 2 YouTube’s database against that information for the copyrighted work claimed by a class
 3 member” to establish whether a direct license exists. Dkt. No. 243-1 at 13. Even accepting this as
 4 true for present purposes, the approach might work as a first cut, but as the record for Schneider
 5 demonstrates, a grant of a license may be much more complicated and disputed than surface
 6 appearances indicate. *See* Dkt. No. 222 at 4-13; *see also Spinelli v. Nat’l Football League*, 903
 7 F.3d 185, 203 (2d Cir. 2018) (“[I]f a sublicensor has no right to issue a particular license, the
 8 sublicensee cannot acquire rights in copyrighted works simply because the sublicensor did so
 9 anyway.”). Plaintiffs have not demonstrated that a database cross-check will provide a clear-cut
 10 answer to the question of licenses on a classwide basis.

11 **III. THE ISRC AND CLFN CLASSES**

12 Plaintiffs’ requests to certify the proposed ISRC and CLFN classes are equally unavailing.
 13 These classes are based on the CMI provisions of Section 1202(b) of the DMCA. Section
 14 1202(b)(1) provides that “[n]o person shall, without the authority of the copyright owner or the
 15 law ... intentionally remove or alter” CMI “knowing” or “having reasonable grounds to know, that
 16 it will induce, enable, facilitate, or conceal” infringement. 17 U.S.C. § 1202(b)(1). Section
 17 1202(b)(3) provides that “[n]o person shall, without the authority of the copyright owner or the
 18 law,” distribute or perform works “knowing that [CMI] has been removed or altered without
 19 authority of the copyright owner or the law,” and “knowing” or “having reasonable grounds to
 20 know, that it will induce, enable, facilitate, or conceal” infringement. *Id.* § 1202(b)(3).

21 As this plain language states, the predicate of a claim under either prong of Section
 22 1202(b) is that CMI was removed or altered without a copyright owner’s permission.
 23 Consequently, the ISRC and CLFN classes share with the Registered Works and Foreign Works
 24 classes the threshold element of copyright ownership. *See* Dkt. No. 243-1 at 3-4. In the opening
 25 brief for certification, plaintiffs did not say how they might establish ownership for the ISRC or
 26 CLFN classes with common evidence. In a reply brief, they made a somewhat offhand mention of
 27 an intention to use again the takedown procedures as common proof of ownership for the ISRC
 28 class, *see* Dkt. No. 271-1 at 12, but said nothing with respect to the CLFN class. Plaintiffs made

1 no other proposals for determining copyright ownership for either class on a common basis.
2 Giving plaintiffs every benefit of the doubt by assuming they proposed to rely on takedown
3 notices for both classes, the takedown approach works no better here than it did for the
4 infringement classes. This is enough to deny certification of the ISRC and CLFN classes.

5 The scienter requirement in Section 1202(b) also weighs against certification. As the
6 frequent use of “knowing” conveys, the statute puts an emphasis on scienter as an element of
7 liability. Some courts have found a “double-scienter” requirement in Section 1202(b). *See, e.g.,*
8 *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 171 (2d Cir. 2020). What matters here is our circuit’s
9 conclusion that, for both subsections (b)(1) and (b)(3), a plaintiff must prove that the defendant
10 possessed “the mental state of knowing, or having a reasonable basis to know, that his actions
11 ‘will induce, enable, facilitate, or conceal’ infringement.” *Stevens v. Corelogic, Inc.*, 899 F.3d
12 666, 673 (9th Cir. 2018).

13 This scienter element demands specific proof. A “generic” assertion that a “general
14 possibility” of infringement exists because CMI was removed “won’t wash.” *Id.* “[A] plaintiff
15 bringing a Section 1202(b) claim must make an affirmative showing, such as by demonstrating a
16 past ‘pattern of conduct’ or ‘modus operandi,’ that the defendant was aware or had reasonable
17 grounds to be aware of the probable future impact of its actions.” *Id.* at 674. This entails
18 “evidence from which one can infer that future infringement is likely, albeit not certain, to occur
19 as a result of the removal or alteration of CMI.” *Id.* at 675.

20 Cases that discuss Section 1202(b) in the summary judgment context illustrate the type of
21 evidence sufficient to prove scienter. In *Stevens*, for example, two photographers brought a
22 putative class action against a defendant that developed software used by online real estate
23 services. *Id.* at 670. The software automatically stripped photographs of CMI metadata during the
24 uploading process without the copyright holders’ authorization. *Id.* at 671. As a result, the
25 photographers alleged that the defendant had violated Sections 1202(b)(1) and (3). *Id.* at 672.

26 The Ninth Circuit affirmed the district court’s grant of summary judgment for the
27 defendant. *Id.* at 670. To establish scienter, each plaintiff was required to make an “[a]ffirmative
28 [s]howing” with “specific evidence that removal of CMI metadata” from their copyrighted works

1 “will impair their policing of infringement.” *Id.* at 675. The photographers did not prove this
 2 because they had no evidence that they “ever used CMI metadata to prevent or detect copyright
 3 infringement” and identified “no instance in which the removal of CMI metadata from any
 4 photograph ‘induce[d], enable[d], facilitate[d], or conceal[ed] an infringement.’” *Id.* (emphasis
 5 and alterations in original). In the one instance where the defendant removed a photograph in
 6 response to a DMCA takedown notice, there was no evidence that the claimant “used metadata to
 7 identify the allegedly infringing copies, that her photograph even contained metadata, or that the
 8 infringement identified had anything to do with removal or alteration of metadata.” *Id.* at 676 n.6.

9 In *Victor Elias Photography, LLC v. Ice Portal, Inc.*, the Eleventh Circuit reached a similar
 10 outcome in another case where a photographer alleged Section 1202(b) claims against a defendant
 11 whose software automatically removed CMI metadata from photographs before they were posted
 12 online. 43 F.4th 1313, 1315-16 (11th Cir. 2022). The Eleventh Circuit affirmed the district
 13 court’s grant of summary judgment for the defendant. *Id.* at 1316. Although the record
 14 established that the photographer used CMI to police infringement and had identified specific
 15 infringements of his works with missing CMI, there was “no evidence linking [the defendant’s]
 16 actions of removing the photographs’ CMI with the instances of infringement.” *Id.* at 1323. The
 17 photographer had no evidence of where or how the infringing works were copied, and so could not
 18 show that the infringements occurred because the defendant’s software removed CMI from his
 19 works. *Id.* at 1324-25. The circuit concluded that the photographer had not shown an
 20 “identifiable connection between the defendant’s actions and the infringement or the likelihood of
 21 infringement” necessary to establish the scienter element of Section 1202(b). *Id.* at 1325.

22 Neither *Stevens* nor *Victor Elias* should be read as imposing exacting requirements of
 23 certain types of evidence to prove scienter for a Section 1202(b). To the contrary, both cases
 24 noted the possibility that a wide range of evidence might do the job. *See Stevens*, 899 F.3d at 675;
 25 *Victor Elias*, 43 F.4th at 1323. But they nonetheless inform the Rule 23 question here in that they
 26 underscore the individualized showing that each ISRC and CLFN class member would need to
 27 make to prove the Section 1202(b) claims. To satisfy the statute’s scienter element, each putative
 28 class member would need to show, with specific evidence for each work-in-suit, how the removal

1 of an ISRC or CLFN induced, enabled, facilitated, or concealed an identifiable infringement of
2 that work.

3 This requirement raises obvious barriers to classwide proof, as illustrated by the
4 individualized disputes of fact that precluded summary judgment on Schneider’s CMI claims. *See*
5 Dkt. No. 222 at 21-22. Plaintiffs again have not demonstrated that “common, aggregating-
6 enabling, issues” with respect to the scienter element of Section 1202(b) are “more prevalent or
7 important the non-common, aggregation-defeating, individual issues.” *Olean*, 31 F.4th at 664
8 (internal quotation omitted).

9 Another barrier to certification for the ISRC class is that Schneider, who was identified as
10 the representative claimant for the class, does not have a work-in-suit that fits the class definition.
11 The ISRC class is defined as “persons who own copyrights in one or more *digital form sound*
12 *recordings* of musical works.” Dkt. No. 243-1 at 3 (emphasis added). It does not include persons
13 who own copyrights in the musical compositions underlying those recordings. *Id.* “It is well
14 settled that ‘[s]ound recordings and musical compositions are separate works with their own
15 distinct copyrights,’” *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018) (citation omitted and
16 alteration in original), and a copyright in the composition does not automatically give the owner a
17 copyright in a sound recording of it, *see Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004).

18 The problem for Schneider is that her works-in-suit do not include sound recordings. She
19 initially alleged ownership and infringement of two copyrighted sound recordings: *VIKINGS*
20 *ANTHEM* and *Concert in the garden*. *See* Dkt. No. 99 ¶ 60 n.7; Dkt. No. 268-19 at 5-6
21 (interrogatory response). The other 76 works-in-suit she alleged were all copyrighted musical
22 compositions. *Id.* Summary judgment was granted in favor of YouTube for both of the sound
23 recordings. The record did not demonstrate that *VIKINGS ANTHEM* had been infringed, *see* Dkt.
24 No. 222. at 4 n.2, and the alleged infringements of *Concert in the garden* were time-barred, *id.* at
25 20. The Court directed the parties to jointly file “a numbered list of Schneider’s remaining works-
26 in-suit and infringement claims” following summary judgment. *Id.* at 23. *VIKINGS ANTHEM*
27 and *Concert in the garden* are not on the list. Dkt. No. 232. In effect, plaintiffs agreed that
28 Schneider’s remaining works-in-suit do not include any sound recordings.

1 Plaintiffs suggest that there may be ISRCs associated with other recordings of Schneider’s
 2 works, *see, e.g.*, Dkt. No. 271-1 at 11-12; Dkt. No. 271-10 at 14-18; but that is of no moment here.
 3 She did not allege ownership or infringement of those sound recordings separate from the
 4 underlying compositions, and so she does not have a work-in-suit that fits the proposed ISRC
 5 Class definition. *See* Dkt. No. 99 ¶ 60 n.7; Dkt. No. 268-19 at 5-6. Consequently, Schneider is
 6 not a typical or adequate representative of the putative ISRC class. *See* Fed. R. Civ. P. 23(a)(3)-
 7 (4); *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018) (“A named plaintiff must
 8 be a member of the class she seeks to represent”).

9 **IV. OTHER RULE 23(A) ELEMENTS**

10 Given the shortfall on commonality and predominance, a detailed discussion of the other
 11 Rule 23(a) elements is not particularly called for. Even so, the Court makes the ensuing
 12 observations.

13 **A. Numerosity (23(a)(1))**

14 Rule 23(a)(1) requires that a proposed class be “so numerous that joinder of all members is
 15 impracticable.” Fed. R. Civ. P. 23(a)(1). In most cases, numerosity is readily established. Here,
 16 the question is more nuanced. In the absence of a classwide method of establishing copyright
 17 ownership and infringement, it is difficult to estimate numerosity with any degree of precision.
 18 The commonality and predominance concerns discussed above indicate that a headcount for the
 19 classes would require individual inquires into the merits. While it is true that ascertainability is
 20 not an element of certification in our circuit, *see Briseno v. ConAgra Foods*, 844 F.3d 1121, 1131
 21 (9th Cir. 2017), numerosity should be established by something more than a good guess. *See, e.g.*,
 22 *Mays v. Wal-Mart Stores, Inc.*, 804 F. App’x 641, 642 (9th Cir. 2020) (unpublished) (“bare
 23 assertions of numerosity without any clear factual grounding” and speculative expert testimony
 24 did not support a finding of numerosity).

25 Plaintiffs came rather close to doing just that by saying that numerosity must exist because
 26 YouTube hosts billions of videos and receives millions of takedown notices annually. *See* Dkt.
 27 No. 271-1 at 3; Dkt. No. 244-12; Dkt. No. 248-8 at 5. They dressed this up a bit with opinions by
 28 an expert that there are at least one thousand members in each proposed class. *See* Dkt. No. 243-1

1 at 4. YouTube objected to the opinions as not properly disclosed during discovery, *see* Dkt. No.
 2 268 at 6, and it is not entirely clear that the class size estimates are based on reliable methods. But
 3 “[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class
 4 certification.” *Sali*, 909 F.3d at 1004. On the record before the Court, it is plausible that the
 5 putative classes cross the threshold required under Rule 23(a)(1). *See Ochoa v. McDonald’s*
 6 *Corp.*, No. 3:14-cv-02098-JD, 2016 WL 3648550, at *4 (N.D. Cal. July 7, 2016) (numerosity is
 7 satisfied if a class comprises of 40 or more members).

8 **B. Typicality (23(a)(3))**

9 Rule 23(a)(3) requires plaintiffs to prove that “the claims or defenses of the representative
 10 parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The typicality
 11 requirement is intended to “assure that the interest of the named representative aligns with the
 12 interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). To
 13 satisfy this requirement, the named plaintiffs’ claims need only be “reasonably coextensive with
 14 those of absent class members; they need not be substantially identical.” *Just Film*, 847 F.3d at
 15 1116 (internal citations and quotations omitted). Typicality may be found when other members
 16 have the same or similar injury as the named plaintiffs arising out of the same course of conduct.
 17 *Id.* Typicality should not be found, and a class should not be certified, in cases where other
 18 members would suffer because the named plaintiffs would be “preoccupied with defenses unique
 19 to” them. *Id.* (quoting *Hanon*, 976 F.2d at 508).

20 Typicality is questionable here. Each work-in-suit will be the subject of individualized
 21 proof of ownership and infringement, which necessarily makes the claim of each plaintiff a *sui*
 22 *generis* inquiry. The summary judgment record for Schneider, and YouTube’s filings with respect
 23 to Uniglobe and AST, highlight these concerns. *See* Dkt. No. 222.

24 **C. Adequacy (23(a)(4))**

25 Except for the issues discussed with respect to Schneider and the ISRC class, YouTube did
 26 not challenge the adequacy of the proposed class representatives or proposed class counsel under
 27 Rule 23(a)(4). Consequently, this element is not in dispute.

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V. RULE 23(C)(4)

“Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted,” Rule 23(c)(4) “authorizes the district court in appropriate cases to isolate the common issues ... and proceed with class treatment of these particular issues.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (citing Fed. R. Civ. P. 23(c)(4)). An issues class must “have proper representatives and otherwise comply with Rule 23’s requirements.” *Zinser*, 253 F.3d at 1192 n.8; *see also Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981). Certification of an issues class may be warranted when certifying particular issues “would significantly advance the resolution of the underlying case.” *Valentino*, 97 F.3d at 1229; *see also Reitman v. Champion Petfoods USA, Inc.*, 830 F. App’x 880, 882 (9th Cir. 2020) (unpublished) (affirming denial of certification because “numerous individualized issues affecting determinations of liability make Rule 23(c)(4) certification inefficient”)

Plaintiffs’ cursory request for a Rule 23(c)(4) certification is not well taken. *See* Dkt. No. 243-1 at 25. They appear to regard it as something of a consolation prize in the event certification is denied under Rule 23(b)(3). That is not the case. Plaintiffs did not explain why an issues class might advance the litigation as a whole, particularly in light of all the individualized questions that foreclosed certification of a (b)(3) class. Consequently, certification of an issues class is denied.

VI. THE MOTION TO EXCLUDE EXPERTS

YouTube asked to exclude the opinions of plaintiffs’ proposed experts, Dr. Charles Cowan or Dr. Hal Singer, under Federal Rule of Evidence 702 and *Daubert*. *See* Dkt. No. 261-1. The Court did not rely on any of these opinions, or the work of either expert, in deciding the certification motion. Consequently, the questions of admissibility that YouTube raised are deferred to another day, as warranted by developments. *See Milan v. Clif Bar & Co.*, 340 F.R.D. 591, 602 (N.D. Cal. 2021).

1 **CONCLUSION**

2 Plaintiffs' requests for certification of a class under Rule 23(b)(3), and for issues under
3 Rule 23(c)(4), are denied.

4 **IT IS SO ORDERED.**

5 Dated: May 22, 2023



8 JAMES DONATO
9 United States District Judge