

Defendants' *Motion for Partial Summary Judgment That Defendant Deckhands Are Entitled to Share in the Seafood Trade Relief Program Bonus Paid to Vessel Owner* at Docket 17 is **DENIED**. Plaintiff's *Motion for Summary Judgment* at Docket 18 is **GRANTED**.

IT IS SO ORDERED this 26th day of May, 2023, at Anchorage, Alaska.



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

Case No. 20-cv-04423-JD

United States District Court,
N.D. California.

Signed May 22, 2023

Background: Copyright owners brought action against online media services provider, alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA). Owners moved for class certification.

Holdings: The District Court, James Donato, J., held that:

- (1) classwide proof of copyright ownership, infringement, or defenses could not be provided by reliance on takedown procedures;
- (2) individual issues of license precluded certification of copyright class;
- (3) predominance requirement for certification of international standard recording code (ISRC) class and clip filename (CLFN) class, which were based on copyright management information (CMI) provisions of DMCA, could not be satisfied;
- (4) scienter requirement in DMCA weighed against certification of ISRC class and CLFN class;

- (5) named plaintiff who owned copyrights in musical compositions underlying sound recordings was not typical or adequate representative of putative class of persons who owned copyrights in one or more digital form sound recordings of musical works, and therefore she could not serve as class representative for that class;
- (6) numerosity could not be estimated with any degree of precision, preventing certification of class; and
- (7) class of common issues could not be certified.

Motion denied.

1. Federal Civil Procedure 161

The overall goal of class action rule is to select the method best suited to adjudication of the controversy fairly and efficiently. Fed. R. Civ. P. 23.

2. Federal Civil Procedure 161

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Fed. R. Civ. P. 23.

3. Federal Civil Procedure 172

A party seeking class certification bears the burden of showing that each of the prerequisites of Federal Rule of Civil Procedure governing class actions and at least one requirement under provision of rule governing types of class actions maintainable have been met. Fed. R. Civ. P. 23(a), 23(b).

4. Federal Civil Procedure 171, 174

The court's analysis on a motion for class certification must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim, but the merits are to be considered only to the extent that they are relevant to determin-

ing whether the prerequisites for class certification are satisfied. Fed. R. Civ. P. 23.

5. Federal Civil Procedure ¶161, 174

The class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits. Fed. R. Civ. P. 23.

6. Federal Civil Procedure ¶162

The decision of whether to certify a class is entrusted to the sound discretion of the district court.

7. Federal Civil Procedure ¶165

Because any competently crafted class complaint literally raises common questions, the court's task is to look for a common contention capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke; what matters is the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Fed. R. Civ. P. 23(a)(2).

8. Federal Civil Procedure ¶165

The existence of shared legal issues with divergent factual predicates is sufficient to have a common question, as required for class certification, as is a common core of salient facts coupled with disparate legal remedies within the class. Fed. R. Civ. P. 23(a)(2).

9. Federal Civil Procedure ¶165

The predominance inquiry on a motion for class certification focuses on whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. Fed. R. Civ. P. 23(b)(3).

10. Federal Civil Procedure ¶165

In the predominance analysis on a motion for class certification, each element of a claim need not be susceptible to class-

wide proof, and the important questions apt to drive the resolution of the litigation are given more weight over individualized questions which are of considerably less significance to the claims of the class.

11. Federal Civil Procedure ¶165

The predominance analysis permits class certification when one or more of the central issues in the action are common to the class and can be said to predominate, even if other important matters will have to be tried separately, such as damages or some affirmative defenses particular to some individual class members. Fed. R. Civ. P. 23(b)(3).

12. Federal Civil Procedure ¶165

In the predominance analysis on a motion for class certification, if defendant provides evidence that valid defense, affirmative or otherwise, will bar recovery on some claims, then court must determine, based on particular facts of case, whether individualized questions will overwhelm common ones and render class certification inappropriate; question is not whether great number of plaintiffs will win or lose at trial on individualized issue, but rather, court must assess necessity and manageability of potential class-member-by-class member discovery process and trial. Fed. R. Civ. P. 23(b)(3).

13. Federal Civil Procedure ¶165

On a motion for class certification, individualized issues weigh heavy in the predominance balancing if discovery and trial must assess thousands of claims one claim at a time. Fed. R. Civ. P. 23(b)(3).

14. Federal Civil Procedure ¶165

On a motion for class certification, the commonality requirements overlap with the predominance requirements and a court must consider cases examining both subsections in performing a predominance analysis; a court may find it appropriate to

assess commonality and predominance in tandem, with a careful eye toward ensuring that the specific requirements of each are fully satisfied. Fed. R. Civ. P. 23(b)(3).

15. Federal Civil Procedure ⇨181

A copyright claim may be poor a candidate for class-action treatment because every copyright claim turns upon facts that are particular to that single claim of infringement, and separate from all the other claims, and every copyright claim also is subject to defenses that require their own individualized inquiries. Fed. R. Civ. P. 23.

16. Federal Civil Procedure ⇨165

On a motion for class certification, considering whether questions of law or fact common to class members predominate begins with the elements of the underlying cause of action. Fed. R. Civ. P. 23(b)(3).

17. Copyrights and Intellectual Property ⇨543

The elements of direct copyright infringement are (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. 17 U.S.C.A. § 106.

18. Copyrights and Intellectual Property ⇨685

For a claim of contributory copyright infringement, a plaintiff must establish that there has been direct infringement by third parties as a threshold matter. 17 U.S.C.A. § 106.

19. Copyrights and Intellectual Property ⇨685

Liability for contributory copyright infringement requires proof that a defendant (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement. 17 U.S.C.A. § 106.

20. Copyrights and Intellectual Property ⇨687

In the online context, "material contribution," for purposes of claim for contributory copyright infringement, means the defendant has actual knowledge that specific infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works. 17 U.S.C.A. § 106.

See publication Words and Phrases for other judicial constructions and definitions.

21. Copyrights and Intellectual Property ⇨688

Inducement liability for contributory copyright infringement requires evidence of active steps taken to encourage direct infringement, such as advertising an infringing use to instructing how to engage in an infringing use. 17 U.S.C.A. § 106.

22. Copyrights and Intellectual Property ⇨683

Vicarious copyright infringement requires gateway showing of direct infringement by third party; in addition, plaintiff must demonstrate that defendant has right and ability to supervise infringing conduct and direct financial interest in infringing activity. 17 U.S.C.A. § 106.

23. Copyrights and Intellectual Property ⇨683

A key component of vicarious liability is evidence that the defendant had the practical and technical ability to identify or screen out infringing material, but did not do so; however, a failure to change operations to avoid distribution of infringing content is not the same as declining to exercise a right and ability to stop direct infringement by others. 17 U.S.C.A. § 106.

24. Federal Civil Procedure ⇌181

Classwide proof of copyright ownership, infringement, or defenses could not be provided by reliance on takedown procedures, and therefore predominance requirement could not be satisfied on that basis on motion for class certification in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA); although provider vetted takedown notices to ensure that they complied with DMCA's procedural requirements, provider used automated process to handle DMCA notices, and any follow-up work was limited to fraction of notices received and it involved inquiries into highly individualized issues like fair use, including provider's handling of counter-notifications from users contesting takedown. 17 U.S.C.A. §§ 106, 512, 1202; Fed. R. Civ. P. 23.

25. Copyrights and Intellectual Property ⇌709

A failure to promptly remove or disable access to a valid takedown notice forfeits the protection of the Digital Millennium Copyright Act (DMCA) safe harbor. 17 U.S.C.A. § 512(c)(1)(C).

26. Copyrights and Intellectual Property ⇌709

To preserve the protections of the Digital Millennium Copyright Act (DMCA) safe harbor, an online service provider must give the user an opportunity to respond to a takedown under the DMCA's "put-back procedures." 17 U.S.C.A. § 512(g).

27. Copyrights and Intellectual Property ⇌1065, 1068(4)

The Digital Millennium Copyright Act (DMCA) does not contemplate that a takedown of content is a substantive determination of copyright ownership or infringement; an adjudication of those questions is

expressly reserved for the courts in a lawsuit filed by the copyright claimant, with the attendant judicial scrutiny of ownership and the objective similarities of specific expressive elements in the two works to determine infringement liability. 17 U.S.C.A. § 512.

28. Copyrights and Intellectual Property ⇌1014(1)

Irrespective of Digital Millennium Copyright Act (DMCA) takedown procedures, copyright holder always retains burden of establishing infringement. 17 U.S.C.A. § 106, 512.

29. Copyrights and Intellectual Property ⇌709

An online service provider retains all defenses to infringement, even if it did not act in a manner to preserve the benefits of the Digital Millennium Copyright Act (DMCA) safe harbor. 17 U.S.C.A. § 512(l).

30. Copyrights and Intellectual Property ⇌708

A takedown under the Digital Millennium Copyright Act (DMCA) indicates only an allegation of infringement. 17 U.S.C.A. § 512.

31. Federal Civil Procedure ⇌181

Predominance requirement on motion for class certification could not be satisfied for copyright ownership claim that required multiple steps through language translation and documents, in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA). 17 U.S.C.A. §§ 106, 1202(b); Fed. R. Civ. P. 23(b)(3).

32. Copyrights and Intellectual Property ⇌704

There can be no infringement of copyrighted work if challenged use falls within scope of valid license. 17 U.S.C.A. § 106.

33. Federal Civil Procedure ⚖️181

Individual issues of license precluded certification of copyright class, in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA); even if provider could cross-reference required copyright management information (CMI) in its database against that information for copyrighted work claimed by class member to establish whether direct license existed, whether provider had license for particular work depended upon facts and circumstances unique to each work and copyright claimant. 17 U.S.C.A. §§ 106, 1202; Fed. R. Civ. P. 23.

34. Federal Civil Procedure ⚖️181

Predominance requirement for certification of international standard recording code (ISRC) class and clip filename (CLFN) class, which were based on copyright management information (CMI) provisions of Digital Millennium Copyright Act (DMCA), could not be satisfied, in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of DMCA, since proof of threshold element of copyright ownership would depend upon facts and circumstances unique to each work and copyright claimant. 17 U.S.C.A. §§ 106, 1202(b)(1); Fed. R. Civ. P. 23(b)(3).

35. Federal Civil Procedure ⚖️181

Scienter requirement in Digital Millennium Copyright Act (DMCA) weighed against certification of international standard recording code (ISRC) class and clip filename (CLFN) class, which were based on copyright management information (CMI) provisions of DMCA, in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of DMCA, since each putative

class member would need to show, with specific evidence for each work-in-suit, how removal of ISRC or CLFN induced, enabled, facilitated, or concealed an identifiable infringement of that work. 17 U.S.C.A. §§ 106, 1202(b); Fed. R. Civ. P. 23(b)(3).

36. Copyrights and Intellectual Property ⚖️664

To be liable under Digital Millennium Copyright Act for removing copyright management information (CMI) metadata and distributing images knowing that CMI was removed, a plaintiff must prove that the defendant possessed the mental state of knowing, or having a reasonable basis to know, that his actions will induce, enable, facilitate, or conceal infringement. 17 U.S.C.A. § 1202(b).

37. Copyrights and Intellectual Property ⚖️664

Specific proof is required to satisfy scienter element of claim under Digital Millennium Copyright Act for removing copyright management information (CMI) metadata and distributing images knowing that CMI was removed. 17 U.S.C.A. § 1202(b).

38. Copyrights and Intellectual Property ⚖️664

Plaintiff bringing a claim under Digital Millennium Copyright Act for removing copyright management information (CMI) metadata and distributing images knowing that CMI was removed must make an affirmative showing, such as by demonstrating a past pattern of conduct or *modus operandi*, that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions; this entails evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI. 17 U.S.C.A. § 1202(b).

39. Federal Civil Procedure ⇌181

Named plaintiff who owned copyrights in musical compositions underlying sound recordings was not typical or adequate representative of putative class of persons who own copyrights in one or more digital form sound recordings of musical works, and therefore she could not serve as class representative for that class in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA), since named plaintiff did not have copyright in any sound recordings. 17 U.S.C.A. §§ 106, 1202(b); Fed. R. Civ. P. 23.

40. Copyrights and Intellectual Property
⇌256, 276

Sound recordings and musical compositions are separate works with their own distinct copyrights; a copyright in composition does not automatically give owner copyright in sound recording of it.

41. Federal Civil Procedure ⇌181

Named plaintiff was not typical or adequate representative of putative international standard recording code (ISRC) class, and therefore she could not serve as class representative for that class in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA); even if ISRCs were associated with other recordings of named plaintiff's works, she did not allege ownership or infringement of those sound recordings separate from underlying compositions, and so she did not have work-in-suit that fit proposed ISRC class definition which included all persons who owned copyrights in one or more digital form sound recordings of musical works. 17 U.S.C.A. §§ 106, 1202(b); Fed. R. Civ. P. 23(a)(3)-(4).

42. Federal Civil Procedure ⇌181

Individual inquiry into merits of copyright ownership and infringement would have been required, in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA), and therefore numerosity could not be estimated with any degree of precision, preventing certification of class. 17 U.S.C.A. §§ 106, 1202(b); Fed. R. Civ. P. 23(a).

43. Federal Civil Procedure ⇌163

Although ascertainability of class members is not an element of class certification, numerosity should be established by something more than a good guess. Fed. R. Civ. P. 23(a)(1).

44. Federal Civil Procedure ⇌172

Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification. Fed. R. Civ. P. 23.

45. Federal Civil Procedure ⇌164

The class action typicality requirement is intended to assure that the interest of the named representative aligns with the interests of the class. Fed. R. Civ. P. 23(a)(3).

46. Federal Civil Procedure ⇌164

To satisfy typicality requirement for class certification, named plaintiffs' claims only need to be reasonably coextensive with those of absent class members; they need not be substantially identical. Fed. R. Civ. P. 23(a)(3).

47. Federal Civil Procedure ⇌164

Typicality required for class certification may be found when other members have same or similar injury as named plaintiffs arising out of same course of conduct. Fed. R. Civ. P. 23(a)(3).

48. Federal Civil Procedure ⇌164

Typicality required for class certification should not be found, and class should not be certified, in cases where other members would suffer because named plaintiffs would be preoccupied with defenses unique to them. Fed. R. Civ. P. 23(a)(3).

49. Federal Civil Procedure ⇌165

A district court in appropriate cases may isolate the common issues and proceed with class treatment of these particular issues, even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted. Fed. R. Civ. P. 23(c)(4).

50. Federal Civil Procedure ⇌164, 165

A class of common issues, i.e., an issues class, must have proper representatives and otherwise comply with class action requirements. Fed. R. Civ. P. 23(c)(4).

51. Federal Civil Procedure ⇌181

Class of common issues, i.e., an issues class, could not be certified, in action brought by copyright owner against online media services provider alleging direct, contributory, and vicarious infringement and violation of Digital Millennium Copyright Act (DMCA), since plaintiff did not explain why issues class might advance litigation as whole, particularly in light of all individualized questions on merits of copyright ownership and infringement. 17 U.S.C.A. §§ 106, 1202(b); Fed. R. Civ. P. 23(b)(3), 23(c)(4).

George Andrew Zelcs, Pro Hac Vice, David William Walchak, Marc Alfred Walenstein, Pro Hac Vice, Randall P. Ewing, Jr., Pro Hac Vice, Ryan Z. Cortazar, Pro Hac Vice, Korein Tillery LLC, Chicago, IL, Stephen Matthew Tillery, Pro Hac

Vice, Carol L. O'Keefe, Pro Hac Vice, Michael E. Klenov, Steven Michael Berezney, Stephen M. Tillery, Pro Hac Vice, Andrew Mark Ellis, Pro Hac Vice, Korein Tillery, LLC, Saint Louis, MO, Demetri Brumis Blaisdell, Pro Hac Vice, The New York Times Company, New York, NY, Jeffrey Peter Waldron, Jr., Pro Hac Vice, Joanna C. Wright, Pro Hac Vice, Philip C. Korologos, Pro Hac Vice, Robert Dwyer, Boies Schiller Flexner LLP, New York, NY, Joshua I. Schiller, Boies Schiller Flexner LLP, San Francisco, CA, Sabria Alexandra McElroy, Pro Hac Vice, Boies Schiller Flexner, LLP, Fort Lauderdale, FL, for Plaintiff Maria Schneider.

George Andrew Zelcs, Pro Hac Vice, David William Walchak, Randall P. Ewing, Jr., Pro Hac Vice, Ryan Z. Cortazar, Pro Hac Vice, Korein Tillery LLC, Chicago, IL, Philip C. Korologos, Jeffrey Peter Waldron, Jr., Pro Hac Vice, Joanna C. Wright, Pro Hac Vice, Joshua I. Schiller, Robert Dwyer, Boies Schiller Flexner LLP, New York, NY, Demetri Brumis Blaisdell, Pro Hac Vice, The New York Times Company, New York, NY, Stephen Matthew Tillery, Pro Hac Vice, Carol L. O'Keefe, Pro Hac Vice, Michael E. Klenov, Steven Michael Berezney, Andrew Mark Ellis, Pro Hac Vice, Korein Tillery, LLC, Saint Louis, MO, for Plaintiff Uniglobe Entertainment, LLC.

George Andrew Zelcs, Pro Hac Vice, David William Walchak, Randall P. Ewing, Jr., Pro Hac Vice, Ryan Z. Cortazar, Pro Hac Vice, Korein Tillery LLC, Chicago, IL, Philip C. Korologos, Jeffrey Peter Waldron, Jr., Pro Hac Vice, Joanna C. Wright, Pro Hac Vice, Robert Dwyer, Boies Schiller Flexner LLP, New York, NY, Demetri Brumis Blaisdell, Pro Hac Vice, The New York Times Company, New York, NY, Andrew Mark Ellis, Pro Hac Vice, Carol L. O'Keefe, Pro Hac Vice, Michael E. Klenov, Steven Michael Berezney,

Stephen M. Tillery, Pro Hac Vice, Korein Tillery LLC, Saint Louis, MO, Joshua I. Schiller, Boies Schiller Flexner LLP, San Francisco, CA, for Plaintiff AST Publishing LTD.

Anna Porto, Travis S. Silva, Daniel E. Jackson, Julia Lees Allen, Luke P. Apfeld, Robert Addy Van Nest, Amos Espeland, Kecker, Van Nest & Peters LLP, San Francisco, CA, Lauren Gallo White, Wilson Sonsini Goodrich and Rosati, PC, San Francisco, CA, David H. Kramer, Kelly Marie Knoll, Lauren Gallo White, Pro Hac Vice, Maura Lea Rees, Wilson Sonsini Goodrich & Rosati, PC, Palo Alto, CA, Brian M. Willen, Pro Hac Vice, Catherine R. Hartman, Pro Hac Vice, Eli Bard Richlin, Pro Hac Vice, Wilson Sonsini Goodrich and Rosati PC, New York, NY, for Defendant YouTube, LLC.

Anna Porto, Travis S. Silva, Daniel E. Jackson, Julia Lees Allen, Luke P. Apfeld, Robert Addy Van Nest, Amos Espeland, Kecker, Van Nest & Peters LLP, San Francisco, CA, David H. Kramer, Kelly Marie Knoll, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA, Maura Lea Rees, Wilson Sonsini Goodrich & Rosati, PC, Palo Alto, CA, Brian M. Willen, Pro Hac Vice, Catherine R. Hartman, Pro Hac Vice, Eli Bard Richlin, Pro Hac Vice, Wilson Sonsini Goodrich and Rosati PC, New York, NY, for Defendant Google LLC.

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

JAMES DONATO, United States
District Judge

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

In effect, plaintiffs allege that YouTube has violated the copyright laws by withholding broad access to Content ID. *See id.* ¶ 80 ("[C]opyright holders should not be forced to *repeatedly* demand that the

same platform take down infringing uses of the same copyrighted work, while other rights holders are provided access to standard digital fingerprinting and blocking tools.”) (emphasis in original). Plaintiffs also allege that YouTube automatically strips metadata out of uploaded videos, including copyright management information (CMI), which makes it harder to catch infringing conduct. *Id.* ¶¶ 83-86. The first amended complaint (FAC) presents claims for direct, contributory, and vicarious copyright infringement, and violations of Section 1202(b) of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202(b)(1)-(3), for removal of CMI and distribution of works with CMI removed.

A number of developments have changed the litigation terrain since the filing of the complaint. In the original complaint, plaintiff Pirate Monitor, a British Virgin Islands company that owns copyrights to foreign films, alleged that YouTube denied it access to Content ID and restricted the number of takedown notices it could submit in a day. Dkt. No. 1 ¶¶ 17, 65-74. Discovery indicated that Pirate Monitor may have uploaded thousands of videos and then submitted corresponding takedown notices under the DMCA to bolster its infringement claims. *See, e.g.*, Dkt. No. 268-42 at 11 (YouTube interrogatory response stating that “[t]he facts that YouTube has learned based on its investigation to date leave little doubt that Pirate Monitor [and its agents] were responsible both for uploading clips of certain of the works-in-suit (and other related content) to YouTube in the first place and then for misusing the DMCA process to request the removal of those clips by YouTube”). YouTube filed counterclaims against Pirate Monitor based on the alleged scheme, and Pirate Monitor subsequently dismissed all of its claims against YouTube with prejudice. Dkt. Nos. 34, 66. Pirate Monitor remains in the case as a counterclaim defendant and has filed a motion for summary

judgment on the counterclaims. *See* Dkt. Nos. 160, 260.

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

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

The factual conflicts concerned Schneider’s knowledge and authorization of these arrangements. Schneider stated that she

had not been advised about the assignment from AMP to MWP or the existence of the PLA, and that MWP has never been her publisher. *See* Dkt. No. 222 at 6. For its part, YouTube proffered emails indicating that MWP “supplied” some of Schneider’s songs to YouTube, and royalty summaries showing that Schneider had received payments from YouTube for several of her works. *Id.* at 7. YouTube also submitted email communications between MWP’s president and Schneider to show that Schneider knew about the PLA and knew that MWP used Content ID to monitor her works. *Id.* Schneider stated that the communications and royalty statements did not disclose to her the existence of the PLA or MWP’s licensing activities. *Id.*

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

Schneider contended that this was fatal to the PLA because under New York law, which governed the AA, Section 7 was a condition precedent to AMP’s, and therefore MWP’s, power to grant a license to YouTube. *Id.* In Schneider’s view, a failure to satisfy the condition precedent negated any licenses ostensibly granted by the PLA. *Id.* YouTube argued that Section 7 was a covenant and not a condition precedent, and so a failure to notify Schneider and obtain her consent might have breached the AA, but did not invalidate the PLA.

Id. The distinction was critical because the failure to satisfy a condition precedent would mean that “any use by the licensee is without authority from the licensor and may therefore, constitute an infringement of copyright,” but the breach of a covenant would give rise only to “a cause of action for breach of contract, not copyright infringement.” *Sohm v. Scholastic, Inc.*, 959 F.3d 39, 45 (2d Cir. 2020) (internal quotations omitted).

Determining whether Section 7 was a condition precedent or a covenant required a detailed analysis of other provisions in the AA, comparisons to other contractual terms that have been deemed conditions precedent under New York law, and consideration of the policy goals of federal copyright law. *See* Dkt. No. 222 at 9-12; *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1051 (9th Cir. 2020) (“A copyright license must be construed in accordance with the purposes underlying federal copyright law.”) (internal quotation omitted). On the facts in the record, the Court concluded that Section 7 was a covenant because it did not contain “‘unmistakable language’” in the “‘linguistic conventions of condition.’” Dkt. No. 222 at 9 (quoting *Sohm*, 959 F.3d at 46). Consequently, a failure to satisfy the notice and consent provision in Section 7 of the AA would not nullify the PLA.

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

YouTube raised another license defense on summary judgment based on its Terms of Service (TOS). *Id.* at 13. The TOS grant a broad license to YouTube for content uploaded by users, and the record established that users must agree to the TOS when creating an account or uploading a

video. *Id.*; Dkt. No. 164-5 § 6(C). YouTube argued it was entitled to summary judgment on more than 100 of Schneider's infringement claims because she and her agents uploaded several of her works-in-suit to YouTube. Dkt. No. 222 at 13.

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

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

Material disputes of fact again precluded summary judgment on Schneider's claims with respect to CMI under Section 1202(b) of the DMCA. The parties presented conflicting evidence on whether Schneider had identified any works-in-suit for which CMI had been removed, whether she and her agents use CMI to monitor infringement, and whether she had adduced evidence of

scienter as required by the statute. *See id.* at 21-22.

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

AST's situation is similarly convoluted. AST originally asserted infringement claims for print and audio books, Dkt. No. 99 ¶¶ 75-76, but stated later that "only the audiobook versions of the Works in Suit are at issue." Dkt. No. 268-34 at ECF p. 5 (letter clarifying AST's interrogatory re-

sponses). AST also said that it obtained ownership of its works-in-suit through “agreements with the authors and/or agents of the authors,” and that it uploaded and authorized others to upload clips of its works-in-suit to YouTube. Dkt. No. 268-37 at 4, 7 (AST’s interrogatory responses).

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

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

The third proposed class is an “International Standard Recording Code Class”

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

The fourth proposed class is a “Clip Filename Class” (CLFN class), again to be represented by Schneider. *Id.* at 4. It is defined as “[a]ll persons who own copyrights in one or more works that: (1) had an associated Clip Filename (‘CLFN’) field populated with copyright management information (‘CMI’) and (2) was contained in a video uploaded to YouTube (a) either without the associated CMI metadata or with the CMI metadata altered and (b) that was removed from YouTube as a result of either a successful Takedown Notice made on or after July 2, 2019, or an allegation of infringement made in a court of law on or after July 2, 2019.” *Id.* at 4.

DISCUSSION

I. LEGAL STANDARDS

[1, 2] The overall goal of Rule 23 is “to select the method best suited to adjudication of the controversy fairly and efficiently.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013) (cleaned up). “The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (citation omitted).

[3–6] Plaintiffs bear the burden of proving by a preponderance of the evidence that the proposed classes satisfy all four requirements of Rule 23(a) and at least one of the subsections of Rule 23(b). *Id.*; *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664–65 (9th Cir. 2022) (en banc), *cert. denied*, — U.S. —, 143 S. Ct. 424, 214 L.Ed.2d 233 (2022). The Court’s analysis “must be rigorous and may entail some overlap with the merits of the plaintiff’s underlying claim,” but the merits are to be considered only to the extent that they are “relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen*, 568 U.S. at 465–66, 133 S.Ct. 1184 (internal quotations and citations omitted). The class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits. *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015). The decision of whether to certify a class is entrusted to the sound discretion of the district court. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

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

[7, 8] The commonality requirement of Rule 23(a)(2) is satisfied when there are “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Because “any competently crafted class complaint literally raises common questions,” the Court’s task is to look for a common contention “capable of classwide resolution —

which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Alcantar*, 800 F.3d at 1052 (internal quotations omitted). What matters is the “capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (internal quotations omitted) (emphasis in original). This does not require total uniformity across a class. “The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374. The commonality standard imposed by Rule 23(a)(2) is “rigorous.” *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013).

[9–11] Rule 23(b)(3) sets out the related but nonetheless distinct requirement that common questions of law or fact predominate over individual ones. Fed. R. Civ. P. 23(b)(3). This inquiry focuses on “‘whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.’” *Olean*, 31 F.4th at 664 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016)). Each element of a claim need not be susceptible to classwide proof, *Amgen*, 568 U.S. at 468–69, 133 S.Ct. 1184, and the “important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule

23(b)(3) permits certification when “one or more of the central issues in the action are common to the class and can be said to predominate,” even if “other important matters will have to be tried separately, such as damages or some affirmative defenses particular to some individual class members.” *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (internal quotations omitted).

[12, 13] “Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a),” *Comcast*, 569 U.S. at 34, 133 S.Ct. 1426. “If the defendant provides evidence that a valid defense -- affirmative or otherwise -- will bar recovery on some claims,” then the Court must “determine, based on the particular facts of the case, ‘whether individualized questions . . . will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3).’” *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023) (quoting *Olean*, 31 F.4th at 669). “The question is not whether a great number of plaintiffs will win or lose at trial on the individualized issue.” *Id.* at 1067 n.11. Rather, the Court “must assess the necessity and manageability of the potential class-member-by-class member discovery process and trial.” *Id.* Individualized issues “weigh heavy in the predominance balancing” if discovery and trial “must assess thousands of claims one claim at a time.” *Id.*; see also *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469 (9th Cir. 2023) (decertifying class where trial of individualized issues would be “prohibitively cumbersome,” and plaintiffs did not prove that class issues predominated).

[14] The “requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a)” and “courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis.” *Olean*, 31 F.4th at 664. The Court finds it appropriate to assess commonality and predomi-

nance in tandem, with a careful eye toward ensuring that the specific requirements of each are fully satisfied. See, e.g., *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-21 (9th Cir. 2017).

[15] It has been said that “copyright claims are poor candidates for class-action treatment,” and for good reason. *Football Ass’n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65 (S.D.N.Y. 2013). Every copyright claim turns “upon facts which are particular to that single claim of infringement, and separate from all the other claims.” *Id.* at 66. Every copyright claim is also subject to defenses that require their own individualized inquiries. See, e.g., *Kihn v. Bill Graham Archives LLC*, No. 20-17397, 2022 WL 18935, at *2 (9th Cir. Jan. 3, 2022) (unpublished) (reversing certification of a copyright class action because “individual issues of license and consent would predominate for the absent class members, who have not yet had the opportunity Plaintiffs had to sift through their claims and exclude those that lack merit”). A claim of copyright infringement typically entails a fact-specific evaluation of “the objective similarities of specific expressive elements in the two works” that distinguishes “between the protected and unprotected material in a plaintiff’s work,” and tests “for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.” *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc) (internal quotations omitted).

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

II. THE REGISTERED WORKS AND FOREIGN WORKS CLASSES

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

All of the class definitions proposed by plaintiffs, including those with respect to CMI, are based on a shared element: persons who own copyrights in one or more works. Dkt. No. 243-1 at 3-4. Ownership of a copyright is an essential predicate for these claims, *see Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991), just as the existence of a license or other permission to use the works is an essential defense against them, *Great Minds*, 945 F.3d at 1110; *see also* 17 U.S.C. § 1202(b) (prohibiting removal or alteration of CMI “without the authority of the copyright owner or the law,” or distribution of such works).

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

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

[16, 17] The proposed infringement classes are a bellwether test of certification, and so will be taken up first. “Considering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.” *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011). The elements of direct copyright infringement are “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns*, 499 U.S. at 361, 111 S.Ct. 1282.

[18–21] For a claim of contributory copyright infringement, a plaintiff “must establish that there has been direct infringement by third parties” as a threshold matter. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007). Liability for contributory infringement also requires proof that a defendant “‘(1) has knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces that infringement.’” *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745 (9th Cir. 2019) (quoting *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007)). In the online context, material contribution means the defendant “has actual knowledge that specific in-

fringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.’” *Id.* (quoting *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671 (9th Cir. 2017)) (emphasis in original). “Inducement liability requires evidence of ‘active steps . . . taken to encourage direct infringement,’” such as “‘advertising an infringing use or instructing how to engage in an infringing use.’” *Id.* (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005)).

[22, 23] Vicarious copyright infringement also requires a gateway showing of direct infringement by a third party. *See Amazon*, 508 F.3d at 1173. In addition, a plaintiff must demonstrate that a defendant: “‘has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.’” *VHT*, 918 F.3d at 746 (quoting *Giganews*, 847 F.3d at 673). A key component of vicarious liability is evidence that the defendant had the practical and technical ability to identify or screen out infringing material, but did not do so. *Id.* A failure to change operations to avoid distribution of infringing content “‘is not the same as declining to exercise a right and ability’” to stop direct infringement by others. *Id.* (quoting *Amazon*, 508 F.3d at 1175).

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

[24] For the proposed Registered Works and Foreign Works classes, plaintiffs say that “nearly every element of every claim and affirmative defense will be established through common evidence.”

Dkt. No. 243-1 at 5. This common evidence is said to be “successful” takedown notices, meaning a takedown notice under the DMCA that resulted in the removal of the allegedly infringing content by YouTube, or the blocking of access to it. *See* 17 U.S.C. § 512(c)(3); Dkt. No. 243-1 at 10. Plaintiffs say a takedown establishes copyright ownership, registration, infringement, and the absence of affirmative defenses, “because YouTube admits it reviews such notices to ensure they are complete and valid and relies on them to remove content and issue copyright strikes.” Dkt. No. 243-1 at 7.¹

[25] The problem with this approach is that the takedown of content in response to a DMCA notice is miles away from substantive proof of copyright ownership or infringement. The takedown procedure is part of the safe harbor provisions that Congress established in the DMCA to allow online service providers like YouTube to manage their risks with respect to infringing materials posted by users. *See* 17 U.S.C. § 512(a)-(d); *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 603-04 (9th Cir. 2018). A service provider may avoid infringement liability if it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity,” upon receipt of a valid takedown notice that makes a claim of infringement pursuant to the DMCA’s procedural requirements. 17 U.S.C. § 512(c)(1)(C); *see also Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016) (same).² A failure to promptly remove or disable access in response to a valid takedown notice forfeits the protection of the safe harbor. *Ventura Content*, 885 F.3d at 604 (“[T]he

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.

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).

service provider, to maintain its shield, must respond expeditiously and effectively to the policing.”); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37 (2d Cir. 2012) (service provider “who receives a takedown notice from a copyright holder is *required* to ‘remove, or disable access to, the material’ in order to claim the benefit of the safe harbor”) (citation omitted) (emphasis in original).

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

[27–29] As these plainly worded statutory provisions demonstrate, the DMCA does not contemplate that a takedown of content is a substantive determination of copyright ownership or infringement. An adjudication of those questions is expressly reserved for the courts in a lawsuit filed by the copyright claimant, with the attendant judicial scrutiny of ownership and “the objective similarities of specific expressive elements in the two works” to determine infringement liability. *Skidmore*, 952 F.3d at 1064. Irrespective of the takedown procedures, a copyright holder always retains the burden of establishing infringement.

See UMG Recordings, Inc. v. Shelter Cap. Partners, LLC, 718 F.3d 1006, 1022 (9th Cir. 2013). A service provider retains all defenses to infringement, even if it did not act in a manner to preserve the benefits of the safe harbor. *See* 17 U.S.C. § 512(l) (“The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.”); *see also* 4 Nimmer on Copyright § 12B.04 (the “penalty” for failing to remove or disable access to material in response to a takedown notice “is not automatic liability -- instead, the service provider simply loses the benefit of the safe harbor that Section 512 affords.”) (citations omitted).

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

user who was wrongly accused of infringement. *Id.* § 512(f).

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

The record demonstrates otherwise. YouTube receives millions of DMCA takedown notices annually. *See* Dkt. No. 248-8 at 5 (YouTube Copyright Transparency Report showing that approximately two million removal requests were submitted via YouTube’s webform in the first half of 2022); Dkt. No. 325 at 23:11-24 (certification hearing transcript). To handle this volume, YouTube relies primarily on an automated process in the first instance to review notices for conformance to the DMCA’s procedural requirements. *See, e.g.*, Dkt. No. 243-12 at 45:10-13, 46:11-24 (YouTube copyright review manager testifying that an automated “classifier” assesses takedown notices for “completeness on the basis of the DMCA statutory requirements”); *see also* Dkt. No. 268-2 ¶¶ 2-3 (YouTube declaration stating that “YouTube uses a largely automated process to review each notice to determine whether they contain the information and representations required for a DMCA notice”).

YouTube’s copyright operations team and contractors manually review takedown notices in limited situations. *See, e.g.*, Dkt. No. 243-12 at 46:22-24 (“[I]f the classifier is uncertain that one of these requirements has been met, then it will route it for a human to take a look at.”). Human review typically is reserved for checking whether

the notices contain the information required by the DMCA and screening out suspicious and facially invalid notices. *Id.* at 47:8-10.

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

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

[31] There are other reasons why takedowns are doubtful sources of classwide proof. Consider the situation of plaintiff AST. YouTube noted that none of the

takedown notices submitted for works ostensibly owned by AST actually identified or even mentioned AST. *See* Dkt. Nos. 244-17, 244-18, 244-19, 244-20, 244-21 (identifying a Russian name “АЗАПИ”). Plaintiffs say this is “misleading” because АЗАПИ is AZAPI in English, and other documents show that AZAPI was authorized to submit notices on AST’s behalf through YouTube’s content verification program. *See* Dkt. No. 271-1 at 5 n.4. Even if that were the case, the salient point is that it took plaintiffs multiple steps through language translation and documents to get to their ownership claim on behalf of a named plaintiff. Plaintiffs have not demonstrated that anything less will be required for the claims of absent class members.

Consequently, reliance on takedown procedures will not provide classwide proof of copyright ownership, infringement, or defenses. Plaintiffs have not demonstrated that these “central issues in the action” are subject to common evidence, and so the Registered Works and Foreign Works classes cannot be certified.³ *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (internal quotation omitted). This conclusion applies to all of the infringement claims, whether direct or indirect. *See Amazon*, 508 F.3d at 1169 (contributory and vicarious copyright infringement liability require proof of an underlying act of direct infringement as a threshold matter).

Plaintiffs’ mention of two cases that certified copyright classes does not lead to a different outcome. In *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-5693 PSG, 2015 WL 4776932 (C.D. Cal. May 27, 2015), a copyright class was certified where the defendant admitted that it had used the

works “without first seeking licenses or paying royalties,” and the record did not demonstrate that “contentious ownership inquiries” would arise. *Id.* at *11-12. In *In re Napster, Inc. Copyright Litig.*, Nos. C MDL-00-1369 MHP, 2005 WL 1287611 (N.D. Cal. June 1, 2005), a class was certified for a single notice of infringement on behalf of copyright owners who retained a single agent as their “common licensing and collection agent.” *Id.* at *4-5. The streamlined circumstances that gave rise to certification in those cases are a far cry from the factually contested issues of ownership and licensing here, and so the cases do not offer a basis for certification of the classes plaintiffs propose.

B. Individualized Questions Predominate.

[32, 33] Without a viable method of classwide proof, plaintiffs’ infringement claims will necessarily require highly individualized inquiries into the merits. The question of a license is a good example of this. There can be no infringement of a copyrighted work if the challenged use falls within the scope of a valid license. *Great Minds*, 945 F.3d at 1110. Consequently, whether YouTube has a license for a particular work will be a matter of intense inquiry at trial.

As the record for plaintiff Schneider demonstrates, the answer to this inquiry will depend upon facts and circumstances unique to each work and copyright claimant. YouTube’s assertion of a license on summary judgment raised a flurry of factual and legal disputes about whether Schneider had actually granted licensing authority to a publisher. *See* Dkt. No. 222

3. This conclusion also relates to plaintiffs’ lengthy discussion in their brief that YouTube’s affirmative defenses, including eligibility for the DMCA safe harbor in 17 U.S.C. § 512, may be established with common evi-

dence. *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.

at 4-13. The disputes prompted the filing of a mountain of evidence and arguments by the parties, and necessitated a close reading of multiple contracts. *Id.* Even then, the Court concluded that the license defense entailed disputes of material fact that a jury will need to decide. *Id.* at 7.

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

As other courts have aptly concluded, such “individual issues of license” in themselves typically preclude certification of copyright class actions under Rule 23(b)(3). *Kihn*, 2022 WL 18935, at *2; *see also Palmer Kane LLC v. Scholastic Corp.*, No. 11 Civ. 7456(KBF), 2012 WL 2952898, at *7 (S.D.N.Y. July 16, 2012). Plaintiffs have not demonstrated otherwise here. Plaintiffs suggest that YouTube “can cross-reference the ISRCs and other required CMI in YouTube’s database against that information for the copyrighted work claimed by a class member” to establish whether a direct license exists. Dkt. No. 243-1 at 13. Even accepting this as true for present purposes, the approach might work as a first cut, but as the record for *Schneider* demonstrates, a grant of a license may be much more complicated and disputed than surface appearances indicate. *See* Dkt. No. 222 at 4-13; *see also Spinelli v. Nat’l Football League*, 903 F.3d 185, 203 (2d Cir. 2018) (“[I]f a sublicenseor has no right to issue a particular license, the sublicensee cannot acquire rights in

copyrighted works simply because the sublicenseor did so anyway.”). Plaintiffs have not demonstrated that a database cross-check will provide a clear-cut answer to the question of licenses on a classwide basis.

III. THE ISRC AND CLFN CLASSES

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

As this plain language states, the predicate of a claim under either prong of Section 1202(b) is that CMI was removed or altered without a copyright owner’s permission. Consequently, the ISRC and CLFN classes share with the Registered Works and Foreign Works classes the threshold element of copyright ownership. *See* Dkt. No. 243-1 at 3-4. In the opening brief for certification, plaintiffs did not say how they might establish ownership for the ISRC or CLFN classes with common evidence. In a reply brief, they made a somewhat offhand mention of an intention to use again the takedown procedures as common proof of ownership for the ISRC class, *see* Dkt. No. 271-1 at 12, but said

nothing with respect to the CLFN class. Plaintiffs made no other proposals for determining copyright ownership for either class on a common basis. Giving plaintiffs every benefit of the doubt by assuming they proposed to rely on takedown notices for both classes, the takedown approach works no better here than it did for the infringement classes. This is enough to deny certification of the ISRC and CLFN classes.

[35, 36] The scienter requirement in Section 1202(b) also weighs against certification. As the frequent use of “knowing” conveys, the statute puts an emphasis on scienter as an element of liability. Some courts have found a “double-scienter” requirement in Section 1202(b). *See, e.g., Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 171 (2d Cir. 2020). What matters here is our circuit’s conclusion that, for both subsections (b)(1) and (b)(3), a plaintiff must prove that the defendant possessed “the mental state of knowing, or having a reasonable basis to know, that his actions ‘will induce, enable, facilitate, or conceal’ infringement.” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 673 (9th Cir. 2018).

[37, 38] This scienter element demands specific proof. A “generic” assertion that a “general possibility” of infringement exists because CMI was removed “won’t wash.” *Id.* “[A] plaintiff bringing a Section 1202(b) claim must make an affirmative showing, such as by demonstrating a past ‘pattern of conduct’ or ‘modus operandi,’ that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions.” *Id.* at 674. This entails “evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI.” *Id.* at 675.

Cases that discuss Section 1202(b) in the summary judgment context illustrate the type of evidence sufficient to prove scienter. In *Stevens*, for example, two photogra-

phers brought a putative class action against a defendant that developed software used by online real estate services. *Id.* at 670. The software automatically stripped photographs of CMI metadata during the uploading process without the copyright holders’ authorization. *Id.* at 671. As a result, the photographers alleged that the defendant had violated Sections 1202(b)(1) and (3). *Id.* at 672.

The Ninth Circuit affirmed the district court’s grant of summary judgment for the defendant. *Id.* at 670. To establish scienter, each plaintiff was required to make an “[a]ffirmative [s]howing” with “specific evidence that removal of CMI metadata” from their copyrighted works “will impair their policing of infringement.” *Id.* at 675. The photographers did not prove this because they had no evidence that they “ever used CMI metadata to prevent or detect copyright infringement” and identified “no instance in which the removal of CMI metadata from any photograph ‘induce[d], enable[d], facilitate[d], or conceal[ed] an infringement.’” *Id.* (emphasis and alterations in original). In the one instance where the defendant removed a photograph in response to a DMCA takedown notice, there was no evidence that the claimant “used metadata to identify the allegedly infringing copies, that her photograph even contained metadata, or that the infringement identified had anything to do with removal or alteration of metadata.” *Id.* at 676 n.6.

In *Victor Elias Photography, LLC v. Ice Portal, Inc.*, the Eleventh Circuit reached a similar outcome in another case where a photographer alleged Section 1202(b) claims against a defendant whose software automatically removed CMI metadata from photographs before they were posted online. 43 F.4th 1313, 1315-16 (11th Cir. 2022). The Eleventh Circuit affirmed the district court’s grant of sum-

mary judgment for the defendant. *Id.* at 1316. Although the record established that the photographer used CMI to police infringement and had identified specific infringements of his works with missing CMI, there was “no evidence linking [the defendant’s] actions of removing the photographs’ CMI with the instances of infringement.” *Id.* at 1323. The photographer had no evidence of where or how the infringing works were copied, and so could not show that the infringements occurred because the defendant’s software removed CMI from his works. *Id.* at 1324-25. The circuit concluded that the photographer had not shown an “identifiable connection between the defendant’s actions and the infringement or the likelihood of infringement” necessary to establish the scienter element of Section 1202(b). *Id.* at 1325.

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

This requirement raises obvious barriers to classwide proof, as illustrated by the individualized disputes of fact that precluded summary judgment on Schneider’s CMI claims. See Dkt. No. 222 at 21-22. Plaintiffs again have not demonstrated that “com-

mon, aggregating-enabling, issues” with respect to the scienter element of Section 1202(b) are “more prevalent or important the non-common, aggregation-defeating, individual issues.” *Olean*, 31 F.4th at 664 (internal quotation omitted).

[39, 40] Another barrier to certification for the ISRC class is that Schneider, who was identified as the representative claimant for the class, does not have a work-in-suit that fits the class definition. The ISRC class is defined as “persons who own copyrights in one or more *digital form sound recordings* of musical works.” Dkt. No. 243-1 at 3 (emphasis added). It does not include persons who own copyrights in the musical compositions underlying those recordings. *Id.* “It is well settled that ‘[s]ound recordings and musical compositions are separate works with their own distinct copyrights,’” *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018) (citation omitted and alteration in original), and a copyright in the composition does not automatically give the owner a copyright in a sound recording of it, see *Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004).

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

maintaining works-in-suit and infringement claims” following summary judgment. *Id.* at 23. *VIKINGS ANTHEM* and *Concert in the garden* are not on the list. Dkt. No. 232. In effect, plaintiffs agreed that Schneider’s remaining works-in-suit do not include any sound recordings.

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

IV. OTHER RULE 23(A) ELEMENTS

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

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

[42, 43] Rule 23(a)(1) requires that a proposed class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). In most cases, numerosity is readily established. Here, the question is more nuanced. In the absence of a classwide method of establishing copyright ownership and infringement, it is difficult to estimate numerosity with any degree of precision. The commonality and predominance concerns discussed above indicate that a headcount for the classes would require individual inquiries into the

merits. While it is true that ascertainability is not an element of certification in our circuit, *see Briseno v. ConAgra Foods*, 844 F.3d 1121, 1131 (9th Cir. 2017), numerosity should be established by something more than a good guess. *See, e.g., Mays v. Wal-Mart Stores, Inc.*, 804 F. App’x 641, 642 (9th Cir. 2020) (unpublished) (“bare assertions of numerosity without any clear factual grounding” and speculative expert testimony did not support a finding of numerosity).

[44] Plaintiffs came rather close to doing just that by saying that numerosity must exist because YouTube hosts billions of videos and receives millions of takedown notices annually. *See* Dkt. No. 271-1 at 3; Dkt. No. 244-12; Dkt. No. 248-8 at 5. They dressed this up a bit with opinions by an expert that there are at least one thousand members in each proposed class. *See* Dkt. No. 243-1 at 4. YouTube objected to the opinions as not properly disclosed during discovery, *see* Dkt. No. 268 at 6, and it is not entirely clear that the class size estimates are based on reliable methods. But “[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification.” *Sali*, 909 F.3d at 1004. On the record before the Court, it is plausible that the putative classes cross the threshold required under Rule 23(a)(1). *See Ochoa v. McDonald’s Corp.*, No. 3:14-cv-02098-JD, 2016 WL 3648550, at *4 (N.D. Cal. July 7, 2016) (numerosity is satisfied if a class comprises of 40 or more members).

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

[45–48] Rule 23(a)(3) requires plaintiffs to prove that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The typicality requirement is intended to “assure that the interest of the named representative aligns with the

interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). To satisfy this requirement, the named plaintiffs’ claims need only be “reasonably coextensive with those of absent class members; they need not be substantially identical.” *Just Film*, 847 F.3d at 1116 (internal citations and quotations omitted). Typicality may be found when other members have the same or similar injury as the named plaintiffs arising out of the same course of conduct. *Id.* Typicality should not be found, and a class should not be certified, in cases where other members would suffer because the named plaintiffs would be “‘preoccupied with defenses unique to’” them. *Id.* (quoting *Hanon*, 976 F.2d at 508).

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

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

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

V. RULE 23(C)(4)

[49, 50] “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”)

[51] 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).

CONCLUSION

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

IT IS SO ORDERED.



**MOUSEBELT LABS PTE.
LTD., Plaintiff,**

v.

**Brian ARMSTRONG, et
al., Defendants.**

Case No. 22-cv-04847-JST

United States District Court,
N.D. California.

Signed May 24, 2023

Background: Singaporean investor in research platform startup brought action in California court against cryptocurrency exchange, website that would have been startup's competitor, and individual who was chief executive officer (CEO) of exchange and controlling shareholder of competitor. After defendants' demurrers were overruled in part and sustained in part with leave to amend, investor filed amended complaint asserting claims for fraud, intentional interference with contractual relations, intentional and negligent interference with prospective economic advantage, unjust enrichment, and quantum meruit. After defendants' demurrer was overruled, defendant removed action and moved to compel arbitration and stay proceedings.

Holdings: The District Court, Jon S. Tigar, J., held that:

(1) Convention on the Recognition and Enforcement of Foreign Arbitral Awards conferred jurisdiction over claims;

- (2) startup founder's knowledge of arbitration clause could not be imputed to defendants;
- (3) defendants did not waive arbitration by litigation conduct;
- (4) jurisdiction pursuant to Convention was federal question jurisdiction;
- (5) federal common law governed whether investor was equitably estopped from repudiating arbitration clause; and
- (6) investor's action was sufficiently intertwined with agreements containing arbitration clause for investor to be equitably estopped from repudiating arbitration clause.

Motion granted.

1. Alternative Dispute Resolution ⚖️515
International Law ⚖️292

To satisfy the jurisdictional prerequisites of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, four conditions must be present: (1) there is an "agreement in writing" within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not a United States citizen, or the commercial relationship has some reasonable relation with one or more foreign states. 9 U.S.C.A. § 201 et seq.; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517.

2. Alternative Dispute Resolution ⚖️515
International Law ⚖️292

Convention on the Recognition and Enforcement of Foreign Arbitral Awards conferred jurisdiction upon district court over Singaporean investor's action against cryptocurrency exchange and others for