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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARIA SCHNEIDER, UNIGLOBE
ENTERTAINMENT, LLC, and AST
PUBLISHING LTD., individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

YOUTUBE, LLC and GOOGLE LLC,

Defendants

CASE NO.: 3:20-cv-04423-JD

**YOUTUBE, LLC AND GOOGLE
LLC'S MOTION FOR SUMMARY
JUDGMENT AS TO PLAINTIFF
MARIA SCHNEIDER**

Date: October 13, 2022
Time: 10:00 am
Courtroom: 11
Judge: Hon. James Donato

YOUTUBE, LLC and GOOGLE LLC,

Counterclaimants,

v.

PIRATE MONITOR LTD, PIRATE MONITOR
LLC, and GÁBOR CSUPÓ,

Counterclaim Defendants.

PUBLIC VERSION

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on October 13, 2022 at 10:00 a.m., Defendants-
3 Counterclaimants YouTube, LLC and Google LLC (“YouTube”) will move the Court for an
4 order granting summary judgment against the claims of Plaintiff Maria Schneider.

5 **STATEMENT OF REQUESTED RELIEF**

6 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, YouTube requests that the
7 Court grant summary judgment against Plaintiff Maria Schneider’s claims for copyright
8 infringement and for violations of 17 U.S.C. § 1202(b).

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 Maria Schneider, a jazz composer, sued YouTube for copyright infringement and
11 improper removal of her copyright management information (“CMI”) in violation of 17 U.S.C.
12 § 1202(b). Those claims, also asserted on behalf of a putative class of copyright holders
13 throughout the world, are meritless for myriad reasons. Schneider’s infringement claims fail
14 because she licensed use of her works on YouTube in at least two different ways. Her CMI
15 claims fail because she cannot make out a prima facie case and because YouTube was authorized
16 to remove any supposed CMI. In addition, much of her case is time barred.

17 In 2008, Schneider gave her publisher, Modern Works Music Publishing (“MWP”), the
18 exclusive right to license her compositions. MWP then granted YouTube a blanket license to use
19 on YouTube all works it controlled—including Schneider’s entire catalog of compositions. By
20 itself, the MWP license disposes of Schneider’s case. But YouTube has additional licenses to
21 Schneider’s works. For example, under the YouTube Terms of Service Agreement (“TOS”),
22 Schneider and her agents separately licensed YouTube to use any content they uploaded to
23 YouTube, including Works-in-Suit.

24 Schneider’s attempts to evade these licenses are specious. For the MWP license, she
25 claims her publisher did not obtain her specific consent before licensing her works to YouTube.
26 Even assuming that were true, it makes no difference because Schneider’s consent was not a
27 condition precedent to MWP’s right to license her works. The license is valid and dispositive.
28 And as to the other license, Schneider has said nothing at all.

1 Schneider also has charged YouTube with improperly removing CMI that she claims may
2 have been buried in the metadata of videos uploaded by other users to YouTube. But Schneider
3 has refused, despite repeated requests, to identify the supposed CMI or the videos allegedly
4 containing it. Even putting that aside, she cannot demonstrate that YouTube’s removal of any
5 CMI was without the requisite “authority of the copyright owner or the law,” because her
6 publisher granted YouTube blanket rights to reformat videos containing her works. Further,
7 Schneider has failed to demonstrate the requisite scienter for a § 1202 claim. Put simply,
8 Schneider cannot show that YouTube intentionally removed CMI, much less that it did so
9 knowing (or with reason to know) that such removal would foment infringement.

10 Finally, Schneider faces insuperable time bars for many of her infringement claims, and
11 for her § 1202 claim as a whole. When Schneider created her YouTube account and uploaded
12 videos to YouTube, she agreed to YouTube’s TOS, including its provision that any claim
13 relating to YouTube’s services be brought within one year of accrual. Beyond that, the
14 governing statute of limitations requires her claims be brought within three years of accrual
15 (17 U.S.C. § 507(b))—that is, when a plaintiff has actual or constructive knowledge of the
16 claims. Schneider admits to having actual knowledge of dozens of her infringement claims years
17 before she sued, and discovery shows she had constructive knowledge of even more. She also
18 had actual knowledge of YouTube’s supposed § 1202 violations more than three years before she
19 sued.

20 Schneider had no cause to bring claims in her own right, much less on behalf of a
21 putative class. The Court should summarily dispose of them and enter judgment against her.

22 **STATEMENT OF ISSUES TO BE DECIDED**

23 1. Whether Schneider’s copyright infringement claims are barred by YouTube’s
24 MWP license and the license Schneider and her agents agreed to when agreeing to YouTube’s
25 TOS.

26 2. Whether Schneider’s CMI claim is barred by her failure to come forward with
27 evidence that YouTube removed her CMI, that YouTube acted with the required scienter, and
28 that any such removal was unauthorized.

1 cutting-edge technologies to assist copyright holders in protecting against the unauthorized use
2 of their work on the service. Zhu Decl. ¶¶ 3-6.

3 ***The YouTube Terms of Service.*** By creating a YouTube account, users gain access to a
4 host of YouTube services at no charge, including video hosting, a global audience for their
5 content, social networking and analytics capabilities, and access to ground-breaking copyright
6 management tools. Zhu Decl. ¶ 7; *see also* Declaration of Paul N. Harold (“Harold Decl.”) Ex.
7 21 (“Schneider Dep. Tr.”) 104:3-19 (testifying that YouTube helped her “to reach an audience
8 after COVID” and did so for “free”); Harold Ex. 22 (“Le Claire Dep. Tr.”) 85:16-86:9, 90:13-16
9 (testifying that YouTube provided free video hosting services and “another way to get more
10 people to learn about” Schneider). Users can also make money from videos they upload. *See,*
11 *e.g.,* Le Claire Dep. Tr. 123:3-18 (acknowledging a \$23.86 payment from YouTube to Schneider
12 under a YouTube advertising program). When creating an account or uploading a video, a user
13 must assent to YouTube’s TOS in exchange for access to these free services and tools. Zhu
14 Decl. ¶ 7. Schneider agreed to the TOS on several instances, including when she created her
15 “Maria Schneider Official Page” account in 2012. Schneider Dep. Tr. 77:22-78:2 (“Q. In
16 creating this YouTube account, you agreed to YouTube’s terms of service; right? A. I don’t
17 recall the terms of service. But, yes.”).

18 Users agreeing to the TOS grant YouTube extensive rights to any content they upload.
19 This TOS license grants both YouTube and other users a license to broadly use such content
20 throughout the service. *See* Zhu Ex. 1 § 6(C). Users also agree to a bilateral clause requiring
21 that any claims relating to the service be brought within one year of accrual. *Id.* § 14.¹

22 ***Schneider’s Works-in-Suit.*** Schneider asserts copyright infringement claims against
23 YouTube based on 78 works (“Works-in-Suit”). Dkt. 99 (“FAC”) ¶ 60 & n.7; *see* Dkt. 98 at 1
24 (requiring FAC to “identify[] all copyrighted works”). Seventy-six of these Works-in-Suit are
25

26 ¹ The TOS provision, entitled “Limitation on Legal Action,” provides: “YOU AND
27 YOUTUBE AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO
28 THE SERVICES MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF
ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY
BARRED.” Zhu Ex. 1 § 14.

1 musical compositions; accordingly, her copyright covers the music (*e.g.*, as reflected in sheet
2 music) but not a sound recording. *See* 17 U.S.C. § 102(a)(2). Schneider’s two remaining
3 Works-in-Suit, *Concert in the Garden* and *Vikings Anthem*, are registered as sound recordings.
4 Schneider has not identified any alleged infringements of these sound recordings from within the
5 statute of limitations period. *See infra* at 22-24 & n.8.

6 ***Schneider’s Administration Agreement.*** Songwriters typically contract with music
7 publishers to administer their compositions. Suk Decl. ¶ 2. In 2008, Schneider contracted with
8 ArtistShare Music Publishing LLC, entering into an Administration Agreement. As set forth in
9 that agreement and as described by ArtistShare’s Chief Operating Officer, Dan Coleman,
10 Schneider appointed ArtistShare as “the sole and exclusive Administrator” of her musical
11 compositions. *See* Declaration of Dan Coleman (“Coleman Decl.”) ¶¶ 2-3 & Ex. A
12 (“Administration Agreement” or “Admin. Agreement”) § 6. Through this Agreement, Schneider
13 granted ArtistShare “the exclusive right” to “license the performance and use of the
14 Compositions” throughout the world. Admin. Agreement §§ 5-6. It also provided the exclusive
15 worldwide right “to execute in [Schneider’s] name any licenses and agreements affecting the
16 Compositions, including, but not limited to, licenses for mechanical reproduction, public
17 performance, synchronization uses, the use of Compositions in connection with merchandising
18 activities, and all so-called ‘digital’ or ‘new media’ uses of the Compositions.” Admin.
19 Agreement §§ 5-6. The licensed Compositions included “all musical compositions, written or
20 composed prior to or during the Term hereof, in whole or in part by [Schneider], or owned or
21 controlled, directly or indirectly, by [Schneider] or any firm or corporation affiliated with or
22 related to [Schneider] or which [Schneider] may form (the “Compositions”).” Admin.
23 Agreement § 2; *see also* Coleman Decl. ¶ 3. Both Coleman and Schneider have confirmed that
24 the Administration Agreement has not been terminated and remains in effect. Schneider Dep.
25 Tr. 130:17-22; Coleman Decl. ¶ 3.

26 In short, the Administration Agreement gave ArtistShare the “exclusive right” to license
27 Schneider’s compositions. Admin. Agreement § 6. ArtistShare separately covenanted that it
28 would “notify” Schneider and “obtain [her] prior written approval” for licenses it granted in most

1 cases. Admin. Agreement § 7. However, it would “deem” that Schneider consented if she did
2 not respond to a request for approval within 10 business days. Admin. Agreement § 7. Licenses
3 could also be granted without Schneider’s prior written approval: Section 7 expressly
4 acknowledged that the publisher might not “obtain [Schneider’s] consent in each instance.” *Id.*
5 And the parties agreed that a failure to obtain consent would breach the covenant only where it
6 was intentional. Admin. Agreement § 7 (“any inadvertent failure to timely obtain [Schneider’s]
7 consent will not be deemed a breach of this Agreement.”).

8 Coleman is also the Co-Founder and President of MWP—one of ArtistShare’s two
9 members and its 50% owner. Coleman Decl. ¶¶ 1-2. He personally has worked with Schneider
10 for the past fourteen years, since her Administration Agreement went into effect. Schneider Dep.
11 Tr. 131:8-11. Coleman has explained that ArtistShare legally assigned all its duties to MWP
12 under § 14A of the Administration Agreement. Coleman Decl. ¶ 4. And under the assignment,
13 MWP acts as “the worldwide subpublisher” for ArtistShare with respect to Schneider’s
14 compositions. Coleman Decl. ¶ 4. Schneider acknowledges that her works “are administered by
15 ModernWorks.” Harold Ex. 3 (Schneider stating that her works “are administered by
16 ModernWorks”); Harold Ex. 4 (Schneider referring to “Modern Works” as “[m]y publishing
17 administrator”); Schneider Dep. Tr. 131:8-11. And she directs licensing inquiries to MWP. *E.g.*,
18 Harold Ex. 5; Harold Ex. 6.

19 ***MWP’s Publishing Licensing Agreement with Google.*** In 2014, MWP licensed to
20 Google, YouTube’s parent company, all musical compositions that MWP “owned or controlled”
21 for use on YouTube. Suk Ex. 1 (“Publishing Licensing Agreement” or “PLA”) Ex. A (definition
22 for “Publisher Composition”). This Publishing License Agreement granted to Google a
23 “license[] to (i) Store, Reformat, make On-Demand Streams of, make Conditional Downloads of,
24 and Display Publisher Compositions as have been embodied in (A) User Videos. . . and to make
25 available Publisher Compositions on and through the Google Services and Embedded YouTube
26 Video Players” and to “(ii) reproduce, distribute, and prepare derivative works (including
27 synchronization rights) based upon the Publisher Compositions.” PLA § 2(a).
28

1 Schneider’s compositions (including those constituting Works-in-Suit) are among the
 2 many thousands of compositions that MWP licensed to YouTube under the PLA, as MWP has
 3 “control of the underlying compositional copyright[s]” in Schneider’s works through the
 4 Administration Agreement. *See* Admin. Agreement §§ 5-6; Coleman Decl. ¶ 4.

5 MWP’s control of Schneider’s works was manifest in more than just its written
 6 authorization from her. It was also demonstrated by MWP’s use of YouTube’s Content ID
 7 system on Schneider’s behalf, as provided for in the PLA. *See* Coleman Decl. ¶¶ 5-8. Content
 8 ID utilizes proprietary technology to allow eligible users to “claim” and automatically track,
 9 block, and/or share revenue associated with third-party user videos that they believe incorporate
 10 their content. *See* Harold Ex. 7. MWP used Content ID in connection with multiple Schneider
 11 musical works. Coleman Decl. ¶ 7 & Ex. C (discussing delivery of Schneider works to YouTube
 12 for use in Content ID). Schneider “kn[ew]” that MWP “ha[s] a deal” with YouTube. Coleman
 13 Decl. ¶ 6 & Ex. B. Schneider regularly received pass-through royalties from MWP that
 14 YouTube paid MWP for the monetization of Schneider’s works on the platform. *See* Coleman
 15 Decl. ¶ 8 & Ex. D. And she was well aware of her ability to use Content ID under the PLA—she
 16 simply chose not to exercise that ability in some instances and for some works. *See* Harold Ex. 8
 17 ([REDACTED]
 18 [REDACTED]); Coleman Decl. ¶ 6.

19 ***Schneider’s lawsuit.*** On July 2, 2020, Schneider and Pirate Monitor LTD, a British
 20 Virgin Islands company purporting to own copyrights in Hungarian films, sued Defendants for
 21 copyright infringement based on the presence on YouTube of videos allegedly containing their
 22 copyrighted content. Dkt. 1. They also charged YouTube with violations of 17 U.S.C. § 1202
 23 based on YouTube’s supposedly improper removal of CMI from unidentified videos. Plaintiffs
 24 purported to bring the action on behalf of themselves and two sprawling putative classes of
 25 copyright holders around the world.

26 Pirate Monitor dismissed its claims with prejudice (*see* Dkt. 66 (dismissal)) shortly after
 27 YouTube uncovered proof of a wide-ranging fraud it orchestrated on the service (*see* Dkt. 60
 28 (amended counterclaims)), and after Pirate Monitor acknowledged it did not own at least one of

1 the copyrighted works it had asserted. *See* Harold Decl. ¶ 27 & Ex. 24 (email from plaintiffs re
2 “error” in complaint). Two additional plaintiffs subsequently joined the lawsuit, AST Publishing
3 Ltd., a Russian audio book publisher, and Uniglobe Entertainment, which purports to own
4 copyrights in three motion pictures. Although their claims are not the subject of this motion, it is
5 plain they suffer from dispositive flaws of their own, including admitted licenses of their Works-
6 in-Suit to YouTube. *See* Harold Ex. 25 at 9-14; Harold Ex. 26 at 6-7.

7 ***Schneider’s CMI claim.*** Schneider has done virtually nothing in discovery to support
8 her unusual § 1202 removal-of-CMI claim. Such claims are generally directed against parties
9 that remove prototypical CMI like visible watermarks or copyright notices from works in order
10 to facilitate infringing sales. Here, Schneider contends certain unidentified metadata embedded
11 in the original video files that users upload might contain details that ***might, in theory***, qualify as
12 CMI for her musical compositions, even though that metadata is not visible in the video itself.
13 Per her claim, when YouTube transcodes the original files to make the user videos accessible, it
14 fails to retain the embedded file metadata, including whatever CMI that metadata may have
15 contained. FAC ¶¶ 33, 83.

16 In response to a YouTube interrogatory, Schneider did not identify a single video
17 containing embedded metadata constituting her CMI. Even for videos Schneider directed to be
18 uploaded to YouTube, she did not put CMI in the metadata. *See, e.g.*, Schneider Dep. Tr.
19 215:12-19; Le Claire Dep. Tr. 191:15-20; Harold Ex. 23 (“Bornheimer Dep. Tr.”) 140:19-20.
20 Further, ***even if*** any videos actually contained Schneider’s CMI in the embedded metadata,
21 Schneider offered no evidence that YouTube knew such CMI was there or intentionally removed
22 it without authorization, much less that it did so knowing or with reason to know that such
23 removal would foment infringement of her copyrighted works. *See* Harold Ex. 10 at 16-22.

24 ***Schneider’s discovery of alleged infringements and CMI removal.*** Schneider did not
25 identify a single alleged infringement of a copyright in her complaint. After a series of discovery
26 disputes, the Court ordered Schneider to provide “a final list of [alleged] infringements” to
27 YouTube by February 25, 2022. Dkt. 98. On that date, she provided a list of 381 alleged
28

1 infringements, identifying by URL the videos on the YouTube service that she contended
2 infringed the Works-in-Suit that she had listed in her complaint. Harold Ex. 1.

3 YouTube served an interrogatory asking Schneider to provide the date she first learned of
4 each infringement and to detail how she became aware of each infringement. Harold Ex. 12 at 4-
5 8. After several amendments and corrections to her response, Schneider provided dates “on or
6 shortly before” which she “became aware of the alleged infringements.” *Id.* These dates ranged
7 from December 10, 2007 (more than twelve years before Schneider sued) to February 23, 2022
8 (twenty months after she sued). *Id.*; *see also* Harold Decl. ¶ 3, Harold Ex. 2 (chart cataloging
9 381 alleged infringements and dates of discovery for each). Schneider said that she and her
10 agents discovered the alleged infringements by “conducting searches for unauthorized copies of
11 her work on YouTube using her name and/or the titles of the Works in Suit or by being alerted to
12 the video by a third party.” Harold Ex. 12 at 8.

13 Schneider admitted that she was actually aware of eighty-five alleged infringements of
14 the Works-in-Suit that remain in the case before July 2, 2019—more than one year before she
15 filed suit on July 2, 2020—and forty-nine alleged infringements before July 2, 2017—more than
16 three years before she sued. *Id.*² Schneider also had constructive knowledge of hundreds more
17 of the alleged infringements since she could have discovered them at or near the date of upload
18 using the same search functionality that she ultimately used to discover them (*see id.*), or by
19 using other YouTube copyright management tools available to her, including Content ID access
20 through her publisher, Modern Works (*see* Coleman Decl. ¶ 6). Exercising reasonable diligence,
21 Schneider would have discovered 328 alleged infringements by July 2, 2019, and 261 by July 2,
22 2017. Harold Ex. 2 at Col. F, H. Instead, she chose to accept royalty payments for uses of her
23 works on YouTube (*see* Coleman Decl. ¶ 8 & Ex. D). She now attempts to recharacterize those
24 same uses of her works as infringements, rather than as licensed uses that earned her money.

25 _____
26 ² Twenty-eight of Schneider’s seventy-eight Works-in-Suit were not registered before the
27 case was filed, and Schneider agreed to but has not yet dismissed these twenty-eight Works-in-
28 Suit and the corresponding seventy-nine alleged infringements. Harold Decl. ¶¶ 25-26. Many of
these alleged infringements are time-barred too; Schneider admits to being aware of thirty-five of
the seventy-nine alleged infringements by July 2, 2019, and twenty-four by July 2, 2017. Harold
Ex. 12 at 4-8; Harold Ex. 2 at Col. E, G.

1 Schneider’s CMI claim also comes years after the fact. While Schneider has not
 2 identified any evidence that YouTube removed CMI from her works, she has known the facts
 3 that form the basis for this claim since at least March 2017, when she submitted comments about
 4 the issue to the U.S. Copyright Office. Harold Ex. 13. Those comments purport to describe how
 5 YouTube was supposedly [REDACTED] *Id.* Her theory
 6 back then, about the general removal of metadata buried in video files, is the same as the one she
 7 has asserted in this case filed more than three years later. *Compare id.* at 5, with FAC ¶ 33.

8 ARGUMENT

9 I. YOUTUBE HAS MULTIPLE LICENSES TO SCHNEIDER’S WORKS.

10 It is elementary that a copyright infringement claim “fails if the challenged use of the
 11 work falls within the scope of a valid license.” *Great Minds v. Office Depot, Inc.*, 945 F.3d
 12 1106, 1110 (9th Cir. 2019). At least two different licenses apply here: a blanket catalog license
 13 from Schneider’s publisher; and a license in the YouTube TOS to works Schneider authorized to
 14 be uploaded to YouTube. *See* Harold Ex. 2 at Col. C, D (cataloging licenses applicable to each
 15 of Schneider’s 381 alleged infringements).

16 A. Through Her Publisher, Schneider Granted YouTube a License to Use Her 17 Entire Catalog of Compositions.

18 Schneider’s infringement claims for seventy-six of her seventy-eight Works-in-Suit (the
 19 musical compositions) fail because Schneider’s publisher, MWP, licensed them to YouTube.
 20 MWP licensed to YouTube all compositions that it “owned or controlled.” PLA, Ex. A
 21 (definition for “Publisher Composition”). And MWP controlled “all [of Schneider’s] musical
 22 compositions” by virtue of its role as “the sole and exclusive Administrator” of the compositions,
 23 its broad “exclusive” rights to license them, and its right “to prosecute, defend, and settle all
 24 claims and actions with respect to” them. Admin. Agreement §§ 2, 6, 17; *see also* Coleman
 25 Decl. ¶¶ 3-8; Coleman Ex. B (2016 email from D. Coleman stating that MWP received revenue
 26 from YouTube because of “our control of the underlying compositional copyright” in
 27 Schneider’s works). New York law controls the agreement between Schneider and MWP.
 28 Admin. Agreement § 20.

1 Schneider alleges that YouTube “reproduced, distributed, displayed, and publicly
2 performed” the Works-in-Suit by streaming videos containing the Works-in-Suit to users. FAC
3 ¶ 113. But the Publishing License Agreement gave YouTube a blanket license to “Store,
4 Reformat, make On-Demand Streams of,” “display,” and otherwise “make available Publisher
5 Compositions on and through the Google Services” including in “User Videos.” PLA § 2(a).
6 That broad license covers all the allegedly infringing conduct that could be attributed to
7 YouTube with respect to the alleged infringements in this case, and bars all of Schneider’s
8 infringement claims, whether direct or secondary.

9 Schneider has contended that YouTube’s license is not valid because MWP did not
10 obtain Schneider’s prior written consent to grant YouTube the license that it did. *See* Dkt. 91 at
11 8. As an initial matter, her objection rings hollow since Schneider has known of the YouTube
12 license and accepted its benefits for years. *See* Coleman Decl. ¶¶ 6-8; Harold Ex. 8; *accord John*
13 *Hancock Life Ins. Co. of New York v. Solomon Baum Irrevocable Fam. Life Ins. Tr.*, 783 F.
14 App’x 89, 90 (2d Cir. 2019) (principal ratifies contracts of purported agent through knowing
15 silence and acceptance of benefits); *Chem. Bank v. Affiliated FM Ins. Co.*, 169 F.3d 121, 128 (2d
16 Cir. 1999) (same), *vacated & superseded by* 196 F.3d 373 (2d Cir. 1999). But ratification aside,
17 Schneider’s objection to the license fails because she cannot show that her consent was a
18 condition precedent on her publisher’s power to grant the license, rather than a mere covenant
19 her publisher made to her. *See Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998); 13 Williston
20 on Contracts § 38:7 (4th ed.) (“A condition precedent is either an act of a party that must be
21 performed or a certain event that must happen before a contractual right accrues or a contractual
22 duty arises.”). Only a condition on MWP’s licensing power could impact the validity of the
23 license it granted YouTube. *Cf. United States Naval Inst. v. Charter Commc’ns, Inc.*, 936 F.2d
24 692, 695 (2d Cir. 1991) (noting that “‘mere breach of covenant may support a claim of damages
25 for breach of contract but will not disturb the remaining rights and obligations under the license
26 including the authority to use the copyrighted material’” (quoting *Fantastic Fakes, Inc. v.*
27 *Pickwick International, Inc.*, 661 F.2d 479, 483-84 (5th Cir. Unit B 1981)).
28

1 A covenant is “a manifestation of intention to act or refrain from acting in a specified
 2 way.” *Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 460 N.E.2d 1077, 1081
 3 (N.Y. 1984) (citation omitted). A condition precedent, on the other hand, is “an act or event ...
 4 which, unless the condition is excused, must occur before a duty to perform a promise in the
 5 agreement arises.” *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415,
 6 418 (N.Y. 1995) (citation omitted). New York law presumes “that terms of a contract are
 7 covenants rather than conditions.” *Graham*, 144 F.3d at 237. “Conditions precedent are not
 8 readily assumed” and must be “expressed in **unmistakable language**.” *Bank of N.Y. Mellon Tr.*
 9 *Co., N.A. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 305 (2d Cir. 2016) (emphasis
 10 added). Any “ambiguous provisions” must “be construed as promises rather than conditions
 11 precedent.” *Id.* at 306 n.8.

12 Schneider’s consent was not a condition precedent to the licenses her publisher granted.
 13 Schneider’s argument relies on Section 7 of the Administration Agreement, which provides:

14 7. YOUR CREATIVE CONTROL. Notwithstanding anything to the contrary
 15 expressed or implied herein, we must notify you and obtain your prior written
 16 approval for any license we grant on your behalf. It is agreed and understood that
 17 either you or your designated agent, who you may designate in writing to us from
 18 time to time (“Designated Agent”) can give consent under this §7. We will deem to
 19 have received your consent under this §7 if, after ten (10) business days from the
 20 receipt of our request, we have not received a reply from you or your Designated
 Agent. Notwithstanding anything contained in this §7, you agree and understand that
 copyright laws and common business practices outside of the USA might hinder or
 preclude Administrator’s efforts to obtain your consent in each instance.
 Administrator agrees to require all subpublishers to comply with the terms of this §7
 to the extent possible in their respective territories, but any inadvertent failure to
 timely obtain your consent will not be deemed a breach of this Agreement.

21 Admin. Agreement § 7.

22 This provision cannot be read to impose a condition precedent on MWP’s power to grant
 23 licenses for several reasons: **First**, the provision expressly acknowledges that the publisher
 24 might **not** “obtain [Schneider’s] consent in each instance,” recognizing that licenses granted
 25 without Schneider’s prior consent would still be valid. **Second**, the provision recognizes that
 26 “any inadvertent failure to timely obtain [Schneider’s] consent will not be deemed a breach of
 27 this Agreement.” In other words, the parties specifically agreed that the provision was a
 28 covenant, rather than a condition, enforceable via a claim for breach in certain circumstances.

1 **Third**, the Administration Agreement “does not caption or otherwise label” Schneider’s consent
 2 “as a ‘condition precedent’” to the grant of licenses, “as one might expect sophisticated parties to
 3 do if that were their intent.” *See Bank of New York Mellon Tr. Co.*, 821 F.3d at 305. Nor do
 4 Sections 6 or 7 “employ any recognized ‘linguistic conventions’ of condition—such as ‘if,’ ‘on
 5 condition that,’ ‘provided that,’ ‘in the event that,’ and ‘subject to.’” *See id.*

6 Schneider’s failure to employ “the explicit language of condition is particularly
 7 significant” with respect to the licensing powers she granted because elsewhere in the
 8 Administration Agreement she “employed precisely such language to establish undoubted
 9 conditions precedent.” *See id.* at 306. For example, Section 16 requires indemnification for
 10 claims, “**provided that** such claims are reduced to final, adverse judgment.” Admin. Agreement
 11 § 16 (emphasis added). In light of this language, and New York law’s presumption against
 12 conditions precedent (*see Bank of N.Y. Mellon Tr. Co.*, 821 F.3d at 305), the Administration
 13 Agreement cannot be read to impose one.

14 In sum, the plain language of the Administration Agreement demonstrates as a matter of
 15 law that any failure to obtain written pre-approval does not affect MWP’s ability to grant
 16 licenses to third parties. Even assuming that Schneider’s publisher had a contractual obligation
 17 to obtain Schneider’s consent (and failed to do so), that failure would be, at most, a “breach of
 18 contract” by the publisher; it would not invalidate the licenses the publisher granted to third
 19 parties or turn licensees like Defendants into copyright infringers. *Graham*, 144 F.3d at 236.
 20 Given this unambiguous provision, the Court should grant judgment against Schneider’s claims
 21 for infringement of her seventy-six musical compositions based on the license in the MWP
 22 Publishing License Agreement. *See Lake Constr. & Dev. Corp. v. City of New York*, 621
 23 N.Y.S.2d 337, 338 (N.Y. App. Div. 1995) (noting the “well settled” rule “that, on a motion for
 24 summary judgment, the construction of an unambiguous contract is a question of law for the
 25 court to pass on”); Harold Ex. 2 at Col. C (identifying the 379 infringement claims licensed
 26 under the PLA).³

27 _____
 28 ³ Schneider asserts YouTube infringed her exclusive right to “publicly perform[]” her
 compositions. *E.g.*, FAC ¶ 114 (citing 17 U.S.C. § 106(4)). While that claim is covered by the

B. Under YouTube’s Terms of Service, Schneider Granted YouTube a License to the Works-in-Suit that She and Her Agents Uploaded to YouTube.

Schneider’s infringement claims also fail for the Works-in-Suit that she and her agents licensed to YouTube under its TOS. *See* Harold Ex. 2 at Col. D (identifying the 114 infringement claims subject to this license grant). Under the plain language of the TOS, YouTube cannot be liable for infringing the copyright in content that a user has uploaded to its channel. *See Bus. Casual Holdings, LLC v. YouTube, LLC*, 2022 WL 837596, at *5 (S.D.N.Y. Mar. 21, 2022).

Under the TOS license, “by submitting Content to YouTube,” users grant YouTube:

a worldwide, non-exclusive, royalty-free, sublicensable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube’s (and its successors’ and affiliates’) business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels.

Zhu Ex. 1 § 6(C); *see also* Zhu Decl. ¶ 8. Users also grant “each user of the Service a non-exclusive license to access your Content through the Service, and to use, reproduce, distribute, display and perform such Content as permitted through the functionality of the Service and under these Terms of Service.” Zhu Ex. 1 § 6(C). The licensed “[c]ontent’ includes the text, software, scripts, graphics, photos, sounds, music, videos, audiovisual combinations, interactive features and other materials [users] may view on, access through, or contribute to the Service.” *Id.* § 2(A). These licenses endure until a commercially reasonable time after the user removes content they have supplied from the service. *Id.* § 6(C). While in effect, however, the license is a bar to copyright claims in any content a user has uploaded.

Modern Works license, it also fails because YouTube purchased a catalog license to publicly perform any composition controlled by the performing rights organization, the American Society of Composers, Authors, and Publishers (“ASCAP”), including Schneider’s compositions. Schneider (and her publisher MWP) are ASCAP members and, like all members, they granted ASCAP the “right to license non-dramatic public performances” of all their musical compositions. Harold Ex. 11, Ex. 9; *see also* Harold Ex. 10 at 11-12; Schneider Dep. Tr. 108:15-17 (“[Q.] You are a member of ASCAP; right? A. I am.”). ASCAP subsequently licensed YouTube to publicly perform the works of ASCAP members. Schneider Dep. Tr. 113:6-8; Suk Decl. ¶ 5.

1 The TOS license bars many of Schneider's claims. In creating the "Maria Schneider
2 Official Page" channel on YouTube in October 2012, Schneider agreed that "by submitting
3 Content to YouTube," she "grant[ed] YouTube a worldwide, non-exclusive, royalty-free,
4 sublicensable and transferable license to use, reproduce, distribute, prepare derivative works of,
5 display, and perform" that Content. Zhu Ex. 1 § 6(C); Schneider Dep. Tr. 77:22-78:2. In the
6 decade since, Schneider has uploaded (or authorized her agents to upload) to YouTube many
7 videos containing the Works-in-Suit. In 2013, Schneider's agent uploaded to Schneider's
8 YouTube account a video recording of the composition, *Hang Gliding*. Harold Ex. 14. *Hang*
9 *Gliding* was thus licensed for use on YouTube, and cannot support an infringement claim against
10 it.

11 In addition, and with Schneider's permission, Schneider's agents uploaded more than a
12 dozen other videos to YouTube containing Works-in-Suit, including *A World Lost*; *Bluebird*;
13 *Braided Together*; *CQ CQ, Is Anybody There?*; *Data Lords*; *Don't Be Evil*; *Look Up*; *A Potter's*
14 *Song*; *Sanzenin*; *Sputnik*; and *Stone Song*. Le Claire Dep. Tr. 217:25-218:23; Harold Ex. 15; *see*
15 *also* Le Claire Dep. Tr. 86:15-25 (testifying that she had uploaded "maybe dozens" of "videos
16 containing Ms. Schneider's compositions" and that "[e]very time [she] uploaded a video to
17 YouTube containing Ms. Schneider's compositions, [she] had permission from Ms. Schneider");
18 *id.* at 62:5-63:24, 107:4-10 (testifying about particular videos she uploaded containing
19 Schneider's compositions); Schneider Dep. Tr. 100:7-101:9. YouTube highlighted these uploads
20 and the resultant license grants to YouTube in its Answer. *See* Dkt. 34 at 2. A week later,
21 Schneider's agent attempted to delete the videos she had uploaded. *See* Harold Ex. 15. But that
22 attempt came too late. Schneider's claims of infringement based on the compositions reflected
23 in those videos are barred by the licenses she and her agents granted to YouTube pursuant to the
24 TOS. YouTube is entitled to judgment on those claims for this reason as well.

25 In addition to her agents, Schneider authorized various third-parties to upload her works
26 to YouTube. In an interrogatory response, Schneider admitted to authorizing the upload of three
27 Works-in-Suit: *Allegresse*; *Three Romances - Choro Dançado*; and *Dance, you monster, to my*
28 *soft song*. Harold Ex. 10 at 11. Her response was less than thorough; at her deposition she

1 admitted to authorizing two additional Works-in-Suit uploaded to YouTube: *Cerulean Skies* and
 2 *Last Season*. Schneider Dep. Tr. 96:17-99:23; Harold Ex. 16, Ex. 17. YouTube is entitled to
 3 judgment based on the TOS license for these works too.

4 In sum, at least seventeen of Schneider’s Works-in-Suit were licensed to YouTube under
 5 the TOS. YouTube is entitled to judgment on claims based on those Works-in-Suit. *See* Harold
 6 Ex. 2 at Col. D (identifying the 114 infringement claims subject to this license grant).

7 **II. SCHNEIDER’S CMI CLAIMS FAIL ON MULTIPLE GROUNDS.**

8 Schneider’s separate claim alleging YouTube improperly removed her copyright
 9 management information in violation of 17 U.S.C. § 1202(b) fails on several grounds. To
 10 support a claim under this provision, Schneider must adduce proof that YouTube:

11 (1) “*intentionally* remov[ed] or alter[ed] any [CMI]” “without the authority of the
 12 copyright owner or the law” or (2) distributed or publicly performed copies of works
 13 without authorization and “*knowing* that [CMI] has been removed or altered without
 authority of the copyright owner or the law.”

14 17 U.S.C. §§ 1202(b)(1), (3) (emphases added). Schneider must also show that YouTube
 15 undertook one of these predicate actions “*knowing*” or “*having reasonable grounds to know*”
 16 that its conduct would “induce, enable, facilitate, or conceal an infringement.” 17 U.S.C.
 17 § 1202(b) (emphases added). Both scienter elements must be satisfied for Schneider’s claim to
 18 survive. *See Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 673 & n.4 (9th Cir. 2018); *Harrington v.*
 19 *Pinterest, Inc.*, 2021 WL 4033031, at *5-6 (N.D. Cal. Sept. 3, 2021).

20 Schneider asserts that metadata embedded in video files that users upload to YouTube
 21 may, in some cases, include data that could constitute someone’s copyright management
 22 information. *See* FAC ¶¶ 83-86, 144-145; 17 U.S.C. § 1202(c) (defining CMI). She contends
 23 that in the process of reformatting (or “transcoding”) the video files uploaded to YouTube,
 24 YouTube does not carry forward the metadata buried in the video. FAC ¶¶ 33, 83; *cf. Viacom*
 25 *Int’l, Inc.*, 676 F.3d at 39 (explaining that “transcoding” is “the conversion . . . of videos into a
 26 standard display format” via “software functions”). According to Schneider, YouTube thus
 27 violates § 1202.
 28

1 This Court found that Schneider’s generalized allegations were sufficient to create a
 2 plausible inference that YouTube’s transcoding carried a “substantial risk’ of inducing
 3 infringement.” Dkt. 157 at 4. But Plaintiffs failed to support even those general allegations with
 4 evidence. Discovery confirms that YouTube is entitled to summary judgment with respect to
 5 Schneider’s § 1202 claims.

6 **A. Schneider Failed to Identify Any CMI Removed by YouTube.**

7 Schneider’s discovery responses failed to identify what CMI for her Works-in-Suit
 8 YouTube supposedly removed from any specific YouTube video. *See* Harold Ex. 10 at 16-22.
 9 Instead, Schneider provided a list of ISWC or ISRC codes that she claims correspond to her
 10 compositions.⁴ Harold Ex. 10 at 16-22. But that information in isolation has no bearing on her
 11 § 1202 claim. At a minimum, to plausibly support her claim Schneider must present evidence
 12 that such codes were actually embedded in the metadata of a particular video uploaded to
 13 YouTube containing her work. Schneider did not even attempt to make this showing. *See id.*;
 14 Schneider Dep. Tr. 214:6-12 (“Q. Do you have any information about how often it’s the case that
 15 ISWC or ISRC codes reflected in this interrogatory response are in the embedded file metadata
 16 of videos uploaded to YouTube? A. I don’t know.”).

17 The absence of any evidence of such use is perhaps unsurprising, given that Schneider
 18 and her agents repeatedly testified that they did not use any embedded metadata (ISWC, ISRC or
 19 otherwise) as CMI to protect her works from infringement. *See* Schneider Dep. Tr. 210:10-15;
 20 Le Claire Dep. Tr. 190:20-25 (“Q. Have you ever used metadata to locate videos containing Ms.
 21 Schneider’s work? A. No. Q. Have you ever attempted to use metadata to locate videos
 22 containing Ms. Schneider’s work? A. No.”); Bornheimer Dep. Tr. at 225:12-13 (testifying “I
 23 have never searched video file metadata for files hosted on YouTube.”); *id.* at 226:21-23. That
 24 they did not do so on videos they uploaded to YouTube is especially unsurprising given that it
 25 would have done them no good; YouTube is a streaming service, not a download service, and
 26

27 ⁴ International Standard Recording and International Standard Musical Work Codes (ISRC
 28 and ISWC, respectively), are alphanumeric identifiers that can be assigned to specific sound
 recordings and musical compositions and used to identify them, for example, to share royalties
 for a particular performance.

1 thus metadata embedded in video files would not be visible or accessible to Schneider’s agents
 2 or users. *See, e.g.*, Bornheimer Dep. Tr. 224:21-23 (testifying “[y]ou can’t search the file
 3 metadata. You can search the YouTube title of the video, which is different and distinct from the
 4 video metadata”).

5 As the leading CMI case recognized in a summary judgment setting, Schneider’s failure
 6 to identify any removed CMI defeats her claim. *See Stevens v. Corelogic, Inc.*, 194 F. Supp. 3d
 7 1046, 1052 (S.D. Cal. 2016) (granting summary judgment where “[p]laintiffs fail[ed] to present
 8 any evidence that the photographs had CMI at the time they were uploaded” or that defendant
 9 “removed or altered any CMI”), *aff’d*, 893 F.3d 643 (9th Cir. 2018).

10 **B. Schneider Failed to Establish that YouTube Acted with the Requisite**
 11 **Scienter.**

12 *YouTube did not intentionally remove CMI or know of its removal.* Because Schneider
 13 did not identify any CMI that YouTube supposedly removed from particular videos, she could
 14 not possibly show that YouTube knew that her CMI was present in the metadata embedded in
 15 such videos, much less that YouTube intentionally removed it or distributed the video knowing it
 16 had been removed. *See* Harold Ex. 10 at 16-22 (refusing to identify “metadata attached to or
 17 removed from videos of Schneider’s Works in Suit”); Harold Ex. 18 at 6 (explaining that
 18 “YouTube’s systems do not have the capacity to detect and cannot be designed to detect the
 19 existence of CMI” in video file metadata). That failure of proof is independently fatal to her
 20 claim. *See Stevens*, 194 F. Supp. 3d at 1052 (granting summary judgment where plaintiff failed
 21 to present evidence that defendant “intentionally removed CMI, as opposed to removal being an
 22 unintended side effect”).

23 *YouTube did not knowingly foment infringement by removing embedded metadata.*

24 Discovery also has established that Schneider cannot show that YouTube knew or had
 25 “reasonable grounds to know” that its alleged actions regarding CMI would “induce, enable,
 26 facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b) (emphasis added). As the Ninth
 27 Circuit has made clear, to make this showing, Schneider must establish more than that
 28 YouTube’s transcoding process carried “the universal possibility of encouraging infringement;

1 specific allegations as to how identifiable infringements ‘will’ be affected are necessary.”
 2 *Stevens*, 899 F.3d at 674. She “must make an affirmative showing, such as by demonstrating a
 3 past ‘pattern of conduct’ or ‘modus operandi,’ that the defendant was aware or had reasonable
 4 grounds to be aware of the **probable future impact** of its actions.” *Id.* (emphasis added).

5 Schneider cannot carry this burden. In discovery, YouTube specifically asked:

6 If You contend that YouTube knew or had “reasonable grounds to know” that its
 7 alleged actions with regard to CMI would “induce, enable, facilitate, or conceal an
 8 infringement of any right” within the meaning of 17 U.S.C. § 1202(b), describe in
 detail the basis for Your contention, including all evidence supporting Your
 contention.

9 Harold Ex. 19 at 9. In her response on May 31, 2022 (one month before the close of discovery),
 10 Schneider objected to the request as premature, stated “that the parties are negotiating responses
 11 to RFPs relevant to information concerning this issue” and reserved “the right to supplement her
 12 response” in the future as she saw fit. *Id.* Entirely absent from Schneider’s response was any
 13 explanation of her theory regarding YouTube’s supposed knowledge or evidence supporting that
 14 theory. Fact discovery is now closed, yet Schneider never supplemented her interrogatory
 15 response with information of substance. In light of her empty response, Schneider may not now
 16 offer new evidence in opposition to this motion. The Court’s inquiry can stop there. *See Fed. R.*
 17 *Civ. P. 37(c)(1); Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 334-35 (C.D. Cal.
 18 2004) (granting summary judgment after refusing to consider evidence that was not disclosed in
 19 interrogatory responses); *Phx. Techs., Ltd. v. VMware, Inc.*, 2017 WL 1957042, at *7-8 (N.D.
 20 Cal. May 11, 2017) (precluding plaintiff from introducing evidence or argument not disclosed in
 21 interrogatory responses before the close of fact discovery).

22 Schneider’s barren interrogatory response aside, there is simply no evidence that
 23 YouTube knew or should have known that removal of embedded metadata would foster
 24 infringement.⁵ This is not a case in which Schneider manually added or used CMI in embedded
 25

26 ⁵ It is “not uncommon” for processing software to not retain metadata. *Stevens*, 899 F.3d at
 27 671 n.1. Leading “social media websites,” including “Facebook, Instagram, and Twitter,” use
 28 image processing software that does not retain metadata. *Id.*; *see also Victor Elias Photography, LLC, _ F.4th _*, 2022 WL 3330350, at *2 (11th Cir. Aug. 12, 2022) (metadata allegedly removed
 when converting images into “industry-standard sizes” and “optimiz[ing] the image files for

(continued...)

1 metadata to police supposed infringing uses of her work. *Cf. Stevens*, 899 F.3d at 671-72. In
2 fact, she and her agents actually disclaimed such policing efforts. *See supra* at 17-18 (citing,
3 *e.g.*, *Le Claire Dep. Tr.* 190:20-25). And even if she had done so, she has not shown, as she
4 must, that YouTube knew anything about such behavior. *See Victor Elias Photography, LLC*,
5 2022 WL 3330350, at *7 (affirming grant of summary judgment against § 1202 claims even
6 where plaintiff purposefully inserted CMI into his images where plaintiff failed to show
7 defendant knew of plaintiff’s use of CMI). In other words, there is nothing to suggest that
8 YouTube knew or had reason to know that its transcoding of videos and the removal of
9 embedded metadata *would* interfere with supposed policing efforts or promote infringement of
10 Schneider’s works. Without such evidence, YouTube is entitled to summary judgment because
11 there has been no “affirmative showing” that YouTube “was aware or had reasonable grounds to
12 be aware of the probable future impact of its actions” on “identifiable infringements.” *See*
13 *Stevens*, 899 F.3d at 674-75 (“plaintiff must provide evidence from which one can infer that
14 future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of
15 CMI”; granting summary judgment where plaintiff failed to show use of CMI metadata to
16 prevent or detect copyright infringement because there was no “ostensible relationship between
17 the removal of CMI metadata and [his] policing of infringement”); *Harrington*, 2021 WL
18 4033031, at *6 (dismissing CMI claim for lack of “any allegations that [plaintiff] actually used
19 CMI metadata to prevent or detect copyright infringement”); *see also Sedlik v. Von*
20 *Drachenberg*, 2022 WL 2784818, at *12 (C.D. Cal. May 31, 2022) (granting summary judgment
21 to defendants on § 1202(b) claim where plaintiff failed to raise triable issue regarding the
22 defendants’ scienter); *see also Victor Elias Photography, LLC*, 2022 WL 3330350, at *8

23 _____
24 faster display”). There are very good reasons for this approach, as metadata can contain malware
25 or other potential service exploits, and can contain personally identifiable information that users
26 do not mean to share. Harold Ex. 18 at 6 (explaining that transcoding ensures removal of
27 “potentially malicious content,” “protects user privacy,” promotes device “compatibility,” and
28 “assists with data compression, which helps save bandwidth and storage space”). And there is
little reason to retain metadata in the face of these risks, since it is often “[m]issing, bad, or
inconsistent.” Dani Deahl, *Metadata is the Biggest Little Problem Plaguing the Music Industry*,
The Verge, [https://www.theverge.com/2019/5/29/18531476/music-industry-songroyalties-
metadata-credit-problems](https://www.theverge.com/2019/5/29/18531476/music-industry-songroyalties-metadata-credit-problems).

1 (“Congress enunciated the double scienter requirement for a reason, and we must interpret the
 2 statute to effectuate that intent.”).⁶ Indeed, the Ninth Circuit’s decision in *Stevens* affirming a
 3 grant of summary judgment against § 1202 claims compels judgment against Schneider’s claims
 4 here. In *Stevens*, the plaintiffs had not shown that they had ever used CMI metadata to prevent
 5 or detect copyright infringement, much less how they would do so. 899 F.3d at 675. The same
 6 applies to Schneider. And in *Stevens*, the plaintiffs failed to identify a single instance in which
 7 removal of CMI induced, enabled, facilitated, or concealed infringement. *Id.* Schneider failed to
 8 do so too. Thus, as in *Stevens*, Schneider’s § 1202 claim must fail.

9 **C. Schneider Authorized YouTube to Remove Embedded Metadata.**

10 On top of all these failures of proof, Schneider also cannot show that YouTube removed
 11 any supposed CMI embedded in metadata “without the authority of the copyright owner.” *See*
 12 17 U.S.C. § 1202(b). The PLA between MWP and YouTube authorized YouTube to “Reformat”
 13 any videos containing Schneider’s works (PLA § 2(a)), *i.e.*, “to digitally re-encode [such videos],
 14 without modification of the content” (PLA, Definitions). In addition, the TOS license between
 15 YouTube and its users (including Schneider, her agents, and her licensees) authorized YouTube
 16 to reproduce and distribute uploaded videos “in any media formats.” *Zhu Ex. 1* § 6(C). These
 17 authorizations permitted YouTube to transcode the videos and remove any metadata, which is
 18 merely “data about the [] file,” *Stevens*, 899 F.3d at 670, not the video’s content. Those express
 19 authorizations likewise bar her § 1202 claim. *Cf. Stevens*, 194 F. Supp. 3d at 1053 (granting
 20 summary judgment on § 1202(b) claim because plaintiffs could not show unauthorized removal
 21 of CMI where plaintiffs “licensed their photographs to real estate agents for the express purpose
 22 of uploading the photographs onto [the defendant’s service,] . . . knew that the agents would be
 23 manipulating the photographs specifically so they could be used on the [service],” and did not
 24 “warn the agents not to remove embedded metadata not viewable with the naked eye”).

25
 26 ⁶ Notably, the metadata of videos files on YouTube is not searchable in any event. *See, e.g.*,
 27 *Bornheimer Dep. Tr.* 224:21-23; *id.* at 225:7-9; *Harold Ex. 20* (Schneider describing a § 1202
 28 claim as [REDACTED]). Thus,
 even if embedded metadata (and any CMI it supposedly contained) had been preserved, it would
 have made no difference to Schneider’s ability to police infringement.

1 **III. HUNDREDS OF SCHNEIDER’S COPYRIGHT INFRINGEMENT CLAIMS AND**
 2 **HER § 1202(b) CLAIMS ARE TIME-BARRED.**

3 Summary judgment as to a host of Schneider’s claims is also warranted because those
 4 claims are time-barred. *See* Harold Ex. 2 at Cols. E-H (identifying the 328 time-barred
 5 infringement claims). Two separate time-bars apply here. First, when Schneider created her
 6 “Maria Schneider Official Page” YouTube account in 2012 (Schneider Dep. Tr. 77:22-78:2),
 7 Schneider agreed to YouTube’s TOS, which requires YouTube and users to bring claims arising
 8 out of or relating to the service within one year of accrual (Zhu Ex. 1 § 14).⁷ Second, all claims
 9 under the Copyright Act must be brought within three years of accrual. 17 U.S.C. § 507(b).
 10 Claims accrue when the plaintiff acquires actual or constructive knowledge, *i.e.*, when she
 11 “discovers, or reasonably should have discovered” the basis for the claims. *Oracle Am., Inc. v.*
 12 *Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047 (9th Cir. 2020) (citation omitted). Schneider
 13 sued on July 2, 2020. Thus, any claims Schneider knew or should have known about before July
 14 2, 2019, are barred by the one-year period in the TOS, and any claims accruing before July 2,
 15 2017, are additionally barred by the three-year statute of limitations. Harold Ex. 2 (identifying
 16 time-barred alleged infringements).

17 Schneider admits she had actual knowledge of dozens of her copyright infringement
 18 claims long before she sued. She concedes that she was “aware” of at least 121 of her alleged
 19 infringement claims more than one year before she sued. Harold Ex. 12 at 4-8. Those claims are
 20 time-barred under the TOS. Schneider also admits she was “aware” of 73 infringement claims
 21 more than three years before she sued. *Id.*⁸ All of these infringement claims are time-barred

22 _____
 23 ⁷ Contractual limitations periods for claims like the one in the TOS “have long been
 24 recognized as valid in California.” *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal.
 25 App. 4th 1118, 1126 (2012). Indeed, this exact provision has been enforced by a court in this
 District to bar claims not asserted within one year of accrual. *Darnaa, LLC v. Google, Inc.*, 2015
 WL 7753406, at *3-4 (N.D. Cal. Dec. 2, 2015).

26 ⁸ This includes the only two alleged infringements of the sound recording *Concert in the*
 27 *Garden*. Schneider has not identified any alleged infringements of the only other sound
 28 recording, *Vikings Anthem*. In fact, Schneider failed to allege any infringements of twenty-seven
 of her Works-in-Suit, including (1) *A World Lost*; (2) *CQ CQ, Is Anybody There?*; (3)
Dissolution; (4) *Divided by two*; (5) *Espino*; (6) *Evelyn*; (7) *Finding flight*; (8) *Free fall*; (9)

(continued...)

1 under the Copyright Act’s statute of limitations and the TOS limitation period. Harold Ex. 2
2 (identifying time-barred alleged infringements).

3 In addition, Schneider had constructive knowledge of hundreds of additional copyright
4 infringement claims long before she sued. “[S]uspicion’ of copyright infringement ‘place[s]
5 upon [the plaintiff] a duty to investigate further into possible infringements of [its] copyrights.”
6 *Oracle Am., Inc.*, 971 F.3d at 1048 (alteration in original) (quoting *Wood v. Santa Barbara*
7 *Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir. 1983)). “Even if the plaintiff ‘may
8 not actually have conducted this further investigation, equity will impute to [the plaintiff]
9 knowledge of facts that would have been revealed by reasonably required further investigation.”
10 *Id.* (alteration in original) (citation omitted); *see also Color Image Apparel, Inc. v. Jaeschke*,
11 2022 WL 2643476, at *5 (C.D. Cal. June 7, 2022) (infringement claims based on Instagram posts
12 time-barred based on constructive knowledge). Schneider has suspected copyright infringement
13 on YouTube since at least 2007, when she first became aware of alleged infringements on
14 YouTube. *See* Harold Ex. 12 at 6 (admitting she was “aware” of alleged infringements since
15 2007); *see also Wood*, 705 F.2d at 1521 (infringement claims time-barred where plaintiff
16 believed defendant had infringed one of plaintiff’s works but failed to investigate defendant’s
17 possible infringement of other works); *Fahmy v. Jay-Z*, 835 F. Supp. 2d 783, 789-90 (C.D. Cal.
18 2011) (claims time-barred where plaintiff was on constructive notice of infringements after he
19 became aware of one alleged infringement by the defendant).

20 Schneider had constructive knowledge of alleged infringements at or near the time of
21 their upload, when a reasonable investigation would have uncovered them, for two reasons.
22 First, Schneider could have used YouTube’s public search function to uncover allegedly
23 unauthorized uses of her works—the same search function she used to identify the alleged
24

25 *Lembrança*; (10) *Nimbus*; (11) *Now and then*; (12) *One for Tad*; (13) *Prairie dance*; (14)
26 *Recapitulation*; (15) *Returning*; (16) *Samba solstice*; (17) *Sanzenin*; (18) *Stone Song*; (19) *String*
27 *Quartet No. 1*; (20) *The blasphemy*; (21) *The Sun Waited for Me*; (22) *The willow*; (23) *This ‘n*
28 *that*; (24) *Tranquilidade*; (25) *VIKINGS ANTHEM*; (26) *Waxwing*; and (27) *Willow Lake*. *See*
Harold Ex. 1; Harold Decl. ¶ 2. Schneider thus has not established a prima facie case of
infringement as to those Works-in-Suit, and YouTube is entitled to judgment as to those works
for that reason alone.

1 infringements for this lawsuit. *See* Harold Ex. 12 at 8 (“Schneider ... identified the
2 infringements ... by conducting searches for unauthorized copies of her work on YouTube.”).
3 Second, since 2014, Schneider through her publisher has had access to and used YouTube’s
4 Content ID to identify uses of her works on YouTube. Coleman Decl. ¶¶ 5-8. Schneider was
5 also aware of third-party services offering Content ID access, but she did not attempt to use those
6 services. *See* Le Claire Dep. Tr. 134:20-136:10. Since 2014, in the exercise of reasonable
7 diligence, Schneider could have used that access to identify matches of her works and review
8 them for potential alleged infringement. Her choice not to do so is no excuse.

9 At least 328 of the allegedly infringing videos at issue in the case were uploaded to
10 YouTube before July 2, 2019. Harold Ex. 2 at Col. H. Claims based on them are time-barred
11 under the TOS. At least 261 of the allegedly infringing videos were uploaded to YouTube
12 before July 2, 2017. Harold Ex. 2 at Col. F. Claims based on them are barred under the statute
13 of limitations.

14 Schneider’s § 1202 claim is also time-barred under both the TOS and the statute of
15 limitations. Schneider has had actual knowledge about YouTube’s alleged removal of CMI
16 embedded in video metadata since at least March 2017. On March 19, 2017, Schneider
17 submitted comments to the U.S. Copyright Office describing how YouTube was allegedly
18 [REDACTED] Harold Ex. 13. There, as in this case, her
19 theory was that YouTube’s transcoding process removed embedded metadata that might contain
20 CMI. *Compare id.* at 1-2 (alleging that YouTube [REDACTED]
21 [REDACTED]), *with* FAC ¶ 33. While Schneider still has not identified any specific
22 instance in which her CMI was removed from any particular video, her allegations regarding
23 transcoding in general are time-barred because Schneider waited more than three years to sue
24 over them.

25 CONCLUSION

26 Schneider’s infringement claims fail on multiple grounds. The Works-in-Suit were
27 licensed through MWP and the Terms of Service. Schneider’s CMI claim fails because she
28 cannot make out a *prima facie* case and because any removal of CMI by YouTube was

1 authorized. And both her CMI claim and many of her infringement claims are also time-barred.
2 Together, these overlapping grounds dispose of all of Schneider's claims against YouTube. *See*
3 Harold Ex. 2 at Col. C-H.

4
5 Dated: August 26, 2022

Respectfully submitted,

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