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EPIDEMIC SOUND, AB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

EPIDEMIC SOUND, AB,

Plaintiff,

v.

META PLATFORMS, INC., f/k/a

FACEBOOK, INC.,

Defendant.

Case No. 3:22-cv-04223-JSC

PLAINTIFF EPIDEMIC SOUND, AB'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF ITS MOTION TO STRIKE CERTAIN OF DEFENDANT META PLATFORMS, INC.'S AFFIRMATIVE DEFENSES

Hearing:
Date: December 18, 2023
Time: 10:00 a.m.
Place: Courtroom 8

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Plaintiff Epidemic Sound, AB ("Epidemic" or "Plaintiff") respectfully submits this reply memorandum of points and authorities in further support of its motion to strike Defendant Meta Platforms, Inc. f/k/a Facebook, Inc.'s ("Meta" or "Defendant") copyright misuse and innocent infringement (to the extent it is asserted as to liability) affirmative defenses pursuant to Federal Rule of Civil Procedure 12(f) ("Rule 12(f)") (Dkt. 126, the "Motion").

I. PRELIMINARY STATEMENT

Epidemic demonstrated in its Motion that Meta's "copyright misuse" defense – a doctrine to be used "sparingly" in this Circuit – was legally misplaced and inapplicable. There is no claim that Epidemic is leveraging its limited copyright monopoly to control of areas outside the monopoly. Nor is there any allegation of any violation of antitrust laws or the public policies underlying the copyright laws. Indeed, Meta does not allege that Epidemic seeks to control anything other than the unauthorized reproduction, distribution, and exploitation of its copyrighted works. Meta's arguments all arise out of a copyright owner's enforcement of its copyrights against unauthorized uses, which does not constitute copyright misuse as a matter of law.

The applicable case law holds that there simply cannot be any "copyright misuse" alleged as a matter of law under these circumstances (and Meta has failed to cite a single relevant case to the contrary). Moreover, Meta's positions and alleged "Strategies" are particularly disingenuous given the host of other content owners who would also have "stockpiles" of claims based on the unauthorized use of their vast libraries (such as the major record labels, music publishers and other content owners) and yet Meta has conceded that "blanket licenses" are required from these parties, has obtained such "blanket licenses," and has paid them for the use of their content on Meta's platforms.[1] Meta did not claim those licenses arose from, or were the result of, copyright misuse, and has no basis to claim so here.

Given the clear inapplicability of this defense, Epidemic requested that Meta withdraw it, to avoid burdening the parties and the Court with this Motion. Meta refused.

[1] *See, e.g.*, https://www.theverge.com/2018/3/9/17100454/facebook-warner-music-deal-songs-user-videos-instagram; https://itp.live/content/3292-3-major-music-labels-now-have-licensing-deals-with-facebook; https://www.digitalmusicnews.com/2018/01/26/facebook-agreement-music-publishers/

Instead, Meta's strategy in opposition appears to be to manufacture as many "disputed facts" and arguments as possible in order to distract the Court from the simplicity of the core legal issues on the Motion. The Motion presents straightforward legal issues and it should be granted in its entirety.

Meta's two[2] theories of "copyright misuse," (so-called "Strategies") are insufficient as a matter of law. *First*, Meta claims that Epidemic "induces infringement" because its licenses permit its subscribers to post audiovisual content featuring Epidemic's works on Meta's platforms. Apparently Meta believes a copyright owner loses control of its rights once it licenses its works to anyone else. Indeed, if Meta is correct, then every copyright owner that licenses the right to use its works would be engaging in "copyright misuse" when it enforced its copyrights against unlicensed users who obtained access to the work from said licensees. It should not be surprising that Meta offers no authority for this position, as it would turn copyright law on its head. Simply put, Epidemic's licenses to ***its users*** do not grant ***Meta*** the right to offer Epidemic's copyrighted works to ***Meta users*** without a license, and it is not "copyright misuse" to require a license for use of copyrighted works.

Second, after ignoring Epidemic's notices of infringement and Epidemic's attempts to enter into a license with Meta for ***years*** prior to commencing this action, Meta claims that Epidemic has been "stockpiling" infringement claims in order to "coerce" a license from Meta, and this is "copyright misuse." Again, Meta offers no legal support for this theory, and ignores the case law cited by Epidemic that expressly hold that Epidemic's exclusive rights include the right to grant or refuse a license on terms it deems acceptable. Instead, Meta primarily relies on cases in which a plaintiff misused their copyrights to prevent access to competing, ***uncopyrighted*** products. A copyright owner's enforcement of its copyrights against the unauthorized use of ***those copyrights*** is not copyright misuse as a matter of law.

[2] Meta appears to have abandoned its "you didn't provide notice of your infringement claim" theory of copyright misuse, likely because Epidemic did provide notice (in an effort to avoid litigation), even though no notice is required as a matter of law.

Finally, with respect to Meta's "innocent infringer" defense, Meta's Opposition ignores the simple and conceded fact that this defense relates ***solely*** to the amount of available damages. It has no bearing whatsoever on Meta's liability for infringement. As such, the innocent infringer defense should not be part of the forthcoming "bellwether" motion for summary judgment, which, as this Court has made clear on several occasions, will address only ***Meta's liability*** for infringement of ten initial works. Adjudicating this issue now will expand discovery well beyond liability – as it will require discovery into all evidence of not only Meta's claimed "innocence," but also all evidence of Meta's willfulness. Adjudication of this issue will not "cabin" damages as Meta suggests, as there are a host of other issues and factors that go into calculating the appropriate range of damages (not to mention the range remains wide even if willfulness/innocence is adjudicated).

Epidemic respectfully submits that its Motion to Strike should be granted and the issue of Meta's willfulness, innocence and all other factors that go into the calculation of damages be litigated after the bellwether motion on liability as to the 10 Works, consistent with the Court's directives.

II. ARGUMENT

A. The Proper Legal Standard For Epidemic's Rule 12(f) Motion to Strike

Meta first attempts to distract the Court from the core issues on the Motion by manufacturing a dispute as to the applicable legal standard. (*See* Dkt. 128 at 3-4.) The Motion could not have been clearer that it was a motion to strike defenses that were insufficient as a matter of law pursuant to Rule 12(f).

At the October 3 hearing, Epidemic's counsel specifically and expressly proposed a "Rule 12" motion to strike certain of Meta's affirmative defenses that are unavailable as a matter of law. (Oct. 3, 2023 Hr'g Tr. at 24:15-25.) The Court clarified that "plaintiff's position is, ***as a matter of law***, [certain defenses are] not available." (*Id.* at 25:22-24 (emphasis added).) The Court, in describing the Motion, stated that it is to address "***a legal question***" as to whether certain defenses are "flat out not available." (*Id.* at 27:5-11 (emphasis added).)

The "legal standard" set forth in the Motion, which relied solely on cases from this Court, provided that an affirmative defense may be struck pursuant to Rule 12(f) as "insufficient either as a matter of law or as a matter of pleading." (Dkt. 126 at 4 (quoting *Howard v. Tanium, Inc.*, No. 21-cv-09703 (JSC), 2022 WL 597028, at *2 (N.D. Cal. Feb. 28, 2022) (Corley, J.) (citation & quotation omitted)).) Epidemic then stated the legal standard for striking a defense as insufficient as a matter of law: "An affirmative defense is legally insufficient if it lacks merit under any set of facts the defendant might allege." (*Id.*) And Epidemic repeatedly explained in the Motion why Meta's defenses were insufficient or unavailable "as a matter of law." Epidemic never mentioned Rule 56 in the Motion nor cited to facts or evidence outside the pleadings (other than Meta's additional "misuse" theories asserted in discovery correspondence).

Nevertheless, in an attempt to evade the clear legal questions on this Motion, Meta claims that "it is unclear exactly" whether Epidemic was "seeking to have the Court apply to its Motion, either the Rule 12(f) ***or Rule 56*** standard." (Dkt. 128 at 3 (emphasis added).) Epidemic moved to strike the copyright misuse and innocent infringer (to the extent it is asserted as to liability) defenses as "legally insufficient" (*i.e.*, unavailable as a matter of law) because they "lack[] merit under any set of facts the defendant might allege." (Dkt. 126 at 4 (quoting *Howard*, 2022 WL 597028, at *2).) It is for this reason that Epidemic even addressed ***unpled*** theories of copyright misuse that Meta asserted in discovery correspondence. That is, even if Meta had alleged facts in its Amended Answer supporting the claimed "Strategies" – and it unquestionably did not – such facts still would not support a copyright misuse defense.[3]

B. <u>The Court Should Strike Meta's Copyright Misuse Defense</u>

Meta's argues that Epidemic's enforcement of its copyrights is "in a manner inconsistent with the public policy goals of copyright law." (Dkt. 128 at 14.) Meta's position is contrary to

[3] Because Meta's copyright misuse and innocent infringer (to the extent asserted as to liability) defenses are unavailable as a matter of law, no amount of discovery could change that. Accordingly, Meta's request for a denial or continuance pursuant to Federal Rule of Civil Procedure 56(d) – as supposedly supported by the Declaration of Allison L. Stillman (Dkt. 128-8), which in many instances mischaracterizes the parties' communications and meet and confers on the topics that Meta claims it needs to prove its defenses – is purely dilatory and should be denied.

the most basic principles of copyright ownership, and plainly has no application here, as demonstrated by even Meta's own cases.

Meta relies heavily on Judge Wardlaw's "much-lauded concurrence" in *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 700 (9th Cir. 2015), which Meta describes as "[t]he most thorough examination of copyright misuse" addressing the "public-policy aims of copyright law." (Dkt. 128 at 15.) Yet, *Omega* is inapposite, and supports striking Meta's copyright misuse defense. In *Omega*, the plaintiff watchmaker sought to combat the "grey market" for its luxury watches in the United States, wherein sellers in the United States made authorized purchases of watches abroad and then resold the watches in the United States on terms that plaintiff could no longer control. *Omega*, 776 F.3d at 701. It was undisputed that Omega's watches, due to being "useful articles," were "not copyrightable." *Id.* at 699. Omega began engraving "barely perceptible" designs "to the back of some of its watches," which designs ***were*** copyrighted. *Id.* at 696. Then, when Omega's watches were resold in the United States without Omega's permission, Omega used copyright infringement suits, claiming infringement of these "barely perceptible" designs, to "decrease competition" and control "importation and distribution of its watches" – ***which watches it otherwise could not control with copyrights***. *Id.* at 696, 701. Judge Wardlaw described this as "an obvious leveraging of a copyright ***to control an area outside its limited monopoly on the design***." *Id.* at 701 (emphasis added).

This scenario – the use of a ***copyright*** to leverage control over some other ***uncopyrighted*** product, service or market – is present throughout the cases relied on by Meta. *See, e.g.*, *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997), *amended*, 133 F.3d 1140 (9th Cir. 1998) (copyright misuse where a copyright holder "[c]ondition[ed] the license on [licensee's] ***promise not to use competitors' products***") (emphasis added); *Disney Enters., Inc. v. Redbox Automated Retail, LLC*, No. 17-cv-08655 (DDP) (AGRx), 2018 WL 1942139, at *6 (C.D. Cal. Feb. 20, 2018) (copyright misuse where Disney "improper[ly] leverage[ed]" its "copyright in the digital content to restrict secondary transfers of physical copies," which was "a power specifically denied to copyright holders by § 109(a)"). Indeed, Meta conceded in a prior action that, "***the overwhelming majority*** of cases in which the misuse doctrine has been invoked deal

with instances in which a copyright holder licensed rights to its copyright to a third-party ***on the condition that the third-party would not also use a competitor's products***." *Facebook, Inc. v. Power Ventures, Inc.*, No. 08-cv-05780 (JF) (RS), Dkt. 58, 2009 WL 6326764, at *10 (N.D. Cal. Dec. 23, 2009) (emphases added).[4]

These cases have no relevancy here. Meta does not and cannot allege that Epidemic is leveraging the copyrights in its copyrighted musical works and sound recordings to control some other ***uncopyrighted*** product, service or market. Rather, Epidemic is suing Meta for infringement of Epidemic's copyrighted works, and seeks to control only the rampant unauthorized use of Epidemic's copyrighted works without compensation to Epidemic and its songwriters, recording artists and producers. Such enforcement is not copyright misuse as a matter of law. *See, e.g.*, *A&M Recs. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001); *Moonbug Ent. Ltd. v. Babybus (Fujian) Network Tech. Co.*, No. 21-cv-06536 (EMC), 2022 WL 580788, at *6 (N.D. Cal. Feb. 25, 2022); *Interscope Recs. v. Time Warner, Inc.*, No. 10-cv-1662 (SVW) (PJWx), 2010 WL 11505708, at *10 (C.D. Cal. June 28, 2010); *LucasArts Ent. Co. v. Humongous Ent. Co.*, 870 F. Supp. 285, 290 (N.D. Cal. 1993).

1. Meta's "Strategy 1" Fails As a Matter of Law

As its so-called "Strategy 1," Meta claims that Epidemic "induces infringement" because Epidemic's licenses allow its subscribers to post audiovisual content incorporating Epidemic's music on Meta's platforms, and thus any attempt to stop Meta from, *e.g.*, separating Epidemic's music from the audiovisual post, and making Epidemic's content available for free for its billions of Meta's unlicensed users for unlimited free usage, violates the public policy underlying copyright law. (Dkt. 128 at 18-19.)[5] Meta, however, offers no legal support for the proposition that it constitutes copyright misuse to sue an infringer of a musical work or sound recording (here, Meta)

[4] Even in *Facebook, Inc. v. Power Ventures, Inc.*, No. 08-cv-05780 JW, 2010 WL 3291750, (N.D. Cal. July 20, 2010), in which Meta boasts "the court ultimately *denied* the motion to strike the misuse defense" (Dkt. 128 at 6 n.11) after previously striking it, the defense was allowed to proceed because Facebook was using copyrights for aspects of its website (like images) to prevent the defendant from helping users download their ***own*** user content from Facebook, which content Facebook unquestionably did not own.

[5] Meta has never pled any allegations supporting this purported "Strategy 1" in either its original or Amended Answer.

because the infringer obtained copies of that copyrighted music from a licensed third party. And of course there is no such support. In fact, Meta, does not cite a single copyright misuse case that supports this theory. Rather, Meta relies on the Court's denial of a motion to strike the unclean hands defense – which defense is not at issue on this Motion – in *Interscope Recs.*, 2010 WL 11505708, at *14. Notably, though, the Court struck the copyright misuse defense in that case. *Id.* at *10-11.

Meta also relies heavily on *Harrington v. 360 ABQ, LLC*, in which the plaintiff – expressly alleged to be a "copyright troll" – set up a scheme whereby he would post his photographs online, concealing their copyrighted status, with the intent of "induc[ing] innocent users to download and use his photographs." No. 22-cv-63, 2022 WL 1567094, at *1 (D.N.M. May 18, 2022). The plaintiff also "hire[d] a service to track those who download and use his photographs," and had a legal team on standby ready to send threatening letters to any users to "extort money from targets of his scheme." *Id.* at *2. The plaintiff had used this scheme on "hundreds of persons," demonstrating that he was "not using the copyright and legal system for an authorized purpose, 17 U.S.C. § 106, but as a method to derive income from infringement demands or suits." *Id.* at *1-3 (emphasis added).[6]

This case is entirely inapposite. Epidemic is a global leader in the music industry that is in the business of partnering with songwriters, producers and artists to facilitate the distribution of their work and ensure that they be adequately compensated for their music by sharing in Epidemic's licensing model, as well as providing content creators with a vast library of musical content to pair with their visual works. Nothing in the pleadings, nor even in Meta's newly

[6] Meta's other "inducement" cases (also out-of-circuit) are plainly distinguishable and do not concern legitimate copyright holders like Epidemic. *See Oppenheimer v. ACL LLC*, 504 F. Supp. 3d 503, 510, 512 (W.D.N.C. 2020) (denying summary judgment on unclean hands defense where plaintiff had not offered any "evidence of the profits he earns from his copyrighted works," supporting theory that he "derive[d] an income from infringement suits" rather than licenses); *Malibu Media, LLC v. Guastaferro*, No. 1:14-cv-1544, 2015 WL 4603065, at *3-4 (E.D. Va. July 28, 2015) (denying motion to strike unclean hands where plaintiff intentionally leaked its content on BitTorrent and facilitated its download by BitTorrent users solely "to extract exorbitant sums from individuals for alleged copyright infringement"); *Malibu Media, LLC v. Cuddy*, No. 13-cv-02385 (WYD) (MEH), 2015 WL 1280783, at *9 (D. Colo. Mar. 18, 2015) (same plaintiff employing BitTorrent scheme).

formulated "Strategies" supports any similarity between Epidemic and the *Harrington* plaintiff. Epidemic has already produced in this litigation thousands of licenses it has entered into with individuals, commercial entities, and platforms, reflecting a business model of legitimate exploitation of its copyrights.[7] The only reason that Meta finds itself in the uncomfortable position of having to defend against a large quantity of claims is because Meta refuses to enter into an appropriate license with Epidemic, not because of any "misuse."

2. Meta's "Strategy 2" Fails As a Matter of Law

As for "Strategy 2," Meta claims that Epidemic has been "stockpiling" infringement claims to attempt to "coerce" a license from Meta. (Dkt. 128 at 19-22.) Meta concedes that Epidemic, as a valid copyright holder, is free to choose whether to grant Meta a license to its copyrighted works on terms it deems to be acceptable. *See Stewart v. Abend*, 495 U.S. 207, 229 (1990) ("[T]his Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work."); *id* at 228-29 (citation omitted) ("[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright."); *A&M Recs.*, 239 F.3d at 1027 (citation & quotation omitted) ("A [copyright holder's] 'exclusive' rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable.") (quoting *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)).

Meta cannot use Epidemic's copyrighted music without a license, and then hide behind (nonexistent) "copyright misuse" to suggest it was "trapped" in order to absolve itself of liability when Epidemic seeks to enforce its valuable copyrights.[8] And to the extent Meta believes that its only two options are (1) accept a license from Epidemic or (2) continuously infringe Epidemic's copyrights which results in Epidemic's claims "piling" up, perhaps Meta should rethink the tools

[7] In fact, Epidemic has produced several limited-use licenses between Epidemic and ***Meta*** and its affiliates for use of Epidemic's music within Meta's own audiovisual productions.

[8] Indeed, if Meta were correct, every copyright infringement dispute in which the copyright owner insisted on a license for use going forward would constitute copyright misuse, which is an absurdity.

that are the subject of this action.

Even if Meta were correct that Epidemic seeks to negotiate a license for Epidemic's copyrighted works, this hypothetical license would cover Epidemic's ***copyrighted or copyrightable*** works and thus would not be "leveraging of a copyright to control an area outside its limited monopoly on the design." *Omega*, 776 F.3d at 701. As such, Meta's reliance on *Omega* and *Disney* is once again misplaced, as discussed above, because the copyright holders in those cases were attempting to use a copyright to control other ***uncopyrighted*** products.[9]

It is beyond dispute that a copyright owner's efforts to enforce its exclusive rights and to insist that those who are engaged in the rampant unauthorized reproduction, distribution, and exploitation of another's copyrights obtain a license for such use is precisely what the Copyright laws are designed to protect. The law is equally clear that a copyright holder may choose to, or choose not to, license its intellectual property to whomever it desires on whatever terms it desires, and courts have consistently held that even "ulterior motives" for legitimately enforcing copyrights against an infringer cannot constitute copyright misuse. [10]

Meta's copyright misuse defense fails as a matter of law.

C. Meta's Innocent Infringer Defense Is Not A Defense To Liability

1. Meta Concedes That Its Innocent Infringer Defense Relates Only To The Amount of Damages to Be Awarded

Epidemic's Motion seeks solely to strike Meta's innocent infringer defense "to the extent it is asserted ***as to liability***." (Dkt. 126 at 11 (emphasis added).) The relief Epidemic seeks is based on a simple, straightforward legal principle that is incapable of dispute: because copyright infringement is a strict liability tort, whether an infringer was innocent, willful, or non-willful has no bearing on the infringer's liability, and concerns only the available range of statutory damages

[9] The only two other cases cited by Meta that even arguably address this theory are distinguishable because the plaintiff in those actions was subject to antitrust consent decrees. *See Tempo Music, Inc. v. Myers*, 407 F.2d 503, 506 (4th Cir. 1969); *Broad. Music, Inc. v. Hearst/ABC Viacom Ent. Servs.*, 746 F. Supp. 320, 324 (S.D.N.Y. 1990).

[10] As with most of its Opposition, Meta attempts to support this theory with various "facts" that it claims exist, including "facts" pertaining to Epidemic's use of the Rights Manager tool – all of which are entirely irrelevant to this Motion. Epidemic notes that Meta still has not produced the Rights Manager data that it was ordered to produce at the October 3, 2023 Court Conference.

that the infringer must pay. *See Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065, 1081 (9th Cir. 2021) ("[C]opyright infringement is a strict liability tort."); *Erickson Prods., Inc. v. Kast*, No. 5:13-cv-05472 (HRL), 2014 WL 1652478, at *5 (N.D. Cal. Apr. 23, 2014) ("To the extent Kast is attempting to forge a defense against liability based upon his intent, plaintiffs' motion to strike is granted."); *Television Educ., Inc. v. Contractors Intel. Sch., Inc.*, No. 2:16-cv-1433 (WBS) (EFB), 2016 WL 7212791, at *2 (E.D. Cal. Dec. 12, 2016) (striking innocent infringer affirmative defenses because it was "addressed to liability" and "not damages") (emphases in original); *Westwood v. Brott*, No. 22-cv-03374 (CRB), 2022 WL 17418975, at *4 (N.D. Cal. Dec. 5, 2022) ("Whether copyright infringement was committed 'willfully' is a question of damages, not liability.") (emphasis added); *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995) ("As a matter of law, 'innocent infringement' … does not absolve a defendant of liability for copyright infringement."); 4 Nimmer on Copyright § 13.08[B][1] (explaining that "the innocent intent of the defendant constitutes no defense to liability").

That is black-letter copyright law. And Meta does not – because it cannot – cite a single case to the contrary in its Opposition. Instead, Meta attempts to transform Epidemic's Motion into a factual dispute as to whether Meta is capable of proving its innocent infringer defense now, before the parties have even engaged in discovery on the subject. There is no dispute that Meta's "innocent infringer" defense has no bearing on whether it is liable for infringement and thus this defense is not ripe for consideration on a bellwether motion for summary judgment on liability.

2. Meta's Innocent Infringer Defense Should Not Be Part of the Forthcoming "Bellwether" Motion

As this Court is well aware, the purpose of this Court's bellwether motion was to streamline the issues in order to focus the parties on "obtaining the discovery they need to file dispositive motions regarding ***liability*** on the 10 initial works." (ECF 111, ¶ 3 (emphasis added).) The Court again made clear at the October 3 hearing that the forthcoming "bellwether" motion concerns only Meta's liability for copyright infringement, and not the amount of damages to which Epidemic is

entitled.[11] (*See, e.g.*, Oct. 3, 2023 Hr'g Tr. at 5:3-9 ("I've decided that we're going to go ahead and adjudicate liability with respect to ten tracks if I'm correct.") and at 6:3-5 ("It's liability in total. Like, is there liability or not …").)

Trying to subvert that adjudication, Meta craves distraction. Meta suggests that the parties should engage in discovery and briefing on its innocent infringer defense as part of the bellwether motion. It does not argue – because it cannot – that it is relevant to its liability, but argues it would involve much of the same discovery as other defenses, such as its waiver defense. But Meta conveniently ignores that discovery regarding "innocent infringement" would ***also*** necessarily require discovery into willful infringement, effectively blowing the doors off discovery and eliminating all streamlining of this case. Indeed, in response to Epidemic's concerns at the October 3 hearing about greatly expanding the present scope of discovery to include whether Meta is a willful infringer – an issue that, like Meta's innocent infringer defense, concerns Meta's state of mind and relates solely to the potential range of damages – the Court indicated that Meta's willfulness is not part of the "bellwether" motion and is not within the present scope of discovery. (*Id.* at 18:10-13 ("I would be inclined to carve [willfulness] out at this point.") and at 22:5-9 ("Put willfulness aside. So if you're articulating a need for discovery, let's put willfulness aside.").) The Court reasoned that willfulness "is a different creature because it kind of goes to everything and it's not specific to the ten." (*Id.* at 18:10-13.) The same concerns apply to Meta's related innocent infringer defense.[12]

For example, Meta disclosed in its Opposition that it will be primarily relying on contracts with distributors that provided the infringing works to Meta. However, mere reliance on a third party representation is insufficient on its own to constitute innocence. *See, e.g.*, *Dolman v. Agee*, 157 F.3d 708, 715 (9th Cir. 1998) (finding of willfulness where infringer "claims that he had reason to believe that HRS, which gave him permission to use the songs, owned the copyrights"); *Swallow*

[11] The parties have agreed that whether statutory damages are ***available*** with respect to Meta's infringement of the ten works will be adjudicated as part of the "bellwether" motion. But that is entirely distinct from adjudicating the potential range of statutory damages to be awarded, should they be available.

[12] Indeed, Meta concedes in its Opposition that "[w]hether alleged infringement was 'innocent' or 'willful' … involves ***substantially the same types of facts and categories of discovery***." (Dkt. 128 at 6 n.3 (emphasis added).)

Turn Music v. Wilson, 831 F. Supp. 575, 580 (E.D. Tex. 1993) ("Mr. Wilson's defense that he did not know that the band was unlicensed and that he had a contract with the band requiring them to not play unauthorized songs cannot absolve him from a finding of willful violation …"). Rather, the relevant inquiry is whether such promises can be ***reasonably*** relied on ***in good faith***, which necessarily opens up discovery into Meta's state of mind for relying on such promises, including documents concerning Meta's negotiations of its contracts with the distributors; Epidemic's repeated notifications to Meta that it was infringing its content; internal communications regarding Epidemic's content on the platform; Meta's basis for blindly trusting these third parties and the reasonableness of so doing; Meta's due diligence, if any; whether the third parties have previously breached their representations and warranties with Meta; whether Meta has previously been subject to infringement claims stemming from works provided by the distributors; etc.[13]

Indeed, as Epidemic previously explained in the Motion, where an infringer continues the infringing conduct after having been notified by the copyright holder that such conduct was unauthorized, courts have held that such conduct was willful, not innocent, as a matter of law. *See Twentieth Century Fox Film Corp. v. Dastar Corp.*, No. 98-cv-7189 (FMC), 2000 WL 35503106, at *10 (C.D. Cal. Aug. 29, 2000); *Tattoo Art, Inc. v. TAT Int'l, LLC*, 794 F. Supp. 2d 634, 665 (E.D. Va. 2011), *aff'd*, 498 F. App'x 341 (4th Cir. 2012). Meta concedes that such an inquiry is relevant to its willfulness or innocence. (Dkt. 128 at 12 ("[E]ven if Epidemic could show that Meta both infringed and continued to do so after receiving notice … that would be only one circumstance for the factfinder to consider in determining Meta's intent.").) Thus, Epidemic would unquestionably be entitled to discovery in order to determine exactly when Meta became aware that its Audio Library and Original Audio tools infringed Epidemic's content and what, if any, actions Meta took in response to such notice.[14] All of this should await the adjudication of

[13] Meta's suggestion that its innocent infringement defenses is easily resolved because the "same facts" from *SA Music LLC v. Apple, Inc*., 592 F. Supp. 3d 869 (N.D. Cal. 2022) – an agreement and a takedown procedure – are present here is disingenuous. (Dkt. 128 at 7-8.) Judge Orrick later clarified that he "did not hold that a combination of rights and a notice-and-takedown system would always demonstrate a lack of willfulness." *SA Music LLC v. Apple, Inc.*, No. 3:20-CV-02146-WHO, 2022 WL 1814148, at *5 (N.D. Cal. June 2, 2022). Rather, his holding was specifically limited to the facts as they pertained to Apple in that case. And, to be clear, a "lack of willfulness" is not the same as "innocence."

[14] These are some examples of additional discovery to which Epidemic would be entitled from Meta, which has consistently resisted this discovery. Opening discovery to include Meta's state

liability on the bellwether motion.

Moreover, "resolving" the issue of innocent infringement will not only defeat the purpose of the liability-based bellwether motion, it would fail to "define" or "cabin" the potential liability of Meta in this case as Meta suggests. Innocence/willfulness is only one of many factors that go into determining damages in copyright cases. Courts look to a host of factors in deciding the appropriate measure of damages – whether they be actual damages or statutory damages – including not only the infringer's state of mind, but also the expenses saved, and profits earned, by the infringer; the revenue lost by the copyright holder and the value of the infringed copyrights; the deterrent effect on the infringer and third parties; the infringer's cooperation in providing evidence concerning the value of the infringing material; and the conduct and attitude of the parties. Judicial efficiency requires that all damages-related discovery should await a determination of liability.

And, even if Epidemic elects statutory damages, and even if those statutory damages are limited to the "innocent infringement" range, there is still a considerable range of $200 to $30,000 per work infringed. Even if only 1,000 works are ultimately at issue, that is a range of $200,000 to $30,000,000, which hardly "cabins" Meta's damages in a way that justifies jettisoning the Court's bellwether approach (and willfulness would increase the upper limit of that range to $150,000,000).

In light of the Court's desire to streamline discovery such that liability on the ten works can be swiftly adjudicated, Meta's innocent infringer defense should not be part of the "bellwether" motion, lest Meta's damages-related defenses swallow the motion's purpose. Indeed, the Court recognized at the October 3 hearing that willfulness, and thus innocence as well, should not even be reached unless and until there is a finding of infringement, asking Meta: "if you're right [about non-infringement], we'll never get there [to willfulness]; right?" (Oct. 3, 2023 Hr'g Tr. at 22:10-14.) The Court was correct, and Meta's non-liability defenses, including innocent infringer, should

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of mind would only further delay the "bellwether" motion. And this is to say nothing of the sweeping discovery to which Meta claims it is entitled from Epidemic as it relates to willfulness and innocence (most of which it claims are not limited to the 10 initial works), including: (i) Epidemic's communications with distributors concerning the withdrawn works; (ii) Epidemic's communications with its licensees; and (iii) documents concerning the "scale" of Meta's infringement.

not be part of the "bellwether" motion.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in the Motion, Epidemic respectfully requests that the Court grant Epidemic's Motion in its entirety, strike Meta's twelfth affirmative defense ("Copyright Misuse") in its entirety, strike Meta's ninth affirmative defense ("Innocent Infringement") to the extent it is asserted as to liability, and grant Epidemic such other and further relief as may be just and proper.

Dated: December 6, 2023

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ATTESTATION REGARDING SIGNATURES

I, Adam Cashman, attest that all signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: December 6, 2023

/s/ Adam Cashman
Adam Cashman