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15 YOUTUBE, LLC and GOOGLE LLC

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 MARIA SCHNEIDER, UNIGLOBE)
15 ENTERTAINMENT, LLC, and AST)
16 PUBLISHING, LTD., individually and on behalf)
17 of all others similarly situated,)

17 Plaintiffs,)

18 v.)

19 YOUTUBE, LLC and GOOGLE LLC,)

20 Defendants.)

21 _____)
22 YOUTUBE, LLC and GOOGLE LLC,)

23 Counterclaimants,)

24 v.)

25 PIRATE MONITOR LTD, PIRATE MONITOR)
26 LLC, and GÁBOR CSUPÓ,)

27 Counterclaim Defendants.)
28 _____)

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

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

Hearing Date: March 10, 2022

Time: 10:00 am

Location: Courtroom 11, 19th Floor

Judge: Hon. James Donato

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on March 10, 2022 at 10:00 a.m., YouTube, LLC and
3 Google LLC (“YouTube”) will move for an order dismissing the claims of Plaintiffs Maria
4 Schneider, Uniglobe Entertainment, LLC (“Uniglobe”), and AST Publishing, LTD. (“AST”).

5 **STATEMENT OF REQUESTED RELIEF**

6 Pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c), YouTube requests that the Court dismiss
7 Plaintiffs’ claims for copyright infringement and for violations of 17 U.S.C. § 1202(b) as set
8 forth in the accompanying Proposed Order.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 In this case filed nearly 18 months ago, Plaintiffs seek to assert copyright infringement
11 claims on behalf of a sprawling putative class of copyright owners. One of the two original
12 plaintiffs, Pirate Monitor, has since dismissed its claims with prejudice after YouTube uncovered
13 proof of its wide-ranging fraud and after it acknowledged it did not own at least one of the
14 copyrighted works it asserted. The other original plaintiff, Maria Schneider, faces
15 insurmountable obstacles to her infringement claims, including because her publishing agent
16 granted YouTube a blanket license to her musical works. Presumably because of these
17 weaknesses, Plaintiffs’ counsel has now filed a First Amended Complaint (“FAC”) with two new
18 named plaintiffs (Uniglobe and AST) joining Schneider as proposed class representatives, but
19 asserting claims based on very different types of copyrighted works, including Russian audio
20 books and Hindi-language translations of films.

21 Like the original plaintiffs, the new plaintiffs continue to hide the ball on their claims.
22 Ignoring this Court’s Order to identify all the copyrighted works at issue in the FAC, Plaintiffs
23 purport to reserve the right to pursue claims for new, unidentified works whenever they please.
24 That not only flouts the Order, but also the law, which requires that all works at issue be
25 identified in the operative pleading. Moreover, to state a claim for infringement, a plaintiff
26 cannot rely on generalized allegations of infringement, but must instead plead specifics. But
27 there is not a single alleged infringement specified for any work identified in the FAC. Plaintiffs’
28 claims remain a moving target, significantly prejudicing YouTube’s ability to respond.

1 The FAC further suffers from a potpourri of pleading problems. Plaintiffs fail, for
2 example, to properly plead facts establishing their supposed ownership of at least 13 identified
3 copyrighted works. This is notable because the Copyright Office does not identify Plaintiffs as
4 the owners of several of the works they purported to put at issue. Copyright Office records also
5 demonstrate that Schneider and Uniglobe failed to obtain pre-suit copyright registration for many
6 of the works they assert. As a matter of law, the infringement claims as to those works cannot
7 proceed. Uniglobe and AST also assert infringement claims based on unregistered foreign works
8 and seek statutory damages and attorneys' fees. But these remedies are legally unavailable for
9 unregistered works.

10 Finally, Plaintiffs fail to adequately allege scienter, a necessary element of their claims
11 under 17 U.S.C. § 1202 relating to removal of alleged copyright management information
12 (CMI). Their conclusory allegations on this key point are not sufficient to state a claim under
13 Ninth Circuit law. The CMI claim, too, should be dismissed.

14 If Plaintiffs are not made to satisfy the basic pleading requirements for their claims, they
15 will continue to bob and weave as they have for the past 18 months. That will unfairly prejudice
16 Defendants and disrupt case management. A dismissal order clearly confining the scope of the
17 case to that which Plaintiffs have properly pled will provide Defendants with fair notice of the
18 claims and chart a path for the litigation.

19 **STATEMENT OF THE ISSUES TO BE DECIDED**

- 20 1. Whether Plaintiffs have stated claims for copyright infringement with respect to
21 unnamed, unidentified works?
- 22 2. Whether Plaintiffs have stated claims for copyright infringement when they have
23 pled only generalized allegations of infringement?
- 24 3. Whether Plaintiffs adequately allege ownership of asserted copyrights?
- 25 4. Whether Plaintiffs have stated claims for copyright infringement when they have
26 not pled a date of copyright registration that pre-dates the filing of the original complaint?
- 27 5. Whether Uniglobe and AST can pursue statutory damage and attorneys' fees for
28 foreign works when they have not registered the works as 17 U.S.C. § 412 requires?

1 6. Whether Plaintiffs have stated claims under 17 U.S.C. § 1202(b) when they have
2 not adequately pled scienter?

3 **PLAINTIFFS' DEFICIENT ALLEGATIONS**

4 This Court granted Maria Schneider leave to amend her original complaint in this action
5 to add two new putative class representatives, Uniglobe and AST. Dkt. 92. But their FAC (Dkt.
6 99 ("FAC")) merely exacerbated flaws in the original complaint and introduced a host of new
7 ones.

8 ***Works-in-Suit.*** Pursuant to this Court's Scheduling Order, Plaintiffs were required to file
9 an amended complaint "identifying all copyrighted works." Dkt. 98. Plaintiffs' FAC fails to
10 comply. Instead of providing a complete list of the copyrighted works at issue, Plaintiffs identify
11 some, while purporting to preserve the right to assert infringement of unnamed "other works."
12 FAC ¶ 113; *see also* FAC ¶ 16 ("Schneider is the legal and/or beneficial owner of exclusive
13 rights under copyrights to numerous works, *including...*" (emphasis added)), ¶ 18 (same for
14 AST).

15 ***Alleged Infringements.*** The FAC does not identify a single video on YouTube that
16 allegedly infringed Plaintiffs' copyrights, much less identify at least one allegedly infringing
17 video for each work at issue in the case. Schneider and Uniglobe (but not AST) allege vaguely
18 that their works have "been posted in full or in part on YouTube and have been viewed by
19 YouTube users," but they do not say where. FAC ¶¶ 61, 72. Schneider and AST (but not
20 Uniglobe) allege that they have sent "successful" takedown notices for videos that once appeared
21 on the service, but again fail to identify any. *See* FAC ¶¶ 65, 73, 77.

22 Schneider highlights her failure to identify alleged infringements in a footnote. FAC ¶ 60
23 n.7. She claims she "has personal knowledge that *a number* of these works have been uploaded
24 without her permission and were publicly viewable on YouTube" but does not point to a single
25 alleged infringement. *Id.* (emphasis added). For the remaining unspecified "*number*" of works,
26 she admits that she "does not have personal knowledge of infringement." *Id.* (emphasis added)
27 For these works, she alleges "infringement on information and belief," without ever describing
28 any basis for that belief. *Id.*

1 **Ownership.** Plaintiffs offer only the bare legal conclusion that they are “legal and/or
2 beneficial owner[s]” of the copyrighted works they assert. FAC ¶¶ 16-18, 60, 66, 75. Plaintiffs
3 do not provide facts to support that blanket assertion, and as to a tranche of works, their
4 ownership claims are dubious. Specifically, for certain of the registered works at issue in the
5 FAC, Copyright Office records do not name Plaintiffs as the owner. Plaintiffs say nothing to
6 address this discrepancy. Plaintiffs fail also to allege any basis for their ownership of
7 unregistered foreign works under applicable law.

8 **Pre-suit Registration and Unregistered Foreign Works.** Plaintiffs fail to allege that they
9 obtained copyright registrations for the majority of works specifically identified in the FAC
10 before this case was filed.¹ For the “other” unidentified works that Plaintiffs may seek to add
11 later, their FAC unsurprisingly says nothing at all about their registration status.

12 Schneider’s allegations here too are artful. Rather than alleging she registered all of her
13 works before filing suit, she avers that “[e]ach of these works was registered with the United
14 States Copyright Office *prior to the assertion of any copyright claims against YouTube*” (FAC
15 ¶¶ 60 n.7) (emphasis added). Through this wording, Schneider apparently seeks to obscure the
16 fact that least 28 of Schneider’s works were not registered by the time she filed her original
17 complaint, as the law requires.²

18 Uniglobe and AST assert foreign works. They do not allege timely registration of these
19

20 ¹ For a handful of works, the FAC pleads registration dates. FAC ¶¶ 60, 67–69. In a few other
21 instances, the FAC pleads that the copyrighted works at issue are “foreign works” exempt from
Section 411(a)’s pre-suit registration requirement. FAC ¶¶ 70, 76.

22 ² The Copyright Office’s website indicates that the following works were registered on
23 November 17, 2020—months after Schneider sued on July 2, 2020: (1) *Aires de Lando*; (2) *A*
24 *Potter’s Song*; (3) *Arbiters of Evolution*; (4) *A World Lost*; (5) *Bluebird*; (6) *Braided Together*;
25 (7) *Carlos Drummond de Andrada Stories (5 songs for soprano and chamber orchestra)*; (8)
26 *Cerulean Skies*; (9) *CQ CQ. Is Anybody There?*; (10) *Data Lords*; (11) *Don’t Be Evil*; (11)
27 *Home*; (12) *Lembrança*; (14) *Look Up*; (15) *Nimbus*; (16) *Rich’s Piece*; (17) *Sanzenin*; (18) *Sky*
28 *Blue*; (19) *Sputnik*; (20) *Stone Song*; (21) *String Quartet No. 1*; (22) *The Monarch and the*
Milkweed; (23) *The Pretty Road*; (24) *The Sun Waited for Me*; (25) *The Thompson Fields*; (26)
Walking by Flashlight (instrumental big band arrangement); (27) *Willow Lake*; (28) *Winter*
Morning Walks (9 songs for soprano, string orchestra, and jazz trio). See Request for Judicial
Notice; Ex. 1.

1 works though registration is not a prerequisite to filing suit on foreign works. *See* FAC ¶¶ 70, 75-
 2 76. Registration is a prerequisite, however, for a party seeking statutory damages and attorneys’
 3 fees. Uniglobe and AST seek those remedies, but they are legally not entitled to them. *E.g.*, FAC
 4 ¶¶ 116, 117.

5 *CMI*. Plaintiffs assert conclusory claims under 17 U.S.C. § 1202(b) alleging Defendants
 6 improperly handled copyright management information (CMI) in videos that users uploaded to
 7 the service. Specifically, Plaintiffs claim that Defendants automatically removed “hidden”
 8 metadata from the uploaded videos, and that some of that metadata could have contained CMI,
 9 such as ownership or copyright information. FAC ¶ 83.³ On the key scienter element of a Section
 10 1202 claim, Plaintiffs offer only the bare conclusion that Defendants knew their actions would
 11 encourage copyright infringement. Plaintiffs plead no facts supporting that conclusion.

LEGAL STANDARDS

12
 13 A complaint will not survive a motion to dismiss unless it states sufficient factual
 14 material, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*,
 15 556 U.S. 662, 678 (2009) (citing Fed. R. Civ. P. 12(b)(6)). A facially plausible claim is one that
 16 “pleads factual content that allows the court to draw the reasonable inference that the defendant
 17 is liable.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere
 18 conclusory statements, do not suffice.” *Id.* Mere “labels and conclusions” or “a formulaic
 19 recitation of the elements of a cause of action” or “naked assertions devoid of further factual
 20 enhancement” are not enough. *Id.*⁴

21
 22 ³ Plaintiffs allege that “YouTube automatically transcodes video files into a variety of
 23 formats for streaming to various devices, a procedure that removes *all metadata* associated with
 24 the original file.” FAC ¶ 33 (emphasis added). But Plaintiffs do not allege that all metadata
 constitutes CMI, that CMI is necessarily present in the metadata embedded in a given file, or
 how YouTube would know that the metadata in a given file contained CMI.

25 ⁴ Schneider has asserted that a Rule 12(b) motion is untimely as to her claims because
 26 Defendants have already answered her original complaint. Schneider’s assertion is mistaken
 27 because the FAC introduces significant new matter (adding 75 new works to her original 3)
 28 warranting a Rule 12(b) motion. In any event, under Rule 12(c), the Court may grant the same
 relief under the same legal standard. *Arreola v. Cal. Dep’t of Corr. & Rehab.*, 2017 WL
 1196802, at *2 (N.D. Cal. Mar. 31, 2017) (Donato, J.) ([T]he same standard of review applicable
 to a Rule 12(b) motion applies to its Rule 12(c) analog.” (quoting *Dworkin v. Hustler Magazine,*
Inc., 867 F.2d 1188, 1192 (9th Cir. 1989)).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE INFRINGEMENT CLAIMS FOR WORKS NOT NAMED IN THE AMENDED COMPLAINT.

To state a claim for copyright infringement a plaintiff must plausibly allege that “he owns a valid copyright [in the asserted work]” and “that [the defendant] copied protected aspects of the [work’s] expression.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-17 (9th Cir. 2018). Naming the work at issue necessarily must precede plausibly alleging ownership and infringement of the work, because “[i]mplicit in the elements” of an infringement claim “is identification of an allegedly-infringed ‘work.’” *Flava Works, Inc. v. Clavio*, 2012 WL 2459146, at *2 (N.D. Ill. June 27, 2012). Thus, a copyright infringement “complaint must specifically identify the works that the plaintiff claims the defendant has infringed.” Paul Goldstein, Goldstein on Copyright §16.1 (3d ed., 2021-1 Supp. 2005); *see also Chambers v. Apple Inc.*, 2014 WL 7044167, at *4 (D.S.C. Dec. 12, 2014) (“In applying Rule 8 . . . courts have held that the plaintiff must identify the specific original work at issue.” (collecting cases)).

The Court has already recognized this fundamental principle. For months, Plaintiffs refused to provide a complete identification of the works they purport to be suing over, claiming they did not have to do so. But when presented with competing proposed scheduling orders for the case which highlighted the parties’ disagreement on this front, the Court ordered Plaintiffs to file an amended complaint “identifying all copyrighted works” at issue. Dkt. 98 at 1.

Despite that clear directive, Plaintiffs still purport to assert claims for infringement of unidentified, unpleaded works. FAC ¶¶ 16, 18, 113. Plaintiffs have not only failed to state a claim of infringement for such works, but have flouted the Court’s Order that sought to put an end to Plaintiffs’ moving target approach to the litigation. The Court should dismiss any infringement claim based on an unnamed work with prejudice.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM BECAUSE THEY HAVE NOT PLED ANY SPECIFIC INSTANCE OF INFRINGEMENT.

Copyright infringement requires “plausibly alleg[ing]” both “‘copying’ and “‘unlawful appropriation’” of a work. *Rentmeester*, 883 F.3d at 1116-17. Without a showing of

1 “representative acts of infringement,” a plaintiff has not plausibly alleged infringement. *Blizzard*
2 *Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1175 (N.D. Cal. 2015); *cf.*
3 *Sega Enterprises, Ltd. v. Accolade, Inc.*, 1992 U.S. Dist. LEXIS 4621 at *4 (N.D. Cal. 1992)
4 (Rule 12(e) motion for more definite statement granted to the extent that SEL must specify the
5 “other works” which are the subject of the copyright claim, and registration of those works, the
6 acts constituting infringement of those works, and the dates when infringement occurred); *Adobe*
7 *Sys. v. Software Speedy*, 2014 WL 7186682 at *6 (N.D. Cal. Dec. 16, 2014) (granting Rule 12(e)
8 motion for more definite statement because Adobe’s “general allegation that Defendants have
9 infringed its ‘marks’ or ‘copyrights’ [was] insufficient”).

10 Plaintiffs have ignored this pleading requirement, failing to identify in the FAC any
11 alleged infringements of the works on which they are suing. Plaintiffs have likewise failed to
12 explain how they have stated plausible claims of infringement as to those works in the absence of
13 some specific infringement allegations. Courts routinely dismiss claims where, as here, plaintiffs
14 offer only generalized allegations. So, for example, the allegation that “[d]ozens of characters
15 from [defendant’s video game]” were infringing was insufficient to state a claim. *Blizzard*
16 *Entm’t*, 149 F. Supp. 3d at 1175. Instead, the plaintiff in *Blizzard Entm’t* needed to identify
17 “which [of defendant’s] characters infringe[d] which [of plaintiff’s copyrighted] characters.” *Id.*;
18 *see also Becton, Dickinson & Co. v. Cytek Biosciences Inc.*, 2020 WL 1877707, at *6 (N.D. Cal.
19 Apr. 15, 2020) (plaintiff needed to allege “what parts of any [of plaintiff’s] manual(s) were
20 copied, what portions of [plaintiff’s] software ... were copied, and in what [defendant] document
21 or software such copying is manifest”). Similarly, an allegation that “Defendants downloaded
22 copyrighted videos of [plaintiff] ... and posted and distributed the aforesaid videos on other
23 websites” was also not sufficient to identify “the infringed work and the infringing act.” *Flava*
24 *Works, Inc.*, 2012 WL 2459146, at *2 (ellipses in original); *see also Cutler v. Enzymes, Inc.*,
25 2009 WL 482291, at *3 (N.D. Cal. Feb. 25, 2009) (complaint failed to plead “discrete” and
26 “specific facts related to the Published Work and alleged copyright infringement”). Again,
27 nowhere in the FAC do plaintiffs identify even *a single video available on YouTube*, much less
28 an allegedly infringing video for each work at issue.

1 The Court’s Scheduling Order required Plaintiffs to provide Defendants with both
 2 preliminary and final infringement identifications. But that has already proven to be no
 3 substitute. In Plaintiffs’ preliminary identification list, they continue to obfuscate on this central
 4 element of their case. Plaintiffs merely provided an undifferentiated mass of hundreds of video
 5 URLs without any indication of which copyrighted works in suit the videos allegedly infringe.
 6 Ex. 2. Accordingly, Defendants still cannot tell, either from Plaintiffs’ pleading or from their
 7 preliminary list of infringements, whether Plaintiffs have identified allegedly infringing videos
 8 for each work at issue in the case.⁵

9 Plaintiffs’ approach is not merely procedurally improper—it is also unfairly prejudicial.
 10 For example, neither Plaintiffs’ FAC nor their preliminary infringements include dozens of
 11 previously identified alleged infringements from Schneider’s sworn interrogatory response.
 12 Harold Decl. ¶ 4; Ex. 3 at 7-10. Obviously, those alleged infringements are known to Plaintiffs
 13 and should have been included in their preliminary list pursuant to the Scheduling Order. But
 14 they are neither there, nor in the FAC, and there has been no explanation at all from Plaintiffs.
 15 Defendants have already undertaken significant investigation and directed discovery efforts to
 16 the previously identified infringements, but now have no idea if they are still part of the case.

17 At this point, it is clear that Plaintiffs are still hiding the substance of their case from
 18 Defendants, eighteen months into it. Plaintiffs’ refusal to provide basic information regarding
 19 their copyright infringement claims warrants dismissal of those claims.

20 **III. PLAINTIFFS HAVE FAILED TO SUFFICIENTLY PLEAD OWNERSHIP OF**
 21 **COPYRIGHTS.**

22 The exclusive rights of copyright owners granted by Congress under § 106 of the
 23 Copyright Act may only be enforced by “[t]he legal or beneficial owner” of “th[e] particular
 24 right” infringed. 17 U.S.C. § 501(b). Plaintiffs’ ownership allegations are deficient for two sets

25
 26 ⁵ Again, Schneider admits in the FAC that she “does not have personal knowledge” of
 27 infringement of some of the listed works, instead alleging infringement based on “information
 28 and belief.” FAC ¶ 60 n.7. YouTube videos are publicly available—and thus knowable to
 Schneider—so her allegations fail to plead infringement under any standard. *See Interscope
 Recs. v. Rodriguez*, 2007 WL 2408484, at *1 (S.D. Cal. Aug. 17, 2007) (allegation of
 infringement based on “information and belief” failed to state a claim).

1 of works: (1) U.S. registered works where Copyright Office records do not reflect the Plaintiff as
2 owner; and (2) foreign works.

3 Copyright Office records cast doubt on Plaintiffs' bare assertions of ownership for three
4 works. For the screenplay for *Americanizing Shelley*, the copyright claimant is listed as Namrata
5 S. Gujral-Cooper, not Uniglobe Entertainment LLC. Ex. 4. For the motion picture *Americanizing*
6 *Shelley*, the record lists Americanizing Shelley, LLC, and Directors Guild of America, Inc., not
7 Uniglobe Entertainment LLC. Ex. 5. For the motion picture *I a Minute*, the copyright claimant is
8 listed as Namrata Singh Gujral-Cooper d/b/a UniGlobe Entertainment, but there is no mention of
9 the plaintiff entity Uniglobe Entertainment, LLC. Ex. 6. A claim resting on the "bare allegation
10 that [plaintiff] is the legal or beneficial owner of the copyright" can be dismissed, especially
11 where the registration records "reflect[] a different entity as the copyright claimant." *Signatours*
12 *Corp. v. Hartford*, 2015 WL 1058181, at *3 (W.D. Wash. Mar. 11, 2015); *see also Apl*
13 *Microscopic, LLC v. David A. Steenblock, D.O., INC.*, 2021 WL 3008294, at *3 (C.D. Cal. July
14 8, 2021) (same); *Pak's Trading Eur. B.V. v. Target*, 2018 WL 8333362, at *7 (C.D. Cal. July 5,
15 2018) (same). That is the case here.

16 Separately, Plaintiffs fail to plead ownership under foreign law. "Initial ownership of a
17 copyrighted work is determined by the laws in the work's country of origin." *Saregama India*
18 *Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011) (quoting *Lahiri v. Universal Music &*
19 *Video Distrib., Inc.*, 513 F.Supp.2d 1172, 1176 n.4 (C.D. Cal. 2007)). But Uniglobe and AST do
20 not specify the countries of origin for their foreign works, let alone allege ownership under those
21 (unnamed) countries' laws. *See* FAC ¶ 70 (Uniglobe alleging that "Hindi-language version of 5
22 *Weddings* was first published in *India and neighboring countries*" (emphasis added)), 75-76 (all
23 AST works "were first published in *Russia and/or other foreign countries*" (emphasis added)).

24 There is good reason to require Plaintiffs to carry their pleading burden here. As the
25 Court may recall, Pirate Monitor attempted to assert copyright claims for a work it did not own,
26 and ultimately dismissed its infringement claims with prejudice after admitting that glaring
27 problem. Dkt. 66. This history provides even more reason why Plaintiffs' conclusory allegations
28 of ownership—which need not be accepted as true, *see Iqbal*, 556 U.S. at 662—should be

1 viewed with skepticism. Uniglobe’s claims based on *Americanizing Shelley, 1 a Minute*, the
 2 Hindi-language translation of *5 Weddings*, and all of AST’s claims should be dismissed for
 3 failure to plausibly allege ownership of copyrighted works.

4 **IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR WORKS THAT WERE**
 5 **NOT REGISTERED BEFORE THE FILING OF THE ORIGINAL COMPLAINT.**

6 The owners of a copyright on a work created in the United States are not permitted to
 7 “institute[]” a “civil action” for infringement unless and until “registration [of the work] ... has
 8 been made” with the U.S. Copyright Office. 17 U.S.C. § 411(a); see *Fourth Estate Pub. Benefit*
 9 *Corp. v. Wall-Street.com*, 139 S. Ct. 881, 886 (2019). Thus, to plead an infringement claim, a
 10 plaintiff must “plausibly allege[] that he obtained a valid copyright registration for [the work]
 11 before initiating th[e] lawsuit.” *Kifle v. YouTube LLC*, 2021 WL 1530942, at *6 (N.D. Cal. Apr.
 12 19, 2021). Plaintiffs tacitly recognize this requirement, as they pled pre-suit registration dates for
 13 some (but not most) of the works named in the complaint. *E.g.*, FAC ¶ 60 (alleging that “Hang
 14 Gliding” was “registered with the United States Copyright Office on May 20, 2003”).

15 In a footnote, Schneider purports to add 75 new works to the case, but does not plead
 16 registration dates for any of them. FAC ¶ 60 n.7. Instead Schneider alleges that each of the new
 17 works “was registered ... *prior to the assertion of any copyright claims against YouTube.*” FAC
 18 ¶ 60 n.7 (emphasis added). That allegation of “[pre-]assertion” registration is not enough. The
 19 statute requires registration before “institut[ing]” a “civil action,” i.e., *pre-suit* registration. 17
 20 U.S.C. § 411(a); *Kifle*, 2021 WL 1530942, at *6 (“before initiating th[e] lawsuit”). Even a
 21 cursory review of Copyright Office records indicates that Schneider registered at least 28 of the
 22 75 works *months after* filing suit on July 2, 2020. See, e.g., FAC ¶ 60 n.7 (asserting claims in
 23 “Aires de Lando” and “A Potter’s Song”); Ex. 1 at 1 (“Aires de Lando” registered “2020-11-
 24 17”); Ex. 1 at 2 (“A Potter’s Song” registered “2020-11-17”); see also *supra* at 2 n.2 (listing the
 25 28 works).

26 Schneider apparently believes that she complied with § 411(a) because she registered the
 27 works before *amending* her complaint. But she “cannot cure [her] failure to meet the
 28 preconditions set forth in 17 U.S.C. § 411(a) by amending [her] pending complaint.” *UAB*

1 “*Planner 5D*” v. *Facebook, Inc.*, 2019 WL 6219223, at *7 (N.D. Cal. Nov. 21, 2019). Many
 2 district courts, following the Supreme Court’s decision on the importance of registration in
 3 *Fourth Estate*, have held that an amendment cannot cure the failure to register a copyright before
 4 suing. *See, e.g., id.*; *Kifle*, 2021 WL 1530942, at *6 (dismissing claim because “the plain
 5 language of § 411(a) refers to the beginning of a lawsuit, not the filing of an amended
 6 pleading”); *Washoutpan.com, LLC v. HD Supply Constr. Supply Ltd.*, 2019 WL 9050859, at *2-3
 7 (C.D. Cal. Aug. 5, 2019) (plaintiff cannot cure “defect by amending the complaint after the
 8 Copyright Office completed registration of the copyright”); *Izmo, Inc. v. Roadster, Inc.*, 2019
 9 WL 2359228, at *2 (N.D. Cal. June 4, 2019) (amendment could not “cure a claimant’s failure to
 10 register its copyright before suing”).

11 Uniglobe has registration issues of its own. It alleges that it registered *Americanizing*
 12 *Shelley* “as a motion picture in March 2006” and *5 Weddings* “as a motion picture in October
 13 2016.” FAC ¶¶ 67-68. But no such registrations appear in searches of the Copyright Office’s
 14 database. Harold Decl. ¶ 8; Ex. 7. While “[s]ecurity agreement[s]” were recorded for the motion
 15 pictures in March 2006 and October 2016 (Ex. 5; Ex. 8), “recording a document is not a
 16 substitute for registering a copyright claim.” U.S. Copyright Office, Compendium of U.S.
 17 Copyright Office Practices § 2303 (3d ed. 2017).

18 As for other “works by Plaintiffs” (FAC ¶ 113) that they have failed to identify in the
 19 FAC, but purport to reserve the right to assert, Plaintiffs unsurprisingly failed to plead
 20 registration. There is no way to tell whether such works were properly registered as § 411(a)
 21 requires.

22 In sum, Schneider’s claims as to the 75 new works added by amendment (FAC ¶ 60 n.7),
 23 Uniglobe’s claim as to the *Americanizing Shelley* and *5 Weddings* motion pictures, and any
 24 claims as to unnamed “other works by Plaintiffs” (FAC ¶ 113) should be dismissed for failure to
 25 allege pre-suit registration.⁶

26 _____
 27 ⁶ If the Court grants further leave to amend, Plaintiffs should be ordered to plead for all
 28 asserted works “the registration number of [their] copyrighted work[s] and the date on which
 [they] registered the copyright[s] at issue with the Copyright Office.” *Strober v. Williams*, 2020
 (continued...)

1 **V. UNIGLOBE AND AST CANNOT RECOVER STATUTORY DAMAGES AND**
 2 **ATTORNEYS' FEES FOR UNREGISTERED FOREIGN WORKS.**

3 Registration issues also impact the remedies that Uniglobe and AST can obtain on the
 4 works they have put at issue. Both parties assert claims based on unregistered foreign works. *See*
 5 FAC ¶¶ 70, 75-76. While these plaintiffs do not need to obtain copyright registration in order to
 6 sue on these foreign works, “even foreign works must be registered to take advantage” of the
 7 Copyright Act’s provisions for statutory damages and attorney’s fees. 2 Nimmer on Copyright
 8 § 7.16 (2021); 17 U.S.C. § 412. Claims for statutory damages and attorney’s fees for such
 9 unregistered works are properly dismissed. *E.g.*, *Football Ass’n Premier League Ltd. v.*
 10 *YouTube, Inc.*, 633 F. Supp. 2d 159, 162 (S.D.N.Y. 2009); *Martin v. Walt Disney Internet Grp.*,
 11 2010 WL 2634695, at *4 (S.D. Cal. June 30, 2010).

12 Despite the absence of registrations for all of their foreign works (Harold Decl. ¶ 10;
 13 Ex. 9), Uniglobe and AST seek statutory damages and attorney’s fees as remedies for alleged
 14 infringement of these works. *E.g.*, FAC ¶¶ 116, 117. Their request for such remedies should be
 15 dismissed with prejudice.

16 **VI. PLAINTIFFS HAVE FAILED TO STATE CLAIMS UNDER § 1202(b) BECAUSE**
 17 **THEY HAVE FAILED TO ADEQUATELY ALLEGE SCIENTER.**

18 The FAC asserts a claim under 17 U.S.C. § 1202 alleging wrongful removal of copyright
 19 management information. Plaintiffs contend that when users upload videos to YouTube,
 20 Defendants remove metadata that is embedded in those files and not ordinarily visible to others.⁷
 21 Plaintiffs contend that such metadata might contain their CMI, and Defendants’ removal of any
 22 such CMI is wrongful.

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 24 WL 6049615, at *2 (M.D. Fla. Sept. 23, 2020), *report and recommendation adopted*, 2020 WL
 25 6044538 (M.D. Fla. Oct. 13, 2020).

26 ⁷ As the Ninth Circuit observed, it is “not uncommon” for processing software to not retain
 27 metadata. *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 671 n.1 (9th Cir. 2018). Leading “social
 28 media websites,” including “Facebook, Instagram, and Twitter,” use image processing software
 that does not retain metadata. *Id.* There are very good reasons for this approach, as metadata can
 contain malware or other potential service exploits, and can contain personally identifiable
 information that users do not mean to share.

1 To state a claim for wrongful CMI removal, however, Plaintiffs must plead facts
2 sufficient to satisfy multiple scienter requirements. Section 1202(b)(1) prohibits “*intentionally*
3 remov[ing] or alter[ing] any [CMI].” Section 1202(b)(3) prohibits distribution of copies of works
4 or phonorecords, “*knowing* that [CMI] has been removed or altered.” Plaintiffs offer only
5 conclusions on those points and they are very much in doubt given that Plaintiffs do not show
6 how Defendants would know in any given instance, that metadata actually contains CMI.

7 But Plaintiffs’ larger failing is with respect to the statute’s additional scienter
8 requirement. For any 1202 claim, Plaintiffs must plead and prove a defendant acted “knowing, or
9 . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an
10 infringement” of a copyright. 17 U.S.C. § 1202(b). In other words, merely removing CMI, even
11 knowingly and intentionally, is not actionable unless the plaintiff can show that the defendant
12 also knew that doing so would encourage infringement.

13 Judge Davila recently addressed this additional scienter requirement in *Harrington v.*
14 *Pinterest, Inc.*, 2021 WL 4033031, at *6 (N.D. Cal. Sept. 3, 2021). As he explained, “to plead a
15 claim under Section 1202(b), a plaintiff must allege sufficient facts to show ‘defendant knows or
16 has a reasonable basis to know that the removal or alteration of CMI or the distribution of works
17 with CMI removed *will* aid infringement.’” *Id.* (quoting *Stevens v. Corelogic, Inc.*, 899 F.3d 666,
18 675 (9th Cir. 2018)). This requires allegations that show more than “the universal possibility of
19 encouraging infringement” when CMI is removed. *Stevens*, 899 F.3d at 674. Rather, “specific
20 allegations as to how identifiable infringements ‘will’ be affected are necessary.” *Id.*

21 Based on this standard, Judge Davila dismissed a Section 1202 claim that was
22 indistinguishable from the one Plaintiffs here try to advance. The plaintiff in *Harrington* claimed
23 that an online service removed invisible metadata that potentially contained CMI from content
24 that users uploaded to the service. The plaintiff claimed that the removal of the metadata
25 prevented copyright owners from effectively policing infringement. *Id.* at *6. But as the court
26 held, such speculative allegations “establish nothing more than the ‘possibility of encouraging
27 infringement,’” and are not sufficient to plead scienter. *Id.* “[A] plaintiff bringing a Section
28 1202(b)(1) claim must offer more than a bare assertion that ‘when CMI metadata is removed,

1 copyright infringement plaintiffs . . . lose an important method of identifying a photo as
2 infringing.” *Stevens*, 899 F.3d at 675.

3 That is all Plaintiffs here have alleged. They aver that CMI has “value for protecting the
4 rights of creators” and “plays a vital role” in “the lawful distribution” of copyrighted works
5 (FAC ¶¶ 84-85). But such assertions point only, at most, to a *possibility* of encouraging
6 infringement when CMI is removed. Plaintiffs failed to plead any facts demonstrating that
7 “[they] actually used CMI metadata to prevent or detect copyright infringement, much less
8 demonstrating a ‘pattern of conduct’ or ‘modus operandi’ by [them] involving policing
9 infringement by tracking metadata.” *Harrington*, 2021 WL 4033031, at *6. And Plaintiffs do not
10 plead any facts showing the Defendants knew or had reason to know of such use, assuming it
11 even existed. Absent such allegations, Plaintiffs do not plausibly allege the requisite scienter. *Id.*

12 The necessary allegations would be particularly challenging for Plaintiffs in this case.
13 Plaintiffs do not explain how anyone could use metadata buried in files on YouTube to search for
14 infringements. In other words, Plaintiffs do not show that the presence or absence of hidden
15 metadata (and any CMI it might contain) could have any effect on infringement. They certainly
16 do not go the next step to show that Defendants knew that by removing metadata that is invisible
17 to users and *might* have contained CMI, Defendants were creating “substantial risk of inducing,
18 enabling, facilitating, or concealing infringement, let alone a pattern or probability of such a
19 connection to infringement.” *Stevens*, 899 F.3d at 676.

20 Plaintiffs’ theory is even more implausible in light of Plaintiffs’ other allegations about
21 how YouTube operates. Plaintiffs aver that YouTube prompts users to add visible metadata,
22 “such as the title, author, or topic,” that is then “associate[d] with the public[ly] displayed video
23 files.” FAC ¶ 33. It is not plausible that a service that prompts users to manually add viewable,
24 searchable CMI to uploaded videos nevertheless acts knowingly to aid infringement simply
25 because the processing of files during upload automatically removes invisible metadata that
26 might carry CMI. Nothing in the FAC plausibly alleges the requisite scienter, and the CMI
27 claims should be dismissed.

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CONCLUSION

For these reasons, the Court should grant YouTube’s motion to dismiss.

Respectfully submitted,

Dated: December 13, 2021

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