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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HAROLD DAVIS,
Plaintiff,
v.
PINTEREST, INC.,
Defendant.

Case No. [19-cv-07650-HSG](#)

**ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 152, 160

Pending before the Court are cross-motions for summary judgment. Dkt. Nos. 152, 160. The Court held a hearing on the motions. For the reasons detailed below, the Court **GRANTS** Defendant’s motion for summary judgment and **DENIES** Plaintiff’s motion.

I. BACKGROUND

A. Factual Background¹

Plaintiff Harold Davis is an artist and professional photographer. *See* Dkt. No. 160-2, Ex. 1 (“Davis Depo.”) at 9:12–14; 66:15–24; *see also* Dkt. No. 153-1 at 10:11–16. Plaintiff contends that Defendant Pinterest, Inc. has infringed the copyrights of 51 of his works by copying and displaying the works on Pinterest’s services. *See* Dkt. No. 56 (“SAC”), Ex. A; *see also* Dkt. No. 114-1 at 3 (“Plaintiff agreed to stipulate the 51 works identified in the SAC were the Works in Suit.”). Pinterest operates an online platform—accessible through a mobile application and website—that allows users to upload images and videos to virtual “boards.” *See* Dkt. No. 156 (“DeChant Decl.”) at ¶¶ 2–3. To understand the alleged copyright infringement in this case, it is essential to understand how Pinterest operates. The Court therefore provides a brief overview.

¹ Except where otherwise noted, the relevant facts are undisputed.

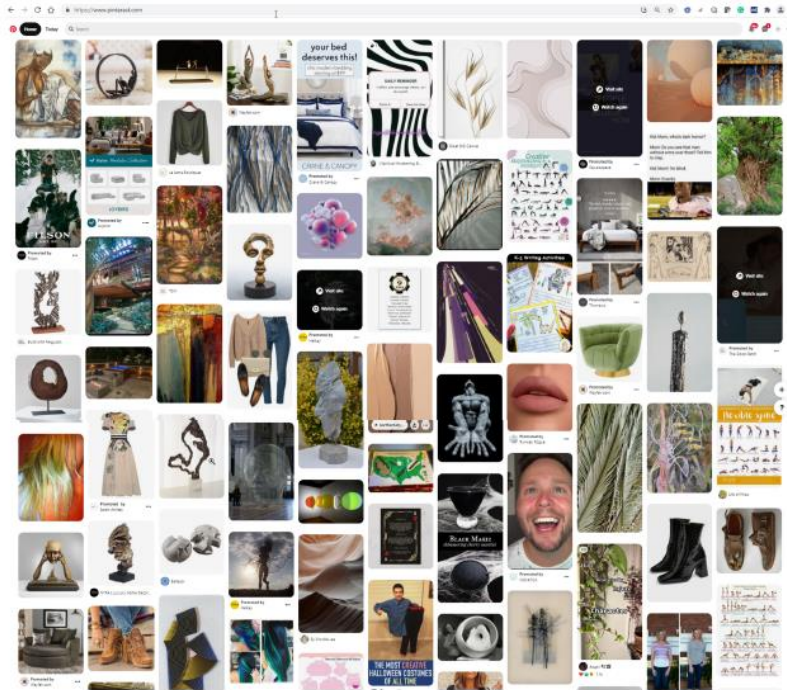
1 **i. Pinterest’s Online Platform**

2 When a user uploads content to Pinterest, he is prompted to create a title and description
3 for the image or video, and is asked to provide a “destination link” to a third-party website. *See id.*
4 at ¶¶ 5–6. The content that a user uploads—including the title, description, and destination link—
5 create a “visual bookmark” that Pinterest refers to as a “Pin.” *See id.* at ¶ 7. Pinterest does not
6 direct users to upload specific content. *See id.* at ¶¶ 2, 4. And because users upload the content, it
7 is possible that a single image may be used by many different users to create distinct “Pins.” *See*
8 *id.* Pinterest acknowledges that it has billions of images on its site. *Id.* And given this volume,
9 Pinterest does not manually review the content that users upload. *Id.*

10 The image that a user uploads is called the “original.” Dkt. No. 160-3, Ex. 2 (“DeChant
11 Depo.”) at 29:2–4. Although Pinterest stores the originals on its servers, it does not display
12 originals on its website or mobile application. *See id.* at 29:6–30:5, 46:16–47:13, 50:9–13.
13 Rather, when a user uploads an image, Pinterest automatically creates copies of the original, which
14 it calls “variants.” *Id.* at 30:24–32:1, 47:14–16, 48:10–21. According to Pinterest, it does so
15 primarily because the images that users upload are “usually not optimized for Pinterest.” *See id.* at
16 82:11–25. Pinterest “want[s] images to load fast . . . so Pinner[s] w[ill] have a delightful
17 experience.” *Id.* Pinterest therefore “generate[s] highly optimized images” of varying sizes for
18 use on its services. *Id.*; *see also id.* at 73:4–20, 76:3–5 (noting variants are given different names
19 internally based on their pixel width and/or height); DeChant Decl. at ¶¶ 8–10.

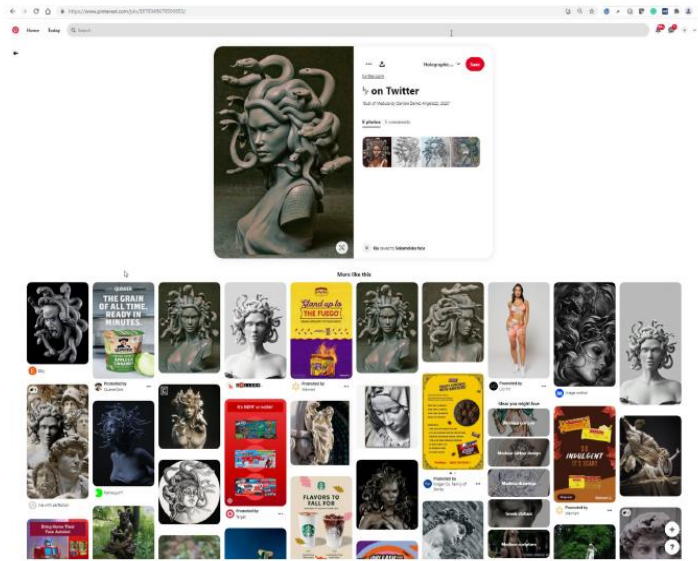
20 Pinterest offers different ways for users to access Pins on its website and mobile
21 application. *See DeChant Decl.* at ¶¶ 12–18. When a user first logs into his Pinterest account, he
22 will see his “personal home feed,” or a grid-view of smaller-sized Pins. *See id.* at ¶ 13. If a user
23 clicks on any of these Pins, he will be taken to another page that includes a larger view of the Pin,
24 as well as the title, description, and destination link for that Pin. *See id.* at ¶ 12. Pinterest
25 automatically generates a user’s home feed with machine-learning algorithms based on multiple
26 inputs, including Pins with which the user has interacted in the past; boards the user has created;
27 searches the user has run; and the people, topics, and boards the user “follows” on the website or
28 mobile application. *See id.* at ¶¶ 12–13. These algorithms influence both the content and layout

1 of the feed. *See id.* According to Pinterest, users have some control over the content they see in
 2 their feed because they can remove specific Pins or edit their preferences for the content they will
 3 see. *Id.* at ¶ 13. Below is an example of this home feed:



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17 *See* DeChant Decl., Ex. 1.

18 Pinterest also offers “related Pins feeds,” which similarly use algorithms to predict what
 19 Pins will be most relevant to the user based on his past activity on the service. *See* DeChant Decl.
 20 at ¶¶ 14–15. These feeds are typically shown under the larger view of the Pin that a user has
 21 clicked on, as illustrated below. *See id.*



Id., Ex. 2. Pinterest states that users are able to remove pins from these feeds, which refines the algorithms to further tailor the feeds to the user. *See id.* Pinterest also offers a search function, which allows users to search for content on its service. *See id.* at ¶ 16. Again, algorithms generate a feed with search results based on both the user’s search query and his past activity on the service. *Id.* Pinterest states that users can likewise remove Pins from the search results, which helps the algorithms tailor future search results. *Id.*

ii. Advertising

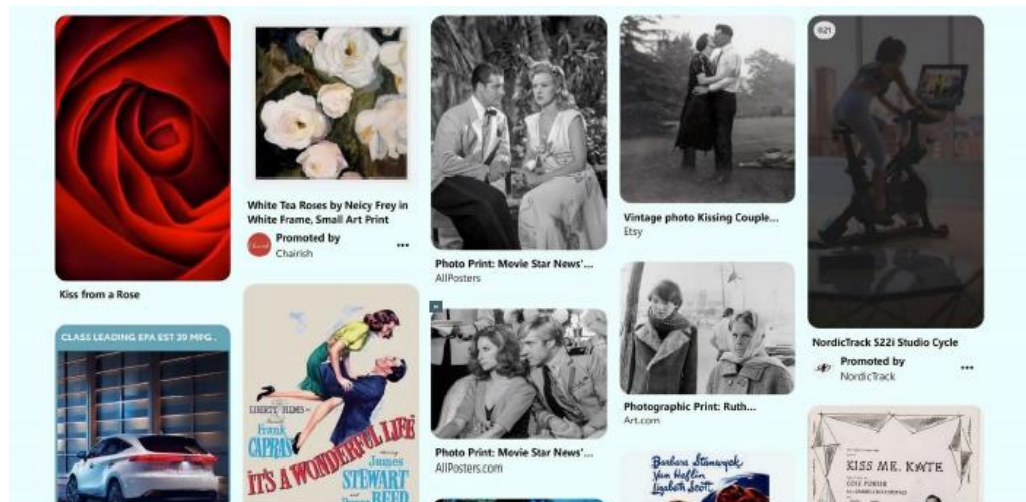
Pinterest does not charge users for its services. *See id.* at ¶ 2. Rather, Pinterest generates revenue through third-party advertising across these various “feeds.” *See id.* at ¶¶ 2, 17. An advertiser or business can create content, and then pay Pinterest to promote that content on the website and mobile application. *See DeChant Depo.* at 96:16–25; *see also Dkt. No. 160-4, Ex. 3 (“Galgon Depo.”)* at 77:2–19. Advertisers may pay Pinterest per click or per view for these “promoted Pins.” *See Galgon Depo.* at 45:22–48:2. As with “organic Pins” (*i.e.*, the content that users rather than advertisers upload), Pinterest creates variants and uses algorithms to determine which promoted Pins are displayed and how they are displayed to users in their feeds. *See id.* at 28:3–31:22, 59:8–60:16, 65:6–66:7, 66:25–67:23. In this way, Pinterest states that it tries to ensure that even promoted Pins are relevant to the user. *See, e.g., id.* at 28:11–20. However, users

1 cannot opt out of seeing advertisements in their feeds. *See id.* at 45:6–12. These feeds, therefore,
2 contain a combination of both organic Pins and promoted Pins.

3 Pinterest also sends notifications to its users by email, in the mobile application, and
4 through push notifications. *See DeChant Decl.* at ¶ 18. According to Pinterest, these notifications
5 alert users to content that Pinterest’s algorithms have identified as being of possible interest to the
6 user. *See id.* Pinterest also uses machine learning models to determine the frequency, content, and
7 timing of notifications for users. *See Dkt. No. 160-13, Ex. 12.* Pinterest sends “billions of
8 notifications . . . every week to users,” and these notifications “drive a significant portion of
9 monthly active users.” *See Dkt. No. 160-12, Ex. 11.* Users, however, may turn off these
10 notifications if they wish. *See DeChant Decl.* at ¶ 18. And these notifications do not contain
11 advertisements. *See id.*

12 **iii. Allegations**

13 Plaintiff has clarified that in this case, he does not challenge users uploading his works or
14 saving them to their boards. *Dkt. No. 171* at 5, 14 (“[T]he images at issue in this case are not the
15 Pins of Plaintiff’s Works that users uploaded and displayed on their personal boards.”); *Dkt. No.*
16 *160* at 1 (“Mr. Davis has no quarrel with individual users of Pinterest (*i.e.*, ‘Pinner’), who display
17 Mr. Davis’ Works on their Boards (*i.e.*, Pinterest’s virtual bulletin boards) for personal purposes
18 because they admire or are inspired by the Works.”), at 21–22 (confirming Plaintiff does not
19 contest “the uploading of content by Pinterest users to their boards, *i.e.*, Pins”). Rather, he
20 challenges the public display of his works in proximity to or in the same feed as promoted Pins.
21 *Dkt. No. 171* at 5, 14; *see also Dkt. No. 160* at 1, 26–27. For example, in the screenshot below,
22 Plaintiff’s work, “Kiss from a Rose,” is displayed in the top left corner of this feed. Next to it is a
23 promoted Pin for an art print called “White Tea Roses by Neicy Frey.” *Dkt. No. 160-11, Ex. 10.*



Id. This promoted Pin is labeled as “Promoted by Chairish.” *Id.* Plaintiff contends that this constitutes “unauthorized commercial use” of his works. *See, e.g.*, Dkt. No. 160 at 1. Plaintiff also challenges the display and distribution of his works in emails and push notifications to users. *See* Dkt. No. 160 at 1.

As explained in more detail in Section III.A.i below, Plaintiff does not identify the exact number of times he contends Pinterest infringed his copyrights. *See* Dkt. No. 160 at 10. But he asserts that “it is reasonable to extrapolate the actual number of infringements by Pinterest during the three-year statute of limitations period to be in the hundreds of thousands, if not millions.” *Id.* He notes, for example, that just one of his works, “Duet of Daffodils,” appeared on Pinterest’s website 4,676 times over the course of just two weeks. *See* Dkt. No. 160-1 (“Moore Decl.”) at ¶¶ 21–22, 28.

B. Procedural Background

Plaintiff filed his initial complaint in November 2019, alleging both direct and contributory copyright infringement. *See* Dkt. No. 1. Defendant moved to dismiss Plaintiff’s contributory infringement claim. *See* Dkt. No. 17. In response, Plaintiff filed the first amended complaint in March 2020. *See* FAC. Defendant again moved to dismiss the contributory infringement claim, and the Court granted the motion in July 2020. *See* Dkt. No. 39. In addition to amending Plaintiff’s claim for contributory infringement, Plaintiff also sought to add a new claim to his complaint, a violation of the Digital Millennium Copyright Act (the “DMCA”), 17 U.S.C.

1 § 1202(b), and to bring the action on behalf of a putative class. *See* Dkt. Nos. 41, 52. The Court
2 denied the motion. *See* Dkt. No. 55. Plaintiff then filed his second amended complaint in
3 November 2020. *See* SAC. Defendant again moved to dismiss the contributory infringement
4 claim, Dkt. No. 62, and the Court granted the motion, Dkt. No. 75. Plaintiff’s case, therefore, now
5 consists of a single claim for direct copyright infringement. The parties have each moved for
6 summary judgment. Dkt. Nos. 152, 160.

7 **II. LEGAL STANDARD**

8 Summary judgment is proper when a “movant shows that there is no genuine dispute as to
9 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
10 A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson*
11 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is “genuine” if there is evidence in the
12 record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* The
13 Court views the inferences reasonably drawn from the materials in the record in the light most
14 favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
15 574, 587–88 (1986), and “may not weigh the evidence or make credibility determinations,”
16 *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *overruled on other grounds by Shakur v.*
17 *Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008).

18 The moving party bears both the ultimate burden of persuasion and the initial burden of
19 producing those portions of the pleadings, discovery, and affidavits that show the absence of a
20 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the
21 moving party will not bear the burden of proof on an issue at trial, it “must either produce
22 evidence negating an essential element of the nonmoving party’s claim or defense or show that the
23 nonmoving party does not have enough evidence of an essential element to carry its ultimate
24 burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102
25 (9th Cir. 2000). Where the moving party will bear the burden of proof on an issue at trial, it must
26 also show that no reasonable trier of fact could not find in its favor. *Celotex Corp.*, 477 U.S. at
27 325. In either case, the movant “may not require the nonmoving party to produce evidence
28 supporting its claim or defense simply by saying that the nonmoving party has no such evidence.”

1 *Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1105. “If a moving party fails to carry its initial
2 burden of production, the nonmoving party has no obligation to produce anything, even if the
3 nonmoving party would have the ultimate burden of persuasion at trial.” *Id.* at 1102–03.

4 “If, however, a moving party carries its burden of production, the nonmoving party must
5 produce evidence to support its claim or defense.” *Id.* at 1103. In doing so, the nonmoving party
6 “must do more than simply show that there is some metaphysical doubt as to the material facts.”
7 *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. A nonmoving party must also “identify with
8 reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91
9 F.3d 1275, 1279 (9th Cir. 1996). If a nonmoving party fails to produce evidence that supports its
10 claim or defense, courts enter summary judgment in favor of the movant. *Celotex Corp.*, 477 U.S.
11 at 323.

12 **III. DISCUSSION**

13 As noted above, Plaintiff contends that Pinterest has infringed the copyrights of 51 of his
14 works by displaying these works in proximity to advertisements and by displaying and distributing
15 them to users via notifications. *See* Dkt. No. 160 at 1, 26. In response, Pinterest (1) disputes the
16 scope of the infringements at issue in this case; and (2) contends that it falls within the safe harbor
17 under the DMCA. *See* Dkt. No. 174 at 15–19; *see also* Dkt. No. 152 at 10–27. Because the Court
18 finds these issues dispositive, it addresses them first before turning to Plaintiff’s motion.

19 **A. Discovery Disputes and Alleged Infringements**

20 Throughout the litigation, the parties have raised a large number of discovery disputes.
21 *See, e.g.*, Dkt. Nos. 93, 98, 99, 103, 104, 115, 127, 131, 137. The parties’ cross-motions for
22 summary judgment suggest that they believe at least some of these discovery disputes have not
23 been fully resolved. *See* Section III.A below. The parties agree that only the 51 works that
24 Plaintiff identified in Exhibit A to the SAC are at issue in this case. However, the parties dispute
25 what alleged *infringements* of these 51 works are at issue. *Compare* Dkt. No. 160 at 18–23, *with*
26 Dkt. No. 174 at 4–7, 9–10. Pinterest argues that Plaintiff is trying to introduce new alleged
27 infringements in his motion for summary judgment, well after the close of discovery. *See* Dkt.
28 No. 174 at 4–7; *see also* Dkt. No. 176-1 at ¶¶ 10–246, & Ex. B (Plaintiff’s summary of “instances

1 of infringement” from March 12, 2019, to November 11, 2020). Plaintiff, for his part, suggests
2 that Pinterest engaged in delaying tactics, which prevented him from identifying the full scope of
3 the alleged infringements earlier. *See* Dkt. No. 160 at 18–23.

4 **i. Identifying Alleged Infringements**

5 From the outset of this case, the parties have disputed whether and when Plaintiff should
6 be required to identify all instances of alleged copyright infringement. *See* Dkt. No. 59. In their
7 initial case management statement, Pinterest argued that requiring Plaintiff to identify the alleged
8 infringements would allow it to investigate and take discovery as necessary. *Id.* at 2–3. Plaintiff,
9 however, urged that he need only provide *examples* of the alleged infringement “because the
10 instances of Defendant’s infringement are numerous and on-going” *See id.* at 3. During the
11 November 24, 2020 case management conference, the Court agreed with Pinterest that a deadline
12 was necessary to ensure the efficient litigation of this case. The Court therefore directed the
13 parties to meet and confer and submit a proposed case schedule incorporating such a deadline.
14 The parties did so, *see* Dkt. No. 61, and on December 15, 2020, the Court largely adopted the
15 parties’ proposal in its scheduling order, Dkt. No. 63. The scheduling order set June 1, 2021, as
16 the “[d]eadline for Plaintiff to serve final identification of alleged infringements at issue.” *Id.* The
17 scheduling order also set a July 2, 2021, discovery cut-off. *Id.* However, the order permitted
18 *Pinterest* to “pursue discovery regarding the identified alleged infringements through September 3,
19 2021.” *See id.*

20 The parties proceeded to engage in discovery. In December 2020, they exchanged
21 interrogatories. Pinterest served Interrogatory No. 2:

22
23 For each Work In Suit, identify the URL on Pinterest or other unique
24 identifying information sufficient for Pinterest to locate each instance
of alleged infringement.

25 *See* Dkt. No. 114-2, Ex. 2 at 3. As Judge Hixson and this Court later explained, Pinterest was
26 asking Plaintiff about “his legal contentions: Identify each instance in which you claim we
27 committed infringement.” Dkt. No. 144 at 4 (quotations omitted). Plaintiff, in turn, served
28 Interrogatory No. 6:

1 Identify every instance in which Works have been Pinned, uploaded,
2 downloaded, displayed or otherwise used on or through the Pinterest
3 Platform. If you cannot identify every instance, explain why.

4 Dkt. No. 160-14, Ex. 13 at 15. Here, Plaintiff was asking Pinterest a factual question about the
5 specific instances in which the 51 works appeared on Pinterest’s platform.

6 As discussed in more detail below, Plaintiff asserts that Pinterest did not adequately
7 respond to Interrogatory No. 6 until after the close of discovery. In any event, on June 1, 2021—
8 the deadline for Plaintiff to identify the alleged infringements at issue in this case—Plaintiff
9 produced a PDF of an Excel spreadsheet. *See* Dkt. No. 114 at 2. On June 4, Plaintiff’s counsel
10 emailed the Excel spreadsheet in native format. *See* Dkt. No. 153-22, Ex. V (“June 4
11 Spreadsheet”). This spreadsheet, however, only lists alleged infringements for 35 of the 51 works
12 in suit. *Compare id.*, with SAC, Ex. A; *see also* Dkt. No. 153-26, Ex. Z (summary chart).
13 Plaintiff also appears to concede that the June 4 Spreadsheet does not include any instances of
14 infringement based on notifications that Pinterest sent to users, just instances of infringement
15 based on Pinterest’s various “feeds.” *See* Dkt. No. 177 at 3–4 (describing evidence produced in
16 August 2021, after the June 4 Spreadsheet, that shows instances in which notifications sent by
17 Pinterest included links to Plaintiff’s works); Dkt. No. 171 at 7–8, 13–14 (same).

18 Pinterest asked Plaintiff to confirm that the June 4 Spreadsheet constituted Plaintiff’s final
19 identification of the alleged infringements in this case, as required by the Court’s scheduling order.
20 *See* Dkt. No. 138-5., Ex. 4 at 1–2. Plaintiff did not address the spreadsheet directly. Rather, he
21 responded that he “identified the federally registered images by artist and name,” and “has
22 explained in detail the nature of Pinterest’s infringement and ha[s] provided *examples* of the
23 infringement.” *See* Dkt. No. 138-6, Ex. 5 (emphasis added). During subsequent communications,
24 Plaintiff again stated that the June 4 Spreadsheet was merely “a sample of the URLs and Pin IDs”
25 because “the same image may have hundreds or thousands of different URLs and Pin IDs.” *See*
26 Dkt. No. 114 at 3.

27 However, both Magistrate Judge Hixson and this Court rejected Plaintiff’s argument that
28 the June 4 Spreadsheet could contain just a sampling of the alleged infringements in this case. *See*

1 Dkt. Nos. 108, 144. As this Court explained:

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It is not Defendant’s job to speculate about the nature and scope of Plaintiff’s case. The Court understands Plaintiff’s concern that the number of possible infringements may be vast, but as Judge Hixson aptly stated, “[i]t is up to [Plaintiff] to build his own case.” *Id.* Plaintiff may not shift that obligation onto Defendant.

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The June 4 Spreadsheet appears to be the only identification of the alleged infringements.

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See Dkt. No. 144 at 7. The Court accordingly rejected Plaintiff’s attempt to expand the scope of the alleged infringements beyond the June 4 Spreadsheet months after the deadline and close of discovery. *See id.* at 7–8. As the Court cautioned Plaintiff in October 2021, the only alleged instances of infringement still in this case are those identified in the June 4 Spreadsheet. *See* Dkt. No. 144.

Nevertheless, in his motion for summary judgment Plaintiff again suggests that the Court should permit him to add additional instances of alleged infringement that were not in the June 4 Spreadsheet. *See* Dkt. No. 160 at 18–23; *see also* Dkt. No. 176-1 at ¶¶ 10–246, & Ex. B. Plaintiff argues that these new infringements were only identifiable through discovery, and Pinterest engaged in “tactics of obfuscation and delay,” which impeded his timely identification of these infringements. *See* Dkt. No. 171 at 12–13, 15.

Plaintiff points out that although he asked Pinterest to “[i]dentify every instance” in which the 51 works had appeared on Pinterest’s platform, Dkt. No. 160-14, Ex. 13 at 15 (Interrogatory No. 6), and to produce related documents, Pinterest did not produce this information until Plaintiff filed a motion to compel. *See* Dkt. No. 160-15, Ex. 14 at 16–20. Judge Hixson eventually ordered Pinterest to conduct a reasonable search and produce documents within 30 days. *See* Dkt. No. 109 at 5. On August 19, 2021, in response to Judge Hixson’s order, Pinterest finally identified documents that showed how often a duplicate or near-duplicate of the works in suit had appeared on a Pinterest feed and the date(s) of those activities. *See id.* at 19. However, Pinterest only produced searches from the week before Plaintiff filed the first amended complaint (March 4 to

1 March 10, 2020) and the week before Plaintiff filed the SAC (November 4 to November 10,
 2 2020). *Id.* at 19. Plaintiff further notes that the documents that Pinterest produced on August 19,
 3 2021, were not decipherable because they referenced a “pin_image_signature” rather than the
 4 name of the works in suit. *See* Dkt. No. 160 at 20. Pinterest did not produce documents to decode
 5 this “pin_image_signature” until September 10, 2021. *See* Moore Decl. at ¶¶ 17–30.

6 The Court understands that Plaintiff needed discovery from Pinterest before he could
 7 identify all the alleged infringements at issue in this case. Because notifications are sent directly
 8 to users, for example, Plaintiff could not run his own independent searches to find such instances
 9 of alleged infringement. Moreover, Plaintiff notes that after he filed the complaint in this case,
 10 Pinterest began disabling access to Pins of Plaintiff’s 51 works across its platform. *See* Dkt. No.
 11 160-8, Ex. 7 at 13:2–15:8, 31:217–32:18, 40:12–41:25, 63:17–64:25. Pinterest confirmed that
 12 someone could not search to find content that is no longer available on the platform. *See id.* at
 13 40:12–41:5. And even the links in the June 4 Spreadsheet are no longer active. Even if Plaintiff
 14 had tried to compile this information for himself, therefore, he would have faced serious
 15 challenges.²

16 But Plaintiff’s need for discovery to identify the instances of alleged infringement was
 17 neither surprising nor incurable. Plaintiff could have moved to compel production of these
 18 documents. Still, Plaintiff fails to explain why he did not do so earlier, or request more time to
 19 provide the final identification of the alleged infringements. Instead, he waited until July 9,
 20 2021—more than a month after the deadline—to move to compel. *See* Dkt. No. 98. As Judge
 21 Hixson noted in response: “Yikes.” *See* Dkt. No. 109 at 1. Judge Hixson further recognized that:

22
 23 The timing and content of this motion to compel are problematic. The
 24 Court will rule on the issues presented to the extent that Davis’s
 briefing enables it to do so. But a motion to compel filed on the last

25 ² Plaintiff attempts to characterize Pinterest’s actions as “spoliation.” *See* Dkt. No. 160 at 20. But
 26 Plaintiff has not proffered concrete evidence that Pinterest failed to preserve relevant evidence.
 27 Although users and third parties may not have had access to Plaintiff’s works on the platform any
 28 longer, there is no evidence in the record that Pinterest did not preserve sufficient information
 about the alleged instances of infringement. Moreover, if, as Plaintiff argues, Pinterest’s display
 of these works constitutes infringement, it defies logic to argue that Pinterest is somehow
 powerless to stop any purported future infringement while the case proceeds.

1 possible day that argues solely in the negative that certain objections
2 lack merit may not result in much effective relief.

3 *See id.* Plaintiff attempts to blame Pinterest for the timing of his discovery of these new
4 infringements, but *Plaintiff* chose to wait so long to obtain the information he needed for his case.
5 Plaintiff was on notice of his June 1, 2021, deadline in December 2020, when the Court entered
6 the scheduling order. *See* Dkt. No. 63. Plaintiff offers no explanation why, with six months'
7 notice, he could not move to compel (if required) and meet this deadline.

8 **ii. Precluding Untimely Alleged Infringements**

9 In a final attempt to expand the alleged infringements in this case, Plaintiff also suggests
10 that the Court lacks authority to preclude this evidence. *See* Dkt. No. 176 at 4–5; *see also* Dkt.
11 No. 171 at 23–28. Plaintiff argues that the Court is improperly imposing sanctions against him
12 for his discovery failures. *See* Dkt. No. 176 at 4 (citing Civil L.R. 7-8); *see also* Dkt. No. 171 at
13 27. He states that to impose such sanctions, Pinterest had to “file a separate motion to exclude the
14 evidence as a sanction,” which it did not do. *See* Dkt. No. 176 at 4. Plaintiff further argues that
15 there is no evidence that he acted in bad faith. *Id.*

16 Plaintiff relies on *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1247 (9th
17 Cir. 2012). In *R & R Sails*, the district court found that the plaintiff had violated its disclosure
18 requirements under Federal Rule of Civil Procedure 26(a) and 26(e), by failing to provide
19 defendant with copies of invoices to support its request for attorneys’ fees. *Id.* at 1245–46. The
20 district court excluded the invoices under Rule 37(c)(1). Under Rule 37:

21
22 If a party fails to provide information or identify a witness as required
23 by Rule 26(a) or (e), the party is not allowed to use that information
24 or witness to supply evidence on a motion, at a hearing, or at a trial,
25 unless the failure was substantially justified or is harmless.

26 Fed. R. Civ. P. 37(c)(1). The Ninth Circuit explained that the district court did not abuse its
27 discretion in finding that the plaintiff had indeed failed to meet its obligations under Rule 26(a)(1)
28 and Rule 26(e)(1). *See id.* 1246. Nevertheless, the Court noted that excluding the invoices
effectively “amounted to dismissal of a claim,” because the invoices were the sole evidence the

1 plaintiff intended to use to support its claim for attorneys’ fees and punitive damages. *See id.* at
 2 1243, 1247. The Ninth Circuit held that the district court was therefore “required to consider
 3 whether the claimed noncompliance involved willfulness, fault, or bad faith” and whether “lesser
 4 sanctions” were available. *See id.* at 1247. Because there was no evidence that the district court
 5 had conducted this inquiry, the Ninth Circuit remanded the case for further proceedings. *See id.* at
 6 1247–48.

7 In contrast, precluding Plaintiff from introducing instances of alleged infringement that he
 8 did not identify in the June 4 Spreadsheet does not amount to the dismissal of a cause of action.
 9 Plaintiff’s claim for direct copyright infringement remains, even without the introduction of new
 10 instances of infringement. The Court, therefore, need only consider whether Plaintiff’s failure to
 11 timely disclose these new infringements is substantially justified or is harmless. *See Fed. R. Civ.*
 12 *P. 37(c)(1); see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
 13 2001) (noting nondisclosure is harmless if it does not prejudice the other party). To determine
 14 whether the untimely disclosure was substantially justified or harmless, a court may consider:
 15 “(1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that
 16 party to cure that prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or
 17 willfulness involved in not timely disclosing the evidence.” *Lanard Toys, Ltd. v. Novelty, Inc.*,
 18 375 Fed. App’x 705, 713 (9th Cir. 2010) (citing *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th
 19 Cir. 2003)).³

20 Plaintiff’s repeated attempts to sidestep the Court’s deadlines suggest that he may have
 21 believed he would not be—or should not be—held to the June 1 deadline. But he ignored this
 22 deadline at his own hazard. As noted above, the delay is not substantially justified. Plaintiff had
 23 ample time to obtain the discovery he required. Nor is the delay harmless. Plaintiff did not raise
 24 these new instances of infringement until approximately four months after the close of discovery
 25 and after briefing on dispositive motions had begun. After the motions for summary judgment
 26 were argued, the Court vacated the trial date given the nature of the issues raised in the motions.

27

28 ³ As an unpublished Ninth Circuit decision, *Lanard Toys* is not precedent, but may be considered for its persuasive value. *See Fed. R. App. P. 32.1; CTA9 Rule 36-3.*

1 However, at the time the motions were filed, trial was fast approaching and it would have been
2 infeasible to reopen discovery. Plaintiff therefore left Pinterest with no ability to effectively
3 address these new instances of infringement. Plaintiff also seeks to introduce significantly more
4 instances of infringement than he initially identified, which would markedly expand the scope of
5 this case. Plaintiff's argument, if accepted, would render discovery deadlines meaningless. The
6 Court finds that Plaintiff's failure to timely disclose these new alleged infringements is thus
7 inherently prejudicial. *See Yeti*, 259 F.3d at 1107 (finding prejudice where plaintiffs received an
8 expert report one month prior to trial and would need to depose the expert and prepare to question
9 him at trial).

10 Plaintiff cannot radically expand the scope of this case at the eleventh hour. The June 4
11 Spreadsheet was—and remains—the final identification of alleged instances of infringement in
12 this case. Plaintiff therefore only timely identified instances of alleged infringement for 35 of the
13 51 works. And these alleged infringements only occurred in the feeds on Pinterest's platform
14 Thus, as relevant for the Court's remaining analysis, instances of alleged infringement from
15 Pinterest's notifications are not at issue in this case.

16 Even if the Court were to consider the notifications sent to Pinterest users, however, it is
17 not clear how they infringe Plaintiff's copyrights. The notifications do not appear to contain
18 copies of Plaintiff's works. Rather, they contain *hyperlinks* to images on Pinterest's website and
19 mobile application. *See, e.g.*, Dkt. No. 153-25, Ex. Y at 4 (“[T]he notifications merely contain
20 links to images that are hosted on a remote server on the Internet.”); Dkt. No. 178-2, Ex. 1 at
21 42:3–43:24. Courts have held that “hyperlinking alone does not constitute copyright infringement,
22 since it does not involve any actual copying.” *See eAdGear, Inc. v. Liu*, No. CV-11-05398 JCS,
23 2012 WL 2367805, at *12 (N.D. Cal. June 21, 2012), *report and recommendation adopted*, No. C-
24 11-05398 RMW JCS, 2012 WL 4005454 (N.D. Cal. Sept. 11, 2012) (collecting cases).

25 Plaintiff appears to acknowledge that the notifications only contain hyperlinks. *See, e.g.*,
26 Dkt. No. 152 at 8–9 (“Notifications [] link to pages on Pinterest's own website.”). He argues,
27 however, that this “is an irrelevant fact” because “[a]ny hyperlinks in notifications merely link
28 back to pages on Pinterest's own website and its own Variants” *See* Dkt. No. 178 at 5, & n.1.

1 Plaintiff's contention that these notifications infringe his copyrights therefore collapses into his
 2 argument that Pinterest infringes his copyrights by displaying images on the Pinterest website and
 3 mobile application. The Court addresses Pinterest's website and mobile application in the context
 4 of the DMCA's safe harbor below.

5 **B. Safe Harbor**

6 Turning to the merits, Defendant invokes the protection of the DMCA's safe harbor under
 7 17 U.S.C. § 512(c). *See* Dkt. No. 152 at 10–27; Dkt. No. 174 at 15–20. In enacting the DMCA,
 8 “Congress recognized that [i]n the ordinary course of their operations service providers must
 9 engage in all kinds of acts that expose them to potential copyright infringement liability.” *UMG*
 10 *Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (citing S.Rep.
 11 No. 105–190, at 8 (1998)). The DMCA therefore strikes a balance between the interests of
 12 “copyright holders in benefitting from their labor; . . . entrepreneurs in having the latitude to
 13 invent new technologies without fear of being held liable if their innovations are used by others in
 14 unintended infringing ways; and those of the public in having access [to] both . . .” *See*
 15 *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1037 (9th Cir. 2013). “The DMCA
 16 balances these interests by requiring service providers to take down infringing materials when
 17 copyright holders notify them of the infringement and by limiting service providers' liability for
 18 unintentional infringement through several safe harbors.” *Mavrix Photographs, LLC v.*
 19 *Livejournal, Inc.*, 873 F.3d 1045, 1051–52 (9th Cir. 2017).

20 Section 512(c) in particular limits service providers' liability for “infringement of
 21 copyright by reason of the storage at the direction of a user of material that resides on a system or
 22 network controlled or operated by or for the service provider.” 17 U.S.C. § 512(c). To qualify for
 23 protection under this provision, a service provider must not have knowledge of the infringements,
 24 and, as relevant to this case, must not:

25 receive a financial benefit directly attributable to the infringing
 26 activity, in a case in which the service provider has the right and
 27 ability to control such activity

28 *Id.* at § 512(c)(1)(B). Therefore, for a service provider to lose safe harbor protection under

1 § 512(c), the plaintiff must show both that the service provider had the right and ability to control
 2 the alleged infringements and that it received a financial benefit directly attributable to those
 3 specific alleged infringements. *See Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 612
 4 (9th Cir. 2018).

5 Here, Plaintiff does not appear to dispute that Pinterest is a service provider for purposes of
 6 § 512(c). *See, e.g.*, Dkt. No. 171 at 2–13. Instead, he argues that Pinterest does not qualify under
 7 the safe harbor because (1) Pinterest’s infringing activity is not “by reason of . . . storage at the
 8 direction of a user”; (2) Pinterest has “the right and ability to control” the infringing activity; and
 9 (3) Pinterest receives “a financial benefit directly attributable to the infringing activity.” *See, e.g.*,
 10 Dkt. No. 171 at 2–13; Dkt. No. 176 at 10–12. Plaintiff’s arguments all turn on the scope of the
 11 alleged “infringing activity” in this case.

12 **i. Infringing Activity**

13 Plaintiff narrowly defines the claimed infringing activity at issue. Notably, Plaintiff does
 14 *not* challenge:

- 15 • Users uploading his works to Pinterest, *see* Dkt. No. 160 at 1, 21–22; Dkt. No. 171
 16 at 1, 5, 14;
- 17 • Pinterest creating variants of these uploaded works in standard display formats so
 18 that they are more compatible with the platform, *see* Dkt. No. 171 at 2; Dkt. No.
 19 176 at 10;
- 20 • Users pinning his works to their boards, *see* Dkt. No. 160 at 1; Dkt. No. 171 at 1;
- 21 • Pinterest using machine learning algorithms “to enable users to locate and gain
 22 access” to his works, *see* Dkt. No. 171 at 2; Dkt. No. 174 at 1, 3–4; or
- 23 • Pinterest using these algorithms to suggest “related content” that was uploaded by
 24 users, including his works, *see* Dkt. No. 171 at 2.

25
 26 Instead, Plaintiff challenges only Pinterest’s creation of variants and use of algorithms to
 27 “select and display Plaintiff’s Works in the context of advertisement.” *See* Dkt. No. 171 at 1, 3–4.
 28 Plaintiff suggests that Pinterest creates variants of his works—and all uploaded content—for both

1 non-infringing and infringing purposes. *See* Dkt. No. 160 at 4–6. Plaintiff argues that part of the
2 reason Pinterest creates variants is “to track user interaction” and to “target advertisements to
3 users.” *See id.* at 6, 10, 12. Plaintiff asserts that to do so Pinterest “embeds” information onto
4 variants “so its automated machine learning (“AutoML”) can use that information to effectively
5 display advertisement” in the same feed as organic pins. *See id.* at 3–5, 14; *see also* Dkt. No. 160
6 at 30–31. Plaintiff thus narrows the purportedly “infringing activity” in this case to the creation of
7 variants, the “embedding” of these variants with data for Pinterest’s advertising algorithms, and
8 the display of these variants in proximity to advertisements on the platform.⁴ *See* Dkt. No. 171 at
9 5–6, 10, 12, 14. In other words, under Plaintiff’s theory, Pinterest does not infringe Plaintiff’s
10 copyrights when it creates a variant and uses algorithms to help users locate that variant.
11 However, Pinterest *does* infringe when it creates the same variant and uses algorithms to display
12 advertising in proximity to that variant.

13 **a. Embeddings**

14 Plaintiff’s theory that the creation of variants is infringing activity is not supported by the
15 record. According to Plaintiff, Pinterest “embeds” data or information within the variants so the
16 AutoML algorithms can effectively display advertising in their proximity. *See* Dkt. No. 171 at 3–
17 5, 14; *see also* Dkt. No. 160 at 30–31. Plaintiff emphasizes that this “embedded data” is “of
18 Pinterest’s own choosing,” and facilitates Pinterest’s own financial objectives rather than user
19 access. *See* Dkt. No. 171 at 4 (emphasis omitted); *see also* Dkt. No. 176 at 8 (arguing that
20 Pinterest uses variants to track users and “generate advertisement revenue”). Despite these
21 assertions, Plaintiff has not pointed to any evidence in the record that Pinterest actually embeds
22 information within variants for use with its advertising algorithms. To support his argument,
23 Plaintiff appears to mischaracterize excerpts from Pinterest’s deposition testimony and internal
24 documents.

25 Plaintiff first points to Mr. DeChant’s deposition testimony. *See* Dkt. No. 171 at 3–5; *see*
26 *also* Dkt. No. 176 at 7–10. When asked what images Pinterest displays on its platform, Mr.

27 _____
28 ⁴ As explained in Section III.A above, instances of alleged infringement due to notifications that
Pinterest sent to its users are not at issue in this case.

1 DeChant explained that Pinterest “encode[s] them in-house” from the images that users upload.
2 *See* DeChant Depo. at 30:24–32:1, 34:6–10, 87:1–5. Mr. DeChant further explained that for
3 variants created after approximately 2021, Pinterest ensures that they maintain preexisting
4 metadata regarding copyright management information from the originals. *Id.* at 34:6–35:17,
5 42:1–44:5, 48:1–9. Plaintiff urges that Pinterest therefore had exclusive control over what was
6 and was not “embedded” within these variants *See* Dkt. No. 176 at 9–10. Plaintiff also cites the
7 deposition of Ryan Galgon, the “Head of Ads Quality Product” at Pinterest, who explained that
8 Pinterest relies on “signals from the user” to create the Pinterest feeds, but that users do not
9 control the order in which Pins appear on their feeds. *See* Galgon Depo. at 55:22–57:8, 59:8–
10 62:25.

11 Plaintiff also relies on a Pinterest blog post which discusses the company’s AutoML
12 algorithms and “embeddings” in the context of advertisements. *See* Dkt. No. 171 at 3–5; *see also*
13 Dkt. No. 160-9, Ex. 8 (blog post). The post explains that Pinterest aims to predict users’
14 engagement with advertisements, including “how likely a user is to save or hide an ad.” *See id.* at
15 1. The post then describes the various technologies that Pinterest uses. *See id.* at 1–11. Plaintiff
16 cites a single sentence from this document discussing Pinterest’s AutoML technology:

17
18 AutoML features a simple descriptive template to fuse varieties of
19 pre-implemented feature transforms such that the deep neural
networks are able to learn from raw signals.

20 *Id.* at 1. From this sentence, Plaintiff suggests that Pinterest “embeds” information or software
21 within variants to target advertising to users. *See* Dkt. No. 171 at 4. But the document does not
22 describe any such process. Rather, the post explains that AutoML reads “raw signals” and “raw
23 features” to learn about user engagement and user satisfaction. *See* Dkt. No. 160-9, Ex. 8. Mr.
24 Galgon explained that raw signals may include data from the “raw image.” *See* Galgon Depo. at
25 52:14–24, 55:2–57:8. As an example, he explained that the title of a Pin may be considered a
26 “raw signal.” AutoML’s model could then “transform” this signal into the number of words in the
27 title. *See* 56:12–22. But the user, not Pinterest, supplies the title of a Pin. And nothing in the blog
28 post or Mr. Galgon’s testimony suggests that AutoML embeds data from its models *onto* the Pin.

1 To the contrary, Mr. Galgon testified that “[v]isual embeddings . . . are generated internally at
 2 Pinterest *for pins*.” *Id.* at 66:4–7, 67:14–23. They “*come off* or are *derived from* the image in a
 3 pin and in images composed of many pixels.” *See id.* at 73:24–74:5 (emphasis added).

4 There is simply no evidence in the record that Pinterest embeds anything within Pins
 5 generally, or Plaintiff’s works specifically, to create or obtain signals for its advertising
 6 algorithms. Plaintiff’s conclusory assertions to the contrary are simply not enough to raise a
 7 material dispute of fact on this issue. The uncontroverted evidence in the record indicates that the
 8 “embeddings” discussed in the blog post and in employees’ testimony “are not pieces of data that
 9 are added to any image file on the service.” *See* Dkt. No. 174-14 at ¶ 4. “Embeddings” is simply
 10 a term of art in machine learning that refers to “cues (both visual and textual) that machine-
 11 learning algorithms glean from Pins, including from the image itself and the user-supplied title and
 12 description.” *See id.* Mr. DeChant explained, for example, that for Pinterest’s models to
 13 determine that a Pin is a flower, it may “look at the description” and “look at the title” of a Pin.
 14 *See* Dkt. No. 174-12, Ex. 11 at 60:3–61:9. These models may be based on, but are not embedded
 15 within, the Pins themselves.

16 **b. Algorithms**

17 The allegedly infringing activity at issue in this case is therefore limited to Pinterest’s use
 18 of algorithms to “select and display Plaintiff’s Works in the context of advertisement.” *See* Dkt.
 19 No. 171 at 1, 3–4. As discussed in more detail below, Plaintiff offers no case law to support his
 20 theory that the use of computer algorithms to analyze user engagement and to tailor advertising
 21 prevents the application of the § 512(c) safe harbor.

22 The Court also has concerns that Plaintiff is attempting an end-run around the DMCA by
 23 asserting that he does not have a problem with users uploading his works to Pinterest in the first
 24 instance. The DMCA does not permit copyright holders to dictate the manner in which service
 25 providers run their platforms. Instead, “Section 512(c) codifies a detailed notice and takedown
 26 procedure by which copyright holders inform service providers of infringing material accessible
 27 through their sites, and service providers then ‘disable access to’ such materials.” *UMG*, 718 F.3d
 28 at 1018 (citing 17 U.S.C. § 512(c)(1)(A)(iii), (c)(1)(C), & (c)(3)(A)(iii)). Plaintiff takes issue with

1 Pinterest’s DMCA takedown procedure because “there was no avenue . . . for Mr. Davis to object
 2 to Pinterest’s commercial use of his Works but not request that the underlying Pin be taken down.”
 3 *See* Dkt. No. 160 at 12. In other words, rather than notify Pinterest of alleged copyright
 4 infringement on its platform so Pinterest can remove it, Plaintiff wants Pinterest to continue to
 5 display his images on its website and mobile application, but he does not want Pinterest to profit
 6 in any way from doing so.

7 Plaintiff also emphasizes the burden that identifying instances of infringement places on
 8 him. *See, e.g., id.* at 16–18. The Court understands Plaintiff’s concerns that sending individual
 9 forms for each instance of infringement may seem impracticable given the scope of his work and
 10 its numerous appearances on Pinterest. *See* Dkt. No. 160 at 15–16. When asked to estimate how
 11 long it would have taken for him to provide Pinterest electronic copies of his images to remove
 12 them from its services, Plaintiff said it would take “[t]wo years full-time, five years full-time, I
 13 really don’t know,” and would involve “[l]ots and lots and lots of uncompensated time.” *See*
 14 Davis Tr. at 264:16–265:22. But Congress, not this Court, decided as a policy matter who should
 15 bear the burden of identifying infringement in the first instance.

16 **ii. By Reason of the Storage at the Direction of the User**

17 In any event, the Court finds that the DMCA safe harbor applies to the facts of this case.
 18 First, as noted above, § 512(c)’s safe harbor applies to any claim of copyright infringement that
 19 arises “by reason of the storage at the direction of a user of material that resides on” the service
 20 provider’s system. 17 U.S.C. § 512(c)(1). In *UMG Recordings, Inc. v. Shelter Capital Partners*
 21 *LLC*, the Ninth Circuit took a pragmatic and broad view of what this language means, explaining
 22 that it is “clearly meant to cover more than mere electronic storage lockers.” 718 F.3d at 1016
 23 (citing 17 U.S.C. § 512(c)(1)(A)). The Court pointed out that users upload and companies store
 24 materials “in order to make those materials accessible to other Internet users.” *Id.* at 1018
 25 (emphasis omitted). In short, “[t]he reason one has a website is so that others may view it.” *Id.*;
 26 *accord Motherless*, 885 F.3d at 606 (“[S]torage at the direction of a user’ affords safe harbor
 27 protection to sites where users can look at other users’ uploads”). Parties thus may enhance users’
 28 accessibility to uploaded content without losing protection under § 512(c). *See UMG*, 718 F.3d at

1 1018 (finding that § 512(c) “encompasses [] access-facilitating processes that automatically
2 occur . . .”).

3 *UMG* is illustrative. There, the defendant Veoh operated a publicly accessible website that
4 allowed users to upload and share videos with other users. *See id.* at 1011. The plaintiff filed suit
5 against Veoh for copyright infringement, arguing that Veoh users had been downloading and
6 sharing videos containing music for which UMG owned the copyright. *See id.* at 1011, 1013.
7 When a user uploaded a video, Veoh’s software would automatically break the file into smaller
8 pieces and convert the video file to Flash 7 format. *See id.* at 1012. According to Veoh, they did
9 this because “the vast majority of internet users have software that can play videos in this format.”
10 *Id.* (quotations omitted). Veoh also extracted metadata from the videos “to help others locate the
11 video for viewing.” *See id.* On appeal, UMG argued that these automatic processes went beyond
12 mere “storage,” and were not done “at the direction of the user.” *See id.* at 1015–16. The Ninth
13 Circuit rejected these arguments. *Id.* at 1016–20. The Court noted that “one is unlikely to infringe
14 a copyright by merely storing material that no one could access.” *Id.* at 1019. Thus, § 512(c)
15 anticipates that to ensure access to user-uploaded content, service providers must “make, transmit
16 and download multiple copies of users’ stored materials.” *Id.* at 1018. The Court thus concluded
17 that “there is no limitation on the service provider’s ability to modify user-submitted material to
18 facilitate storage and access, as Veoh’s automatic processes do.” *See id.* at 1019–20.

19 Plaintiff appears to concede that Pinterest engages in at least some automated processes to
20 facilitate users’ access to content on Pinterest’s platform. *See* Dkt. No. 171 at 2–3 (noting that
21 providing user-uploaded content efficiently is “one aspect of Pinterest’s creation of [v]ariants”).
22 As Nicholas DeChant, a Senior Software Engineer at Pinterest, explained, Pinterest creates
23 variants of different sizes from the content that users upload to enhance the user experience. *See*
24 DeChant Depo. at 73:4–20, 76:3–5, 82:11–25. The images that users upload are “usually not
25 optimized for Pinterest,” but Pinterest’s variants allow images to load faster. *See id.* *See id.* at
26 82:11–25; *see also* DeChant Decl. at ¶¶ 8–10. Pinterest’s creation of variants for these user-
27 accessibility purposes is precisely the kind of process that courts have found to occur “by reason
28 of the storage and at the direction of the user.”

1 To the extent that Plaintiff suggests tracking user activity through algorithms or displaying
2 advertising on the platform is somehow copyright infringement, he offers no support for this novel
3 theory.⁵ *See, e.g.*, Dkt. No. 176 at 7 (“The undisputed evidence is that the users never asked to be
4 tracked using the Variants that Pinterest created from Plaintiff’s Works”). Copyright
5 infringement requires Plaintiff to establish that Pinterest “violate[d] at least one exclusive right
6 granted to copyright holders under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508
7 F.3d 1146, 1159 (9th Cir. 2007). Neither tracking users’ activity nor displaying advertising near
8 Plaintiff’s works violates Plaintiff’s exclusive rights. But even if this did constitute infringing
9 activity, such conduct would still fall within § 512(c)’s protection.

10 *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012), offers a useful
11 analogy. There, the Second Circuit considered whether YouTube was protected by the DMCA’s
12 safe harbor provision. YouTube allowed users to upload and view video clips for free. *See id.* at
13 28–29. When a user uploaded content, YouTube’s automatic software functions would make
14 copies of the video in its original format and in Flash format to ensure the video was accessible by
15 other users. *Id.* YouTube also used computer algorithms to analyze the video a user selected in
16 order to identify other related videos. *Id.* at 28. This “related videos” function would then display
17 links to and “thumbnails” of these other videos. *Id.* In upholding the district court’s grant of
18 summary judgment, the Second Circuit rejected the plaintiffs’ argument that this related videos
19 function constituted “promotion” rather than “access” to stored content. *Id.* at 39–40. The court
20 explained that the algorithms were fully automated, and ultimately “serve[d] to help YouTube
21 users locate and gain access to material stored at the direction of other users.” *Id.* at 40.

22 So too here. The evidence shows that Pinterest uses algorithms based on user preferences
23 to identify and display Pins in users’ feeds. As in *Viacom*, this helps facilitate users’ access to
24 Pins. Moreover, even if using algorithms to promote advertising could somehow be problematic,
25 the evidence in this case indicates that the algorithms used to identify and display organic Pins are
26 separate from the algorithms used to identify and display promoted Pins in a user’s feed. *See* Dkt.

27 _____
28 ⁵ The Court addresses the separate question of whether Pinterest receives “a financial benefit directly attributable to the infringing activity” in Section III.B.iv.

1 No. 157 (“Galgon Decl.”) at ¶ 9 (“The process through which advertisements appear in feeds is
2 independent from the process through which non-advertising content appears in them.”); DeChant
3 Decl. at ¶ 17 (same). The algorithms that select whether and how to display *Plaintiff’s works* in
4 Pinterest’s feeds are thus still promoting user access to user-uploaded content.

5 During the hearing on the cross-motions for summary judgment, Plaintiff identified *BWP*
6 *Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42 (2d Cir. 2019) (per curiam), as his best case in
7 support of the idea that Pinterest’s infringing conduct was not “by reason of the storage at the
8 direction of a user of material that resides on” the service provider’s system. *See* Dkt. No. 184
9 (“MSJ Tr.”) at 9:5–10:3. The Court finds this case inapposite.

10 In *Polyvore*, the Second Circuit briefly considered a challenge to a website that “allowed
11 users to create and share digital photo collages devoted to fashion, art, and design.” *See id.* at 44
12 (Walker, J., concurrence). The website provided a tool for users to “clip” images from other
13 websites and collect them on Polyvore’s platform. *Id.* at 44–45. From these clipped images,
14 Polyvore created a vast database of searchable images on its site. *See id.* at 45. The district court
15 did not address the applicability of § 512(c). Rather, it found that the plaintiff had not provided
16 sufficient evidence that Polyvore had acted volitionally, as required to establish direct
17 infringement, and granted summary judgment in favor of Polyvore. *See id.* at 46–48.

18 On appeal, the Second Circuit succinctly found in a per curiam opinion that the district
19 court had erred in granting summary judgment as to direct infringement because “there is a dispute
20 of material fact regarding whether Polyvore created multiple copies of [the plaintiff’s] photos that
21 were not requested by Polyvore users.” *Id.* at 44. In concurrence, Judge Walker noted that he
22 could not determine from the record whether the safe harbor applied because the defendant had
23 not provided evidence about why additional copies of the uploaded images were made. *See id.* at
24 54–55, 57–59. Judge Walker cited the Second Circuit’s opinion in *Viacom*, and said he would
25 remand the case for the district court to apply its reasoning after further factfinding. *Id.* at 59. The
26 opinion in *Polyvore*, however, does not provide concrete guidance for the application of *Viacom* or
27 the safe harbor.

28 Ultimately, Plaintiff appears to dislike that Pinterest obtains revenue from advertisements

1 on its platform, on which Plaintiff’s artwork also appears. However, courts have not withheld safe
2 harbor protection simply because service providers advertise on their platforms alongside user-
3 uploaded content. In *UMG*, the Ninth Circuit noted that “Veoh generates revenue from
4 advertising displayed along with the videos” on its platform. *See* 718 F.3d at 1011. In
5 *Motherless*, the Ninth Circuit considered whether safe harbor protection should extend to a
6 pornography website. *See* 855 F.3d at 600–01, 606. Users could upload images and videos, and
7 the plaintiff alleged that the website contained clips of its copyrighted movies. *See id.* at 602–03.
8 In determining whether materials on the site were there “by reason of the storage and at the
9 direction of a user,” the Ninth Circuit focused on the fact that users—and not the plaintiff—
10 actually uploaded the pictures and videos. *See id.* at 604–08. The fact that the website had an
11 incentive program, in which users received credits for the most popular material on the site, did
12 not change the analysis. *See id.*; *see also id.* at 613. Ultimately, the court reasoned that the
13 images and videos were “up on the site[] because the users put them there.” *See id.* at 606. As in
14 *UMG*, the court noted that 85% of the website’s revenue came from advertisements, and that
15 “more views would lead to more advertising revenue.” *See id.* at 600-01, 613. But the Ninth
16 Circuit still held that its activities were protected by § 512(c). *See id.* at 604–20.

17 As in *UMG* and *Motherless*, Plaintiff’s works appear on Pinterest because users upload
18 them. And Pinterest creates optimized copies and uses algorithms to enhance users’ access to
19 these images. There thus is no triable issue of fact as to whether Plaintiff’s claim for copyright
20 infringement arises “by reason of the storage at the direction of a user of material that resides on”
21 the service provider’s system. 17 U.S.C. § 512(c)(1).

22 **iii. Right and Ability to Control the Infringing Activity**

23 The record here also reflects no triable issue of fact as to whether Pinterest had the “right
24 and ability to control” the infringing activity. Section 512(c) is unavailable to a service provider
25 where “the service provider has the right and ability to control [infringing] activity.” 17 U.S.C.
26 § 512(c)(1)(B). The Ninth Circuit has explained that the right and ability to control the infringing
27 activity means “something more than merely having the general ability to locate infringing
28 material and terminate users’ access.” *See Fung*, 710 F.3d at 1045 (quotation omitted). Rather,

1 “the service provider must [also] exert[] substantial influence on the activities of users.” *See id.*
 2 (quotation omitted). In *UMG*, the Court explained that the right and ability to control could also
 3 include “purposeful conduct” that intentionally induces infringing activity by users. 718 F.3d at
 4 1030; *accord Motherless*, 885 F.3d at 613 (affirming grant of summary judgment to service
 5 provider where “uploaders, not [defendant], controlled what was uploaded” and “there was
 6 nothing in the uploaded video clips to identify their infringing nature”).

7 In *Fung*, the Ninth Circuit held that there was “overwhelming evidence” that the plaintiff
 8 had “engaged in culpable, inducing activity,” and therefore did not qualify for the § 512(c) safe
 9 harbor. 710 F.3d at 1046. The plaintiff operated peer-to-peer filing sharing websites that
 10 collected and indexed torrent files. *See id.* at 1027–29. These sites both solicited torrent files
 11 from users and collected torrent files from *other* torrent sites. *See id.* The Ninth Circuit held that
 12 the plaintiff was ineligible for protection under § 512(c) because:

13
 14 Fung organized torrent files on his sites using a program that matches
 15 file names and content with specific search terms describing material
 16 likely to be infringing, such as “screener” or “PPV.” And when users
 17 could not find certain material likely to be infringing on his sites,
 18 Fung personally assisted them in locating the files. Fung also
 19 personally removed “fake[], infected, or otherwise bad or abusive
 20 torrents” in order to “protect[] the integrity of [his websites’] search
 21 index[es].”

22 *Id.* at 1046 (alterations in original).

23 These cases focus on the control that defendants have over users’ infringing activity.
 24 *Accord Motherless*, 885 F.3d at 613 (“Nothing in the record suggests that Motherless told its users
 25 what to upload. . . . [T]he uploaders, not Motherless, controlled what was uploaded.”). There is
 26 no evidence in the record that Pinterest exercises this kind of control. Users upload content, and
 27 Pinterest does not direct them to upload any specific content. *See, e.g., DeChant Decl.* at ¶¶ 2, 4.

28 Plaintiff emphasizes that “Pinterest has sole control over how it displayed [Plaintiffs’
 works] among paid advertisement in search results, the ‘home feed,’ and ‘related Pins’ feeds, and
 users cannot opt out of these feeds.” *See Dkt. No. 176* at 11. But again, he does not explain how
 the use of algorithms or the existence of advertisement on the platform constitutes infringing

1 activity. Nor does he explain how Pinterest’s control over its algorithms or the advertising on its
2 platform constitutes the kind of control that is necessary to lose safe harbor protection under
3 § 512(c). The Court finds this conduct indistinguishable from that of YouTube in *Viacom*, and
4 thus concludes that Pinterest meets the second requirement for the safe harbor.

5 **iv. Financial Benefit from the Infringing Activity**

6 Lastly, to show the required financial benefit, Plaintiff must show that the service provider
7 earned revenue “distinctly attributable to the infringing material at issue.” *Motherless*, 885 F.3d at
8 613.

9 As an initial matter, Plaintiff has not identified evidence that Pinterest received any
10 financial benefit from an advertisement that appeared in proximity to one of the specific alleged
11 infringements in this case. During the hearing on these motions, Plaintiff’s counsel explained that
12 they attempted to obtain financial information from Pinterest through discovery, but were
13 ultimately unsuccessful. *See* MSJ Tr. at 15:14–16:15. Plaintiff’s counsel therefore acknowledged
14 that they did not have evidence linking a specific work with any amount of money that Pinterest
15 earned through advertising. Rather, Plaintiff’s argument is that Pinterest’s business model relies
16 on advertising displayed next to organic Pins. *See id.* As counsel urged, “the entirety of
17 Pinterest’s website is to sell advertisement space.” *See id.* at 15:23–24.

18 Plaintiff’s evidence regarding Pinterest’s overall business model, however, does not
19 establish that Pinterest obtained a financial benefit distinctly attributable to the infringement
20 alleged here. The advertisements may be shown in proximity to Plaintiff’s works, but as already
21 explained, the algorithms that Pinterest uses for its advertisements are not associated with those
22 works. *See, e.g.*, Galgon Decl. at ¶ 9. Pinterest uses distinct algorithms to determine the layout of
23 organic Pins and promoted Pins in the same feed. *See* DeChant Decl. ¶ 17; *see also* DeChant
24 Depo. at 100:14–101:5. Therefore, despite Plaintiff’s suggestion, neither advertisers nor Pinterest
25 can target advertisements to appear near any specific organic Pin. *See* Galgon Decl. ¶ 6.
26 Pinterest’s advertisements are instead tailored to the Pinterest *user*. *See id.* An advertiser, for
27 example, may choose to target Pinterest users of a certain demographic, age, or gender. The Court
28 need not opine on the desirability as a policy matter of advertisers gaining such detailed insight

1 into users' behavior and history. It is enough for purposes of this opinion that such targeting does
2 not generate revenue "directly attributable" to Plaintiff's works.

3 At bottom, Plaintiff's theory appears to be that by displaying his works at all, Pinterest is
4 able to drive traffic to Pinterest's website, where it derives revenue from separate advertising. The
5 Ninth Circuit has explicitly held that this is not sufficient. In the context of the pornography
6 website in *Motherless*, the Court acknowledged that "[o]f course, the more pornography
7 Motherless had, the more users it would attract, and more views would lead to more advertising
8 revenue." *See Motherless*, 885 F.3d at 613. But "[t]he words 'the' and 'directly' in the statute . . .
9 must mean that some revenue has to be distinctly attributable to the infringing material at issue."
10 *Id.* The Ninth Circuit thus concluded that the service provider could not lose its safe harbor
11 protection absent "evidence that Motherless made [] money directly from the [clips of the
12 plaintiff's movies]." *Id.* The same principle controls here.

13 * * *


14 The Court finds that there are no disputes as to any material facts relating to the DMCA
15 safe harbor. The DMCA safe harbor applies in this case and bars Plaintiff's direct infringement
16 claim. The Court therefore need not address whether Plaintiff has met his burden of establishing
17 direct copyright infringement.

18 **IV. CONCLUSION**

19 Accordingly, the Court **GRANTS** Pinterest's motion for summary judgment and **DENIES**
20 Plaintiff's motion. The Clerk is directed to enter judgment in favor of Defendant and to close the
21 case. Dkt. Nos. 185, 186, 187, 188, 189 are **TERMINATED** as moot.

22 **IT IS SO ORDERED.**

23 Dated: 5/3/2022

24 
25 HAYWOOD S. GILLIAM, JR.
26 United States District Judge
27
28