

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 19 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HARRISON SNOW KINSLEY,

Plaintiff-Appellant,

v.

UDEMY, INC., a Delaware Corporation,

Defendant-Appellee.

No. 21-15787

D.C. No. 3:19-cv-04334-JSC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, Magistrate Judge, Presiding

Submitted October 17, 2022**
San Francisco, California

Before: CLIFTON, NGUYEN, and OWENS, Circuit Judges.

Harrison Snow Kinsley appeals the district court's grant of summary judgment in favor of Udemy, Inc., on his action alleging copyright infringement and other related claims. We have jurisdiction under 28 U.S.C. § 1291. We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

review de novo the district court’s summary judgment. *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). We review the district court’s rulings on Kinsley’s motions to file under seal, Kinsley’s request to modify the schedule, and oral argument on Udeemy’s summary judgment motion for abuse of discretion. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (applying abuse of discretion standard to decision relating to sealing); *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 983 (9th Cir. 2011) (same as to decision on motion to amend scheduling order); *Mahon v. Credit Bureau, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (same as to district court decision not to hear oral argument). We affirm.

1. The district court correctly held that, as to Kinsley’s copyright infringement claims, Udeemy satisfied all the requirements under the Digital Millennium Copyright Act’s (“DMCA”) safe harbor provision.¹ *See* 17 U.S.C. § 512(c). Kinsley argues that Udeemy did not reasonably implement a repeat infringer policy as required under § 512(i) because Udeemy did not immediately ban the users that uploaded his courses. To the contrary, the record shows that Udeemy maintained both internal and public-facing repeat infringer policies and

¹ We need not address Kinsley’s argument that Udeemy is not a service provider as defined in 17 U.S.C. § 512(k)(1)(B) because Kinsley contests this issue for the first time on appeal. Therefore, this argument has been waived. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546 n.15 (9th Cir. 1991).

that it banned the instructors who posted the courses at issue, even if not immediately. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007). Moreover, no admissible evidence in the record shows that Udemey had actual or “red flag” knowledge of the infringing material. *See* 17 U.S.C. § 512(c)(1)(A); *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013). Udemey also has no “right and ability to control” the infringing activity, and its implementation of a non-substantive quality review process does not constitute the exercise of “substantial influence on the activities of users.” *UMG Recordings*, 718 F.3d at 1030 (citation omitted); 17 U.S.C. § 512(c)(1)(B). Finally, there is no triable issue of fact on whether Udemey responded expeditiously. *See* 17 U.S.C. § 512(c)(1)(C). The courses are no longer published—one was removed within three days of Kinsley’s report, the other removed the same day—and the associated instructors are banned. Accordingly, Udemey meets the requirements of § 512(c)’s safe harbor provision.

2. The district court correctly concluded that Kinsley’s non-copyright claims are preempted by the Copyright Act. On appeal, Kinsley focuses on his misappropriation claim, which does not “protect rights which are qualitatively different from the copyright rights.” *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987), *abrogated on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The same is true for his other state law claims.

Therefore, his remaining claims are preempted by the Copyright Act.

3. Kinsley raises additional arguments as to other rulings by the district court, none of which has merit. The district court did not abuse its discretion in denying Kinsley's motions to file under seal because he failed to follow the district's local rules. *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979). The district court acted well within its discretion in declining to amend the discovery schedule when Udey's production, which occurred after the close of discovery, consisted of only nine, mostly redundant documents. Kinsley had weeks to review those documents and decide whether to attach them to his opposition to the summary judgment motion. Kinsley did not "diligently pursue[] [his] previous discovery opportunities" and did not "show how allowing additional discovery would have precluded summary judgment." *Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002) (citation omitted).² Finally, the district court did not abuse its discretion in deciding the summary judgment motion without an oral hearing. Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

AFFIRMED.

² Kinsley filed two pending motions to supplement the record on appeal (Dkt. Nos. 23, 63). We deny the motions.