

Mark A. Lemley (State Bar No. 155830)  
**LEX LUMINA PLLC**  
745 Fifth Avenue, Suite 500  
New York, NY 10151  
Telephone: (646) 898-2055  
Facsimile: (646) 906-8657  
Email: mlemley@lex-lumina.com

Nicole M. Jantzi (*pro hac vice*)  
Paul M. Schoenhard (*pro hac vice*)  
**FRIED, FRANK, HARRIS, SHRIVER  
& JACOBSON LLP**  
801 17th Street NW  
Washington, DC 20006  
Telephone: (202) 639-7254  
Email: nicole.jantzi@friedfrank.com  
paul.schoenhard@friedfrank.com

(Additional counsel on signature page)

*Counsel for Defendant Stability AI, Inc. and Stability AI Ltd.*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

SARAH ANDERSEN, an individual;  
KELLY MCKERNAN, an individual;  
KARLA ORTIZ, an individual,

Individual and Representative Plaintiffs,

v.

STABILITY AI, LTD., a UK corporation;  
STABILITY AI, INC., a Delaware  
corporation;  
MIDJOURNEY, INC., a Delaware  
corporation;  
DEVIANTART, INC., a Delaware  
corporation,

Defendants.

CASE NO. 3:23-cv-00201-WHO

**DEFENDANTS STABILITY AI, LTD AND  
STABILITY AI, INC.'S AMENDED  
NOTICE OF MOTION, MOTION TO  
DISMISS, AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS**

Date: July 19, 2023  
Time: 2:00 p.m.  
Place: Courtroom 2 - 17<sup>th</sup> Floor  
Before: Hon. William H. Orrick

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on July 19, 2023, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, Courtroom 2, 17th Floor, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendants Stability AI Ltd. and Stability AI, Inc., through their undersigned counsel, will, and hereby do, move to dismiss Plaintiffs' Class Action Complaint ("Compl." or "Complaint") pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6).

Stability AI Ltd. and Stability AI Inc.'s Motion to Dismiss ("Motion") is based on this Notice, the supporting Memorandum of Points and Authorities, Request for Judicial Notice, Declaration of Paul M. Schoenhard and exhibits thereto, the complete files and records in this action, and any additional material and arguments as may be considered in connection with the hearing on the Motion.

**ISSUES TO BE DECIDED:**

1. Whether Plaintiffs' claims of direct and vicarious copyright infringement (Counts I and II) should be dismissed for any works that do not comply with 17 U.S.C. § 411(a);
2. Whether Plaintiffs' claim of direct copyright infringement (Count I) should be dismissed to the extent that it is based on output images for failure to identify the allegedly infringing works and for lack of substantial similarity;
3. Whether Plaintiffs' claim of vicarious copyright infringement (Count II) should be dismissed for failure to identify an act of direct infringement or plead any elements of the claim;
4. Whether Plaintiffs' Digital Millennium Copyright Act claim (Count III) should be dismissed for failure to plead facts to satisfy the elements of the claim;
5. Whether Plaintiffs' statutory and common-law right of publicity claims (Counts IV and V) should be dismissed because they are preempted by Section 301(a) of the Copyright Act and otherwise fail to state a claim upon which relief can be granted;
6. Whether Plaintiffs' unfair competition claim (Count VI) should be dismissed because it is preempted by federal copyright law; and

7. Whether Plaintiffs' declaratory relief claim (Count VII) is improper and should be dismissed in its entirety because it is duplicative or otherwise be dismissed to the extent Plaintiffs have failed to state the underlying claims.

**RELIEF SOUGHT:** Stability AI Ltd. and Stability AI, Inc. seek an order dismissing all claims against them under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Dated: April 18, 2023

Respectfully submitted,

s/ Paul M. Schoenhard

Mark A. Lemley (State Bar No. 155830)  
**LEX LUMINA PLLC**  
745 Fifth Avenue, Suite 500  
New York, NY 10151  
Telephone: (646) 898-2055  
Facsimile: (646) 906-8657  
Email: mlemley@lex-lumina.com

Nicole M. Jantzi (*pro hac vice*)  
Paul M. Schoenhard (*pro hac vice*)  
**FRIED, FRANK, HARRIS, SHRIVER  
& JACOBSON LLP**  
801 17th Street NW  
Washington, DC 20006  
Telephone: (202) 639-7254  
Email: nicole.jantzi@friedfrank.com  
paul.schoenhard@friedfrank.com

Michael C. Keats (*pro hac vice*)  
Amir R. Ghavi (*pro hac vice*)  
**FRIED, FRANK, HARRIS, SHRIVER  
& JACOBSON LLP**  
One New York Plaza  
New York, NY 10004  
Telephone: (212) 859-8000  
Email: michael.keats@friedfrank.com  
amir.ghavi@friedfrank.com

***Counsel for Defendants Stability AI, Inc.  
and Stability AI Ltd.***

## TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT .....	1 -
II.	STATEMENT OF RELEVANT FACTS .....	2 -
III.	LEGAL STANDARD .....	3 -
IV.	ARGUMENT .....	4 -
A.	The Court Should Dismiss Counts I And II to the Extent Plaintiffs Did Not Register Their Copyrights Before Filing Suit. ....	4 -
B.	Count I Should be Dismissed to the Extent it is Based on Output Images. ....	6 -
C.	Count II Should be Dismissed Because Plaintiffs Do Not Adequately Plead Underlying Direct Infringement. ....	7 -
D.	Count III Should be Dismissed for Failure to Plead DMCA Violations. ....	9 -
E.	Plaintiffs’ Right of Publicity Claims are Preempted. ....	10 -
1.	Plaintiffs’ claims fall within the subject matter of copyright. ....	11 -
2.	Plaintiffs’ claims seek to protect “rights” that are equivalent to the exclusive rights of copyright holders. ....	16 -
F.	The Court Should Dismiss Plaintiffs’ Right of Publicity Claims for Failure to State a Claim upon Which Relief Can Be Granted. ....	17 -
a.	Plaintiffs do not sufficiently allege the Stability Defendants use their identities. ....	18 -
b.	Plaintiffs do not allege sufficient identity use “on or in products” or for purposes of advertising, selling, or soliciting purchases. ....	20 -
c.	Plaintiffs do not sufficiently allege that Defendants knowingly used their identities in a manner directly connected to a commercial purpose. ....	22 -
d.	Plaintiffs’ alleged injuries show that they were not injured by identity misappropriation. ....	23 -
G.	Plaintiffs’ Unfair Competition Claims are Preempted. ....	23 -
H.	Plaintiffs’ Declaratory Relief Claim Is Improper. ....	24 -
V.	CONCLUSION .....	25 -

## TABLE OF AUTHORITIES

## Page(s)

## Cases

<i>In re Adobe Sys., Inc. Priv. Litig.</i> , 66 F. Supp. 3d 1197 (N.D. Cal. 2014) .....	25
<i>Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt., Inc.</i> , 744 F.3d 595 (9th Cir. 2014).....	7, 8
<i>In re Apple Inc. Device Performance Litig.</i> , 386 F. Supp. 3d 1155 (N.D. Cal. April 22, 2019) .....	3
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	3
<i>Becton, Dickinson &amp; Co. v. Cytex Biosciences Inc.</i> , 2020 WL 1877707 (N.D. Cal. Apr. 15, 2020) .....	6, 8
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	3
<i>U.S. ex. Rel. Berge v. Bd. of Tr. of the Univ. of Ala.</i> , 104 F.3d 1453 (4th Cir. 1997).....	11, 14
<i>Bespaq Corp. v. Haoshen Trading Co.</i> , No. 04-3698, 2005 WL 14841 (N.D. Cal. Jan. 3, 2005) .....	4
<i>Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.</i> , 149 F. Supp. 3d 1167 (N.D. Cal. 2015) .....	6
<i>Bonin v. Calderon</i> , 59 F.3d 815 (9th Cir. 1995).....	6
<i>Carlini v. Paramount Pictures Corp.</i> , No. 21-55213 (9th Cir. Mar. 2, 2022) .....	6, 8
<i>Carson v. Here's Johnny Portable Toilets</i> , 698 F.2d 831 (6th Cir. 1983).....	19, 20
<i>Comedy III Productions, Inc. v. Gary Saderup, Inc.</i> , 25 Cal.4th 387 (2001).....	21
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003) .....	24
<i>Dolls Kill, Inc. v. Zoetop Business Co.</i> , 2022 WL 16961477 (C.D. Cal. Aug. 25, 2022) .....	10

1	<i>Downing v. Abercrombie &amp; Fitch,</i>	
2	265 F.3d 994 (9th Cir. 2001).....	13, 15
3	<i>Editorial Photocolor Archives, Inc. v. Granger Collection,</i>	
4	61 N.Y.2d 517 (N.Y. 1984).....	11
5	<i>Entous v. Viacom Int'l, Inc.,</i>	
6	151 F. Supp. 2d 1150 (C.D. Cal. 2001).....	14, 17
7	<i>Falkner v. GM, LLC,</i>	
8	393 F. Supp. 3d 927 (C.D. Cal. 2018).....	10
9	<i>Faulkner Press, L.L.C. v. Class Notes, L.L.C.,</i>	
10	756 F. Supp. 2d 1352 (N.D. Fla. 2010).....	10
11	<i>Fisher v. Nissel,</i>	
12	No. CV 21-5839, 2022 WL 16961479 (C.D. Cal. Aug. 15, 2022) .....	4
13	<i>Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC,</i>	
14	139 S. Ct. 881 (2019) .....	4, 5
15	<i>Free Speech Sys., LLC v. Menzel,</i>	
16	390 F. Supp. 3d 1162 (N.D. Cal. 2019) .....	9
17	<i>Harrington v. Pinterest, Inc.,</i>	
18	2022 WL 4348460 (N.D. Cal. Sept. 19, 2022).....	9, 10
19	<i>Izmo, Inc. v. Roadster, Inc.,</i>	
20	No. 18-cv-06092, 2019 WL 2359228 (N.D. Cal. June 4, 2019) .....	5
21	<i>Jewelry 10, Inc. v. Elegance Trading Co.,</i>	
22	No. 88-cv-1320, 1991 WL 144151 (S.D.N.Y. July 20, 1991) .....	14
23	<i>Jules Jordan Video, Inc. v. 144942 Canada, Inc.,</i>	
24	617 F.3d 1146 (9th Cir. 2010).....	12, 13
25	<i>Kiely v. Universal Music Grp.,</i>	
26	2020 WL 4037161 (C.D. Cal. Mar. 5, 2020) .....	6
27	<i>Kifle v. Youtube LLC,</i>	
28	2021 WL 1530942 (N.D. Cal. Apr. 19, 2021) .....	5
	<i>Kodadek v. MTV Networks, Inc.,</i>	
	152 F.3d 1209 (9th Cir. 1998).....	24
	<i>Laws v. Sony Music Ent., Inc.,</i>	
	448 F.3d 1134 (9th Cir. 2006).....	11, 13, 16, 17
	<i>Levitt v. Yelp! Inc.,</i>	
	765 F.3d 1123 (9th Cir. 2014).....	3

1	<i>Lions Gate Entertainment Inc. v. TD Ameritrade Servs. Co., Inc.</i> ,	
2	170 F. Supp. 3d 1249 (C.D. Cal. 2016).....	24
3	<i>Litchfield v. Spielberg</i> ,	
4	736 F.2d 1352 (9th Cir. 1984).....	7
5	<i>Lykkeberg v. Bank of Am., N.A.</i> ,	
6	2012 WL 1099773 (N.D. Cal. Apr. 2, 2012) .....	25
7	<i>Maloney v. T3Media, Inc.</i> ,	
8	853 F.3d 1004.....	<i>passim</i>
9	<i>Melendez v. Sirius XM Radio, Inc.</i> ,	
10	2021 WL 2593471 (S.D.N.Y. June 24, 2021).....	16
11	<i>Mir v. Little Co. of Mary Hosp.</i> ,	
12	844 F.2d 646 (9th Cir. 1988).....	5
13	<i>In re NCAA Student-Athlete Name &amp; Likeness Licensing Litig.</i> ,	
14	724 F.3d 1268 (9th Cir. 2013).....	18, 22, 23
15	<i>New Day Worldwide Inc. v. Swift</i> ,	
16	2020 WL 6050700 (C.D. Cal. July 21, 2020) .....	6
17	<i>North Star Int’l v. Arizona Corp. Commission</i> ,	
18	720 F.2d 578 (9th Cir. 1983).....	3
19	<i>Obado v. Magedson</i> ,	
20	2014 WL 3778261 (D.N.J. July 30, 2014) .....	20
21	<i>Parziale v. HP, Inc.</i> ,	
22	2020 WL 5798274 (N.D. Cal. Sept. 29, 2020).....	7, 8
23	<i>Perfect 10, Inc. v. Giganews, Inc.</i> ,	
24	847 F.3d 657 (9th Cir. 2017).....	8
25	<i>Perfect 10, Inc. v. Google, Inc.</i> ,	
26	2010 WL 9479060 (C.D. Cal. July 30, 2010) .....	20
27	<i>Perfect 10, Inc. v. Visa Serv. Ass’n</i> ,	
28	494 F.3d 788 (9th Cir. 2007).....	7, 8
	<i>Perfect 10, Inc. v. Yandex N.V.</i> ,	
	962 F. Supp. 2d 1146 (N.D. Cal. 2013) .....	4, 7
	<i>Ricketts v. Haah</i> ,	
	2013 WL 3242947 (C.D. Cal. June 26, 2013).....	5
	<i>In re Silicon Graphics, Inc. Sec. Litig.</i> ,	
	183 F.3d 970 (9th Cir. 1999).....	3

1	<i>Skidmore v. Led Zeppelin</i> ,	
2	952 F.3d 1051 (9th Cir. 2020) .....	6
3	<i>Slep-Tone Ent. Corp. v. Wired for Sound Karaoke &amp; DJ Servs., LLC</i> ,	
4	845 F.3d 1246 (9th Cir. 2017) .....	24
5	<i>Stevens v. Corelogic</i> ,	
6	899 F.3d 666 (9th Cir. 2018) .....	9
7	<i>Sybersound Records, Inc. v. UAV Corp.</i> ,	
8	517 F.3d 1137 (9th Cir. 2008) .....	24
9	<i>Takeda Pharm. Co., Ltd. v. Mylan Inc.</i> ,	
10	62 F. Supp. 3d 1115 (N.D. Cal. 2014) .....	25
11	<i>United States v. Washington</i> ,	
12	759 F.2d 1353 (9th Cir. 1985) .....	25
13	<i>Vault Corp v. Quaid Software Ltd.</i> ,	
14	847 F.2d 255 (5th Cir. 1988) .....	7
15	<i>Waits v. Frito-Lay, Inc.</i> ,	
16	978 F.2d 1093 (9th Cir. 1992) .....	18, 20
17	<i>White v. Samsung Elecs, Am., Inc.</i> ,	
18	971 F.2d 1395 (9th Cir. 1992) .....	18, 19, 20
19	<i>Wixen Music Publ., Inc. v. Triller, Inc.</i> ,	
20	No. CV-20-10515, 2021 WL 1255190 (C.D. Cal. Feb. 24, 2021) .....	5
21	<i>Zeleny v. Burge</i> ,	
22	2022 WL 3013138 (C.D. Cal. July 1, 2022) .....	5
23	<b>Statutes</b>	
24	17 U.S.C. § 101 .....	11, 12, 13
25	17 U.S.C. § 102(a) .....	11
26	17 U.S.C. § 103(a) .....	12
27	17 U.S.C. § 106 .....	11, 16, 17
28	17 U.S.C. § 301(a) .....	11
	17 U.S.C. § 411(a) .....	4, 5
	17 U.S.C. § 1202(b) .....	9
	47 U.S.C. § 230 .....	22

1 California Civil Code § 3344 ..... 18, 21

2 **Other Authorities**

3 6 Patry on Copyright § 18:16 ..... 17

4 10B Charles A. Wright & Arthur R. Miller,

5 Fed. Prac. & Proc. Civ. § 2751..... 25

6 J. Thomas McCarthy & Roger E. Schechter,

7 Rights of Publicity and Privacy § 11.51 ..... 19

8 Restatement (Second) of Torts § 652C cmt. d ..... 19

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. PRELIMINARY STATEMENT**

Defendant Stability AI Ltd.<sup>1</sup> (“Stability AI”) is at the forefront of the burgeoning generative artificial intelligence (“AI”) industry, rapidly expanding the boundaries of human creativity and capability while maintaining a commitment to make its technology available to all. Stable Diffusion, meanwhile, is an open-source generative AI text-to-image model that has rapidly become a base model for developers and artists around the world. Users of Stable Diffusion (and Stability AI’s DreamStudio) can input prompts of their choosing to generate creative, entirely novel images.

To enable this functionality, Stable Diffusion was trained on *billions* of images that were publicly available on the Internet. To be clear, training a model does not mean copying or memorizing images for later distribution. Indeed, *Stable Diffusion does not “store” any images*. Rather, training involves development and refinement of millions of parameters that collectively define—in a learned sense—what things look like. Lines, colors, shades, and other attributes associated with innumerable subjects and concepts. The purpose of doing so is not to enable the models to reproduce copies of training images. If someone wanted to engage in wholesale copying of images from the Internet, there are far easier methods to do so, including cutting and pasting an image and perhaps using tools like Photoshop to edit them.

Nor is Stable Diffusion a “collage tool.” Instead, Stable Diffusion enables users to create entirely new and unique images utilizing simple word prompts. As the Complaint concedes, *“none of the Stable Diffusion output images provided in response to a particular Text Prompt is likely to be a close match for any specific image in the training data.”* (Compl. ¶ 93.)

So if and when this Court is forced to address any of Plaintiffs’ copyright claims involving Stable Diffusion on the merits, Stability AI is confident that only one conclusion can be reached: *Stability AI enables creation; it is not a copyright infringer.*

---

<sup>1</sup> Stability AI consents to personal jurisdiction in this District solely for purposes of this action and any others raising substantially similar claims arising under the Copyright Act, DMCA and/or Lanham Act. Stability AI’s participation in this litigation should not be construed as consent to personal jurisdiction in this District for any other purpose or as a waiver of its right to contest personal jurisdiction in any other action.

On a motion to dismiss, however, Plaintiffs’ allegations must be accepted as true, although in many cases they are not. But even so, Plaintiffs’ claims fail on the pleadings.

First, it is well-settled that a copyright owner must register her works with the Copyright Office *before* filing a lawsuit for alleged copyright infringement. Plaintiffs and their counsel know this. But Andersen alleges only that she registered sixteen collections of her works; and McKernan and Ortiz did not register any. McKernan and Ortiz’s copyright claims—and any claim Andersen may present with respect to unregistered works—fail for that reason alone.

Meanwhile, Plaintiffs present scattershot claims that fail to allege any facts to support necessary elements or that otherwise fail as a matter of law. Plaintiffs’ direct copyright infringement claim based on output images fails for the independent reason that Plaintiffs do not allege a *single* act of direct infringement, let alone any output that is substantially similar to Plaintiffs’ artwork. Plaintiffs’ vicarious copyright claim suffers from the same deficiency, plus the additional flaw that Plaintiffs make no effort to plead facts in support of the remaining elements of such claim. Plaintiffs’ Digital Millennium Copyright Act (“DMCA”) claim also fails multiple times over because Plaintiffs do not allege a *single* work from which copyright management information was allegedly altered or removed, explain what CMI was allegedly removed, or allege any facts to support the double-scienter requirement. Further, Plaintiffs’ right-of-publicity claims are expressly preempted by the Copyright Act because they are simply efforts to recast copyright claims under other legal rubrics. In any event, Plaintiffs offer no more than a bare recitation of the elements of such claims with cursory allegations that “Defendants” (collectively, but neither individually nor with any specificity) somehow violated their rights of publicity. But Stability AI has not made any knowing use of Plaintiffs’ names or likenesses, much less for any commercial purposes or in a way that injured Plaintiffs. Finally, Plaintiffs’ unfair competition claim is also preempted, and their duplicative claim for declaratory relief is improper and serves no useful purpose.

Accordingly, Stability AI and its parent company, Stability AI, Inc. (collectively, “Stability Defendants”), respectfully request that this Court grant their motion to dismiss.

## **II. STATEMENT OF RELEVANT FACTS**

For purposes of this motion, all allegations in the Complaint (ECF No. 1) are read in the

light most favorable to Plaintiffs and assumed to be true. Defendants’ recitation of and/or reliance on such allegations in the arguments below should not be understood as an admission that any such allegations are, in fact, true.

Outside the Complaint, however, the Court can confirm and can take judicial notice of the following additional facts:

- Plaintiff McKernan did not register any copyrighted works prior to filing suit. Decl.<sup>2</sup> ¶ 5.
- Plaintiff Ortiz did not register any copyrighted works prior to filing suit. *Id.* ¶ 6.

### III. LEGAL STANDARD

A Rule 12(b)(6) motion “test[s] the legal sufficiency of the complaint.” *North Star Int’l v. Arizona Corp. Commission*, 720 F.2d 578, 581 (9th Cir. 1983). The complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Claims have “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Plaintiffs must allege “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. While courts must accept well-pleaded factual allegations as true, “threadbare recitals of a cause of action’s elements[] supported by mere conclusory statements” are not “entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 663. A complaint must also “contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)).

In evaluating a motion to dismiss, the court is “limited to the pleadings, documents incorporated-by-reference in the pleadings, and matters of which the court may take judicial notice.” *In re Apple Inc. Device Performance Litig.*, 386 F. Supp. 3d 1155, 1164 (N.D. Cal. April 22, 2019) (citation omitted). If the complaint cannot be saved by an amended pleading, leave to amend should not be granted. *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 991 (9th Cir. 1999).

---

<sup>2</sup> As used herein, Decl.” refers to the Declaration of Paul M. Schoenhard, filed concurrently herewith.

1 **IV. ARGUMENT**

2 **A. The Court Should Dismiss Counts I And II to the Extent Plaintiffs Did Not**  
 3 **Register Their Copyrights Before Filing Suit.**

4 The Supreme Court recently clarified that a copyright owner must register her copyrights  
 5 before filing a claim for alleged infringement. *Fourth Estate Public Benefit Corp. v. Wall-*  
 6 *Street.com, LLC*, 139 S. Ct. 881, 886 (2019) (“Registration occurs, and a copyright claimant may  
 7 commence an infringement suit, when the Copyright Office registers a copyright.”); *see also* 17  
 8 U.S.C. § 411(a) (“[N]o civil action for infringement of the copyright in any United States work shall  
 9 be instituted until preregistration or registration of the copyright claim has been made in accordance  
 10 with this title.”). The registration requirement is “akin to an administrative exhaustion requirement  
 11 that the owner must satisfy before suing to enforce ownership rights.” *Fourth Estate*, 139 S. Ct. at  
 12 887. Accordingly, to state a copyright infringement claim, a plaintiff “must plausibly allege . . . that  
 13 [he] owns a valid copyright registration for [his] work.” *Fisher v. Nissel*, No. CV 21-5839, 2022  
 14 WL 16961479 at \*3 (C.D. Cal. Aug. 15, 2022) (citing *Malibu Textiles, Inc. v. Label Lane Int’l, Inc.*,  
 15 922 F.3d 946, 951 (9th Cir. 2019)). Vicarious copyright infringement claims require the same  
 16 showing. *See Perfect 10, Inc. v. Yandex N.V.*, 962 F. Supp. 2d 1146, 1158 (N.D. Cal. 2013)  
 17 (“[V]icarious liability requires an underlying act of direct infringement”).

18 Here, Plaintiffs present no allegations that McKernan or Ortiz registered any copyrighted  
 19 works before the Complaint was filed. *See* Compl. ¶¶ 29, 30 & *passim*. Accordingly, McKernan’s  
 20 and Ortiz’s copyright infringement claims should be dismissed in their entirety. *See, e.g., Fisher*,  
 21 2022 WL 16961479 (dismissing copyright infringement claim where complaint failed to “allege any  
 22 facts demonstrating Plaintiff had satisfied Section 411(a)’s prefiling registration requirement prior  
 23 to asserting his copyright infringement claim” about particular works).

24 Meanwhile, Plaintiffs’ allegations with respect to Andersen are limited to only 16 registered  
 25 collections, Compl. ¶ 28 & Exs. 1–16, but even then, Plaintiffs do not identify which “Works” from  
 26 Andersen’s collections Defendants allegedly infringed. This falls far short of plausibly alleging that  
 27 any (let alone each) of these works meets Section 411(a)’s registration requirement. *See, e.g.,*  
 28 *Bespaq Corp. v. Haoshen Trading Co.*, No. 04-3698, 2005 WL 14841, at \*2 (N.D. Cal. Jan. 3, 2005)

(dismissing copyright claim under Section 411(a) because complaint “d[id] not identify which preexisting works in the registered catalog have been infringed by the defendants”).

To the extent the Court wonders whether Plaintiffs’ error is simply one of inartful pleading, the Stability Defendants submit that it is not. Indeed, there can be no doubt that Plaintiffs and their counsel were well aware of the pre-filing registration requirement, as Plaintiffs affirmatively plead that *Andersen* (but not McKernan or Ortiz) “complied with the statutory requirements for registration.” Compl. ¶ 28. Nor do McKernan or Ortiz actually have copyright registrations they merely failed to plead. On this point, this Court may “take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss.” *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988). And indeed, courts regularly take notice that the U.S. Copyright Office has or has not granted a plaintiff copyright registration for their works. *See, e.g., Ricketts v. Haah*, 2013 WL 3242947, at \*2 (C.D. Cal. June 26, 2013) (taking judicial notice that “according to the Copyright Office database, Plaintiffs have not registered any copyrights”); *see also, e.g., Wixen Music Publ., Inc. v. Triller, Inc.*, No. CV-20-10515, 2021 WL 1255190, at \*3 (C.D. Cal. Feb. 24, 2021) (“Copyright certificates are the type of documents that the court may judicially notice under Rule 201(b)(2).”) (collecting cases). Here, the Copyright Office’s records confirm that neither McKernan nor Ortiz registered copyrights in any works prior to filing suit. *See* Decl. at ¶¶ 5, 6. Plaintiffs’ claims regarding unregistered works should be dismissed.

These faults are fatal to Plaintiffs’ copyright claims and cannot be cured, as “permitting amendment to cure a claimant’s failure to register its copyright before suing would undermine the objectives animating the Supreme Court’s decision in *Fourth Estate*.” *Izmo, Inc. v. Roadster, Inc.*, No. 18-cv-06092, 2019 WL 2359228 at \*2 (N.D. Cal. June 4, 2019); *see also, e.g., Kifle v. Youtube LLC*, 2021 WL 1530942, at \*6 (N.D. Cal. Apr. 19, 2021) (“By tying the registration requirement to when a ‘civil action’ is ‘instituted,’ the plain language of § 411(a) refers to the beginning of a lawsuit, not the filing of an amended pleading.”) (collecting cases).

Accordingly, the direct and vicarious copyright infringement claims of Plaintiffs McKernan, Ortiz and Andersen should be dismissed with prejudice and without leave to amend. *See, e.g., Zeleny v. Burge*, 2022 WL 3013138 (C.D. Cal. July 1, 2022) (dismissing with prejudice where

plaintiffs failed to register their copyrights before initiating suit); *New Day Worldwide Inc. v. Swift*, 2020 WL 6050700 (C.D. Cal. July 21, 2020) (similar); *Kiely v. Universal Music Grp.*, 2020 WL 4037161 (C.D. Cal. Mar. 5, 2020) (similar); *see also Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (futility is sufficient grounds to deny leave to amend).

**B. Count I Should be Dismissed to the Extent it is Based on Output Images.**

Independently, Plaintiffs' direct copyright infringement claim also fails to the extent it is based on allegedly infringing images generated by users of Stable Diffusion or DreamStudio (*i.e.*, "output images"). To allege direct copyright infringement, Plaintiffs must sufficiently allege unlawful appropriation and copying. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc). Unlawful appropriation requires a plaintiff to allege that there are "substantial similarities" between the allegedly copied and allegedly infringing works. *Id.* But Plaintiffs' output-image-based allegations do not meet this standard, and Plaintiffs readily admit that output images from Stable Diffusion can never do so.

As an initial matter, Plaintiffs fail to identify a single allegedly infringing output image, let alone one that is substantially similar to any of their copyrighted works. Much to the contrary, Plaintiffs affirmatively plead that "[i]n general, none of the Stable Diffusion output images provided in response to a particular Text Prompt is likely to be a close match for any specific image in the training data." Compl. ¶ 93. Where, as here, Plaintiffs fail to make "any allegations of even representative infringements," and themselves allege that there is *not* substantial similarity between their works and any output images, the Complaint fails to allege direct copyright infringement. *Becton, Dickinson & Co. v. Cytex Biosciences Inc.*, 2020 WL 1877707, at \*6 (N.D. Cal. Apr. 15, 2020); *see also, e.g., Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1175 (N.D. Cal. 2015) (dismissing direct copyright infringement claim where Plaintiffs provide no "representative infringement," instead "mak[ing] only general allegations" that "[m]any, if not all, of" allegedly infringing works "are copied or derived from" Plaintiffs' works); *see generally, e.g., Carlini v. Paramount Pictures Corp.*, No. 21-55213 (9th Cir. Mar. 2, 2022) (unpublished) (dismissing for failure to allege unlawful appropriation).

Nor does Plaintiffs' theory that all output images are somehow "necessarily...derivative

work[s]” (Compl. ¶ 90) save their claim. In an apparent effort to upend almost all artistic creation, Plaintiffs’ apparent theory would require finding that any work is a “derivative work” under the Copyright Act simply because it makes reference in any way whatsoever to a prior work. But the Ninth Circuit has rejected this “novel proposition,” reiterating that “substantial similarity” is required to show infringement. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984); *see also Vault Corp v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (“To constitute a derivative work, ‘the infringing work must incorporate in some form a portion of the copyrighted work’. . . [and] **must be substantially similar** to the copyrighted work.”) (quoting *Litchfield*, 736 F.2d at 1357). Plaintiffs’ theory must similarly be rejected.

Count I should be dismissed as to all Plaintiffs to the extent it is based on output images.<sup>3</sup>

**C. Count II Should be Dismissed Because Plaintiffs Do Not Adequately Plead Underlying Direct Infringement.**

Plaintiffs’ vicarious copyright infringement claim independently fails on multiple fronts. To be liable for vicarious copyright infringement, a party must “allege that the defendant has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.” *Perfect 10, Inc. v. Visa Serv. Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007); *see also id.* (“One . . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”) (citing *Metro-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)). In short, “vicarious liability requires an underlying act of direct infringement.” *Perfect 10, Inc. v. Yandex N.V.*, 962 F. Supp. 2d at 1158 (granting summary judgment on vicarious infringement claim where there was no underlying direct infringement). Plaintiffs fail to plead *any* plausible facts to satisfy any element of their vicarious copyright infringement claim.

Fundamentally, Plaintiffs’ vicarious copyright infringement claim fails for the same reason

---

<sup>3</sup> Any future allegation that a specific output image is substantially similar to a training image would contradict Plaintiffs’ current allegations that there is no substantial similarity. *See* Compl. ¶ 93. “A party cannot amend pleadings to ‘directly contradict[t] an earlier assertion made in the same proceeding.’” *Airs Aromatics, LLC v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (citation omitted; alteration in original); *Parziale v. HP, Inc.*, 2020 WL 5798274 (N.D. Cal. Sept. 29, 2020) (finding leave to amend would be futile when it requires “impermissibl[e] contradict[i]ons of] Plaintiff’s prior pleadings”) (collecting cases).

as their direct infringement claim: Plaintiffs do not plead any single, specific act of direct copyright infringement for which either of the Stability Defendants is allegedly vicariously liable. Although Plaintiffs vaguely allege the existence of one or more “Imposters” who have allegedly created “Fakes” (Compl. ¶ 171), Plaintiffs fail to identify any particular output image that is substantially similar to any of their copyrighted works (registered or otherwise).<sup>4</sup> Instead, Plaintiffs affirmatively plead a lack of substantial similarity: “[i]n general, none of the Stable Diffusion output images provided in response to a particular Text Prompt is likely to be a close match for any specific image in the training data.” Compl. ¶ 93. Plaintiffs’ failure to plead a specific act of direct infringement, and their affirmative allegation that there is *not* substantial similarity, must doom their vicarious copyright infringement claim. *See Becton, Dickinson & Co. v. Cytek Biosciences Inc.*, 2020 WL 1877707, at \*6; *see also Carlini*, No. 21-55213. Like Plaintiffs’ direct copyright infringement claim, these failures are not curable. *See Airs Aromatics, LLC v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014); *Parziale v. HP, Inc.*, 2020 WL 5798274 (N.D. Cal. Sept. 29, 2020).

Plaintiffs also fail to make any effort to allege facts that either of the Stability Defendants has (1) “the right and ability to supervise the infringing conduct” or (2) a “direct financial interest in the infringing activity.” *Perfect 10*, 494 F.3d at 802. Nor do Plaintiffs sufficiently allege that there is a “causal link between the infringement of [their] own copyrighted works and any profit to” the Stability Defendants for purposes of the direct financial interest element. *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017). This element requires plausible allegations of a causal link between “the infringement in this case” (i.e., of output images that allegedly infringe on Plaintiffs’ protected works) and a financial benefit to the Stability Defendants. *Id.* (citation omitted). Without allegations of infringing outputs, there is nothing to “link.” And because Plaintiffs cannot allege infringing outputs without contradicting their current allegations, *see supra*, they can never satisfy these elements either. Count II should be dismissed with prejudice.

---

<sup>4</sup> Plaintiffs also do not allege that Imposter-generated output images are the primary use case of Stable Diffusion or DreamStudio, or the extent to which output images are Imposter-generated.

**D. Count III Should be Dismissed for Failure to Plead DMCA Violations.**

Plaintiffs’ DMCA claim is also fatally deficient. In relevant part, the DMCA prohibits (1) intentionally removing or altering copyright management information (CMI), (2) distributing CMI with knowledge that the CMI has been removed or altered, and (3) distributing works with the knowledge that CMI has been removed or altered, while knowing or having reasonable grounds to know that doing so will “induce, enable, facilitate, or conceal an infringement of any” copyright. 17 U.S.C. § 1202(b); *Stevens v. Corelogic*, 899 F.3d 666, 673 (9th Cir. 2018).

Here, Plaintiffs fail to point to a single, specific example of one of their works whose CMI was altered or removed by the Stability Defendants or to what specific CMI was removed from such specific work(s). This alone is grounds for dismissal. *See, e.g., Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1175 (N.D. Cal. 2019) (Orrick, J.) (dismissing a DMCA claim where the plaintiff failed to “provid[e] any facts to identify which photographs had CMI removed or to describe what the removed or altered CMI was”).

Plaintiffs have also not alleged either prong of Section 1202’s “double-scienter requirement” beyond conclusory statements of the elements. Plaintiffs do not make any plausible factual allegations that the Stability Defendants were aware Plaintiffs’ allegedly copyrighted works were scraped, let alone that either of the Stability Defendants “intentionally removed CMI from [their] Works or . . . distributed [their] works knowing that CMI had been removed.” *Harrington v. Pinterest, Inc.*, 2022 WL 4348460, at \*5 (N.D. Cal. Sept. 19, 2022) (dismissing DMCA claim where plaintiff failed to allege that “Pinterest was even aware that any specific Work existed on its Platform,” or “knew that any of his Works contained CMI at the time they were uploaded”). Nor could they do so when Plaintiffs affirmatively plead that Stability AI allegedly scraped over five billion images from the Internet. Compl. ¶ 57. As for whether the Stability Defendants knew, or had reasonable grounds to know, that their actions would “induce, enable, facilitate, or conceal an infringement,” Plaintiffs have failed to “make an affirmative showing, such as by demonstrating a past ‘pattern of conduct’ or ‘modus operandi,’ that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions.” *Stevens*, 899 F.3d at 673-74. Plaintiffs have made no allegations, for example, that the Stability Defendants were aware that

1 Plaintiffs had a practice of including CMI metadata in their works. *See Harrington*, 2022 WL  
 2 4348460, at \*5.<sup>5</sup> Moreover, Plaintiffs cannot satisfy the double scienter requirement because, as  
 3 here, “there can be no knowledge of any removal or alteration if there is no underlying removal or  
 4 alteration.” *Falkner v. GM, LLC*, 393 F. Supp. 3d 927, 939 (C.D. Cal. 2018).

5 Nor could Plaintiffs’ DMCA claim be cured by pointing to a specific output image or CMI.  
 6 DMCA claims require significantly *more than* substantial similarity—they require CMI to be  
 7 removed from a plaintiff’s actual work or an identical copy of their work. *See Dolls Kill, Inc. v.*  
 8 *Zoetop Business Co.*, 2022 WL 16961477, at \*4 (C.D. Cal. Aug. 25, 2022) (“[C]ourts have found  
 9 that no DMCA violation exists where” the work from which CMI was removed and the distributed  
 10 work “are not identical.”) (citation omitted). Here, however, Plaintiffs affirmatively allege that  
 11 output images are not even substantially similar to their copyrighted works (let alone identical copies  
 12 thereof). *See* Compl. ¶ 93. Moreover, even assuming CMI data is absent from Stable Diffusion’s  
 13 or DreamStudio’s output images, such an absence on output images (which are neither identical  
 14 copies nor copies at all) does not constitute “removal or alteration” of CMI. *See id.*; *see also*  
 15 *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1359 (N.D. Fla. 2010) (granting  
 16 judgment as a matter of law to defendant where “nothing was removed from the copyrighted works”,  
 17 but instead “information from [plaintiff’s] courses was allegedly copied into a different form and  
 18 then incorporated into the note packages”). Plaintiffs’ claim should be dismissed with prejudice.  
 19 *See Dolls Kill*, 2022 WL 16961477, at \*4 (dismissing DMCA claim with prejudice where “Plaintiff  
 20 cannot cure the DMCA claim without contradicting the current allegations that support its copyright  
 21 infringement claim”).

#### 22 **E. Plaintiffs’ Right of Publicity Claims are Preempted.**

23 Plaintiffs’ right-of-publicity claims are expressly preempted by the federal Copyright Act.  
 24 The Copyright Act provides the sole remedy for claims invoking rights “equivalent to any of the  
 25

---

26 <sup>5</sup> Plaintiffs do not even allege plausible facts to suggest that the Stability Defendants were  
 27 aware that any Imposters (or anyone else) created or wanted to create output images based on “in  
 28 the style of Sarah Andersen,” “in the style of Kelly McKernan,” or “in the style of Karla Ortiz” Text  
 Prompts. Without such allegations, it is even more implausible that either of the Stability  
 Defendants had the requisite double scienter.

exclusive rights within the general scope of copyright . . . in works of authorship.” 17 U.S.C. § 301(a). Specifically, Section 301 of the Copyright Act seeks “to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright” and that “extend to works, so long as the rights fall within the scope of the Federal copyright law.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th (quoting H.R. Rep. No. 94-1476, at 130 (1976)) (internal quotations omitted). In short, plaintiffs cannot, “by miscasting their causes of action, secure the equivalent of copyright protection under guise of State law.” *Editorial Photocolor Archives, Inc. v. Granger Collection*, 61 N.Y.2d 517, 523 (N.Y. 1984). So if a claim is different from a copyright infringement claim in name only, but otherwise falls under federal copyright law’s purview, it is preempted.

The Ninth Circuit prescribes a two-part test for whether state-law claims are preempted by Section 301. *See Maloney*, 853 F.3d at 1010. First, courts consider “whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.” *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006). Second, assuming it does, courts “must determine whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.” *Id.* at 1138. Where, as here, right of publicity claims satisfy the Ninth Circuit’s two-part test, they must be dismissed with prejudice. *See Maloney*, 853 F.3d at 1011, 1020.

### **1. Plaintiffs’ claims fall within the subject matter of copyright.**

The first prong of the preemption test is satisfied if the “subject matter of the state law claim falls within the subject matter of copyright.” *Laws*, 448 F.3d at 1137. This inquiry focuses on whether the claims concern one of the “original works of authorship fixed in any tangible medium of expression” in Section 102 of the Act, including “pictorial, graphic, and sculptural works.” *Id.*; 17 U.S.C. §§ 101, 102(a); *see also Maloney*, 853 F.3d at 1011. While a copyrightable work by definition falls within the subject matter of copyright, copyrightability is not a necessary prerequisite for preemption as “the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.” *U.S. ex. Rel. Berge v. Bd. of Tr. of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997). In short, claims that concern matters broadly within copyright’s subject matter, even if styled as publicity-right claims, satisfy the first prong and support a finding of preemption.

Here, the subject matter of Plaintiffs’ right of publicity claims squarely falls within the subject matter of copyright. Plaintiffs’ works constitute “pictorial, graphic and sculptural works” or other “fixed” works of authorship, and are therefore clearly subject matter under the Copyright Act. *See* 17 U.S.C. § 101. Plaintiffs allege that this case involves derivative works stemming from these copyrighted works; specifically, that (1) Stable Diffusion and DreamStudio are somehow derivative works containing compressed copies of Plaintiffs’ works,<sup>6</sup> and (2) Stable Diffusion and DreamStudio can be used to create output images that are somehow also “necessarily [] derivative work[s].”<sup>7</sup> Compl. ¶¶ 18, 95. These purported derivative works clearly fall within the subject matter of copyright. *See* 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes compilations and derivative works.”). Plaintiffs therefore allege that all of the works involved in this dispute fall within the subject matter of copyright.

Likely seeking to avoid preemption, Plaintiffs attempt to re-cast their right of publicity claims as ones invoking the use of their names in their statutory claim and their “names and artistic identities” in their common-law claim. *See, e.g.,* Compl. ¶¶ 202-212, 214-222. These attempts should fail. As a threshold matter, courts routinely reject attempts to redefine the subject matter of a right of publicity claim as a plaintiff’s “persona” rather than the subject matter of the Copyright Act when the persona is embodied in a copyrighted work. In *Jules Jordan Video, Inc.*, for example, an actor claimed that defendants violated his right of publicity by (1) reproducing, counterfeiting, and selling copies of his films that included his name, likeness, photograph, and voice; and (2) by using his name and likeness on the counterfeit DVD covers. *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1153-54 (9th Cir. 2010). The Court rejected these contentions, reaching the “obvious conclusion” that the “factual basis of [the plaintiff’s] right of publicity claim

---

<sup>6</sup> To be clear, Plaintiffs’ allegations in this regard are untrue, reflecting their fundamental misunderstanding of Stability AI’s technology.

<sup>7</sup> Plaintiffs’ allegations in this regard are also untrue and, indeed, belied by Plaintiffs’ own allegations. Plaintiffs allege that “[t]he system struggles with a Text Prompt like ‘a dog wearing a baseball cap while eating ice cream’ because, though there are many photos of dogs, baseball caps, and ice cream among the Training Images (and the latent images derived from them) there are unlikely to be any Training Images that combine all three.” Compl. ¶ 97. Thus, according to the Complaint, the output image of a dog wearing a baseball cap while eating ice cream is not derivative of any original work.

1 was the unauthorized reproduction of his performance on the DVDs,” which fell within the subject  
 2 matter of copyright. *Id.* at 1154. The Court also rejected allegations that the plaintiff’s name and  
 3 likeness were appropriated on the DVD covers because the pictures on the DVD covers were “still  
 4 shots” of the copyrighted performance. *Id.* In short, the Court looked beyond the illusory allegations  
 5 of name and persona appropriation to the actual subject matter of the plaintiff’s claim.

6 The Court should similarly reject Plaintiffs’ allegations of name and “artistic identity”  
 7 appropriation here.

8 *First*, to the extent that Plaintiffs’ claims can be read to allege the use of their “names” and  
 9 “artistic identities,” their claims are still preempted because they do not allege that something “more  
 10 personal than any work of authorship” (which could be outside the subject matter of copyright) was  
 11 misappropriated. *Laws*, 448 F.3d at 1141 (citation omitted). As explained *infra* (Section F(a)),  
 12 Plaintiffs do not even invoke the subject matter of a right of publicity claim, *i.e.*, their “very identity  
 13 or persona[s] . . . as [] human being[s].” *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th  
 14 Cir. 2001) (citation omitted). Regardless, Plaintiffs’ “artistic identities” **are** fixed in a “tangible  
 15 medium of expression”—*i.e.*, Plaintiffs’ works that elucidate their style. 17 U.S.C. § 101. Plaintiffs  
 16 concede as much in the Complaint. They note that their “names and artistic identities . . . extend to  
 17 Plaintiffs’ entire corpus of work” (Compl. ¶ 215), and they bring (insufficient) copyright  
 18 infringement claims based on the very same works that they allege appropriate their “artistic  
 19 identities.” Plaintiffs’ allegations of name appropriation do not change this analysis. Courts  
 20 regularly reject publicity-right claims based on allegations of name appropriation where, like here,  
 21 the claim is ultimately based on a copyrighted work. *See, e.g., Maloney*, 853 F.3d at 1008, 1016  
 22 (dismissing claim alleging name and likeness appropriation where plaintiffs’ “publicity-right claim  
 23 is little more than a thinly disguised copyright claim”). In short, where, as here, the “entirety of the  
 24 allegedly misappropriated [identity attribute] is contained within a copyrighted medium,” then  
 25 “what is put forth [] as protectable is **not** ‘more personal than any work of authorship’ and falls in  
 26 the subject matter of copyright. *Laws*, 448 F.3d at 1141 (emphasis altered).

27 *Second*, and alternatively, Plaintiffs’ claims are also within the subject matter of copyright  
 28 to the extent they involve anything more than Plaintiffs’ specific works of art. Besides Plaintiffs’

works themselves, Plaintiffs’ claims of “artistic identity” appropriation could only refer to the appropriation of their artistic styles. *See Compl. ¶ 215* (“Plaintiffs’ names and artistic identities. . . extend to Plaintiffs’ entire corpus of work and allow consumers and the public to identify work ‘in the style of’ Plaintiffs.”); *compare Compl. ¶ 212* (alleging a “market flooded with AI-generated copies associated with Plaintiffs’ names and artistic *styles*”) *to id. ¶ 222* (alleging a “market flooded with AI-generated copies built on Plaintiffs’ unique artistic *identities*”). True, “artistic style” is not protected by the Copyright Act. “The law of copyright does not protect ideas, but only the particular expression of them.” *Jewelry 10, Inc. v. Elegance Trading Co.*, No. 88-cv-1320, 1991 WL 144151, at \*4 (S.D.N.Y. July 20, 1991). In the context of works of art, “this principle can refer to elements of style and technique,” which are “*ideas* implicit in a work.” *Id.* (emphasis added); *see also, id.* (explaining that a “painter who develops a style or technique. . . cannot prevent others from adopting those ideas in their work”). Perhaps this point of law is why Plaintiffs attempt to repackage their copyright claims (which Plaintiffs affirmatively allege lack substantial similarity) as publicity claims based on their styles. But such attempt fails to state a claim here, too. Although “‘ideas’ do not enjoy copyright protection, courts have consistently held that they fall within the ‘subject matter of copyright’ for the purposes of preemption analysis.” *Entous v. Viacom Int’l, Inc.*, 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001) (collecting cases); *see also U.S. ex. Rel. Berge.*, 104 F.3d at 1463.

*Third*, Plaintiffs do not allege their identities were commercially exploited via advertising or in merchandise (which could potentially take their claims out of the subject matter of copyright). “[T]he distinction pertinent to the preemption of a publicity-right claim is . . . the way in which one’s name or likeness is affected by the *use* of the copyrighted work.” *Maloney*, 853 F.3d at 1013 (emphasis altered). When, for example, pictures of surfers are included in a clothing catalog, and that catalog essentially “suggest[s] that the surfers had *endorsed*” the clothing, those surfers “sustained injury to their individual personas” through commercial exploitation of their likenesses. *Id.* at 1013–14 (emphasis altered) (discussing *Downing*, 264 F.3d 994). But when a publicity right claim does not target “non-consensual *use* of one’s name or likeness on merchandise or in advertising,” and instead merely targets someone’s “likeness [that] has been captured in a copyrighted artistic visual work . . . being distributed for personal use,” that person has not sustained

injury to their persona in a way that escapes preemption. *Id.* at 1010 (emphasis altered).<sup>8</sup>

Here, Plaintiffs do not sufficiently allege that their identities were used on merchandise or in advertising, so their claims remain within the subject matter of copyright. They make no allegations about merchandise, and, as described *infra* at 22, the advertising allegations are fatally conclusory. Even assuming the least conclusory of those allegations are plausible factual allegations (which they are not), Plaintiffs' allegations are still insufficient. Namely, Plaintiffs allege that: (1) Defendants advertised art "in the style" of Plaintiffs' work; and (2) Defendants "advertised their AI's ability to copy or generate work in the artistic style that Plaintiffs popularized in order to sell Defendants' products and services." Compl. ¶ 205; *see also* Compl. ¶ 208, 221 (similar). The first allegation (which is devoid of any factual support in the Complaint) ultimately "target[s] the **display** and **distribution**" of what Plaintiffs allege are derivative works—*i.e.*, targets the "control of the artistic works themselves." *Maloney*, 853 F.3d at 1016 n.9 & 2011 (emphasis altered). And the second does not change that fact. Critically, Plaintiffs point to **no single advertisement** whatsoever that used any of their specific names or "artistic identities" that would be sufficient to allegedly injure their "personas." *Cf. Downing*, 265 F.3d at 999-1000 (finding athletes' personas injured when their likenesses were used in a clothing catalog to sell t-shirts). So there is nothing to potentially take their claims out of the subject matter of copyright.

Moreover, to the extent that Plaintiffs' allegations rely on the ability to type names as Text Prompts (or generally advertising the ability to do so), these are plainly insufficient to injure Plaintiffs' personas—if it were otherwise, the ability to enter any name into a Google search would violate every human's publicity rights. And to the extent that Plaintiffs' Complaint can be construed to allege that the Stability Defendants used Plaintiffs' names and "artistic identities" to sell **anything**, it would be in relation to the output that Plaintiffs call derivative works. But courts regularly find that using names or other identity attributes in connection with advertising the distribution of copyrightable works does not exploit identity or escape preemption. *See, e.g.*,

---

<sup>8</sup> The fact that Plaintiffs' case involves allegedly derivative artwork instead of photographs does not render *Maloney*'s analysis irrelevant. *See Maloney*, 853 F.3d at 1013 ("[O]ur precedents clarify that the distinction pertinent to the preemption of a publicity-right claim is **not** the type of copyrightable work at issue.") (emphasis altered).

*Melendez v. Sirius XM Radio, Inc.*, 2021 WL 2593471, at \*5 (S.D.N.Y. June 24, 2021), *aff'd*, 50 F.4th 294 (2d Cir. 2022) (dismissing a claim alleging misappropriation of voice, name, and identity where the alleged advertising use is “exploitation or promotion of the work itself, for its own value, rather than an exploitation of the Plaintiff’s identity”).

*Fourth*, Plaintiffs’ alleged injury in their right of publicity claims show that the subject matter of their claims fall within the subject matter of the Copyright Act. Crucially, Plaintiffs’ asserted reputational injuries in their publicity-right claims relate solely to a “market flooded with AI-generated copies” and “knock-off images generated from Plaintiffs’ work.” Compl. ¶¶ 212, 222. If anything, these would be **copyright** injuries stemming from alleged (though, as above, legally insufficient) copyright infringement. Indeed, it is the very same circumstance that Plaintiffs (insufficiently) complain of in their vicarious copyright infringement claim. *See, e.g.*, Compl. ¶¶ 171–173 (alleging that “Imposters” can use Defendants’ products to create “Fakes” that “can pass as original works by that artist” and that have been sold online). By Plaintiffs’ own allegations, this is a case in which “plaintiffs [are] seeking to use the right of publicity simply to prevent ‘publication’ of an artistic, visual work,” which places their claims in the subject matter of copyright, rather than one in which “plaintiffs sustained injury to their individual ‘personas’ because their likenesses were exploited commercially without their consent,” which does not. *Maloney*, 853 F.3d at 1013.

Because Plaintiffs’ right of publicity claims target and ultimately seek to control the creation, distribution and/or display of allegedly derivative works (or works somehow allegedly reflecting Plaintiffs’ alleged artistic styles), they fall within the subject matter of copyright.

## 2. Plaintiffs’ claims seek to protect “rights” that are equivalent to the exclusive rights of copyright holders.

Plaintiffs’ right of publicity claims also satisfy the second prong of the preemption analysis. “To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights.” *Laws*, 448 F.3d at 1143 (citation omitted). Stated differently, a claim is preempted if the “alleged appropriation” is “equivalent to rights within the general scope of copyright as specified by section 106 of the Copyright Act.” *Id.* Such rights include the “‘exclusive rights’ to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others

to do those things, and to prepare derivative works based upon the copyrighted work.” *Maloney*, 853 F.3d at 1010 (citing 17 U.S.C. § 106).

Plaintiffs’ claims assert rights equivalent to those enumerated in 17 U.S.C. § 106 and are preempted because they have no “extra element” beyond copyright law. Through their right of publicity claims, Plaintiffs seek to control the creation, distribution and/or display of allegedly derivative works to avoid “a proliferation of AI-generated art” and “a market flooded with AI-generated copies” of their art. *See* Compl. ¶¶ 212, 222, *supra* at 16. In other words, they seek to protect exactly the same kind of rights already protected by the Copyright Act and to rectify exactly the same kind of alleged injuries protectable by copyright law, which warrants preemption. *See, e.g., Maloney*, 853 F.3d at 1019 (holding second preemption analysis prong satisfied where plaintiffs “do not identify any use of their likenesses independent of the display, reproduction, and distribution of the copyrighted material in which they are depicted”); *Laws*, 448 F.3d at 1144 (second prong met where “the underlying nature of [plaintiff’s] . . . claims is part and parcel of a copyright claim”).<sup>9</sup>

Because the subject matter of Plaintiffs’ publicity-right claims fall within the subject matter of copyright and seek to protect rights equivalent to those in Section 106 of the Copyright Act, they are preempted and should be dismissed.

**F. The Court Should Dismiss Plaintiffs’ Right of Publicity Claims for Failure to State a Claim upon Which Relief Can Be Granted.**

Independently, Plaintiffs’ right of publicity claims fail because they do not satisfy the elements of such claims. The right of publicity is “the right of a person whose identity has commercial value—most often a celebrity—to control the commercial use of that identity.” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992). It was “developed to protect the commercial

---

<sup>9</sup> To the extent that Plaintiffs’ right of publicity claim seek to prevent the use of their “artistic styles,” which is not a right protectable under the Copyright Act, that right is still “equivalent to rights within the general scope of copyright” for purposes of preemption. *Laws*, 448 F.3d at 1143; *see also* 6 Patry on Copyright § 18:16 (“The term ‘general scope’ is used to make the point that the state right asserted need not be identical or even equivalent to a specific right granted in Section 106 in order to be preempted . . . The state right may be narrower, broader, or contain somewhat different elements, yet it will still be preempted if its essence is the same as the federal right.”); *Entous*, 151 F. Supp.2d at 1159-60 (finding claim “based solely on Defendant’s unauthorized use of [a plaintiff’s] ideas without compensation” to be preempted).

1 interest of celebrities in their identities.” *White v. Samsung Elecs, Am., Inc.*, 971 F.2d 1395, 1396  
 2 (9th Cir. 1992). The theory of the right “is that a celebrity’s identity can be valuable in the promotion  
 3 of products.” *Id.* While the right of publicity in California is no longer restricted to celebrities, it is  
 4 still premised on protecting an individual’s property interest in the economic value of their identity.

5 There are two ways to assert a right of publicity claim in California: a common law  
 6 commercial misappropriation cause of action and a statutory remedy for commercial  
 7 misappropriation under § 3344 of the California Civil Code. To plead a California common law  
 8 right of publicity claim, a plaintiff must allege: “(1) the defendant’s use of the plaintiff’s identity;  
 9 (2) the appropriation of plaintiff’s name or likeness to the defendant’s advantage, commercially or  
 10 otherwise; (3) lack of consent; and (4) resulting injury.” *Maloney*, 853 F.3d at 1008 n.2 (quoting  
 11 *Fleet v. CBS, Inc.*, 50 Cal. App.4th 1911, 1918 (1996)). Section 3344 provides that “[a]ny person  
 12 who knowingly uses another’s name, voice, signature, photograph, or likeness, . . . on or in products,  
 13 merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products,  
 14 merchandise, goods or services, without such person’s prior consent . . . shall be liable.” Cal. Civ.  
 15 Code § 3344. To plead a claim under § 3344, a plaintiff must allege “all the elements of the common  
 16 law cause of action” plus “a knowing use by the defendant as well as a direct connection between  
 17 the alleged use and the commercial purpose.” *In re NCAA Student-Athlete Name & Likeness*  
 18 *Licensing Litig.*, 724 F.3d 1268, 1273 n.4 (9th Cir. 2013).

19 Although Plaintiffs’ allegations are vague and conclusory, what they do allege shows that  
 20 their right of publicity claims are flawed and cannot be cured. Specifically, Plaintiffs (1) do not  
 21 adequately allege identity appropriation; (2) do not adequately allege use “on or in products” or for  
 22 purposes of advertising or soliciting purchases; (3) do not plausibly allege knowing use or a direct  
 23 connection between the use and commercial purposes; and (4) do not adequately allege injury. For  
 24 each of these reasons—independently—Plaintiffs’ right of publicity claims fail.

25 **a. Plaintiffs do not sufficiently allege the Stability Defendants use**  
 26 **their identities.**

27 A right of publicity claim does not lie in a defendant’s use of a plaintiff’s name, likeness,  
 28 signature, etc., per se, but rather in the use of a plaintiff’s *identity* via such means. *See, e.g. White*,

971 F.2d at 1398 (“It is not important *how* the defendant has appropriated the plaintiff’s identity, but *whether* the defendant has done so.”) (emphasis altered).

Plaintiffs’ “name” appropriation allegations show that they are *not* alleging their identities were appropriated. Plaintiffs vaguely allege that Defendants use Plaintiffs’ names (1) “in Defendants’ AI Image Products,” Compl. ¶ 202; (2) “to advertise art ‘in the style’ of Plaintiffs’ work”; and (3) to “link and associate the art generated by [Defendants’] AI with Plaintiffs’ specific styles and artistic accomplishments,” ¶ 207. But alleging the use of a plaintiff’s name without appropriation of identity does not state a right of publicity claim. In *Carson v. Here’s Johnny Portable Toilets*, for example, the court considered whether the phrase “Here’s Johnny” appropriated the identity of the entertainer Johnny Carson in a business named “Here’s Johnny Portable Toilets.” 698 F.2d 831 (6th Cir. 1983). In holding that it did, however, the court explained that using the name “John William Carson” was neither necessary nor sufficient to state a right of publicity claim. *See id.* at 837. This is because a company called “John William Carson Portable Toilets,” “though literally using appellant’s ‘name,’ . . . would not have appropriated Carson’s identity as a celebrity.” *Id.* Thus, the relevant inquiry is not whether Plaintiffs’ *names* were appropriated, but whether their *identities* were appropriated through, in this case, Plaintiffs’ names.<sup>10</sup>

Here, Plaintiffs do not sufficiently allege that Defendants appropriated their identities through use of their names. To the extent Plaintiffs’ claims depend on third parties’ “use[ of] AI Image Products to create works using the names of Plaintiffs and the Class in Prompts,” Compl. ¶ 171, this raises two fatal issues. First, users (not Defendants) are the ones using Plaintiffs’ names. *See Perfect 10, Inc. v. Google, Inc.*, 2010 WL 9479060, at \*13 (C.D. Cal. July 30, 2010) (citation omitted) (rejecting right-of-publicity claim lacking use by defendant). Second, Text Prompts are not “names” within the context of publicity claims. If Plaintiffs’ theory were to be accepted, a right of publicity claim would lie each time someone entered an individual’s name on a Google search.

---

<sup>10</sup> *See also, e.g.*, J. Thomas McCarthy & Roger E. Schechter, Rights of Publicity and Privacy § 11.51 (“A ‘name’ is merely one indicator of personal identity. The right of publicity protects identity, not a name per se.”); Restatement (Second) of Torts § 652C cmt. d (“The value of the plaintiff’s name is not appropriated by mere mention of it. . . nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity”).

Common sense dictates that California’s right of publicity cannot be so extended. Indeed, even the appearance of an individual’s name “as part of the *search results* displayed in response to a user-generated query does not mean that the relevant company used Plaintiff’s name for advertising or trade purposes.” *Obado v. Magedson*, 2014 WL 3778261, at \*7 (D.N.J. July 30, 2014) (emphasis added). So too for search terms or Text Prompts. Accordingly, to the extent that Plaintiffs even allege that anyone “literally us[ed]” their names, this usage “would not have appropriated [Plaintiffs’] identit[ies] as [human beings].” *Carson*, 698 F.2d at 837.

Plaintiffs’ allegations that their “artistic identities” have been misappropriated also do not suffice for a right of publicity claim. Plausible claims require the misappropriation of an individual’s actual identity rather than “artistic identity” or “style.” *See, e.g., White*, 971 F.2d at 1399 (finding allegations of an automobile commercial with a robot wearing an evening gown and wig in front of a Wheel of Fortune sufficient to show appropriation of Vanna White’s identity); *see also Waits*, 978 F.2d at 1100-01 (distinguishing between voice misappropriation, which is susceptible to tort liability, and style misappropriation, which is not). Thus, to the extent that Plaintiffs’ right of publicity claim is based on Plaintiffs’ “artistic styles,” *see supra* at 14, they fail. *See White*, 971 F.2d at 1399; *Waits*, 978 F.2d at 1100-01. And in any event, or alternatively, Plaintiffs allege appropriation of their artwork itself, as evidenced by the fact that Plaintiffs (unsuccessfully) claim copyright infringement regarding everything allegedly in or stemming from Defendants’ products that allegedly reflect Plaintiffs’ “artistic identities.”

In short, the gravamen of Plaintiffs’ complaint is not that Defendants have appropriated to themselves the economic value of Plaintiffs’ identities as human beings, but that Defendants have appropriated Plaintiffs’ copyrighted artwork or artistic styles. Their right of publicity claims accordingly must fail.

**b. Plaintiffs do not allege sufficient identity use “on or in products” or for purposes of advertising, selling, or soliciting purchases.**

Section 3344 imposes liability where a person knowingly uses another’s name “on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent.” Cal. Civ. Code

1 § 3344. Plaintiffs’ generic allegations are insufficient to state a claim under this section.

2 *First*, Plaintiffs do not adequately allege that Defendants use their identity “on or in  
3 products.” The “on or in products, merchandise, or goods” language in the California statute refers  
4 to tangible or otherwise observable products that contain aspects of an individual’s identity. *See*,  
5 *e.g.*, *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 395 (2001) (finding  
6 plaintiffs stated a § 3344 claim based on the “on or in products” language regarding a t-shirt with a  
7 picture of the Three Stooges because defendant’s “lithographic prints of The Three Stooges are  
8 themselves *tangible personal property* . . . made as products to be sold and displayed” and  
9 defendant’s t-shirts are “likewise *tangible personal property* . . . made as products to be sold and  
10 worn”) (emphasis added). But here, the Complaint (incorrectly) alleges only that Plaintiffs’ names  
11 exist somewhere in Defendants’ software as “links” to Plaintiffs’ artwork. *See, e.g.*, Compl. ¶¶ 207,  
12 218. While this is not how Stability AI’s products actually function, even taking Plaintiffs’  
13 allegations as true for purposes of this motion shows that Plaintiffs’ names are neither tangible nor  
14 observable on or in Stability AI’s products. They are therefore not “on or in” Stability AI’s products  
15 within the meaning of the California statute.

16 *Second*, Plaintiffs’ right of publicity claims are rife with vague and conclusory advertising  
17 allegations that should be disregarded. For example, Plaintiffs allege that “Defendants” (writ large)  
18 use their names and identities “for the purposes of advertising, selling, and soliciting purchases,”  
19 Compl. ¶ 217; that they used Plaintiffs’ names to “advertise art ‘in the style’ of Plaintiff’s work,”  
20 Compl. ¶ 205; and that they “advertise the ability of their systems to generate artwork ‘in the style’  
21 of Plaintiffs’ work” and prominently use “[t]his functionality . . . throughout Defendants’ apps,  
22 website, and social media posts.” Compl. ¶¶ 210, 208. But Plaintiffs do not point to any  
23 advertisements of Stability AI’s products that used each of Sarah Andersen’s, Kelly McKernan’s,  
24 or Karla Ortiz’s names or identities. Nor do they make factual allegations to show how the Stability  
25 Defendants allegedly used each of Sarah Andersen’s, Kelly McKernan’s, or Karla Ortiz’s names or  
26 identities to advertise art. These allegations should be disregarded.

27 *Third*, to the extent that Plaintiffs’ vague advertising allegations center on users’ ability to  
28 type names into search bars as Text Prompts, they are plainly insufficient. Plaintiffs allege that

Defendants created products able to “prioritize inclusion of specific artists’ works by invoking the name of the artist” and promoted those capabilities. *See, e.g.*, Compl. ¶¶ 203; 205; 208; *see also* Compl. ¶ 44 (listing the purported class-wide question of “[w]hether Defendants violated Plaintiffs’ and the Class’s rights of publicity when they designed their AI Image Products to respond to prompts requesting output images ‘in the style of’ specific individuals”). But as explained *supra*, common sense dictates that the general ability to type names into Google cannot give rise to a right of publicity claim for every human being, and neither can the general ability to enter any creator’s name as a Text Prompt into Stable Diffusion or DreamStudio. And even if such use could be considered “advertising, selling, or soliciting purchases,” users (not the Stability Defendants) are the ones using Plaintiffs’ names in such manner.<sup>11</sup>

Because Plaintiffs have not sufficiently alleged commercial purpose, their right of publicity statutory claim must fail.

**c. Plaintiffs do not sufficiently allege that Defendants knowingly used their identities in a manner directly connected to a commercial purpose.**

Plaintiffs also do not and cannot allege a “knowing use” of their names or a “direct connection” between the use of their identities and a commercial purpose, which are required to state a claim under the California statute. *See In re NCAA*, 724 F.3d at 1273 n.4. Notably, Plaintiffs allege that Defendants “harvest[ed], cop[ied], or extract[ed] data from websites by using automated tools, including bots or web crawlers” to collect *billions* of images for Stable Diffusion’s training data. Compl. ¶ 26 (emphasis added). It is simply not plausible that any of the three Defendants knew that Plaintiffs’ images (let alone any purported identity attributes) were among the billions of images allegedly accessed, much less that there is any direct connection between the alleged inclusion of Plaintiffs’ images (and any purported, though non-existent, identity attributes) in an allegedly otherwise-indiscriminate review of all available images on the Internet and any

---

<sup>11</sup> To the extent that Plaintiffs are alleging that a user’s mere act of typing Plaintiffs’ names into text prompts somehow violates their rights of publicity or constitutes unfair competition, *e.g.*, Compl. ¶ 208, the Stability Defendants are immune from such claims pursuant to Section 230 of the Communications Decency Act. *See* 47 U.S.C. § 230.

commercial purpose. Nor do Plaintiffs allege knowledge based on any notice they provided Defendants. (They could not so allege, as they provided Defendants with no such notice prior to filing suit.) Moreover, because Plaintiffs have alleged *neither* a “use” of their identities nor a “commercial purpose,” there is simply nothing to “direct[ly] connect[.]”

**d. Plaintiffs’ alleged injuries show that they were not injured by identity misappropriation.**

Nor do Plaintiffs satisfy the injury elements of their claims. Plaintiffs’ claims require them to show a “resulting injury” from the use of their identities. *See Maloney*, 853 F.3d at 1008 n.2; *In re NCAA*, 724 F.3d at 1273 n.4. Not only can they not do so because their identities were not used, but their alleged right-of-publicity injuries conclusively show that any alleged injury does not arise from the alleged identity misappropriation. Specifically, Plaintiffs allege that “[t]he goodwill associated with Plaintiffs’ names and distinct identities is compromised by a proliferation of AI-generated art associated with Plaintiffs’ names and identities,” and that “[t]he value of Plaintiffs’ name recognition and Plaintiffs’ distinct artistic styles—and thus the value of their art itself—is diluted in a market flooded with AI-generated copies built on Plaintiffs’ unique artistic identities.” Compl. ¶ 222. In other words, Plaintiffs do not assert that the economic value of their identities as human beings have been compromised by Defendants’ use of their names or artistic identities in search terms or even in advertising or soliciting purchases, but rather that the value of their *art* (or, at minimum, the “goodwill associated with their names”) is diminished via allegedly infringing artwork competing with theirs in the market. Thus, Plaintiffs do not satisfy the “resulting injury” element of their claims.

In short, Plaintiffs’ right of publicity claims should be dismissed because they are ultimately (insufficient) copyright infringement claims that fail to meet the elements of California’s statutory or common-law right of publicity causes of action.

**G. Plaintiffs’ Unfair Competition Claims are Preempted.**

“When [a Lanham Act] claim is more accurately conceived of as attacking unauthorized copying,” Supreme Court precedent “requires [courts] to avoid recognizing a ‘species of mutant copyright law’ by making such claims cognizable under the Lanham Act.” *Slep-Tone Ent. Corp. v.*

1 *Wired for Sound Karaoke & DJ Servs., LLC*, 845 F.3d 1246, 1250 (9th Cir. 2017) (discussing *Dastar*  
 2 *Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-38 (2003)); *see also Dastar*, 539 U.S.  
 3 at 34 (holding that the unfair competition provision of the Lanham Act should be construed narrowly  
 4 when it threatens to “create [] an addition to the law of copyright”). In short, “[t]he Supreme Court  
 5 has extended th[e] principle of copyright preemption to the Lanham Act.” *Lions Gate Entertainment*  
 6 *Inc. v. TD Ameritrade Servs. Co., Inc.*, 170 F. Supp. 3d 1249, 1264 (C.D. Cal. 2016). Where a  
 7 Lanham Act claim is rooted in an allegation that “Defendants have failed to obtain the permission  
 8 of the author of the ‘idea, concept, or communication,’” it is subject to dismissal based on principles  
 9 of “*Dastar* preemption.” *Id.* at 1264, 1267.

10 The same holds true with respect to claims brought under California statutory and common  
 11 law of unfair competition. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th  
 12 Cir. 2008) (“To the extent the improper business act complained of is based on copyright  
 13 infringement, the claim [is] properly dismissed because it is preempted.”); *Kodadek v. MTV*  
 14 *Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998).

15 Here, the “unfair acts” Plaintiffs allege are expressly the same alleged acts of copyright  
 16 infringement and DMCA violation for which Plaintiffs seek redress pursuant to their affirmative  
 17 copyright and DMCA claims. Accordingly, following the same two-step analysis described above  
 18 (*see* Section E) and pursuant to the Supreme Court’s decision in *Dastar Corp. v. Twentieth Century*  
 19 *Fox Film Corp.*, Plaintiffs’ unfair competition claims are preempted and should be dismissed.

#### 20 **H. Plaintiffs’ Declaratory Relief Claim Is Improper.**

21 Count VII is an improper, duplicative, and insufficient claim for declaratory relief that  
 22 should be dismissed. The Declaratory Judgment Act and its California counterpart are designed to  
 23 adjudicate rights and obligations involving controversies that have “not reached the stage at which  
 24 either party may seek a coercive remedy” or in which “a party who could sue for coercive relief has  
 25 not yet done so.” 10B Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2751; *see*  
 26 *also In re Adobe Sys., Inc. Priv. Litig.*, 66 F. Supp. 3d 1197, 1219 (N.D. Cal. 2014) (finding the  
 27  
 28

Declaratory Judgment Act and Cal. Civ. Code § 1060 “broadly equivalent”).<sup>12</sup> A declaratory relief claim is thus inappropriate and should be dismissed when it “serves no useful purpose and will not resolve any issues that adjudication of” the substantive counts “will not also resolve.” *Takeda Pharm. Co., Ltd. v. Mylan Inc.*, 62 F. Supp. 3d 1115, 1127 (N.D. Cal. 2014) (dismissing duplicative declaratory judgment claims); *see also United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (holding declaratory relief should be denied when the relief “will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties”) (collecting cases); *Lykkeberg v. Bank of Am., N.A.*, 2012 WL 1099773 (N.D. Cal. Apr. 2, 2012) (“Declaratory relief should not be used as a superfluous or second cause of action to determine issues that are identical and subsumed within existing causes of action.”) (citations omitted). Here, Plaintiffs’ Count VII seeks a declaration that Defendants violated certain statutes and is facially duplicative of Counts I, II, III, IV, and VI, which pursue causes of action under each of those statutes. Count VII therefore serves “no useful purpose” and would not “afford relief from the uncertainty and controversy faced by the parties.” And to the extent that Plaintiffs’ substantive claims fail, their declaratory relief count premised on the same alleged conduct and violations of the same statutes also fails. Count VII should be dismissed.

## V. CONCLUSION

For the foregoing reasons, Plaintiffs’ complaint should be dismissed with prejudice.

Dated: April 18, 2023

Respectfully submitted,

s/ Paul M. Schoenhard

Mark A. Lemley (State Bar No. 155830)  
**LEX LUMINA PLLC**  
 745 Fifth Avenue, Suite 500

---

<sup>12</sup> Regardless, while Plaintiffs plead their Declaratory Relief claim under both federal and California law, this Court should evaluate their claim under Federal law. *See In re Adobe*, 66 F. Supp. 3d at 1218 (evaluating plaintiff’s claim under the federal Declaratory Judgment Act despite plaintiff’s argument that the California Declaratory Relief Act should apply).

1 New York, NY 10151  
2 Telephone: (646) 898-2055  
3 Facsimile: (646) 906-8657  
4 Email: mlemley@lex-lumina.com

5 Nicole M. Jantzi (*pro hac vice*)  
6 Paul M. Schoenhard (*pro hac vice*)  
7 **FRIED, FRANK, HARRIS, SHRIVER**  
8 **& JACOBSON LLP**  
9 801 17th Street NW  
10 Washington, DC 20006  
11 Telephone: (202) 639-7254  
12 Email: nicole.jantzi@friedfrank.com  
13 paul.schoenhard@friedfrank.com

14 Michael C. Keats (*pro hac vice*)  
15 Amir R. Ghavi (*pro hac vice*)  
16 **FRIED, FRANK, HARRIS, SHRIVER**  
17 **& JACOBSON LLP**  
18 One New York Plaza  
19 New York, NY 10004  
20 Telephone: (212) 859-8000  
21 Email: michael.keats@friedfrank.com  
22 amir.ghavi@friedfrank.com

23 ***Counsel for Defendants Stability AI, Inc.***  
24 ***and Stability AI Ltd.***  
25  
26  
27  
28

1 COOLEY LLP  
ANGELA L. DUNNING (212047)  
2 adunning@cooley.com  
J. ASHETON LEMAY (*pro hac vice*)  
3 alemay@cooley.com  
KAYLA BLAKER (*pro hac vice*)  
4 kblaker@cooley.com  
3175 Hanover Street  
5 Palo Alto, California 94304-1130  
Telephone: (650) 843-5000  
6 Facsimile: (650) 849-7400

7 JUDD D. LAUTER (290945)  
jlauter@cooley.com  
8 3 Embarcadero Center, 20<sup>th</sup> Floor  
San Francisco, California 94111  
9 Telephone: (415) 693-2000  
Facsimile: (415) 693-2222

10 *Counsel for Defendant Midjourney, Inc.*

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

15  
16 SARAH ANDERSEN, an individual;  
KELLY MCKERNAN, an individual;  
17 KARLA ORTIZ, an individual,

18 Individual and Representative Plaintiffs,

19 v.

20 STABILITY AI LTD., a UK corporation;  
STABILITY AI, INC., a Delaware  
21 corporation; MIDJOURNEY, INC., a  
Delaware corporation; DEVIANTART, INC.,  
22 a Delaware corporation,

23 Defendants.

Case No. 3:23-cv-00201-WHO

**DEFENDANT MIDJOURNEY, INC.'S NOTICE  
OF MOTION AND MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT AND TO STRIKE  
CLASS CLAIMS**

Date: July 19, 2023  
Time: 2:00 p.m.  
Courtroom: 2, 17<sup>th</sup> Floor  
Judge: William H. Orrick

Trial Date: None  
Date Action Filed: January 13, 2023

## TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION TO DISMISS AND/OR STRIKE .....	viii
MEMORANDUM OF POINTS AND AUTHORITIES .....	1
I. INTRODUCTION.....	1
II. SUMMARY OF RELEVANT FACTS AND ALLEGATIONS.....	2
A. Named Plaintiffs .....	2
B. Defendants and Their AI Image Products.....	3
C. Plaintiffs’ Hodgepodge Theories of Wrongdoing.....	4
D. Plaintiffs’ Class Allegations.....	6
III. LEGAL STANDARDS.....	6
A. Motions to Dismiss Under Rule 12(b)(6).....	6
B. Motions to Strike Under Rule 12(f) .....	6
IV. ALL CLAIMS AGAINST MIDJOURNEY SHOULD BE DISMISSED.....	7
A. Plaintiffs Fail to Adequately Plead Direct or Vicarious Copyright Infringement (Claims 1, 2).....	7
1. Plaintiffs do not allege valid copyright registrations for their Works.....	7
2. Plaintiffs fail to plead infringement by Midjourney .....	8
3. Plaintiffs fail to allege cognizable violations of rights to prepare derivative works and to perform works .....	11
4. Plaintiffs fail to plead a viable claim for vicarious infringement.....	12
B. Plaintiffs Fail to Adequately Plead a Violation of the DMCA (Claim 3).....	14
1. Plaintiffs identify no Work from which CMI was altered or removed.....	15
2. Plaintiffs’ improper shotgun pleading fails to articulate Midjourney’s alleged involvement in the alteration or removal of CMI .....	16
3. Plaintiffs fail to plead any facts to establish scienter .....	16
C. Plaintiffs’ Right of Publicity Claims (Claims 4, 5) Should Be Dismissed .....	17
D. Plaintiffs Fail to Plead a Viable Claim for Unfair Competition (Claim 6) .....	19
E. Plaintiffs’ Claim for Declaratory Relief is Redundant and Improper (Claim 8) .....	21
V. PLAINTIFFS’ CLASS ALLEGATIONS SHOULD BE STRICKEN UNDER RULE 12(f).....	21
1. No purported “Damages Class” can be certified.....	22
2. No purported “Injunctive Relief Class” can be certified .....	25
VI. CONCLUSION.....	25

## TABLE OF AUTHORITIES

## Page(s)

## Cases

<i>A&amp;M Records v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	13, 14
<i>Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt., Inc.</i> , 744 F.3d 595 (9th Cir. 2014).....	11, 15
<i>Apple Computer, Inc. v. Microsoft Corp.</i> , 759 F. Supp. 1444 (N.D. Cal.), <i>on reconsideration</i> , 779 F. Supp. 133 (N.D. Cal. 1991), and <i>aff'd</i> , 35 F.3d 1435 (9th Cir. 1994) .....	11
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	6, 13, 16
<i>Bates v. Bankers Life &amp; Cas. Co.</i> , 993 F. Supp. 2d 1318 (D. Or. 2014) .....	21
<i>Becton, Dickinson &amp; Co. v. Cytek Biosciences Inc.</i> , 2020 WL 1877707 (N.D. Cal. Apr. 15, 2020) .....	9, 10
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	6
<i>Berkic v. Crichton</i> , 761 F.2d 1289 (9th Cir. 1985).....	10
<i>Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.</i> , 149 F. Supp. 3d 1167 (N.D. Cal. 2015) .....	10
<i>Block v. Major League Baseball</i> , 65 Cal. App. 4th 538 (1998) .....	24
<i>Brazil v. Dell Inc.</i> , 585 F. Supp. 2d 1158 (N.D. Cal. 2008) .....	21
<i>Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.</i> , 174 F.3d 1036 (9th Cir. 1999).....	20
<i>Bureerong v. Uvawas</i> , 922 F. Supp. 1450 (C.D. Cal. 1996).....	6
<i>Cavalier v. Random House, Inc.</i> , 297 F.3d 815 (9th Cir. 2002).....	10
<i>Colaprico v. Sun Microsystems, Inc.</i> , 758 F. Supp. 1335 (N.D. Cal. 1991) .....	7

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b>Page(s)</b>
1		
2		
3	<i>Columbia Pictures Indus., Inc. v. Fung,</i>	
4	710 F.3d 1020 (9th Cir. 2013).....	13
5	<i>Dahlia v. Rodriguez,</i>	
6	735 F.3d 1060 (9th Cir. 2013).....	6
7	<i>Daniels-Hall v. Nat’l Educ. Ass’n,</i>	
8	629 F.3d 992 (9th Cir. 2010).....	6
9	<i>Dastar Corp. v. Twentieth Century Fox Film Corp.,</i>	
10	539 U.S. 23 (2003).....	20
11	<i>Destfino v. Reiswig,</i>	
12	630 F.3d 952 (9th Cir. 2011).....	16
13	<i>Dolls Kill, Inc. v. Zoetop Bus. Co.,</i>	
14	2022 WL 16961477 (C.D. Cal. Aug. 25, 2022) .....	15
15	<i>Ellis v. Costco Wholesale Corp.,</i>	
16	657 F.3d 970 (9th Cir. 2011).....	25
17	<i>Ellison v. Robertson,</i>	
18	357 F.3d 1072 (9th Cir. 2004).....	13
19	<i>Fantasy, Inc. v. Fogerty,</i>	
20	984 F.2d 1524 (9th Cir. 1993).....	6
21	<i>Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.,</i>	
22	499 U.S. 340 (1991).....	7
23	<i>Football Ass’n Premier League Ltd. v. YouTube, Inc.,</i>	
24	297 F.R.D. 64 (S.D.N.Y. 2013) .....	23, 24
25	<i>Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC,</i>	
26	139 S. Ct. 881 (2019).....	7, 8
27	<i>FPX, LLC v. Google, Inc.,</i>	
28	276 F.R.D. 543 (E.D. Tex. 2011).....	23
	<i>Free Speech Sys., LLC v. Menzel,</i>	
	390 F. Supp. 3d 1162 (N.D. Cal. 2019) .....	15
	<i>Frost-Tsuji Architects v. Highway Inn, Inc.,</i>	
	2015 WL 263556 (D. Haw. Jan. 21, 2015), <i>aff’d</i> , 700 F. App’x 674 (9th Cir.	
	2017) .....	15

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b>Page(s)</b>
1		
2		
3	<i>General Tel. Co. of S.W. v. Falcon,</i>	
4	457 U.S. 147 (1982).....	7, 21
5	<i>In re High-Tech Empl. Antitrust Litig.,</i>	
6	985 F. Supp. 2d 1167 (N.D. Cal. 2013) .....	22
7	<i>Hovsepian v. Apple, Inc.,</i>	
8	2009 WL 5069144 (N.D. Cal. Dec. 17, 2009) .....	7, 21
9	<i>Huynh v. Jabil Inc.,</i>	
10	2023 WL 1802417 (N.D. Cal. Feb. 7, 2023) .....	22
11	<i>In re iPhone Application Litig.,</i>	
12	2011 WL 4403963 (N.D. Cal. Sept. 20, 2011) .....	16
13	<i>Izmo, Inc. v. Roadster, Inc.,</i>	
14	2019 WL 2359228 (N.D. Cal. June 4, 2019) .....	8
15	<i>Jules Jordan Video, Inc. v. 144942 Canada Inc.,</i>	
16	617 F.3d 1146 (9th Cir. 2010).....	19
17	<i>Kevari v. Scottrade, Inc.,</i>	
18	2018 WL 6136822 (C.D. Cal. Aug. 31, 2018).....	25
19	<i>Kifle v. YouTube LLC,</i>	
20	2021 WL 1530942 (N.D. Cal. Apr. 19, 2021) .....	8
21	<i>Kirk Kara Corp. v. W. Stone &amp; Metal Corp.,</i>	
22	2020 WL 5991503 (C.D. Cal. Aug. 14, 2020).....	15
23	<i>Lane v. Facebook, Inc.,</i>	
24	696 F.3d 811 (9th Cir. 2012).....	24
25	<i>Lautemann v. Bird Rides, Inc.,</i>	
26	2019 WL 3037934 (C.D. Cal. May 31, 2019) .....	25
27	<i>Litchfield v. Spielberg,</i>	
28	736 F.2d 1352 (9th Cir. 1984).....	11
	<i>Malasky v. Esposito,</i>	
	2019 WL 79032 (N.D. Cal. Jan. 2, 2019), <i>aff'd</i> , 781 F. App'x 643 (9th Cir.	
	2019) .....	21
	<i>Maloney v. T3Media, Inc.,</i>	
	853 F.3d 1004 (9th Cir. 2017).....	18, 19

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b>Page(s)</b>
1		
2		
3	<i>Mangindin v. Wash. Mut. Bank,</i>	
4	637 F. Supp. 2d 700 (N.D. Cal. 2009) .....	21
5	<i>Manning v. Boston Med. Ctr. Corp.,</i>	
6	725 F.3d 34 (1st Cir. 2013) .....	22
7	<i>McDonald v. West,</i>	
8	138 F. Supp. 3d 448 (S.D.N.Y. 2015) .....	19
9	<i>Mohanna v. Carrington Mortg. Servs. LLC,</i>	
10	2018 WL 3730419 (N.D. Cal. Aug. 6, 2018) .....	20
11	<i>Montz v. Pilgrim Films &amp; Television, Inc.,</i>	
12	649 F.3d 975 (9th Cir. 2011) .....	19
13	<i>MultiCraft Imports, Inc. v. Mariposa USA, Inc.,</i>	
14	2017 WL 5664996 (C.D. Cal. Sept. 14, 2017) .....	9, 10
15	<i>O’Neal v. Sideshow, Inc.,</i>	
16	583 F. Supp. 3d 1282 (C.D. Cal. 2022) .....	15
17	<i>Oracle Am., Inc. v. Hewlett Packard Enter. Co.,</i>	
18	823 F. App’x 516 (9th Cir. 2020) .....	20
19	<i>Parziale v. HP, Inc.,</i>	
20	2020 WL 5798274 (N.D. Cal. Sept. 29, 2020) .....	11
21	<i>Perfect 10, Inc. v. Amazon.com, Inc.,</i>	
22	508 F.3d 1146 (9th Cir. 2007) .....	12, 13
23	<i>Perfect 10, Inc. v. Giganews, Inc.,</i>	
24	847 F.3d 657 (9th Cir. 2017) .....	14
25	<i>Perfect 10, Inc. v. Google, Inc.,</i>	
26	2010 WL 9479060 (C.D. Cal. July 30, 2010) .....	18
27	<i>Rice-Sherman v. Big Heart Pet Brands, Inc.,</i>	
28	2020 WL 1245130 (N.D. Cal. Mar. 16, 2020) (Orrick, J.) .....	22
	<i>Roblox Corp. v. Wowwee Group Ltd.,</i>	
	2023 WL 2433970 (N.D. Cal. Mar. 9, 2023) .....	8
	<i>Roth Greeting Cards v. United Card Co.,</i>	
	429 F.2d 1106 (9th Cir. 1970) .....	10
	<i>Ruegsegger v. Caliber Home Loans, Inc.,</i>	
	2019 WL 8163640 (C.D. Cal. Jan. 8, 2019) .....	21

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b>Page(s)</b>
1		
2		
3	<i>Sanders v. Apple Inc.</i> ,	
4	672 F. Supp. 2d 978 (N.D. Cal. 2009) .....	7, 21, 22
5	<i>Smith v. Weeknd</i> ,	
6	2019 WL 6998666 (C.D. Cal. Aug. 23, 2019) .....	14
7	<i>Solano v. Playgirl, Inc.</i> ,	
8	292 F.3d 1078 (9th Cir. 2002) .....	17
9	<i>Sollberger v. Wachovia Sec., LLC</i> ,	
10	2010 WL 2674456 (C.D. Cal. June 30, 2010) .....	16
11	<i>Somers v. Apple, Inc.</i> ,	
12	729 F.3d 953 (9th Cir. 2013) .....	6
13	<i>Sound &amp; Color, LLC v. Smith</i> ,	
14	2023 WL 2821881 (C.D. Cal. Feb. 28, 2023) .....	14
15	<i>Stevens v. CoreLogic, Inc.</i> ,	
16	899 F.3d 666 (9th Cir. 2018) .....	15, 17
17	<i>Stokes v. CitiMortgage, Inc.</i> ,	
18	2015 WL 709201 (C.D. Cal. Jan. 16, 2015) .....	22
19	<i>Sybersound Records, Inc. v. UAV Corp.</i> ,	
20	517 F.3d 1137 (9th Cir. 2008) .....	20
21	<i>Synopsys, Inc. v. ATopTech, Inc.</i> ,	
22	2013 WL 5770542 (N.D. Cal. Oct. 24, 2013) .....	8, 9, 15
23	<i>Technology &amp; Intell. Prop. Strategies Grp. PC v. Fthenakis</i> ,	
24	2011 WL 3501690 (N.D. Cal. Aug. 10, 2011) .....	21
25	<i>Tietsworth v. Sears, Roebuck &amp; Co.</i> ,	
26	720 F. Supp. 2d 1123 (N.D. Cal. 2010) .....	25
27	<i>UAB “Planner5D” v. Facebook, Inc.</i> ,	
28	2019 WL 6219223 (N.D. Cal. Nov. 21, 2019) .....	7, 8
	<i>Unicolors, Inc. v. H&amp;M Hennes &amp; Mauritz, L.P.</i> ,	
	595 U.S. 944 (2022) .....	7
	<i>Vulcan Golf, LLC v. Google, Inc.</i> ,	
	254 F.R.D. 521 (N.D. Ill. 2008) .....	22, 23
	<i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
	564 U.S. 338 (2011) .....	23, 25

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b>Page(s)</b>
1		
2		
3	<i>White v. Samsung Elecs. Am., Inc.</i> ,	
4	971 F.2d 1395 (9th Cir. 1992).....	17
5	<b>Statutes</b>	
6	15 U.S.C.	
7	§ 1125.....	4, 20
8	17 U.S.C.	
9	§ 102.....	18, 19
10	§ 103.....	18
11	§ 106.....	<i>passim</i>
12	§ 301.....	18, 20
13	§ 411.....	7, 8
14	§ 412.....	24
15	§§ 1201–05.....	4, 15
16	§ 1202.....	<i>passim</i>
17	Cal. Bus. & Prof. Code §§ 17200 .....	4, 20, 21
18	Cal. Civ. Code	
19	§ 3344.....	4, 17
20	<b>Other Authorities</b>	
21	Fed. R. Civ. P.	
22	8.....	9, 16
23	12(b)(6) .....	6
24	12(f).....	6, 21, 22, 25
25	23.....	<i>passim</i>
26	4 NIMMER ON COPYRIGHT (2010)	
27	§ 19D.03.....	19
28	3 NIMMER ON COPYRIGHT (2022)	
	§ 8.09.....	12
	§ 8.14.....	12
	2 PATRY ON COPYRIGHT § 4:14.....	19

**NOTICE OF MOTION AND MOTION TO DISMISS AND/OR STRIKE**

**PLEASE TAKE NOTICE** that on July 19, 2023 at 2:00 p.m., at the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California, in Courtroom 2, 17th Floor, Defendant Midjourney, Inc. (“Midjourney”) will and hereby does move, pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure (“Rules”), to dismiss the Complaint (Dkt. 1). This motion is based upon this Notice of Motion; the accompanying Memorandum of Points and Authorities, Request for Judicial Notice and Consideration of Documents Incorporated by Reference (“RJN”), Declaration of Judd D. Lauter (“Lauter Decl.”) and exhibits thereto; other pleadings and papers on file in this action; and such other matters as may be presented to the Court at the hearing.

**STATEMENT OF RELIEF SOUGHT:** Midjourney seeks an order: (a) dismissing all claims against it under Rule 12(b)(6) on the ground that the Complaint fails to allege sufficient facts to state plausible claim for relief; and (b) striking the class claims under Rule 12(f) on the ground that it is evident from the Complaint that this case cannot be maintained as a class action.

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

This case concerns artificial intelligence (“AI”) models designed to enhance human creativity. Generative AI is a burgeoning technology in which software is trained to identify relationships and patterns in data and generate new content (“output”), such as text, images, and audio, based on that training. Some models are trained on vast text repositories to be able to predict the sequence of words best suited to respond to a question, complete lines of code, or even create original stories and songs. Other models, like those at issue here, are trained on millions or even billions of publicly available images on the Internet to recognize the quintessential characteristics and dimensions of the people, places, and things depicted in them, and, in turn, generate new images in response to natural language text prompts (e.g., “a dog wearing a baseball cap while eating ice cream”).

As Plaintiffs concede, “none of the ... output images provided in response to a particular Text Prompt is likely to be a close match for any specific image in the training data.” (¶ 93.)<sup>1</sup> This stands to reason, as any one image comprises an infinitesimal fragment of a model’s training, just as each visual (every face, sunset, painting) an artist has ever perceived and every text a writer has ever read comprises a tiny fraction of the content and imagery that inform their imagination.

Named plaintiffs in this putative class action are three visual artists who assert that their rights were violated when their artwork was used to train Stable Diffusion, an open-source generative AI platform. Plaintiffs further allege that Stable Diffusion was embedded as the “image-generating engine” in “AI Image Products” offered by defendants Stability AI Ltd. and Stability AI, Inc. (together, “Stability”), Midjourney, and DeviantArt, Inc. (collectively, “Defendants”), which can be used to create images that infringe Plaintiffs’ works. Plaintiffs, however, fail to allege the most basic facts necessary to state a claim against Midjourney—for themselves or any purported class.

To begin, the Complaint does not identify a single work by any Plaintiff that Midjourney supposedly used as training data. Nor do Plaintiffs identify *any* image that has ever been generated on the platform, let alone one that is actionably similar to their works. Absent such facts, they fail to plead copyright infringement (irrespective of obvious fair use defenses, which Plaintiffs ignore).

<sup>1</sup> Unless otherwise stated, citations to “¶” and “Ex. ” are to the Complaint’s paragraphs and exhibits, all emphases are added, and internal citations and quotation marks are omitted.

Further, the premise permeating the Complaint—that any images created with Defendants’ platforms *must* constitute infringing “derivative works,” no matter how dissimilar they appear—badly misconstrues the law. Two of the Plaintiffs do not even own a copyright registration, depriving them of standing. The claims for direct and vicarious copyright infringement (Claims 1, 2) must be dismissed.

The same is true of all other claims against Midjourney. Claim 3—for violation of the Digital Millennium Copyright Act (“DMCA”)—fails because, among other things, Plaintiffs do not identify any copyright management information (“CMI”) that Midjourney purportedly altered or removed, with the requisite scienter or otherwise. The right-of-publicity claims (Claims 4, 5) cannot survive, as Plaintiffs plead no instance in which Midjourney has used their names or “artistic identities” for any purpose and, in any case, the alleged misappropriation of their “identities” is just a repackaged infringement claim preempted by the Copyright Act. Plaintiffs’ state law unfair competition claim (Claim 6) fails for several reasons, including that it lacks a viable predicate violation and is preempted to the extent it is based on copyright infringement. And their claim for declaratory relief (Claim 8) simply mirrors Plaintiffs’ other (meritless) claims, rendering it both redundant and improper. In sum, the claims are all generalized “noise” and no substance, necessitating dismissal.

Finally, even if Plaintiffs could state some cognizable, individual claim for relief, their class claims should be stricken. Although Midjourney recognizes the Court’s reluctance to adjudicate class allegations before the certification stage, the nature of the claims alleged, and the vast and individualized permutations of fact and law that will need to be separately assessed as to “billions” of alleged Works, renders this case facially unsuitable to class treatment under any class definition.

## II. SUMMARY OF RELEVANT FACTS AND ALLEGATIONS<sup>2</sup>

### A. Named Plaintiffs

Named plaintiffs Sarah Andersen, Kelly McKernan, and Karla Ortiz (together, “Plaintiffs”) claim to be artists residing in Oregon, Tennessee, and California, respectively. (¶¶ 28–30.) The Complaint alleges that each “created and owns” a “copyright interest” in “Works used as Training Images.” (*Id.*)<sup>3</sup> “Works” is defined to include “any image that was used to train any version of

<sup>2</sup> Although the Complaint badly misconstrues the facts, Midjourney confines its discussion to the facts as pleaded and those incorporated by reference or subject to judicial notice.

<sup>3</sup> “Training Image” is defined to mean, in general, “an image, or image paired with a descriptive text caption, that is included among the training data for a machine-learning process.” (¶ 25.)

1 Stable Diffusion that was offered directly and/or incorporated into another product by one or more  
 2 Defendants during the Class Period.” (§ 27.) Although the Complaint provides URLs where  
 3 exemplar “Works” by Plaintiffs can allegedly be found (§§ 28–30 & nn.1–3), it does not specify  
 4 which images appearing at the corresponding webpages were created by Plaintiffs, and many  
 5 appear to be signed by or attributed to unrelated third parties. (Lauter Decl. §§ 2–4 & Exs. A–C.)

6 Of the three named Plaintiffs, only Andersen claims to own a copyright registration. (§ 28.)  
 7 The Complaint alleges that her registrations cover collections that “include Works used as Training  
 8 Images,” but does not identify any such Works or which registration(s) purportedly cover them. (*Id.*)

### 9 **B. Defendants and Their AI Image Products**

10 According to Plaintiffs, this class action “concerns a DeviantArt software product called  
 11 DreamUp, a Midjourney software product, and a Stability software product called DreamStudio,  
 12 all of which are AI-Image Products and, upon information and belief, built on a Stability Software  
 13 Library called Stable Diffusion.” (§ 50.) Each is described more fully below.

14 **Stability:** Plaintiffs allege that Stability “created, trained, and maintain[s] Stable  
 15 Diffusion,” an AI software product that “produces images in response to Text Prompts.”  
 16 (§§ 33, 52.) Stability allegedly released Stable Diffusion in August 2022 under a “permissive open-  
 17 source license” pursuant to which “programmers and users can download for free the software and  
 18 its associated machine-learning models derived from the Training Images.” (§ 53.) That same  
 19 month, Stability allegedly released DreamStudio, a web-based platform through which Stable  
 20 Diffusion can be accessed. (§ 55.) The Complaint alleges there have been at least five “major  
 21 releases” of Stable Diffusion but does not distinguish between these versions. (§ 52.)

22 Plaintiffs claim that “Stability scraped, and thereby copied over five billion images from  
 23 websites as the Training Images used as training data for Stable Diffusion” without negotiating  
 24 licenses or seeking consent from the creators. (§§ 57, 58.) Stable Diffusion was allegedly trained  
 25 using a two-part “diffusion technique” using “complicated mathematics, linear algebra, and a series  
 26 of algorithms” to first recognize addition of “noise” (unstructured, random data) to these images, and  
 27 to then “denoise” the data to generate new “images that are similar to those found in its training data.”  
 28 (§§ 66–70.) Plaintiffs further claim that, “[b]y training Stable Diffusion on the Training Images,

1 Stability caused those images to be stored at and incorporated into Stable Diffusion as compressed  
 2 copies,” which it then uses “in generating its output in response to Text Prompts.” (¶¶ 3, 58, 59.)

3 **DeviantArt**: DeviantArt was founded in 2000 as an online community where digital artists  
 4 post and share their work. (¶ 62.) Plaintiffs claim that “[t]housands—and possibly millions—of  
 5 the Training Images” Stability used to train Stable Diffusion were “copied from DeviantArt.”  
 6 (¶ 63.) Plaintiffs further claim that DeviantArt “created, sells, markets and distributes DreamUp,”  
 7 a commercial product released in November 2022 that “relies on Sable Diffusion to produce  
 8 images.” (¶ 35; *see* ¶ 129 (quoting DeviantArt’s CEO on use of Stable Diffusion in DreamUp).)

9 **Midjourney**: Midjourney is a San Francisco-based company with only “11 full-time staff.”  
 10 (¶¶ 34, 132, 133; *see also* Lauter Ex. D (describing Midjourney as a “small self-funded team”).)  
 11 Midjourney “created, sells, markets and distributes” an “online AI-based image generator” of the  
 12 same name, that uses “Text Prompts as input and produces digital images as output.” (¶¶ 34, 134.)

13 Many of the allegations about Midjourney are internally inconsistent. For example, the  
 14 Complaint simultaneously alleges that its product was first released in beta on three different  
 15 dates—March, July and August 2022. (¶¶ 61, 135, 149.) It also alleges (without actual or stated basis)  
 16 that “Midjourney relies on Stable Diffusion as its underlying software engine for generating images”  
 17 (¶ 134), elsewhere asserting that only some “iterations” “used” Stable Diffusion (¶ 34) and, later,  
 18 that the alleged August 2022 beta version did so (¶ 149). Plaintiffs also plead on information and  
 19 belief that “the version of the Midjourney Product currently available was trained on a *subset* of  
 20 the images used to train Stable Diffusion,” but do not say what that subset consisted of, or when,  
 21 how, or by whom this training was supposedly implemented. (¶ 34.) Notably, Plaintiffs do not  
 22 allege that Midjourney has ever trained *any* version of its platform on any Work belonging to them.

### 23 C. Plaintiffs’ Hodgepodge Theories of Wrongdoing

24 Plaintiffs filed this suit in January 2023, alleging claims against all Defendants for: (1/2) direct  
 25 and vicarious copyright infringement (17 U.S.C. § 106); (3) violation of the DMCA (17 U.S.C.  
 26 §§ 1201–05); (4/5) violation of their rights of publicity (Cal. Civ. Code § 3344; common law);  
 27 (6) unfair competition (15 U.S.C. § 1125; Cal. Bus. & Prof. Code §§ 17200 *et seq.* (“UCL”); common  
 28 law); and (8) declaratory relief. Claim 7, for breach of contract, is asserted against DeviantArt only.

**Copyright Infringement (Claims 1, 2):** The thrust of the copyright claims is that Plaintiffs’ “copyright interest[s]” in unidentified Works were violated when, without their permission, Stability allegedly used those Works to train Stable Diffusion and Defendants then allegedly incorporated Stable Diffusion as an “embedded image-generating engine” in their AI Image Products to enable users to create images. (¶¶ 2–4, 27, 65.) Plaintiffs also claim that, by virtue of how Stable Diffusion works, every output from Defendants’ platforms must be unauthorized “derivative work[s]” (¶¶ 4, 18, 20, 95), even though, by Plaintiffs’ admission, “*none*” of the images generated “is likely to be a close match for any specific image in the training data” (¶ 93). Plaintiffs assert that all Defendants are both *directly* liable for this conduct, and *vicariously* liable for images generated in response to user text prompts that include Plaintiffs’ names (deemed “Fakes”). (¶¶ 171–72.) The Complaint does not identify any instance in which Midjourney’s platform was used to create a “Fake.”

**DMCA (Claim 3):** Plaintiffs accuse all Defendants of violating the DMCA by “remov[ing] or alter[ing] CMI from images that are owned by Plaintiffs and the Class by training Stable Diffusion on those images and designing it to omit any CMI as part of the output.” (¶ 183.) Yet, Plaintiffs elsewhere allege that only Stability (not Midjourney) trained and designed Stable Diffusion. (¶¶ 1–3, 25, 33, 57–58, 107.) Plaintiffs do not allege that Midjourney trained its own product on any Works of Plaintiffs, identify no CMI that it allegedly removed or altered in training, and identify no output from the Midjourney platform from which any purported CMI was removed or altered.

**Right of Publicity (Claims 4, 5):** Plaintiffs claim that Defendants are violating their statutory and common law rights of publicity because platform users “can use” an “artist’s name to generate new works in the artist’s style” by including it in a text prompt; AI-generated works “in the style of” unidentified artists are “already sold on the internet”; and this “siphon[s] commissions from the artists.” (¶¶ 5, 8, 203, 218.) The Complaint also includes generalized allegations that Defendants use Plaintiffs’ names and “artistic identities” to advertise and promote their AI platforms. (¶¶ 205, 217, 219.) Plaintiffs, however, do not cite a single example of Midjourney ever doing any of this.

**Unfair Competition/Declaratory Relief (Claims 6, 8):** Plaintiffs allege that Defendants committed unfair competition by infringing Plaintiffs’ copyrights and violating the DMCA (¶ 224), and that Plaintiffs are entitled to a declaration judgment as to these identical violations (¶ 239).

**D. Plaintiffs' Class Allegations**

In addition to their own interests, Plaintiffs seek to represent three putative "Classes," namely:

(a) an "Injunctive Relief Class" comprised of:

All persons or entities nationalized and/or domiciled in the United States that own a copyright interest in any work that was used to train any version of an AI Image Product that was offered directly and/or incorporated into another product by one or more Defendants during the Class Period.

(b) a "Damages Class," which inexplicably has the identical definition; and

(c) a "DeviantArt Damages Subclass," which pertains to Deviant Art only, not Midjourney.

Plaintiffs also refer to a "Class Period" (§§ 27–30, 41) that is never alleged or defined.

**III. LEGAL STANDARDS**

**A. Motions to Dismiss Under Rule 12(b)(6)**

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). To survive dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In assessing plausibility, a court need not "accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013) (same); *Twombly*, 550 U.S. at 555 ("[C]ourts are not bound to accept as true a legal conclusion couched as a factual allegation."). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

**B. Motions to Strike Under Rule 12(f)**

Rule 12(f) allows a court to strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike serve to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996) (quoting *Fantasy, Inc.*

1 *v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)). Motions to strike may be granted where “it is  
 2 clear that the matter to be stricken could have no possible bearing on the subject matter of the  
 3 litigation.” *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991). As the  
 4 Supreme Court has explained in the context of class claims, “[s]ometimes the issues are plain  
 5 enough from the pleadings to determine whether the interests of the absent parties are fairly  
 6 encompassed within the named plaintiff’s claim.” *General Tel. Co. of S.W. v. Falcon*, 457 U.S.  
 7 147, 160 (1982). Where the complaint demonstrates that a class action cannot be maintained on  
 8 the facts alleged, courts have granted motions to strike class allegations at the pleading stage. *See*  
 9 *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990–91 (N.D. Cal. 2009) (granting motion to strike  
 10 class); *Hovsepian v. Apple, Inc.*, 2009 WL 5069144, at \*6 (N.D. Cal. Dec. 17, 2009) (same).

#### 11 **IV. ALL CLAIMS AGAINST MIDJOURNEY SHOULD BE DISMISSED**

##### 12 **A. Plaintiffs Fail to Adequately Plead Direct or Vicarious Copyright Infringement** 13 **(Claims 1, 2)**

14 To establish copyright infringement, a plaintiff must plead and prove both: “(1) ownership  
 15 of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist*  
 16 *Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The Complaint pleads neither.

##### 17 **1. Plaintiffs do not allege valid copyright registrations for their Works**

18 As a threshold matter, the direct and vicarious copyright infringement claims by Plaintiffs  
 19 McKernan and Ortiz must be dismissed for lack of a registration. “The first element of a copyright  
 20 claim requires a plaintiff to plausibly allege that it owns a valid copyright registration.” *UAB*  
 21 *“Planner5D” v. Facebook, Inc.*, 2019 WL 6219223 \*5 (N.D. Cal. Nov. 21, 2019) (Orrick, J.). A  
 22 valid registration is a “prerequisite for bringing a ‘civil action for infringement’ of the copyrighted  
 23 work.” *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 944 (2022) (quoting 17 U.S.C.  
 24 §411(a)); *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 885 (2019) (same).

25 Here, the Complaint alleges that McKernan and Ortiz own unspecified “copyright interests”  
 26 in unidentified Works (¶¶ 29, 30), but does not plead that either holds a copyright *registration* for  
 27 *any* works, let alone any Works at issue here. It is blackletter law that, having failed to plead  
 28 ownership of a copyright registration, McKernan and Ortiz’s copyright infringement claims must

1 be dismissed. *See Roblox Corp. v. Wowwee Grp. Ltd.*, 2023 WL 2433970, at \*4 (N.D. Cal. Mar.  
 2 9, 2023) (dismissing copyright infringement claims for failure to plead a registration as required by  
 3 § 411(a)); *Kifle v. YouTube LLC*, 2021 WL 1530942, at \*6 (N.D. Cal. Apr. 19, 2021) (same).

4 Although the Complaint alleges that the third Plaintiff, Andersen, owns various copyright  
 5 registrations “for sixteen collections that *include* Works used as Training Images” (§ 28), it does  
 6 not identify which Works at issue are covered by those Registrations, which is impossible to discern  
 7 from the Registrations themselves. (*See* Exs. 1–16.) It also does not allege that any of those  
 8 registrations cover Works allegedly copied or used by *Midjourney*. As such, the Complaint fails to  
 9 adequately identify any registered Work that *Midjourney* is supposed to have infringed.

10 If the Court grants Andersen leave to amend, she should be required to plead facts  
 11 establishing registration of specific at-issue Works. However, claims related to any of Andersen’s  
 12 unregistered Works and all claims alleged by McKernan and Ortiz must be dismissed with  
 13 prejudice. “A plaintiff cannot cure its failure to meet the preconditions set forth in 17 U.S.C.  
 14 § 411(a) by amending [its] complaint.” *UAB “Planner 5D”*, 2019 WL 6219223, at \*7 (citing *Izmo*,  
 15 *Inc. v. Roadster, Inc.*, 2019 WL 2359228, at \*2 (N.D. Cal. June 4, 2019)). Rather, “[t]he Supreme  
 16 Court has made clear that the registration requirement of § 411(a) was ‘akin to an administrative  
 17 exhaustion requirement that the owner must satisfy *before* suing to enforce ownership rights.’”  
 18 *Izmo*, 2019 WL 2359228, at \*2 (quoting *Fourth Estate*, 139 S. Ct. at 887). Allowing Plaintiffs to  
 19 amend to plead registrations obtained after filing suit “would undermine the objectives animating  
 20 the Supreme Court’s decision in *Fourth Estate*.” *Id.*; *see Roblox*, 2023 WL 2433970, at \*4 (same).

## 21 **2. Plaintiffs fail to plead infringement by Midjourney**

22 All Plaintiffs’ copyright infringement claims, direct and vicarious, fail as a matter of law  
 23 for the additional reason that Plaintiffs do not identify a single registered “Work” that was used *by*  
 24 *Midjourney* to train its platform, or any allegedly infringing image generated as output.

25 A copyright plaintiff “must plead some non-speculative facts about what [the defendant]  
 26 infringed and how.” *Synopsys, Inc. v. ATopTech, Inc.*, 2013 WL 5770542, at \*4 (N.D. Cal. Oct.  
 27 24, 2013). Vague claims that “never make clear what [was] copied” or never describe the “works  
 28 that infringe [plaintiff’s] [c]opyright” fail to put a defendant on fair notice of the claim against it.

1 *Id.* (dismissing for failure to satisfy Rule 8). For example, in *Becton, Dickinson & Co. v. Cytex*  
 2 *Biosciences Inc.*, Judge Chesney dismissed a claim for infringement of medical software and  
 3 manuals as the complaint did not describe what was copied and “in what [defendant] document or  
 4 software such copying is manifest.” 2020 WL 1877707, at \*6 (N.D. Cal. Apr. 15, 2020) (citing  
 5 *MultiCraft Imports, Inc. v. Mariposa USA, Inc.*, 2017 WL 5664996, at \*3 (C.D. Cal. Sept. 14, 2017)).

6 The allegations against Midjourney are likewise fatally deficient regarding both the Works  
 7 Midjourney purportedly infringed and the allegedly infringing output its users purportedly created.

8 **Failure to plead infringement of input:** Plaintiffs claim in generalized terms that all  
 9 “Defendants” directly infringed their Works by using them as training images. (¶¶ 155–57.)  
 10 However, “Works” is defined as “any image that was *used to train any version of Stable Diffusion.*”  
 11 (¶ 27.) Only Stability is alleged to have trained Stable Diffusion (¶¶ 1–3, 25, 33, 57–58, 107), not  
 12 Midjourney. To the extent Plaintiffs’ direct infringement claims are predicated on use of their  
 13 images to train Stable Diffusion, Plaintiffs fail to state a claim against Midjourney.

14 Plaintiffs’ conclusory allegations that Midjourney made unauthorized use of publicly  
 15 accessible images to train its own platform fare no better. Plaintiffs plead on information and belief  
 16 that “the version of the Midjourney Product currently available was trained on a *subset* of the  
 17 [billions of] images used to train Stable Diffusion.” (¶ 34; *see also* ¶¶ 2, 25.) Plaintiffs also plead  
 18 that “Midjourney relies on appropriating millions of copyrighted images created by artists and using  
 19 these images as Training Images” (¶ 144) and that Midjourney has been “helping themselves to  
 20 millions of copyrighted works for free” (¶ 152). But nowhere does the Complaint plead what was  
 21 in this “subset” of training material, or that it included even one work by *Plaintiffs*. The absence  
 22 of well-pleaded factual allegations establishing use by Midjourney of any of Plaintiffs’ artwork is  
 23 fatal to their claims. *Synopsys*, 2013 WL 5770542, at \*4.

24 **Failure to identify allegedly infringing output:** Plaintiffs, obliquely, also appear to allege  
 25 that Defendants are directly liable for infringing images created by users because their platforms  
 26 “generate digital images and other output that are derived exclusively from the Training Images,  
 27 and that add nothing new.” (¶ 164; *see* ¶¶ 158, 160 (alleging Defendants directly infringed  
 28 Plaintiffs’ rights by reproducing, distributing, performing, and displaying “one or more of the

1 Works” and by “prepar[ing] Derivative Works”).) Plaintiffs also separately allege that all  
 2 Defendants are vicariously liable for their users’ creation and sale of “Fakes.” (¶¶ 171–73.) Yet  
 3 the Complaint does not identify a single alleged “Derivative Work” or “Fake” generated using the  
 4 Midjourney platform. That is, the Complaint does not plead any example of output from  
 5 Midjourney’s platform that allegedly infringes Plaintiffs’ rights. This, too, is fatal to their claims.

6 Just as Plaintiffs are required to plead which Works were infringed, they must also identify  
 7 the works that are allegedly infringing. *See Becton*, 2020 WL 1877707, at \* 4. Among other things,  
 8 this enables the Court to consider whether there is substantial similarity between the accused work  
 9 and the protectable elements of Plaintiffs’ Works, as required to establish infringement. *MultiCraft*  
 10 *Imports*, 2017 WL 5664996, at \*4. Where, as here, a complaint lacks “allegations of even  
 11 representative infringements, [it] fails to provide notice as a matter of law.” *Id.* at \*3; *see also*,  
 12 *Blizzard Ent’m’t., Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1175 (N.D. Cal. 2015)  
 13 (dismissing claim lacking allegations identifying “representative acts of infringement”).

14 Plaintiffs’ failure to identify any allegedly infringing output requires dismissal for a related  
 15 reason: they do not allege the requisite substantial similarity of protected expression. Infringement  
 16 requires “substantial similarity between the infringing work and the work copyrighted; and that  
 17 similarity must have been caused by the defendant’s having copied the copyright holder’s  
 18 creation.” *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). To  
 19 assess substantial similarity, the Ninth Circuit applies a two-part test. *Cavalier v. Random House*,  
 20 *Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). The “extrinsic test” is an “objective comparison of specific  
 21 expressive elements”; it focuses on the “articulable similarities” between two works’ “*protectible*  
 22 *elements, standing alone.*” *Id.* (emphasis in original); *see also Berkic v. Crichton*, 761 F.2d 1289,  
 23 1293–94 (9th Cir. 1985) (excluding ideas and scenes-a-faire in assessing substantial similarity).  
 24 The “intrinsic test,” a subjective comparison, focuses on “whether the ordinary, reasonable audience  
 25 would find the works substantially similar” in “total concept and feel.” *Cavalier*, 297 F.3d at 822.

26 Here, Plaintiffs do not even attempt to plead in conclusory terms that any images generated  
 27 using Midjourney’s platform are substantially similar to any of Plaintiffs’ Works, intrinsically or  
 28 extrinsically. Rather, they affirmatively plead just the opposite. (*See* ¶¶ 93 (“none of the [] output

images ... is likely to be a close match”), 192–93 (output is so dissimilar from asserted Works that it would be “impossible” for Plaintiffs to identify them without CMI).) Plaintiffs’ copyright claims, thus, fail out of the gate to the extent premised on Midjourney output. Moreover, Plaintiffs cannot cure this defect by amendment, as it would require them to contradict their own pleading. *See Airs Aromatics, LLC v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (explaining that amendments that contradict an earlier pleading are impermissible); *see also Parziale v. HP, Inc.*, 2020 WL 5798274, at \*7 (N.D. Cal. Sept. 29, 2020) (dismissing copyright claim with prejudice and collecting cases). Dismissal should be with prejudice.

### 3. Plaintiffs fail to allege cognizable violations of rights to prepare derivative works and to perform works

Plaintiffs’ claims that Midjourney infringed their exclusive rights to prepare derivative works and to perform their Works (¶¶ 160(b), (d)) fail as a matter of law and should be dismissed.

**Preparation of derivative works (17 U.S.C. § 106(2)):** At the heart of Plaintiffs’ copyright infringement theory is the fallacy that because each output image generated using Midjourney is, in a colloquial sense, “derived” from images used to train its model, *every* such image is “*necessarily* a derivative work.” (¶ 95; *see also* ¶ 18 (defining “Derivative Work” as “output of AI Image Products,” without qualification), ¶ 4 (alleging that “‘new’ images are based entirely on the Training Images and are derivative works”), ¶ 20 (defining “Generative AI” as a “program [that] copies training data and uses it to produce derivative works of that training data”).) Plaintiffs’ gross mischaracterization as to how Defendants’ respective platforms operate aside, this reasoning betrays a fundamental misunderstanding of the meaning of “derivative work” as a legal term of art.

A derivative work is one which is “substantially copied” from a prior work. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (upholding judgment that no reasonable jury could find alleged derivative work was substantially similar to original). “All works are derived to a certain degree from pre-existing works. A derivative work within the meaning of the copyright law, however, is one which substantially borrows the expression of ideas from an existing work.” *Apple Comput., Inc. v. Microsoft Corp.*, 759 F. Supp. 1444, 1454 (N.D. Cal. 1991), *on reconsideration*, 779 F. Supp. 133 (N.D. Cal. 1991), *and aff’d*, 35 F.3d 1435 (9th Cir. 1994). Unless

1 a purported derivative work “is substantially similar to its forbear, it [is] nonactionable.” 2 Nimmer  
2 on Copyright § 8.09 (2022).

3 As discussed above, Plaintiffs do not, and cannot, allege that every image generated using  
4 the Midjourney platform is substantially similar to any particular training image. Again, they allege  
5 the opposite, going so far as to suggest that, without CMI, even Plaintiffs cannot tell by looking at  
6 any output whether it might be based on their Works. (¶¶ 93, 192–93.) Plaintiffs thus falsely  
7 equivocate between “derivative work” as a copyright concept, and “derivative work” as a term they  
8 made up to describe all output created by Defendants’ users. Any infringement claims relying on  
9 the former concept must be dismissed for failure to identify a single output by Midjourney that  
10 allegedly looks anything like Plaintiffs’ Works. Any infringement claims relying on the latter,  
11 manufactured-for-litigation concept are not cognizable and fail as a matter of law.

12 **Performance (17 U.S.C. § 106(4)):** Plaintiffs allege that Midjourney has directly infringed  
13 their exclusive rights by “perform[ing] one or more of the Works publicly in violation of 17 U.S.C.  
14 § 106(4)” (¶ 160(d)), but the performance right does not apply to static images. By statute, the right  
15 is expressly limited to “literary, musical, dramatic, and choreographic works, pantomimes, and  
16 motion pictures and other audiovisual works.” 17 U.S.C. § 106(4). “Pictorial” works, such as  
17 photographs, paintings, illustrations (i.e., Plaintiffs’ alleged “Works” here), are categorically  
18 excluded because it is impossible to “perform” them. 2 Nimmer on Copyright § 8.14 (2022).  
19 Plaintiffs ignore this basic distinction in attempting to invoke non-existent “performance” rights.

#### 20 **4. Plaintiffs fail to plead a viable claim for vicarious infringement**

21 Plaintiffs’ claim for vicarious copyright infringement fails for two additional reasons: (1) they  
22 do not plead facts establishing any of the elements of the claim, and (2) they plead both direct and  
23 vicarious liability based on the same alleged conduct, which is impermissible as a matter of law.

24 **Deficient pleading:** To plead vicarious infringement, Plaintiffs must allege facts plausibly  
25 establishing that (1) another party has engaged in direct infringement; (2) Midjourney exercises control  
26 over (i.e., has “the right and ability to supervise”) that infringing conduct; and (3) Midjourney has a  
27 direct financial interest in the infringing activity. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,  
28 1173 (9th Cir. 2007). Plaintiffs fail to allege facts sufficient to satisfy any of these elements.

1 The premise of Plaintiffs’ vicarious infringement theory is that unnamed “[i]ndividuals  
 2 [deemed “Imposters”] have used AI Image Products to create works using the names of Plaintiffs  
 3 and the Class in prompts” (so-called “Fakes), that “can pass as original works by that artist.”  
 4 (§ 171.) As discussed above, however, Plaintiffs have not identified a single allegedly infringing  
 5 output or purported “Fake,” much less one generated by a Midjourney user inputting any Plaintiff’s  
 6 name into a prompt. Nor is there any pleaded basis to conclude that any so-called “Fake” generated  
 7 in response to such a prompt is or would be substantially similar to any Plaintiff’s Work. Whether  
 8 one’s work “can pass” as that of another artist is irrelevant if there is no substantial similarity in  
 9 protected expression. Accordingly, Plaintiffs fail to plead an act of direct infringement by another  
 10 party—the first, most basic element of a claim for vicarious infringement.

11 The second element required Plaintiffs to plead that Midjourney has the “legal right to stop  
 12 or limit the directly infringing conduct, as well as the practical ability to do so.” *Perfect 10*, 508  
 13 F.3d at 1173. The Complaint alleges no such thing.

14 Regarding the third element, Plaintiffs offer the conclusory statement that “Defendants have  
 15 directly and indirectly profited from acts of infringement by Imposters.” (§ 176.) This is nothing  
 16 more than a recitation of an element of the claim and is “not entitled to the assumption of truth.”  
 17 *Iqbal*, 556 U.S. at 664. The Complaint elsewhere alleges that Midjourney receives revenue from  
 18 monthly subscription fees (*e.g.*, §§ 137, 138, 152), but this is no help to Plaintiffs either. A service  
 19 provider receives a “direct financial benefit” from infringing activity for purposes of vicarious  
 20 infringement only where “there is a causal relationship between the infringing activity and any  
 21 financial benefit a defendant reaps.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1044  
 22 (9th Cir. 2013) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). In other words,  
 23 “[f]inancial benefit exists where the availability of infringing material acts as a ‘draw’ for  
 24 customers.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001). Conversely,  
 25 “flat periodic payments for service” like those paid by Midjourney users, “[ordinarily] would not  
 26 constitute receiving a financial benefit directly attributable to the infringing activity” for purposes  
 27 of establishing vicarious liability. *Ellison*, 357 F.3d at 1079 (quoting S. Rep. 105-190). Thus,  
 28 Plaintiffs fail to plead facts sufficient to establish any of the elements of vicarious infringement.

1        **Contradictory pleading:** Plaintiffs may seek leave to address these pleading defects by  
 2 amendment, but amendment would be futile. Plaintiffs allege that the same acts purportedly giving  
 3 rise to their claim for vicarious infringement also constitute *direct* infringement by Midjourney,  
 4 foreclosing any claim for relief based on a secondary liability theory as a matter of law.

5        Direct copyright infringement requires “that the alleged infringers violated at least one  
 6 exclusive right granted to copyright holders under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Giganews,*  
 7 *Inc.*, 847 F.3d 657, 666 (9th Cir. 2017). In contrast, vicarious infringement imposes liability for  
 8 *another’s* direct infringement. *See Napster*, 239 F.3d at 1013 n.2 (“Secondary liability ... does not  
 9 exist in the absence of direct infringement by a third party.”). By law, a defendant cannot be both  
 10 directly and vicariously liable for the same allegedly infringing act. For example, in *Sound &*  
 11 *Color, LLC v. Smith*, the plaintiff brought direct and secondary infringement claims relating to the  
 12 creation of a purportedly infringing song. 2023 WL 2821881, at \*2 (C.D. Cal. Feb. 28, 2023). The  
 13 court granted dismissal of the secondary infringement claims, explaining that defendants “cannot  
 14 be secondarily liable for their own direct infringement.” *Id.* at \*47–48; *see also Smith v. Weeknd*,  
 15 2019 WL 6998666, at \*1–3 (C.D. Cal. Aug. 23, 2019) (same, dismissing claims).

16        In this case, Plaintiffs assert that all Defendants, including Midjourney, directly infringe  
 17 Plaintiffs’ rights when their platforms generate images in response to user prompts. (*See* ¶¶ 156–  
 18 60.) Plaintiffs’ vicarious infringement claims concern a subset of those images, namely, those  
 19 created by “using the names of Plaintiffs and the Class in prompts.” (¶¶ 171–75.) Having asserted  
 20 that any use of Midjourney to generate images necessarily results in an infringing “Derivative  
 21 Work” and thus constitutes *direct* infringement by Midjourney (¶¶ 95, 158), Plaintiffs’ attempt to  
 22 hold Midjourney *vicariously* liable for that same conduct must be dismissed with prejudice.

### 23        **B. Plaintiffs Fail to Adequately Plead a Violation of the DMCA (Claim 3)**

24        Plaintiffs claim that Midjourney has violated the DMCA (17 U.S.C. § 1202(b)) by removing  
 25 or altering CMI from Plaintiffs’ Works. (¶ 191.) To state a claim under § 1202(b), a plaintiff must  
 26 plausibly allege: (1) the existence of CMI on a copyrighted work; (2) removal or alteration of that  
 27 CMI; (3) the removal or alteration was done “intentionally”; and (4) the removal or alteration was  
 28 committed “knowing, or, ... having reasonable grounds to know that it would induce, enable,

facilitate, or conceal” copyright infringement. 17 U.S.C. § 1202(b); *Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 673 (9th Cir. 2018). For the reasons set forth below, Plaintiffs have failed to adequately plead that Midjourney removed or altered CMI or did so with the requisite scienter.

**1. Plaintiffs identify no Work from which CMI was altered or removed**

Plaintiffs fail to allege a single example of any of their Works from which CMI was removed or altered. As such, they fail to allege facts sufficient to plead the second element, warranting dismissal. *See Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1175 (N.D. Cal. 2019) (Orrick, J). In *Menzel*, this Court considered conclusory claims regarding removal and distribution of CMI alleged by the counter-plaintiff, a photographer. *Id.* The Court dismissed the § 1202(b) claims, reasoning that because the photographer “merely alleged that his photographs ‘were altered to remove certain of [his] copyright management information’ without providing any facts to identify which photographs had CMI removed,” he failed to state a plausible claim for relief. *Id.* The same result should obtain here. *Id.*; *see also Synopsys*, 2013 WL 5770542, at \*4.

Plaintiffs’ defective DMCA claim cannot be cured by amendment. Plaintiffs were required to plead specific instances in which CMI was altered or removed from originals of their Works, *Dolls Kill, Inc. v. Zoetop Bus. Co.*, 2022 WL 16961477, at \*3–4 (C.D. Cal. Aug. 25, 2022) (holding that § 1201(b)(1) requires removal or alteration of CMI from originals), or otherwise *exact copies* of their Works. *See, e.g., id.*; *Kirk Kara Corp. v. W. Stone & Metal Corp.*, 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020) (dismissing DMCA claim because “while the works may be *substantially similar*, Defendant did not make *identical* copies of Plaintiff’s works and then remove the engraved CMI”); *Frost-Tsuji Architects v. Highway Inn, Inc.*, 2015 WL 263556, at \*3 (D. Haw. Jan. 21, 2015) (same), *aff’d*, 700 F. App’x 674 (9th Cir. 2017); *O’Neal v. Sideshow, Inc.*, 583 F. Supp. 3d 1282, 1287 (C.D. Cal. 2022) (dismissing DMCA claim and finding that no violation exists where the works are not identical). As noted above, however, Plaintiffs’ DMCA claim is premised on allegations that output is so dissimilar to Plaintiffs’ Works that they cannot identify infringement without CMI. (*See* ¶¶ 192–93.) Accordingly, any properly pleaded DMCA claim would impermissibly contradict the allegations in the Complaint. *Airs Aromatics*, 744 F.3d at 600. This claim, too, should be dismissed with prejudice.

1                                   **2. Plaintiffs’ improper shotgun pleading fails to articulate Midjourney’s**  
 2                                   **alleged involvement in the alteration or removal of CMI**

3                   The DMCA claim fails for the additional reason that Plaintiffs do not plausibly plead that  
 4                   *Midjourney* removed or altered CMI. The claim is styled as a “shotgun” pleading in which all  
 5                   allegations are directed to all Defendants, without specifying what any individual defendant is  
 6                   supposed to have done. (See ¶¶ 181–200 (referring to “Defendants” throughout).) This failure “to  
 7                   allege what role each Defendant played in the alleged harm makes it exceedingly difficult, if not  
 8                   impossible, for individual Defendants to respond to [the] allegations.” *In re iPhone Application*  
 9                   *Litig.*, 2011 WL 4403963, at \*8 (N.D. Cal. Sept. 20, 2011). Such pleading “deprives [d]efendants  
 10                  of knowing exactly what they are accused of doing wrong,” and does not satisfy Rule 8(a).  
 11                  *Sollberger v. Wachovia Sec., LLC*, 2010 WL 2674456, at \*4–5 (C.D. Cal. June 30, 2010); *Destfino*  
 12                  *v. Reiswig*, 630 F.3d 952, 958–59 (9th Cir. 2011) (affirming dismissal of “shotgun pleading”).

13               Plaintiffs’ jumbled allegations are particularly incoherent when applied to Midjourney. For  
 14               instance, the Complaint alleges that all “Defendants removed or altered CMI from images that are  
 15               owned by Plaintiffs and the Class by training Stable Diffusion on those images and designing it to  
 16               omit any CMI as part of the output” (¶ 183), even though only Stability allegedly “created” and  
 17               “trained” Stable Diffusion (¶¶ 1–3, 33). It also alleges that “Defendants intentionally removed or  
 18               altered CMI from the Works after they were posted on DeviantArt or other websites” (¶ 184), even  
 19               though Midjourney has no alleged ability to remove or alter content posted to another party’s website.

20                                   **3. Plaintiffs fail to plead any facts to establish scienter**

21               On top of failing to identify any Work from which Midjourney removed or altered CMI,  
 22               Plaintiffs have also failed to allege facts plausibly establishing that Midjourney *intentionally* did  
 23               so, or *knowingly* distributed CMI or copies of Works with *knowledge* or *reason to know* that such  
 24               conduct would “induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b). The  
 25               Complaint recites the *elements* of the DMCA’s so-called “double-scienter” requirement (*see*  
 26               ¶¶ 189–91), but fails to allege any *facts* to support a reasonable inference that Midjourney had the  
 27               requisite intent or knowledge. “Threadbare recitals of the elements of a cause of action, supported  
 28               by mere conclusory statements, do not suffice” to state a claim. *Iqbal*, 556 U.S. at 678.

1           The deficiencies in Plaintiffs’ allegations concerning the second scienter requirement (*i.e.*,  
 2 that Midjourney knew or had reason to know that its conduct would “induce, enable, facilitate, or  
 3 conceal infringement”) are particularly egregious. The Ninth Circuit has made clear that this  
 4 demands “a more specific application than the universal possibility of encouraging infringement;  
 5 specific allegations as to how identifiable infringements ‘will’ be affected are necessary.” *Stevens*,  
 6 899 F.3d at 674 (affirming grant of summary judgment to defendant on § 1202(b) claim). It “is  
 7 intended to limit liability ... to instances in which the defendant knows or has a reasonable basis to  
 8 know that the removal or alteration of CMI or the distribution of works with CMI removed *will* aid  
 9 infringement.” *Id.* at 674–75 (emphasis in original). Accordingly, a plaintiff charging a DMCA  
 10 violation “must make an affirmative showing, such as by demonstrating a past ‘pattern of conduct’  
 11 or ‘modus operandi,’ that the defendant was aware or had reasonable grounds to be aware of the  
 12 probable future impact of its actions.” *Id.* at 673–74.

13           Here, Plaintiffs make no effort to satisfy their burden to plead facts showing that  
 14 Midjourney knew or should have known that its alleged actions would aid infringement. As in  
 15 *Stevens*, they “identify no instance in which the removal of CMI” from any Work has “induce[d],  
 16 enable[d], facilitate[d] or conceal[ed] an infringement.” *Id.* at 675–76. They do not even identify  
 17 an instance in which Midjourney’s platform was used to infringe, much less that it was designed  
 18 and intended for that purpose. Absent such allegations, Plaintiffs’ DMCA claim must be dismissed.

### 19           **C. Plaintiffs’ Right of Publicity Claims (Claims 4, 5) Should Be Dismissed**

20           California law provides a statutory cause of action where “any person ... knowingly uses  
 21 another’s name, voice, signature, photograph, or likeness, in any manner, on or in products,  
 22 merchandise, or goods, or for purposes of advertising ... without such person’s prior consent.” Cal.  
 23 Civ. Code § 3344(a); *see also Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1088 (9th Cir. 2002).  
 24 Somewhat broader, the common law permits a right-of-publicity claim when a defendant (1) uses  
 25 a plaintiff’s identity (2) to defendant’s commercial or other advantage (3) without consent (4)  
 26 causing injury to plaintiff. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1402 (9th Cir. 1992).

27           Plaintiffs’ right of publicity allegations are, to put it mildly, difficult to parse. The  
 28 Complaint charges Defendants with purported “use” of Plaintiffs’ “names” and, with respect to the

1 common law claim, their “artistic identities.” (§§ 201–22.) In each instance, however, Plaintiffs  
 2 elide specifics in favor of conclusory allegations that fail to put any Defendant on notice of the  
 3 claims against it. For example, Plaintiffs allege that Defendants “used Plaintiffs’ names to advertise  
 4 art ‘in the style’ of Plaintiffs’ work” (§ 205), used their names to “to link and associate [images]  
 5 with Plaintiffs’ specific styles and artistic accomplishments,” and “emphasized the ability of” their  
 6 platforms to create images in the style of the Plaintiffs’ artworks (§ 208). Not once, however, do  
 7 Plaintiffs identify any instance in which their names or “artistic identities” were actually referenced.  
 8 Plaintiffs do not point to a single statement on Midjourney’s website, interview with the press, ad  
 9 for the platform, or any other example of anyone from Midjourney mentioning any Plaintiff, in a  
 10 commercial context or otherwise. The Court can judicially notice the contents of Midjourney’s  
 11 website (Lauter Decl. 5 & Ex. D; no references to Plaintiffs appear there. On this basis alone,  
 12 Plaintiffs’ conclusory allegations fail to state a right-of-publicity claim against Midjourney.

13 The vagueness of the Complaint obfuscates what appears to be the true, but legally non-  
 14 cognizable, premise of Plaintiffs’ publicity claims: that Defendants purportedly violate an artist’s  
 15 publicity rights when users enter the artist’s name into a text prompt to generate works in the “style”  
 16 of that artist. (*See* § 215 (alleging that Plaintiffs’ publicity rights extend to their “artistic identities,”  
 17 which are “not limited to a specific copyrighted image or work,” but, rather, “extend to Plaintiffs’  
 18 entire corpus of work”).) If that is Plaintiffs’ theory, however, it describes a process by which  
 19 Midjourney *users*, not Midjourney, utilize Plaintiffs’ names in text prompts, “akin to a text query  
 20 passed to an internet search engine.” (§ 24.) That would not be a use by Midjourney. *See Perfect*  
 21 *10, Inc. v. Google, Inc.*, 2010 WL 9479060, at \*13 (C.D. Cal. July 30, 2010) (rejecting right of  
 22 publicity claim predicated on use of likeness by others).

23 In addition, such a theory is statutorily preempted because it would entitle Plaintiffs to  
 24 monopolize conceptual elements of their Works that Congress explicitly excluded from the scope  
 25 of copyright protection. Under 17 U.S.C. § 301(a), state claims are preempted by the Copyright  
 26 Act where (1) “the ‘subject matter’ of the state law claim falls within the subject matter of copyright  
 27 as described in 17 U.S.C. §§ 102 and 103”; and (2) “the rights asserted under state law are  
 28 equivalent to the rights contained in 17 U.S.C. § 106.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004,

1 1010 (9th Cir. 2017). “If a plaintiff asserts a claim that is the equivalent of a claim for infringement  
 2 of a copyrightable work, that claim is preempted.” *Jules Jordan Video, Inc. v. 144942 Canada*  
 3 *Inc.*, 617 F.3d 1146, 1155 (9th Cir. 2010).

4 Plaintiffs purport to possess “artistic identities” that encompass all art “in the style of” their  
 5 respective Works (§ 215), which they define as “a work that others would accept as [one] created  
 6 by [them].” (§ 5.) This novel conception of publicity rights plainly satisfies both elements and  
 7 triggers preemption, as it amounts to nothing more than a rearticulation of Plaintiffs’ defective claim  
 8 under 17 U.S.C. § 106. Indeed, Plaintiffs use nearly identical language to describe the alleged acts  
 9 of direct copyright infringement upon which their vicarious infringement claim is predicated,  
 10 namely, that individuals have used Defendants’ platforms “to create images that can pass as original  
 11 works by [Plaintiffs].” (§ 171.)

12 Plaintiffs are not spared from preemption because artistic “styles,” as species of aesthetic  
 13 ideas or concepts, are excluded from copyright protection. *See* 17 U.S.C. § 102(b); 2 Patry on  
 14 Copyright § 4:14 (“Style is not protected.”) (citing cases). *See, e.g., McDonald v. West*, 138 F.  
 15 Supp. 3d 448, 455 (S.D.N.Y. 2015) (explaining that “copyright does not protect styles” “[f]or the  
 16 same reason” it “does not protect ideas”). “[T]he scope of the subject matter of copyright law is  
 17 broader than the protections it affords.” *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975,  
 18 979 (9th Cir. 2011) (quoting 4 Nimmer on Copyright § 19D.03[A][2][b] (2010)). “[S]tate-law  
 19 protection for fixed ideas”—precisely what Plaintiffs seek by claiming publicity rights in a “style”  
 20 embodied within a corpus of artwork—“falls within the subject matter of copyright and thus  
 21 satisfies the first prong of the statutory preemption test, despite the exclusion of fixed ideas from  
 22 the scope of actual federal copyright protection.” *Id.* at 979. Because Plaintiffs do not identify any  
 23 use of their purported styles “independent of the display, reproduction, and distribution of the  
 24 copyrighted material in which they are depicted ... none of plaintiffs’ claims is qualitatively  
 25 different from a copyright claim,” and they are, therefore, preempted. *Maloney*, 853 F.3d at 1019.

#### 26 **D. Plaintiffs Fail to Plead a Viable Claim for Unfair Competition (Claim 6)**

27 Dismissal of Plaintiffs’ unfair competition claim is appropriate for three reasons.  
 28

**Plaintiffs fail to adequately plead a violation of the Lanham Act or Common Law:**

Plaintiffs make no effort to plead facts to support a claim for “Unfair Competition” under the Lanham Act and California common law. (*See* Compl. at 40; ¶ 44(v).) These offhand references appear to have been inadvertent, and, in any event, fail as a matter of law.

“Unfair competition” under Section 1125 refers to deceptive or misleading uses of words, names, or other symbols *that cause confusion* regarding the source, affiliation, or sponsorship of goods or services or that, “in commercial advertising or promotion, misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125; *see also Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1046–47 (9th Cir. 1999). Similarly, unfair competition under California common law requires a showing that defendants “have passed off their goods as those of another” or “exploit[ed] trade names or trademarks.” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008). Plaintiffs allege nothing of the sort. Instead, they explicitly recast their allegations of copyright infringement and violation of the DMCA as “unlawful business practices.” (¶ 224.) As such, whatever Plaintiffs’ intent, they fail to state a claim for unfair competition under either common law or the Lanham Act. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (cautioning against “misuse or over-extension of trademark and related protections into areas traditionally occupied by patent or copyright”).

**Plaintiffs’ UCL claim is preempted:** The alleged predicate violations for Plaintiffs’ UCL claim are (a) “Infringement of Plaintiffs’ and the Class’s copyrights”; and (b) violation of the DMCA. (¶ 224.) The former is preempted under well-settled law. *See Sybersound Records*, 517 F.3d at 1152 (affirming dismissal of UCL claim with prejudice and explaining: “To the extent the improper [] act complained of is based on copyright infringement, the claim was properly dismissed because it is preempted” under 17 U.S.C. § 301(a)); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 823 F. App’x 516, 519 (9th Cir. 2020) (same, affirming summary judgment).

**Plaintiffs lack a predicate violation:** Violation of the UCL’s “unlawful” prong “effectively borrows violations of others laws” and “cannot survive” if predicated on defective claims. *Mohanna v. Carrington Mortg. Servs. LLC*, 2018 WL 3730419, at \*8 (N.D. Cal. Aug. 6, 2018)

(dismissing UCL claim as all predicate claims were dismissed) (Orrick, J.). Because Plaintiffs fail to adequately state a claim for either copyright infringement or violation of the DMCA (*see* Sections IV.A & B, *supra*), their UCL claim must also be dismissed for this additional reason. *Id.*

**E. Plaintiffs’ Claim for Declaratory Relief is Redundant and Improper (Claim 8)**

A claim for declaratory relief is “unnecessary” and should be dismissed “where an adequate remedy exists under some other cause of action.” *Mangindin v. Wash. Mut. Bank*, 637 F. Supp. 2d 700, 707–08 (N.D. Cal. 2009) (dismissing where declaratory relief claim was “entirely commensurate with the relief sought through ... other causes of action”); *see also Technology & Intell. Prop. Strategies Grp. PC v. Fthenakis*, 2011 WL 3501690, at \*10 (N.D. Cal. Aug. 10, 2011) (dismissing claim as “needlessly duplicative” where “the requested declarations are wholly dependent on the Court’s findings on [the] substantive claims”). Dismissal is also appropriate where a request for declaratory relief is derivative of claims that themselves warrant dismissal. *See Malasky v. Esposito*, 2019 WL 79032, at \*10 (N.D. Cal. Jan. 2, 2019), *aff’d*, 781 F. App’x 643 (9th Cir. 2019).

Plaintiffs’ claim for declaratory relief is merely a rehash of their other substantive claims. It is, thus, both needlessly duplicative and derivative of other defective claims that, as discussed above, should also be dismissed. Claim 8 should be dismissed with prejudice.

**V. PLAINTIFFS’ CLASS ALLEGATIONS SHOULD BE STRICKEN UNDER RULE 12(F)**

Even if the Court were to allow Plaintiffs’ defective individual claims to proceed (or to be amended), the Court should nonetheless strike the class allegations from the Complaint because there is no conceivable class that might satisfy the requirements of Rule 23 in this case.

Although motions to strike class allegations are uncommon, the Supreme Court has acknowledged that it is possible to determine the viability of a proposed class at the pleading stage. *See General Tel. Co.*, 457 U.S. at 160. *See, e.g., Sanders*, 672 F. Supp. 2d at 991 (granting motion to strike class definition); *Hovsepian*, 2009 WL 5069144, at \*6 (same); *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1166–67 (N.D. Cal. 2008) (same); *Ruegsegger v. Caliber Home Loans, Inc.*, 2019 WL 8163640, at \*6 (C.D. Cal. Jan. 8, 2019) (“it is clear from the pleadings that a class could not be certified”); *Bates v. Bankers Life & Cas. Co.*, 993 F. Supp. 2d 1318, 1342 (D. Or. 2014) (holding that the “inability to satisfy the requirements of Rule 23(a)(3) provides sufficient grounds, without

more, for granting defendants’ motion to strike”). Where, as here, a complaint demonstrates on its face that a class action cannot be maintained, courts have granted motions to strike class allegations in order “to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Sanders*, 672 F. Supp. 2d at 990–91.

Midjourney recognizes that this Court has repeatedly cautioned against motions to strike class allegations at the pleading stage, explaining that doing so “is only appropriate where the defendant presents an argument that completely precludes certification of *any class*, not just the class currently defined in the complaint.” *Rice-Sherman v. Big Heart Pet Brands, Inc.*, 2020 WL 1245130, at \*15 (N.D. Cal. Mar. 16, 2020) (emphasis in original) (Orrick, J.); *Huynh v. Jabil Inc.*, 2023 WL 1802417, at \*7 (N.D. Cal. Feb. 7, 2023) (same) (Orrick, J.). This is such a case, however.

As set forth below, Plaintiffs seek to do the impossible by applying a single class definition to four distinct violations of law, each with its own elements and individualized, fact-intensive inquiries that overwhelm any conceivable common issues. Because it is “obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis,” the Court should use its “authority under [Rule] 12(f) to delete the complaint’s class allegations.” *See Stokes v. CitiMortgage, Inc.*, 2015 WL 709201, at \*4 (C.D. Cal. Jan. 16, 2015) (quoting *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013)).

### 1. No purported “Damages Class” can be certified

Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). To that end, “this Court must determine whether common evidence and common methodology could be used to prove the elements of the underlying cause of action.” *In re High-Tech Empl. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1186–87 (N.D. Cal. 2013). As the Complaint amply demonstrates, these requirements cannot be met here under any set of circumstances.

As a general matter, courts consistently decline to proceed on a class-wide basis for claims involving fact-intensive analyses of intellectual property infringement. For example, in *Vulcan Golf, LLC, v. Google, Inc.*, several trademark owners brought a class action against Google for

1 permitting registration of domain names that incorporated the putative class members' marks. 254  
 2 F.R.D. 521 (N.D. Ill. 2008). In denying certification under Rule 23(b)(3), the court explained that  
 3 "individual issues predominate as to the trademark-related claims and the certification of any class  
 4 related to the trademark claims would simply be unmanageable." *Id.* at 534. In particular, the court  
 5 was concerned about the need "to conduct hearings regarding ownership on even a tiny fraction of  
 6 the potentially millions of registered and unregistered marks or personal names of the putative class  
 7 members" to determine ownership of at-issue marks. *Id.* at 528.

8 Similarly, in *FPX, LLC v. Google, Inc.*, which involved allegations that Google violated  
 9 putative class members' trademark rights by selling them as keywords, the district court declined  
 10 certification because the class could not even satisfy Rule 23(a)(2)'s lower threshold of  
 11 commonality, let alone the higher bar imposed by Rule 23(b)(3)'s predominance requirement. 276  
 12 F.R.D. 543, 550 (E.D. Tex. 2011). The court concluded that the trademark claim was not capable  
 13 of class-wide resolution because determining whether one class member's trademark rights were  
 14 violated would not resolve any other class member's trademark claim. *See id.* (citing *Wal-Mart*  
 15 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("Their claims must depend upon a common  
 16 contention.... That common contention, moreover, must be of such a nature that it is capable of  
 17 classwide resolution—which means that determination of its truth or falsity will resolve an issue  
 18 that is central to the validity of each one of the claims in one stroke.")). The same reasoning applies  
 19 to copyright infringement claims, which are generally regarded as "poor candidates for class-action  
 20 treatment" because each individual's claim "must be resolved upon facts which are particular to  
 21 that single claim of infringement, and separate from all the other claims." *Football Ass'n Premier*  
 22 *League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65–66 (S.D.N.Y. 2013) (denying class certification).

23 Here, Plaintiffs plead a "Damages Class" that would include any person or entity in the U.S.  
 24 that owns an undefined "copyright interest" in a work used to train an AI Image Product (§ 41),  
 25 ignoring that this case presents multiple species of rights violations apart from copyright, each  
 26 independently demanding the type of individualized, fact-intensive analyses—with respect to  
 27 determining both class membership and ultimate liability—that courts consistently regard as  
 28 predominating over common issues. Just resolving the claims for direct copyright infringement

1 would require the Court to proceed on an image-by-image basis across every putative class member  
 2 to resolve issues of protectability (*i.e.*, whether an image merits copyright protection), ownership,  
 3 registration, substantial similarity, authorization (including whether any image was published under  
 4 a “copyleft” license, or its use was otherwise subject to an express or implied license), fair use, and  
 5 other matters necessary to proving such a claim. *See Football Ass’n*, 297 F.R.D. at 67. On top of  
 6 that, under 17 U.S.C. § 412, the Court would need to make individualized inquiry into *when* each  
 7 putative class member procured its registration for *each* image at issue to ascertain if he or she may  
 8 be entitled to statutory damages or must instead prove actual damages, which in turn may entail  
 9 evidence of previous licensing and royalty arrangements, and evidence on the extent to which any  
 10 allegedly infringing work has been used, distributed, or generated revenue. Given that Plaintiffs  
 11 have alleged that as many as “five billion images” are at issue (¶ 57), adjudicating class-wide  
 12 claims, *just with respect to direct copyright infringement*, would be impossible.

13 Plaintiffs’ other claims implicate entirely independent fact intensive analyses. For example,  
 14 addressing claims for vicarious infringement would involve all of the same issues as direct  
 15 infringement, but with an added layer of attenuation that would require the Court to consider the  
 16 conduct of innumerable third parties. (*See supra*, at 12–14.) In addition, Plaintiffs’ DMCA and  
 17 right of publicity claims would require the Court to determine, among other things, whether class  
 18 members’ copyrighted works contained CMI; whether any CMI was removed or altered; whether  
 19 that removal, in fact, caused any harm; and whether each class members’ identity, name or likeness  
 20 was used by Midjourney and how. And the *amount* of purported damages would necessarily vary  
 21 significantly between class members, as some Works and some individuals’ rights will inevitably be  
 22 valued more highly than others. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 823–24 & n.5 (9th Cir.  
 23 2012) (noting that “significant variation” in claimed damages among class members is relevant to  
 24 Rule 23(b)(3) “predominance” analysis); *Block v. Major League Baseball*, 65 Cal. App. 4th 538,  
 25 543–46 (1998) (affirming denial of certification in publicity action by baseball players, as ability to  
 26 award damages was complicated by fact that “the value of each player’s right of publicity would  
 27 depend, at least in part, on the level of his celebrity” and “court would be obligated to evaluate”  
 28 defenses, including consent, that may not be common and were a “strong barrier to certification”).

1 Plaintiffs should not be permitted to subject Defendants to extraordinarily broad and  
 2 burdensome discovery on a putative class-wide basis (let alone the expense of objecting to  
 3 certification) while Plaintiffs grope hopelessly for a cognizable class that can never be found.  
 4 Because it is evident from the face of the Complaint that Plaintiffs cannot construct any workable  
 5 damages class in which common issues predominate, its defective class claims and “Damages  
 6 Class” should be stricken under Rule 12(f). *Kevari v. Scottrade, Inc.*, 2018 WL 6136822, at \*7–8  
 7 (C.D. Cal. Aug. 31, 2018) (granting motion to strike where plaintiff’s class allegations “fail[ed] to  
 8 sufficiently plead predominance”); *Lautemann v. Bird Rides, Inc.*, 2019 WL 3037934, at \*7 (C.D.  
 9 Cal. May 31, 2019) (striking class allegations where “class members’ claims necessarily turn[ed]  
 10 on individualized questions”); *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1147  
 11 (N.D. Cal. 2010) (granting motion to strike and finding express warranty claims improper for class  
 12 treatment as they “involve[d] elements that are individual to each purported class member”).

## 13 2. No purported “Injunctive Relief Class” can be certified

14 Plaintiffs also purport to assert an “Injunctive Relief Class” under Rule 23(b)(2), but this  
 15 should be stricken as well. Plaintiffs cannot show that injunctive relief could be fashioned against  
 16 Midjourney “respecting the class as a whole,” because, as discussed above, there are myriad  
 17 permutations of facts and law that must be considered before any injunction can be issued against  
 18 Midjourney as to any individual class member or work. Equally problematic, Plaintiffs’ proposed  
 19 “Injunctive Relief Class” uses the *identical* definition as their purported “Damages Class.” The  
 20 Supreme Court has ruled that Rule 23(b)(2) “does not authorize class certification” where, as  
 21 alleged here, “each class member would be entitled to an individualized award of monetary  
 22 damages.” *Wal-Mart Stores*, 564 U.S. at 360–61; *see Ellis v. Costco Wholesale Corp.*, 657 F.3d  
 23 970, 986–87 (9th Cir. 2011) (reversing certification of a (b)(2) class where plaintiffs sought both  
 24 monetary and injunctive relief and explaining that (b)(2) cannot be invoked where the claims  
 25 involve “individualized determinations of each [class member’s] eligibility” to monetary relief).

## 26 VI. CONCLUSION

27 Plaintiffs’ Complaint fails to state any factually or legally cognizable claim against  
 28 Midjourney. All claims against Midjourney should be dismissed, and the class claims stricken.

1 Dated: April 18, 2023

COOLEY LLP

2  
3 By: /s/ Angela L. Dunning

4 Angela L. Dunning

Judd Lauter

Kayla Blaker

5 Asheton Lemay

6 Attorneys for Defendant

7 MIDJOURNEY, INC.

1 LATHAM & WATKINS LLP  
Andrew M. Gass (SBN 259694)  
2 *andrew.gass@lw.com*  
Michael H. Rubin (SBN 214636)  
3 *michael.rubin@lw.com*  
505 Montgomery Street, Suite 2000  
4 San Francisco, California 94111-6538  
Telephone: 415.391.0600

5 *Attorneys for Defendant DeviantArt, Inc.*  
6  
7

8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**  
11

12 SARAH ANDERSEN, an individual;  
KELLY MCKERNAN, an individual;  
13 KARLA ORTIZ, an individual,

14 Individual and Representative Plaintiffs,

15 v.

16 STABILITY AI LTD., a UK corporation;  
STABILITY AI, INC., a Delaware corporation;  
17 MIDJOURNEY, INC., a Delaware corporation;  
DEVIANTART, INC., a Delaware corporation,

18 Defendants.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CASE NO. 3:23-cv-00201-WHO

**DEFENDANT DEVIANTART, INC.'S  
NOTICE OF MOTION, MOTION TO  
DISMISS, AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS**

Date: July 19, 2023  
Time: 2:00 p.m.  
Place: Courtroom 2 - 17th Floor  
Before: Hon. William H. Orrick

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on July 19, 2023 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, Courtroom 2, 17th Floor, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendant DeviantArt, Inc. (“DeviantArt”) through its undersigned counsel, will, and hereby does, move to dismiss Plaintiffs’ (“Plaintiffs”) Class Action Complaint (“Compl.” or “Complaint”) pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(b)(6).

DeviantArt’s Motion to Dismiss (“Motion”) is based on this Notice, the supporting Memorandum of Points and Authorities (“Memorandum”), the complete files and records in this action, and any additional material and arguments as may be considered in connection with the hearing on the Motion.

**STATEMENT OF RELIEF SOUGHT**

DeviantArt seeks an order pursuant to FRCP 12(b)(6) dismissing the claims against DeviantArt for failure to state a claim upon which relief can be granted.

**ISSUES TO BE DECIDED**

The Motion presents the following issues to be decided: (1) Whether the undifferentiated allegations in the Complaint violate FRCP 8(a)(2) and require dismissal; (2) Whether Plaintiffs’ claims of direct and vicarious copyright infringement (Counts I & II) should be dismissed for failure to comply with 17 U.S.C. § 411(a) and failure to specifically identify the allegedly infringed works; (3) Whether Plaintiffs’ claim of direct infringement against DeviantArt (Count I) should be dismissed for failure to plead facts sufficient to hold DeviantArt liable for infringement of the exclusive rights set out in 17 U.S.C. § 106; (4) Whether Plaintiffs’ claim of vicarious infringement (Count II) should be dismissed for failure to identify an act of direct infringement and/or failure to plead the elements of vicarious liability; (5) Whether Plaintiffs’ claims under 17 U.S.C. § 1202(b) (Count III) should be dismissed for failure to plead facts sufficient to hold DeviantArt liable for violation of the Digital Millennium Copyright Act; (6) Whether Plaintiffs’ claims of violation of the statutory and common law rights of publicity (Counts IV & V) should be dismissed because those claims are preempted by the Copyright Act, *see* 17 U.S.C. § 301(a), and/or barred by the

1 First Amendment; (7) Whether Plaintiffs’ claims of violation of the statutory and common law  
 2 rights of publicity (Counts IV & V) should be dismissed for failure to plead facts sufficient to hold  
 3 DeviantArt liable; (8) Whether Plaintiffs’ claim of “unfair competition” (Count VI) should be  
 4 dismissed for failure to plead facts sufficient to hold DeviantArt liable under 15 U.S.C. § 1125,  
 5 Cal. Bus. & Prof. Code §§ 17200, or common law unfair competition; (9) Whether Plaintiffs’ claim  
 6 of breach of contract (Count IX<sup>1</sup>) should be dismissed for failure to plead facts sufficient to hold  
 7 DeviantArt liable and for failing to identify the allegedly breached contract term; and (10) Whether  
 8 Plaintiffs’ claim for declaratory judgment (Count VII) should be dismissed because Plaintiffs have  
 9 failed to adequately state any of their underlying claims.

10 Dated: April 18, 2023

Respectfully submitted,

LATHAM & WATKINS LLP

By: /s/ Andrew M. Gass

Andrew M. Gass (SBN 259694)

*andrew.gass@lw.com*

Michael H. Rubin (SBN 214636)

*michael.rubin@lw.com*

505 Montgomery Street, Suite 2000

San Francisco, California 94111-6538

Telephone: 415.391.0600

*Attorneys for Defendant DeviantArt, Inc.*

27 <sup>1</sup> Plaintiffs’ claim of breach of contract is styled as “Count IX” even though it is Plaintiffs’ seventh  
 28 claim for relief and even though the Complaint contains only eight claims for relief. This Motion  
 nonetheless will refer to the claim as “Count IX” to avoid confusion.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	1
II. FACTS ALLEGED.....	3
A. Nonparty Researchers Develop “Diffusion” Technology.....	3
B. Stability AI, With Another Nonparty’s Assistance, Creates Stable Diffusion .....	4
C. DeviantArt Releases DreamUp.....	5
D. Plaintiffs File This Lawsuit Against Stability AI, Midjourney, and DeviantArt.....	6
III. LEGAL STANDARD.....	6
IV. ARGUMENT .....	7
A. Plaintiffs’ Undifferentiated Allegations Violate Rule 8(a)(2) .....	7
B. Plaintiffs’ Claims Against DeviantArt All Fail On The Merits .....	9
1. Plaintiffs’ Claim For Direct Copyright Infringement Fails .....	9
a. Plaintiffs Fail To Allege Registration Of Their Copyrights .....	9
b. Plaintiffs’ Direct Infringement Claim Against DeviantArt Fails.....	10
2. Plaintiffs’ Claim For Vicarious Copyright Infringement Fails.....	12
3. Plaintiffs’ DMCA Claim Fails .....	14
4. Plaintiffs’ Right-Of-Publicity Claims Fail.....	17
5. Plaintiffs’ Unfair Competition Law Claim Fails .....	21
6. Plaintiffs’ Breach Of Contract Claim Fails.....	22
7. Plaintiffs’ Declaratory Judgment Claim Fails With The Other Claims .....	23
C. Dismissal With Prejudice Is Appropriate As To DeviantArt.....	24
V. CONCLUSION.....	25

**TABLE OF AUTHORITIES****Page(s)****CASES**

<i>Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt., Inc.</i> , 744 F.3d 595 (9th Cir. 2014) .....	24
<i>Armstrong-Harris v. Wells Fargo Bank, N.A.</i> , No. 21-cv-7637, 2022 WL 3348426 (N.D. Cal. Aug. 12, 2022) .....	21
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	6
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	6
<i>Bespaq Corp. v. Haoshen Trading Co.</i> , No. 04-cv-3698, 2005 WL 14841 (N.D. Cal. Jan. 3, 2005) .....	9
<i>Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.</i> , 149 F. Supp. 3d 1167 (N.D. Cal. 2015) .....	11, 13
<i>Brooks v. Thomson Reuters Corp.</i> , No. 21-cv-01418, 2021 WL 3621837 (N.D. Cal. Aug. 16, 2021) .....	20
<i>Carter v. Oath Holdings Inc.</i> , No. 17-cv-7086, 2018 WL 5819458 (N.D. Cal. Nov. 5, 2018) .....	21
<i>Comedy III Prods., Inc. v. Gary Saderup, Inc.</i> , 25 Cal. 4th 387 (2001) .....	20
<i>Destfino v. Reiswig</i> , 630 F.3d 952 (9th Cir. 2011) .....	7, 8
<i>Dolls Kill, Inc. v. Zoetop Bus. Co.</i> , No. 22-cv-1463, 2022 WL 16961477 (C.D. Cal. Aug. 25, 2022) .....	16
<i>Entous v. Viacom Int'l, Inc.</i> , 151 F. Supp. 2d 1150 (C.D. Cal. 2001) .....	18
<i>Epikhin v. Game Insight N. Am.</i> , No. 14-cv-4383, 2015 WL 2412357 (N.D. Cal. May 20, 2015) .....	14
<i>Flava Works, Inc. v. Clavio</i> , No. 11-cv-5100, 2012 WL 2459146 (N.D. Ill. June 27, 2012) .....	11, 13
<i>Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC</i> , 139 S. Ct. 881 (2019) .....	9

1	<i>Free Speech Sys. LLC v. Menzel</i> ,	
2	390 F. Supp. 3d 1162 (N.D. Cal. 2019) .....	15
3	<i>Frost-Tsuji-Architects v. Highway Inn, Inc.</i> ,	
4	No. 13-cv-496, 2015 WL 263556 (D. Haw. Jan. 21, 2015).....	16
5	<i>Fuzzy Logic Prods., Inc. v. Trapflic, LLC</i> ,	
6	No. 15-cv-6203, 2015 WL 12791508 (C.D. Cal. Nov. 20, 2015) .....	11
7	<i>In re Gilead Scis. Sec. Litig.</i> ,	
8	536 F.3d 1049 (9th Cir. 2008) .....	6
9	<i>In re iPhone App. Litig.</i> ,	
10	No. 11-md-22590, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011).....	7
11	<i>Jewelry 10, Inc. v. Elegance Trading Co.</i> ,	
12	No. 88-cv-1320, 1991 WL 144151 (S.D.N.Y. July 20, 1991).....	18
13	<i>Karkanen v. California</i> ,	
14	No. 17-cv-6967, 2018 WL 3820916 (N.D. Cal. Aug. 10, 2018) .....	7
15	<i>Kelly v. Arriba Soft Corp.</i> ,	
16	77 F. Supp. 2d 1116 (C.D. Cal. 1999) .....	16
17	<i>Kifle v. YouTube LLC</i> ,	
18	No. 21-cv-1752, 2021 WL 1530942 (N.D. Cal. Apr. 19, 2021).....	9, 10
19	<i>Kirby v. Sega of Am., Inc.</i> ,	
20	144 Cal. App. 4th 47 (2006) .....	20
21	<i>Kirk Kara Corp. v. W. Stone &amp; Metal Corp.</i> ,	
22	No. 20-cv-1931, 2020 WL 5991503 (C.D. Cal. Aug. 14, 2020) .....	16, 17
23	<i>Kodadek v. MTV Networks, Inc.</i> ,	
24	152 F.3d 1209 (9th Cir. 1998) .....	21
25	<i>Laws v. Sony Music Ent.</i> ,	
26	448 F.3d 1134 (9th Cir. 2006) .....	18
27	<i>Litchfield v. Spielberg</i> ,	
28	736 F.2d 1352 (9th Cir. 1984) .....	12
	<i>Livingston v. Morgan</i> ,	
	No. 06-cv-2389, 2006 WL 8459602 (N.D. Cal. July 31, 2006) .....	13
	<i>Low v. LinkedIn Corp.</i> ,	
	900 F. Supp. 2d 1010 (N.D. Cal. 2012) .....	22

1	<i>Malasky v. Esposito</i> ,	
2	No. 16-cv-4102, 2019 WL 79032 (N.D. Cal. Jan. 2, 2019).....	23
3	<i>Mayen v. Bank of Am. N.A.</i> ,	
4	No. 14-cv-3757, 2015 WL 179541 (N.D. Cal. Jan. 14, 2015).....	24
5	<i>McDonald v. West</i> ,	
6	138 F. Supp. 3d 448 (S.D.N.Y. 2015).....	18
7	<i>MDY Indus., LLC v. Blizzard Ent., Inc.</i> ,	
8	629 F.3d 928 (9th Cir. 2010) .....	12
9	<i>Mills v. Netflix, Inc.</i> ,	
10	No. 19-cv-7618, 2020 WL 548558 (C.D. Cal. Feb. 3, 2020) .....	16
11	<i>Mulcahy v. Cheetah Learning, LLC</i> ,	
12	386 F.3d 849 (8th Cir. 2004) .....	12
13	<i>Nat'l Bus. Dev. Servs., Inc. v. Am. Credit Educ. &amp; Consulting, Inc.</i> ,	
14	299 F. App'x 509 (6th Cir. 2008) .....	11, 13
15	<i>O'Neal v. Sideshow, Inc.</i> ,	
16	583 F. Supp. 3d 1282 (C.D. Cal. 2022) .....	16, 17
17	<i>Parziale v. HP, Inc.</i> ,	
18	No. 19-cv-5363, 2020 WL 5798274 (N.D. Cal. Sept. 29, 2020).....	24
19	<i>Paulson v. Carter</i> ,	
20	230 F. App'x 645 (9th Cir. 2007) .....	19
21	<i>Perfect 10, Inc. v. Giganews, Inc.</i> ,	
22	847 F.3d 657 (9th Cir. 2017) .....	14
23	<i>Perfect 10, Inc. v. Google, Inc.</i> ,	
24	No. 04-cv-9484, 2010 WL 9479060 (C.D. Cal., July 30, 2010).....	19, 20
25	<i>Perfect 10, Inc. v. Visa Int'l Serv. Ass'n</i> ,	
26	494 F.3d 788 (9th Cir. 2007) .....	13, 14
27	<i>ProCD, Inc. v. Zeidenberg</i> ,	
28	86 F.3d 1447 (7th Cir. 1996) .....	18
	<i>Skidmore ex rel. Randy Craig Wolfe Trust v. Led Zeppelin</i> ,	
	952 F.3d 1051 (9th Cir. 2020) .....	11
	<i>Ray v. ESPN, Inc.</i> ,	
	783 F.3d 1140 (8th Cir. 2015) .....	18

1	<i>Reddy v. Litton Indus., Inc.</i> ,	
2	912 F.2d 291 (9th Cir. 1990) .....	24
3	<i>Rentmeester v. Nike, Inc.</i> ,	
4	883 F.3d 1111 (9th Cir. 2018) .....	12
5	<i>Ross v. Roberts</i> ,	
6	222 Cal. App. 4th 677 (2013) .....	20
7	<i>Sebastian Brown Prods., LLC v. Muzooka, Inc.</i> ,	
8	143 F. Supp. 3d 1026 (N.D. Cal. 2015) .....	7
9	<i>Spinelli v. NFL</i> ,	
10	903 F.3d 185 (2d Cir. 2018).....	16
11	<i>Stebbins v. Polano</i> ,	
12	No. 21-cv-4184, 2022 WL 2668371 (N.D. Cal. July 11, 2022) .....	24
13	<i>Stevens v. Corelogic, Inc.</i> ,	
14	899 F.3d 666 (9th Cir. 2018) .....	8
15	<i>Sutherland v. Francis</i> ,	
16	No. 12-cv-5110, 2014 WL 879697 (N.D. Cal. Mar. 3, 2014) .....	23
17	<i>Sybersound Records, Inc. v. UAV Corp.</i> ,	
18	517 F.3d 1137 (9th Cir. 2008) .....	22
19	<i>UAB “Planner 5D” v. Facebook, Inc.</i> ,	
20	No. 19-cv-3132, 2019 WL 6219223 (N.D. Cal. Nov. 21, 2019) .....	9, 10, 24
21	<i>Vault Corp. v. Quaid Software Ltd.</i> ,	
22	847 F.2d 255 (5th Cir. 1988) .....	12
23	<i>Warner Bros. Ent. Inc. v. RDR Books</i> ,	
24	575 F. Supp. 2d 513 (S.D.N.Y. 2008).....	12
25	<i>Young v. Facebook, Inc.</i> ,	
26	790 F. Supp. 2d 1110 (N.D. Cal. 2011) .....	23
27	<i>Zepeda v. PayPal, Inc.</i> ,	
28	777 F. Supp. 2d 1215 (N.D. Cal. 2011) .....	23

## STATUTES

15 U.S.C. § 1125.....	21
17 U.S.C. § 102.....	17, 18
17 U.S.C. § 103.....	17

1	17 U.S.C. § 106.....	11, 12, 17, 18
2	17 U.S.C. § 301(a) .....	17, 18, 21
3	17 U.S.C. § 411(a) .....	9, 14
4	17 U.S.C. § 1202(b) .....	<i>passim</i>
5	Cal. Bus. & Prof. Code §§ 17200, <i>et seq.</i> .....	6, 21
6	Cal. Civ. Proc. Code § 425.16 .....	17
7	Cal. Civ. Code § 3344.....	6, 17

## RULES

9	Fed. R. Civ. P. 8(a) .....	6, 7, 13, 14
10	Fed. R. Civ. P. 11 .....	4
11	Fed. R. Civ. P. 12(b)(6).....	1, 6

## OTHER AUTHORITIES

13	William F. Patry, Patry on Copyright (Mar. 2023 update) .....	18
14	Restatement (Second) of Torts § 652C (1977) .....	19
15	Restatement (Third) of Unfair Competition §§ 46, 47 .....	19

## I. INTRODUCTION

The Complaint in this case concerns cutting-edge technology—content-generation artificial intelligence—but fails for rudimentary legal reasons. Some of those deficiencies require dismissal of the claims targeted at all of the defendants, which comprise three different businesses. But with respect to Defendant DeviantArt, in particular, the core legal infirmity that broadly condemns the bulk of the liability alleged is that almost all the conduct Plaintiffs complain of—so far as can be discerned from their opaque allegations—is conduct by other actors. Even taking Plaintiffs’ claims at face value, *DeviantArt* did none of the things that supposedly give rise to the liability asserted.

In August 2022, Defendants Stability AI Ltd. and Stability AI, Inc. (together, “Stability AI”) allegedly released a new open-source artificial-intelligence (“AI”) image-generation software program called Stable Diffusion. According to Plaintiffs, Stability AI created Stable Diffusion by “training” it on billions of artworks “scraped” from the web. ECF No. 1 (“Compl.”) ¶ 25. As a result of those efforts, Stable Diffusion can “produce[] images in response to text prompts.” *Id.* ¶ 52. Defendant Midjourney, Inc. (“Midjourney”) also allegedly trained an AI content-generation program on images scraped from the web. *Id.* ¶ 149. That core conduct—using pre-existing content to create novel AI technology—presents a number of legal questions that have been the subject of law review articles, conference panels, and news reports in recent months.

It is not, however, anything that *DeviantArt* is even alleged to have done. According to the Complaint, DeviantArt’s role in the events that have brought us here has been solely to (1) operate a website where artists can post their own creations; (2) unknowingly serve as the source of images that were scraped and used, without DeviantArt’s consent, to train Stable Diffusion; and (3) months after Stability AI released Stable Diffusion under a permissive open-source license, create a service allowing DeviantArt’s users to access Stable Diffusion to create their own AI-generated artworks. All the conduct described in the Complaint about scraping the internet for content to train AI programs is conduct that, according to Plaintiffs, predated by a matter of months or years anything DeviantArt did that pertains to the claims asserted.

Plaintiffs nevertheless indiscriminately bring half a dozen causes of action against not just Stability AI and Midjourney, but DeviantArt as well. Most should be dismissed as to DeviantArt

1 for the straightforward reason that, on Plaintiffs’ telling, DeviantArt is not the one who did the  
 2 things that supposedly yield liability. Nor do Plaintiffs allege any facts to suggest that DeviantArt  
 3 was some kind of co-conspirator at any of the relevant times.

4 As for the few claims that arguably target DeviantArt’s own alleged conduct, they too fail  
 5 as a matter of law. For example, the Complaint seems to assert a species of copyright infringement  
 6 claim against DeviantArt on the theory that *every* output image generated by Stable Diffusion is  
 7 automatically an infringing “derivative work,” because it is, in the plain-English sense, “derived”  
 8 from the works that Stability AI allegedly used to train Stable Diffusion. That is so, according to  
 9 the Complaint, even though *no* output is likely to be a “close match” for any particular training  
 10 image. *Id.* ¶ 93. This legal theory is foreclosed by prevailing doctrine concerning what constitutes  
 11 a “derivative work” in the copyright-law sense of the term. The Ninth Circuit has held that to  
 12 qualify as a “derivative work” under the Copyright Act, a follow-on creation must be *substantially*  
 13 *similar* to the original, heavily borrowing its copyrightable elements—a materially more stringent  
 14 standard than simply being “based on” something that came before. Here, Plaintiffs have  
 15 affirmatively alleged that the images Stable Diffusion creates *do not* meet that standard.

16 The remaining claims are equally flawed. Plaintiffs’ claim for vicarious copyright  
 17 infringement fails several times over: first because Plaintiffs do not plausibly allege any direct  
 18 infringement for which DeviantArt could be held secondarily liable—instead vaguely gesturing at  
 19 unidentified users who allegedly produced works that, by mimicking the Plaintiffs’ (unprotectable)  
 20 “artistic styles,” can apparently “pass as [Plaintiffs’] original works,” *id.* ¶ 171; and, second,  
 21 because Plaintiffs do not allege facts satisfying any of the elements for holding DeviantArt  
 22 vicariously liable for an act of direct infringement, even if such an act had been properly alleged  
 23 (which it has not). Plaintiffs also plead themselves out of court on their Digital Millennium  
 24 Copyright Act (“DMCA”) claim by alleging almost no concrete supporting facts, and by  
 25 affirmatively averring that the outputs of Defendants’ services do not reproduce identical or near-  
 26 identical copies of Plaintiffs’ works. Plaintiffs’ right-of-publicity claims fail for three independent  
 27 reasons: first because they are preempted under the Copyright Act; second for failing to plausibly  
 28 allege a *prima facie* case under California law; and third because they are barred by the First

Amendment. Their skeletal unfair-competition claim is also preempted, and fails on the merits in any event. Finally, Plaintiffs’ sole claim against DeviantArt uniquely—for breach of contract—is factually and logically incoherent. The only ostensible breaches Plaintiffs claim were alleged breaches by *Stability AI* (as a user of DeviantArt’s website) of what Plaintiffs claim are its obligations to DeviantArt, not by DeviantArt of any supposed obligation to Plaintiffs.

The Court should dismiss Plaintiffs’ entire Complaint against DeviantArt. DeviantArt respectfully seeks dismissal with prejudice, because any non-futile effort to amend would require pleading the exact opposite of facts that Plaintiffs have alleged to date, or other facts that Plaintiffs have no good faith basis to assert.

## II. FACTS ALLEGED

Defendant DeviantArt is an online community for digital artists, where those artists can post and share their art. *See* Compl. ¶¶ 62, 114. Founded in 2000, it hosts millions of its users’ images on its website. *Id.* ¶¶ 111–14. Although Plaintiffs’ factual allegations about the conduct giving rise to their claims date back to 2015, Plaintiffs do not allege any relevant act by DeviantArt until at least November 2022. *See id.* ¶¶ 35, 67.

### A. Nonparty Researchers Develop “Diffusion” Technology

Starting in 2015, computer science researchers—with no alleged relationship to DeviantArt—developed and refined “diffusion” technology. *Id.* ¶ 67. That technology can allegedly be “trained” to reconstruct images it has previously encountered, including in response to “Text Prompts” entered by users. *Id.* ¶¶ 66–92. According to the Complaint, a diffusion model “can produce a copy of any of its Training Images,” and so “can be considered an *alternative* way of storing a copy of those images.” *Id.* ¶ 75(c) (emphasis added).

However, Plaintiffs also admit that “none of the [diffusion] output images provided in response to a particular Text Prompt is likely to be a close match for any specific image in the training data.” *Id.* ¶ 93. Because such outputs integrate “multiple latent images[,] . . . the resulting hybrid image will not look exactly like any of the Training Images.” *Id.* Indeed, Plaintiffs allege that, based on a comparison of the visual images alone, the outputs of a diffusion model will be unrecognizable even to the creators of the works on which the model was trained. *See id.* ¶¶ 192–

93 (alleging that, without copyright management information, creators of training images cannot “know[] or learn[] that the Output is based upon one or more of their works”).

**B. Stability AI, With Another Nonparty’s Assistance, Creates Stable Diffusion**

According to Plaintiffs, at some point before August 2021, a third-party German nonprofit called the “Large-Scale Artificial Intelligence Open Network,” or LAION—which is not alleged to have any connection to DeviantArt—“copied and scraped” millions of images from the internet. *Id.* ¶¶ 101–03. It then made available to the public a 400-million-image dataset, for use in training content-generation AI models. *Id.*

Sometime before August 2022, Stability AI allegedly paid LAION to create a new dataset of 5.85 billion images (and another subset “containing the images rated most highly for beauty and visual appeal”) for use in training its own content-generation AI model. *Id.* ¶¶ 104–07. And, while Plaintiffs allege that DeviantArt images were among the content LAION scraped from the web, *see id.* ¶¶ 109–10, Plaintiffs do not allege that DeviantArt was aware of, let alone consented to, that scraping. Indeed, they claim that LAION scraped images “*without the consent of . . . website operators*” like DeviantArt, and allege that such scraping violated DeviantArt’s Terms of Service (“ToS”). *Id.* ¶¶ 103, 124–25 (emphasis added).<sup>2</sup>

At some point between the creation of the LAION datasets and August 2022, Stability AI allegedly used those datasets to train a text-to-image content-generation AI model, called “Stable Diffusion.” *Id.* ¶ 105.<sup>3</sup> In August 2022, Stability allegedly released Stable Diffusion to the public on an open-source basis. *Id.* ¶¶ 52–53. And Stable Diffusion was “rapid[ly] adopt[ed]” by programmers shortly after its release. *Id.* ¶ 54. Plaintiffs do not allege that DeviantArt had any knowledge or willing involvement in any of the preceding development efforts, nor do they allege

<sup>2</sup> If Plaintiffs try, in their opposition to this motion or in any amended complaint, to change their story and allege that DeviantArt played any role in LAION’s (or Stability’s) alleged scraping activity, which it did not, DeviantArt reserves its right to begin the Rule 11 process and pursue sanctions to the fullest possible extent.

<sup>3</sup> DeviantArt understands that in reality, the Complaint’s allegations about this process are wildly inaccurate—but for this motion’s purposes, those false allegations make no difference because even assuming their truth, DeviantArt had nothing to do with them.

any relevant conduct by DeviantArt that occurred during this time period.<sup>4</sup>

### C. DeviantArt Releases DreamUp

Sometime before November 2022, DeviantArt relied on Stable Diffusion’s “permissive open-source license” to use its “software and . . . associated machine-learning models” to create a web service allowing its users to access Stability’s product in order to create AI-generated content. *Id.* ¶¶ 53–54, 64. According to the Complaint, DeviantArt entered the picture publicly when, in November 2022, it released that service, called DreamUp, to its user community. *Id.* Plaintiffs allege that DreamUp “relies on Stability [AI]’s Stable Diffusion” to produce images in response to text prompts submitted by users. *Id.* ¶¶ 35, 55. Plaintiffs do not claim that DeviantArt “trained” DreamUp on any existing images; instead, they allege that DreamUp merely “provide[s] a user interface and *access to* a trained version of Stable Diffusion.” *Id.* ¶¶ 33, 64 (emphasis added).

Shortly after DreamUp’s release, DeviantArt’s management hosted a “group audio session” where they responded to artists’ concerns about AI content generation generally, and DreamUp specifically. *Id.* ¶¶ 128–29. Plaintiffs allege that around this time, DeviantArt updated its ToS to respond to developments in the AI space in general, and concerning Stable Diffusion in particular. *Id.* ¶ 130. First, DeviantArt clarified its prior policy under which it included “meta tag[s]” in all user-posted content forbidding use of that content to “train an [AI] system” unless the posting artist consents to such use. *See id.*; Compl. Ex. 17 (“ToS”) at 23. Second, except for where users override that default by “actively giv[ing their] consent,” DeviantArt made clear that it prohibited using such content to train any AI program. ToS at 23. Even so, DeviantArt “ma[de] no guarantees that it [would] pursue each unauthorized use of” its website. *Id.* at 24. And it made clear why it adopted these measures: “DeviantArt is a community of creators that invests significant time and resources to protect its users and foster a cooperative and collaborative environment.” *Id.* at 23. DeviantArt “encourage[d] adoption of these directives across other creative platforms, so that creators are able to share their artistic creations with online audiences

---

<sup>4</sup> Plaintiffs also allege that Midjourney—another party that, according to the Complaint, has no relation to DeviantArt—created, trained, and released its own “AI-based image generator.” Compl. ¶¶ 132–34. Plaintiffs allege that Midjourney’s product relies on Stable Diffusion to function, and also that Midjourney has independently “used the LAION image datasets for training” its product. *Id.* ¶¶ 134, 149.

without fear of losing control of their own works.” *Id.*<sup>5</sup>

**D. Plaintiffs File This Lawsuit Against Stability AI, Midjourney, and DeviantArt**

Months later, Plaintiffs Sarah Andersen, Kelly McKernan, and Karla Ortiz—each of whom claims to have “popularized” an “artistic style” that is now “recognizable to the public,” Compl. ¶¶ 204–05—filed this lawsuit against Stability AI, Midjourney, and DeviantArt. Their Complaint, brought on behalf of themselves and a vaguely defined putative nationwide class, largely glosses over which Defendant allegedly did what, requiring a close reading to parse the preceding chronology. The legal claims are in many respects just as opaque as these factual allegations. But they largely boil down to the notion that the creation and, in more limited respects, deployment of Stable Diffusion (as well as any other products that rely on it to generate content) yield civil liability on more than half a dozen legal theories: (1) direct copyright infringement; (2) vicarious copyright infringement; (3) violation of the DMCA; (4) violation of California’s statutory and common law rights of publicity; (5) unfair competition under California law and the Lanham Act; and (6) breach of contract. *Id.* ¶¶ 153–236.<sup>6</sup>

**III. LEGAL STANDARD**

To satisfy Rule 8 and survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). Those “[f]actual allegations must be enough to raise a right to relief above the speculative level” and “a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court need not accept as true conclusory allegations or legal characterizations, nor need it accept unreasonable inferences or unwarranted factual deductions. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). When a plaintiff raises generalized allegations against

<sup>5</sup> DeviantArt’s Terms of Service also prohibit users from monetizing DreamUp or its outputs. ToS at 2 (defining the “Service” as “all elements, software, programs and code forming or incorporated in to www.DeviantArt.com”), 8 (prohibiting use of “the Service” for “any commercial purpose”).

<sup>6</sup> Plaintiffs also request a declaratory judgment that “Defendants violated the Copyright Act, DMCA Section 1202, Cal. Civ. Code § 3344, and Cal. Civ. Code § 17200.” Compl. ¶ 239.

multiple defendants, the complaint has not “stated sufficient facts to state a claim for relief that is plausible against *one* [d]efendant.” *In re iPhone App. Litig.*, No. 11-md-22590, 2011 WL 4403963, at \*3 (N.D. Cal. Sept. 20, 2011) (emphasis in original).

#### IV. ARGUMENT

##### A. Plaintiffs’ Undifferentiated Allegations Violate Rule 8(a)(2)

The Complaint should be dismissed in the first place for impermissibly seeking to impose liability on DeviantArt by vaguely attributing to all “Defendants” conduct that Plaintiffs admit DeviantArt had nothing to do with. “[A] complaint which lumps together multiple defendants in one broad allegation fails to satisfy the notice requirement of Rule 8(a)(2).” *Sebastian Brown Prods., LLC v. Muzooka, Inc.*, 143 F. Supp. 3d 1026, 1037 (N.D. Cal. 2015) (cleaned up). Such “shotgun pleading” fails to give defendants fair notice of the factual and legal bases of the claims against each of them, and therefore merits dismissal under Rule 8(a)(2)’s requirement of a “short and plain statement.” *Destfino v. Reiswig*, 630 F.3d 952, 958–59 (9th Cir. 2011) (affirming dismissal of entire complaint that made “everyone did everything allegations”); *see also Karkanen v. California*, No. 17-cv-6967, 2018 WL 3820916, at \*7 (N.D. Cal. Aug. 10, 2018) (“Courts consistently conclude that a complaint which lump[s] together multiple defendants in one broad allegation fails to satisfy the notice requirement of Rule 8(a)(2).” (cleaned up) (collecting cases)).

Here, for all but the breach of contract claim (which Plaintiffs bring only against DeviantArt, and which fails for several other reasons discussed below), the Complaint does not “allege what role each defendant played in the alleged harm,” making it “exceedingly difficult, if not impossible, for [DeviantArt] to respond to Plaintiffs’ allegations.” *In re iPhone App. Litig.*, 2011 WL 4403963, at \*8. Even worse, the Complaint uses this generalized, undifferentiated pleading technique repeatedly to vaguely associate DeviantArt with conduct that it elsewhere makes clear was carried out by *other* Defendants.

For example, on Plaintiffs’ telling, it was non-party LAION, allegedly in part at Stability AI’s request—but not DeviantArt or LAION at DeviantArt’s request—that allegedly scraped images from the internet and compiled datasets for training purposes. And, according to the Complaint, it was Stability AI (and Stability AI alone) who then trained Stable Diffusion using

1 these images. Nowhere do Plaintiffs allege that DeviantArt compiled any images or used them to  
 2 train any program. *See* Compl. at 22 (alleging LAION was “[t]he source of the Stable Diffusion  
 3 training data”); *id.* ¶ 103–04 (LAION “scraped or copied” billions of images from the web).  
 4 Elsewhere, the Complaint suggests that LAION scraped the training images *from* DeviantArt  
 5 without DeviantArt’s consent, knowledge, or participation. *See id.* ¶¶ 63, 103. But inexplicably,  
 6 the Complaint then turns around and, in claiming direct copyright infringement, accuses *all*  
 7 “Defendants” of “download[ing], stor[ing], or distribut[ing] copies of the Works for use in training  
 8 or otherwise creating AI Image Products.” *Id.* ¶ 157. In other words, while the Complaint’s factual  
 9 allegations suggest that each Defendant played a distinct and separate role in the challenged  
 10 conduct (or none at all), the *legal claims* conspicuously neglect to differentiate between them,  
 11 instead using only the vague and conclusory label “Defendants.” *See id.* ¶¶ 153–226.

12 Plaintiffs’ DMCA claim offers another egregious example of Plaintiffs’ blunderbuss  
 13 pleading strategy. The Complaint alleges that “Defendants” removed or altered copyright  
 14 management information (“CMI”) from their works, distributed works knowing that CMI had been  
 15 removed or altered, and distributed CMI knowing it had been altered. *Id.* ¶¶ 180–200. But it says  
 16 nothing about when that CMI was allegedly removed or altered, who did so, and how they did it.  
 17 For example, it does not explain whether this happened when the training images were allegedly  
 18 scraped, when Stability AI allegedly used the images to train Stable Diffusion, or when a service  
 19 like DreamUp produces an output image. Of course, if the scraping or training process removed  
 20 or altered CMI, then DeviantArt, by Plaintiffs’ own allegations, would have had nothing to do with  
 21 it, *see id.* ¶¶ 101–10—and would not even have known about such removal or alteration, much  
 22 less intended it. *See Stevens v. Corelogic, Inc.*, 899 F.3d 666, 674 (9th Cir. 2018) (recognizing  
 23 strict scienter requirements under Section 1202(b) of the DMCA).

24 The same is true of Plaintiffs’ other claims. Plaintiffs’ refusal to differentiate between  
 25 Defendants in the causes of action they assert is a barely disguised attempt to blur the Defendants’  
 26 respective roles in the conduct at the core of Plaintiffs’ complaint. This gambit requires dismissal.  
 27 *See, e.g., Destfino*, 630 F.3d at 958–59.

28

**B. Plaintiffs’ Claims Against DeviantArt All Fail On The Merits**

Beyond Plaintiffs’ impermissible attempt to impose liability against all Defendants in gross, each of Plaintiffs’ claims against DeviantArt also individually fails to state a plausible claim on the merits.

**1. Plaintiffs’ Claim For Direct Copyright Infringement Fails**

**a. Plaintiffs Fail To Allege Registration Of Their Copyrights**

First, Plaintiffs have failed to satisfy the Copyright Act’s basic prerequisite to filing an infringement lawsuit: registration. Generally, plaintiffs must register their copyrights before they can “institute” a lawsuit alleging infringement of them. 17 U.S.C. § 411(a) (precluding copyright-infringement suit “until preregistration or registration of the copyright claim has been made in accordance with this title”); *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887–88 (2019) (affirming dismissal on these grounds). And because Section 411(a) requires registration before “institut[ing]” a copyright infringement action, “[a] plaintiff cannot cure its failure to meet the preconditions set forth in [that statute] by amending its pending complaint.” *UAB “Planner 5D” v. Facebook, Inc.*, No. 19-cv-3132, 2019 WL 6219223, at \*7 (N.D. Cal. Nov. 21, 2019); *see also Kifle v. YouTube LLC*, No. 21-cv-1752, 2021 WL 1530942, at \*6 (N.D. Cal. Apr. 19, 2021) (refusing amendment where plaintiff “registered [a work] after filing suit but before filing” an amended pleading).

Here, there are *no* allegations that two Plaintiffs—Ms. Ortiz and Mx. McKernan—registered any works before suing. Their claims must therefore be dismissed. *See Fourth Est.*, 139 S. Ct. at 887. And even for Ms. Anderson, the Complaint only alleges she registered “sixteen *collections that include Works used as Training Images.*” Compl. ¶ 28 (emphasis added). It does not identify which “Works” from those collections Defendants supposedly infringed, or even claim that Ms. Anderson ever registered *those* “Works.” This falls far short of plausibly alleging that any (let alone each) of these works meets Section 411(a)’s registration requirement. *See, e.g., Bespaq Corp. v. Haoshen Trading Co.*, No. 04-cv-3698, 2005 WL 14841, at \*2 (N.D. Cal. Jan. 3, 2005) (dismissing copyright claim under Section 411(a) because complaint “d[id] not identify which preexisting works in the registered catalog have been infringed by the defendants”). Even

1 if that tactic sufficed, all Plaintiffs’ other copyright claims—aside from those relating to the  
 2 unspecified “Works” within those sixteen collections—would still have to be dismissed. *See Kifle*,  
 3 2021 WL 1530942, at \*6; *UAB “Planner 5D”*, 2019 WL 6219223, at \*7.

4 **b. Plaintiffs’ Direct Infringement Claim Against DeviantArt Fails**

5 If Plaintiffs had registered the works at issue, their claim of direct copyright infringement  
 6 against DeviantArt would *still* fail as alleged. Plaintiffs’ allegations are vague (as discussed  
 7 above), but they appear to comprise three distinct theories of infringement. None states a claim as  
 8 matter of law as to DeviantArt.

9 *First*, Plaintiffs claim that “Defendants” violated their copyright rights by scraping and  
 10 copying their works to train Stable Diffusion. *See* Compl. ¶¶ 57, 155. Indeed, that is the *sole*  
 11 subject of their class allegations of direct copyright infringement. *See id.* ¶ 44(i). But even if that  
 12 allegation were true, and even if that alleged scraping were copyright infringement, the Complaint  
 13 does not allege that DeviantArt had anything to do with it. To the contrary, the Complaint alleges  
 14 that Stability AI trained Stable Diffusion on the LAION databases, which were created by scraping  
 15 images *from* DeviantArt’s website without DeviantArt’s consent. *Id.* ¶ 103 (emphasis added); *see*  
 16 *id.* ¶¶ 101–10. It does not allege that DeviantArt scraped any works, trained Stable Diffusion on  
 17 those works, or otherwise participated in any of the conduct relating to the copying of works used  
 18 to create and train Stable Diffusion. According to the Complaint, all DeviantArt did was provide  
 19 a service that allows users to *access* Stable Diffusion’s core functionality, *i.e.* to create AI-  
 20 generated artwork. *Id.* ¶ 35. Plaintiffs therefore fail to state a claim against DeviantArt on this  
 21 “input” theory of direct copyright infringement.

22 *Second*, Plaintiffs elsewhere seem to suggest that DeviantArt is liable for direct copyright  
 23 infringement merely for building a tool that leverages Stable Diffusion’s technology. But the  
 24 Complaint admits that DeviantArt did not create or train Stable Diffusion. *Id.* ¶¶ 33, 64–65, 120.  
 25 And it does not allege that DeviantArt, in creating DreamUp, did anything more than allow its  
 26 users to *access* the engine Stability AI created; it does not, for example, claim that DeviantArt  
 27 itself made copies of any of Plaintiffs’ copyrighted works when creating DreamUp (or otherwise  
 28 infringed any of Plaintiffs’ exclusive rights). *See id.* As a result, the Complaint fails to provide a

1 factual basis for claiming that DeviantArt violated any of the rights protected by Section 106 of  
 2 the Copyright Act simply by providing a service that allowed users to access Stable Diffusion’s  
 3 technology. *See* 17 U.S.C. § 106(1)–(6) (granting copyright holders certain exclusive rights to,  
 4 among other things, reproduce, prepare derivative works based on, and distribute copies).

5 *Third*, the Complaint also seems to claim that the images *users* create using DreamUp  
 6 infringe Plaintiffs’ copyrights. *See* Compl. ¶¶ 4–5. This theory fails because Plaintiffs have not  
 7 identified a single actual output image that allegedly infringes any of their copyrighted works; to  
 8 the contrary, Plaintiffs affirmatively aver that DreamUp’s output images will not be recognizable  
 9 as copies of Plaintiffs’ works—much less “substantially similar” to them, Compl. ¶¶ 93, 192–93.

10 “[O]nly substantial similarity in protectable expression may constitute actionable copying  
 11 that results in infringement liability.” *Skidmore ex rel. Randy Craig Wolfe Trust v. Led Zeppelin*,  
 12 952 F.3d 1051, 1064 (9th Cir. 2020). Plaintiffs do not identify a single output image that has  
 13 allegedly infringed any one of their copyrighted works, precluding any claim of substantial  
 14 similarity that could result in copyright liability. *See, e.g., Blizzard Ent., Inc. v. Lilith Games*  
 15 *(Shanghai) Co.*, 149 F. Supp. 3d 1167, 1175 (N.D. Cal. 2015) (dismissing claim for copyright  
 16 infringement where complaint “ma[d]e only general allegations” that allegedly infringing works  
 17 were “derived from and substantially similar to” plaintiffs’ works, without even identifying  
 18 “representative acts of infringement”); *Fuzzy Logic Prods., Inc. v. Trapflix, LLC*, No. 15-cv-6203,  
 19 2015 WL 12791508, at \*4 (C.D. Cal. Nov. 20, 2015) (dismissing copyright claim where complaint  
 20 was “devoid of any comparisons of protectable elements”); *see also Nat’l Bus. Dev. Servs., Inc. v.*  
 21 *Am. Credit Educ. & Consulting, Inc.*, 299 F. App’x 509, 512 (6th Cir. 2008) (affirming dismissal  
 22 where plaintiff’s complaint failed to identify specific works by defendants that infringed on  
 23 plaintiff’s copyright); *Flava Works, Inc. v. Clavio*, No. 11-cv-5100, 2012 WL 2459146, at \*2–3  
 24 (N.D. Ill. June 27, 2012) (dismissing in similar circumstances).

25 That is no surprise because, again, Plaintiffs proactively allege that the output images  
 26 DreamUp produces *will not* be substantially similar to any images Stability AI used to train Stable  
 27 Diffusion: “None of the Stable Diffusion output images provided in response to a particular text  
 28 prompt is likely to be a close match for any specific image in the training data.” Compl. ¶ 93

(emphasis added). Indeed, beyond alleging that DreamUp is unlikely to produce a “close match” for any copyrighted images—which is itself enough to doom any claim of “substantial similarity”—the Complaint also claims that DreamUp’s outputs will be *so dissimilar* from the inputs so as to be unrecognizable even to the artists who created the allegedly infringed works. *See id.* ¶¶ 192–93 (plaintiffs cannot “know[] or “learn” that any given output “is based on one or more of the[ir] Works” without CMI attached to those images). This dooms Plaintiffs’ claim for any output-based theory of direct infringement. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1121 (9th Cir. 2018) (affirming dismissal with prejudice of copyright infringement claim because the “works at issue here are as a matter of law not substantially similar”).

Perhaps recognizing this core problem, Plaintiffs seem to advance a theory that *any* output of a product like DreamUp is necessarily “derivative,” and thus infringing under Section 106(2), because it is in some sense “based on” Stability AI’s training images. *See id.* ¶¶ 90, 95. But the Ninth Circuit has held that to qualify as a “derivative work” under the Copyright Act, a follow-on creation must be *substantially similar* to the original, not simply “based on” it. *See Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984). Responding to the “novel” argument that Section 106(2) covers “any work *based on* a copyrighted work,” the circuit rejected it as “frivolous,” confirming that “to prove infringement, one must show substantial similarity.” *Id.* (emphasis added); *see also Mulcahy v. Cheetah Learning, LLC*, 386 F.3d 849, 853 (8th Cir. 2004) (adopting the rule in *Litchfield*); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (same); *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008) (“A work is not derivative . . . simply because it is ‘based upon’ the preexisting works.”). Under settled law, a “derivative work” must copy protected elements of the original, not just be “based on” it. The Court should reject Plaintiffs’ “frivolous” effort to the contrary.

## 2. Plaintiffs’ Claim For Vicarious Copyright Infringement Fails

Plaintiffs’ claim for vicarious copyright infringement should also be dismissed. *See* Compl. ¶¶ 169–77. First, “[t]o establish secondary infringement” of any kind, plaintiffs “must first demonstrate direct infringement” by another. *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 937 (9th Cir. 2010). Then, “[t]o state a claim for vicarious copyright infringement” in

particular, “a plaintiff must allege that the defendant has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007). Plaintiffs attempt to support their claim by alleging that certain “Individuals have used AI Image Products” (though they do not say which ones) “to create works” (though they do not identify any such works) that *can* “pass as original works by [an] artist,” and that some (unspecified) individuals have sold those unspecified “Fakes” online. Compl. ¶¶ 171–73. They then claim that the (again, unspecified) “Defendant-owner of the AI Image Product used to create each Fake is vicariously liable for any infringements committed by Imposters.” *Id.* ¶ 175. These vague allegations flunk all three core prerequisites for vicarious liability.

*First*, Plaintiffs identify no specific directly infringing work for which DeviantArt could be vicariously liable. Their vicarious infringement claim relies entirely on the allegation that unidentified “Imposters” have used the names of unspecified “artists” in text prompts to produce “Fakes” that “can pass as original works by that artist.” *Id.* ¶ 171. But Plaintiffs never identify those “Fakes,” or the copyrighted works they purportedly infringe. This alone requires dismissal. *Livingston v. Morgan*, No. 06-cv-2389, 2006 WL 8459602, at \*3 (N.D. Cal. July 31, 2006) (“A complaint for copyright infringement fails to satisfy the requirements of Rule 8(a) if it does not allege the specific copyrighted work that has been infringed or how and when the asserted infringement occurred.” (collecting cases)); *see also, e.g., Nat’l Bus. Dev. Servs.*, 299 F. App’x at 512; *Blizzard Ent.*, 149 F. Supp. at 1175; *Flava Works*, 2012 WL 2459146, at \*2–3. Moreover, Plaintiffs admit that those “Fakes” are not substantially similar in the copyright-law sense to the artists’ “original works,” Compl. ¶¶ 93, 192, and, at best, reflect only the “artistic style” of the original artist, *id.* ¶ 204. As explained above, “Fakes” that are not substantially similar to Plaintiffs’ works cannot infringe copyrights in those works. *See supra* at 11. And as discussed below, “artistic styles” are unprotectable under the Copyright Act. *See infra* at 17.

*Second*, even if Plaintiffs had plausibly alleged direct infringement, the Complaint does not even try to allege the elements for imputing liability for such infringement to DeviantArt: (1) the right and ability to supervise the infringing conduct; and (2) a direct financial interest in

the infringement itself. *See Visa Int’l Serv. Ass’n*, 494 F.3d at 802. The Complaint does not even mention these elements, much less allege any facts that satisfy them, and this claim should be dismissed on that ground alone. *See, e.g., Epikhin v. Game Insight N. Am.*, No. 14-cv-4383, 2015 WL 2412357, at \*5 (N.D. Cal. May 20, 2015) (plaintiffs “plainly failed” to plausibly allege claim for vicarious copyright infringement where complaint did “[n]ot even recit[e] the elements of vicarious copyright infringement, . . . let alone any facts in support of those allegations”). Even on a strained read, the Complaint does not allege any facts that could be construed as giving DeviantArt the right or ability to monitor, supervise, control, or prevent the so-called “Impostors” from intentionally creating “Fakes.” Nor does the Complaint identify any direct financial interest of DeviantArt in this alleged infringement. Although Plaintiffs allege that *all* DreamUp users pay a fee, Compl. ¶ 115, they include no allegations that there was a “causal link between the infringement of the plaintiff[s]’ own copyrighted works and any profit to [DeviantArt],” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017); *see id.* at 674 (requiring plaintiffs to show a direct financial benefit “from the specific infringement alleged”).<sup>7</sup>

### 3. Plaintiffs’ DMCA Claim Fails

Plaintiffs’ DMCA claim is particularly hard to parse. The Complaint does not mention any facts related to this cause of action until the claim for relief, *see* Compl. ¶¶ 178–200, and, even there, Plaintiffs essentially repeat the statutory language and conclude that all defendants (again, with no differentiation) have violated the Act. But even assuming this claim does not violate Rule 8(a)(2), *see supra* at 7, it fails to state a plausible claim for relief.

Section 1202 of the DMCA relates to copyright management information, or “CMI.” CMI is defined by the statute to include the “title and other information identifying the work,” the name of the work’s creator, the name of the work’s copyright owners, and the information set out in a notice of copyright. *See* 17 U.S.C. § 1202(c). As relevant here, the DMCA prohibits intentionally removing or altering CMI from a work, *see id.* § 1202(b)(1), as well as knowingly distributing removed or altered CMI, *see id.* § 1202(b)(2), or knowingly distributing works or “copies of

---

<sup>7</sup> Moreover, for the same reasons given above, Plaintiffs’ claim for vicarious copyright infringement should be dismissed for lack of registration. *See* 17 U.S.C. § 411(a); *supra* at 9.

works” containing removed or altered CMI, *see id.* § 1202(b)(3).

Plaintiffs, in boilerplate allegations tracking the statutory language, claim that their works included certain CMI, *see* Compl. ¶ 180, and that all Defendants violated all three prongs of Section 1202(b) by removing or altering that CMI and then distributing images with altered or removed CMI, knowing that the CMI was removed or altered, *see id.* ¶¶ 184, 189–90. Although the factual basis for these claims is difficult to locate, the Complaint seems to rest on two theories of DMCA liability: One based on the alteration or removal of CMI when images were scraped from the internet and used to train Stable Diffusion—which we will call the “Input CMI Theory.” *See id.* ¶ 191. And another based on the outputs of each AI Image Product, which Plaintiffs allege “distribute” images with either altered CMI or with CMI removed—which we will call the “Output CMI Theory.” *See id.* ¶¶ 191–93. Both theories fail.

*The Input CMI Theory.* The Input CMI Theory fails because there are no factual allegations in the Complaint about DeviantArt’s participation in the underlying conduct. Even if some other party or non-party altered or removed CMI when scraping images from the web or training their products on them, the Complaint does not allege that DeviantArt had anything to do with that conduct—much less that DeviantArt *intentionally* removed or altered any CMI at that point.<sup>8</sup> As discussed above, the scraping and training was allegedly done without DeviantArt’s consent.

*The Output CMI Theory.* The Output CMI Theory also fails, for at least two reasons: (1) Plaintiffs provide no plausible factual allegations to support it; and (2) Plaintiffs do not allege that DeviantArt ever distributed identical copies of Plaintiffs’ works, as Section 1202(b) requires.

*First*, Plaintiffs’ Output CMI Theory lacks any factual support. It does not identify the supposedly distributed works from which Defendants allegedly altered or removed CMI, what the altered or removed CMI was, or which Defendants altered or removed it. This conclusory, generalized pleading does not come close to stating a claim under Section 1202(b). *See, e.g., Free Speech Sys. LLC v. Menzel*, 390 F. Supp. 3d 1162, 1175 (N.D. Cal. 2019) (“[B]ecause [plaintiff]

---

<sup>8</sup> *See* 17 U.S.C. § 1202(b) (requiring plaintiff to prove that defendant “kn[ew]” that conduct would “induce, enable, facilitate, or conceal an infringement”); *id.* § 1202(b)(1) (imposing liability on the “intentional[] remov[al]” of CMI); *id.* § 1202(b)(2) (imposing liability on distribution or import of removed or altered CMI “knowing that the [CMI] has been removed or altered”); *id.* § 1202(b)(3) (same as to distribution or import of “copies of works”).

1 has merely alleged that his photographs ‘were altered to remove certain of [his] [CMI]’ without  
 2 providing any facts to identify which photographs had CMI removed or to describe what the  
 3 removed or altered CMI was, he has not sufficiently stated a claim under Section 1202(b)(1) with  
 4 respect to ‘removal,’ much less with respect to distribution under (b)(2) and (b)(3).’); *Spinelli v.*  
 5 *NFL*, 903 F.3d 185, 204 (2d Cir. 2018) (affirming dismissal where complaint “does not actually  
 6 identify any instance in which CMI was removed or even make clear what specific type of CMI is  
 7 at issue”); *Mills v. Netflix, Inc.*, No. 19-cv-7618, 2020 WL 548558, at \*4 (C.D. Cal. Feb. 3, 2020)  
 8 (dismissing on similar grounds).

9       *Second*, this theory of DMCA liability fails because the Complaint does not allege that  
 10 DeviantArt distributed identical copies of Plaintiffs’ actual “works” with removed or altered CMI.  
 11 “The DMCA prohibits removing or altering CMI; it does not prohibit merely omitting CMI from  
 12 an infringing work.” *Dolls Kill, Inc. v. Zoetop Bus. Co.*, No. 22-cv-1463, 2022 WL 16961477,  
 13 at \*3 (C.D. Cal. Aug. 25, 2022). As a result, “courts have found that no DMCA violation exists  
 14 where the works”—*i.e.*, the work from which CMI was allegedly removed or altered and the  
 15 distributed work—“are not *identical*.” *Id.* at \*4 (emphasis added) (quoting *Kirk Kara Corp. v. W.*  
 16 *Stone & Metal Corp.*, No. 20-cv-1931, 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020)); *see*  
 17 *O’Neal v. Sideshow, Inc.*, 583 F. Supp. 3d 1282, 1287 (C.D. Cal. 2022) (confirming this rule and  
 18 dismissing DMCA claim); *Frost-Tsuji-Architects v. Highway Inn, Inc.*, No. 13-cv-496, 2015 WL  
 19 263556, at \*3 (D. Haw. Jan. 21, 2015) (“[T]he drawing by [defendant] is not identical to the  
 20 drawing by [plaintiff], such that this court can say that [defendant] removed or altered [plaintiff’s]  
 21 [CMI] from [the drawing].”), *aff’d*, 700 F. App’x 674 (9th Cir. 2017); *id.* (“[B]asing a drawing on  
 22 [plaintiff’s] work is not sufficient to support a [Section 1202] claim.”). In other words, for an  
 23 output-based DMCA claim, a defendant must distribute *a plaintiff’s work* or identical copy with  
 24 altered or removed CMI—not a work that is merely similar to a plaintiff’s work, or, as is alleged  
 25 here, in the same style as a plaintiff’s works. *See Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116,  
 26 1122 (C.D. Cal. 1999) (reproduction of thumbnails of plaintiffs’ images without CMI did not  
 27 violate DMCA because CMI was not “removed”), *rev’d in part on other grounds*, 336 F.3d 811  
 28 (9th Cir. 2003). Otherwise, nearly every act of alleged copyright infringement would also support

1 a DMCA violation.

2 Plaintiffs do not allege that any distributed works containing removed or altered CMI were  
 3 *identical* to their copyrighted works. Indeed, as discussed above, they allege just the opposite:  
 4 that, for any works that DeviantArt distributes, those works will be different, bordering on  
 5 unrecognizable, from Plaintiffs’ own works. *See* Compl. ¶ 93 (admitting that output images “will  
 6 not look exactly like any of the Training Images” used to “train it,” and that no such outputs are  
 7 likely to be a “close match” for any training images); *id.* ¶¶ 192–93 (alleging that, without CMI,  
 8 Plaintiffs “are prevented from knowing or learning that the Output is based upon one or more of  
 9 their works”). That is fatal. Courts have rigorously enforced this important limit on DMCA  
 10 claims, dismissing such claims even where the challenged works were “substantially similar” to  
 11 the work from which CMI was allegedly removed or altered. *See, e.g., Kirk Kara*, 2020 WL  
 12 5991503, at \*6 (“[T]he works may be *substantially similar*, [but] Defendant did not make *identical*  
 13 copies of Plaintiff’s works and then remove the engraved CMI”). They have had especially little  
 14 trouble doing so when, as here, plaintiffs “*concede*[] that the works were modified or altered.”  
 15 *O’Neal*, 583 F. Supp. 3d at 1287.

#### 16 4. Plaintiffs’ Right-Of-Publicity Claims Fail

17 The Complaint includes two right-of-publicity claims—one under California Civil Code  
 18 Section 3344 and another under California common law. *See* Compl. ¶¶ 201–22. As explained  
 19 further in DeviantArt’s anti-SLAPP motion under Cal. Civ. Proc. Code Section 425.16 (“Anti-  
 20 SLAPP Mot.”), *see* Anti-SLAPP Mot. at 11–21, both claims should be dismissed, for three  
 21 reasons: (1) the claims are preempted by the Copyright Act; (2) Plaintiffs fail to plead a *prima*  
 22 *facie* right-of-publicity claim; and (3) in any event, their claims are barred by the First Amendment.

23 *Copyright Act Preemption.* Plaintiffs’ right-of-publicity claims are preempted by Section  
 24 301 of the Copyright Act. The Copyright Act preempts state law claims that “come within the  
 25 subject matter of copyright as specified by [17 U.S.C. §§ 102, 103]” and assert “rights that are  
 26 equivalent to any of the exclusive rights within the general scope of copyright as specified by [17  
 27 U.S.C. § 106].” 17 U.S.C. § 301(a).

28 *First*, Plaintiffs’ claims are within the subject matter of copyright. At their core, these

claims attempt to monopolize the “artistic styles” embodied in fixed visual works they posted on the internet. Although “copyright does not protect styles,” *McDonald v. West*, 138 F. Supp. 3d 448, 455 (S.D.N.Y. 2015), copyright *preemption* sweeps more broadly than copyright *protection*, “prevent[ing] states from giving special protection to subject matter that Congress,” through Section 102(b), “has decided should be in the public domain,” *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (Easterbrook, J.). It is thus well-established that “ideas”—which are specifically excluded from copyright protection by Section 102(b)—fall within the “subject matter of copyright” for preemption purposes. *See, e.g., Entous v. Viacom Int’l, Inc.*, 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001). And because “artistic styles” are just the kind of “ideas” that Congress specifically decided to exclude from the universe of copyright protection, they, too, are within copyright’s subject matter for preemption purposes. *See* 17 U.S.C. § 102(b); *Jewelry 10, Inc. v. Elegance Trading Co.*, No. 88-cv-1320, 1991 WL 144151, at \*4 (S.D.N.Y. July 20, 1991) (“style[s]” are “ideas” and therefore unprotectable); *McDonald*, 138 F. Supp. 3d at 455 (“copyright does not protect styles” “[f]or the same reason” copyright “does not protect ideas”).<sup>9</sup>

*Second*, Plaintiffs’ right-of-publicity claims assert rights that “are equivalent” to the rights “within the general scope of copyright” because they effectively assert a novel species of copyright’s derivative-work right. 17 U.S.C. § 106(2); *Laws v. Sony Music Ent.*, 448 F.3d 1134, 1143–45 (9th Cir. 2006). Embracing their theory would allow publicity-rights holders to prevent *any* member of the public from deriving a “style” from a published artistic work and reproducing it in new visual works. While that right would sweep far beyond the derivative-work right granted in the Copyright Act, *see supra* at 11, it would be functionally equivalent to the derivative-work right for preemption purposes. *See Laws*, 448 F.3d at 1143–45; 6 William F. Patry, Patry on Copyright § 18:16 (“The state right may be narrower, broader, or contain somewhat different elements, yet it will still be preempted if its essence is the same as the federal right.”).<sup>10</sup>

<sup>9</sup> To the extent that artistic “styles” were part of artists’ copyrightable expression, the case for preemption would be stronger still: we would then have a state law claim effectively reprising the exclusive rights granted by federal copyright law, which is flatly impermissible under Section 301.

<sup>10</sup> Plaintiffs cannot survive preemption by reframing their claims through the lens of name appropriation, *see, e.g., Compl. ¶ 203*, because the “crux” of each claim is an attempt to monopolize an unprotectable style. *Ray v. ESPN, Inc.*, 783 F.3d 1140, 1142–43 (8th Cir. 2015) (name-appropriation claim preempted); *see also Anti-SLAPP Mot. at 14 & n.11* (citing cases).

1        *Failure to Plead Prima Facie Claim.* The Complaint fails to allege a prima facie violation  
 2 of Plaintiffs’ publicity rights. Those rights protect against unauthorized uses of names or  
 3 likenesses “for purposes of trade,” thus barring the use of a name or likeness to “advertis[e] []  
 4 goods or services” or the “place[ment]” of one’s name or likeness “on merchandise.” Restatement  
 5 (Third) of Unfair Competition §§ 46, 47; *see also id.* § 47, cmt. c (1995) (right-of-publicity claim  
 6 covers use of persona to “attract attention” to product). The right does *not*, however, prohibit  
 7 “[t]he use of [a person’s] identity primarily for the purpose of communicating information or  
 8 expressing ideas.” *Id.* § 47, cmt. c; *see also* Restatement (Second) of Torts § 652C, cmt. d (1977)  
 9 (“The value of the plaintiff’s name is not appropriated by mere mention of it, or by reference to it  
 10 in connection with legitimate mention of his public activities.”).

11        Plaintiffs’ publicity-rights claims challenge DreamUp’s ability to (1) understand references  
 12 to Plaintiffs’ names in users’ text prompts, (2) use those references to identify (unprotectable)  
 13 visual elements in the works Plaintiffs posted online, and (3) replicate those (unprotectable) style  
 14 elements in visual outputs. Compl. ¶ 171.<sup>11</sup> That is not a use of a persona by DeviantArt to “attract  
 15 attention” or “for purposes of trade.” Restatement (Third) of Unfair Competition §§ 46, 47 &  
 16 cmt. c. Rather, to the extent users have used Plaintiffs’ names in DreamUp prompts (and the  
 17 Complaint provides no specific allegations to suggest they have), they used those names “primarily  
 18 for the purpose of communicating information or expressing ideas”—that is, as a reference to the  
 19 Plaintiffs’ (unprotectable) artistic styles—which is “not generally actionable as a violation of the  
 20 person’s right of publicity.” *Id.* § 47 cmt. c.

21        Plaintiffs’ publicity-rights claims also fail for the independent reason that the Complaint  
 22 does not allege that *DeviantArt*—as opposed to its users—has used Plaintiffs’ names or likenesses.  
 23 “[B]oth the statutory and common law versions of a right of publicity claim require that the  
 24 defendant *actually use* the plaintiff’s likenesses.” *Perfect 10, Inc. v. Google, Inc.*, No. 04-cv-9484,  
 25 2010 WL 9479060, at \*13 (C.D. Cal., July 30, 2010) (citation omitted) (emphasis added). Here,

---

26  
 27 <sup>11</sup> Plaintiffs claim “Defendants” used “Plaintiffs’ names and identities” on “apps, website[s], and  
 28 social media posts,” and that “Defendants used Plaintiffs’ names to advertise art,” Compl. ¶¶ 205,  
 219, but plead no “specific facts” to back up these “conclusory allegations,” which is obviously  
 insufficient, *Paulson v. Carter*, 230 F. App’x 645, 645 (9th Cir. 2007).

1 however, the Complaint’s only well-pleaded allegation of “use” is that DeviantArt’s *users*—whom  
 2 the Complaint refers to as “Imposters”—have “used [DreamUp] to create works using the names  
 3 of Plaintiffs . . . in prompts.” Compl. ¶ 171. But “[c]ontributing’ to someone’s violation of [a  
 4 publicity right] is not the same as actually ‘violating’ it.” *Google, Inc.*, 2010 WL 9479060, at \*13  
 5 (rejecting publicity rights claim for failure to establish use by defendant).<sup>12</sup> These claims fail for  
 6 that reason alone.

7 *Transformative Use.* Even if otherwise viable, Plaintiffs’ right-of-publicity claims would  
 8 be barred by the First Amendment’s “transformative use” test, which “balance[s]” the right of  
 9 publicity against the “First Amendment right of free expression” by asking whether defendants  
 10 merely used the plaintiff’s likeness as “one of the ‘raw materials’ from which an original work is  
 11 synthesized.” *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 57–58 (2006).

12 Here, Plaintiffs’ right-of-publicity claims all focus on the use of their “artistic styles” in  
 13 DreamUp outputs. But Plaintiffs admit that DreamUp outputs are not visually identical to the  
 14 originals, or even close to it. *See* Compl. ¶¶ 93, 192–93; *Kirby*, 144 Cal. App. 4th at 59 (visually  
 15 comparing plaintiffs’ likeness to defendant’s work to determine transformativeness). Plaintiffs  
 16 also admit that the outputs reflect data gleaned from the “billions of [other] images” used to train  
 17 Stable Diffusion, *see* Compl. ¶ 179, along with the ideas, messages, or concepts in users’ text  
 18 prompts, *see id.* ¶ 91; *see also Kirby*, 144 Cal. App. 4th at 59 (work transformative because it  
 19 “contained significant expressive content beyond the [plaintiffs]’ mere likenesses”). Plaintiffs’  
 20 works, to the extent they were used in training at all, represent only a tiny sliver of the “over five  
 21 billion images” that were allegedly used to train Stable Diffusion. Compl. ¶ 57. As a result, any  
 22 trace of Plaintiffs’ “styles” used in DreamUp outputs is clearly “transformed” into “something  
 23 new, with a further purpose or different character.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*,  
 24 25 Cal. 4th 387, 404 (2001) (citation omitted). And even if Plaintiffs could allege that DeviantArt  
 25 used their names, *but see supra* 19, any use of those names to create DreamUp outputs would be  
 26 transformative under the same logic, *see Ross v. Roberts*, 222 Cal. App. 4th 677, 687–88 (2013)

27 <sup>12</sup> *Brooks v. Thomson Reuters Corp.*, No. 21-cv-01418, 2021 WL 3621837, at \*3 (N.D. Cal. Aug.  
 28 16, 2021) (citing cases dismissing publicity claims based on use of names or likenesses by “third  
 parties . . . on the defendant’s websites”).

(rapper’s use of the “name and certain details of an infamous [cocaine dealer]’s criminal life” to create “celebrity identity . . . of a cocaine kingpin turned rapper” was transformative because rapper “clearly added new expression”). The claims are thus barred by the First Amendment.

### 5. Plaintiffs’ Unfair Competition Law Claim Fails

Plaintiffs assert an “unfair competition” claim under (1) 15 U.S.C. § 1125 (the Lanham Act), (2) Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”), and (3) the common law, *see* Compl. ¶¶ 223–26, cursorily alleging “unlawful business practices,” consisting of the alleged (a) “[i]nfringement of Plaintiffs’ . . . copyrights” and (b) “[v]iolations of Plaintiffs’ . . . rights under the DMCA,” *id.* ¶ 224. Each iteration of this claim fails.

*First*, to the extent Plaintiffs’ unfair-competition claim rests on the Lanham Act, it fails because Plaintiffs have not even tried to plead a Lanham Act violation. “To state a claim under the Lanham Act, a plaintiff must allege a likelihood of confusion.” *Carter v. Oath Holdings Inc.*, No. 17-cv-7086, 2018 WL 5819458, at \*5 (N.D. Cal. Nov. 5, 2018). Plaintiffs do not satisfy this minimum requirement. In fact, the Complaint contains only two passing references to the Lanham Act and is devoid of any factual allegations of “confusion” or “false designation of origin” required to plead such a claim. *See* 15 U.S.C. § 1125.

*Second*, Plaintiffs’ statutory UCL claim fails because it does not plausibly allege any predicate violations that could support such a claim. A claim brought under the UCL’s “unlawful” prong—as Plaintiffs’ appears to be—“borrows violations of other laws and treats them as unlawful practices.” *Armstrong-Harris v. Wells Fargo Bank, N.A.*, No. 21-cv-7637, 2022 WL 3348426, at \*3 (N.D. Cal. Aug. 12, 2022) (citation omitted). So “[i]f a plaintiff cannot state a claim under the predicate law, . . . the UCL claim also fails.” *Id.* (citation omitted). Because Plaintiffs have failed to state a claim against DeviantArt for copyright infringement or violation of the DMCA, *see supra* at 9–17, their UCL claim also fails. Plaintiffs’ UCL claim separately fails, to the extent premised on their copyright infringement claim, because Section 301 of the Copyright Act preempts it. *See Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998) (UCL claim “expressly base[d] . . . on . . . the Copyright Act” was “clear[ly]” preempted).

*Third*, to the extent this claim is based on California’s “Common Law” cause of action for

1 unfair competition, it fails because such a claim requires a showing that defendants “have passed  
 2 off their goods as those of another” or “exploit[ed] trade names or trademarks.” *Sybersound*  
 3 *Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008) (dismissing UCL claim on this  
 4 basis). Plaintiffs have not even tried to claim either, and there are no factual allegations in the  
 5 Complaint supporting either theory.

## 6 **6. Plaintiffs’ Breach Of Contract Claim Fails**

7 Plaintiffs’ sole claim against DeviantArt uniquely—for breach of contract—should be  
 8 dismissed because it (1) depends on contract provisions that, by their terms, do not apply to  
 9 DeviantArt, and instead target *Stability AI*’s alleged breach of DeviantArt’s ToS; and (2) alleges  
 10 none of the elements of a contract breach under California law. *See Low v. LinkedIn Corp.*, 900  
 11 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012) (“Under California law, to state a claim for breach of  
 12 contract a plaintiff must plead the contract, plaintiffs’ performance . . . , defendant’s breach, and  
 13 damage to plaintiff therefrom.” (citation omitted)).

14 *First*, the main basis of Plaintiffs’ breach-of-contract claim appears to be *Stability AI*’s  
 15 alleged breach of DeviantArt’s ToS—not any breach by DeviantArt itself. The Complaint  
 16 exclusively cites contract provisions that do not restrict DeviantArt’s conduct at all. *See* Compl.  
 17 ¶¶ 123–26. Several such terms apply only to DeviantArt’s users. *See* Compl. ¶ 124 (quoting ToS  
 18 provisions); ToS at 8, 19 (“*You* agree not to use the Service . . . for any commercial purpose”  
 19 (emphasis added)); *id.* at 2–3, 13–14 (“*You* may not reproduce, distribute, publicly display or  
 20 perform, or prepare derivative works based on any of the Content . . . without the express, written  
 21 consent of DeviantArt or the appropriate owner of copyright in such works” (emphasis added));  
 22 *see also id.* at 2, 13 (Introduction) (DeviantArt is referred to as “we,” “our,” and “us,” not “You”).  
 23 Another term, as Plaintiffs selectively quote it, seems to say that *no* “commercial activities are  
 24 permitted on or through the Service without DeviantArt’s written approval.” Compl. ¶ 124. But  
 25 that is no help to Plaintiffs: Even on its face, it still allows DeviantArt to approve its own  
 26 commercial activities. And more fundamentally, this provision goes on, in text Plaintiffs elide, to  
 27 define “[c]ommercial activities” as “the offering, solicitation or sale of goods or services by anyone  
 28 *other than DeviantArt.*” ToS at 8, 19 (emphasis added). As a result, Plaintiffs do not—and

1 cannot—explain how DeviantArt breached these terms, which do not even apply to its conduct.

2 Perhaps recognizing this problem, the Complaint pivots to criticizing DeviantArt not for  
3 breaching any contract terms itself, but for being “aware” that *Stability AI* had allegedly violated  
4 those terms, knowing that it “could have taken legal action against Stability [AI] for” those  
5 breaches, and declining to do so. Compl. ¶¶ 125–26 (emphasis added). This is nonsense. Even if  
6 Stability AI were bound by and violated DeviantArt’s ToS—a point that Plaintiffs do not even  
7 bother to try establishing—Plaintiffs identify nothing that would make DeviantArt liable to  
8 Plaintiffs for Stability AI’s conduct. The ToS expressly grant DeviantArt discretion in dealing  
9 with infringement on its website. *See* ToS at 3, 14. And there is nothing in the ToS requiring  
10 DeviantArt to take any action—much less “legal action”—against a user that violates its ToS.

11 *Second*, Plaintiffs’ claim for relief adds several vague allegations that DeviantArt breached  
12 unspecified contract terms when it shared and sold unspecified “personal data with” unspecified  
13 “unauthorized parties in violation of” (again) unspecified terms of the “DeviantArt Privacy  
14 Statement.” Compl. ¶ 232. These conclusory assertions are plainly insufficient under California  
15 law, which—at minimum—requires Plaintiffs to identify the contract terms they allege have been  
16 breached and the information they contend was wrongly shared. *See Sutherland v. Francis*, No.  
17 12-cv-5110, 2014 WL 879697, at \*4 (N.D. Cal. Mar. 3, 2014) (dismissing contract claim that did  
18 not include “the essential terms of the agreement and more specific allegations as to breach”),  
19 *rev’d in part on other grounds*, 647 F. App’x 686 (9th Cir. 2016); *Zepeda v. PayPal, Inc.*, 777  
20 F. Supp. 2d 1215, 1220 (N.D. Cal. 2011) (same); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110,  
21 1117 (N.D. Cal. 2011) (same). Plaintiffs nowhere identify those terms or what “personal data”  
22 they have in mind. The Complaint is simply devoid of allegations regarding what the alleged  
23 wrongdoing was, and what part of the agreement made it wrongful—which thus requires dismissal.

#### 24 **7. Plaintiffs’ Declaratory Judgment Claim Fails With The Other Claims**

25 Plaintiffs’ claim for declaratory relief as to DeviantArt should be dismissed because it is  
26 not an independent cause of action. When, as here, there is no basis sustaining for any of the  
27 claims underlying a request for a declaratory judgment, dismissal is appropriate. *See Malasky v.*  
28 *Esposito*, No. 16-cv-4102, 2019 WL 79032, at \*10 (N.D. Cal. Jan. 2, 2019) (dismissing declaratory

1 relief claim “[b]ecause the court has dismissed [the] underlying claims”), *aff’d*, 781 F. App’x 643  
 2 (9th Cir. 2019); *Mayen v. Bank of Am. N.A.*, No. 14-cv-3757, 2015 WL 179541, at \*5 (N.D. Cal.  
 3 Jan. 14, 2015) (same).

#### 4 **C. Dismissal With Prejudice Is Appropriate As To DeviantArt**

5 Finally, the Court should dismiss Plaintiffs’ claims with prejudice. Such dismissal is  
 6 appropriate “when any proposed amendment would be futile.” *Reddy v. Litton Indus., Inc.*, 912  
 7 F.2d 291, 296 (9th Cir. 1990). And “[a] party cannot amend pleadings to directly contradict an  
 8 earlier assertion made in the same proceeding.” *Airs Aromatics, LLC v. Victoria’s Secret Stores*  
 9 *Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (cleaned up). So courts routinely find  
 10 amendment futile when plaintiffs cannot, without contradicting their original complaint, “advance  
 11 an alternative set of allegations” that would plausibly support a viable legal claim. *Id.*; *see also*  
 12 *Reddy*, 912 F.2d at 296–97 (affirming dismissal with prejudice on this ground); *Stebbins v. Polano*,  
 13 No. 21-cv-4184, 2022 WL 2668371, at \*5 (N.D. Cal. July 11, 2022) (dismissing copyright claim  
 14 with prejudice); *Parziale v. HP, Inc.*, No. 19-cv-5363, 2020 WL 5798274, at \*7 (N.D. Cal. Sept.  
 15 29, 2020) (same and collecting cases).

16 The Complaint’s pleading defects as to DeviantArt are incurable by amendment. That is  
 17 the case, as noted above, for Plaintiffs’ failure to register their copyrights, which dooms their  
 18 ability to proceed with any of their copyright infringement claims. *See UAB “Planner 5D”*, 2019  
 19 WL 6219223, at \*7. Their claim for direct copyright infringement, in particular, cannot be cured  
 20 by amendment because (1) it challenges conduct that Plaintiffs affirmatively admit DeviantArt had  
 21 nothing to do with; and (2) as for DreamUp’s outputs, Plaintiffs admit that they are not  
 22 substantially similar to any allegedly infringed works. Plaintiffs’ DMCA claims are also beyond  
 23 repair for the similar reasons that Plaintiffs (1) allege scraping by Stability AI, not DeviantArt; and  
 24 (2) concede that the DreamUp’s outputs are far from “identical” to Plaintiffs’ works. Amendment  
 25 is also futile for Plaintiffs’ right-of-publicity claims because those claims are preempted by the  
 26 Copyright Act, rely on flawed, unprecedented expansions of California law, and are barred by the  
 27 First Amendment. Plaintiffs cannot cure their unfair-competition claims because they have no  
 28 reasonable grounds for alleging confusion, passing off, or any predicate violations under the

1 statutory UCL. And finally, Plaintiffs cannot identify any terms of DeviantArt's ToS or privacy  
 2 policy that could conceivably support a breach of contract claim—as noted, none of the contract  
 3 terms Plaintiffs cite even bind DeviantArt. Because all these defects go to the heart of Plaintiffs'  
 4 claims and are established based on admissions Plaintiffs have made and cannot now contradict,  
 5 the Court should dismiss the claims against DeviantArt with prejudice.

6 **V. CONCLUSION**

7 For all these reasons, the claims against DeviantArt should be dismissed with prejudice.

8  
 9 Dated: April 18, 2023

Respectfully submitted,

10 LATHAM & WATKINS LLP

11 By: /s/ Andrew M. Gass

12 Andrew M. Gass (SBN 259694)

*andrew.gass@lw.com*

13 Michael H. Rubin (SBN 214636)

*michael.rubin@lw.com*

14 505 Montgomery Street, Suite 2000

15 San Francisco, California 94111-6538

16 Telephone: 415.391.0600

17 *Attorneys for Defendant DeviantArt, Inc.*