

1 Joseph R. Saveri (State Bar No. 130064)
 2 Cadio Zirpoli (State Bar No. 179108)
 3 Christopher K.L. Young (State Bar No. 318371)
 4 Louis A. Kessler (State Bar No. 243703)
 5 Elissa A. Buchanan (State Bar No. 249996)
 6 William W. Castillo Guardado (State Bar No. 294159)
 7 Holden Benon (State Bar No. 325847)
JOSEPH SAVERI LAW FIRM, LLP
 601 California Street, Suite 1000
 San Francisco, California 94108
 Telephone: (415) 500-6800
 Facsimile: (415) 395-9940
 Email: jsaveri@saverilawfirm.com
 czirpoli@saverilawfirm.com
 cyoung@saverilawfirm.com
 lkessler@saverilawfirm.com
 eabuchanan@saverilawfirm.com
 wcastillo@saverilawfirm.com
 hbenon@saverilawfirm.com

*Counsel for Individual and Representative
 Plaintiffs and the Proposed Class*

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

J. DOE 1, et al.,
 Individual and Representative Plaintiffs,
 v.
 GITHUB, INC., et al.,
 Defendants.

Case Nos. 4:22-cv-06823-JST
 4:22-cv-07074-JST

**PLAINTIFFS' MOTION FOR
 LEAVE TO FILE MOTION FOR
 RECONSIDERATION (L.R. 7-9)**

1 Plaintiffs argued that DMCA §§ 1202(b)(1) and (b)(3) contain no such requirement and
2 distinguished the cases cited by Defendants. ECF Nos. 66 at 7–8 (Opposition to GitHub and
3 Microsoft MTD Complaint); and 67 at 17–19 (Opp. to OpenAI MTD Complaint).

4 After a hearing on the motions, the Court denied Defendants’ motions as to DMCA
5 §§ 1202(b)(1) and 1202(b)(3). The Court noted that “Plaintiffs thus plead sufficient facts to
6 support a reasonable inference that Defendants intentionally designed the programs to remove CMI
7 from any licensed code they reproduce as output.” ECF No. 95 at 19 (May 11, 2023 order). This
8 Court ruled that Plaintiffs had pleaded facts establishing standing to pursue a claim for injunctive
9 relief under DMCA §§ 1202(b)(1) and (b)(3) but had failed to plead facts to pursue a claim for
10 damages. ECF No. 95 at 10 (“Plaintiffs ... have standing to pursue injunctive relief”) and 8
11 (“Because Plaintiffs do not allege that they themselves have suffered the injury they describe, they
12 do not have standing to seek retrospective relief for that injury”).

13 On June 8, 2023, Plaintiffs filed their First Amended Complaint (“FAC”), seeking both
14 damages and injunctive relief as part of their DMCA claim. ECF No. 97; 102 (corrected FAC); 135
15 (second corrected FAC). The FAC maintained the allegations the Court found sufficient to
16 establish standing for injunctive-relief claims. In order to address the deficiencies with respect to
17 standing to pursue damages claims, the FAC included new facts with respect to Doe 1, Doe 2, and
18 Doe 5. With respect to each, Plaintiffs offered specific examples of the code written by each as well
19 as the output from Copilot. FAC ¶¶ 97-128. Plaintiffs alleged, based on these facts, that the output
20 from Copilot is often a verbatim copy and often a modification. *Id.* Plaintiffs alleged these facts
21 were sufficient to state a claim by Doe 1, Doe 2, and Doe 5, on their own behalf and on behalf of the
22 class they seek to represent. The allegations with respect to Doe 3 and Doe 4 were undisturbed,
23 thus leaving unaffected the allegations the Court found sufficient for injunctive relief as to them.
24 More generally, the FAC did not change the allegations the Court found sufficient to establish
25 standing for injunctive relief as to any of the named Plaintiffs.

26 With respect to damages, Plaintiffs alleged that Copilot reproduced copies of Doe 5’s code
27 verbatim. FAC ¶ 123 (“The first suggestion from Copilot offers . . . a verbatim copy of Doe 5’s
28 original code”) and ¶ 125 (“Once again, the first suggestion from Copilot offers . . . a verbatim copy

1 of Doe 5's code (except for small cosmetic variations in line breaks)"). Defendants moved only to
2 dismiss Plaintiffs' damage claims (and not their injunctive-relief claims) and repeated their
3 contention that claims under DMCA §§ 1202(b)(1) and (b)(3) require removal or alteration of CMI
4 from an identical copy of a copyrighted work. ECF No. 108 at 13–15 (Microsoft and GitHub MTD
5 FAC); and 109 at 12–14 (OpenAI MTD FAC).

6 In opposition, Plaintiffs highlighted that “this argument has been extensively (and
7 exhaustively) briefed,” and that the Court had already considered the arguments raised in the prior
8 briefing. ECF Nos. 140 at 13-14; 141 at 14.

9 In its January 3, 2024 Order (ECF No. 189), the Court granted the Defendants' motions as
10 to DMCA §§ 1202(b)(1) and 1202(b)(3), in their entirety. The Court granted the motion with
11 respect to both injunctive relief and damages, including the injunctive relief claims previously
12 found sufficient and including the damage claims of Doe 5. *See* ECF No. 95. The Court found that
13 Plaintiffs failed to allege sufficient facts of identity of output. The Court did not acknowledge
14 the allegations that CoPilot emits identical verbatim copies of Doe5's code.

15 **II. LEGAL ARGUMENT**

16 First, Plaintiffs did not change the allegations with respect to two of the Plaintiffs, Doe 3
17 and Doe 4, in any way and did not change the allegations found sufficient for injunctive relief as to
18 Doe 1, Doe 2 and Doe 5. Therefore, the facts that the Court found sufficient for injunctive relief
19 remained and would logically continue to be sufficient in the FAC and subsequent amendments.

20 Second, for that reason, and for the additional reason that Defendants did not challenge
21 them, Plaintiffs did not reiterate the arguments which the Court had previously found persuasive
22 with respect to injunctive relief standing. Plaintiffs understood the issue to have been resolved in
23 their favor in the Court's prior order on those motions. *See* ECF No. 95. Repeating arguments
24 which the Court found persuasive, and which the Defendants did not repeat, was unnecessary. The
25 Court should not have dismissed them.

26 Third, the Court failed to consider case law which holds that DMCA § 1202(b) applies,
27 contrary to Defendants' arguments, to non-identical collaborative or derivative works. The Court
28

1 also disregarded well-pleaded allegations with respect to DOE 5 that Copilot emits verbatim copies
2 of Doe 5's original code. *See* FAC ¶ 123, 125.

3 **A. By the Court's reasoning in its Order, the DMCA injunctive claims for Does 3**
4 **and 4 should have remained intact, but instead they were dismissed.**

5 In its Order, the Court analyzed standing with respect to each plaintiff. The Court stated at
6 the outset that "Does 1, 2, and 5 have standing to pursue claims for both injunctive relief and
7 damages, whereas Does 3 and 4 have standing to pursue only claims for injunctive relief." Order
8 at 9.

9 Later in the Order, the Court acknowledged that Plaintiffs' FAC makes allegations of
10 identical output from Copilot that are not mutually exclusive with allegations of modified output:
11 "Plaintiffs' amended complaint alleges that '[t]hough Output from Copilot is often a verbatim
12 copy, even more often it is a modification." Order at 15.

13 Based on code examples added to the FAC for Does 1, 2, and 5, the Court ruled that
14 because "the examples Plaintiffs provide with respect to Does 1, 2, and 5 state that the Copilot
15 output is a 'modified format' ... [t]his ... is not sufficient for a Section 1202(b) claim." Order at 15
16 (emphasis added). But Plaintiffs did not make equivalent allegations of code examples for Does 3
17 and 4, as the Court acknowledged by not mentioning them.

18 Despite this salient difference in the allegations for Does 3 and 4, at the end of the Order,
19 the Court ruled that "Defendants' motions to dismiss Plaintiffs' claims under Sections 1202(b)(1)
20 and 1202(b)(3) of the DMCA ... are granted." Order at 16. That is, the Court dismissed Plaintiffs'
21 DMCA claims in their entirety—as to both damages and injunctive relief—despite the differences
22 in the unchanged allegations for Does 3 and 4 and despite the fact that the Court had previously
23 found them sufficient for purposes of standing to pursue injunctive relief claims.

24 **B. The Court failed to consider caselaw holding that identical copies are not**
25 **required to bring a DMCA claim.**

26 With respect to standing for the damages claims by Doe 5, Plaintiffs also move for
27 reconsideration. Plaintiffs understand that "[m]otions for reconsideration are designed to bring to
28 the Court's attention clear instances of missed arguments, not simply to make the very same points

1 but more loudly.” *Sheet Metal Workers Nat’l Pension Fund v. Bayer Aktiengesellschaft*, No. 20-CV-
2 04737-RS, 2021 WL 5302525, at *1 (N.D. Cal. Nov. 15, 2021).

3 In dismissing Plaintiffs’ DMCA claim for damages, the Court relied on three district court
4 cases, *Advanta-STAR Auto. Rsch. Corp. of Am. v. Search Optics, LLC*, No. 22-CV-1186 TWR (BLM),
5 2023 WL 3366534 (S.D. Cal. May 9, 2023), *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. CV 20-
6 1931-DMG, 2020 WL 5991503 (C.D. Cal. Aug. 14, 2020), and *Frost-Tsuji Architects v. Highway Inn,*
7 *Inc.*, No. CIV. 13-00496 SOM, 2015 WL 263556 (D. Haw. Jan. 21, 2015), *aff’d*, 700 F. App’x 674
8 (9th Cir. 2017). Order at 15. In so doing, the Court failed to consider the decision in *GC2 v. Int’l*
9 *Game Tech.*, 391 F. Supp. 3d 828 (N.D. Ill. 2019), despite its inclusion in Plaintiffs’ oppositions to
10 Defendants’ first motions to dismiss. *See* ECF Nos. 66 & 67. As Plaintiffs argued, the Court in *GC2*
11 held that DMCA § 1202(b) applies to collaborative or derivative works that are not identical, noting
12 that:

13 [None of the] cases cited by the defendants stands for the broad proposition that
14 derivative or collaborative works are categorically excluded from protection under the
15 DMCA’s provision for removal of copyright management information. Indeed, the
16 “original work” language on which the defendants precariously rest their entire
argument does not even appear in the statute. Rather, it is entirely a product of district
court opinions focused on different language in provision.

17 391 F. Supp. 3d at 843–44; ECF No. 67 at 18. Notably, neither the Court’s May 11, 2023 Order nor
18 its January 3, 2024 Order apply the holding of *GC2* to the facts here or otherwise reference the
19 case. *See* ECF Nos. 95 and 189.¹ The decision in *GC2*, unlike those cited by the Court in its January
20 3, 2024 Order, is directly on point and provides a sound basis for the correct statutory analysis of
21 DMCA § 1202(b).

22
23
24
25
26 ¹ Plaintiffs note the decision in *ADR Int’l Ltd. v. Inst. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411, 429
27 (S.D. Tex. 2023). Applying *GC2*, the Court held that “none of the cases Defendants cite support
28 the proposition that Section 1202 requires a plaintiff to plead the allegedly infringing works are
identical copies of the plaintiff’s works.” 667 F. Supp. 3d at 429. Plaintiffs did not cite the decision
in any of the prior briefing on the issue of identity.

1 **C. Though the Court’s Order initially acknowledged allegations in Plaintiffs’ FAC**
2 **regarding verbatim output of Doe 5’s code, the Court did not account for these**
3 **allegations in its ruling.**

4 In addition, the Court overlooked where Plaintiffs specifically alleged identical output of
5 Doe 5’s Licensed Materials. Specifically, Plaintiffs alleged, “Once again, the first suggestion from
6 Copilot offers ... a verbatim copy of Doe 5’s code (except for small cosmetic variations in line
7 breaks).” FAC ¶ 125. The Court even acknowledged another instance of identical output from Doe
8 5, quoting the FAC’s allegation that “Copilot offers to complete the second test with a verbatim
9 copy of Doe 5’s original code.” Order at 4 (citing to FAC ¶ 122-23).

10 The Court nevertheless found that Plaintiffs had failed to plead identity of Output to
11 support their Section 1202(b) claims. *See* ECF No. 189 at 2, 14–16 (“Indeed, the examples Plaintiffs
12 provide with respect to Does 1, 2, and 5 state that the Copilot output is a “modified format,”
13 “variation[,]” or the “functional[] equivalent” of the licensed code”). This is inconsistent with the
14 well-plead allegations of the complaint. In doing so, the Court failed to construe the allegations in
15 the FAC as true and failed to construe the pleadings in the light most favorable to Plaintiffs. *See*
16 *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). The Court focused solely on Plaintiffs’
17 examples of near-identical Outputs and failed to consider Plaintiffs’ allegations of identical outputs.
18 Thus, even if the Court maintains its ruling that claims under DMCA § 1202 require identity,
19 Doe 5 met this burden in the FAC and the Court’s dismissal of Doe 5’s claim for damages should
20 be revoked and their claim reinstated.

21 **III. CONCLUSION**

22 As the Court previously held, the allegations with respect to Doe 3 and Doe 4 were
23 sufficient to establish standing injunctive relief. Because these allegations were not changed in the
24 First Amended Complaint, they should not have been dismissed. With respect to Doe 5 Plaintiffs’
25 claims under DMCA §§ 1202(b)(1) and (b)(3) were improperly dismissed by this Court. Plaintiffs’
26 claims should not have been dismissed because identity is not required for claims under DMCA
27 §§ 1202(b)(1) and (b)(3) under existing authority. Even if identity is required, Plaintiffs’ FAC
28 set forth allegations of identical (“verbatim”) output of Doe 5’s code.

1 For these reasons, this Court should amend its Order to specify the injunctive relief claims
2 are not dismissed and to deny Defendants' motions to dismiss Plaintiffs' claims for damages as to
3 Doe 5 under DMCA §§ 1202(b)(1) and 1202(b)(3).

4
5 Dated: February 28, 2024

By: /s/ Joseph R. Saveri
Joseph R. Saveri

6
7 Joseph R. Saveri (State Bar No. 130064)
8 Cadio Zirpoli (State Bar No. 179108)
9 Christopher K.L. Young (State Bar No. 318371)
10 Louis A. Kessler (State Bar No. 243703)
11 Elissa A. Buchanan (State Bar No. 249996)
12 William W. Castillo Guardado (State Bar No. 294159)
13 Holden Benon (State Bar No. 325847)
14 JOSEPH SAVERI LAW FIRM, LLP
15 601 California Street, Suite 1000
16 San Francisco, California 94108
17 Telephone: (415) 500-6800
18 Facsimile: (415) 395-9940
19 Email: jsaveri@saverilawfirm.com
20 czirpoli@saverilawfirm.com
21 cyoung@saverilawfirm.com
22 lkessler@saverilawfirm.com
23 eabuchanan@saverilawfirm.com
24 wcastillo@saverilawfirm.com
25 hbenon@saverilawfirm.com

26
27
28
Counsel for Plaintiffs and the Proposed Class