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16 **UNITED STATES DISTRICT COURT**  
17 **NORTHERN DISTRICT OF CALIFORNIA**  
18 **OAKLAND DIVISION**

19 J. DOE 1 et al.,  
20 *Individual and Representative Plaintiffs,*  
21 v.  
22 GITHUB, INC., et al.,  
23 *Defendants.*

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

**PLAINTIFFS’ OPPOSITION TO  
OPENAI’S MOTION TO DISMISS THE  
SECOND AMENDED COMPLAINT**

Date: May 16, 2024  
Time: 2:00 p.m.  
Courtroom: 6, 2nd Floor  
Judge: Hon. Jon Tigar

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## I. INTRODUCTION

This case involves the fundamental right of software creators who license their code pursuant to open-source licenses to have their rights protected under the law. The OpenAI defendants (“OpenAI”), which knew the code was subject to these open-source licenses, copied software creators’ code to create an artificial intelligence product, Codex, that has the power to reproduce the very code on which it was trained. OpenAI could have followed the law: it could have licensed this code (as it has sought to do with others); it could have also ensured that any copies, modifications, and derivatives of this code adhered to the terms of the open-source licenses under which the original code was created. Instead, OpenAI acted with impunity.

OpenAI seeks to dismiss claims in Plaintiffs’ Second Amended Complaint (“SAC”) for violations of the Digital Millennium Copyright Act (“DMCA”) and breach of contract arising from violation of the terms of the open-source licenses (“OSLs”) that were attached to code and other materials (aka “Licensed Materials”) belonging to Plaintiffs. OpenAI’s motion under DMCA should be rejected for the same reasons the Court should reject GitHub and Microsoft’s motion to dismiss Plaintiffs’ DMCA claims. OpenAI’s attempt to dismiss the Plaintiffs’ breach of contract claim fares no better. Plaintiffs allege that the Licenses they published code subject to are valid as enforceable contracts, despite OpenAI’s arguments to the contrary.

## II. PROCEDURAL HISTORY

### A. Plaintiffs’ Initial Complaint (ECF No. 1)

On November 21, 2022, Plaintiffs Doe 1, Doe 2, Doe 3, and Doe 4 filed their initial complaint in this matter alleging, that OpenAI (and other defendants) violated DMCA §§ 1202(b)(1) and (b)(3) by removing or altering Copyright Management Information (“CMI”) from Plaintiffs’ Licensed Materials and distributing copies of those Materials that did not include CMI. ECF No. 1 ¶¶ 138–67. Plaintiffs also brought a claim for Breach of Contract—Open-Source License Violations. *Id.* ¶¶ 168–83.

1           **B.     The Court’s Order on OpenAI’s Motion to Dismiss the Initial Complaint**  
2           **(ECF No. 95)**

3           On January 26, 2023, OpenAI filed its motion to dismiss. ECF No. 53. OpenAI argued  
4 that Plaintiffs failed to state a claim for breach of contract (ECF No. 53 at 13–14) and failed to  
5 state a claim for violation of the DMCA. ECF No. 53 at 9–13.

6           On May 11, 2023, the Court issued its Order. The Court upheld the sufficiency of  
7 Plaintiffs’ allegations for breach of contract and their claims under DMCA §§ 1202(b)(1) and  
8 1202(b)(3). ECF No.95 (cited herein as *Doe 1 v. GitHub, Inc.*, 672 F. Supp. 3d 837, 859 (N.D. Cal.  
9 2023) or “First MTD Order”). The Court also upheld the sufficiency of Plaintiffs’ breach of  
10 open-source license pleadings. *Id.* at 860.

11           **C.     Plaintiffs’ First Amended Complaint (ECF No. 97)**

12           On June 8, 2023, Plaintiffs filed their First Amended Complaint. ECF No. 97. Plaintiffs  
13 maintained their claims for violations of DMCA §§ 1202(b)(1) and (b)(3), *id.* at ¶¶ 183–213, and  
14 Breach of the OSLs. *Id.* at ¶¶ 214–29.

15           Plaintiffs’ FAC also alleged new facts establishing Plaintiffs suffered particularized harm  
16 by specifying how Codex and Copilot output code that matches their licensed code that appears  
17 in GitHub public repositories, yet without providing the required attribution and notice and in  
18 violation of other terms of their licenses. Specifically, Plaintiffs provided examples of Copilot  
19 emitting Plaintiffs’ code verbatim as output with only cosmetic changes. *E.g., id.* at ¶¶ 100–28.  
20 The sample outputs are sufficiently distinctive to prove Copilot could have only taken the  
21 underlying code for these outputs from Plaintiffs’ GitHub repositories. *E.g., id.* at ¶¶ 103, 110,  
22 119. As the FAC alleged, these examples illustrate the typical behavior of Copilot and raise a  
23 plausible inference that Plaintiffs’ code has also been output in the past. *Id.* at ¶ 97.

24           OpenAI filed its motion to dismiss the FAC on June 29, 2023. ECF No. 110. OpenAI did  
25 not attempt to dismiss Plaintiffs’ breach-of-contract claims based on the OSLs. As to the DMCA  
26 claim, OpenAI argued that Plaintiffs had failed to allege CMI removal from identical copies. ECF  
27 No. 110 at 12–13.



1           **D.     The Court’s Order on OpenAI’s Motion to Dismiss First Amended**  
 2           **Complaint (ECF No. 189)**

3           On January 3, 2024, the Court issued its order on the motion to dismiss the FAC. ECF  
 4 No. 189 (hereinafter “Second MTD Order”). The Court dismissed Plaintiffs’ claims under  
 5 DMCA §§ 1202(b)(1) and (b)(3), holding that the pleadings were insufficient because output  
 6 from Copilot is often a modification of Plaintiffs’ licensed works, as opposed to an “identical  
 7 copy.” *Id.* at 15. Though the Court recognized that DMCA § 1202(b)(1) only requires  
 8 intentionally removing or altering any copyright recognized information without the authority of  
 9 the copyright owner, and is distinct from § 1202(b)(3), which makes it illegal to “distribute, [or]  
 10 import for distribution . . . copies of works,” the court applied an “identity” requirement to  
 11 both DMCA §§ 1202(b)(1) and (b)(3). *Id.* at 15. The Court cited *Kirk Kara Corp. v. W. Stone &*  
 12 *Metal Corp.*, No. CV 20-1931-DMG (EX), 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020), a  
 13 case that involved jewelry designs where the CMI was engraved in the copyrighted work. ECF  
 14 No. 189 at 15. The Court still granted Plaintiffs leave to amend their DMCA §§ 1202(b)(1) and  
 15 (b)(3) claims.

16           **E.     Plaintiffs’ SAC (ECF No. 200) and Its New Allegations**

17           On January 25, 2024, Plaintiffs filed their Second Amended Complaint. ECF No. 200.  
 18 Consistent with the Second MTD Order, the SAC included new allegations regarding the  
 19 increased likelihood that Plaintiffs’ or class members’ licensed code would be emitted verbatim as  
 20 the capacity and scope of the Copilot and Codex model grows. *Id.* at ¶¶ 104–07.

21           **III.    ARGUMENT**

22           **A.     Plaintiffs’ Second Amended Complaint Plausibly Alleges DMCA Violations**  
 23           **under DMCA §§ 1202(b)(1) and 1202(b)(3)**

24           The DMCA restricts “the removal or alteration of copyright management information  
 25 (“CMI”)—information such as the title, the author, the copyright owner, the terms and  
 26 conditions for use of the work, and other identifying information set forth in a copyright notice or  
 27 conveyed in connection with the work.” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 671 (9th Cir.  
 28 2018). Sections 1202(b)(1) and (b)(3) of the DMCA, under which Plaintiffs plead, provide that

1 one cannot, without authority of the copyright owner, “(1) “intentionally remove or alter any  
2 copyright management information,” *or* (3) “distribute or import for distribution . . . copies of  
3 works . . . knowing that copyright management information has been removed or altered” while  
4 “knowing, or . . . having reasonable grounds to know, that it will induce, enable, facilitate, or  
5 conceal an infringement of *any right under this title.*” 17 U.S.C. § 1202(b) (emphasis added).  
6 Rights under Title 17, which encompasses the Copyright Act and DMCA, are not limited to the  
7 exclusive right of copyright holders to make copies of their works under § 106(1), but also include  
8 the exclusive right to make derivative works under § 106(2), and to distribute copies under  
9 § 106(3). *See* 17 U.S.C. § 106. Further, the Copyright Act’s definition of “copies” does not  
10 require “identity.” 17 U.S.C. § 101.

11 “The pleading burden under the DMCA is low.” *See Mollman v. Zoetop Bus. Co.*, No. CV  
12 22-4128 (PA) (GJSx), 2022 WL 17207103, at \*3 (C.D. Cal. Sept. 16, 2022). Moreover, while  
13 § 1202(b) claims require a plaintiff to plead scienter, such knowledge may be alleged generally and  
14 can be inferred through circumstantial evidence of intent. *See, e.g., Logan v. Meta Platforms, Inc.*,  
15 636 F. Supp. 3d 1052, 1063–64, 2022 WL 14813836, at \*9 (N.D. Cal. Oct. 25, 2022) (“‘[I]ntent,  
16 knowledge, and other conditions of a person’s mind may be alleged generally’” for purposes of  
17 pleading DMCA § 1202(b)’s mental state requirements”) (citations omitted).

18 A violation of § 1202(b)(1) is distinct from a violation of § 1202(b)(3) because it does not  
19 require the “distribution” or “import for distribution” of “copies of works” for liability. “To  
20 plead a violation of Section 1202(b)(1), a plaintiff must allege intentional removal of CMI.”  
21 *Harrington v. Pinterest, Inc.*, No. 5:20-CV-05290-EJD, 2022 WL 4348460, at \*4 (N.D. Cal. Sept.  
22 19, 2022). The DMCA makes the mere removal of CMI from digital copies illegal before  
23 distribution of copies. To the extent an identity requirement can be read into § 1202(b)(1), it  
24 should focus on how the copy was made and CMI removed—i.e., whether it was digital copying  
25 and removal of CMI. Plaintiffs have alleged that OpenAI made direct identical digital copies of  
26 Plaintiffs’ works and thereafter automated the removal of its CMI. SAC ¶¶, 91, 94–97, 143–44.

27 In its First MTD Order (ECF No. 95) this Court held that Plaintiffs had sufficiently  
28 alleged violations of DMCA §§ 1202(b)(1) and 1202(b)(3) because Plaintiffs had plausibly alleged

1 that their “licensed code contain[ed] CMI,” and that “Defendants removed or altered that CMI  
 2 from licensed code, distributed CMI knowing CMI had been removed or altered, and distributed  
 3 copies of the code knowing that CMI had been removed or altered, all while knowing and  
 4 possessing reasonable grounds to know that doing so would induce infringement.” *Doe 1*, 672 F.  
 5 Supp. 3d 837, 857.

6 In its Second MTD Order, however, the Court dismissed Plaintiffs’ DMCA claims solely  
 7 on the grounds that “no DMCA violation exists where the works are not identical,” and Plaintiffs  
 8 had failed to satisfy this requirement “[b]ecause the Complaint characterized Copilot output as ‘a  
 9 “modified format,’ ‘variation[ ],’ or the ‘functional[ ] equivalent’ of the licensed code.” ECF  
 10 No. 189 at 15 (quoting FAC ¶¶ 103, 110, 120).

11 In sum, this Court has already held that Plaintiffs have otherwise sufficiently pled DMCA  
 12 violations under §§ 1202(b)(1) and 1202(b)(3). The sole issue remaining before the Court is  
 13 whether Plaintiffs’ SAC sufficiently alleges that Copilot produces “identical” copies of Plaintiffs’  
 14 licensed code. For the following reasons, and for the reasons the Court set forth in its First MTD  
 15 Order, Plaintiffs’ SAC satisfies this requirement, and thus Plaintiffs’ claims under §§ 1202(b)(1)  
 16 and 1202(b)(3) for injunctive relief should not be dismissed.

### 17 **1. Plaintiffs’ DMCA claims are plausibly alleged under any standard**

18 Plaintiffs do not seek to relitigate previous arguments concerning the DMCA’s alleged  
 19 “identity” requirement and its application to the facts in this case. Plaintiffs, however, ask this  
 20 Court to address new issues arising in relation to this standard and its application to software code  
 21 in particular—issues that were either never previously raised or addressed in prior briefing or the  
 22 Court’s Second MTD Order.<sup>1</sup>

23 Relatedly, Plaintiffs ask this Court to reconsider the caselaw on which it relied in reaching  
 24 its “identity” holding in the Second MTD Order, particularly in light of the recent district  
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26 <sup>1</sup> ECF No. 189 (“A court may consider a motion “to the extent it presents issues not previously  
 27 resolved.” (quoting *Jones v. Life Ins. Co. of N. Am.*, No. 08-CV-03971-RMW, 2015 WL 8753996, at  
 28 \*3 (N.D. Cal. Dec. 15, 2015)). While Plaintiffs acknowledge that there is a pending motion for  
 reconsideration of the Court’s Order on the FAC MTD, the arguments asserted herein also differ  
 from the arguments raised there.

1 court decision in *ADR Int’l Ltd. v. Inst. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411 (S.D. Tex.  
 2 2023) (“*ADR Int’l*”), where this alleged “identity” element was squarely rejected. *See id.* at  
 3 427–29 (finding no “identity” requirement for DMCA claims after examining the statutory  
 4 language, legislative history, and caselaw).

5 **a. Identity is not an element of a DMCA § 1202 claim**

6 The plain language of DMCA § 1202 makes it a violation to remove or alter CMI. It does  
 7 not require that the output work be original or identical to obtain relief. *See* 17 U.S.C.  
 8 § 1202(b)(1). Similarly, the definition of “copy” under the DMCA includes no requirement of  
 9 identity. *See* 17 U.S.C. § 1202(c). Indeed, the DMCA contains only one mention of the word  
 10 “identical”—as an exemption under Section 1201 for certain types of institutions. *See* 17 U.S.C.  
 11 § 1201(d)(2) (“The exemption made available under paragraph (1) shall only apply with respect  
 12 to a work when an *identical* copy of that work is not reasonably available in another form.”)  
 13 (emphasis added). One can presume therefore that Congress could have required an “identical  
 14 copy” element into other sections of the DMCA if it so intended.

15 To be considered a copy under the DMCA, the “allegedly infringing work must be fixed in  
 16 some tangible form from which the work can be perceived, reproduced, or otherwise  
 17 communicated, either directly or with the aid of a machine or device.” *Columbia Pictures Indus.,*  
 18 *Inc. v. Galindo*, No. 20-cv-3129-MEMF (GJSx), 2022 WL 17094713, at \*8 (C.D. Cal. Nov. 18,  
 19 2022) (citing 17 U.S.C. § 101). The statute defines CMI as “information conveyed in connection  
 20 with copies . . . of a work[.]” 17 U.S.C. § 1202(c). By a plain reading of the statute, there is no  
 21 need for a copy to be identical—there only needs to be copying, which Plaintiffs have amply  
 22 alleged. *See, e.g.*, SAC ¶¶ 112–40.

23 The DMCA was enacted to protect copyrights in the digital era where digital copies can  
 24 be made and disseminated in an instant. *See, e.g., Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524  
 25 F. Supp. 2d 1184, 1199 (C.D. Cal. 2007) (“With this evolution in technology, the law must adapt  
 26 in order to make digital networks safe places to disseminate and exploit copyrighted works.”); *see*  
 27 *also* S. Rep. No. 105-190, at 2 (1998) (“[T]he law must adapt in order to make digital networks  
 28 safe places to disseminate and exploit copyrighted materials”) (footnote call numbers omitted).

1 Here, Plaintiffs allege that OpenAI utilized identical digital copies of their copyrighted  
2 works to train Codex (SAC, ¶¶ 91, 95–97) and removed the CMI from it knowing that Copilot  
3 (which runs on top of Codex and which OpenAI codeveloped with GitHub, *id.* at ¶ 59)  
4 reproduces Plaintiffs’ copyrighted code identically, without attribution, notice, or any of the other  
5 requirements that may adhere from the applicable license. *Id.* at ¶¶ 102–03, 145–49. OpenAI  
6 knowingly enables and induces Copilot users to infringe on Plaintiffs’ exclusive right under  
7 § 106(2) of the Copyright Act to prepare derivative works. 17 U.S.C. § 106(2); *see* SAC, ¶¶ 90–  
8 105. Liability is established under DMCA § 1202 (b)(1) when CMI is removed from digital copies  
9 knowing doing so “will induce, enable, facilitate, or conceal an infringement of *any right* under  
10 this title.” 17 U.S.C. § 1202(b).

11 *None* of the cases that Defendants previously relied on—and this Court cited in its Second  
12 MTD Order adopting an “identity” standard for DMCA violations—explain the origins of  
13 this so-called standard. For good reason—there is no support from statutory language, legislative  
14 history, or potentially analogous interpretations of “copying” under the Copyright Act. In fact,  
15 careful review of many of these cases also cite other cases that never discussed the issue of  
16 “identity” (despite being cited for that proposition).

17 For example, this Court (and Defendants) cited *Kirk Kara Corp. v. W. Stone & Metal Corp.*,  
18 No. CV 20-1931-DMG (EX), 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020) as central  
19 support for the DMCA’s alleged “identity” requirement. *Kirk Kara*, however, never  
20 examined the standard, and instead relied on three cases, each of which provide no support for it.  
21 As the court in *ADR Int’l* noted, the *Kirk Kara* court cited *Kelly v. Arriba Soft Corp.*, 77 F. Supp.  
22 2d 1116, 1122 (C.D. Cal. 1999) and *Frost-Tsuji Architects v. Highway Inn, Inc.*, No. CIV 13-00496  
23 SOM, 2015 WL 263556, at \*2 (D. Haw. Jan. 21, 2015), “but neither [of these cases] mentioned  
24 nor employed an identical copies requirement.” *ADR Int’l*, 667 F. Supp. 3d. at 427. The *Kirk*  
25 *Kara* court similarly cited *Fischer v. Forrest*, 286 F. Supp. 3d 590 (S.D.N.Y. 2018), yet the term  
26 “identical” appears nowhere in the decision. To the contrary, in the *Fischer* court’s brief  
27 discussion of whether sufficient copying had occurred, the court did not apply an identity  
28 standard at all, stating that where DMCA claims had been adequate, “the underlying work has

1 been *substantially* or entirely reproduced.” *Id.* at 609 (emphasis added); *see also ADR Int’l*, 667 F.  
2 Supp. 3d at 427 (rejecting *Kirk Kara*’s reliance on *Fischer*).

3 Notably, in *ADR Int’l*, the district court expressly rejected OpenAI’s claim that the  
4 DMCA included an “identity” requirement in part by dissecting the very cases on which  
5 OpenAI here—and this Court in its Second MTD Order—relied on when imposing an  
6 “identity” requirement on DMCA violations. *ADR Int’l*, 667 F. Supp. 3d at 427–29  
7 (observing that “Defendants’ cases do not require a plaintiff to plead allegedly infringing works  
8 are identical copies” and recognizing “the one case that requires identical copies [i.e., *Kirk Kara*]  
9 is not well reasoned.”).

10 The *ADR Int’l* court also held that neither the statute’s plain language nor its legislative  
11 history—which the district court examined (unlike the cases that OpenAI relies on)—supported  
12 an “identity” requirement. Instead, well-established standards of statutory construction  
13 compelled the opposite conclusion, namely, that “copying” under the DMCA should align with  
14 “copying” under the Copyright Act, given that the DMCA is contained in Chapter 12 of the  
15 Copyright Act and, therefore, subject to Section 101 of the Copyright Act’s definition of copying.  
16 Section 101 defines “copies” as “material objects, other than phonorecords, in which a work is  
17 fixed by any method now known or later developed, and from which the work can be perceived,  
18 reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”  
19 17 U.S.C. § 101. This definition “lacks any requirement for an identical copy.” *ADR Int’l*, 667 F.  
20 Supp. 3d at 427; *cf. Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 305 (3d Cir. 2011)  
21 (“Defendants are essentially asking us to rewrite § 1202 to insert a term—that is, ‘automated  
22 copyright protection or management system’—which appears nowhere in the text of the DMCA  
23 and which lacks a clear definition. We would need compelling justification indeed to adopt such a  
24 statutorily-unmoored interpretation.”).

25 In accord with this correct analysis, courts have routinely declined to require identity  
26 when evaluating DMCA claims under a standard drawn directly from Copyright Act infringement  
27 claims. *See, e.g., Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1188 (9th Cir. 2016);  
28 *Widespread Elec. Sales, LLC v. Upstate Breaker Wholesale Supply, Inc.*, No. 3:20-CV-2541-K, 2023

1 WL 8721435, at \*1 (N.D. Tex. Dec. 17, 2023); *Software Pricing Partners, LLC v. Geisman*, No.  
2 3:19-cv-00195-RJC-DCK, 2022 WL 3971292, at \*5 (W.D.N.C. Aug. 31, 2022) (“Geisman, as a  
3 former employee of SPP, reasonably knew that such information was copyrighted work and knew  
4 he was altering it by changing it enough to look like his own work while maintaining a substantial  
5 similarity to the original work. Accordingly, Geisman is liable for violating the DMCA.”). Under  
6 the DMCA, all these actions would fail if courts adhered to the “identity” standard OpenAI  
7 proposes—and which this Court adopted in the Second MTD Order. OpenAI has not cited a  
8 single case holding that the standard for “copying” under the DMCA is higher than the  
9 Copyright Act or that the statutes should be read disharmoniously.

10 In addition to being incorrect, adopting OpenAI’s rigid “identity” standard to  
11 software code also has uniquely troubling implications given that mere cosmetic differences  
12 between the original and copied code are not probative of whether the copied code is “identical.”  
13 *See* 17 U.S.C. § 1201(d)(2) (containing the only mention of the word “identical” in 17 U.S.C.  
14 § 1201(d)(2) regarding an exemption for public institutions); *see also* S. Rep. No. 105-190, at 31  
15 (1998) (explaining the meaning of public institution exemption and requirement that copies be  
16 “identical” for exemption to apply). The decision in *Oracle Int’l Corp. v. Rimini St., Inc.*, No. 2:14-  
17 cv-01699-MMD-DJA, 2023 WL 4706127 (D. Nev. July 24, 2023) is especially instructive. There,  
18 the court rejected the party’s argument “that a work that removes copyright management  
19 information must be an *exact copy of the original work.*” *Id.* at \*82 (emphasis added). The court  
20 stated that “this construction of the DMCA” demanding an exact copy—the same construction  
21 OpenAI demands in this case—“would weaken the statute’s intended protections for copyright  
22 holders” and that “when a defendant modifies source code ‘substantially similar’” to the  
23 underlying “copyrighted source code, including by replacing the author’s name with its own, the  
24 defendant is liable under the DMCA.” *Id.* (internal quotations omitted); *Rimini St., Inc.*, 2023  
25 WL 4706127, at \*14 (examining whether copies of code were “substantially similar”). In a case  
26 involving software code in this very district, the court found that an allegation of CMI removal  
27 from code that is derivative of a plaintiff’s copyrighted source code is sufficient at the pleading  
28 stage to sustain a DMCA § 1202 claim. *See Splunk Inc. v. Cribl, Inc.*, 662 F. Supp. 3d 1029, 1053

1 (N.D. Cal. 2023). Identicality is simply not an element of a Section 1202 claim.

2 **b. Plaintiffs allege that Copilot reproduces identical copies of**  
3 **Plaintiffs' code**

4 Even if “identicality” were actually an element of a DMCA violation, Plaintiffs’  
5 allegations under §§ 1202(b)(1) and (b)(3) still satisfy this standard. Plaintiffs have plausibly  
6 alleged that any differences between Copilot-generated code and Plaintiffs’ original code are  
7 “immaterial” and “semantically insignificant”—in other words: identical. *See, e.g.*, SAC ¶ 108.

8 Plaintiffs identify several instances where Copilot *has* reproduced verbatim, (i.e.,  
9 identical) copies of Plaintiffs’ code. *See* SAC ¶¶ 135, 137. Plaintiffs note that “[w]hen Copilot is  
10 prompted with the first section of Doe 5’s code . . . [t]he first suggestion from Copilot offers . . . a  
11 verbatim copy of Doe 5’s original code.” *Id.* at ¶ 135. Plaintiffs similarly allege that Copilot  
12 reproduces “a verbatim copy of Doe 5’s code (except for small cosmetic variations in line  
13 breaks)” when prompted by different lines of Doe 5’s code. *Id.* at ¶ 137. Line breaks do not  
14 comprise the copyrighted work as they are not “semantically meaningful,” *id.* at ¶ 72, and thus  
15 any difference in line breaks between Copilot output and Plaintiffs’ code are immaterial to the  
16 analysis.

17 Elsewhere, the SAC plausibly alleges that Copilot reproduces code sufficient to satisfy an  
18 “identicality” requirement, because minor deviations between the original code and Copilot’s  
19 copy of that code are “immaterial” or “semantically insignificant variations of the original  
20 Licensed Materials.” *Id.* at ¶ 108. With respect to Doe 2, Plaintiffs allege that slight differences in  
21 three key words still render the Copilot code “semantically equivalent” and that the code is  
22 otherwise “a verbatim copy” of the original code. *Id.* at ¶ 115. Plaintiffs further allege that “the  
23 particular arrangement and sequencing seen in [Doe 2’s] code is distinctive expression found only  
24 in one location on GitHub.” *Id.* Similarly, Plaintiffs allege that Copilot clearly reproduces Doe 1’s  
25 code given that its omitted output only contains “cosmetic” differences that do not affect the way  
26 the code functions, and that the output even contains Doe 1’s actual “comments in the code”—in  
27 other words, the coder’s own expressive commentary about his own code, which could only come  
28 from Doe 1, further evidencing copying. *Id.* at ¶ 121.



1 Plaintiffs further allege that Copilot renders a “verbatim copy” of Doe 5’s original code  
2 except with an aspect of the code that is immaterial to the question of whether it has been copied.  
3 *Id.* ¶ 128. The renaming of variables is akin to renaming James Bond as “Jim Bond”: republishing  
4 the popular 007 movie series would still constitute an act of infringement irrespective of the new  
5 names. Indeed, the SAC is replete with allegations making clear that the scant “cosmetic”  
6 differences in Copilot-generated code have no bearing on whether the Copilot-generated code is  
7 “functionally equivalent” or identical to Plaintiffs’ code. *See, e.g., id.* at ¶¶ 122, 131, 137. Plaintiffs  
8 also allege that these small cosmetic differences are “a feature, not a bug” that enables “Copilot  
9 to conceal the copying of Licensed Materials.” *Id.* at ¶ 155.

10 OpenAI’s contention that minor differences in line breaks, capitalization, or variable  
11 names defeat a finding of identity is a factual argument that can be tested through expert  
12 testimony showing that these modifications are, in fact, material such that the code is, in fact, *not*  
13 identical. *See, e.g., Rimini St., Inc., 2023 WL 4706127, at \*14* (“Ms. Frederiksen-Cross performed  
14 analytic dissection as part of her comparison of RSI810ST.SQR against TAX810DC.SQR. She  
15 determined that the RSI810ST.SQR file contains substantial portions of Oracle’s protected  
16 expression and was substantially similar to Oracle’s TAX810DC.SQR file. Examples of Oracle’s  
17 protected expression within the RSI810ST.SQR file include, “blocks of identical lines that are  
18 performing exactly the same function using identical code in the same order.”) (internal citations  
19 omitted). But this case is about *code*. Minor differences may have no implication as to whether the  
20 code functions identically or not.

21 In addition, Plaintiffs’ SAC contains new allegations regarding Copilot’s duplicate-  
22 detection feature, which GitHub created “in response to public criticism of Copilot’s  
23 mishandling of Licensed Materials.” *Id.* at ¶ 145. As Plaintiffs allege, the feature “either allow[s]  
24 or block[s] code completion suggestions that match publicly available code.” *Id.* In other words,  
25 the feature was created because GitHub, OpenAI, and the other defendants *knew* that Copilot was  
26 emitting verbatim copies of licensed code on which it had trained. *See id.* at ¶¶ 144–48. A tool that  
27 attempts to block Copilot from producing output that is identical to code hosted in public GitHub  
28 repositories *by definition* establishes Copilot’s ability to reproduce verbatim copies of code.

1 Moreover, as Plaintiffs allege, “even assuming the filter works as advertised, because it only  
2 checks for verbatim excerpts, it does nothing to impede the Outputs from Copilot that are  
3 modifications of Licensed Materials.” *Id.* at ¶ 145. In other words, code that includes minor  
4 differences in line breaks, capitalization, or even order of enums—all semantically “immaterial  
5 differences”—are not necessarily flagged by the feature. *Id.*

6 At the pleading stage, Plaintiffs’ allegations regarding the duplicate-detection feature  
7 clearly bolster the plausibility of Plaintiffs’ claims that Copilot produces identical code and is  
8 substantially likely to continue producing Plaintiffs’ licensed code.

## 9 2. The DMCA does not require an entire work to be copied

10 OpenAI also claims, without citation to a single authority, that “the reproduction of short  
11 passages that may be part of [a] larger work, rather than the reproduction of an entire work, is  
12 insufficient to violate [DMCA] Section 1202.” OpenAI Br. at 5. But the DMCA has no such  
13 requirement.

14 Like OpenAI’s “identity” argument, its claim that DMCA liability attaches only  
15 where the offending party has copied an “entire work” contravenes the most basic tenets of  
16 copyright law. By OpenAI’s logic, a party could copy and distribute a fragment of a copyrighted  
17 work—say, a chapter of a book, a stanza of a poem, or a scene from a movie—and face no  
18 repercussions for infringement. Courts, however, have routinely acknowledged that “[e]ven a  
19 small amount of the original, if it is qualitatively significant, may be sufficient to be an  
20 infringement” even where “the full original could not be recreated from the excerpt.” *Horgan v.*  
21 *Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986); *see also Burroughs v. Metro-Goldwyn-Mayer, Inc.*,  
22 683 F.2d 610, 624 n.14 (2d Cir. 1982).

23 OpenAI’s unsupported theory would render the DMCA toothless by allowing anyone to  
24 copy another’s work so long as they only copied a part of it. But “[n]o plagiarist can excuse the  
25 wrong by showing how much of his work he did not pirate.” *Shaw v. Lindheim*, 919 F.2d 1353,  
26 1362 (9th Cir. 1990), *overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

1           **B. Plaintiffs Adequately Allege Breach of Contract by OpenAI Through Its Mass**  
 2           **Violation of Open-Source Licenses**

3           In its initial Motion to Dismiss, OpenAI urged the Court to dismiss Plaintiffs’ breach of  
 4 contract claim (Count II), contending that Plaintiffs had failed to plead the existence of a contract  
 5 and failed to identify the actual contractual provisions OpenAI had breached. ECF No. 53 at 13–  
 6 15. The Court rejected these arguments wholesale, holding Plaintiffs had sufficiently alleged “that  
 7 Codex and Copilot reproduce licensed code as output without attribution, copyright notice, or  
 8 license terms, thereby violating the relevant provisions of each license,” and that while Plaintiffs  
 9 had not identified “the specific subsections of each suggested license that correspond to each of  
 10 these requirements,” they had “sufficiently identified ‘the contractual obligations allegedly  
 11 breached,’ as required to allege breach of contract. *Doe 1*, 672 F. Supp. 3d at 860.

12           Plaintiffs then filed their FAC, leaving their breach-of-contract allegations unchanged.  
 13 OpenAI did not move to dismiss this count. ECF No. 110. In the SAC, the same nucleus of facts  
 14 underlying Plaintiffs’ breach of contract claim remain unchanged. After filing the SAC—which  
 15 contains the very same breach of contract claim upheld by this Court in its First MTD Order—  
 16 OpenAI sought another bite at the apple, advancing two central claims for the first time.

17           First—that Plaintiffs have failed to allege a breach based on the operation of OpenAI’s  
 18 Codex and thus have failed to state a claim against OpenAI based on Codex given that “GitHub”  
 19 is allegedly a “separate product” from Copilot. OpenAI Br. at 7–8.

20           Second—that Plaintiffs have failed to articulate a theory of breach of contract because  
 21 OpenAI never adhered to the licensing “conditions” to begin with, meaning its use of the  
 22 Plaintiffs’ Licensed Materials was never in fact governed by the attached licenses. *Id.* at 10.

23           For the reasons below, OpenAI’s arguments fail.

24           **1. OpenAI’s failure to raise these arguments before forecloses OpenAI’s**  
 25           **Rule 12 motion under Rule 12(g)(2)**

26           “Rule 12(g)(2) provides that a defendant who fails to assert a failure-to-state-a-claim  
 27 defense in a pre-answer Rule 12 motion cannot assert that defense in a later pre-answer motion  
 28 under Rule 12(b)(6)” though “the defense may be asserted in other ways.” *In re Apple iPhone*

1 *Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017) (citing Fed. R. Civ. P. 12(g)(2) & (h)(2)); *see also*  
2 Fed. R. Civ. P. 12(g)(2) (“Except as provided in Rule 12(h)(2) or (3), a party that makes a motion  
3 under this rule must not make another motion under this rule raising a defense or objection that  
4 was available to the party but omitted from its earlier motion.”). “The sole Rule 12 exception is  
5 that a party may subsequently raise the foreclosed issue ‘in a post-answer motion under  
6 Rule 12(c)’; otherwise, the party may validly raise the issue ‘in a pleading under Rule 7 . . . or at  
7 trial.’” *In re Packaged Seafood Prods. Antitrust Litig.*, 277 F. Supp. 3d 1167, 1174 (S.D. Cal. 2017)  
8 (quoting *Apple iPhone*, 846 F.3d at 318). Moreover, when assessing a 12(g)(2) motion, district  
9 courts consider the prejudice to plaintiffs in allowing a defendant to seek dismissal of claims on  
10 grounds that could have been brought through an earlier motion. *See, e.g., Harrell v. City of Gilroy*,  
11 No. 17-CV-05204-LHK, 2019 WL 452039, at \*8 (N.D. Cal. Feb. 5, 2019) (noting that courts have  
12 discretion to consider successive Rule 12(b)(6) motions if the motion does not prejudice the  
13 plaintiff and expedites resolution of the case.”).

14 The facts in this case are precisely why Rule 12(g)(2) exists: “to avoid repetitive motion  
15 practice, delay, [or] ambush tactics.” *Packaged Seafood Prods.*, 277 F. Supp. 3d at 1174 (quotations  
16 omitted and alteration in the original). This is OpenAI’s *third* motion to dismiss; yet, its *first* time  
17 arguing for a Rule 12 dismissal of Plaintiffs’ breach of contract claims—which have not changed  
18 one iota in any of the complaints. *Compare* ECF No. 201 *with* ECF No. 1. OpenAI has known of  
19 these allegations for nearly 16 months, when Plaintiffs filed their initial Complaint. ECF No. 1.  
20 Nothing prevented OpenAI from making the exact same breach of contract arguments it pursues  
21 today, and OpenAI has offered no explanation as to why it failed to raise these argument earlier.  
22 Nor has OpenAI explained why it failed to raise these arguments in its second motion to dismiss,  
23 instead sitting silent until its third round of Rule 12(b)(6) briefing. *See Mario V. v. Armenta*, No.  
24 18-cv-00041-BLF, 2019 WL 81337140, at \*2 (N.D. Cal. Apr. 17, 2019) (denying subsequent Rule  
25 12(b)(6) motion under Rule 12(g)(2) where “Plaintiffs filed their original complaint more than a  
26 year ago,” “Defendants’ first motions to dismiss were litigated more than eight months ago” and  
27 “[t]he issues now raised by Defendants could have, and under the Federal Rules should have,  
28 been litigated then.”).

1 OpenAI should not be rewarded for its delay in advancing breach of contract arguments  
2 that could have been made on two prior occasions and, notably, before discovery had commenced.  
3 At this point in the case, however, Plaintiffs have issued numerous discovery requests pertaining  
4 to their breach of contract claims, met and conferred on these issues in person, exchanged six  
5 letters in relation to discovery, and also filed one joint letter brief with the Court. Indulging  
6 OpenAI's belated attempt to dismiss Plaintiffs' breach of contract claim at this stage in the  
7 litigation would thus be manifestly unjust to Plaintiffs. *See Packaged Seafood Prods.*, 277 F. Supp.  
8 3d at 1174 (“[T]o refuse to enforce Rule 12(g)(2)'s clear command on such a foundational  
9 argument as the one Defendants here urge . . . would set a dangerous precedent regarding the  
10 ability to continually hamstring a plaintiff with wave after wave of motions to dismiss.”).

11 Notwithstanding that OpenAI has waived its right challenge Plaintiffs' breach of contract  
12 claim, its arguments fail on the merits, as well.

13 **2. Plaintiffs adequately allege breach of contract based on the operation**  
14 **of OpenAI's Codex product and its integration into GitHub and**  
15 **OpenAI's joint venture, the Copilot product**

16 OpenAI incorrectly contends that Plaintiffs' breach-of-contract claim should be dismissed  
17 as to OpenAI specifically, on the grounds that Plaintiffs' claim only concerns the operation of  
18 Copilot and not Codex, and OpenAI bases this assertion that Plaintiffs “acknowledge that  
19 OpenAI Codex and GitHub Copilot are different products by different parties.” OpenAI Br. at 7.  
20 OpenAI's characterization of Codex and Copilot as “different products” made by “different  
21 parties” ignores countless allegations in the SAC plausibly alleging a deeply integrated  
22 relationship between these products. It also ignores the allegation of a joint venture relationship  
23 between OpenAI and GitHub/Microsoft pursuant to which OpenAI has joint and several liability  
24 for the claims alleged in the Complaint. SAC ¶ 59; *see also id.* at ¶ 27 (alleging that OpenAI “co-  
25 created Copilot and offers it jointly with GitHub”); ¶ 45 (“Each acted as the principal, agent, or  
26 joint venture of, or for other Defendants with respect to the acts, violations, and common course  
27 of conduct herein alleged”). Both OpenAI's copying and use of Plaintiffs' licensed code through  
28 Codex, and Copilot's Codex-based reproduction of Plaintiffs' licensed code gives rise to breach-  
of-contract claims. *See* SAC ¶ 68 (stating that Codex “has not been trained to provide Attribution.

1 Nor does it include a Copyright Notice nor any License Terms attached to the Output. This is by  
2 design”); *id.* at 11 (describing breach of contract claims in “Contract-Related Conduct” section in  
3 terms of “[d]efendants violat[ing] the Licenses governing the use of the Licensed Materials by  
4 using them to train Copilot and for republishing those materials without appending the required  
5 Attribution, Copyright Notice, or License Terms.”)

6 Contrary to OpenAI’s claims, Plaintiffs allege that “Codex and Copilot are related”  
7 precisely because Codex “powers GitHub Copilot, which [OpenAI] built and launched in  
8 partnership with GitHub.” SAC ¶ 59. Specifically, “GitHub Copilot uses the OpenAI Codex to  
9 suggest code and entire functions in real-time.” *Id.* at ¶ 47 (quoting GitHub website). Plaintiffs  
10 have additionally alleged that both Codex and Copilot fail to identify “any Licensing Terms  
11 attached to the Output” as neither was “programmed to treat attribution, copyright notices, and  
12 license terms as legally essential.” *Id.* at ¶¶ 68, 92. Moreover, Plaintiffs allege that “Defendants  
13 have kept secret the details of Codex’s modifications and its integration into or interaction with  
14 Copilot,” *id.* at ¶ 59, which this Court acknowledged in its First MTD Order, *Doe 1*, 672 F. Supp.  
15 3d at 851 n.9 (Defendants are “the only parties with knowledge of how Copilot and Codex were  
16 designed and operate.”). Defendants’ lack of transparency underscores the need for discovery on  
17 this very point.

18 In addition to Plaintiffs’ allegations regarding Codex’s integration into Copilot, Plaintiffs  
19 specifically allege that GitHub and OpenAI “launched Copilot in June 2021” and that they “co-  
20 created Copilot” as a joint venture and jointly share in its profits. SAC ¶¶ 26–27, 45, 59, 225.  
21 Parties to a joint venture are jointly and severally liable for the actions of their partners. *See, e.g.,*  
22 *Myrick v. Mastagni*, 185 Cal. App. 4th 1082, 1091 (2010) (“The incidents of a joint venture are in  
23 all important respects the same as those of a partnership. One such incident of partnership is that  
24 all partners are jointly and severally liable for partnership obligations, irrespective of their  
25 individual partnership interests.” (quoting 9 Witkin, Summary of Cal. Law (10th ed. 2005)  
26 Partnership, § 9, p. 584.)). And “where there is a joint venture, all members of a joint venture are  
27 liable for contracts executed by another member in furtherance of the joint venture.” *Forest v.*  
28 *Equitable Life Assurance Soc’y of U.S.*, No. C99-5173 SI, 2001 WL 1338809, at \*4 (N.D. Cal. June

1 12, 2001) (collecting cases).

2 **3. OpenAI’s failure to abide by open-source licenses adequately supports**  
3 **a breach-of-contract claim**

4 Although this Court already upheld Plaintiffs’ breach-of-contract claim in its First MTD  
5 Order, OpenAI now argues that this claim should be dismissed because the attribution and notice  
6 requirements imposed by Plaintiffs’ Suggested Licenses are conditions of the copyright license  
7 rather than covenants. OpenAI Br. at 10. OpenAI claims that “failure to meet a condition does  
8 not give rise to a claim for breach of contract.” *Id.* at 18. Thus, if “Plaintiffs are right that there  
9 has been a failure to fulfill the attribution and notice terms,” OpenAI claims, the consequence of  
10 that failure is that no license was granted, and Plaintiffs may only seek redress through a copyright  
11 infringement action brought under the Copyright Act. *Id.* at 10, 26.

12 As discussed below, OpenAI is plainly wrong on the law. That the Suggested Licenses  
13 create an enforceable contract is not novel. The facts giving rise to this claim are  
14 straightforward—indeed, this Court has recognized that Plaintiffs have pleaded all elements of a  
15 breach of contract claim based on the Suggested Licenses. *Doe 1*, 672 F. Supp. 3d at 859–60. This  
16 Court is not alone in upholding breach of contract claims based on OSLs—several courts have  
17 upheld breach of contract claims involving OSLs, including some of the very Suggested Licenses  
18 at issue in this case. *See, e.g., Software Freedom Conservancy, Inc. v. Vizio, Inc.*, No. 8:21-cv-01943-  
19 JLS-KES, 2022 WL 1527518, at\*3 (C.D. Cal. May 13, 2022) (“*SFC*”); *Artifex Software, Inc. v.*  
20 *Hancom, Inc.*, No. 16-CV-06982-JSC, 2017 WL 1477373, at \*3 (N.D. Cal. Apr. 25, 2017). Instead,  
21 OpenAI’s positions would appear to upset any claim that these OSLs are valid or enforceable. As  
22 in accord with how these courts have concluded, that is wrong.

23 OpenAI’s position also ignores that Plaintiffs have alleged far more than breaches of  
24 attribution and notice requirements. *See, e.g., SAC ¶¶ 244, 247.* Thus, even if OpenAI is correct  
25 about its willful breach of attribution and notice terms in the OSLs at issue in this case (it is not),  
26 at most this would warrant a narrowing of Plaintiffs’ breach of contract claim—not dismissal of it.

1                   **a. Plaintiffs sufficiently plead breach of contract because the**  
2                   **attribution and notice requirements of OSLs are properly**  
3                   **considered covenants and not conditions**

4           OpenAI argues that attribution and notification duties are “conditions” of the grant of the  
5           copyright license, breach of which can only be remedied by a copyright infringement claim rather  
6           than pursuant to a breach of contract claim. OpenAI Br. at 10–19. Make no mistake—OpenAI’s  
7           ambition here is to utterly eviscerate open-source licensing in the large, including the OSLs that  
8           required it to provide attribution and notice of the source code it used to create Codex and  
9           Copilot, as well as provide such attribution and notice when those models reproduce identical  
10          copies of Plaintiffs’ source code. *Id.*

11          As a baseline, a “copyright owner who grants a nonexclusive, limited license ordinarily  
12          waives the right to sue licensees for copyright infringement, and [] may sue only for breach of  
13          contract.” *Ticketmaster L.L.C. v. Prestige Ent., Inc.*, 306 F. Supp. 3d 1164, 1172 (C.D. Cal. 2018)  
14          (quoting *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999)) (internal  
15          quotations omitted). “However, if the licensee acts outside the scope of the license, the licensor  
16          may sue for copyright infringement.” *Id.* (quoting *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629  
17          F.3d 928, 939 (9th Cir. 2010)). The Ninth Circuit has referred to contractual terms that limit a  
18          copyright license’s scope as “conditions,” the breach of which constitute copyright infringement,  
19          but it refers to all other license terms as “covenants,” the breach of which is actionable only under  
20          contract law. *MDY Indus.*, 629 F.3d at 939, *as amended on denial of reh’g* (Feb. 17, 2011), *opinion*  
21          *amended and superseded on denial of reh’g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011).  
22          The distinction between conditions and covenants is decided “according to state contract law”  
23          and “[w]herever possible, equity construes ambiguous contract provisions as covenants rather  
24          than conditions.” *Id.*

25          Under some interpretations of contract law, “conditions” relate to mutually agreed  
26          limitations on the scope of the licensor’s limited use of the copyrighted material. “A condition is  
27          created by the *mutual* assent of the parties and is binding on both, while a covenant is binding on  
28          the covenantor only.” *Ticketmaster*, 306 F. Supp. 3d at 1172–73 (emphasis added). Under  
California law, contractual provisions can also operate as both conditions and covenants, *see, e.g.*,



1 *Call v. Alcan Pac. Co.*, 251 Cal.App.2d 442, 447 (1967), and parties can either treat the contract as  
2 terminated or enforce the covenant, *see, e.g.*, 1 Witkin, Summary of Cal. Law, Contracts § 801  
3 (2023) (“The same fact or act can be both a condition and a promise”); 13 Williston on Contracts  
4 § 38:15 (collecting cases). Importantly, describing terms in a license as “conditions” does *not*  
5 control whether a term is treated as a condition or covenant under contract law. Instead, whether  
6 a term may serve as a condition, limiting the scope of a license, depends on “the whole contract,  
7 its purpose, and the intention of the parties” regardless of whether it is referred to as a  
8 “condition.” *Ticketmaster*, 306 F. Supp. 3d at 1173 (*quoting JMR Constr. Corp. v. Env’l Assessment*  
9 *& Remediation Mgmt., Inc.*, 243 Cal. App. 4th 571, 596 (2015)); *see also Pac. Allied v. Century Steel*  
10 *Prods.*, 162 Cal. App. 2d 70, 79–80 (1958) (conditions are disfavored by the law). Generally,  
11 “[c]onditions precedent are disfavored and will not be read into a contract unless required by  
12 plain, unambiguous language.” *Netbula, LLC v. Storage Tech. Corp.*, No. C06-07391 MJJ, 2008  
13 WL 228036, at \*3 (N.D. Cal. Jan. 18, 2008) (*quoting Effects Associates, Inc. v. Cohen*, 908 F.2d 555,  
14 559 n.7 (9th Cir. 1990)).

15 OpenAI’s brief includes a multipage table that quotes extensively from some of the OSLs  
16 at issue in the SAC. OpenAI Br. at 11–17. The length of OpenAI’s table is meant to distract from  
17 its cramped and conclusory legal argument: that the mere use of the magic language “provided  
18 that” and “condition” in every case necessarily creates terms that are legally conditions, not  
19 covenants. OpenAI Br. at 11, 16. Not so.

20 In the first instance, OpenAI’s blanket assertions about the meaning of the world’s most  
21 popular OSLs—all of which are at issue in this case—would imperil the entire ecosystem of  
22 open-source licensing. OpenAI’s position that every OSL merely imposes conditions, not  
23 covenants, would mean that software coders have no redress for violation of their OSLs *unless*  
24 they have registered their code with the Copyright Office and bring a copyright-infringement  
25 action in federal court. Indeed, Plaintiffs suspect that GitHub and Microsoft have not sought to  
26 join OpenAI’s argument on this issue because it would cause a four-alarm public-relations  
27 firestorm among the millions of open-source programmers who have relied on GitHub’s  
28 representations that OSLs are meaningful, not illusory. SAC at 10, n.4 (enumerating the 11

1 “Suggested Licenses” that are at issue in the SAC and form part of the definition of the proposed  
2 class).

3 OpenAI is likely correct that as part of this litigation, the meaning of the Suggested  
4 Licenses in the context of other admissible evidence under California contract law will need to be  
5 determined. But not on the simplistic and incomplete basis OpenAI proposes. Rather, the project  
6 will require this Court to consider the text of the licenses separately, and interpret “the whole  
7 contract, its purpose, and the intention of the parties.” *Ticketmaster*, 306 F. Supp. 3d at 1173.  
8 Common evidence will likely be relevant, but ultimately, the “intention of the parties” is an issue  
9 of fact that cannot be resolved as part of a motion to dismiss, especially because all inferences  
10 must still be drawn in Plaintiffs’ favor. *Laborers Health Welf. Tr. Fund v. Kaufman & Broad of N.*  
11 *Cal., Inc.*, 707 F.2d 412, 418 (9th Cir. 1983) (contractual “intent . . . is a question for the trier of  
12 fact); *McShannock*, 976 F.3d at 886–87. Plaintiffs specifically allege facts showing Plaintiffs intent  
13 that the Suggested Licenses create enforceable contracts to relevant license terms. OpenAI  
14 improperly seeks to foreclose this whole process, encouraging this Court to adopt a permanent  
15 interpretation of these OSLs based on selective quotations in its Rule 12 motion. OpenAI Br.  
16 at 11–17. As a procedural and substantive matter, this invitation should be declined.

17 **a. *Jacobsen v. Katzer* is not determinative**

18 The main case OpenAI cites in support of its position is *Jacobsen v. Katzer*, 535 F.3d 1373  
19 (Fed. Cir. 2008).<sup>2</sup> In *Jacobsen*, the plaintiff, who had registered his code with the Copyright  
20 Office, offered software under an open-source license called the Artistic License. *Id.* at 1375–76.  
21 The central issue on appeal was not whether plaintiff there had adequately pled a *breach of contract*  
22 *claim*, but whether the district court erred in dismissing plaintiff’s *copyright infringement* claim. *Id.*  
23 at 1377. In the words of the *Jacobsen* court, “[t]he heart of the argument on appeal concerns  
24 whether the terms of the Artistic License are conditions of, or merely covenants to, the copyright  
25 license,” because “if the terms of the Artistic License allegedly violated are both covenants and  
26 conditions, they may serve to limit the scope of the license and are governed by contract law.” *Id.*

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27  
28 <sup>2</sup> Plaintiffs note that decisions of the Federal Circuit are not binding.

1 at 1380. If the terms were “merely covenants, by contrast, they are governed by contract law.” *Id.*

2 Specifically, the court analyzed whether the attribution and notice requirements in the  
3 Artistic License defendants had allegedly violated were “conditions of, or merely covenants to,  
4 the copyright license.” *Id.* at 1381. The appeals court held that the requirements were “conditions  
5 to the scope” of the license. *Id.* at 1382. But critical to the *Jacobsen* court’s holding were  
6 contractual features specific to the Artistic License—namely, that the attribution and notice  
7 requirements had to be harmonized with the “Preamble” of the Artistic License, which expressly  
8 recognized that “[t]he intent of th[e] document [wa]s to state the conditions *under which* a  
9 Package may be copied.” *Jacobsen*, 535 F.3d at 1381 (emphasis added). So yes, the *Jacobsen* court  
10 did find that the attribution and notice requirements of the Artistic License were conditions—but  
11 only after engaging in the necessary holistic contractual analysis in the context of determining  
12 whether a copyright registrant had the right to bring a copyright infringement claim. *See*  
13 *Ticketmaster*, 306 F. Supp. 3d at 1173 (determination of condition vs. covenant requires  
14 consideration of “the whole contract, its purpose, and the intention of the parties”).

15 Even as it cites *Jacobsen* with abandon in its brief, OpenAI makes some careful omissions  
16 which defeat its argument. Most conspicuously, OpenAI does not mention that *Jacobsen* dealt  
17 with whether an infringement claim could be brought, not whether a breach of contract claim  
18 could be brought under the Artistic License’s terms. Indeed, OpenAI does not cite (nor have  
19 Plaintiffs been able to identify) a single case dismissing a claim where a plaintiff was suing under  
20 an open-source license on the grounds that no contract was formed because the terms of the  
21 relevant license were conditions rather than covenants. Indeed, *none* of the cases OpenAI cites in  
22 support concern breach-of-contract claims but rather copyright-infringement claims.

23 There is good reason why no cases have dismissed contract claims based on OpenAI’s  
24 novel argument—it is black letter contract law that assent is manifested once intent to perform  
25 can be inferred. *See* Restatement (Second) of Contracts § 2 (1981) (“A promisor manifests an  
26 intention if he believes or has reason to believe that the promise will infer that intention from his  
27 words or his conduct”). *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) is instructive. In  
28 *ProCD*, the court was confronted with a novel issue at the time—whether a license, which was

1 encoded on a compact disc, printed in a manual, and that appeared every time a software runs is  
 2 binding on the user when the box containing the consumer product merely stated that there were  
 3 restrictions contained in an enclosed license. *Id.* at 1450. Defendant bought the consumer package  
 4 of the software but decided to ignore the license. *Id.* The court, applying Wisconsin law,  
 5 concluded the license was binding and gave the example of a purchaser of an airline ticket:

6 Or consider the purchase of an airline ticket. The traveler calls the carrier  
 7 or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in  
 8 that order. The ticket contains elaborate terms, which the traveler can  
 reject by canceling the reservation. To use the ticket is to accept the  
 terms, even terms that in retrospect are disadvantageous.

9 *Id.* at 1451.

10 Those principles are no less applicable here. If OpenAI did not wish to be bound by the  
 11 terms of the Suggested Licenses that adhered to using Plaintiffs' code, it simply could choose not  
 12 to use them. Indeed, there is code that is published without any license at all. *See, e.g.*, ¶ 185.  
 13 Rather, OpenAI chose to use Plaintiffs' code, thereby accepting the terms of the Suggested  
 14 Licenses. OpenAI ignored the licenses instead. That is a breach of contract. Any other answer  
 15 would undermine the entire software industry by rendering open-source programmers potentially  
 16 liable for failures to perform while allowing users unfettered use of software without limitation.  
 17 *See ProCD*, 86 F.3d at 1451-52 (explaining that not recognizing software licenses would render  
 18 those transactions “unfettered by terms—so the seller has made a broad warranty and must pay  
 19 consequential damages for any shortfalls in performance, two ‘promises’ that if taken seriously  
 20 would drive prices through the ceiling or return transactions to the horse-and-buggy age.”).  
 21 Whether a copyright infringement claim is available is immaterial. *Cf. SFC*, 2022 WL 1527518, at  
 22 \*4 (“Potentially, there is an argument that Vizio’s distribution of the software violates various the  
 23 conditions of the software’s copyright; however, SFC has not chosen to bring such claim. *And,*  
 24 *indeed, because SFC is not the copyright holder, it cannot even assert one.*”) (emphasis added).<sup>3</sup>

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25  
 26 <sup>3</sup> Plaintiffs observe that unlike here, *Jacobsen* involved code that had been registered with the  
 27 Copyright Office; hence, *Jacobsen* could seek relief under the Copyright Act through an  
 28 infringement action. While Plaintiffs in this case maintain a copyright interest in their code, *see,*  
*e.g.*, SAC ¶¶ 19-23, none have registered their code with the Copyright Office—indeed, to do so  
 would defeat the purpose of open source and most software code is not registered. OpenAI, itself,

1 Remarkably, OpenAI omits to mention that the Artistic License is **not** one of the OSLs at  
 2 issue in this case. *See generally* OpenAI Br. at nowhere. The Artistic License is not one of the 11  
 3 “Suggested Licenses” that form the basis of Plaintiffs’ claims. SAC at 10, n.4. So *Jacobsen*, even  
 4 on its own terms, is merely advisory for this case.

5 Beyond that, none of the OSLs in this case—the aforementioned Suggested Licenses—  
 6 contain same clear intent as the Artistic License at issue in *Jacobsen* to create conditions and not  
 7 covenants. Although many of the OSLs at issue here include “provided that” language in sections  
 8 regarding reproduction and redistribution, these provisions do not operate pursuant to a clear,  
 9 overarching expressions of intent that the license will be granted only upon their satisfaction.<sup>4</sup> *See*  
 10 OpenAI Br. at 10–17. In fact, other language is clearly to the contrary.

11 Although OpenAI has scoured the OSLs for conditional language—e.g., “provided that”  
 12 and “conditions”—the mere fact that conditional language is used in a license does not  
 13 necessarily indicate that a condition is intended. *Ticketmaster*, 306 F. Supp. 3d at 1173. To treat  
 14 these terms as merely conditions with respect to the Suggested Licenses would undermine the  
 15 most basic tenet of contract law, i.e., that terms in a contract are to be read holistically and in  
 16 keeping with the parties’ intent. *Ticketmaster*, 306 F. Supp. 3d at 1173 (citation omitted). This is  
 17 especially true in this case, where the Suggested Licenses were drafted by different hands, in  
 18 different jurisdictions, at different times.

19 Further, because none of the OSLs in this case unambiguously suggest that the licensors  
 20 intended the attribution and notice requirements to operate as conditions precedent to the grant  
 21

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22 has never registered a copyright. Instead, it typically publishes its open-source code through  
 23 OSLs, including two used by Plaintiffs in this case (Apache and MIT). OpenAI’s position here  
 24 would mean that software coders, and companies like OpenAI who routinely use OSLs, are out of  
 25 luck to enforce the terms of their OSLs *unless* they have registered their code. If not, they cannot  
 26 bring a breach of contract claim (because, as OpenAI argues, no license was granted), and they  
 27 cannot bring a copyright infringement claim (because, as OpenAI contends, such claims require  
 28 registration). To interpret the OSLs in this case as such—and OSLs more generally—would  
 imperil the entire ecosystem of open-source licensing, including OpenAI’s.

<sup>4</sup> For instance, the Eclipse Public License 2.0 expressly opens with stating: “ANY USE,  
 REPRODUCTION, OR DISTRIBUTION OF THE PROGRAM CONSTITUTES  
 RECIPIENT’S ACCEPTANCE OF THIS AGREEMENT.” ECF No. 1-1, Appendix A at 11.

1 of the license, this Court should decline OpenAI’s invitation to treat the terms merely as  
 2 conditions that strip the rights of software coders to enforce their licenses. *Netbula*, 2008 WL  
 3 228036, at \*3.

4 **b. Plaintiffs’ allegations of OSL violations include “copyleft”**  
 5 **requirements that OpenAI completely fails to address**

6 Moreover, *Jacobsen* pertained only to violations of attribution and notice requirements.  
 7 *Jacobsen*, 609 F. Supp. 2d at 933. Here, however, Plaintiffs do not simply allege that OpenAI  
 8 violated attribution and notice requirements. They also allege that OpenAI “fail[ed] to provide  
 9 the source code of Copilot nor a written offer to provide the source code upon the request of each  
 10 licensee,” SAC ¶ 254, and failed to provide a copy of the corresponding OSLs with any “copy,  
 11 redistribution, or derivative of the software code,” *id.* at ¶ 184. In other words, Plaintiffs allege  
 12 violations pertaining to other features of the OSLs that courts since *Jacobsen* have recognized  
 13 properly fall under contract law. *Artifex Software*, 2017 WL 1477373, at \*3 (quoting *Versata*  
 14 *Software, Inc. v. Ameriprise Fin., Inc.*, No. A-14-CA-12-SS, 2014 WL 950065, at \*5 (W.D. Tex.  
 15 Mar. 11, 2014)).

16 In open-source licensing parlance, license provisions that require users to publish their  
 17 modifications of licensed source code are called “copyleft” requirements. Copyleft requirements  
 18 are not a feature of every open-source license, but they are part of six of the 11 Suggested  
 19 Licenses at issue in this case.<sup>5</sup> These OSLs are also among the most ubiquitous OSLs and are  
 20 commonly attached to code published in GitHub’s public repositories. For instance, the four  
 21 GNU copyleft licenses open with a Preamble that celebrates “free software” and the right to  
 22 “receive source code or . . . get it if you want it,” including the right to “change the software or  
 23 use pieces of it in new free programs; *and that you know you can do these things.*” *See id.* at 16, 29,  
 24 35, 49 (emphasis added).

25 Every court that has considered breach of copyleft provisions in an OSL has held that

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26 <sup>5</sup> The Suggested Licenses are the Eclipse Public License 2, the GNU Affero General Public  
 27 License version 3, the GNU General Public License version 2, the GNU General Public License  
 28 version 3, the GNU Lesser General Public License version 2.1, and the Mozilla Public License  
 2.0. *See* ECF No. 1-1, Appendix A.

1 such claims are the subject of contract law. *Artifex Software*, 2017 WL 1477373, at \*3; *Versata*  
2 *Software*, 2014 WL 950065, at \*5; *SFC*, 2022 WL 1527518, \* 3. In *Versata Software*, for example,  
3 the district court considered whether a counterclaim for breach of the GPL’s Source Code  
4 Provision was preempted by copyright law. The *Versata* court rejected the argument that this  
5 provision “amount[ed] to nothing more than a promise to not commit copyright infringement”—  
6 in other words, a right that was not recognized as one of the exclusive rights protected by  
7 copyright. *Versata Software*, 2014 WL 950065, at \*5. As the court explained, the plaintiff breached  
8 an additional obligation: “an affirmative promise to make its derivative work open source because  
9 it incorporated an open source program into its software,” which was “an additional contractual  
10 promise separate and distinct from any rights provided by the copyright laws.” *Id.*

11 Similarly, in *Artifex Software*, the district court held that the Copyright Act did not  
12 preempt a contract claim alleging a breach of the GPL’s requirement to share source code,  
13 recognizing the GPU GPL’s open-source requirement to be an “extra element” or additional  
14 contractual promise. *Artifex Software*, 2017 WL 1477373, at \*3. And more recently in *SFC*, 2022  
15 WL 1527518, the district court squarely recognized that there was “no right to receive certain  
16 works—or source code in particular—under the Copyright Act” and that such a right would in  
17 fact appear to be “*the very opposite*” of those exclusive rights recognized under the Act. *Id.* at \*3.  
18 Thus, the court upheld a breach of contract claim in relation to the very same breach allegations  
19 Plaintiffs make here.

20 So, too, should the Court here. Plaintiffs have plausibly alleged that Copilot outputs  
21 source code licensed under OSLs that include copyleft provisions, and that the failure of Copilot  
22 to provide the source code or the corresponding license directly contravenes this scheme. SAC  
23 ¶¶ 13-20. Neither of these rights are protected by the Copyright Act. Therefore, even if the Court  
24 determined that the attribution and notice requirements in this case are conditions rather than  
25 covenants that limit the scope of the OSLs, Plaintiffs have still plausibly alleged breaches of  
26 copyleft provisions, which courts have routinely found to be covenants under contract law.

#### 27 **IV. CONCLUSION**

28 For the foregoing reasons, OpenAI’s motion to dismiss the SAC should be denied.

1 Dated: March 27, 2024

By:           /s/ Joseph R. Saveri            
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