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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

19 SARAH ANDERSEN, ET AL.,
 20 Plaintiffs,
 21 v.
 22 STABILITY AI LTD., ET AL.,
 23 Defendants.

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

**DEFENDANTS STABILITY AI LTD.
 AND STABILITY AI, INC.'S REPLY IN
 SUPPORT OF MOTION TO DISMISS
 PLAINTIFFS' FIRST AMENDED
 COMPLAINT**

Date: May 8, 2024
 Time: 2:00 p.m.
 Courtroom: Videoconference
 Judge: Hon. William H. Orrick

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23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 7
- II. ARGUMENT 7
 - A. Plaintiffs do not plausibly allege that Stability AI induced infringement..... 7
 - 1. Plaintiffs do not allege acts of infringement by a third party..... 7
 - 2. Plaintiffs do not allege Stability AI’s promotion of its models to commit copyright infringement. 9
 - 3. The fact that Stability AI’s models are capable of noninfringing uses is not an affirmative defense. 11
 - B. Plaintiffs fail to state a claim under the DMCA..... 13
 - 1. Plaintiffs have not plausibly alleged a claim under Section 1202(b)(1). ... 13
 - 2. Plaintiffs have not plausibly alleged a claim under Section 1202(b)(3). ... 18
 - 3. Plaintiffs’ 1202(a) claim fails because (1) the MIT license is not “conveyed in connection with” Plaintiffs’ works, and (2) Plaintiffs remain silent as to the requisite scienter. 18
 - C. Plaintiffs’ unjust enrichment claim must be dismissed..... 19
 - 1. Right of publicity elements do not save Plaintiffs’ claim. 19
 - 2. Plaintiffs do not allege that existing legal remedies are inadequate. 20
 - D. Additional named plaintiffs and claims exceed the scope of the Court’s Order.... 21
- III. CONCLUSION..... 21

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

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443 F.3d 676 (9th Cir. 2006)..... 10

ADR Int’l Ltd. v. Inst. for Supply Mgmt., Inc.,
667 F. Supp. 3d 411 (S.D. Tex. 2023) 15

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No. C 93-3933 FMS, 1994 WL 794759 (N.D. Cal. Apr. 4, 1994) 21

Caribbean Queen, Inc. v. Lee,
No. CV-20-09637 AB, 2021 WL 3215110 (C.D. Cal. Mar. 24, 2021) 12

Clark v. Eddie Bauer LLC,
No. 21-35334, 2024 WL 177755 (9th Cir. Jan. 17, 2024) 21

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No. 20-cv-3129 -MEMF (GJSx), 2022 WL 17094713 (C.D. Cal. Nov. 18,
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710 F.3d 1020 (9th Cir. 2013)..... 8, 10, 14

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No. 1:16-CV-1275, 2019 WL 4805888 (C.D. Ill. Aug. 19, 2019)..... 14

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No. 4:18-CV-902-A, 2019 WL 5842756 (N.D. Tex. Nov. 7, 2019) 17

Doe 1 v. GitHub, Inc.,
No. 22-cv-06823-JST, 2024 WL 235217 (N.D. Cal. Jan. 22, 2024) 14, 18

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76 F. Supp. 3d 999 (N.D. Cal. 2014) 18

Friedman v. Live Nation Merch., Inc.,
833 F.3d 1180 (9th Cir. 2016)..... 14

Fujitsu Ltd. v. Netgear Inc.,
620 F.3d 1321 (Fed. Cir. 2010)..... 12

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49 F.4th 1308 (9th Cir. 2022) 20

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 2 No. C 07-3983JSW, 2007 WL 4532214 (N.D. Cal. Dec. 19, 2007)..... 19

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 8 747 F. App’x 6 (2d Cir. 2018) 19

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 10 636 F. Supp. 3d 1052 (N.D. Cal. 2022) 16

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 14 853 F.3d 1004 (9th Cir. 2017)..... 20

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 16 158 F.3d 693 (2d Cir. 1998)..... 8

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Perez v. Bath & Body Works, LLC,
 No. 21-CV-05606-BLF, 2022 WL 2756670 (N.D. Cal. July 14, 2022) 20

Polaris Indus. Inc. v. Albright,
 143 S. Ct. 2612 (2023) 20

SellPoolSuppliesOnline.com, LLC v. Ugly Pools Ariz., Inc.,
 804 F. App’x 668 (9th Cir. 2020) 18, 19

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 23 <https://arxiv.org/pdf/2301.13188.pdf> 9

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1 **I. INTRODUCTION**

2 Plaintiffs' opposition confirms that the Court should dismiss Plaintiffs' claims with
3 prejudice. Plaintiffs do not dispute that they have not plausibly alleged that any third party (other
4 than perhaps Plaintiffs' own attorneys) caused a Stable Diffusion model to output any image
5 allegedly similar to any of Plaintiffs' images. That failure is fatal to each of their claims.

6 As to the inducement claims, Plaintiffs do not dispute that to allege inducement of
7 copyright infringement, they must allege actual infringement by a third party. Nor do they
8 dispute that they must allege Stability AI's promotion of its models to commit copyright
9 infringement. Because Plaintiffs allege neither, their inducement claim should be dismissed.

10 Plaintiffs' remaining claims are equally defective. Plaintiffs' DMCA claims fail because
11 they have not plausibly alleged the required elements. For their Section 1202(b)(1) claims,
12 Plaintiffs have not plausibly alleged Stability AI's intentional removal of CMI from Plaintiffs'
13 works. And Plaintiffs' inability to supply any model-generated copies of their works that lack
14 CMI further dooms their claims. Regarding Section 1202(a), Plaintiffs do not dispute that they
15 must establish that Stability AI's copyright notice was conveyed in connection with Plaintiffs'
16 works, but they have not done so. Plaintiffs' claims under Section 1202(b)(3), first introduced in
17 their opposition brief, are deficient for the same reason as their Section 1202(b)(1) claim:
18 Plaintiffs have not alleged that the models output works that are identical to Plaintiffs'. Finally,
19 Plaintiffs' unjust enrichment claim is preempted by copyright law.

20 **II. ARGUMENT**

21 **A. Plaintiffs do not plausibly allege that Stability AI induced infringement.**

22 **1. Plaintiffs do not allege acts of infringement by a third party.**

23 Plaintiffs do not dispute that their inducement claim requires them to allege infringement
24 of their copyrighted images by a third party. ECF No. 174 ("Opp'n") at 3–4; ECF No. 162
25 ("Mot.") at 4, 7. Infringement by a third party is one of the key distinctions between a direct
26 infringement claim and an inducement claim. *See id.* at 7 (citing *Columbia Pictures Indus., Inc.*
27 *v. Fung*, 710 F.3d 1020, 1030 (9th Cir. 2013) ("To prove copyright infringement on an
28 inducement theory, [plaintiff] also had to adduce 'evidence of actual infringement by' users of

1 [defendant’s] services.”)). As Stability AI pointed out in its opening brief, Plaintiffs’ inducement
2 claim fails to allege infringement by a third party. Mot. at 7. It is therefore just a repetition of
3 arguments that the Court has already rejected as to direct liability. Mot. at 4–5. Plaintiffs offer
4 three reasons why their inducement claim supposedly differs from their direct infringement claim.
5 Opp’n at 5–6. None is a substitute for an allegation of third-party infringement.

6 First, Plaintiffs argue that their inducement claim is factually distinct from their direct
7 infringement claim because it relates to distribution of Stability AI’s app, Reimagine XL. The
8 app, Plaintiffs allege, “allows users to elicit substantially similar copies of training images.”
9 Opp’n at 5. This argument is puzzling since Reimagine XL is mentioned in Plaintiffs’ direct
10 infringement claim (Count 1), but *not* in their inducement claim (Count 2). *See* ECF No. 129
11 (“FAC”) ¶¶ 219–237. More importantly, Plaintiffs do not allege any third-party acts of
12 infringement via the Reimagine XL app. Plaintiffs cite their *own* use of Reimagine XL as an act
13 of infringement (*see* Opp’n at 4), but an author cannot infringe its own works. *See Matthew*
14 *Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998) (rejecting a self-infringement
15 tactic where the plaintiff “failed to identify any primary infringer, other than [its own] counsel.”).
16 Plaintiffs cannot plausibly contend that Stability AI induced Plaintiffs’ attorneys—a defect they
17 ignore in their opposition brief. Mot. at 7.

18 Second, Plaintiffs argue that their inducement claim is factually and legally distinct
19 because they are allowed to plead theories in the alternative. Opp’n at 5–6. But this is not simply
20 a matter of alternative pleading. To plead an inducement claim, Plaintiffs must plausibly allege
21 each element of inducement, including infringement by a third party. *Fung*, 710 F.3d at 1032,
22 1034. Plaintiffs have not done so.

23 Third, Plaintiffs argue that their inducement claim is factually and legally distinct because
24 “the fulcrum of an inducement claim is Stability AI’s liability for infringement *by others*.” Opp’n
25 at 6. But a fulcrum is merely a pivot point around which a lever turns. Plaintiffs lack the lever:
26 infringement by others. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913,
27 940 (2005) (“[T]he inducement theory of course requires evidence of actual infringement by
28 recipients of the device, the software in this case.”). Without an allegation of third-party

1 infringement, Plaintiffs’ inducement claim merely duplicates their direct infringement claim,
2 requiring dismissal.

3 **2. Plaintiffs do not allege Stability AI’s promotion of its models to**
4 **commit copyright infringement.**

5 The inducement claim fails for an independent reason. Plaintiffs do not dispute that to
6 allege inducement of copyright infringement, they must allege that Stability AI acted with an
7 object of promoting its models’ use to infringe copyright. Opp’n at 3; Mot. at 4. In response to
8 Stability AI’s argument that a single statement by its CEO is insufficient to establish promotion,
9 Plaintiffs attempt to bolster the statement with quotes from a researcher named Nicholas Carlini.
10 Opp’n at 4. But Plaintiffs’ reliance on Carlini fails for three reasons.

11 First, Plaintiffs do not allege that Carlini has any affiliation with Stability AI. Plaintiffs
12 identify Carlini as a “prominent machine-learning researcher” who “has studied the behavior of
13 diffusion models.” FAC ¶ 90. But Carlini’s academic findings do not provide the facts Plaintiffs
14 must allege: that *Stability AI itself* promoted its models’ use to commit copyright infringement.

15 Second, Plaintiffs’ partial quotation on page 4, allegedly attributed to Carlini, is materially
16 misleading. Plaintiffs imply that Carlini found that “Stable Diffusion ‘can be induced to generate
17 essentially identical copies of certain training images.’” Opp’n at 4 (citing FAC 136, which
18 attributes the quoted text to “Carlini Paper at 4”). But the actual quote, included as footnote 2 of
19 Carlini’s academic publication,¹ states, “This paper covers a very restricted definition of
20 ‘memorization’: *whether* diffusion models can be induced to generate near-copies of some
21 training examples.” (Emphasis added.) Footnote 2 is not a statement about the capability of
22 diffusion models; it is a characterization of certain experimental parameters. Nor does the
23 statement speak to inducement by Stability AI. Carlini uses the term “can be induced” to refer to
24 the *models’* response to the *researchers’* instructions; he was not referring to any action by
25 Stability AI or to the legal meaning of inducement. The quote has no bearing on Stability AI’s
26 alleged inducement of third-party infringement.

27 _____
28 ¹ Nicholas Carlini, *Extracting Training Data from Diffusion Models* (Jan. 30, 2023),
<https://arxiv.org/pdf/2301.13188.pdf>.

1 Third, a statement by an unrelated party that diffusion models are capable of generating
2 “near-copies” (in addition to a vastly larger number of noninfringing outputs) is irrelevant.
3 Plaintiffs must allege Stability AI’s *own* “clear expression or other affirmative steps to foster
4 infringement.” *Fung*, 710 F.3d at 1034 (citation omitted). They do not.

5 In addition to the Carlini study, Plaintiffs suggest that Stability AI and its CEO promoted
6 infringement with a series of statements characterizing diffusion models as a form of lossy data
7 compression. Opp’n at 4. Yet Plaintiffs fail to explain how generic statements about
8 compression amount to promotion of copyright infringement. Perhaps Plaintiffs are referring to
9 their already-rejected theory that Stable Diffusion contains compressed copies of training images.
10 But in response to Plaintiffs’ original arguments on that subject, the Court stated that if Plaintiffs
11 contend Stable Diffusion contains “compressed copies” of the Training Images, Plaintiffs need to
12 define “compressed copies” and provide plausible facts in support. ECF No. 117 (“Order”) at 9.
13 As Plaintiffs’ FAC provides neither the required definition nor explanation, the list of statements
14 regarding the models’ ability to compress data is irrelevant to Plaintiffs’ inducement claim.

15 Plaintiffs’ final attempt at alleging promotion of infringement reflects a misunderstanding
16 of copyright principles. Plaintiffs cite a statement on the Clipdrop website that the Clipdrop
17 Reimagine XL app “produces similar-looking images with different details and compositions.”
18 Opp’n at 4; FAC ¶ 180. By suggesting that “similar-looking images with different details and
19 compositions” are equivalent to “substantially similar copies” amounting to copyright
20 infringement, Plaintiffs conflate the protection of an expression with the protection of an idea.
21 *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (copyright protection “is given only to the expression of
22 the idea—not the idea itself.”) The remainder of the document Plaintiffs quote in the FAC
23 underscores this error.²

24
25 ² In assessing a motion to dismiss, the court may consider in their entirety documents that the
26 complaint references or that are integral to its claims. *See Parrino v. FHP, Inc.*, 146 F.3d 699,
27 706 (9th Cir. 1998) (footnote omitted) (“[A] district court ruling on a motion to dismiss may
28 consider a document the authenticity of which is not contested, and upon which the plaintiff’s
complaint necessarily relies.”), *superseded by statute on other grounds as stated in Abrego v.
Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
1405 n.4 (9th Cir. 1996) (“[C]onsideration [of entire document] is appropriate in the context of a
motion to dismiss, and does not convert the motion into one for summary judgment.”).

1 The quote comes from a document³ that provides three example images produced by the
2 app when prompted with an “Original” image. The images are reproduced below.



9 From left to right: “Original”; “Reimagine 1”; “Reimagine 2”; “Reimagine 3”

10 To say that the second, third, and fourth images, which are indeed “similar-looking images with
11 different details and compositions,” are so similar to the “Original” as to constitute infringing
12 copies is to grant protection to the idea of a bedroom with plants. But copyright protects
13 expression, not ideas. “In no case does copyright protection for an original work of authorship
14 extend to any idea, procedure, process, system, method of operation, concept, principle, or
15 discovery.” 17 U.S.C. § 102(b). Stability AI’s description of its models as producing “similar-
16 looking images with different details and compositions” falls far short of a promotion of
17 infringement. Likewise, representations that Stability AI’s models can produce images in the
18 style of a particular artist (*see* FAC ¶¶ 226-229) do not constitute promotion of infringement,
19 because “style” is not copyrightable. Mot. at 6 n.3. Without some allegation of promotion—by
20 Stability AI—of its models *to infringe copyright*, Plaintiffs’ inducement claim cannot stand.

21 **3. The fact that Stability AI’s models are capable of noninfringing uses is
22 not an affirmative defense.**

23 Plaintiffs do not dispute that Plaintiffs themselves demonstrated the models’ non-
24 infringing uses by generating images in Exhibit D (ECF No. 129-4) of the FAC that have no
25 relation to Plaintiffs’ works. Mot. at 6. Instead, Plaintiffs argue—without supporting authority—
26 that whether the models are “capable of noninfringing uses” is an affirmative defense and a
27 question that must be reserved for trial. *See* Opp’n at 6. Plaintiffs are incorrect.

28 ³ Clipdrop, *Reimagine XL*, <https://clipdrop.co/stable-diffusion-reimagine> (last visited April 12, 2024).

1 In Stability AI’s opening brief, it cited *Sony Corp. of America v. Universal City Studios,*
2 *Inc.*, 464 U.S. 417, 442 (1984), for the premise that noninfringing uses undermine a claim for
3 secondary liability. Mot. at 6. In *Sony*, the Supreme Court looked to patent law for guidance
4 regarding contributory copyright infringement. *Sony*, 464 U.S. at 434–42. The Court noted that
5 “under the patent laws the Court has always recognized the critical importance of not allowing the
6 patentee to extend his monopoly beyond the limits of his specific grant.” *Id.* at 441. The Court
7 further observed that patent cases deny the patentee any right to control the distribution of
8 unpatented articles unless they are “unsuited for any commercial noninfringing use.” *Id.* (quoting
9 *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 198 (1980)). Nowhere did the Court
10 characterize the issue of whether a product has noninfringing uses as an affirmative defense.
11 Plaintiffs nevertheless assert, without citation, that the issue is an affirmative defense. Opp’n at 6.
12 To the contrary, the *Sony* Court drew the substantial noninfringing use test from patent law, and
13 in patent law, a plaintiff must affirmatively plead that the component has no substantial
14 noninfringing uses. *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326 (Fed. Cir. 2010).

15 In any event, courts in the Ninth Circuit consider whether a product or service has
16 noninfringing uses at the motion to dismiss stage. For example, the Ninth Circuit in *Luvdarts*
17 *LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013), considered non-infringing
18 uses in its affirmation of the district court’s 12(b)(6) dismissal of a contributory copyright
19 infringement claim. *See also Caribbean Queen, Inc. v. Lee*, No. CV-20-09637 AB (JCx), 2021
20 WL 3215110, at *5 (C.D. Cal. Mar. 24, 2021) (dismissing claim where there was “no basis for
21 concluding that [Plaintiff] actively induced this alleged infringement to occur” nor “any
22 allegation that the product lacks substantial non-infringing uses.”).

23 Here, Plaintiffs argue that Stability AI’s assertion of noninfringing uses is “conclusory,
24 unsupported, and requires the Court to draw an impermissible inference in Stability AI’s favor.”
25 Opp’n at 6. But no inference is needed; all that is needed is Plaintiffs’ Exhibit D. The exhibit
26 shows a series of images generated by Plaintiffs using text prompts in Stable Diffusion. In
27 response to the word “chef,” the model generates an image of a chef. Plaintiffs do not allege that
28 the image infringes Plaintiffs’ rights. FAC ¶¶ 160–161. Nor do they allege that the image of a

1 teacher generated in response to the text prompt “teacher” infringes Plaintiffs’ rights. *Id.* ¶ 162.
2 Plaintiffs’ own pleading, thus, demonstrates the models’ noninfringing uses. Mot. at 6.

3 Ignoring this Court’s observation that “it is simply not plausible that every Training Image
4 used to train Stable Diffusion was copyrighted” or that “*all* Output images are derivative images”
5 (Order at 12), Plaintiffs stubbornly contend that Stability AI’s models are “good for nothing else
6 but infringement.” Opp’n at 6. Particularly in view of Plaintiffs’ own Exhibit D, the inaccuracy
7 of Plaintiffs’ blanket statement is self-evident.

8 **B. Plaintiffs fail to state a claim under the DMCA.**

9 **1. Plaintiffs have not plausibly alleged a claim under Section 1202(b)(1).**

10 Plaintiffs’ opposition brief confirms that they believe that Stability AI “removes” CMI
11 from their copyrighted works only at the output stage. Opp’n at 9. That is, they allege that
12 Stability AI copies their images with CMI intact and trains its models on the images with the CMI
13 intact, but when Stability AI’s model outputs their images, there is no such CMI. *Id.*; FAC ¶ 247.
14 But those allegations, even if true, do not state a claim for improper removal of CMI under
15 Section 1202(b)(1) for at least three independent reasons: Plaintiffs have failed to allege (1) the
16 removal of CMI from an identical copy of any of their copyrighted works; (2) that any removal
17 was intentional; and (3) that Stability AI had reasonable grounds to know that any removal would
18 enable or conceal copyright infringement.

19 **a. Plaintiffs have not alleged the removal of CMI from any of**
20 **their copyrighted works.**

21 As Stability AI explained in its opening brief, Plaintiffs have not plausibly alleged that
22 Stability AI “removed” CMI from their copyrighted works, as that term is used in
23 Section 1202(b)(1), because they have not alleged that any output from any of Stability AI’s
24 models was identical to one of their copyrighted works but for the removal of CMI. Mot. at 7–8.
25 Plaintiffs do not dispute that they have not alleged any identical outputs. Instead, they argue that
26 (1) identity is not required for removal; and (2) they do not need to show an identical output
27 because the copyrighted works were used in their entirety for training. Neither of these
28 arguments has merit.

1 Identity. As explained in Stability AI’s opening brief, courts in the Ninth Circuit have
2 found that omitting CMI from a work that is similar, but not identical to, a copyright owner’s
3 copyrighted work does not constitute the “removal” of CMI for purposes of a claim under Section
4 1202(b). *See* Mot. at 7-8 (citing cases). Indeed, at least one other court has dismissed claims
5 alleging that a defendant violated Section 1202 when its large language model produced images
6 or text that were supposedly similar to the plaintiffs’ copyrighted works, but not identical. *See*
7 *Doe 1 v. GitHub, Inc.*, No. 22-cv-06823-JST, 2024 WL 235217, at *8–9 (N.D. Cal. Jan. 22, 2024)
8 (dismissing Section 1202(b) claim for failure to meet law’s identity requirement). The recent
9 Ninth Circuit decisions are unsurprising; an alternative result would be nonsensical. As reflected
10 in Plaintiffs’ Exhibit G, the output of the model is a new work, not a slavish copy of an old one.
11 *See* FAC, Exhibit G (ECF No. 129-7). The statute does not require Stability AI to include
12 Plaintiffs’ CMI on a new and different work.

13 In arguing otherwise, Plaintiffs do not cite a single on point Ninth Circuit case:

- 14 • *Columbia Pictures* was about copyright infringement, not Section 1202 of the
15 DMCA. *Columbia Pictures Indus., Inc. v. Galindo*, No. 20-cv-3129 -MEMF
16 (GJSx), 2022 WL 17094713, at *8 (C.D. Cal. Nov. 18, 2022).
- 17 • In *Friedman*, the Ninth Circuit found that “the photographs used by Live Nation
18 were exact copies of the images precisely as they appeared on Sony’s website and
19 in Friedman’s book.” *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1188
20 (9th Cir. 2016). The language that Plaintiffs quote in their papers delineates when
21 a court may infer copying by defendants; it does *not* address the standard for what
22 constitutes removal. *Id.* (“A striking similarity between the works may give rise to
23 a permissible inference of copying.”) (cleaned up).
- 24 • *Design Basics* held that there could be no DMCA claim where the works at issue
25 were not even substantially similar, not that substantial similarity would be
26 enough. *Design Basics, LLC v. Signature Constr., Inc.*, No. 1:16-CV-1275, 2019
27 WL 4805888, at *9 (C.D. Ill. Aug. 19, 2019).

1 Instead of citing relevant in-Circuit authority, Plaintiffs rely largely on an opinion from a
2 district court in Texas, *ADR International*, but that case does not help them either. There, the
3 court explicitly distinguished a prior case, which had held that there was *no* DMCA violation
4 where “the plaintiff alleged the defendant used her work to generate nonidentical renditions of the
5 copyrighted works.” *ADR Int’l Ltd. v. Inst. for Supply Mgmt., Inc.*, 667 F. Supp. 3d 411, 428-29
6 (S.D. Tex. 2023). That is Plaintiffs’ theory here.

7 Copyrighted works used in their entirety for training: Plaintiffs also argue that they have
8 alleged that “Defendants incorporated their Works *in their entirety* into the Stability Models as
9 Training Images.” Opp’n at 13-14 (emphasis in original). That would not matter. Plaintiffs do not
10 allege that CMI was removed from those training images; they allege that the models output new
11 images that lack CMI, and it is this output that constitutes removal. FAC ¶ 247, Opp’n at 9.

12 **b. Plaintiffs have not alleged that removal of CMI was intentional.**

13 As an initial matter, Plaintiffs argue that they have plausibly alleged the “*Knowing*
14 *removal of CMI*,” relying on allegations that they claim show that Stability AI knew that
15 copyrighted works in its training sets contained CMI. Opp’n at 9 (emphasis in original), 10
16 (discussing detection scores for watermarks). But that is not the standard. Under 1202(b)(1),
17 Plaintiffs must allege that Stability AI “*intentionally* remove[d] or [a]ter[ed]” CMI, 17 U.S.C.
18 1202(b)(1) (emphasis added), not that it merely knew that CMI existed or was removed. The
19 closest that Plaintiffs come is their conclusory statement that Stability AI’s training process “is
20 designed to remove or alter CMI from the training images.” *Id.* at 9. Another court has rejected
21 almost exactly this type of allegation on the grounds that it was not enough to plausibly allege a
22 DMCA claim. *Tremblay v. OpenAI, Inc.*, No. 23-cv-03223-AMO, 2024 WL 557720, at *4 (N.D.
23 Cal. Feb. 12, 2024) (failure to state a Section 1202(b)(1) claim where Plaintiffs alleged that “[b]y
24 design, the training process does not preserve any CMI” without providing facts in support.)
25 (alteration in original).

26 Plaintiffs’ other allegations about how the training process works do not make plausible
27 Plaintiffs’ conclusory statement that removal was intentional. The diffusion process, according to
28 Plaintiffs, iteratively adds noise to an image until the image disappears, and then reverses the

1 steps to reveal the image. FAC ¶¶ 82-90. Plaintiffs do not explain how the models would use
2 this process to selectively remove CMI, such as Plaintiff Brom’s signature, while maintaining the
3 rest of the image.

4 At most, Plaintiffs have alleged a general technological process that happens to remove
5 CMI while altering the image in other ways. But courts have found that the DMCA does not
6 impose liability for the omission of CMI that occurs as an “unintended side effect” of a
7 technological process—like scraping images from the internet without also scraping associated
8 CMI. *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), *rev’d on other*
9 *grounds*, 336 F.3d 811 (9th Cir. 2003) (no Section 1202 liability arising from the fact that search
10 engine “crawler did not include [CMI] when it indexed the images”); *see also Logan v. Meta*
11 *Platforms, Inc.*, 636 F. Supp. 3d 1052, 1064 (N.D. Cal. 2022) (“Unlike editing a plaintiff’s
12 watermark out of a photo, automatically omitting CMI by embedding a photo out of the full
13 context of the webpage where the CMI is found cannot itself plead intentionality as required by
14 the DMCA.”). In other words, the incidental removal of CMI does not raise an inference that any
15 removal of CMI was intentional, and incidental removal is all that Plaintiffs have alleged here.

16 **c. Plaintiffs have not alleged that Stability AI had reasonable**
17 **grounds to know that its actions would enable or conceal**
18 **copyright infringement.**

19 Plaintiffs do not dispute that they must allege that Stability AI had reasonable grounds to
20 know that its alleged removal of CMI “will induce, enable, facilitate, or conceal an infringement.”
21 17 U.S.C. 1202(b); *see also* Opp’n at 8. Attempting to satisfy this scienter element, Plaintiffs
22 simply assert that they have alleged that the removal of CMI “would induce, enable, facilitate, or
23 conceal” ongoing infringement. *Id.* at 10. But if a conclusory statement like Plaintiffs’ were
24 sufficient to plead scienter, any party that plausibly pleads removal of CMI would automatically
25 satisfy the scienter element. “[T]he mental state requirement in Section 1202(b) has a more
26 specific application than the universal possibility of encouraging infringement; specific
27 allegations as to how identifiable infringements ‘will’ be affected are necessary.” *Stevens v.*
28 *Corelogic, Inc.*, 899 F.3d 666, 674 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1222, 203 L. Ed. 2d
208 (2019).

1 Plaintiffs also rely on a user’s ability to prompt an output of a similar style to an artist
2 using an artist’ name. Opp’n at 13–14. But, as Stability AI pointed out in its opening brief, that
3 is not enough. Opp’n at 15. If the artist’s name was included in the prompt, it is difficult to see
4 how omitting CMI with the same information in the output would enable or conceal infringement.
5 It is also not copyright infringement to mimic an aesthetic style. Mot. at 8. Plaintiffs attempt to
6 undermine this argument by noting that DMCA claims are distinct from infringement claims.
7 True enough, but that is not the point: Section 1202(b) requires that the violative act be done with
8 “reasonable grounds to know[] that it will induce, enable, facilitate, or conceal” copyright
9 infringement. Since none of the models’ output images contain substantial copyrightable
10 expression, there is no infringement to induce, enable, facilitate, or conceal.

11 Plaintiffs’ cases do not address this issue:

- 12 • Two of Plaintiffs’ cited cases hold that claims under Section 1202—unlike claims for
13 copyright infringement—do not require registration as a prerequisite for bringing a
14 lawsuit. *Med. Broad. Co. v. Flaiz*, No. Civ.A. 02-8554, 2003 WL 22838094, at *3 (E.D.
15 Pa. Nov. 25, 2003) (“Nothing in § 1202 of the DMCA suggests that registration is a
16 precondition to a lawsuit.”); *Diamondback Indus., Inc. v. Repeat Precision, LLC*,
17 No. 4:18-CV-902-A, 2019 WL 5842756, at *2 (N.D. Tex. Nov. 7, 2019) (“Although a
18 DMCA claim requires the defendant to know of potential infringement, such requirement
19 does not necessitate registration because infringement can occur absent registration.”).
- 20 • Plaintiffs’ third citation addresses a claim under Section 1201, not 1202. *MDY Indus.,*
21 *LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 950–52 (9th Cir. 2010). That court considered
22 whether certain provisions of Section 1201 prohibit circumvention of access controls
23 when access does not constitute copyright infringement. *Id.* (Noting that “bypassing a
24 password and breaking into a locked room in order to read or view a copyrighted work
25 would not infringe on any of the copyright owner’s exclusive rights under § 106.”)

26 Neither copyright registration requirements nor any element of Section 1201 is at issue in the present
27 case. Plaintiffs cannot rebut Stability AI’s argument that lack of copyrightable expression in the
28 models’ output dooms Plaintiffs claims under Section 1202.

1 **2. Plaintiffs have not plausibly alleged a claim under Section 1202(b)(3).**

2 For the first time, Plaintiffs claim that they have plausibly alleged a claim not only based
3 on the removal of CMI, but also the distribution of copyrighted works from which CMI had been
4 removed. Opp’n at 7, 10. Plaintiffs are presumably referencing DMCA Section 1202(b)(3),
5 which provides a cause of action for distribution of works “knowing that copyright management
6 information has been removed or altered.” 17 USC 1202(b)(3). That claim also fails.

7 First, Plaintiffs nowhere mention 1202(b)(3) or distribution in their complaint. FAC
8 ¶¶ 238–250. That alone is fatal to their claims. *Frenzel v. Aliphcom*, 76 F. Supp. 3d 999, 1009
9 (N.D. Cal. 2014) (“It is axiomatic that the complaint may not be amended by the briefs in
10 opposition to a motion to dismiss.”) (cleaned up).

11 Second, as explained in Section II.B.1.a, *supra*, Plaintiffs have not alleged that the model
12 generates works that are identical to the Plaintiffs’ works. That is fatal to Plaintiffs’ 1202(b)(3)
13 claims, just as it is to their 1202(b)(1) claims. *GitHub, Inc.*, 2024 WL 235217, at *8 (dismissing
14 Section 1202(b)(1) and 1202(b)(3) claims because “Section 1202(b) claims require that copies be
15 ‘identical.’”); *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. CV 20-1931-DMG (Ex), 2020
16 WL 5991503, at *6 (C.D. Cal. Aug. 14, 2020) (substantial similarity not sufficient to plead
17 Section 1202(b)(3) claim). To the extent that Plaintiffs are arguing that the distribution of the
18 models themselves is enough to state a 1202(b)(3) claim, that does not help them. The Court has
19 rejected the theory that the models are derivative works, Order at 10 n.7, and even if they were, it
20 wouldn’t state a claim under 1202(b)(3).

21 Third, as with 1202(b)(1), Plaintiffs must allege that Stability AI had reasonable grounds
22 to know that its actions would enable or conceal copyright infringement. 17 U.S.C. 1202(b). For
23 the reasons explained in Section II.B.1.c, *supra*, Plaintiffs have alleged no such thing.

24 **3. Plaintiffs’ 1202(a) claim fails because (1) the MIT license is not**
25 **“conveyed in connection with” Plaintiffs’ works, and (2) Plaintiffs**
26 **remain silent as to the requisite scienter.**

27 Plaintiffs do not dispute that for the MIT license to constitute false CMI, the license must
28 be “conveyed in connection with” Plaintiffs’ works. Attempting to dodge the outcome dictated
by *SellPoolSuppliesOnline.com, LLC v. Ugly Pools Ariz., Inc.*, 804 F. App’x 668, 670–71 (9th

1 Cir. 2020), Plaintiffs suggest that the Ninth Circuit gave special weight in that case to copyright
2 markings on the plaintiff’s photos. Opp’n at 17. Plaintiffs write, “and *critically*, ‘Plaintiff’s
3 photos were imprinted with their own copyright markings.’” *Id.* But even a cursory review of the
4 *SellPoolSupplies* opinion reveals that Plaintiffs’ copied text is followed by a footnote. “We note
5 that,” explains the court, “even if this last fact were subject to genuine dispute, we would still
6 agree with the district court that Defendants’ copyright notice was not ‘conveyed in connection’
7 with Plaintiff’s photos given the other undisputed facts.” *SellPoolSuppliesOnline.com*, 804 F.
8 App’x at 671 n.1. Clearly the presence of copyright markings on the plaintiff’s photos was not
9 dispositive. Plaintiffs cannot distinguish the remaining facts of *SellPoolSupplies*: defendants’
10 copyright notice (1) was located in a separate region from plaintiff’s photos, (2) was generic,
11 (3) did not communicate that defendants owned the photos, and (4) was not located on or next to
12 the photos. *Id.* at 671. Even if a court were to conclude that the models somehow incorporate
13 Plaintiffs’ works—a conclusion which Stability AI denies—the parallels to *SellPoolSupplies*
14 demonstrate that the MIT license was not conveyed in connection with Plaintiffs’ works.

15 Plaintiffs’ claim further fails for lack of intent. Plaintiffs do not dispute that they must
16 allege that Stability AI “knowingly and with the intent to induce, enable, facilitate, or conceal
17 infringement” provided or distributed false CMI. Opp’n at 16. But apart from a rote recitation of
18 the elements of a CMI claim, Defendants say nothing of Stability AI’s scienter with respect to the
19 supposedly false CMI. *See* Opp’n at 14–17. Plaintiffs must demonstrate that Stability AI
20 “knowingly” provided false CMI *and* that it did so “with the intent to induce, enable, facilitate, or
21 conceal infringement. 17 U.S.C. 1202(a); *Krechmer v. Tantaros*, 747 F. App’x 6, 9 (2d Cir.
22 2018). This Plaintiffs haven’t even tried to do.

23 **C. Plaintiffs’ unjust enrichment claim must be dismissed.**

24 **1. Right of publicity elements do not save Plaintiffs’ claim.**

25 Courts have found preemption where the core of the unjust enrichment claim is
26 unauthorized copying of the plaintiff’s work. *See Jonathan Browning, Inc. v. Venetian Casino*
27 *Resort, LLC*, No. C 07-3983JSW, 2007 WL 4532214, at *9 (N.D. Cal. Dec. 19, 2007); *Shade v.*
28 *Gorman*, No. C 08-3471 SI, 2009 WL 196400, at *5 (N.D. Cal. Jan. 28, 2009). When

1 considering preemption of right of publicity claims by copyright law, the Ninth Circuit has
2 distinguished between (1) claims targeting non-consensual use of one’s name or likeness on
3 merchandise or in advertising and (2) claims that a likeness has been captured in a copyrighted
4 visual work and the work itself is being distributed. *Maloney v. T3Media, Inc.*, 853 F.3d 1004,
5 1011 (9th Cir. 2017). The latter type of publicity-right claim “interferes with the exclusive rights
6 of the copyright holder, and is preempted by section 301 of the Copyright Act.” *Id.* Here,
7 Plaintiffs do not contend that Stability AI has used their names and likenesses on merchandise or
8 in advertising. Instead, they contend that Stability AI was unjustly enriched by the models’
9 ability to “mimic Plaintiffs’ artistic style.” Opp’n at 20. At heart, their unjust enrichment claim
10 is one alleging unauthorized reproduction of Plaintiffs’ works and unauthorized creation of
11 derivative works. Under these circumstances, the “subject matter of the state law claims falls
12 within the subject matter of copyright and the rights asserted under state law are equivalent to the
13 rights contained in 17 U.S.C. § 106.” *Maloney*, 853 F.3d at 1020 (cleaned up).

14 **2. Plaintiffs do not allege that existing legal remedies are inadequate.**

15 Plaintiffs attempt to distinguish their unjust enrichment claim from their copyright
16 infringement claims by seeking alternative, equitable remedies. Opp’n at 19. Yet a plaintiff
17 seeking equitable remedies must do more than just ask for different remedies. They must explain
18 why legal remedies, *i.e.*, monetary damages, are inadequate. *Sonner v. Premier Nutrition Corp.*,
19 971 F.3d 834, 844 (9th Cir. 2020). “The issue is not whether a pleading may seek distinct forms
20 of relief in the alternative, but rather whether a prayer for equitable relief states a claim if the
21 pleading does not demonstrate the inadequacy of a legal remedy.” *Sharma v. Volkswagen AG*,
22 524 F. Supp. 3d 891, 907 (N.D. Cal. 2021) (citing *Sonner*, 971 F.3d at 844.). “*Sonner* holds that
23 it does not.” *Id.*

24 Although some California district courts have distinguished *Sonner* (*see Perez v. Bath &*
25 *Body Works, LLC*, No. 21-CV-05606-BLF, 2022 WL 2756670, at *7 (N.D. Cal. July 14, 2022)),
26 the Ninth Circuit continues to rely on its holding to affirm dismissals of equitable claims. *See*
27 *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1313 (9th Cir. 2022), *cert. denied sub nom. Polaris*
28 *Indus. Inc. v. Albright*, 143 S. Ct. 2612, (2023) (dismissing equitable claim and noting that

1 “[n]othing in *Sonner*’s reasoning suggested that its holding was limited to cases in which a party
2 had voluntarily dismissed a damages claim to avoid a jury trial.”); *Clark v. Eddie Bauer LLC*, No.
3 21-35334, 2024 WL 177755, at *2 (9th Cir. Jan. 17, 2024) (dismissing claim for retrospective
4 equitable relief because plaintiff’s complaint “contains no allegations as to why she lacks an
5 adequate remedy at law for her disgorgement and restitution claims.”). Because Plaintiffs have
6 not sufficiently pled their lack of an adequate remedy at law, this Court does not have equitable
7 jurisdiction to hear Plaintiffs’ claim. The unjust enrichment claim must be dismissed.

8 **D. Additional named plaintiffs and claims exceed the scope of the Court’s Order.**

9 Plaintiffs do not dispute that they must respect the Court’s Order regarding the scope of
10 permissible amendment. Opp’n at 21–22. The Order allowed leave to amend “to provide clarity
11 regarding [Plaintiffs’] theories of how each defendant separately violated their copyrights,
12 removed or altered their copyright management information, or violated their rights of publicity
13 and plausible facts in support.” Order at 1. But instead of clarifying their existing claims,
14 Plaintiffs added seven new class representatives, replaced their vicarious liability claim with one
15 for inducement, and exchanged their unfair competition claim for one for unjust enrichment.

16 If Plaintiffs wanted to exceed the limits of the Order, they should have requested leave to
17 amend further. See *Aikins v. St. Helena Hosp.*, No. C 93-3933 FMS, 1994 WL 794759, at *2
18 (N.D. Cal. Apr. 4, 1994) (“Plaintiffs did not request leave to name a new plaintiff, and the Court’s
19 order cannot reasonably be construed as having granted plaintiffs such leave.”); *Peguero v.*
20 *Toyota Motor Sales, USA, Inc.*, No. 2:20-cv-05889-VAP (ADSx), 2021 WL 2910562, at *4 (C.D.
21 Cal. Apr. 26, 2021) (amendment exceeded scope of leave where “Plaintiffs did not obtain
22 Defendants’ consent to add three additional Plaintiffs or the seven new claims in the FAC.”).
23 Here, Plaintiffs failed to request the Court’s leave or Stability AI’s consent to add two causes of
24 action and seven new class representatives. These amendments exceed the scope of the Court’s
25 Order and should be dismissed.

26 **III. CONCLUSION**

27 Stability AI urges the Court to dismiss with prejudice Plaintiffs’ claims of inducement
28 (Count Two), violation of the DMCA (Count Three), and unjust enrichment (Count Four).

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