

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SARAH ANDERSEN, et al.,  
Plaintiffs,  
v.  
STABILITY AI LTD., et al.,  
Defendants.

Case No. [23-cv-00201-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS TO  
DISMISS FIRST AMENDED  
COMPLAINT**

Dkt. Nos. 160, 162, 163, 164, 169

Defendants Stability AI Ltd. and Stability AI, Inc. (collectively “Stability AI”), Midjourney, Inc., DeviantArt, Inc., and Runway AI, Inc. move to dismiss various claims from plaintiffs’ First Amended Complaint (“FAC,” Dkt. No. 129). For the reasons discussed below, those motions are GRANTED in part and DENIED in part.

**BACKGROUND**

Artists Sarah Andersen, Kelly McKernan, Karla Ortiz, Hawke Southworth, Grzegorz Rutkowski, Gregory Manchess, Gerald Brom, Jingna Zhang, Julia Kaye, and Adam Ellis (“Plaintiffs”<sup>1</sup>) filed this putative class action on behalf of artists challenging the defendants’ creation and/or use of Stable Diffusion, an artificial intelligence (“AI”) software product. They allege that Stable Diffusion used plaintiffs’ artistic works as “training images” and as a result Stable Diffusion can produce output images “in the style” of those images. *See generally* FAC. In the FAC, plaintiffs allege claims against the three defendants identified in the original complaint (Stability AI, Midjourney, and DeviantArt) and against a new defendant, Runway AI.<sup>2</sup> Plaintiffs

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<sup>1</sup> In their FAC, plaintiffs reasserted claims for the three original plaintiffs (Sarah Anderson, Kelly McKernan, and Karla Ortiz) and added – without the court permission – seven additional plaintiffs (H. Southworth PKA Hawke Southworth, Grzegorz Rutkowski, Gregory Manchess, Gerald Brom, Jingna Zhang, Julia Kaye, and Adam Ellis). FAC ¶¶ 14-23.

<sup>2</sup> The basic factual allegations regarding how defendants’ AI products were trained and work were

1 contend that Runway AI worked with, helped train, and then distributed Stable Diffusion with  
2 Stability AI. Plaintiffs assert that Runway made a text-to-image generator available via its online  
3 AI image product called AI Magic Tools.

4 Plaintiffs' claims center first around the creation of the LAION training sets, where five  
5 billion images were allegedly scraped into datasets used by Stability and Runway to train the  
6 versions of Stable Diffusion. FAC ¶ 4. Plaintiffs state that Midjourney likewise trained its  
7 product using Stable Diffusion, and that all four defendants use Stable Diffusion in their AI  
8 products; in doing so, those four defendants copy or utilize versions of plaintiffs' artistic works.  
9 *Id.* ¶¶ 5-6. Significantly, plaintiffs allege that the "LAION-5B dataset contains only URLs of  
10 training images, not the actual training images. Therefore, anyone who wishes to use LAION-5B  
11 for training their own machine learning model must first acquire copies of the actual training  
12 images from their URLs using the img2dataset or other similar tool." FAC ¶ 221. They also  
13 clarify their theory of direct infringement, adding allegations regarding CLIP-guided diffusion in  
14 the training phase but also in use, after training. *Id.* ¶¶ 82-150.

15 Plaintiffs assert claims on behalf of six different classes:

16 "Injunctive Relief Class" under Rule 23(b)(2): All persons or entities nationalized or  
17 domiciled in the United States that own a copyright interest in any work that was used to train any  
18 version of an AI image product that was offered directly or incorporated into another product by  
19 one or more Defendants during the Class Period. FAC ¶ 34.

20 "Damages Class" under Rule 23(b)(3): All persons or entities nationalized or domiciled in  
21 the United States that own a copyright interest in any work that was used to train any version of an  
22 AI image product that was offered directly or incorporated into another product by one or more  
23 Defendants during the Class Period. *Id.*

24 "LAION-5B Damages Subclass" under Rule 23(b)(3): All persons or entities nationalized  
25 or domiciled in the United States that own a registered copyright in any work in the LAION-5B

26  
27 \_\_\_\_\_  
28 identified in my prior Order and will not be repeated here. *See* October 30, 2023, Order at Dkt.  
No. 117. To the extent new, material allegations have been added to the FAC, they will be  
addressed as part of the substantive analysis below.

1 dataset that was used to train any version of an AI image product that was offered directly or  
2 incorporated into another product by one or more Defendants during the Class Period.<sup>3</sup> *Id.*

3 “LAION-400M Damages Subclass” under Rule 23(b)(3): All persons or entities  
4 nationalized or domiciled in the United States that own a registered copyright in any work in the  
5 LAION-400M dataset that was used to train any version of an AI image product that was offered  
6 directly or incorporated into another product by one or more Defendants during the Class Period.  
7 *Id.*

8 “DeviantArt Damages Subclass” under Rule 23(b)(3): All members of the Damages Class  
9 who (1) maintained an account on DeviantArt; (2) posted copyrighted work on DeviantArt; and  
10 (3) had that work used to train any version of an AI image product. *Id.*

11 “Midjourney Named Artist Class” under Rule 23(b)(3): All persons or entities who appear  
12 on the Midjourney Names List and whose names were invoked within prompts of the Midjourney  
13 Image Product during the Class Period.<sup>4</sup> *Id.*

14 Plaintiffs assert the following claims against the different sets of defendants:

15 Against Stability AI: (1) direct copyright infringement of the LAION-5B Registered  
16 Works by training the Stability Models, including Stable Diffusion 2.0 and Stable Diffusion XL  
17 1.0 on behalf of the LAION-5B Registered Plaintiffs and Damages Subclass; (2) inducement of  
18 copyright infringement by distributing Stable Diffusion 2.0 and Stable Diffusion XL 1.0 for free  
19 on behalf of the LAION-5B Registered Plaintiffs and Damages Subclass; (3) violations of the  
20 Digital Millennium Copyright Act (“DMCA”) by removing and altering copyright management  
21 information (“CMI”) of training images on behalf of all Plaintiffs, the Damages and the Injunctive  
22 Classes; and (4) unjust enrichment under Cal. Bus. & Prof. Code § 17200 and California Common  
23

24 \_\_\_\_\_  
25 <sup>3</sup> The “LAION-5B Registered Plaintiffs” as used in the FAC include “the subset of plaintiffs who  
26 hold copyrights in these LAION-5B Registered Works that were registered before the filing of the  
initial complaint in this action, namely Sarah Andersen, Jingna Zhang, Gerald Brom, Gregory  
Manchess, Julia Kaye, and Adam Ellis.” FAC ¶ 213.

27 <sup>4</sup> The “Midjourney Named Plaintiffs” are the plaintiffs whose names were disclosed by  
28 Midjourney as artists whose works were included and could be recreated through use of  
Midjourney’s product; Grzegorz Rutkowski, Sarah Andersen, Karla Ortiz, Gerald Brom, and Julia  
Kaye. FAC ¶¶ 263, 264.

1 Law on behalf of all Plaintiffs, the Damages and the Injunctive Classes.

2 Against Runway AI: (1) Direct copyright infringement of the LAION-5B Registered  
3 Works by training the Runway Models, including Stable Diffusion 1.5 on behalf of the LAION-  
4 5B Registered Plaintiffs, LAION-5B Subclass, and Karla Ortiz Individually; (2) Inducement of  
5 copyright infringement by distributing Stable Diffusion 1.5 for free on behalf of the LAION-5B  
6 Registered Plaintiffs and Subclass; (3) DMCA violations by removing and altering CMI of  
7 training images on behalf of all Plaintiffs, the Damages and Injunctive Classes; and (4) Unjust  
8 enrichment under Cal. Bus. & Prof. Code § 17200 and California Common Law on behalf of all  
9 Plaintiffs, the Damages and Injunctive Classes.

10 Against Midjourney: (1) Direct copyright infringement of the LAION-400M Registered  
11 Works by training the Midjourney 400M Models, including Midjourney Model version 1 on  
12 behalf of the LAION-400M Registered Plaintiffs and Damages Subclass; (2) Direct copyright  
13 infringement of the LAION-5B Registered Works by training the Midjourney 5B Models,  
14 including Midjourney Model version 5.2 on behalf of the LAION-5B Registered Plaintiffs and  
15 Damages Subclass; (3) DMCA violations by removing and altering CMI of training images  
16 on behalf of All Plaintiffs, the Damages and Injunctive Class; (4) Lanham Act — false  
17 endorsement by unauthorized commercial use of artists’ names on behalf of the Midjourney  
18 Named Plaintiffs and Class; (5) Lanham Act — vicarious trade-dress violation by profiting from  
19 imitations of protectable trade dress on behalf of the Midjourney Named Plaintiffs and Class; and  
20 (6) Unjust enrichment under Cal. Bus. & Prof. Code § 17200 and California Common Law on  
21 behalf of all Plaintiffs, and the Damages and Injunctive Class.

22 Against DeviantArt: (1) Direct copyright infringement by copying the DreamUp–CompVis  
23 Model and incorporating it into DreamUp on behalf of the LAION-5B Registered Plaintiffs; (2)  
24 Breach of contract for violation of its Terms of Service on behalf of the DeviantArt Plaintiffs; (3)  
25 Unjust enrichment under Cal. Bus. & Prof. Code § 17200 and California Common Law on behalf  
26 of the DeviantArt Plaintiffs.

27 In October 2023, I largely granted the motions to dismiss brought by defendants Stability,  
28 Midjourney and DeviantArt. The only claim that survived was the direct infringement claim

1 asserted against Stability, based on Stability’s alleged “creation and use of ‘Training Images’  
 2 scraped from the internet into the LAION datasets and then used to train Stable Diffusion.”  
 3 October 2023 Order at 7. The remainder of the claims were dismissed with leave, so that plaintiffs  
 4 could amend “to provide clarity regarding their theories of how each defendant separately violated  
 5 their copyrights, removed or altered their copyright management information, or violated their  
 6 rights of publicity and plausible facts in support.” *Id.* at 1.

7 As one example, I required plaintiffs on amendment to address the following deficiencies  
 8 with a second theory of direct infringement, separate from the creating and use of images for  
 9 training theory:

10 Plaintiffs will be required to amend to clarify their theory with respect  
 11 to compressed copies of Training Images and to state facts in support  
 12 of how Stable Diffusion – a program that is open source, at least in  
 13 part – operates with respect to the Training Images. If plaintiffs  
 14 contend Stable Diffusion contains “compressed copies” of the  
 15 Training Images, they need to define “compressed copies” and  
 16 explain plausible facts in support. And if plaintiffs’ compressed  
 copies theory is based on a contention that Stable Diffusion contains  
 mathematical or statistical methods that can be carried out through  
 algorithms or instructions in order to reconstruct the Training Images  
 in whole or in part to create the new Output Images, they need to  
 clarify that and provide plausible facts in support.

17 October 2023 Order at 8-9; *see also id.* 9 n.7 (“Plaintiffs’ second theory of direct infringement –  
 18 that Stable Diffusion is a ‘derivative work’ because it contains compressed copies of billions of  
 19 copyrighted images and by incorporating Stable Diffusion into” defendants’ own AI products,  
 20 defendants are “liable for producing works that have been ‘transformed’ based on plaintiffs’ works  
 21 [] fails for the same reasons.”).

22 Plaintiffs added defendant Runway AI and seven new plaintiffs when it filed the FAC.  
 23 Each defendant moves to dismiss.

### 24 **LEGAL STANDARD**

25 Under FRCP 12(b)(6), a district court must dismiss a complaint if it fails to state a claim  
 26 upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must  
 27 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
 28 *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts

1 that “allow the court to draw the reasonable inference that the defendant is liable for the  
2 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must  
3 be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts do not  
4 require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a  
5 right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

6 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the  
7 Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the  
8 plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However,  
9 the court is not required to accept as true “allegations that are merely conclusory, unwarranted  
10 deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049,  
11 1055 (9th Cir. 2008). If the court dismisses the complaint, it “should grant leave to amend even if  
12 no request to amend the pleading was made, unless it determines that the pleading could not  
13 possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.  
14 2000). In making this determination, the court should consider factors such as “the presence or  
15 absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by  
16 previous amendments, undue prejudice to the opposing party and futility of the proposed  
17 amendment.” *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

## 18 DISCUSSION

### 19 I. ADDITION OF NEW PLAINTIFFS & CLAIMS

20 Stability objects to the addition of seven new plaintiffs to the FAC, as well as the addition  
21 of two new claims against it (induced infringement, Count 2) and unjust enrichment (Count 4).  
22 Stability MTD, Dkt. No. 162 at 13-14. DeviantArt similarly objects to the addition of new  
23 plaintiffs and the addition of the unjust enrichment claim. DeviantArt MTD, Dkt. No. 163, at 23-  
24 24. Defendants argue that the addition of the new plaintiffs and claims exceeds the scope of the  
25 leave to amend I allowed plaintiffs in the October 2023 Order and, therefore, the new plaintiffs  
26 and claims should be stricken.

27 Plaintiffs respond that they were given broad “leave to amend and attempt to cure the  
28 deficiencies identified” in their claims and the ability of the then three named plaintiffs to pursue

1 the claims asserted. Because leave was not cabined to “solely” or exclusively correct the  
2 deficiencies, plaintiffs argue that the additions were permissible and in any event should be  
3 allowed under Rule 15’s liberal amendment standard. *See* *Oppo. to Stability*, Dkt. No. 174, at 22;  
4 *Oppo. to DeviantArt*, Dkt. No. 177, at 21-22.

5 Plaintiffs are correct that leave to amend under Rule 15 is “freely given,” especially at the  
6 start of a case. However, once a complaint is dismissed and a court grants plaintiffs specific leave  
7 to amend to address identified legal or factual deficiencies, adding plaintiffs or claims beyond  
8 those previously alleged requires either requesting and securing leave, which plaintiffs did not do,  
9 or the consent of defendants, which plaintiffs did not seek. *See* Fed. R. Civ. P, 15(a)(2) (“In all  
10 other cases, a party may amend its pleading only with the opposing party’s written consent or the  
11 court’s leave.”).<sup>5</sup>

12 That said, I would have granted leave to amend if plaintiffs had sought leave, given the  
13 lack of prejudice to defendants. At this juncture, where each defendant has addressed the newly  
14 added claims and plaintiffs, it would elevate form over substance to grant the motions to dismiss  
15 on this ground. And I will assume that plaintiffs have implicitly sought leave to amend to include  
16 the new plaintiffs and claims in a Second Amended Complaint. I will grant leave and address the  
17 arguments defendants make against the added claims and plaintiffs.<sup>6</sup>

## 18 **II. STABILITY AI MOTION TO DISMISS**

### 19 **A. Induced Copyright Infringement**

20 Stability challenges plaintiffs’ first theory of induced copyright infringement interpreting  
21 the claim as one alleging that the Stable Diffusion models themselves are infringing works. Under  
22 this theory, Stability is inducing infringement by distributing the models when any third-party  
23

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24 <sup>5</sup> The only case relied on by plaintiffs is totally inapposite. It addresses a situation where plaintiffs  
25 were given leave to amend to file a second amended complaint and revised motion for class  
26 certification by stipulation, and after the court consolidated cases, defendants moved to dismiss the  
27 new plaintiffs based on statute of limitations grounds. *See Bos. Ret. Sys. v. Uber Techs., Inc.*, No.  
28 19-CV-06361-RS, 2021 WL 4503137, at \*2 (N.D. Cal. Oct. 1, 2021).

<sup>6</sup> As explained below, the end result is that plaintiffs may file a Second Amended Complaint  
including the new plaintiffs and may attempt to plead unjust enrichment claims against any  
defendant based on theories (if any) that are not preempted by the Copyright Act.

1 downloads, uses, or deploys the models provided by Stability. *See* FAC, Count Two (alleging  
2 contributory infringement by “distributing Stable Diffusion 2.0 and Stable Diffusion XL 1.0 for  
3 free” on “behalf of the LAION-5B Registered Plaintiffs and Damages Subclass”) ¶¶ 233-236.<sup>7</sup>

4 Stability argues, first, that this theory is simply a repackaged direct infringement theory,  
5 that by “distributing” Stable Diffusion, Stability violates plaintiffs’ exclusive rights of distribution  
6 of their works.<sup>8</sup> But whether this is a direct infringement claim (where liability is imposed against  
7 Stability for distributing copyrighted works) or more properly characterized as an inducement  
8 claim (where liability is imposed because Stability induces or otherwise causes others to copy  
9 protectible material) depends on how Stable Diffusion works and is implemented by users other  
10 than Stability itself. Any potential overlap – or potential requirement for plaintiffs to elect one  
11 claim or another – is better addressed on summary judgment, after discovery.

12 Stability also argues that the inducement claim must be dismissed to the extent plaintiffs  
13 are alleging that Stability encourages the use of Stable Diffusion to create infringing outputs. That  
14 theory is barred, according to Stability, because plaintiffs fail to allege any facts that Stability  
15 promoted the use of Stable Diffusion to “infringe copyright, as shown by clear expression or other  
16 affirmative steps taken to foster infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,*  
17 *Ltd.*, 545 U.S. 913, 919 (2005). Stability argues that given the lack of allegations supporting a  
18 specific intent by Stability to promote infringement, the claim fails.

19 However, plaintiffs point to one statement by Stability’s CEO that Stability took 100,000  
20 gigabytes of images and compressed it to a two-gigabyte file that can “recreate” any of those  
21 images.<sup>9</sup> Stability responds that the “isolated” use of the word “create” by its CEO cannot

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22  
23 <sup>7</sup> Stability does not challenge plaintiffs’ claim of direct copyright infringement, as that survived  
the prior motion to dismiss. October 2023 Order at 7.

24 <sup>8</sup> Stability also contends this theory is another take on the “derivative” works claim I dismissed in  
25 the October 2023 Order. However, that claim was dismissed in large part because of the  
26 ambiguity and lack of plausible facts that Stable Diffusion was itself a “derivative work” because  
27 it contained compressed copies of billions of copyrighted images. *See* October 2023 Order at 10  
n.7. Plaintiffs were given leave to amend their compressed copies theory in support of direct  
copyright infringement with respect to the fully trained Stable Diffusion product, and as discussed  
with respect to the motions to dismiss below, have plausibly done so.

28 <sup>9</sup> *See* FAC ¶ 4 (“Emad Mostaque described it thus: ‘Stable Diffusion is the model itself. It’s a



1 demonstrate that it intended to foster infringement. Stability argues that “clear allegations of  
2 active steps to encourage direct infringement” are especially important here, where plaintiffs do  
3 not dispute that Stable Diffusion is capable of substantial noninfringing uses, like creating art from  
4 inputs that do not reference particular artists or invoke particular artists’ styles or have any  
5 substantial similarity to plaintiffs’ works.

6 The theory of this case is not similar to – for example – a case asserting contributory  
7 infringement based on the sale of VCRs where, after discovery, plaintiff had no evidence of  
8 defendant’s intent to induce infringement. The Supreme Court explained that, in those  
9 circumstances, intent could not be “based on presuming or imputing intent to cause infringement  
10 solely from the design or distribution of a product capable of substantial lawful use, which the  
11 distributor knows is in fact used for infringement.” *See Grokster, Ltd.*, 545 U.S. at 933  
12 (discussing holding of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417  
13 (1984)). Instead, this is a case where plaintiffs allege that Stable Diffusion is built to a significant  
14 extent on copyrighted works and that the way the product operates necessarily invokes copies or  
15 protected elements of those works. The plausible inferences at this juncture are that Stable  
16 Diffusion *by operation* by end users creates copyright infringement and was created to facilitate  
17 that infringement by design. In addition to the comment of Stability’s CEO, plaintiffs reference  
18 articles by academics and others that training images can sometimes be reproduced as outputs  
19 from the AI products. FAC ¶¶ 90, 130-139.

20 Whether true and whether the result of a glitch (as Stability contends) or by design  
21 (plaintiffs’ contention) will be tested at a later date. The allegations of induced infringement are  
22 sufficient.

### 23 **B. DMCA**

24 Stability also moves again to dismiss plaintiffs’ DMCA claims asserted under 17 U.S.C.  
25 section 1202(a) for providing or distributing false copyright management information (“CMI”)

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27 \_\_\_\_\_  
28 collaboration that we did with a whole bunch of people ... We took 100,000 gigabytes of images  
and compressed it to a two-gigabyte file that can recreate any of those [images] and iterations of  
those.””).

1 and under section 1202(b)(1) for intentional removal of CMI.<sup>10</sup> I dismissed plaintiffs’ DMCA  
2 claim with leave to amend in the October 2023 Order, explaining:

3 [E]ach plaintiff must identify the exact type of CMI included in their  
4 online works that were online and that they have a good faith belief  
5 were scraped into the LAION datasets or other datasets used to train  
6 Stable Diffusion. At the hearing, plaintiffs argued that it is key for the  
7 development of generative AI models to capture not only images but  
8 any accompanying text because that accompanying text is necessary  
9 to the models’ ability to “train” on key words associated with those  
10 images. Tr. at 9:13-24. But there is nothing in the Complaint about  
11 text CMI present in the images the named plaintiffs included with  
12 their online images that they contend was stripped or altered in  
13 violation of the DMCA during the training of Stable Diffusion or the  
14 use of the end-products. Plaintiffs must, on amendment, identify the  
15 particular types of their CMI from their works that they believe were  
16 removed or altered.

17 In addition, plaintiffs must clarify and then allege plausible facts  
18 regarding which defendants they contend did the stripping or altering  
19 in violation of the DMCA and when that occurred.

20 October 2023 Order at 18.

21 **1. Claim Under 1202(a)**

22 Stability moves to dismiss the subsection (a) claim regarding false CMI. Plaintiffs allege  
23 that “Stability distributes the Stability Models under the MIT License (see, e.g. —  
24 <https://github.com/Stability-AI/stablediffusion/blob/main/LICENSE>). Within this license, Stability  
25 asserts copyright in the Stability Models. By asserting copyright in the Stability Models, which  
26 infringe the copyrights of the LAION-5B Plaintiffs, Stability is providing and distributing false  
27 CMI in violation of 17 U.S.C. § 1202(a).” FAC ¶ 248.

28 Stability argues that this claim fails because Stability’s generic license does not suggest  
any association at all with plaintiffs’ works, and therefore was not made “in connection with”  
plaintiffs’ works which is necessary to support a claim under 1202(a). *See Logan v. Meta  
Platforms, Inc.*, 636 F. Supp. 3d 1052, 1062 (N.D. Cal. 2022) (plaintiff failed to allege facts  
showing defendant “conveyed CMI in connection” with plaintiff’s photos where “Meta’s allegedly

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<sup>10</sup> Section 1202(a) prohibits the knowing, with the intent to induce or enable infringement, provision or distribution of false CMI. Section 1202(b)(1) governs unpermitted removal or alteration of CMI and distribution of works with removed or altered CMI. *See* 17 U.S.C. § 1202 *et seq.*

1 false CMI is ‘[a] [generic] copyright tag on the bottom of each Facebook user page,’ separated  
2 from the rest of the content on the webpage, and is not located on or next to” plaintiff’s photos);  
3 *but see Post Univ. v. Course Hero, Inc.*, No. 3:21-CV-1242 (JBA), 2023 WL 5507845, at \*4 (D.  
4 Conn. Aug. 25, 2023) (“Thus, at the motion to dismiss stage, unless it is ‘implausible’ that a  
5 viewer could understand the information to be referring to the defendant as the work’s copyright  
6 holder, dismissal is inappropriate.”). In addition, Stability contends that plaintiffs fail to allege  
7 facts plausibly satisfying the “double scienter” required under (a); that Stability knowingly  
8 provided false CMI with the intent to induce or enable infringement.

9 I agree on both counts. The generic license that accompanies use of Stable Diffusion on its  
10 face claims rights to Stable Diffusion as a work, not to the LAION dataset and not any works that  
11 were used to create the LAION dataset. It is implausible that a viewer reading the license  
12 disclosure for Stable Diffusion would understand that Stability is claiming rights to or conveying  
13 any false information regarding the rights of the plaintiffs whose copyrighted works are among the  
14 billions of images in the LAION datasets.

15 The 1202(a) claim is dismissed again, this time with prejudice as plaintiffs do not identify  
16 a basis for this claim.

## 17 2. Claim Under 1202(b)(1)

18 Similarly, Stability contends that plaintiffs have failed to plead plausible facts that Stability  
19 AI intentionally removed or altered CMI from plaintiffs’ works during the training process for  
20 Stable Diffusion, and failed to allege the double-scienter requirement that Stability did so in order  
21 to facilitate infringement. In the FAC, plaintiffs allege that “Stability directly copied the LAION-  
22 5B Works and used these Statutory Copies as training data for the Stability Models. The works  
23 copied by Stability included CMI, including in the form of distinctive marks such as watermarks  
24 or signatures, and as the captions in the image-text pairs. The training process is designed to  
25 remove or alter CMI from the training images. Therefore, Stability intentionally removed or  
26 altered CMI from the Plaintiffs’ works in violation of 17 U.S.C. § 1202(b)(1).” FAC ¶ 245.  
27 Plaintiffs support that allegation by pointing to some of plaintiffs’ images that were used as  
28 Training Images in LAION-5B and that contained CMI, comparing them to images that were

1 created, for example, when plaintiffs’ names were used as Midjourney image prompts. FAC ¶¶  
 2 189-200. Plaintiffs have also, as directed in the October 2023 Order, identified the CMI present  
 3 on their works that they contend has been stripped by Stability. *Id.* ¶¶ 239-241. Finally, plaintiffs  
 4 allege that Stability engaged in knowing removal of CMI, as supported by their allegations  
 5 regarding how the diffusion process works, how training images are used, and based on plausible  
 6 allegations regarding Stability AI’s prominent role in the funding of LAION. *Id.* ¶¶ 245-247.

7 Stability, however, raises a new argument on this round of motions, based on a recent  
 8 opinion from the Hon. Jon S. Tigar. *Doe 1 v. GitHub, Inc.*, No. 22-CV-06823-JST, 2024 WL  
 9 235217, at \*8 (N.D. Cal. Jan. 22, 2024). Stability contends that because the output images are  
 10 admittedly not *identical* to the Training Images, there can be no liability for any removal of CMI  
 11 that occurred during the training process. That is because failing to affix CMI to a “different  
 12 work” is not “removal” under Section 1202. Judge Tigar wrote:

13 Defendants now ask the Court to address an unresolved argument  
 14 from the prior briefing—namely, that “[Section] 1202(b) claims lie  
 15 only when CMI is removed or altered from an identical copy of a  
 16 copyrighted work.” ECF No. 107-3 at 20 (emphasis added); see ECF  
 17 No. 109-3 at 23–24. Defendants argue that because Plaintiffs’ new  
 18 allegations state that output from Copilot is often a modification of  
 19 their licensed works, as opposed to an “identical copy,” they have  
 20 effectively pleaded themselves out of their Section 1202(b)(1) and  
 21 1202(b)(3) claims. ECF No. 109-3 at 23. Agreeing with Defendants  
 22 on both fronts, the Court finds that it is not precluded from analyzing  
 23 this claim anew and that Section 1202(b) claims require that copies  
 24 be “identical.”

25 *Id.* \* 8; see also *Doe 1 v. GitHub, Inc.*, No. 22-CV-06823-JST, 2024 WL 1643691, at \*2 (N.D.  
 26 Cal. Apr. 15, 2024) (rejecting motion for reconsideration because there was no allegation that any  
 27 output was identical to any plaintiff’s work in its entirety, so there could be no “removal” of CMI  
 28 for purposes of DMCA).<sup>11</sup>

Judge Tigar’s analysis disagrees with a case from the Southern District of Texas, where the

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<sup>11</sup> In so holding, Judge Tigar followed *Advanta-STAR Auto. Rsch. Corp. of Am. v. Search Optics, LLC*, No. 22-CV-1186 TWR, 2023 WL 3366534, at \*12 (S.D. Cal. May 9, 2023); *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. CV 20-1931-DMG, 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020); *Frost-Tsuji Architects v. Highway Inn, Inc.*, No. CIV. 13-00496 SOM, 2015 WL 263556, at \*3 (D. Haw. Jan. 21, 2015), *aff’d*, 700 F. App’x 674 (9th Cir. 2017) (no section 1202(b) violation where the allegedly infringing drawing was “not identical”).

1 court rejected the “identity” requirement. *See ADR Int’l Ltd. v. Inst. for Supply Mgmt. Inc.*,  
 2 667 F. Supp. 3d 411, 427 (S.D. Tex. 2023) (“[b]ased on the plain wording of the statute, the Court  
 3 is not persuaded that the DMCA includes an ‘identical copy’ requirement,” noting the copying  
 4 should be “substantially similar” but does not have to be “perfect”).

5 Recognizing that this issue is unsettled, I agree with the reasoning of Judge Tigar that  
 6 followed other district court decisions within the Ninth Circuit. Because there are no allegations  
 7 that any output from Stable Diffusion was identical to a plaintiff’s work, the DMCA section  
 8 1202(b) claim fails as well.<sup>12</sup>

9 The DMCA claims against Stability are DISMISSED WITH PREJUDICE.<sup>13</sup>

10 **C. Unjust Enrichment**

11 In addition to arguing that leave to amend was not granted to assert this claim, addressed  
 12 above, Stability argues that the unjust enrichment claim cannot proceed because it is preempted by  
 13 the Copyright Act. It also contends that plaintiffs fail to allege that they have an inadequate  
 14 remedy at law as required by *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020).

15 To support this claim, plaintiffs allege that Stability AI “has unjustly misappropriated the  
 16 LAION-5B Works in order to develop, train and promote the Stability Models, enabling it to  
 17 receive profit and other benefits.” FAC ¶252. “By using Plaintiffs’ works to train, develop and  
 18 promote the Stability Models, Plaintiffs and the Class were deprived of the benefit of the value of  
 19 their works, including monetary damages.” *Id.* ¶ 254. Stability points out that this claim is  
 20 expressly based on the use of plaintiffs’ copyrighted works without consent, and as a result is  
 21 covered by and preempted by the Copyright Act.

22  
 23  
 24 <sup>12</sup> The only allegations regarding identical outputs in the FAC are those regarding researcher’s  
 25 ability to reproduce identical images to training images – that as noted above supports the  
 26 plausibility of the copyright infringement claims – but there are no allegations that Stable  
 27 Diffusion can produce a work identical to one of the plaintiffs here, sufficient to show actionable  
 28 removal of CMI under section 1202(b).

<sup>13</sup> Runway and Midjourney also move to dismiss the DMCA claim asserted against them. The  
 arguments raised by those defendants, and plaintiffs’ responses, are based on the defendants’ use  
 of Stable Diffusion and materially identical to the arguments addressed above. As a result, the  
 DMCA claims asserted against Runway and Midjourney are likewise DISMISSED WITH  
 PREJUDICE and will not be addressed further.

1 “Section 301 of the Act seeks ‘to preempt and abolish any rights under the common law or  
2 statutes of a State that are equivalent to copyright and that extend to works,’ so long as the rights  
3 fall ‘within the scope of the Federal copyright law.’ [] ‘We have adopted a two-part test,’ in  
4 accordance with section 301, ‘to determine whether a state law claim is preempted by the Act.  
5 Laws,’ [] First, we decide ‘whether the ‘subject matter’ of the state law claim falls within the  
6 subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.’ [] Second, assuming it  
7 does, we determine ‘whether the rights asserted under state law are equivalent to the rights  
8 contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.’”  
9 *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (quoting *Laws v. Sony Music*  
10 *Entm't, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006)).

11 Plaintiffs correctly note that to “survive preemption, the state cause of action must protect  
12 rights which are qualitatively different from the copyright rights. The state claim must have an  
13 extra element which changes the nature of the action.” *Laws*, 448 F.3d at 1143. Plaintiffs do not  
14 identify an “extra element” required under California’s Unfair Competition Law (“UCL”) or  
15 common law (which the unjust enrichment claims are based on) that changes the nature of those  
16 state law claims to protect something other than rights protected under Copyright Act. Instead,  
17 they assert that the heart of their unjust enrichment claim is Stability being unjustly enriched by its  
18 “image product’s ability to mimic Plaintiffs’ artistic style and benefit from their notoriety and  
19 reputation as sought-after artists.” *Oppo. to Stability AI* at 20. More specifically, they allege that  
20 the Stable Diffusion models use “CLIP-guided diffusion” that relies on prompts including artists’  
21 names to generate an image. Therefore, the “crux” of plaintiffs’ unjust enrichment claim revolved  
22 not around plaintiffs’ works but around plaintiffs themselves and their “artistic personas.” *Id.*

23 The problem with plaintiffs’ theory is that it is not in the FAC. The unjust enrichment  
24 claim against Stability (and the other defendants) is tied instead to use of plaintiffs’ works. *See*  
25 *FAC* ¶ 42 (“Whether the use of Plaintiffs and Class members’ works to train, develop, and  
26 promote Defendants AI Image Products constitute an unjust benefit conferred upon Defendants to  
27 Plaintiffs’ detriment”); *see also id.* ¶¶ 252-255 (alleging unjust misappropriation of works).

28 As alleged, the unjust enrichment claim against Stability added to the FAC without leave

1 of court is preempted by the Copyright Act. It is DISMISSED. If plaintiffs have a good faith  
 2 theory of unjust enrichment that falls outside the scope of the protections provided by the  
 3 Copyright Act, they are given leave to make one last attempt to state an unjust enrichment claim.<sup>14</sup>

4 Stability’s motion to dismiss is DENIED concerning the challenged copyright claims, but  
 5 GRANTED for the DMCA claims without leave to amend and GRANTED for the unjust  
 6 enrichment claim with leave to amend.

### 7 **III. RUNWAY AI MOTION TO DISMISS**

8 Newly added defendant Runway AI is primarily alleged to have trained or assisted in the  
 9 training at least Stable Diffusion 1.5, using Training Images from the LAION dataset. *See, e.g.,*  
 10 FAC ¶¶ 4, 163, 176, 342-345. In addition to challenging plaintiffs’ DMCA and unjust  
 11 enrichment/UCL claims – which fail for the same reasons identified above with respect to  
 12 Stability – Runway argues that the infringement claims fail given the allegations alleged with  
 13 respect to its particular conduct.

#### 14 **A. Request for Judicial Notice**

15 As an initial matter, Runway asks me to take judicial notice of a motion to dismiss filed in  
 16 another case in this District, as well as the complaint from the case. Runway RJN (Dkt. No. 164),  
 17 Exs. A&B. Plaintiffs oppose, arguing that judicial notice of court records from other cases is  
 18 inappropriate for the purpose Runway seeks; to encourage me to follow the “approach” of those  
 19 other courts. “On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another  
 20 court’s opinion, it may do so ‘not for the truth of the facts recited therein, but for the existence of  
 21 the opinion, which is not subject to reasonable dispute over its authenticity.’” *Southern Cross*  
 22 *Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426–27 (3rd  
 23

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24 <sup>14</sup> Because of this conclusion, I need not reach Stability’s argument under *Sonner v. Premier*  
 25 *Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020). I have however, repeatedly held that a plaintiff  
 26 satisfies *Sonner* at the pleading stage by simply pleading inadequate remedies at law. *See Costa v.*  
 27 *Apple, Inc.*, No. 23-CV-01353-WHO, 2023 WL 7389276, at \*4 (N.D. Cal. Aug. 9, 2023). If  
 28 plaintiffs reassert unjust enrichment claims in their Second Amended Complaint, they should  
 address that issue. The unjust enrichment claims asserted against Runway and Midjourney raise  
 identical issues. Those claims are, therefore, DISMISSED with one last leave to amend and will  
 not be addressed further. The unjust enrichment claim asserted against DeviantArt is addressed  
 below.

1 Cir.1999).” *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Notifying me of the  
2 existence of opinions from the judges in other cases may be accomplished by a far simpler  
3 method, citing them as persuasive authority. Judicial notice is not an appropriate method to  
4 suggest that I should follow the analysis of other courts addressing different cases with different  
5 facts.

6 Runway also asks me to take judicial notice – under the doctrine of incorporation – of the  
7 full contents of three academic articles cited in plaintiffs’ FAC. *Id.*, Exs. C, D & E. Plaintiffs  
8 object to this request, noting that one article is only mentioned once in the FAC and the others a  
9 few more times as support for the plausibility of plaintiffs’ assertion that Stable Diffusion contains  
10 “compressed copies” of the Training Images based on how these models generally work.  
11 Plaintiffs argue that it is inappropriate to take “notice” of the debated truth, meaning or  
12 implications of the articles to foreclose their claims. I agree. I will not take judicial notice of the  
13 full contents of the academic articles to resolve disputes of fact, or the legal implications from  
14 undisputed facts, at this juncture.

15 Runway’s request for judicial notice is DENIED.

### 16 **B. Direct Copyright Infringement**

17 Runway does not move to dismiss first direct copyright infringement claim asserted  
18 against it. *See* Count 11, FAC ¶¶ 347-349. That claim is based on Runway’s alleged use of  
19 Training Images to train Stable Diffusion 1.5, a claim that survived Stability AI’s prior motion to  
20 dismiss. October 2023 Order at 7 (discussing the “Training Theory”). Runway does challenge  
21 plaintiffs’ two other direct infringement theories. First, the “Model Theory” is based on the theory  
22 that the Stable Diffusion 1.5 product itself – after it was trained – is “an infringing Statutory Copy”  
23 of plaintiffs’ works or a “Statutory Derivative Work” because it represents a transformation of  
24 plaintiffs’ works. *See* FAC ¶¶ 209, 350. Second, Runway challenges plaintiffs’ “Distribution  
25 Theory” of infringement, based on allegations that Runway infringes plaintiffs’ exclusive  
26 distribution rights because distributing Stable Diffusion 1.5 is equivalent to distributing plaintiffs’  
27 works. FAC ¶ 352.

28 As with Stability, because Runway does not challenge the use of the images for training



1 purposes, I need not address the other theories of direct infringement. However, I note that both  
 2 the model theory and the distribution theory of direct infringement depend on whether plaintiffs’  
 3 protected works are contained, in some manner, in Stable Diffusion as distributed and operated.  
 4 That these works may be contained in Stable Diffusion as algorithmic or mathematical  
 5 representations – and are therefore fixed in a different medium than they may have originally been  
 6 produced in – is not an impediment to the claim at this juncture. 1 Nimmer on Copyright §  
 7 2.09[D][1] (2024) (“A work is no less a motion picture (or other audiovisual work) whether the  
 8 images are embodied in a videotape, videodisc, or any other tangible form.”).

9 Plaintiffs addressed the deficiencies in their prior complaint, alleging additional facts in the  
 10 FAC concerning how the training images remain in and are used by Stable Diffusion. *See, e.g.*,  
 11 FAC ¶¶ 71, 83, 88-90, 150.<sup>15</sup> Plaintiffs rely, with respect to Runway as with Stability, on  
 12 comments from Stability’s CEO regarding the contents of the model and their ability to reproduce  
 13 works, as well as academic papers indicating that the Stable Diffusion models are capable of  
 14 producing very similar if not identical works to at least some training images. FAC ¶¶ 122-150.  
 15 And plaintiffs also rely on use of their names as prompts in the Runway products to create outputs  
 16 mimicking aspects of plaintiffs’ protected works as evidence that their protected works are being  
 17 copied or distributed in Runway’s product. *Id.* ¶¶ 163-169.

18 Runway disputes the accuracy of those assertions – including the full meaning and import  
 19 of the academic articles relied on by plaintiffs – and argues that the prompt-examples do not  
 20 support assertions of direct copyright infringement absent express identification of outputs that are  
 21 “substantially similar” to plaintiffs’ copyrighted works. But the allegations at this juncture are  
 22 sufficient to allow the direct infringement claims to proceed. Whether evidence can support each  
 23

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24 <sup>15</sup> Runway’s and the other defendants’ repeated reliance on “run of the mill” copyright cases  
 25 where a showing of substantial similarity between works is required when determining whether an  
 26 inference of copying can be supported – *see, e.g., Hanagami v. Epic Games, Inc.*, 85 F.4th 931,  
 27 935 (9th Cir. 2023) – or liability imposed – *see, e.g., Narell v. Freeman*, 872 F.2d 907, 910 (9th  
 28 Cir. 1989) – are unhelpful in this case where the copyrighted works themselves are alleged to have  
 not only been used to train the AI models but also invoked in their operation. Whether that use is  
 “substantial enough” either in operation or output of images to qualify for the fair use defense will  
 be tested on summary judgment. *See, e.g., Authors Guild v. Google, Inc.*, 804 F.3d 202, 226 (2d  
 Cir. 2015) (affirming summary judgment that Google’s “program does not allow access in any  
 substantial way to a book’s expressive content”).

1 of the theories and whether plaintiffs will need to choose between theories (*e.g.*, between direct  
2 infringement based on selling a product containing effective copies of copyrighted works or  
3 violating plaintiffs' rights to restrict distribution of their works) will be addressed at summary  
4 judgment.<sup>16</sup>

5 Runway's motion to dismiss the direct infringement claims is DENIED.

### 6 **C. Induced Infringement**

7 Runway argues that plaintiffs have also failed to allege two elements of the induced  
8 infringement claim: acts of infringement by third parties using Runway's products and that  
9 Runway promoted use of Stable Diffusion to infringe. Runway claims that the only support for  
10 the induced infringement claim are comments plaintiffs identify by Stability executives, not  
11 statements by anyone associated with Runway.

12 Plaintiffs allege that Runway helped train and develop Stable Diffusion, and therefore,  
13 knew that the product allegedly uses or invokes the training images in its operation. Those  
14 allegations, combined with allegations that Runway actively induces others to download Stable  
15 Diffusion by distributing Stable Diffusion through popular coding websites and also by making

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16  
17 <sup>16</sup> Runway, like the other defendants, picks up on my questions from the prior oral argument to  
18 argue that plaintiffs should be able to point to source code from the "open source" AI products to  
19 identify where in the Stable Diffusion and defendants' AI products copies of plaintiffs' works are  
20 stored. *See, e.g.*, Runway Reply at 4-5. In the FAC, plaintiffs challenge the use of the label  
21 "open source," pointing out that various components of the models, including weights files, are  
22 not open for inspection by all. FAC ¶¶ 147-148. Those allegations satisfy the Court's prior  
23 queries. Runway also relies on a decision by a different judge in this court rejecting derivative  
24 infringement theories in *Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2023 WL  
25 8039640, at \*1 (N.D. Cal. Nov. 20, 2023). In *Kadrey*, the Hon. Vince Chhabria considered  
26 copyright infringement with respect to copyrighted written works that were used to train large  
27 language models ("LLaMA"), software programs designed to produce naturalistic text outputs in  
28 response to user prompts. He dismissed plaintiffs' derivative copyright theories because plaintiffs  
failed to allege that the "LLaMA models themselves" could be understood "as a recasting or  
adaptation of any of the plaintiffs' books" and because there were no allegations that the outputs  
of those models could be "understood as recasting, transforming, or adapting the plaintiffs' books"  
or otherwise producing outputs that were "substantially similar" to aspects of plaintiffs' books.  
*Kadrey*, 2023 WL 8039640 at \*1. The products at issue here – image generators allegedly trained  
on, relying on, and perhaps able to invoke copyrighted images – and the necessary allegations  
regarding the products' training and operations, are materially different from those in *Kadrey*.  
Whether substantial similarity remains a hurdle to specific theories – including any derivative  
infringement theory – depends in part on what the evidence shows concerning how these products  
operate and, presumably, whether and what the products can produce substantially similar outputs  
as a result of "overtraining" on specific images or by design.

1 selling its products (including AI Magic Tools) that include Stable Diffusion, are sufficient. FAC  
2 ¶¶ 83, 163, 185, 352, 358.<sup>17</sup>

3 Runway’s motion to dismiss is DENIED on the infringement claims, GRANTED with  
4 prejudice on the DMCA claims, and GRANTED with leave to amend on the unjust  
5 enrichment/UCL claim.

#### 6 **IV. MIDJOURNEY MOTION TO DISMISS**

7 In addition to moving to dismiss the DMCA and unjust enrichment claims addressed  
8 above, Midjourney moves to dismiss the copyright claims and Lanham Act false endorsement and  
9 trade dress claims<sup>18</sup> asserted against it.

#### 10 **A. Copyright**

##### 11 **1. Registration**

12 Midjourney argues, with respect to three of the named plaintiffs – Anderson, Kaye, and  
13 Brom – that the evidence of their registration of newly identified copyrighted works is  
14 insufficient. With respect to Anderson and Kaye, Midjourney asserts that a subset of each artists’  
15 works identified as being both copyrighted and included in the LAION datasets used to train the  
16 AI products are compilations. It contends that copyright protection only extends to the new  
17 material in compilations and Anderson and Kaye fail to identify which works within the subset of  
18 compilations are the new material. It also argues that for two of three of the works identified by  
19 Brom, the copyright registrations extend only to text and not artwork. Midjourney Mot. at 6-8.

20 It is undisputed that plaintiffs who do not have valid copyright protections will not be able  
21 to pursue copyright claims based on un-registered works or works whose registrations covered  
22 only text. It is also undisputed that *each* of the named plaintiffs who claim their copyright-  
23 protected works were included in the LAION datasets have at least one work whose registration is  
24 facially valid. At this juncture, therefore, the Copyright Act claims survive against Midjourney

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26 <sup>17</sup> Runway’s argument that plaintiffs’ induced infringement claim must fail because plaintiffs do  
27 not plead that Runway’s models lack “substantial non-infringing uses” is rejected for the reasons  
discussed above with respect to Stability. *See supra* at 8-9.

28 <sup>18</sup> 15 U.S.C. § 1125(a) *et seq.*

1 and the other defendants. However, the identification in the FAC and exhibits of unprotected  
2 works is not irrelevant; plaintiffs rely on some of those works to plausibly demonstrate that their  
3 works were used as training images and that their works or elements of their works can be  
4 recreated through the AI products. The identification of those works may not prove liability under  
5 the Copyright Act, but they do provide support for the plausibility of plaintiffs' Copyright Act  
6 theories.

## 7                                   2.        Use as Training Images

8           In my prior Order, I required plaintiffs to clarify the basis of their copyright claims against  
9 Midjourney, as plaintiffs' allegations regarding whether and how Midjourney used plaintiffs'  
10 images in the training of its product were insufficient. October 2023 Order at 13-14. In their  
11 FAC, plaintiffs now allege that Midjourney separately trained its product on the LAION400M and  
12 LAION5B datasets. *See* FAC ¶¶ 266, 274. Plaintiffs also allege that Midjourney incorporates  
13 Stable Diffusion into its own AI product. *Id.* ¶¶ 169-170.

14           Midjourney contests the adequacy of these new allegations with respect to the training of  
15 images, arguing plaintiffs must identify specific, individual registered works that each artist  
16 contends Midjourney actually used for training. Given the unique facts of this case – including the  
17 size of the LAION datasets and the nature of defendants' products, including the added allegations  
18 disputing the transparency of the “open source” software at the heart of Stable Diffusion – that  
19 level of detail is not required for plaintiffs to state their claims. Instead, plaintiffs have added to  
20 their FAC more detailed allegations regarding the training and use of the LAION datasets by  
21 defendants generally and Midjourney specifically. Plaintiffs have plausible allegations showing  
22 why they believe their works were included in the LAION datasets. And plaintiffs plausibly  
23 allege that the Midjourney product produces images – when their own names are used as prompts  
24 – that are similar to plaintiffs' artistic works. *See* FAC Exs. F&G.

25           Midjourney nonetheless argues that these examples are insufficient because some of the  
26 identified works are not registered and the resulting outputs could just as likely be the result of  
27 training on unregistered works or utilizing only unprotected elements from plaintiffs' works. But  
28 plaintiffs' reliance on those exhibits are not to establish copyright infringement as a matter of law.

1 Instead, they are relied on to support the *plausibility* of plaintiffs’ copyright theories (that all or  
 2 most of the works in the LAION datasets were used by Midjourney and the other defendants to  
 3 train their AI products, and that plaintiffs’ works or their protected elements that are contained in  
 4 the AI products as the works or protected elements can be recreated by using the AI products).  
 5 The FAC allegations and the exhibits help plaintiffs cross the plausibility threshold. Whether  
 6 plaintiffs will be able to prove their claims is a different matter and those claims will be tested on  
 7 an evidentiary basis at summary judgment.<sup>19</sup>

8 Midjourney’s motion to dismiss the Copyright Act claims is DENIED.

9 **B. Lanham Act**

10 In place of the right of publicity claims asserted against Midjourney that were dismissed in  
 11 my October 2023 Order, five plaintiffs (Anderson, Brom, Kaye, Ortiz and Rutkowski) now assert  
 12 Lanham Act claims based on theories of false endorsement and trade dress. These plaintiffs allege  
 13 that their names appeared on the list of 4700 artists posted by Midjourney’s CEO on Discord, the  
 14 platform where Midjourney’s AI product operates. Midjourney’s CEO promoted the list as  
 15 describing the various styles of artistic works its AI product could produce. FAC ¶¶ 261-262,  
 16 305.<sup>20</sup> Plaintiffs also allege that Midjourney has itself published user-created images that  
 17 incorporate the plaintiff artists’ names in Midjourney’s “showcase” site. *Id.* ¶ 325(b) & Ex. K.

18 **1. False Endorsement**

19 “To prevail on its Lanham Act trademark claim, a plaintiff must prove: (1) that it has a  
 20 protectible ownership interest in the mark; and (2) that the defendant’s use of the mark is likely to

21 \_\_\_\_\_  
 22 <sup>19</sup> Echoing the arguments made by Runway, Midjourney also challenges the model and  
 23 distribution theories. As above, given the FAC’s plausible allegations regarding training of  
 24 Midjourney’s product and that “copies” or protected elements of some of some plaintiffs’  
 registered works remain in Midjourney’s AI product, these theories survive to be tested on  
 summary judgment.

25 <sup>20</sup> FAC ¶ 305 (“Midjourney’s use of the Midjourney Named Plaintiffs’ names was purely to  
 26 advertise its image generator. This use does not contribute significantly to a matter of public  
 27 interest. The purpose of publishing over 4700 names in the Midjourney Name List was to promote  
 28 and highlight the capabilities of Midjourney’s image generator to emulate and create work that is  
 indistinguishable from that of the artists whose names were published.”); ¶ 309 (“A reasonably  
 prudent consumer in the marketplace for art products likely would be confused as to whether the  
 Midjourney Named Plaintiffs included in the Midjourney Name List sponsored or approved of  
 Midjourney’s image generator.”).

1 cause consumer confusion.” *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1202–203  
2 (9th Cir. 2012) (quoting *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d  
3 1137, 1144 (9th Cir. 2011)). A false designation of origin claim likewise requires a showing of a  
4 likelihood of consumer confusion. *New W. Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201  
5 (9th Cir. 1979) (“Whether we call the violation infringement, unfair competition or false  
6 designation of origin, the test is identical[:] is there a ‘likelihood of confusion?’”).

7 Midjourney contends that plaintiffs fail to allege the first, necessary element of their false  
8 endorsement claim: falsity. They note that plaintiffs do not allege that the Midjourney AI product  
9 cannot recognize works by those included on the Midjourney Names List, and argue that just  
10 because the Names List exists and was promoted by the Midjourney CEO, that by itself cannot  
11 support an inference of endorsement. Midjourney points to a part of the Discord thread (identified  
12 by plaintiffs as the source of the Midjourney CEO’s identification of the Names List) not relied on  
13 by plaintiffs, where the CEO indicated that the names on the list came from “wikipedia and magic  
14 the gathering.” Midjourney MTD, Dkt. No. 169, at 18. Midjourney argues that this part of the  
15 Discord thread is judicially noticeable and dispels any inference that the artists on the lists could  
16 plausibly be considered to have endorsed the Midjourney product.

17 As discussed above, judicial notice of other comments in the thread is not appropriate to  
18 dispute the facts plaintiffs otherwise plausibly assert, especially as the plaintiffs dispute the  
19 accuracy and inferences to be drawn from the totality of the messages in that thread. And even if  
20 the Names List itself was insufficient to support an inference of false endorsement, plaintiffs also  
21 allege that their names were used in connection with works included in Midjourney’s “showcase.”  
22 FAC ¶ 325b. Whether or not a reasonably prudent consumer would be confused or misled by the  
23 Names List and showcase to conclude that the included artists were endorsing the Midjourney  
24 product can be tested at summary judgment. *See Adobe Sys. Inc. v. A & S Elecs., Inc.*, 153 F.  
25 Supp. 3d 1136, 1142 (N.D. Cal. 2015).<sup>21</sup>

26  
27 <sup>21</sup> While the court in *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968) explained that the  
28 “Lanham Act does not prohibit a commercial rival’s truthfully denominating his goods a copy of a  
design in the public domain, though he uses the name of the designer to do so,” that was a case  
where the seller expressly advertised its product as “equivalent” to the trademarked product, which

1 Midjourney also argues that to get past the First Amendment protection provided to  
 2 expressive works, plaintiffs must, but have not, alleged that Midjourney’s use of plaintiffs’ names  
 3 to invoke their styles has “no artistic relevance to the underlying work whatsoever, or, if it has  
 4 some artistic relevance, unless the [use of trademark or other identifying material] explicitly  
 5 misleads as to the source or the content of the work.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235,  
 6 1239 (9th Cir. 2013) (quoting *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir.1989)). However, the  
 7 plaintiffs have plausibly alleged that the use of their names by Midjourney in the List and  
 8 showcase misleads consumers regarding source and endorsement. Open questions also remain  
 9 whether Midjourney promoting its product for commercial gain for use by others to create artistic  
 10 images is *itself* expressive use that creates “artistic relevance” to plaintiffs’ underlying works.  
 11 Discovery may show that it is or that is it not. Unlike in *Brown v. Elec. Arts, Inc.*, where plaintiff  
 12 alleged only that his likeness was used in a video game, we do not yet have the sort of record, or  
 13 sort of alleged use, that could support dismissal of the claim at the motion to dismiss stage.

## 14 2. Vicarious Trade Dress

15 The same five plaintiffs (Anderson, Brom, Kaye, Ortiz and Rutkowski) also allege a trade  
 16 dress claim based on the use of their names in connection with the Midjourney AI product’s use of  
 17 a “CLIP-guided model” that has been trained on the work of the Midjourney Named Plaintiffs and  
 18 allows users to create works capturing the “trade dress of each of the Midjourney Named Plaintiffs  
 19 [that] is inherently distinctive in look and feel as used in connection with their artwork and art  
 20 products.” FAC ¶¶ 321. The CLIP model, plaintiffs assert, works as a trade dress database that  
 21 can recall and recreate the elements of each artist’s trade dress. FAC ¶¶ 83, 320. Plaintiffs point  
 22 to examples showing how Midjourney recreates works with their trade dress in Ex. F to the FAC.

23 Midjourney argues that plaintiffs have failed to state this claim because they have not  
 24 adequately identified the “concrete elements” of each plaintiff’s trade dress. *See, e.g., YZ Prods.*,

25  
 26 \_\_\_\_\_  
 27 the court recognized was promoting competition. *Id.* at 565-66. That case was also admittedly not  
 28 one with allegations of “misrepresentation or confusion as to source or sponsorship,” as here. *Id.*  
 Whether the use of plaintiffs’ names and works in Midjourney’s advertising/promotion or the  
 operation of its product was misleading or is truthful comparative advertising can be tested at  
 summary judgment.

1 *Inc. v. Redbubble, Inc.*, 545 F. Supp. 3d 756, 767 (N.D. Cal. 2021) (“images alone are insufficient  
2 to provide adequate notice dismissing trade dress claim,” and requiring plaintiff to identify “the  
3 concrete elements” of their protected trade dress). It acknowledges that plaintiffs have identified  
4 aspects of their trade dress, *see* FAC ¶ 319,<sup>22</sup> but asserts that those descriptions are impermissibly  
5 broad. *See, e.g., Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 549 F. Supp. 2d 1168, 1176 (N.D.  
6 Cal. 2007 (granting summary judgment on the “some of the elements of plaintiff’s proposed trade  
7 dress [that] are overbroad”). Plaintiffs refute that characterization, arguing instead that they have  
8 identified the “set of recurring visual elements and artistic techniques, the particular combination  
9 of which are distinctive to each of the Midjourney Named Plaintiffs.” *Id.* ¶ 319.

10 While the images from Exhibit F on their own would be insufficient identification, and  
11 while some of the alleged “concrete elements” identified in the FAC are, standing alone, vague  
12 and possibly overbroad, those elements cannot be considered alone but as a whole in the context  
13 of plaintiffs’ other, plausible allegations. *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F. Supp. 3d 1057,  
14 1068 (N.D. Cal. 2015). Here, the combination of identified elements and images, when  
15 considered with plaintiffs’ allegations regarding how the CLIP model works as a trade dress  
16 database, and Midjourney’s use of plaintiffs’ names in its Midjourney Name List and showcase,  
17 provide sufficient description and plausibility for plaintiffs’ trade dress claim.

18 Midjourney also argues that artistic elements or styles identified for each artist that are  
19 allegedly re-creatable by using its product are functional, and therefore not protected.<sup>23</sup> It ignores,

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21 <sup>22</sup> FAC ¶ 319 (“ a. Sarah Andersen is known for work that is simple, cartoony, and often strictly  
22 in black and white. In particular, she is known for “Sarah’s Scribbles,” a comic featuring a young  
23 woman with dark hair, big eyes, and a striped shirt. b. b. Karla Ortiz is known for a mixture of  
24 classical realism and impressionism, often delving into fantastical, macabre and surrealist themes,  
25 and inspired by the technical prowess of American Renaissance movements with a strong  
26 influence of contemporary media. c. Gerald Brom is known for gritty, dark, fantasy images,  
27 painted in traditional media, combining classical realism, gothic and counterculture aesthetics. d.  
28 Grzegorz Rutkowski is known for lavish fantasy scenes rendered in a classical painting style. e.  
29 Julia Kaye is known for three-panel black-and-white comics, loosely inked with a thin fixed-width  
30 pen, wherein each individual comic is a microvignette in the artist’s life.”).

<sup>23</sup> *See Arcsoft*, 153 F. Supp. 3d at 1068 (“To determine whether a claimed trade dress is functional,  
the Ninth Circuit considers several factors: ‘(1) whether the design yields a utilitarian advantage,  
(2) whether alternative designs are available, (3) whether advertising touts the utilitarian  
advantages of the design, and (4) whether the particular design results from a comparatively  
simple or inexpensive method of manufacture.’” (quoting *Apple Inc. v. Samsung Elecs. Co.*, 786



1 however, the Ninth Circuit’s test for determining non-functionality and instead relies on a series of  
 2 inapposite cases addressing jewelry, wooden cutouts, and keychains. *See, e.g., Int’l Ord. of Job’s*  
 3 *Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (use of name and emblem of  
 4 fraternal organization were functional aesthetic components of jewelry); *Crafty Prods., Inc. v.*  
 5 *Michaels Companies, Inc.*, 424 F. Supp. 3d 983, 993 (S.D. Cal. 2019), *aff’d sub nom. Crafty*  
 6 *Prods., Inc. v. Fuqing Sanxing Crafts Co.*, 839 F. App’x 95 (9th Cir. 2020) (plaintiffs failed to  
 7 identify “concrete elements” of their trade dress and instead attempted to capture the “entire  
 8 design” of hundreds of different wooden cardboard pieces); *Au-Tomotive Gold, Inc. v. Volkswagen*  
 9 *of Am., Inc.*, 457 F.3d 1062, 1064 (9th Cir. 2006) (reversing summary judgment protecting  
 10 defendants’ use of trademarked symbols in keychains and license plate holders, as “[t]he doctrine  
 11 of aesthetic functionality does not provide a defense against actions to enforce the trademarks  
 12 against such poaching” or source identification).

13 Midjourney complains that plaintiffs intend to assert a monopoly over some of the  
 14 elements plaintiffs identify as critical parts of their protected trade dress. But that ignores the  
 15 plausible allegations that the CLIP model functions as a trade dress database and the use of its  
 16 product to produce works based on the names of these plaintiffs. Plaintiffs have no protection  
 17 over “simple, cartoony drawings” or “gritty fantasy paintings.” Midjourney Reply, Dkt. No. 184  
 18 at 13. But their trade dress claims must be considered viewing *all* identified elements as well as  
 19 the nature of the use of the CLIP model and their names. Those issues will be tested on an  
 20 evidentiary basis. This claim will not be dismissed based on “aesthetic functionality.”

21 Midjourney contends that the trade dress claim must nonetheless be dismissed because  
 22 plaintiffs allege their trade dress is “either” distinctive or, in the alternative, has acquired  
 23 secondary meaning.<sup>24</sup> However, plaintiffs pleaded secondary meaning. *See* FAC ¶ 328 (“Each of  
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25 F.3d 983, 991 (Fed.Cir.2015)). “In applying these factors and evaluating functionality, ‘it is  
 26 crucial that [the court] focus not on the individual elements, but rather on the overall visual  
 27 impression that the combination and arrangement of those elements create.’” *Arcsoft*, 153 F.  
 28 Supp. 3d at 1068 (quoting *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th  
 Cir.2001)).

<sup>24</sup> As the case relied on by Midjourney, *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138,  
 (9th Cir. 2009), explains: “Secondary meaning can be established in many ways, including (but

1 the Midjourney Named Plaintiffs’ trade dress possesses secondary meaning because the trade  
2 dress of their art products invoke a mental association by a substantial segment of potential  
3 consumers between the trade dress and the creator of the art product.”). Proof of intentional  
4 copying by Midjourney has been alleged, especially considering the allegations regarding the  
5 CLIP model functioning as a trade dress database, the express use of plaintiffs’ names in the  
6 Midjourney Names List to promote the product and the use of some plaintiffs’ names and  
7 likenesses of their works in the Midjourney showcase, and the “mental recognition” of  
8 Midjourney’s calling out of plaintiffs by name.

9 Finally, Midjourney contests the sufficiency of plaintiffs’ vicarious trade dress claim,  
10 arguing that plaintiffs have failed to allege facts of “joint ownership or control” over the infringing  
11 product by Midjourney and any end user. Plaintiffs allege:

12 Midjourney exercises control over the infringing images by including  
13 the CLIP model in its image pipeline, and by marketing artist-name  
14 prompts as a key feature of its image generator via the Midjourney  
15 Name List. Without the CLIP model, Midjourney’s users would not  
16 be able to infringe on the Midjourney Named Plaintiffs’ trade-dress  
17 rights or those of the other artists on the Midjourney Name List.

18 FAC ¶ 326. These allegations support the claim for vicarious trade dress infringement. See, e.g.,  
19 *Y.Y.G.M. SA v. Redbubble, Inc.*, No. 219CV04618RGKJPR, 2020 WL 3984528, at \*9 (C.D. Cal.  
20 July 10, 2020 (“To impose vicarious liability the shared control must extend in some way to the  
21 infringed intellectual property itself.”).

22 Midjourney’s motion to dismiss the Lanham Act claims is DENIED.<sup>25</sup>

23 not limited to) direct consumer testimony; survey evidence; exclusivity, manner, and length of use  
24 of a mark; amount and manner of advertising; amount of sales and number of customers;  
25 established place in the market; and proof of intentional copying by the defendant.’ *Filipino  
26 Yellow Pages, Inc. v. Asian Journal Publ’ns, Inc.*, 198 F.3d 1143, 1151 (9th Cir.1999). To show  
27 secondary meaning, a plaintiff must demonstrate ‘a mental recognition in buyers’ and potential  
28 buyers’ minds that products connected with the [mark] are associated with the same source.’  
*Japan Telecom v. Japan Telecom Am.*, 287 F.3d 866, 873 (9th Cir.2002) (internal quotation  
omitted).” 581 F.3d at 1145.

<sup>25</sup> I acknowledge Midjourney’s reliance on treatises and cases that caution against “extending  
trademark law to intrude into the domain of copyright law.” See McCarthy on Trademarks and  
Unfair Competition § 10:40.50 (5th ed.); see also *id.* (“Is there such a thing as trademark  
protection for the ‘style’ of an artist? Courts have almost uniformly said no.”); *Leigh v. Warner  
Bros.*, 10 F. Supp. 2d 1371, 1380–81 (S.D. Ga. 1998), *aff’d in part, rev’d in part on other  
grounds*, 212 F.3d 1210 (11th Cir. 2000) (no trademark claim based on use of plaintiff’s

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**C. Request for Judicial Notice**

Midjourney requests judicial notice of: (1) messages from a Discord thread, where Midjourney CEO David Holz released “our style list” and posted a link to a spreadsheet on Google Docs called “Midjourney Style List” that contained the named of 4700 artists, under the doctrine of incorporation by reference, Dkt. No. 170-1, Ex. 1; (2) messages in a different Discord thread that plaintiffs rely on in part, where Holz discusses Midjourney’s image-prompt tool, Dkt. No. 170-1, Ex. 2; (3) another Discord thread discussing the image-prompt tool; and (4) a transcript from the hearing before Judge Chhabria in the *Kadrey* case.

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As noted before, judicial notice of documents from the *Kadrey* case is not necessary, as either side can point to the orders from that case to argue their persuasiveness or differences with respect to the sufficiency of the allegations in this case. *See supra* at 15-16. Judicial notice is also not appropriate for any of the three Discord threads to dispute the facts plausibly alleged. For example, Midjourney does not dispute that the list of artists was disclosed and promoted by its CEO, which is the central reason for which plaintiffs rely on that Discord thread and its attachment. Midjourney seeks to rely on the thread to dispute the meaning of the comments by Holz and point to messages that are not relied on by plaintiffs (and whose meanings are disputed by plaintiffs) to foreclose plaintiffs’ claims. That is not appropriate.

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Midjourney’s request for judicial notice is DENIED.

**V. DEVIANTART MOTION TO DISMISS**

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**A. Copyright Claim**

DeviantArt moves again to dismiss the copyright claims asserted against it by attempting to set itself apart from the other defendants. It points out that it has not been alleged to have trained any AI model, but simply to have implemented and used the AI tools provided by Stability and others. It argues that holding it liable for that conduct would make the millions of third parties

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copyrighted photograph because the work “merely identifie[d] the artist rather than any products or services” he sold, it could not “be protected as a trademark,” even if it was an example of his “unique artistic style.”). These cases do not readily fit the allegations plaintiffs raise regarding how Midjourney’s product and other CLIP model products function as trade dress databases, combined with Midjourney’s use of plaintiffs’ names and showcase examples calling out named plaintiffs. This argument is better determined on a full record.

1 who have downloaded and implemented the AI products challenged in this case – many of which  
2 are open source software – liable for infringement, which is unsupportable.

3 In the October 2023 Order, I dismissed the copyright infringement claim asserted against  
4 DeviantArt, explaining:

5 In addition to providing clarity regarding their definition of and theory  
6 with respect to the inclusion of compressed copies of Training Images  
7 in Stable Diffusion, plaintiffs shall also provide more facts that  
8 plausibly show how DeviantArt is liable for direct copyright  
9 infringement when, according to plaintiffs’ current allegations,  
10 DeviantArt simply provides its customers access to Stable Diffusion  
11 as a library. Plaintiffs do cite testimony from DeviantArt’s CEO that  
12 DeviantArt uses Stable Diffusion because Stability allowed  
13 DeviantArt to “modify” Stable Diffusion. Compl. ¶ 129. The problem  
14 is that there are no allegations what those modifications might be or  
15 why, given the structure of Stable Diffusion, any compressed copies  
16 of copyrighted works that may be present in Stable Diffusion would  
17 be copied within the meaning of the Copyright Act by DeviantArt or  
18 its users when they use DreamUp. Nor do plaintiffs provide plausible  
19 facts regarding DeviantArt “distributing” Stable Diffusion to its users  
20 when users access DreamUp through the app or through DeviantArt’s  
21 website.

22 October 2023 Order at 10.

23 DeviantArt argues, first, that plaintiffs’ copyright act claims are barred by the October  
24 2023 Order because plaintiffs still do not allege that DeviantArt itself copied or used their works  
25 to train Stable Diffusion or trained any other program. The FAC alleges only that DeviantArt  
26 incorporates and relies on Stable Diffusion for its DreamUp product. FAC ¶¶ 6, 387-392, 395-397.  
27 Plaintiffs have added allegations to their FAC, however, regarding how copies or protected  
28 elements of their works remain, in some format, in Stable Diffusion and how those works can be  
invoked by use of all of the Stable Diffusion versions. The actual operation of Stable Diffusion  
1.4 and whether the amount of any plaintiff’s copyrighted works in that program suffices for  
copyright infringement or a fair use defense concerning DeviantArt remains to be tested at  
summary judgment.

Moreover, while plaintiffs admittedly did not include assertions or examples in the FAC of  
outputs from DreamUp that appear to copy elements of their works (as they did for the other  
defendants), their added allegations regarding the use of the LAION datasets to train Stable  
Diffusion and how Stable Diffusion versions operates, including specific examples and academic

1 references to the operation of Stable Diffusion 1.4 used by DreamUp, suffice. *See* FAC ¶¶ 132-  
2 137, 388-397. For example, in paragraph 393 plaintiffs assert:

3 On information and belief, by the end of training, Stable Diffusion 1.4  
4 was capable of reproducing protected expression from each of the  
5 LAION-5B Registered Works that was in each case substantially  
6 similar to that registered work, because— a. In the Carlini Paper,  
7 Nicholas Carlini tested Stable Diffusion 1.4 and found that it could  
8 emit stored copies of its training images; b. The training procedure  
9 for Stable Diffusion 1.4 was very similar to that of Stable Diffusion  
10 1.5, which was shown in Exhibit E: Runway text prompts and Exhibit  
11 H: Runway image prompts to be capable of emitting stored copies of  
12 protected expression.

13 *See also* ¶ 394 (“Therefore, like Stable Diffusion 1.5, Stable Diffusion 1.4 also qualifies as an  
14 infringing Statutory Copy of the LAION-5B Registered Works. Because Stable Diffusion 1.4  
15 represents a transformation of the LAION-5B Registered Works into an alternative form, Stable  
16 Diffusion 1.4 also qualifies as an infringing Statutory Derivative Work.”).

17 DeviantArt asks me to review to the full content of one of the academic articles plaintiffs  
18 rely on, the Carlini Study, in particular the article’s conclusion that for the 350,000 training  
19 images studied, only 109 output images were “near-copies” of the training images. *See* DeviantArt  
20 Reply at 4-5. DeviantArt argues that it is simply not plausible that LAION 1.4 can reproduce any  
21 of plaintiffs’ copyrighted works given that the set of training images Carlini selected were the  
22 “most-duplicated” examples, numbering in the millions of impressions in the datasets. *Id.*  
23 Plaintiffs’ reference to Carlini, however, is only one part of the allegations that help make  
24 plaintiffs’ allegations plausible regarding how these products operate and how “copies” of the  
25 plaintiffs’ registered works are captured in some form in the products. As noted above, it is not  
26 appropriate to rely on the defendants’ assertions regarding the method or sample size used by  
27 Carlini and their conclusions from it to foreclose plaintiffs’ claims; plaintiffs aggressively dispute  
28 the implications from the sample size and results of that study. Finally, while the differences  
between Stable Diffusion 1.4 and the other Stable Diffusion versions might be legally significant  
based on what the evidence shows after discovery, at this juncture the allegations about the  
common training of those versions and how they all operate are sufficient to keep plaintiffs’

1 copyright infringement allegations against DeviantArt alive.<sup>26</sup>

2 Finally, DeviantArt contends that any use of plaintiffs' works in Stable Diffusion 1.4  
3 should be considered fair use as a matter of law, given the huge size of the training datasets and  
4 plaintiffs apparent inability to use Stable Diffusion 1.4 to reproduce any works that look similar to  
5 their copyrighted works. Whether DreamUp operates in a way that could draw upon or otherwise  
6 reproduce plaintiffs' works to an extent that violates the Copyright Act and whether a fair use  
7 defense applies are issues that must be tested on an evidentiary basis. *See, e.g., Authors Guild v.*  
8 *Google, Inc.*, 804 F.3d 202, 226 (2d Cir. 2015) (applying fair use defense upon summary judgment  
9 record).

10 DeviantArt's motion to dismiss the Copyright Act claims is DENIED.

11 **B. Breach of Contract**

12 DeviantArt moves again to dismiss the breach of contract claim that plaintiffs assert based  
13 on the same provision of DeviantArt's Terms of Service ("ToS") that I considered in the October  
14 2023 Order. In that Order I explained:

15 In opposition, plaintiffs focus on § 16 of the TOS, a provision not  
16 identified or quoted in their Complaint:

17 16. Copyright in Your Content

18 DeviantArt does not claim ownership rights in Your Content.  
19 For the sole purpose of enabling us to make your Content  
20 available through the Service, you grant to DeviantArt a non-  
21 exclusive, royalty-free license to reproduce, distribute, re-  
22 format, store, prepare derivative works based on, and publicly  
23 display and perform Your Content. Please note that when you  
upload Content, third parties will be able to copy, distribute  
and display your Content using readily available tools on their  
computers for this purpose although other than by linking to  
your Content on DeviantArt any use by a third party of your  
Content could violate paragraph 4 of these Terms and  
Conditions [preserving copyright rights in the original owner

24 \_\_\_\_\_  
25 <sup>26</sup> Given this conclusion, I need not separately reach the question of whether plaintiffs can assert a  
26 theory of derivative copyright infringement based on the use of the diffusion model itself. As  
27 defendants note, the soundness of this theory was questioned in my October 2023 Order and by  
28 other judges in this District, with respect to *output images*. *See* October 2024 Order at 10-13;  
*Tremblay v. OpenAI, Inc.*, No. 23-CV-03223-AMO, 2024 WL 557720, at \*3 (N.D. Cal. Feb. 12,  
2024). Judge Chhabria also rejected the derivative theory as applied to the AI model in *Kadrey v.*  
*Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2023 WL 8039640, at \*1 (N.D. Cal. Nov. 20, 2023).  
But as noted above, the allegations regarding the training and operation of the language models at  
issue in *Kadrey* are significantly different than the image creation models at issue here.

1 of the copyright and disclaiming any ownership interest of  
2 DeviantArt in the posted work] unless the third party receives  
3 permission from you by license.

4 Plaintiffs argue that DeviantArt breached this provision when “it  
5 incorporated Stable Diffusion into its own AI Image product knowing  
6 that Stability had scraped DeviantArt’s artists’ work.” Oppo to  
7 DeviantArt MTD [Dkt. No. 65] at 22. However, section 16 provides  
8 a limited license to DeviantArt and warns that third parties may be  
9 able to copy and violate content-owners’ rights. It does not clearly  
10 cover the conduct that plaintiffs accuse DeviantArt of in this suit;  
11 offering for use a product that a third party may have created in part  
12 by using material posted on DeviantArt’s own site. There are no facts  
13 alleged supporting an allegation that DeviantArt *itself* exceeded the  
14 scope of the limited license.

15 DeviantArt also challenges the ability of plaintiff McKernan and the  
16 unspecified “others” to sue DeviantArt for breach claims based on  
17 contractual provisions prohibiting other users (presumably here,  
18 Stability) from using DeviantArt content for commercial uses. The  
19 Complaint does not allege and is devoid of facts supporting the  
20 inference that Stability is bound by the TOS or that plaintiff  
21 McKernan or others are third party beneficiaries of specific  
22 provisions in the TOS who may sue to enforce terms of agreements  
23 entered between DeviantArt and Stability.

24 The breach of contract claim is DISMISSED with leave to amend. If  
25 plaintiffs attempt to amend this claim, they must identify the exact  
26 provisions in the TOS they contend DeviantArt breached and facts in  
27 support of breach of each identified provision. To the extent plaintiffs  
28 rely on provisions that appear to protect or benefit DeviantArt but not  
the users, or contracts.

17 In the FAC, plaintiffs reallege a violation of Section 16, based on the same theory as  
18 above, and DeviantArt argues it fails for the same reason. *See* FAC ¶¶ 420-422. I agree. For the  
19 reasons discussed in the October 2023 Order, plaintiffs cannot state a breach of contract claim as a  
20 matter of law based on allegations that DeviantArt knew Stable Diffusion was trained on LAION  
21 datasets that had been scraped in part from DeviantArt’s website. As before, there are no  
22 allegations that DeviantArt did anything to permit the scraping of images from its site. Plaintiffs  
23 admit that DeviantArt played no role in the scraping or training. Nothing in the TOS precludes  
24 DeviantArt from using Stable Diffusion, even if it had knowledge that some of the images used in  
25 its training were scraped from its own site and its members’ works.

26 Plaintiffs argue that DeviantArt breached this provision because it is now using – through  
27 its use of Stable Diffusion – its members’ works for purposes beyond “the sole purpose of  
28 enabling us to make your Content available through the Service.” But nothing in Section 16 limits

1 DeviantArt’s ability to use plaintiffs’ works that are available from another source, *i.e.*, the  
2 LAION datasets as incorporated into Stable Diffusion. The breach claim fails, again, as a matter  
3 of law.

4 Plaintiffs added a breach of the implied covenant claim in the FAC, premised also on a  
5 breach of Section 16 of the ToS. *See* ¶ 422b; Dkt. No. 177 at 16.<sup>27</sup> “[T]o state a claim for breach  
6 of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific  
7 contractual provision that was frustrated.” *Rockridge Tr. v. Wells Fargo, N.A.*, 985 F. Supp. 2d  
8 1110, 1156 (N.D. Cal. 2013). DeviantArt argues that the implied covenant claim fails because  
9 plaintiffs do not identify any contractual provision that obligated DeviantArt to protect its users  
10 from competition from DeviantArt or anyone else, or to offer protection from data scraping, or  
11 that would otherwise preclude DeviantArt from using a tool developed by third parties even if that  
12 tool was based in part on works scraped from its site without its involvement. I agree. There is no  
13 basis to find any provision of the ToS was frustrated by DeviantArt’s alleged conduct.

14 The breach of contract claim is DISMISSED. As plaintiffs did not contest this claim at oral  
15 argument, despite my tentative ruling order identifying my intent to dismiss this claim (Dkt. No.  
16 193), and did not suggest any facts they could allege to salvage their breach claim in an amended  
17 complaint, this claim is DISMISSED with prejudice.

### 18 **C. Unjust Enrichment**

19 Consistent with the analysis above, the newly added unjust enrichment claim against  
20 DeviantArt based on use of plaintiffs’ “works to develop and promote DreamUp and the  
21 DreamUp–CompVis Model” that deprived plaintiffs “the benefit of the value of their works” FAC  
22 ¶ 433, is dismissed as preempted under the Copyright Act. In their opposition to DeviantArt’s  
23 motion, plaintiffs imply that the unjust enrichment claim against DeviantArt could be based upon  
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25 <sup>27</sup> FAC ¶422b provides: “DeviantArt breached the implied covenant of good faith and fair dealing.  
26 The release of DreamUp unleashed a flood of AI-generated images on DeviantArt that  
27 immediately began drowning out the work of human artists like the DeviantArt Plaintiffs. By  
28 releasing DreamUp, DeviantArt put itself into competition with the DeviantArt Plaintiffs and its  
other artist members, undermining their very purpose in being on DeviantArt in the first place.  
DeviantArt’s bad faith was further exemplified by its hasty addition of a permissive new ‘Data  
Scraping & Machine Learning Activities’ provision to its Terms of Service after DeviantArt’s  
members complained about the unfairness of DreamUp.”



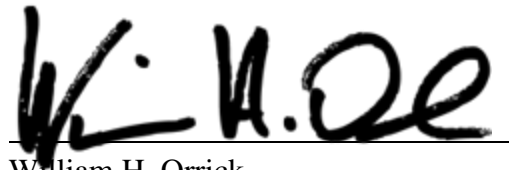
United States District Court  
Northern District of California

1 a different ground; misrepresentations made by DeviantArt to plaintiffs. Plaintiffs’ Oppo. to  
2 DeviantArt at 19. Plaintiffs are given one last attempt to amend their unjust enrichment claims  
3 against each defendant. If the theory underlying plaintiffs’ unjust enrichment claim against  
4 DeviantArt rests on different facts and theories from the unjust enrichment claim asserted against  
5 the other defendants, plaintiffs should make that clear.

6 **CONCLUSION**

7 Defendants’ motions to dismiss the DMCA claims are GRANTED and the DMCA claims  
8 are DISMISSED WITH PREJUDICE. Defendants’ motions to dismiss the unjust enrichment  
9 claims are GRANTED and those claims are DISMISSED with leave to amend. Defendants’  
10 motions to dismiss the Copyright Act claims are DENIED. Midjourney’s motion to dismiss the  
11 Lanham Act claims is DENIED. DeviantArt’s motion to dismiss the breach of contract and breach  
12 of the implied covenant of good faith and fair dealing claims is GRANTED and those claims are  
13 DISMISSED WITH PREJUDICE.

14 Dated: August 12, 2024



William H. Orrick  
United States District Judge

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