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7

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

11
12 SARAH ANDERSEN, an individual;
KELLY MCKERNAN, an individual;
13 KARLA ORTIZ, an individual,

14 Individual and Representative Plaintiffs,

15 v.

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

18 Defendants.
19

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

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

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

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

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

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

12 **STATEMENT OF RELIEF SOUGHT**

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

15 **ISSUES TO BE DECIDED**

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

1 First Amendment; (7) Whether Plaintiffs’ claims of violation of the statutory and common law
2 rights of publicity (Counts IV & V) should be dismissed for failure to plead facts sufficient to hold
3 DeviantArt liable; (8) Whether Plaintiffs’ claim of “unfair competition” (Count VI) should be
4 dismissed for failure to plead facts sufficient to hold DeviantArt liable under 15 U.S.C. § 1125,
5 Cal. Bus. & Prof. Code §§ 17200, or common law unfair competition; (9) Whether Plaintiffs’ claim
6 of breach of contract (Count IX¹) should be dismissed for failure to plead facts sufficient to hold
7 DeviantArt liable and for failing to identify the allegedly breached contract term; and (10) Whether
8 Plaintiffs’ claim for declaratory judgment (Count VII) should be dismissed because Plaintiffs have
9 failed to adequately state any of their underlying claims.

10 Dated: April 18, 2023

Respectfully submitted,

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

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1 **I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

10 II. FACTS ALLEGED

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

16 A. Nonparty Researchers Develop “Diffusion” Technology

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

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

1 93 (alleging that, without copyright management information, creators of training images cannot
2 “know[] or learn[] that the Output is based upon one or more of their works”).

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

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

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

17 At some point between the creation of the LAION datasets and August 2022, Stability AI
18 allegedly used those datasets to train a text-to-image content-generation AI model, called “Stable
19 Diffusion.” *Id.* ¶ 105.³ In August 2022, Stability allegedly released Stable Diffusion to the public
20 on an open-source basis. *Id.* ¶¶ 52–53. And Stable Diffusion was “rapid[ly] adopt[ed]” by
21 programmers shortly after its release. *Id.* ¶ 54. Plaintiffs do not allege that DeviantArt had any
22 knowledge or willing involvement in any of the preceding development efforts, nor do they allege

23
24
25 ² If Plaintiffs try, in their opposition to this motion or in any amended complaint, to change their
26 story and allege that DeviantArt played any role in LAION’s (or Stability’s) alleged scraping
27 activity, which it did not, DeviantArt reserves its right to begin the Rule 11 process and pursue
28 sanctions to the fullest possible extent.

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

1 any relevant conduct by DeviantArt that occurred during this time period.⁴

2 **C. DeviantArt Releases DreamUp**

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

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

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

1 without fear of losing control of their own works.” *Id.*⁵

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

4 Months later, Plaintiffs Sarah Andersen, Kelly McKernan, and Karla Ortiz—each of whom
 5 claims to have “popularized” an “artistic style” that is now “recognizable to the public,” Compl.
 6 ¶¶ 204–05—filed this lawsuit against Stability AI, Midjourney, and DeviantArt. Their Complaint,
 7 brought on behalf of themselves and a vaguely defined putative nationwide class, largely glosses
 8 over which Defendant allegedly did what, requiring a close reading to parse the preceding
 9 chronology. The legal claims are in many respects just as opaque as these factual allegations. But
 10 they largely boil down to the notion that the creation and, in more limited respects, deployment of
 11 Stable Diffusion (as well as any other products that rely on it to generate content) yield civil
 12 liability on more than half a dozen legal theories: (1) direct copyright infringement; (2) vicarious
 13 copyright infringement; (3) violation of the DMCA; (4) violation of California’s statutory and
 14 common law rights of publicity; (5) unfair competition under California law and the Lanham Act;
 15 and (6) breach of contract. *Id.* ¶¶ 153–236.⁶

16 **III. LEGAL STANDARD**

17 To satisfy Rule 8 and survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain
 18 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
 19 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). Those “[f]actual allegations must be
 20 enough to raise a right to relief above the speculative level” and “a formulaic recitation of the
 21 elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 22 The Court need not accept as true conclusory allegations or legal characterizations, nor need it
 23 accept unreasonable inferences or unwarranted factual deductions. *In re Gilead Scis. Sec. Litig.*,
 24 536 F.3d 1049, 1055 (9th Cir. 2008). When a plaintiff raises generalized allegations against

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

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

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

4 **IV. ARGUMENT**

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

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

18 Here, for all but the breach of contract claim (which Plaintiffs bring only against
19 DeviantArt, and which fails for several other reasons discussed below), the Complaint does not
20 “allege what role each defendant played in the alleged harm,” making it “exceedingly difficult, if
21 not impossible, for [DeviantArt] to respond to Plaintiffs’ allegations.” *In re iPhone App. Litig.*,
22 2011 WL 4403963, at *8. Even worse, the Complaint uses this generalized, undifferentiated
23 pleading technique repeatedly to vaguely associate DeviantArt with conduct that it elsewhere
24 makes clear was carried out by *other* Defendants.

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

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

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

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

28

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

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

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

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

7 First, Plaintiffs have failed to satisfy the Copyright Act’s basic prerequisite to filing an
8 infringement lawsuit: registration. Generally, plaintiffs must register their copyrights before they
9 can “institute” a lawsuit alleging infringement of them. 17 U.S.C. § 411(a) (precluding copyright-
10 infringement suit “until preregistration or registration of the copyright claim has been made in
11 accordance with this title”); *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct.
12 881, 887–88 (2019) (affirming dismissal on these grounds). And because Section 411(a) requires
13 registration before “institut[ing]” a copyright infringement action, “[a] plaintiff cannot cure its
14 failure to meet the preconditions set forth in [that statute] by amending its pending complaint.”
15 *UAB “Planner 5D” v. Facebook, Inc.*, No. 19-cv-3132, 2019 WL 6219223, at *7 (N.D. Cal. Nov.
16 21, 2019); *see also Kifle v. YouTube LLC*, No. 21-cv-1752, 2021 WL 1530942, at *6 (N.D. Cal.
17 Apr. 19, 2021) (refusing amendment where plaintiff “registered [a work] after filing suit but before
18 filing” an amended pleading).

19 Here, there are *no* allegations that two Plaintiffs—Ms. Ortiz and Mx. McKernan—
20 registered any works before suing. Their claims must therefore be dismissed. *See Fourth Est.*,
21 139 S. Ct. at 887. And even for Ms. Anderson, the Complaint only alleges she registered “sixteen
22 *collections that include Works used as Training Images.*” Compl. ¶ 28 (emphasis added). It does
23 not identify which “Works” from those collections Defendants supposedly infringed, or even claim
24 that Ms. Anderson ever registered *those* “Works.” This falls far short of plausibly alleging that
25 any (let alone each) of these works meets Section 411(a)’s registration requirement. *See, e.g.*,
26 *Bespaq Corp. v. Haoshen Trading Co.*, No. 04-cv-3698, 2005 WL 14841, at *2 (N.D. Cal. Jan. 3,
27 2005) (dismissing copyright claim under Section 411(a) because complaint “d[id] not identify
28 which preexisting works in the registered catalog have been infringed by the defendants”). Even

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

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

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

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

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

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

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

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

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

1 (emphasis added). Indeed, beyond alleging that DreamUp is unlikely to produce a “close match”
2 for any copyrighted images—which is itself enough to doom any claim of “substantial
3 similarity”—the Complaint also claims that DreamUp’s outputs will be *so dissimilar* from the
4 inputs so as to be unrecognizable even to the artists who created the allegedly infringed works.
5 *See id.* ¶¶ 192–93 (plaintiffs cannot “know[] or “learn” that any given output “is based on one or
6 more of the[ir] Works” without CMI attached to those images). This dooms Plaintiffs’ claim for
7 any output-based theory of direct infringement. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111,
8 1121 (9th Cir. 2018) (affirming dismissal with prejudice of copyright infringement claim because
9 the “works at issue here are as a matter of law not substantially similar”).

10 Perhaps recognizing this core problem, Plaintiffs seem to advance a theory that *any* output
11 of a product like DreamUp is necessarily “derivative,” and thus infringing under Section 106(2),
12 because it is in some sense “based on” Stability AI’s training images. *See id.* ¶¶ 90, 95. But the
13 Ninth Circuit has held that to qualify as a “derivative work” under the Copyright Act, a follow-on
14 creation must be *substantially similar* to the original, not simply “based on” it. *See Litchfield v.*
15 *Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984). Responding to the “novel” argument that
16 Section 106(2) covers “any work *based on* a copyrighted work,” the circuit rejected it as
17 “frivolous,” confirming that “to prove infringement, one must show substantial similarity.” *Id.*
18 (emphasis added); *see also Mulcahy v. Cheetah Learning, LLC*, 386 F.3d 849, 853 (8th Cir. 2004)
19 (adopting the rule in *Litchfield*); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir.
20 1988) (same); *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008)
21 (“A work is not derivative . . . simply because it is ‘based upon’ the preexisting works.”). Under
22 settled law, a “derivative work” must copy protected elements of the original, not just be “based
23 on” it. The Court should reject Plaintiffs’ “frivolous” effort to the contrary.

24 **2. Plaintiffs’ Claim For Vicarious Copyright Infringement Fails**

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

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

11 *First*, Plaintiffs identify no specific directly infringing work for which DeviantArt could
12 be vicariously liable. Their vicarious infringement claim relies entirely on the allegation that
13 unidentified “Imposters” have used the names of unspecified “artists” in text prompts to produce
14 “Fakes” that “can pass as original works by that artist.” *Id.* ¶ 171. But Plaintiffs never identify
15 those “Fakes,” or the copyrighted works they purportedly infringe. This alone requires dismissal.
16 *Livingston v. Morgan*, No. 06-cv-2389, 2006 WL 8459602, at *3 (N.D. Cal. July 31, 2006) (“A
17 complaint for copyright infringement fails to satisfy the requirements of Rule 8(a) if it does not
18 allege the specific copyrighted work that has been infringed or how and when the asserted
19 infringement occurred.” (collecting cases)); *see also, e.g., Nat’l Bus. Dev. Servs.*, 299 F. App’x at
20 512; *Blizzard Ent.*, 149 F. Supp. at 1175; *Flava Works*, 2012 WL 2459146, at *2–3. Moreover,
21 Plaintiffs admit that those “Fakes” are not substantially similar in the copyright-law sense to the
22 artists’ “original works,” Compl. ¶¶ 93, 192, and, at best, reflect only the “artistic style” of the
23 original artist, *id.* ¶ 204. As explained above, “Fakes” that are not substantially similar to
24 Plaintiffs’ works cannot infringe copyrights in those works. *See supra* at 11. And as discussed
25 below, “artistic styles” are unprotectable under the Copyright Act. *See infra* at 17.

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

1 the infringement itself. *See Visa Int’l Serv. Ass’n*, 494 F.3d at 802. The Complaint does not even
 2 mention these elements, much less allege any facts that satisfy them, and this claim should be
 3 dismissed on that ground alone. *See, e.g., Epikhin v. Game Insight N. Am.*, No. 14-cv-4383, 2015
 4 WL 2412357, at *5 (N.D. Cal. May 20, 2015) (plaintiffs “plainly failed” to plausibly allege claim
 5 for vicarious copyright infringement where complaint did “[n]ot even recit[e] the elements of
 6 vicarious copyright infringement, . . . let alone any facts in support of those allegations”). Even
 7 on a strained read, the Complaint does not allege any facts that could be construed as giving
 8 DeviantArt the right or ability to monitor, supervise, control, or prevent the so-called “Impostors”
 9 from intentionally creating “Fakes.” Nor does the Complaint identify any direct financial interest
 10 of DeviantArt in this alleged infringement. Although Plaintiffs allege that *all* DreamUp users pay
 11 a fee, Compl. ¶ 115, they include no allegations that there was a “causal link between the
 12 infringement of the plaintiff[s]’ own copyrighted works and any profit to [DeviantArt],” *Perfect*
 13 *10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017); *see id.* at 674 (requiring plaintiffs to
 14 show a direct financial benefit “from the specific infringement alleged”).⁷

15 3. Plaintiffs’ DMCA Claim Fails

16 Plaintiffs’ DMCA claim is particularly hard to parse. The Complaint does not mention any
 17 facts related to this cause of action until the claim for relief, *see* Compl. ¶¶ 178–200, and, even
 18 there, Plaintiffs essentially repeat the statutory language and conclude that all defendants (again,
 19 with no differentiation) have violated the Act. But even assuming this claim does not violate Rule
 20 8(a)(2), *see supra* at 7, it fails to state a plausible claim for relief.

21 Section 1202 of the DMCA relates to copyright management information, or “CMI.” CMI
 22 is defined by the statute to include the “title and other information identifying the work,” the name
 23 of the work’s creator, the name of the work’s copyright owners, and the information set out in a
 24 notice of copyright. *See* 17 U.S.C. § 1202(c). As relevant here, the DMCA prohibits intentionally
 25 removing or altering CMI from a work, *see id.* § 1202(b)(1), as well as knowingly distributing
 26 removed or altered CMI, *see id.* § 1202(b)(2), or knowingly distributing works or “copies of
 27

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

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

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

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

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

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

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

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

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

1 a DMCA violation.

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

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

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

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

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

1 claims attempt to monopolize the “artistic styles” embodied in fixed visual works they posted on
 2 the internet. Although “copyright does not protect styles,” *McDonald v. West*, 138 F. Supp. 3d
 3 448, 455 (S.D.N.Y. 2015), copyright *preemption* sweeps more broadly than copyright *protection*,
 4 “prevent[ing] states from giving special protection to subject matter that Congress,” through
 5 Section 102(b), “has decided should be in the public domain,” *ProCD, Inc. v. Zeidenberg*, 86 F.3d
 6 1447, 1453 (7th Cir. 1996) (Easterbrook, J.). It is thus well-established that “ideas”—which are
 7 specifically excluded from copyright protection by Section 102(b)—fall within the “subject matter
 8 of copyright” for preemption purposes. *See, e.g., Entous v. Viacom Int’l, Inc.*, 151 F. Supp. 2d
 9 1150, 1159 (C.D. Cal. 2001). And because “artistic styles” are just the kind of “ideas” that
 10 Congress specifically decided to exclude from the universe of copyright protection, they, too, are
 11 within copyright’s subject matter for preemption purposes. *See* 17 U.S.C. § 102(b); *Jewelry 10,*
 12 *Inc. v. Elegance Trading Co.*, No. 88-cv-1320, 1991 WL 144151, at *4 (S.D.N.Y. July 20, 1991)
 13 (“style[s]” are “ideas” and therefore unprotectable); *McDonald*, 138 F. Supp. 3d at 455 (“copyright
 14 does not protect styles” “[f]or the same reason” copyright “does not protect ideas”).⁹

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

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

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

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

11 Plaintiffs’ publicity-rights claims challenge DreamUp’s ability to (1) understand references
 12 to Plaintiffs’ names in users’ text prompts, (2) use those references to identify (unprotectable)
 13 visual elements in the works Plaintiffs posted online, and (3) replicate those (unprotectable) style
 14 elements in visual outputs. Compl. ¶ 171.¹¹ That is not a use of a persona by DeviantArt to “attract
 15 attention” or “for purposes of trade.” Restatement (Third) of Unfair Competition §§ 46, 47 &
 16 cmt. c. Rather, to the extent users have used Plaintiffs’ names in DreamUp prompts (and the
 17 Complaint provides no specific allegations to suggest they have), they used those names “primarily
 18 for the purpose of communicating information or expressing ideas”—that is, as a reference to the
 19 Plaintiffs’ (unprotectable) artistic styles—which is “not generally actionable as a violation of the
 20 person’s right of publicity.” *Id.* § 47 cmt. c.

21 Plaintiffs’ publicity-rights claims also fail for the independent reason that the Complaint
 22 does not allege that *DeviantArt*—as opposed to its users—has used Plaintiffs’ names or likenesses.
 23 “[B]oth the statutory and common law versions of a right of publicity claim require that the
 24 defendant *actually use* the plaintiff’s likenesses.” *Perfect 10, Inc. v. Google, Inc.*, No. 04-cv-9484,
 25 2010 WL 9479060, at *13 (C.D. Cal., July 30, 2010) (citation omitted) (emphasis added). Here,
 26

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

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

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

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

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

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

4 **5. Plaintiffs’ Unfair Competition Law Claim Fails**

5 Plaintiffs assert an “unfair competition” claim under (1) 15 U.S.C. § 1125 (the Lanham
 6 Act), (2) Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”), and (3) the common law, *see Compl.*
 7 ¶¶ 223–26, cursorily alleging “unlawful business practices,” consisting of the alleged
 8 (a) “[i]nfringement of Plaintiffs’ . . . copyrights” and (b) “[v]iolations of Plaintiffs’ . . . rights
 9 under the DMCA,” *id.* ¶ 224. Each iteration of this claim fails.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **V. CONCLUSION**

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

8

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Respectfully submitted,

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