

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

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL TREMBLAY, et al.,
Plaintiffs,
v.
OPENAI, INC., et al.,
Defendants.

Case No. [23-cv-03223-AMO](#)

**ORDER GRANTING
MOTION TO DISMISS
THE UCL CLAIM**

Re: Dkt. No. 122

Before this Court is OpenAI’s motion to dismiss Count II of Plaintiffs’ First Consolidated Amended Complaint (“FCAC”). The matter is fully briefed and suitable for decision without oral argument. Accordingly, the hearing set for **August 1, 2024** is VACATED. *See* Civil L.R. 7-6. This Order assumes familiarity with the facts of the case, the parties’ arguments, and the relevant law. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the Court hereby **GRANTS** the motion for the following reasons.

I. BACKGROUND

On February 12, 2024, the Court granted Defendants’ motion to dismiss with leave to amend the claims for vicarious copyright infringement, violation of the Digital Millennium Copyright Act, negligence, and unjust enrichment. ECF 104. The Court denied the motion to dismiss the Unfair Competition Law (UCL) claim under the “unfair” theory. *Id.* Plaintiffs filed the FCAC, alleging only a direct copyright infringement claim and a UCL claim. ECF 120.¹ Defendants move to dismiss the UCL claim for failure to state a claim. ECF 122 (“Mot.”).

¹ Defendants did not move to dismiss the claim for direct copyright infringement in their initial motion to dismiss, ECF 33, and do not move to dismiss that claim in the instant motion.

1 **II. DISCUSSION**

2 OpenAI argues that Plaintiffs fail to state a UCL claim under either the unlawful or
3 fraudulent prongs and that the unfair prong is preempted by the Copyright Act. Mot. at 10-13.
4 Plaintiffs do not respond to Defendants’ arguments about the “unlawful” or “fraudulent” prongs,
5 thus conceding those theories. See ECF 126 (“Opp.”) at 4-8; *Namisnak v. Uber Techs., Inc.*, 444
6 F. Supp. 3d 1136, 1146 (N.D. Cal. 2020) (citing *Ardente, Inc. v. Shanley*, No. C 07-4479 MHP,
7 2010 WL 546485, at *6 (N.D. Cal. Feb. 10, 2010) (“Plaintiff fails to respond to this argument and
8 therefore concedes it through silence.”). They argue that OpenAI’s motion is procedurally
9 improper under Federal Rule of Civil Procedure 12(g) and that, even if it were not, the Copyright
10 Act does not preempt their UCL claim. Opp. at 4-8. The Court addresses the procedural question
11 before addressing preemption.

12 **A. Rule 12(g) Does Not Preclude Defendants’ Motion**

13 Federal Rule of Civil Procedure 12(g) prohibits a party from making another motion under
14 Rule 12 that “rais[es] a defense or objection that was available to the party but omitted from its
15 earlier motion.” Fed. R. Civ. P. 12(g)(2). Plaintiffs argue that the Court should disallow
16 Defendants’ motion to dismiss their UCL claim on preemption grounds because Defendants could
17 have raised that issue in their first motion to dismiss and failed to do so. Opp. at 4-6. The law is
18 clear, however, that an “amended complaint supersedes the original, the latter being treated
19 thereafter as nonexistent.” *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (citation
20 omitted).

21 In ruling on OpenAI’s motion to dismiss the first Complaint, the Court found that Plaintiffs
22 sufficiently pleaded the UCL claim. ECF 104 at 9-10. Plaintiffs nonetheless amended the UCL
23 claim.² See ECF 120-3 at 18-20. Accordingly, Defendants are permitted to move to dismiss it
24 from the FCAC, and Rule 12(g) does not preclude the Court’s consideration of the motion. See,
25 e.g., *Biddle v. Walt Disney Co.*, No. 22-CV-07317-EJD, 2024 WL 3171860, at *8 (N.D. Cal. June

26 _____

27 ² The Court notes that the pretrial order required filing a consolidated complaint after the Court’s
28 ruling on the motion to dismiss. ECF 74. However, Plaintiffs voluntarily elected to amend the
 UCL claim.

1 25, 2024) (“an amended complaint supersedes any prior complaint and is fairly subject to renewed
 2 challenge on a motion to dismiss”); *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F.
 3 Supp. 2d 880, 893-94 (C.D. Cal. 2012) (“Having chosen to amend their complaint in lieu of
 4 proceeding with their remaining claims, the [amended complaint] supersedes the original and
 5 Defendants are not held to the reconsideration standards”) (citing cases).³ Therefore, the Court
 6 concludes that Rule 12(g) does not bar consideration of OpenAI’s preemption argument.⁴

7 **B. The Copyright Act Preempts Plaintiffs’ UCL Claim**

8 The Copyright Act of 1976 expressly preempts state law claims where the plaintiff’s work
 9 “come[s] within the subject matter of copyright” and the state law grants “legal or equitable rights
 10 that are equivalent to any of the exclusive rights within the general scope of copyright[.]”
 11 17 U.S.C. § 301(a). The rights protected under the Copyright Act include the rights of
 12 reproduction, preparation of derivative works, distribution, performance, and display. *Id.* § 106.
 13 The Ninth Circuit has established a two-part test to determine whether state law claims are
 14 preempted by the copyright law: First, the court decides “whether the ‘subject matter’ of the state
 15 law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.”
 16 *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006). If it does, the court must then
 17 “determine whether the rights asserted under state law are equivalent to the rights contained in 17
 18 U.S.C. § 106[.]” *Id.* at 1137-38. On the other hand, “[i]f a state law claim includes an ‘extra
 19 element’ that makes the right asserted qualitatively different from those protected under the
 20 Copyright Act, the state law is not preempted by the Copyright Act.” *Altera Corp. v. Clear Logic,*
 21 *Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005) (quoting *Summit Mach. Tool Mfg. v. Victor CNC Sys.*, 7

22 _____
 23 ³ See also *Doe #35 v. Labrador*, 679 F. Supp. 3d 1019, 1038 (D. Idaho 2023) (citing cases
 allowing defendants to file a successive motion to dismiss an amended complaint).

24 ⁴ Even if OpenAI should or could have raised preemption in its first motion to dismiss, Ninth
 25 Circuit precedent permits the Court to consider a successive motion to dismiss in its discretion.
 26 See *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 317-18 (9th Cir. 2017), *aff’d sub nom. Apple*
 27 *Inc. v. Pepper*, 587 U.S. 273 (2019) (the Ninth Circuit is “forgiving” when a district court rules
 28 “on the merits of a late-filed Rule 12(b)(6) motion” because strict adherence to Rule 12(g)(2) “can
 produce unnecessary and costly delays”); see also *Columbia Exp. Terminal, LLC v. ILWU-PMA*
Pension Fund, No. 20-CV-08202-JSW, 2023 WL 3510377, at *3 (N.D. Cal. May 16, 2023)
 (concluding that “resolving the [late-filed Rule 12(b)(6)] motion would facilitate judicial economy
 and efficiency”).

1 F.3d 1434, 1439-40 (9th Cir. 1993)).

2 Here, the subject matter of the UCL claim falls within the subject matter of copyright.
3 Plaintiffs allege that Defendants' unfair business practice was "using Plaintiffs' Infringed Works
4 to train ChatGPT without permission" FCAC ¶ 71. The "Infringed Works" are copyrighted
5 books and a play. FCAC ¶¶ 10-22, 66, Ex. A (ECF 120-1) at 1-13. Books and "works, other than
6 audiovisual works, expressed in words, regardless of the nature of the material objects" are
7 considered "literary works," 17 U.S.C. § 101, which fall within the subject matter of copyright, *id.*
8 § 102 (literary works, musical works, and dramatic works are the subject matter of copyright).
9 Thus, the UCL claim based on the copying of Plaintiffs' Infringed Works falls squarely within the
10 ambit of the Copyright Act. *See* 17 U.S.C. § 301(a). In Opposition, Plaintiffs argue that the UCL
11 claim is "also based on the claim that Defendants have unfairly created a commercial product,
12 making available a source of content generation that distorts the legal marketplace in which
13 Plaintiffs and Class members compete." ECF 126 at 8. Plaintiffs do not allege these harms in the
14 FCAC, so they are not part of the UCL claim. Nevertheless, even if Plaintiffs had pleaded these
15 allegations, they only describe the harms that resulted from Plaintiff's unauthorized use and
16 copyright of Plaintiffs' copyrighted books. FCAC ¶¶ 34, 71, 73-74; *see Laws*, 448 F.3d at 1141
17 (concluding that misappropriation claim related to unauthorized duplication of a copyrighted song
18 fell within the subject matter of the Copyright Act). Because the subject matter of the UCL claim
19 involves OpenAI's unauthorized use and copying of Plaintiffs' copyrighted books, the claim falls
20 within the "subject matter" of the Copyright Act. *See Maloney v. T3Media, Inc.*, 853 F.3d 1004,
21 1011 (9th Cir. 2017).

22 The UCL claim is also qualitatively the same as the direct copyright infringement claim.
23 The basis of both claims is the unauthorized copying and use of the Infringed Works to train
24 ChatGPT. FCAC ¶¶ 65-66, 73-74. Even though the elements of the UCL claim are not identical
25 to the copyright claim, "the underlying nature" of Plaintiffs' UCL claim is "part and parcel of [the]
26 copyright claim." *See Laws*, 448 F.3d at 1144; *see also Sybersound Recs., Inc. v. UAV Corp.*, 517
27 F.3d 1137, 1152 (9th Cir. 2008) (finding that dismissal of UCL claim as preempted by the
28 Copyright Act was proper where the "improper business act complained of is based on copyright

United States District Court
Northern District of California

1 infringement”). Accordingly, the Court finds that the UCL claim is preempted by the Copyright
2 Act.

3 The final consideration is whether Plaintiffs should be granted leave to amend. Plaintiffs
4 invoke Ninth Circuit caselaw that leave to amend should be freely granted. Opp. at 8 (citing *Doe*
5 *v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). However, the UCL claim does not lack factual
6 allegations; it lacks a tenable legal theory. See *Brown v. Van’s Int’l Foods, Inc.*, No. 22-CV-
7 00001-WHO, 2022 WL 1471454, at *6 (N.D. Cal. May 10, 2022) (“As the defect lies in the legal
8 theory, not the factual allegations, the dismissal is without leave to amend.”). The Court dismisses
9 the UCL claim without leave to amend as amendment would be futile. See, e.g., *Young Money*
10 *Ent., LLC v. Digerati Holdings, LLC*, No. 2:12-CV-07663-ODW, 2012 WL 5571209, at *9 (C.D.
11 Cal. Nov. 15, 2012) (dismissing UCL claim without leave to amend where the claim was not
12 qualitatively different from the copyright claim and “any attempt to amend the claim to avoid
13 preemption would be futile”).

14 **III. CONCLUSION**

15 For the foregoing reasons, the Court **DISMISSES** the UCL claim without leave to amend.

17 **IT IS SO ORDERED.**

18 Dated: July 30, 2024



ARACELI MARTÍNEZ-OLGUÍN
United States District Judge

19
20
21
22
23
24
25
26
27
28