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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NITA BATRA,

Plaintiff,

v.

POPSUGAR INC.,

Defendant.

Case No. 4:18-CV-03752-HSG

DEFENDANT POPSUGAR INC.'S NOTICE AND MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Date: November 8, 2018
Time: 2pm
Courtroom: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

Date Filed: June 25, 2018

Trial Date: Not Yet Set

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on November 8, 2018, at 2pm or as soon thereafter as the Court directs, before the Honorable Haywood S. Gilliam, Jr., United States District Court, 1301 Clay Street, Courtroom 2, 4th Floor, Oakland, CA 94612, Defendant POPSUGAR INC. ("POPSUGAR") will, and hereby does, move the Court pursuant to Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6) for an order dismissing the Complaint filed by Plaintiff Nita Batra ("Plaintiff") individually and purportedly on behalf of all others similarly situated, and dismissing with prejudice all of Plaintiff's claims for relief.

POPSUGAR respectfully requests that the Court grant this Motion to Dismiss with prejudice on the following grounds:

1. Plaintiff's First Claim for Relief asserts that POPSUGAR violated the Digital Millennium Copyright Act but fails to allege that POPSUGAR knew or should have known that its actions would facilitate a third party's efforts to infringe upon Plaintiff's copyrights or that POPSUGAR actually removed copyright management information (CMI).
2. Plaintiff's Second Claim for Relief asserts that POPSUGAR infringed upon Plaintiff's copyrights, but Plaintiff fails to allege that she either owns the copyrights in the works in question or has applied to register the copyrights of the works in question.
3. Plaintiff's Third, Fourth and Sixth Claims for Relief assert that POPSUGAR violated Plaintiff's California right of publicity, interfered with her performance of a contract, and violated the California Unfair Competition Law, but the Copyright Act preempts these claims. Additionally, Plaintiff has failed to allege that POPSUGAR intended to, or did, interfere with a contract between Plaintiff and a third party.
4. Plaintiff's Fifth Claim for Relief asserts a claim under Section 43 of the Lanham Act, but Plaintiff does not allege that POPSUGAR made an inaccurate statement about a good sold.

POPSUGAR'S Motion is based upon this Notice, the attached Memorandum of Points and Authorities in Support thereof, all pleadings, papers, and submissions before the Court in connection with this action, and upon such further oral or written argument and evidence as may be presented at or prior to the hearing of this matter.

Dated: August 17, 2018

KEKER, VAN NEST & PETERS LLP

By: */s/ Benedict Y. Hur*
BENEDICT Y. HUR
TRAVIS SILVA

Attorneys for Defendant
POPSUGAR INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a copyright-infringement case. But Plaintiff Nita Batra, recognizing that some state-law claims include more favorable damages regimes than might be available under the Copyright Act, pleads more than a copyright-infringement claim. She includes state-law claims for contract interference, unfair competition, and violation of the right of publicity. While creative lawyers sometimes try to plead these claims in copyright cases, Congress has prohibited this very type of end-run around the Copyright Act, a carefully balanced statutory scheme that harmonizes artists' rights, free-speech concerns, the public's right to information and property rights. As Judge Breyer has explained, the Copyright Act includes a "very broad" provision that preempts state-law claims that intrude on the field of copyright.[1] The preemption provision is "stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."[2]

Plaintiff also pleads a Lanham Act claim and a claim under the Digital Millennium Copyright Act (DMCA), a statute designed to reign in digital piracy. Like the preempted state-law claims, these federal claims contain a more plaintiff-friendly damages regime than the Copyright Act. And, also like Plaintiff's state-law claims, the trademark and DMCA claims are improper because they protect against conduct that is plainly not at issue here.

Finally, the Court should dismiss with leave to amend the copyright-infringement claim because Plaintiff failed to provide any information about the copyrights' registration, a precondition to bringing this suit, or about her eligibility for the statutory damages she requests.

The Court should limit this litigation to its proper scope. Narrowing the case will protect the delicate balance Congress struck with the Copyright Act, keep discovery tightly focused on Batra's copyright-infringement claim, and assist the parties in moving the case toward resolution.

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[1] *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1121 (N.D. Cal. 2001).

[2] *Id.* (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746).

II. FACTUAL BACKGROUND

A. Batra is an influencer who exploits photographs that she posts to the Internet.

According to the Complaint,[3] Plaintiff Nita Batra is an "Influencer,"[4] someone who leverages social media to make money by promoting products related to fashion.[5] Plaintiff has posted more than 1,400 images to her Instagram account, which is followed by over 214,000 Internet accounts.[6] Most of her Instagram "images feature Plaintiff wearing fashionable clothing."[7] The photos are arranged on an Instagram profile page containing a "header," and each photo has a "sidebar" that contains "identifying information regarding the author of the photograph, including his or her name and/or links(s) to personal websites(s) or other social media sites, such as a personal YouTube channel."[8]

Plaintiff exploits the photographs she posts to Instagram through an affiliate marketing service called "LIKEtoKNOW.it."[9] Plaintiff's Instagram posts include LIKEtoKNOW.it affiliate links.[10] When clicked on, the link directs the user to a third-party retailer's webpage; there, the user can buy the product featured in the post.[11] When a user purchases the product using Plaintiff's LIKEtoKNOW.it link, "a percentage of the sale price is allocated to Plaintiff."[12] Plaintiff's relationship with LIKEtoKNOW.it is governed by an "Influencer End User License Agreement and Terms of Service Agreement."[13]

B. Batra's infringement allegations

POPSUGAR is a media company that operates popsugar.com, "a website focused on pop

[3] For the purposes of this Motion to Dismiss, POPSUGAR treats Plaintiff's allegations of material facts as true. *See Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994).

[4] Complaint, ECF No. 1 (Compl.) ¶ 12.

[5] *See id.* ¶¶ 1, 11.

[6] *Id.* ¶ 12.

[7] *Id.* ¶ 13.

[8] *Id.* ¶¶ 12, 37.

[9] *Id.* ¶ 11.

[10] *See id.* ¶¶ 1, 13.

[11] *Id.* ¶ 13.

[12] *Id.*

[13] *Id.* ¶ 55.

culture, fashion and lifestyle issues."[14] Plaintiff alleges that beginning last year, POPSUGAR reposted Plaintiff's Instagram photos, along with "top-level Instagram headers to its own website," specifically, to a "subpage" corresponding to Plaintiff.[15] Plaintiff refers to these photos as the "Infringed Images."[16] Plaintiff alleges that POPSUGAR "removed the LIKEtoKNOW.it affiliate links" when it reposted Plaintiff's Instagram photos to its own website.[17] POPSUGAR replaced those links with links provided by a different affiliate shopping platform, ShopStyle.[18] POPSUGAR undertook these acts, Plaintiff alleges, without her permission.[19] Plaintiff alleges that "[t]his had the effect of interfering with the revenue stream from LIKEtoKNOW.it to Plaintiff," though she does not explain how it did so.[20] Plaintiff does not allege that POPSUGAR did anything to remove her Instagram photos from the Internet or that POPSUGAR interfered with Plaintiff's direct control over her Instagram account.

C. Batra seeks to expand this copyright case by pleading state-law claims and representing two plaintiff classes.

The Complaint asserts six causes of action. First, Plaintiff pleads a copyright-infringement claim (second cause of action), alleging that POPSUGAR reproduced Plaintiff's images on its website without her consent.[21] In connection with this claim, Plaintiff alleges that she either holds a copyright registration certificate or has applied for one.[22] No such certificate is appended to her Complaint.

Second, Plaintiff asserts two additional federal claims. She pleads a claim for an alleged violation of the Digital Millennium Copyright Act, purportedly based on POPSUGAR's alleged removal of "information regarding the Influencers' authorship or ownership of the Infringed

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[14] *Id.* ¶¶ 14, 15.
[15] *Id.* ¶¶ 2, 16.
[16] *Id.* ¶ 2.
[17] *Id.* ¶ 17.
[18] *Id.*
[19] *Id.* ¶ 2.
[20] *Id.* ¶ 17.
[21] *Id.* ¶ 3.
[22] *Id.* ¶ 42.

Images," as well as "other information from the posts."[23] Plaintiff also pleads a claim under Section 43(a) of the Lanham Act, alleging that POPSUGAR's alleged conduct created a "false impression" that Plaintiff endorsed or is affiliated with POPSUGAR.[24]

Finally, in addition to these federal claims, Plaintiff pleads three claims arising from California law. She pleads a statutory right-of-publicity claim; a contract-interference claim; and a claim under the Unfair Competition Law (UCL).[25] The UCL claim is derivative of the five freestanding claims.[26]

Plaintiff seeks to represent two classes. She first proposes a general class of "all persons whose Infringed Images Defendant reposted to popsugar.com."[27] She also proposes either a second class or a subclass (the Complaint is unclear) comprised of "all persons (a) whose Infringed Images Defendant posted without authorization to popsugar.com, (b) where those images were registered with the Copyright Office at the time or within three months of their publication."[28] Plaintiff asks the Court (i) to award actual damages, restitution, statutory damages "of up to $150,000 for each Infringed Image" for her copyright-infringement claim, statutory damages of up to $750 for each violation of the right of privacy, and punitive damages; (ii) to issue an injunction; (iii) to issue an order seizing POPSUGAR's property; and (iv) to award attorneys' fees, costs, and interest.[29] Plaintiff filed her Complaint on June 25, 2018.

On July 20, 2018, POPSUGAR removed a lawsuit brought by another influencer, *O'Brien v. POPSUGAR INC.*, No. 18-cv-04405, to this Court. The factual allegations in *O'Brien* overlap those in this case; the Plaintiff in this case asserts three of the four claims asserted in *O'Brien*; and the proposed class in *O'Brien* appears to consist of members of the principal class proposed in

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[23] *Id.* ¶ 3.

[24] *Id.*

[25] *Id.*

[26] *See id.* ¶ 71.

[27] *Id.* ¶ 27.

[28] *Id.* ¶ 28. Both classes carve out putative class members whose claims are barred by the statute of limitations, who are employed by or affiliated with POPSUGAR, and the Court and certain judicial staff. *Id.* ¶¶ 27, 28.

[29] *Id.* pp. 12-13.

this case who are citizens of California.[30] The Court related *O'Brien* to this case on August 7, 2018.[31]

The parties stipulated to extend POPSUGAR's time to respond to the Complaint in this case.[32] POPSUGAR files this Motion to Dismiss within the stipulated time.

III. LEGAL STANDARD

To survive a Rule 12(b)(6) motion, the Complaint must contain "'well-pleaded factual allegations'" that—if proven—"'plausibly give rise to an entitlement to relief.'"[33] "Determining whether a complaint states a plausible claim for relief " is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[34] While the Court will accept the plaintiff's factual allegations as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim.[35] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do'" and the Complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[36] The Court must dismiss any state-law claim that is

[30] ECF No. 22 (July 26, 2018 Administrative Motion to Relate Cases).

[31] ECF No. 22 (Aug. 7, 2018 Order)

[32] ECF No. 16 (July 17, 2018 Stipulation)

[33] *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

[34] *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

[35] *Id.* at 678.

[36] *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

preempted by federal law.[37]

IV. ARGUMENT

A. Plaintiff has failed to allege a violation of the DMCA.

In her first cause of action, Plaintiff claims POPSUGAR violated 17 U.S.C. § 1202(b)(1), which prohibits the removal or alteration of any copyright management information (CMI).[38] But Plaintiff has not come close to alleging sufficient facts to support such a claim.

1. Congress enacted the DMCA to stop new forms of digital piracy.

"Fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity of conventional copyright enforcement to find and enjoin unlawfully copied material," Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998 "to combat copyright piracy in its earlier stages, before the work was even copied."[39] The DMCA targets digital pirates who seek to "circumvent" or "traffic in" industry-sponsored technologies that block online piracy, such as, for example, encryption protocols that stop digital pirates from creating counterfeit DVDs.[40] The principal anti-circumvention provisions are codified at 17 U.S.C. § 1201.

To further the purpose of Section 1201, Congress enacted Section 1202, which prohibits individuals from "intentionally remov[ing] or alter[ing] any copyright management information . .

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[37] *See Close v. Sotheby's Inc.*, 894 F.3d 1061 (9th Cir. 2018) (affirming dismissal of state-court claim preempted by Copyright Act); *e.g.*, *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1128 (N.D. Cal. 2001) (dismissing state-law claim preempted by Copyright Act); *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1074 (N.D. Cal. 2016) (same); *Zito v. Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1027 (N.D. Cal. 2003) (same); *Dielsi v. Falk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996) (same); *Halpern v. Uber Techs., Inc.*, No. 15-CV-02401-JSW, 2015 WL 4572433, at *4 (N.D. Cal. July 29, 2015) (same); *AJ Mgmt. Consulting, LLC v. MBC FZ-LLC*, No. 13-CV-03213-BLF, 2014 WL 2878891, at *7 (N.D. Cal. June 24, 2014) (same); *Brian Jonestown Massacre v. Davies*, No. 13-CV-04005 NC, 2014 WL 4076549, at *4 (N.D. Cal. Aug. 18, 2014) (same); *AF Hodlings, LLC v. Doe*, No. 5:12-CV-02048-EJD, 2012 WL 4747170, at *3 (N.D. Cal. Oct. 3, 2012) (same); *Bierman v. Toshiba Corp.*, No. C-10-4203 MMC, 2010 WL 4716879, at *2 (N.D. Cal. Nov. 12, 2010) (same); *Shade v. Gorman*, No. C 08-3471 SI, 2009 WL 196400, at *5 (N.D. Cal. Jan. 28, 2009) (same); *Beilstein-Institut Zur Forderung Der Chemischen Wissenschaften v. MDL Info. Sys., Inc.*, No. C 04-05368 SI, 2006 WL 3218719, at *4 (N.D. Cal. Nov. 7, 2006) (same).

[38] Compl. ¶¶ 35-39; *see* 17 U.S.C. § 1202(b)(1).

[39] *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001).

[40] *Id.*; *see id.* at 436-37.

. knowing, or . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under" Title 17.[41] Congress defined CMI to include eight narrowly defined, statutorily enumerated categories of information.[42] In enacting the DMCA, legislators hoped that CMI would "assist in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership," help to facilitate licensing Internet-based copyright, and discourage piracy.[43] The DMCA permits prevailing plaintiffs to recover as statutory damages up to $25,000 per Section 1202 violation.[44]

2. Plaintiff has failed to—and cannot—plead that POPSUGAR possessed the requisite mental state to violate Section 1202(b).

Five days before Plaintiff filed her Complaint, the Ninth Circuit explained in *Stevens v. CoreLogic* the facts a plaintiff must allege to meet the mental-state requirement of Section 1202(b). *Stevens* holds that, consistent with the DMCA's purpose, the plaintiff must make "specific allegations as to how identifiable infringements 'will' be affected" by the removal of CMI.[45] The plaintiff must allege how "the defendant knows or has a reasonable basis to know that the removal or alteration of CMI or the distribution of works with CMI removed ***will*** aid infringement."[46] A "plaintiff bringing a Section 1202(b)(1) claim must offer more than a bare assertion that 'when CMI metadata is removed, copyright infringement plaintiffs lose an important method of identifying a photo as infringing."[47] Instead, the plaintiff must allege that "future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI."[48]

Plaintiff's factual allegations do not meet the requirement of *Stevens*. Plaintiff merely alleges that in "copying and republishing the Infringed Images on its own website, Defendant

[41] 17 U.S.C. § 1202(b)(1).
[42] *See id.* § 1202(c).
[43] *Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1199 (C.D. Cal. 2007).
[44] 17 U.S.C. § 1203(c)(3).
[45] *Stevens v. CoreLogic, Inc.*, — F.3d —, —, 2018 WL 3751423, *4 (9th Cir. 2018).
[46] *Id.* at *5.
[47] *Id.* at *6 (alterations omitted).
[48] *Id.*

omitted the Instagram sidebar. In doing so, Defendant removed and/or altered CMI associated with the infringed images."[49] But Plaintiff fails to allege, as *Stevens* requires, how future infringement of her works is more likely because CMI has allegedly been removed or altered. She has failed to allege, for example, that she uses CMI "to prevent or detect copyright infringement, much less how [she] would do so."[50] She has failed to allege that POPSUGAR was "'familiar with a pattern of conduct' or 'aware of an established modus operandi that will in the future cause a person" to infringe upon her copyrights.[51] These omissions are fatal to her claim.

It is irrelevant that the alleged CMI removal occurred incident to POPSUGAR's own alleged infringement of the accused images. The "'induce, enable, facilitate or conceal' requirement is intended to limit liability in some fashion—specifically, to instances in which the defendant knows or has a reasonable basis to know that the removal or alteration of CMI or the distribution of works with CMI removed ***will aid infringement***."[52] Even assuming POPSUGAR removed information associated with Plaintiff's photos (and that such information is CMI), that conduct did not hide or otherwise aid the alleged infringement. POPSUGAR did not obscure the origin of the accused images; indeed, Plaintiff specifically alleges that ***POPSUGAR published her name*** on a "top-level Instagram header" that also included her picture.[53] She even alleges that POPSUGAR displayed her name so conspicuously on its website that she was "damaged" by the false implication that she endorses POPSUGAR.[54] This allegation precludes Plaintiff from alleging that POPSUGAR acted with the mental state required by *Stevens*.[55] And, in any event, the DMCA's legislative history demonstrates that Section 1202 is intended to serve a very different purpose than to simply increase liability for an ordinary copyright-infringement claim,

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[49] Compl. ¶ 38.

[50] *Stevens*, 2018 WL 3751423 at *6.

[51] *Id.* at *6 (quoting *U.S. v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010)).

[52] *Id*. at *5 (emphasis added).

[53] Compl. ¶¶ 16, 63.

[54] Compl. ¶¶ 63-64.

[55] *See Stevens*, 2018 WL 3751423 at *5-*6; *cf. Gattoni v. Tibi, LLC*, 254 F. Supp. 3d 659, 664 (S.D.N.Y. 2017) (noting that Defendant's maintaining of a "credit 'tag'" undermines allegations related to mental-state requirement even where some CMI is removed).

such as Plaintiff's second cause of action.[56] Section 1202 protects against high-tech piracy rather than the garden-variety copyright-infringement claim Plaintiff alleges elsewhere in her Complaint.[57] It cannot be invoked here.

3. Plaintiff fails to identify removed CMI.

Not only does Plaintiff ignore the mental-state requirement of Section 1202(b), she also fails to identify any CMI that POPSUGAR removed.

Section 1202 defines CMI in a carefully enumerated list. The list includes the work's title, the author's name or other identifying information, copyright owner's name or other identifying information, and identifying "numbers or symbols referring to such information or links to such information."[58] Plaintiff alleges that POPSUGAR included the "top-level Instagram headers" associated with Plaintiff's and other influencer's photographs.[59] These headers contain Plaintiff's name and profile picture.[60] Plaintiff thus cannot allege that POPSUGAR removed the name or other identifying information of the copyright holder.

Rather, Plaintiff appears to pin her DMCA claim on the alleged removal of an "Instagram sidebar" that features the Instagram account holder's name "and/or link(s) to personal website(s) or other social media site, such as a personal YouTube channel."[61] This, however, is the very type of threadbare, conclusory allegation prohibited by *Iqbal*.[62] Plaintiff fails to make any allegation that references a particular URL or social media account, names her YouTube channel, or otherwise identifies any link that was displayed next to any of her images. She does not even claim that the allegedly removed information would actually identify her. Plaintiff's DMCA claim should therefore be dismissed for this independent reason as well.

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[56] *See Textile Secrets*, 524 F. Supp. 2d at 1199.

[57] Compl. ¶¶ 40-47.

[58] 17 U.S.C. § 1202(c).

[59] Compl. ¶ 16.

[60] *Id*. ¶ 63.

[61] Compl. ¶ 37.

[62] *Iqbal*, 556 U.S. at 678.

B. Plaintiff has failed to state a claim under Section 43(a) of the Lanham Act.

Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), provides for two distinct causes of action; one for false designation of a product's origin (false–origin claim)[63] and a second for false advertising.[64] Plaintiff fails to allege facts to support either claim.

Section 43 prohibits making false statements about products. The Supreme Court has specifically held that a false-origin plaintiff must allege that the defendant made a false statement about "the producer of the tangible goods that are offered for sale."[65] Similarly, a false-advertising claim can only attack statements about "products."[66] In dismissing a Section 43 claim targeting the misappropriation of "creative content," Judge Seeborg has noted that "[c]opyright and trademark law target two different legal concepts" and the "Supreme Court has 'been careful to caution against misuse or over-extension of trademark and related protections into areas traditionally occupied by patent or copyright.'"[67]

Plaintiff attempts to over-extend trademark protections into the copyright domain. Plaintiff does not allege that POPSUGAR made a false statement about the ***product sold to the consumer*** (*i.e.*, the clothing or other items endorsed by Plaintiff). This omission dooms both Section 43 claims. Rather, Plaintiff's Section 43 claims pertain to the alleged misappropriation of her photographs, which has nothing to do with the quality or origin of goods sold by third-party

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[63] To plead a false origin claim, a plaintiff must allege "(1) use in commerce (2) any word, false designation of origin, false or misleading description, or representation of fact, which (3) is likely to cause confusion or misrepresents the characteristics of his or another person's goods or services." *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 902 (9th Cir. 2007).

[64] "There are five elements to a false advertising claim . . . (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products." *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012).

[65] *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003); *accord Freecycle Network*, 505 F.3d at 902 (statement must be "likely to cause confusion or misrepresents the characteristics of his or another person's ***goods or services***") (emphasis added).

[66] *Skydive Arizona*, 673 F.3d at 1110.

[67] *Capcom Co. v. MKR Grp., Inc.*, No. 08-cv-0904 RS, 2008 WL 4661479, at *12 (N.D. Cal. Oct. 20, 2008) (quoting *Dastar*, 539 U.S. at 34).

vendors. Therefore, her Section 43 claims fail on their face.

The Eastern District of Pennsylvania recently dismissed both a Section 43 false-origin and a Section 43 false-advertising claim on virtually identical facts. In *Quadratec, Inc. v. Turn 5, Inc*., both plaintiff and defendant sold identical aftermarket auto parts.[68] The plaintiff alleged that defendant misappropriated its photographs, then leveraged them to promote its products. The court dismissed both Section 43 claims, noting that both parties were "in the business of selling aftermarket Jeep® products. There can be no confusion as to the origin of these goods, because aftermarket Jeep® products—whether sold by Plaintiff or Defendant—are manufactured by the same source."[69] *Quadratec* is indistinguishable from Plaintiff's Section 43(a) claim.

Finally, Plaintiff's false-advertising claim should be dismissed for the independent reason that it does not comply with the pleading requirements of Rule 9. Most Ninth Circuit courts require a plaintiff alleging a cause of action under Section 43(a)(1)(B) to comply with Rule 9.[70] The Ninth Circuit generally requires a plaintiff pleading a false advertising claim to comply with Rule 9.[71] Plaintiff fails to make specifically denominated "Rule 9 allegations," and the specific allegations contained in Paragraphs 60-68 are so threadbare they likely fail to comply with the liberal pleading standards of Rule 8, let alone the more stringent pleading requirements of Rule 9.[72]

C. The Copyright Act preempts Plaintiff's state-law claims.

Plaintiff also attempts to supplement her copyright-infringement claim with three state-law claims. All are preempted by the Copyright Act.

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[68] No. 13-cv-6384, 2015 WL 4876314, (E.D. Penn. Aug. 13, 2015).

[69] *Id.* at *9; *accord id.* at *10 (holding that plaintiff had failed to plead first element of false advertising claim by failing to allege that defendant "made a false or misleading statement about its goods, or about Plaintiff's goods").

[70] *Ecodisc Tech. AG v. DVD Format/Logo Licensing Corp*., 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010); *Architectural Mailboxes, LLC v. Epoch Design, LLC*, No. 10-cv-974 DMS CAB, 2011 WL 1630809, at *5 (S.D. Cal. Apr. 28, 2011) (collecting cases).

[71] *Kearns v. Ford Motor Co*., 567 F.3d 1120, 1125 (9th Cir. 2009) (applying Rule 9 to California UCL claims); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003) (applying Rule 9 to California false advertising claims).

[72] *See Iqbal*, 556 U.S. at 678.

The Copyright Act contains a "very broad" preemption provision, Section 301, which preempts state laws that intrude on the field of copyright.[73] Ninth Circuit courts apply a "two-part test to determine whether a state-law claim is preempted by the Act."[74] The Court will "first determine whether the 'subject matter' of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103. Second, assuming that it does, [the Court will] determine whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders."[75] Courts apply this analysis at the motion-to-dismiss stage.[76]Applying this test demonstrates that Plaintiff is "miscasting [her] causes of action" in an effort to "secure the equivalent of copyright protection under guise of State law,"[77] the exact type of subterfuge Section 301 is designed to prohibit.

Section 301 is a critical component of the Copyright Act, a complex, carefully balanced statutory scheme that protects intellectual property rights. "The challenge of copyright is to strike the 'difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.'"[78] The Copyright Act is a

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[73] *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1121 (N.D. Cal. 2001). In relevant part, Section 301(a) reads:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

[74] *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006).

[75] *Id*. at 1137-38 (footnotes omitted).

[76] *E.g.*, *Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018) (affirming dismissal of preempted claim); *Zito v. Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1027 (N.D. Cal. 2003) (dismissing preempted claims); *see generally supra*, n. 37 (collecting cases).

[77] *Editorial Photocolor Archives, Inc. v. Granger Collection*, 463 N.E.2d 365, 368 (N.Y. 1984) (holding Copyright Act preempted state-law contract-interference and unfair competition claims).

[78] *Harper & Row Publis., Inc. v. Nation Enterp.*, 471 U.S. 539, 580 (1985) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

comprehensive framework that defines the subject matter of copyright,[79] enumerates the exclusive rights copyright holders are entitled to,[80] and provides the remedies available in cases of copyright infringement.[81] The purpose of the preemption provision is to provide for a "general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims."[82] It is "'stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.'"[83] To protect that "vague borderline," the scope of "the Act's preemption is notably broader than the wing of its protection."[84]

1. The subject matter of Plaintiff's state-law claims falls within the scope of Section 102.

The Court must first determine whether the subject matter of Plaintiff's claims falls within the scope of the Copyright Act.[85] By pleading a copyright-infringement claim and focusing this litigation on the reproduction of photographs, Plaintiff concedes as much. Plaintiff alleges that she "post[s] copyrightable photographs that [she] create[s] and own[s] to Instagram."[86] She alleges that she either holds or has applied for a copyright-registration certificate.[87] And she alleges that POPSUGAR infringed upon her copyrights.[88] Courts agree that photographs are

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[79] 17 U.S.C. § 102.

[80] 17 U.S.C. § 106.

[81] 17 U.S.C. §§ 502-506.

[82] *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995).

[83] *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1121 (N.D. Cal. 2001) (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746).

[84] *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011) (quoting *United States* ex rel *Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1463 (4th Cir 1997)).

[85] *See Laws*, 448 F.3d at 1137.

[86] Compl. ¶ 41.

[87] *Id.* ¶ 42.

[88] *Id.* ¶ 43.

copyrightable.[89]

In three relatively recent cases—*Laws v. Sony Music*,[90] *Jules Jordan Video v. 144942 Canada*,[91] and *Maloney v. T3Media*[92]—the Ninth Circuit held that the Copyright Act preempted the state-law claims similar to Plaintiff's; indeed, both *Laws* and *Jules Jordan* reject the same argument Plaintiff is likely to advance to defend her state-law claims. In *Jules Jordan*, for instance, the plaintiff challenged the defendant's unauthorized reproduction of adult motion pictures for which he held the copyright. He argued that his "name, likeness, photograph, and voice appear[ed]" in unauthorized reproductions of his films and he "claimed that the factual basis of his right of publicity claim was the unauthorized reproduction of his performance on the DVDs."[93] The Ninth Circuit "rejected this argument" because while "'California law recognizes an ascertainable interest in the publicity associated with one's voice, we think it is clear that federal copyright law preempts a claim alleging misappropriation of one's voice when ***the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium***.'"[94] As in *Jules Jordan*, the alleged misappropriation of Plaintiff's "likeness"[95] is "entire[ly] . . . contained within a copyrighted medium" and is therefore preempted.[96]

Plaintiff's claim-specific allegations do nothing to change this analysis. In pleading her right-of-publicity claim, Plaintiff refers to the "Infringed Images," calling them "photographs featuring the likeness of Plaintiff."[97] She alleges in conclusory fashion that POPSUGAR

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[89] *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074-77 (9th Cir. 2000).

[90] 448 F.3d 1134 (2006).

[91] 617 F.3d 1146 (2010).

[92] 853 F.3d 1004 (2017); *see also Fleet*, 50 Cal. App. 4th at 1919 (affirming dismissal of preempted right-of-publicity claim).

[93] *Jules Jordan*, 617 F.3d at 1154.

[94] *Id.* at 1153 (quoting *Laws*, 448 F.3d at 1141) (emphasis added). And, for this reason, Plaintiff's claim is distinguishable from *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), in which the plaintiff's right-of-publicity claim stemmed from the defendant's act of designing and marketing distinctive clothing associated with plaintiffs' identities. *Id.* at 1000.

[95] Compl. ¶ 50.

[96] *Jules Jordan*, 617 F.3d at 1153.

[97] Compl. ¶ 50.

misappropriated her name in addition to her likeness,[98] but she does not, as California law requires, explain any direct connection between the use of her name and POPSUGAR's commercial activity[99] and, in any event, the use of her name is indistinguishable from the use of the plaintiff's name in *Laws*.[100] And in pleading her contract-interference claim, Plaintiff alleges that POPSUGAR disrupted contract performance by "intentionally remov[ing] the LIKEtoKNOW.it links" from photographs.[101] So while Plaintiff uses slightly different language in pleading each of these claims, the plain language she uses to describe each confirms that her state-law claims challenge the reproduction of photographs.

2. The rights Plaintiff's state-law claims seek to protect are duplicative of Section 106.

Under the second part of the Ninth Circuit's two-part test, the Court must determine whether the rights asserted by Plaintiffs' state-law claims are equivalent to an exclusive right protected by Section 106. "Section 106 affords copyright owners the 'exclusive rights' to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work."[102] "'To survive preemption, the state cause of action must protect rights which are qualitatively different from copyright rights. The state claim must have an extra element which changes the nature of the action.'"[103] Plaintiff's claims seek to protect rights that fall within the scope of Section 106 and are thus preempted.

a. Plaintiff's right-of-publicity claim is co-extensive with copyright protections.

The Ninth Circuit has held that when the "entirety" of the alleged misappropriation is

[98] *Id.* ¶ 51.

[99] *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

[100] *Laws*, 448 F.3d at 1136 (noting that defendant included plaintiff's name in the booklet accompanying the CD containing the sound recording that was the subject of right-of-publicity claim); *see also Romantics v. Activision Publishing, Inc.*, 574 F. Supp. 2d 758, 762, 768 (E.D. Mich. 2008) (right-of-publicity claim targeting performance of song in video game preempted and noting that plaintiff's name was displayed within video game).

[101] Compl. ¶ 57.

[102] *Maloney*, 853 F.3d at 1019 (quoting 17 U.S.C. § 106).

[103] *Id.* (quoting *Laws*, 448 F.3d at 1143).

"contained within a copyrighted medium," the right-of-publicity claim is preempted.[104] That is the case here. As POPSUGAR illustrates above, Plaintiff's principal allegation pertains to POPSUGAR's publication and public display of photographs.[105] Plaintiff also alleges that POPSUGAR knowingly used Plaintiff's "name" and "likeness" to promote products.[106] But Plaintiff never provides any specific factual allegations to support this "unadorned, the defendant-unlawfully-harmed-me accusation" of the type prohibited by *Iqbal*.[107] She never explains how POPSUGAR leveraged her names or likeness to sell products ***independent of POPSUGAR's alleged use of Plaintiff's photos***. And she never alleges a "direct connection" between the purported use of her name and POPSUGAR's commercial goals.[108] Because ***all*** alleged misappropriation is contained within copyrightable photographs, Plaintiff's right-of-publicity claim is not qualitatively different from her copyright claim and is thus preempted.[109]

b. Plaintiff's contract-interference claim is co-extensive with copyright protections.

"Generally, tortious interference claims (with contract or prospective economic advantage) are held to be preempted because the rights asserted in such claims are not qualitatively different from the rights protected by copyright."[110] The same is true here.

> The principal factual allegation underpinning Plaintiff's contract-interference claim reads:
>
> Defendant intentionally removed the LIKEtoKNOW.it links from Class members' Instagram pages as part of its unauthorized reposting of the Infringed Images to its own website. These actions prevented the performance of the parties' contract or made performance of that contract more difficult.[111]

This is simply another way of alleging that when POPSUGAR reposted Plaintiff's photographs on its website, Plaintiff earned less money. The right Plaintiff seeks to vindicate here—the right

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[104] *Jules Jordan*, 617 F.3d at 1153 (quoting *Laws*, 448 F.3d at 1141) (emphasis added).

[105] *See supra*, p. 13.

[106] Compl. ¶ 49.

[107] *Iqbal*, 556 U.S. at 678.

[108] *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

[109] *See Jules Jordan*, 617 F.3d at 1153.

[110] *Stromback v. New Line Cinema*, 384 F.3d 283, 306 (6th Cir. 2004).

[111] Compl. ¶ 57.

to exploit her copyrightable work—goes to the heart of the Copyright Act's purpose and is protected by Section 106.

The Second Circuit explained this in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[112] a decision widely followed by California courts.[113] There, the defendant photocopied plaintiffs' copyrighted book, a memoir by President Ford, then published a news article based on the facts contained in the photocopied pages before the memoir's publication. The plaintiffs argued that the defendant had destroyed the author's right "to exercise and enjoy the benefit of the pre-book publication serialization rights" and thus committed tortious contract interference. Affirming the District Court's dismissal of that claim, the Second Circuit held that

> If there is a qualitative difference between the asserted right and the exclusive right under the Act of preparing derivative works based on the copyrighted work, we are unable to discern it. In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that it could not possibly be deemed a separate element.[114]

Here, Plaintiff's allegations pertaining to POPSUGAR's "derivative use" of those photographs is "bound up with the [copy]right itself."[115] Any "economic loss resulting from the misappropriation of [a] copyrighted work" is cognizable as a copyright-infringement claim.[116] Plaintiff's contract-

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[112] 723 F.2d 195, 201 (2d Cir. 1983). The Supreme Court granted certiorari in *Harper & Row* and reversed the Second Circuit's analysis pertaining to the defendant's fair use defense. The Supreme Court's decision does not touch on the Second Circuit's preemption discussion. 471 U.S. 539 (1985).

[113] *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1073 (N.D. Cal. 2016) (holding the Section 301 preempts plaintiff's contract-interference claim); *Wilder v. CBS Corp.*, No. 12-CV-8961-SVW-RZ, 2016 WL 693070, at *8 (C.D. Cal. Feb. 13, 2016) (same); *TV One*, 2012 WL 13012674, at *11(same); *Solo v. Dawson*, No. 09-cv-05623-MMM-RCX, 2010 WL 11508000, at *10 (C.D. Cal. Feb. 8, 2010) (same); *see also Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008) (affirming dismissal prospective economic advantage claim as preempted); *Wild v. NBC Universal, Inc.*, 788 F. Supp. 2d 1083 (C.D. Cal. 2011), *reissued without substantive change as*, 2011 WL 13272427 (C.D. Cal. June 28, 2011) (dismissing prospective economic advantage claim); *Aagard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1219 (E.D. Cal. 2004) (same); *Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (same); *Morris v. Atchity*, No. 08-cv-5321-RSWL, 2009 WL 463971, at *10 (C.D. Cal. Jan. 13, 2009); *Maheu v. CBS, Inc.*, 201 Cal. App. 3d 662, 678 (1988) (same).

[114] 723 F.2d at 201.

[115] *Id.*

[116] *TV One LLC v. BET Networks*, No. 11-cv-08983 MMM (EX), 2012 WL 13012674, at *10 (C.D. Cal. Apr. 2, 2012).

interference claim is thus preempted.

c. Plaintiff's UCL claim is co-extensive with copyright protections.

California's UCL protects against unlawful and unfair business practices.[117] "Where, as here, the improper business act complained of is based on copyright infringement,' a UCL claim is 'properly dismissed because it is preempted.'"[118] Indeed, the Ninth Circuit has held repeatedly that the Copyright Act preempts a Section 17200 claim in a copyright-infringement case.[119]

The core of Plaintiff's skeletal UCL claim appears to be that POPSUGAR unjustly enriched itself by republishing Plaintiff's photographs and that POPSUGAR misappropriated Plaintiff's "hard work."[120] But these allegations do "not add any 'extra element' which changes the nature of the action"—indeed, they are "part and parcel of the copyright claim."[121] Section 106 protects a copyright holder's right to exploit her work by publishing a work.[122] And more broadly, the Copyright Act allows plaintiffs to recover profits "attributable to the infringement" where appropriate.[123] Because Plaintiff's UCL claim seeks to vindicate a right already protected by the Copyright Act, it should be dismissed as preempted.[124]

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[117] Cal. Bus. & Prof. Code § 17200.

[118] *Epikhin v. Game Insight N. Am.*, No. 14-CV-04383-LHK, 2015 WL 2412357, at *5 (N.D. Cal. May 20, 2015) (quoting *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008)).

[119] *E.g.*, *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998); *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986).

[120] Compl. ¶ 71. A leading copyright treatise notes that "[u]nfair competition represents the most frequently asserted state claim. Many such claims are preempted since they are typically based on nothing more than the allegation that it is 'unfair' that the defendant copied the plaintiff's 'time, labor, skill and investment.' Courts have rightly held, consistent with the legislative reports, that such allegations do not qualitatively change the nature of an infringement claim." 6 William F. Patry, *Patry on Copyright* § 18:47.

[121] *Del Madera*, 820 F.3d at 977.

[122] 17 U.S.C. § 106(1), (3) & (5).

[123] 17 U.S.C. § 504(b).

[124] *Cf. Systems XIX, Inc. v. Parker*, 30 F. Supp. 2d 1225, 1231 (N.D. Cal. 1998) (holding that the Copyright Act preempts restitution claim where plaintiff sought to recover unjust profits earned from through copyright infringement).

D. Plaintiff contract-interference claim fails for other, independent reasons.

To state a claim for contract interference, Plaintiff must allege: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage."[125] Plaintiff fails to do so.

First, Plaintiff has not sufficiently alleged the existence of a valid contract between her and rewardStyle. Plaintiff makes the conclusory allegation that she had such a contract,[126] but she does not attach the contract to the Complaint, allege particular terms, or specifically identify the contractual terms she believes POPSUGAR disrupted. Such information is critical to pleading a contract-interference claim, and its absence here requires the claim's dismissal.[127]

Second, Plaintiff fails to allege how the conduct at issue was "designed to induce a breach or disruption" of her alleged contract with rewardStyle—or that "actual breach or disruption" occurred.[128] In a contract-interference case, the plaintiff typically alleges that the defendant caused a third party "not to perform the contract."[129] Alternatively, the plaintiff can allege that the defendant's conduct "prevent[ed]" the plaintiff from performing a contract with a third party,

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[125] *Popescu v. Apple Inc.*, 1 Cal. App. 5th 39, 51 (2016) (quoting *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990)).

[126] Compl. ¶ 55.

[127] *E.g.*, *SCEcorp v. Super. Ct.*, 3 Cal. App. 4th 673, 677 (1992) (in a contract-interference case referring to contract as "foundation of the causes of action" and noting it was "attached to the complaint").

[128] *Popescu*, 1 Cal. App. 5th at 51.

[129] Restatement (Second) of Torts § 766; *see Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 39 (1941) (seminal California contract-interference case holding that defendant liable only where it "intentionally and actively induced the ***breach***") (Traynor, J.) (emphasis added); *e.g.*, *Herron v. State Farm Mut. Ins. Co.*, 56 Cal. 2d 202 (1961) (defendant liable where it actively assisted third party in breaching its contract with plaintiff). California generally adheres to the Restatement's view of the contract-interference tort. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1156 (2003); *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 64 (1998), *as modified* (Sept. 23, 1998).

or caused the plaintiff's performance "to be more expensive of burdensome."[130] Here, Plaintiff pleads no facts to support either species of the claim. Plaintiff's rewardStyle contract allegedly obligated rewardStyle to compensate her when Internet users clicked on the links she included with her Instagram content.[131] But Plaintiff does not allege that POPSUGAR's conduct caused rewardStyle to breach its promise to pay Plaintiff commissions when Internet users purchased goods in a sale originating from Plaintiff's Instagram account.[132] And Plaintiff does not allege that POPSUGAR made it more costly or burdensome for her to post photos to her Instagram account, to use the LIKEtoKNOW.it application, or even that she had a contractual obligation to do these things.[133] Accordingly, Plaintiff has failed to state a contract-interference claim.

E. The Court should dismiss Plaintiff's copyright-infringement claim with leave to amend.

Plaintiff does not allege that she has registered any works with the U.S. Copyright Office. Rather, she alleges that she "either hold[s] a copyright registration certificate" or has "applied for a registration certificate."[134] Because alleging possession of copyright registration ***before*** initiating suit is a prerequisite to bringing a copyright-infringement claim, the Court should dismiss this claim, granting Plaintiff leave to amend if she has indeed registered a relevant work.

"[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made."[135] This statute "imposes a type of precondition to suit."[136] A plaintiff may satisfy this precondition by

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[130] Restatement (Second) of Torts § 766A; *see Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1129 (1990) ("We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome."); *e.g.*, *Richardson v. La Rancherita*, 98 Cal. App. 3d 73, 78 (1979) (defendant liable where its conduct caused plaintiff to incur actual costs to perform contract with third party).

[131] *See* Compl. ¶ 55.

[132] *See Imperial Ice Co.*, 18 Cal. 2d at 39.

[133] *See Pac. Gas & Elec. Co.*, 50 Cal. 3d at 1129.

[134] Compl. ¶ 42.

[135] 17 U.S.C. § 411(a).

[136] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 167 (2010).

alleging "receipt by the Copyright Office of a complete application" for copyright registration.[137] "An allegation that [a plaintiff] 'is in the process of registering' the copyright does not plausibly support the inference that the registration had already been made at the time this suit was filed."[138] Here, Plaintiff has not made the necessary allegations. She fails to identify the specific photographs POPSUGAR allegedly publicly displayed without her permission or to allege that she submitted a complete application for their registration prior to initiating suit. Critically, she fails to allege when she first published the photographs, the effective date of their registration, or when POPSUGAR purportedly displayed them. These dates are crucial to this litigation because Plaintiff specifically requests statutory damages[139]—and such damages may be unavailable to Plaintiff depending on the sequencing of initial publication, registration, and alleged infringement. Statutory penalties are unavailable where "the infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work."[140] For that reason, the Court should dismiss her copyright-infringement claim or, alternatively, dismiss her request for statutory damages[141] for failure to plead facts that would support her eligibility for such damages.

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[137] *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010).

[138] *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1143 (N.D. Cal. 2010)

[139] Compl. ¶ 45.

[140] *Id.*

[141] *E.g.*, *Brian Jonestown Massacre v. Davies*, No. 13-CV-04005 NC, 2014 WL 4076549, at *6 (N.D. Cal. Aug. 18, 2014).

V. CONCLUSION

Plaintiff may be able to amend her complaint to allege a copyright-infringement claim against POPSUGAR. But she impermissibly seeks to expand this case by including five causes of action unsupported by the nucleus of operative facts. The Court should dismiss those claims with prejudice for the reasons POPSUGAR provides above.

Dated: August 17, 2018

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