

ORS § 702.001

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.001 Revised Uniform Athlete Agents Act.

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

History

[2017 c.113, § 1](#), effective January 1, 2018.

Annotations

Notes

Codification

This section was enacted into law by the Oregon Legislature but was not added to or made a part of any section of the Oregon Revised Statutes by any legislation. It was assigned the present code section number by the Oregon Legislative Counsel pursuant to its revision authority. See ORS § 173.111 et seq.

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ORS § 702.005

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.005 Definitions.

As used in [ORS 702.005](#) to [702.065](#), [702.200](#), [702.991](#) and [702.994](#) and section 1 of this 2022 Act:

(1) “Agency contract” means an agreement in which a student athlete authorizes a person to negotiate or solicit on behalf of the student athlete a professional sports services contract or an endorsement contract.

(2)

(a) “Athlete agent” means an individual who:

(A) Directly or indirectly recruits or solicits a student athlete to enter into an agency contract; or

(B) For compensation, procures employment or offers, promises, attempts or negotiates to obtain employment for a student athlete as a professional athlete or member of a professional sports team or organization;

(C) For compensation or in anticipation of compensation related to a student athlete’s participation in athletics:

(i) Serves the athlete in an advisory capacity on a matter related to finances, business pursuits or career management decisions; or

(ii) Manages the business affairs of the athlete by providing assistance with bills, payments, contracts or taxes;

(D) In anticipation of representing a student athlete for a purpose related to the athlete’s participation in athletics:

(i) Gives consideration to the athlete or another person;

(ii) Serves the athlete in an advisory capacity on a matter related to finances, business pursuits or career management decisions; or

(iii) Manages the business affairs of the athlete by providing assistance with bills, payments, contracts or taxes; or

(E) Is a licensed, registered or certified professional and offers or provides services to a student athlete customarily provided by members of the profession and the individual:

(i) Also recruits or solicits the athlete to enter into an agency contract;

(ii) Also, for compensation, procures employment or offers, promises, attempts or negotiates to obtain employment for the athlete as a professional athlete or member of a professional sports team or organization; or

(iii) Receives consideration for providing the services calculated using a different method than for an individual who is not a student athlete.

702.005 Definitions.

- (b) “Athlete agent” does not include an individual who:
- (A) Acts solely on behalf of a professional sports team or organization;
 - (B) Is employed by, and acts solely on behalf of, a publicly traded corporation engaged in consumer brand marketing and seeking to negotiate an endorsement contract;
 - (C) Serves a student athlete in an advisory capacity on a matter related to finances, business pursuits or career management decisions and the individual is:
 - (i) An employee of an educational institution acting exclusively as an employee of the institution for the benefit of the institution; or
 - (ii) A student of the educational institution participating in a clinic, studio, lab or other program created by the educational institution for educational, training or support purposes; or
 - (D) Is a licensed, registered or certified professional and offers or provides services to a student athlete customarily provided by members of the profession.
- (3) “Athletic director” means:
- (a) An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs for male students and female students, the athletic program for males or the athletic program for females, as appropriate;
 - (b) If the educational institution is a public or private elementary school or secondary school and the educational institution does not have a person responsible for administering the overall athletic program:
 - (A) The principal of the educational institution; or
 - (B) If the educational institution does not have a principal, the person designated by the governing body of the school district, education service district or charter school to manage the educational institution; or
 - (c) If the educational institution is a technical or vocational school, community college or university and the educational institution does not have a person responsible for administering the overall athletic program:
 - (A) The president of the educational institution; or
 - (B) If the educational institution does not have a president, the person designated by the governing body of the educational institution to manage the educational institution.
- (4) “Contact” means a communication, direct or indirect, between an athlete agent and a student athlete, to recruit or solicit the student athlete to enter into an agency contract.
- (5) “Educational institution” means a public or private elementary school, secondary school, technical or vocational school, community college, university or other educational institution.
- (6) “Endorsement contract” means an agreement under which a student athlete is employed or receives consideration to use on behalf of the other party any value that the student athlete may have because of publicity, reputation, following or fame obtained because of athletic ability or performance.
- (7) “Enrolled” means registered for courses and attending athletic practice or class.
- (8) “Intercollegiate sport” means a sport played at the collegiate level for which eligibility requirements for participation by a student athlete are established by a national association that promotes or regulates collegiate athletics.
- (9) “Interscholastic sport” means a sport played between educational institutions that are not community colleges, colleges or universities.

702.005 Definitions.

- (10) “Licensed, registered or certified professional” means an individual who is licensed, registered or certified as an attorney, dealer in securities, financial planner, insurance agent, real estate broker or sales agent, tax consultant or accountant or a member of a profession, other than that of athlete agent, who is licensed, registered or certified by the state or a nationally recognized organization that licenses, registers or certifies members of the profession on the basis of experience, education or testing.
- (11) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, business or nonprofit entity, joint venture, public body, as defined in [ORS 174.109](#), or any other legal or commercial entity.
- (12) “Professional sports services contract” means an agreement under which an individual is employed, or agrees to render services, as a player on a professional sports team, with a professional sports organization or as a professional athlete.
- (13) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (14)
- (a) “Recruit or solicit” means attempt to influence the choice of an athlete agent by a student athlete or, if the athlete is a minor, a parent or guardian of the athlete.
 - (b) “Recruit or solicit” does not include giving advice on the selection of a particular athlete agent in a family, coaching or social situation unless the individual giving the advice does so because of the receipt or anticipated receipt of an economic benefit, directly or indirectly, from the agent.
- (15) “Registration” means registration as an athlete agent pursuant to [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#).
- (16) “Sign” means, with present intent to authenticate or adopt a record:
- (a) To execute or adopt a tangible symbol; or
 - (b) To attach to or logically associate with the record an electronic symbol, sound or process.
- (17) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.
- (18) “Student athlete” means an individual who is eligible to attend an educational institution who engages in, is eligible to engage in or may be eligible in the future to engage in any interscholastic sport or intercollegiate sport. If an individual is permanently ineligible to participate in a particular interscholastic sport or intercollegiate sport, the individual is not a student athlete for purposes of that sport.

History

[1999 c.1079 § 1](#); [2001 c.300 § 80](#); [2003 c.364 § 56](#); [2005 c.525 § 1](#); [2013 c.54, § 1](#), effective January 1, 2014; [2015 c.767, § 208](#), effective July 27, 2015, operative July 1, 2015; [2017 c.113, § 2](#), effective January 1, 2018; [2021 c.422, § 3](#), effective June 29, 2021; [2022 c.20, § 2](#), effective July 1, 2022.

Annotations

Notes

Amendment Notes

702.005 Definitions.

The 2021 amendment by c. 422 § 3, effective June 29, 2021, added “and section 1 of this 2021 Act” in the introductory language.

The 2022 amendment by c. 20 § 2, effective July 1, 2022, added “and section 1 of this 2022 Act” in the introductory language; added the (2)(b)(i) designation; and added (2)(b)(ii).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.012

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

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702.012 Registration requirement; exceptions; issuance; expiration; renewal; suspension; revocation.

- (1) Except as otherwise provided in subsection (2) of this section, an individual may not act as an athlete agent in Oregon without holding a certificate of registration issued under this section or [ORS 702.019](#).
- (2) Before being issued a certificate of registration, an individual may act as an athlete agent in Oregon for all purposes except entering into an agency contract, if:
 - (a) A student athlete, or another person acting on behalf of the athlete, initiates communication with the individual; and
 - (b) Within seven days after an initial act as an athlete agent, the individual submits an application for registration as an athlete agent in Oregon.
- (3) An agency contract resulting from conduct in violation of this section is void and the athlete agent shall return any consideration received under the contract.
- (4) Except as otherwise provided in subsection (5) of this section, the Department of Education shall issue a certificate of registration to an individual who complies with [ORS 702.017 \(1\)](#) and (2).
- (5) The department may refuse to issue a certificate of registration if the department determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the department may consider whether the applicant has:
 - (a) Pleaded guilty or no contest to, has been convicted of, or has charges pending for a crime that, if committed in Oregon, would be a crime involving moral turpitude or a felony;
 - (b) Made a materially false, misleading, deceptive or fraudulent representation in the application or as an athlete agent;
 - (c) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity;
 - (d) Engaged in conduct prohibited by [ORS 702.027](#);
 - (e) Had a registration or licensure as an athlete agent suspended, revoked or denied or been refused renewal of registration or licensure as an athlete agent in any state;
 - (f) Engaged in conduct the consequence of which was that a sanction, suspension or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student athlete or educational institution; or
 - (g) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty or integrity.
- (6) In making a determination under subsection (5) of this section, the department shall consider:
 - (a) How recently the conduct occurred;

702.012 Registration requirement; exceptions; issuance; expiration; renewal; suspension; revocation.

(b) The nature of the conduct and the context in which it occurred; and

(c) Any other relevant conduct of the applicant.

(7) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the department. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(8) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (7) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The department shall renew the registration if the department determines:

(a) The registration requirements of the other state are substantially similar to or more restrictive than [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#); and

(b) The renewed registration has not been suspended or revoked and no action involving the individual's conduct as an athlete agent is pending against the individual or the individual's registration in any state.

(9) A certificate of registration or a renewal of a registration is valid for two years.

(10) The department may suspend, revoke or refuse to renew a registration for conduct that would have justified denial of registration under subsection (5) of this section.

(11) The department may deny, suspend, revoke or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing.

History

[1999 c.1079 § 2](#); [2005 c.525 § 4](#); [2013 c.54, § 4](#), effective January 1, 2014; [2017 c.113, § 3](#), effective January 1, 2018.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 3 (S.B. 5), effective January 01, 2018 added "or another person acting on behalf of the athlete" in (2)(a); deleted "or whose application has been accepted under ORS 702.017 (3)" at the end of (4); rewrote (5)(a), which formerly read: "Been convicted of a crime that, if committed in Oregon, would be a crime involving moral turpitude or a felony"; and rewrote (8).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

702.012 Registration requirement; exceptions; issuance; expiration; renewal; suspension; revocation.

End of Document

ORS § 702.017

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.017 Application form; contents; issuance of certificate of registration.

- (1) An applicant for registration as an athlete agent shall submit an application for registration to the Department of Education in a form prescribed by the department and, if requested by the department, shall allow the department to take fingerprints for the purpose of requesting a state or nationwide criminal records check under [ORS 181A.195](#).
- (2) The application must be in the name of an individual and, except as otherwise provided in subsection (3) of this section, signed or otherwise authenticated by the applicant under penalty of perjury. The application must state or contain:
 - (a) The name of the applicant and the address of the applicant's principal place of business;
 - (b) The applicant's date of birth and place of birth;
 - (c) The following contact information for the applicant:
 - (A) Cellular and work telephone numbers; and
 - (B) Any means of electronic communication, including a facsimile number, electronic mail address and personal, business or employer website addresses;
 - (d) The following information about the applicant's business or employer, if applicable:
 - (A) Name, address and telephone numbers;
 - (B) The nature of the business; and
 - (C) The type of organization;
 - (e) Each social media account with which the applicant or applicant's business or employer is affiliated;
 - (f) Any business or occupation engaged in by the applicant for the five years preceding the date of submission of the application, including self-employment and employment by others, and any professional or occupational license, registration or certification held by the applicant during that time;
 - (g) A description of the applicant's:
 - (A) Formal training as an athlete agent;
 - (B) Practical experience as an athlete agent; and
 - (C) Educational background relating to the applicant's activities as an athlete agent;
 - (h) The names and addresses of three individuals not related to the applicant who are willing to serve as references;
 - (i) The name, sport and last known team for each individual for whom the applicant acted as an athlete agent during the five years preceding the date of submission of the application;
 - (j) The names and addresses of all persons who are:

702.017 Application form; contents; issuance of certificate of registration.

- (A)** A partner, member, officer, manager, associate or profit sharer of the athlete agent's business or who directly or indirectly hold an equity interest of five percent or greater of the athlete agent's business if the business is not a corporation; and
- (B)** An officer or director of a corporation employing the athlete agent or a shareholder having an interest of five percent or greater in the corporation;
- (k)** A description of the status of any application by the applicant, or any person named under paragraph (j) of this subsection, for a state or federal business, professional or occupational license, other than as an athlete agent, from a state or federal agency, including any denial, refusal to renew, suspension, withdrawal or termination of the license and any reprimand or censure related to the license;
- (L)** Whether the applicant or any person named pursuant to paragraph (j) of this subsection has pleaded guilty or no contest to, has been convicted of, or has charges pending for a crime that, if committed in Oregon, would be a crime involving moral turpitude or a felony, and if so, identification of the following:
 - (A)** The name of the crime;
 - (B)** The law enforcement agency involved; and
 - (C)** If applicable, the date of conviction and penalty imposed;
- (m)** Whether there has been any administrative or judicial determination that the applicant or any person named pursuant to paragraph (j) of this subsection has made a false, misleading, deceptive or fraudulent representation;
- (n)** Whether there has been any denial of an application for, suspension or revocation of, refusal to renew or abandonment of the registration or licensure of the applicant or any person named pursuant to paragraph (j) of this subsection as an athlete agent in any state;
- (o)** Any sanction, suspension or disciplinary action taken against the applicant or any person named pursuant to paragraph (j) of this subsection arising out of occupational or professional conduct;
- (p)** Any instance in which the conduct of the applicant or any person named pursuant to paragraph (j) of this subsection resulted in the imposition of a sanction, suspension or declaration of ineligibility to participate in an interscholastic, intercollegiate or professional athletic event on a student athlete or an educational institution;
- (q)** The name of each student athlete for whom the applicant acted as an athlete agent for the five years preceding the date of submission of the application or, if the athlete is a minor, the name of the parent or guardian of the athlete, together with the athlete's sport and last known team;
- (r)** Whether, within the 15 years preceding the date of submission of the application, the applicant, or any person named pursuant to paragraph (j) of this subsection, has been a defendant or respondent in a civil proceeding, including a proceeding seeking an adjudication of incompetence, and, if so, the date and a full explanation of each proceeding;
- (s)** Whether the applicant, or any person named under paragraph (j) of this subsection, has an unsatisfied judgment or order or a judgment of continuing effect for spousal support or child support and the applicant or person is in arrears as of the date of the application;
- (t)** Whether, within the 10 years preceding the date of submission of the application, the applicant, or any person named pursuant to paragraph (j) of this subsection, was adjudicated as bankrupt or was an owner of a business that was adjudicated as bankrupt;
- (u)** Each state in which the applicant currently is registered as an athlete agent or has applied to be registered as an athlete agent;
- (v)** If the applicant is certified or registered by a professional league or player's association:

702.017 Application form; contents; issuance of certificate of registration.

- (A) The name of the league or association;
 - (B) The date of certification or registration, and the date of expiration of the certification or registration, if any; and
 - (C) If applicable, the date of any denial of an application for, suspension or revocation of, refusal to renew, withdrawal of, or termination of, the certification or registration or any reprimand or censure related to the certification or registration; and
 - (w) Any other information required by the department.
- (3) Instead of proceeding under subsection (2) of this section, an individual registered as an athlete agent in another state may apply for registration as an athlete agent in this state by submitting to the department:
- (a) A copy of the application for registration in the other state;
 - (b) A statement that identifies any material change in the information on the application or verifies there is no material change in the information, signed under penalty of perjury; and
 - (c) A copy of the certificate of registration from the other state.
- (4) The department shall issue a certificate of registration to an individual who applies for registration under subsection (3) of this section if the department determines:
- (a) The application and registration requirements of the other state are substantially similar to or more restrictive than [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#); and
 - (b) The registration has not been suspended or revoked and no action involving the individual's conduct as an athlete agent is pending against the individual or the individual's registration in any state.
- (5) For purposes of implementing subsection (4) of this section, the department shall:
- (a) Cooperate with national organizations concerned with athlete agent issues and agencies in other states that register athlete agents to develop a common registration form and determine which states have laws that are substantially similar to or more restrictive than [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#); and
 - (b) Exchange information, including information related to actions taken against registered athlete agents or their registrations, with those organizations and agencies.

History

[1999 c.1079 § 3](#); [2005 c.730 §§ 41,87](#); [2017 c.113, § 4](#), effective January 1, 2018.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 4 (S.B. 5), effective January 01, 2018 rewrote the section.

Uncodified Provisions

[2017 c.113 § 1](#) provides:

702.017 Application form; contents; issuance of certificate of registration.

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.019

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702.019 Temporary certificate of registration.

The Department of Education may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

History

[2005 c.525 § 6.](#)

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[ORS § 702.023](#)

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702.023 Fees.

(1) An application for registration or renewal of registration must be accompanied by a fee in the following amount:

- (a) \$ 250 for an initial application for registration;
- (b) \$ 150 for an application for registration based upon a certificate of registration or licensure issued by another state;
- (c) \$ 150 for an application for renewal of registration; or
- (d) \$ 150 for an application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state.

(2) Any fees collected under this section by the Department of Education shall be deposited in the Department of Education Account established under [ORS 326.115](#).

History

[2005 c.525 § 7.](#)

Annotations

Notes

Uncodified Provisions

2017 c.113 § 1 provides:

Sec. 1. ORS 702.005 to 702.065, 702.991 and 702.994 shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.027

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702.027 Restrictions on athlete agents.

An athlete agent may not intentionally:

- (1) Initiate contact with a student athlete or, if the athlete is a minor, a parent or guardian of the athlete unless registered under [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#);
- (2) Refuse or fail to retain or permit inspection of the records required to be retained by [ORS 702.059](#);
- (3) Fail to register when required by [ORS 702.012](#);
- (4) Provide materially false or misleading information in an application for registration or renewal of registration;
- (5) Predate or postdate a written agency contract;
- (6) Fail to notify a student athlete or, if the athlete is a minor, a parent or guardian of the athlete before the student athlete, parent or guardian enters into an agency contract for a particular sport that entering into the agency contract may make the student athlete ineligible to participate as a student athlete in that sport; or
- (7) Represent a student athlete who is enrolled in a post-secondary institution of education, if the athlete agent represented a post-secondary institution of education at any time in the preceding four years.

History

[1999 c.1079 § 6](#); [2005 c.525 § 8](#); [2013 c.54, § 5](#), effective January 1, 2014; [2017 c.113, § 9](#), effective January 1, 2018; [2021 c.422, § 2](#), effective June 29, 2021.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 9 (S.B. 5), effective January 01, 2018 added “or, if the athlete is a minor, a parent or guardian of the athlete” in (1) and (6); and added “parent or guardian” preceding “enters into” in (6).

The 2021 amendment by c. 422 § 2, effective June 29, 2021, added (7); and made related changes.

702.027 Restrictions on athlete agents.

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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[ORS § 702.029](#)

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702.029 Notice to athletic director regarding contact with student athlete.

- (1) As used in this section, “communicating or attempting to communicate” means contacting or attempting to contact by an in-person meeting, a record or any other method that conveys or attempts to convey a message.
- (2) Before communicating or attempting to communicate with a student athlete or, if the athlete is a minor, a parent or guardian of the athlete, an athlete agent shall provide written notice to the athletic director of the educational institution at which the student athlete is enrolled. Notice provided under this subsection must state that the athlete agent intends to communicate with:
 - (a) The athlete or, if the athlete is a minor, a parent or guardian of the athlete, to influence the athlete or parent or guardian to enter into an agency contract; or
 - (b) Another individual to have that individual influence the athlete or, if the athlete is a minor, the parent or guardian of the athlete to enter into an agency contract.
- (3) Within 10 days after a communication or attempt to communicate with an athlete agent is initiated by a student athlete or another individual on behalf of the athlete, the agent shall provide written notice to the athletic director of any educational institution at which the athlete is enrolled.
- (4) The written notice required by this section may be delivered personally or by registered or certified mail, electronic mail, facsimile or other electronic means.
- (5) An educational institution that becomes aware of a violation of [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) by an athlete agent shall notify the Department of Education and any professional league or players association with which the institution is aware the agent is licensed or registered of the violation.

History

[2013 c.54, § 3](#), effective January 1, 2014; [2017 c.113, § 7](#), effective January 1, 2018.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 7 (S.B. 5), effective January 01, 2018 added (1); redesignated former (1) as (2); in (2), in the first sentence, substituted “Before communicating or attempting to communicate” for “Before initiating

702.029 Notice to athletic director regarding contact with student athlete.

contact,” added “or, if the athlete is a minor, a parent or guardian of the athlete,” and deleted “or admitted” following “is enrolled” at the end of the sentence, and substituted “intends to communicate with” for “intends to contact a student athlete at the educational institution” in the second sentence; added (2)(a) and (2)(b); added (3); redesignated former (2) as (4); deleted “subsection (1) of” preceding “this section” in (4); and added (5).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.030

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.030 Restrictions on inducement of student athletes; exceptions.

(1) Except as otherwise provided in subsection (2) of this section, an athlete agent, with the intent to induce a student athlete or, if the athlete is a minor, a parent or guardian of the athlete to enter into an agency contract, may not take any of the following actions or encourage any other individual to take or assist any other individual in taking any of the following actions on behalf of the agent:

- (a) Give any materially false or misleading information or make a materially false promise or representation.
- (b) Furnish anything of value to the student athlete before the student athlete enters into an agency contract.
- (c) Furnish anything of value to any individual other than the student athlete or another registered athlete agent.

(2) An athlete agent, who is certified to be an athlete agent in a particular sport by a national association that promotes or regulates intercollegiate athletics and establishes eligibility standards for participation by a student athlete in that sport, may pay expenses incurred before the signing of an agency contract to:

- (a) A student athlete;
- (b) A parent or guardian of the student athlete; or
- (c) An individual who is a member of a class of individuals authorized to receive payment for the expenses by the national association that certified the agent if the expenses are:
 - (A) For the benefit of a student athlete who is a member of a class of student athletes authorized to receive the benefit by the national association that certified the athlete agent;
 - (B) Of a type authorized to be paid by an athlete agent by the national association that certified the athlete agent; and
 - (C) For a purpose authorized by the national association that certified the athlete agent.

History

[2005 c.525 § 11](#); [2017 c.113, § 10](#), effective January 1, 2018; [2019 c.92, § 1](#), effective January 1, 2020.

Annotations

Notes

702.030 Restrictions on inducement of student athletes; exceptions.

Amendment Notes

The 2017 amendment by c. 113, § 10 (S.B. 5), effective January 01, 2018 rewrote the section.

The 2019 amendment by c. 92 § 1 (SB 686), effective January 1, 2020, added the (1) designation; added “Except as otherwise provided in subsection (2) of this section” in (1); redesignated former (1) through (3) as (1)(a) through (1)(c); and added (2).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.047

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.047 Contract requirements.

- (1) A written agency contract must be in a record, signed or otherwise authenticated by the parties.
- (2) A written agency contract must state or contain:
 - (a) The amount and method of calculating the consideration to be paid by the student athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services;
 - (b) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student athlete or, if the athlete is a minor, the parent or guardian of the athlete signed the written agency contract;
 - (c) A description of any expenses that the student athlete agrees to reimburse;
 - (d) A description of the services to be provided to the student athlete;
 - (e) The duration of the contract;
 - (f) The date of execution; and
 - (g) A statement that the athlete agent is registered as an athlete agent in this state and a list of any other states in which the agent is registered as an athlete agent.
- (3) Except where section 1 of this 2021 Act applies, a written agency contract must contain, in close proximity to the signature of the student athlete or, if the athlete is a minor, the signature of the parent or guardian of the athlete, a conspicuous notice in boldfaced type in capital letters stating:

WARNING TO THE STUDENT ATHLETE:

IF YOU OR YOUR PARENT OR GUARDIAN SIGNS THIS CONTRACT:

- (1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT ATHLETE IN YOUR SPORT.
- (2) IF YOU HAVE AN ATHLETIC DIRECTOR, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, OR BEFORE YOU PARTICIPATE IN ANY INTERSCHOLASTIC OR INTERCOLLEGIATE SPORTS EVENT, WHICHEVER OCCURS FIRST, THAT YOU HAVE ENTERED INTO THIS CONTRACT AND PROVIDE THE NAME AND CONTACT INFORMATION OF THE ATHLETE AGENT.
- (3) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.

-
- (4) A written agency contract that does not conform to this section is voidable by the student athlete or, if the athlete is a minor, the parent or guardian of the athlete. If the contract is voided, any consideration received from the athlete agent under the contract to induce entering into the contract is not required to be returned.
- (5) The athlete agent shall give a record of the written agency contract to the student athlete or, if the athlete is a minor, to the parent or guardian of the athlete at the time of execution.
- (6) Except where section 1 of this 2021 Act applies, an agency contract must be accompanied by a separate record signed by the student athlete or, if the athlete is a minor, the parent or guardian of the athlete acknowledging that signing the contract may result in the loss of the athlete's eligibility to participate in the athlete's sport.
- (7) At the time an agency contract is executed, the athlete agent shall give the student athlete or, if the athlete is a minor, the parent or guardian of the athlete a copy in a record of the contract and the separate acknowledgement as required by subsection (6) of this section.
- (8) If a student athlete is a minor, an agency contract must be signed by the parent or guardian of the athlete and the notice required by subsection (3) of this section must be revised accordingly.

History

[1999 c.1079 § 9](#); [2005 c.525 § 12](#); [2013 c.54, § 6](#), effective January 1, 2014; [2017 c.113, § 5](#), effective January 1, 2018; [2021 c.422, § 4](#), effective June 29, 2021.

Annotations

Notes

Amendment Notes

The 2021 amendment by c. 422 § 4, effective June 29, 2021, added "Except where section 1 of this 2021 Act applies" at the beginning of (3).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

[ORS § 702.052](#)

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.052 Right to cancel contract.

- (1) A student athlete or, if the athlete is a minor, the parent or guardian of the athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after entering into the agency contract.
- (2) The right of a student athlete or, if the athlete is a minor, the parent or guardian of the athlete to cancel an agency contract under this section may not be waived.
- (3) If a student athlete, parent or guardian cancels an agency contract, the student athlete, parent or guardian is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student athlete to enter into the contract.

History

[1999 c.1079 § 10](#); [2005 c.525 § 15](#); [2013 c.54, § 7](#), effective January 1, 2014; [2017 c.113, § 8](#), effective January 1, 2018.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 8 (S.B. 5), effective January 01, 2018 added “or, if the athlete is a minor, the parent or guardian of the athlete” in (1) and (2); and added “parent or guardian” twice in (3).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

ORS § 702.054

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.054 Notice of contract.

- (1) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student athlete may participate, whichever occurs first, the athlete agent shall give notice in a record of the existence of the contract to the athletic director of the educational institution at which the student athlete is enrolled or the athlete agent has reasonable grounds to believe the student athlete intends to enroll.
- (2) Within 72 hours after entering into an agency contract or before the next athletic event in which the student athlete may participate, whichever occurs first, the student athlete shall inform the athletic director of the educational institution at which the student athlete is enrolled that the student athlete has entered into an agency contract and the name and contact information of the athlete agent.
- (3) If a student athlete subsequently enrolls at an educational institution after entering into an agency contract, the athlete agent shall notify the athletic director of the institution of the existence of the contract not later than 72 hours after the agent knew or should have known the athlete enrolled.
- (4) If an athlete agent has a relationship with a student athlete before the athlete enrolls in an educational institution and receives an athletic scholarship from the institution, the agent shall notify the institution of the relationship not later than 10 days after the enrollment if the agent knows or should have known of the enrollment and:
 - (a) The relationship was motivated in whole or part by the intention of the agent to recruit or solicit the athlete to enter an agency contract in the future; or
 - (b) The agent directly or indirectly recruited or solicited the athlete to enter an agency contract before the enrollment.

History

[2005 c.525 § 14](#); [2017 c.113, § 6](#), effective January 1, 2018.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 6 (S.B. 5), effective January 01, 2018 added “and the name and contact information of the athlete agent” in (2); and added (3) and (4).

702.054 Notice of contract.

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.057

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

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702.057 Civil remedies available for educational institutions and student athletes.

- (1) An educational institution or student athlete shall have a cause of action against an athlete agent for damages caused by a violation of [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#). In an action under this section, the court may award to the prevailing party costs and reasonable attorney fees.
- (2) For the purposes of this section, damages of an educational institution or student athlete include losses and expenses incurred because, as a result of the conduct of an athlete agent, the educational institution or student athlete was injured by a violation of [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) or was penalized, disqualified or suspended from participation in athletics by a national association for the promotion and regulation of athletics, by an athletic conference or by reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by such an organization.
- (3) A cause of action under this section does not accrue until the educational institution or student athlete discovers or by the exercise of reasonable diligence would have discovered the violation by the athlete agent.
- (4) Any liability of the athlete agent under this section is several and not joint.
- (5) [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) do not restrict rights, remedies or defenses of any person under law or equity.

History

[1999 c.1079 § 11](#); [2005 c.525 § 17](#); [2017 c.113, § 13](#), effective January 1, 2018.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 13 (S.B. 5), effective January 01, 2018 substituted “educational institution or student athlete” for “educational institution” and deleted “or former student athlete” following “athlete agent” wherever it appears.

Uncodified Provisions

702.057 Civil remedies available for educational institutions and student athletes.

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.059

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.059 Retention of records; inspection.

- (1) An athlete agent shall retain the following records for a period of five years:
 - (a) The name and address of each individual represented by the athlete agent;
 - (b) Any agency contract entered into by the athlete agent; and
 - (c) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student athlete to enter into an agency contract.
- (2) Records required by subsection (1) of this section to be retained are open to inspection by the Department of Education during normal business hours of the athlete agent.

History

[2005 c.525 § 16.](#)

Annotations

Notes

Uncodified Provisions

2017 c.113 § 1 provides:

Sec. 1. ORS 702.005 to 702.065, 702.991 and 702.994 shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.063

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.063 Rules.

The State Board of Education may adopt any rules necessary to carry out the provisions of [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#).

History

[1999 c.1079 § 4a](#); [2005 c.525 § 18](#).

Annotations

Notes

Uncodified Provisions

2017 c.113 § 1 provides:

Sec. 1. ORS 702.005 to 702.065, 702.991 and 702.994 shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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[ORS § 702.065](#)

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athlete Agents (§§ 702.001 — 702.175)

702.065 Uniformity of law.

In applying and construing [ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#), the courts, a prosecuting attorney as defined in [ORS 646.605](#) and the Department of Education shall give consideration to the need to promote uniformity of the law with respect to its subject matter among states that have enacted the Uniform Athlete Agents Act.

History

[2005 c.525 § 21](#); [2013 c.54, § 9](#), effective January 1, 2014.

Annotations

Notes

Uncodified Provisions

2017 c.113 § 1 provides:

Sec. 1. ORS 702.005 to 702.065, 702.991 and 702.994 shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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ORS § 702.200

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Student Athletes (§§ 702.200 — 702.990)

702.200 Student athlete rights; name, image or likeness.

(1) As used in this section:

(a) “Athletic association, conference or organization with authority over intercollegiate sports” includes the National Collegiate Athletic Association.

(b) “Post-secondary institution of education” means:

(A) A public university listed in [ORS 352.002](#).

(B) An Oregon-based, generally accredited, private institution of higher education.

(c)

(A) “Student’s rights” means the rights of a student enrolled in a post-secondary institution of education to earn compensation for use of the student’s name, image or likeness and to contract with and retain professional representation or an athlete agent.

(B) “Student’s rights” does not include a right to receive compensation from a postsecondary institution of education.

(2) Except as provided in this section, a post-secondary institution of education or an athletic association, conference or organization with authority over intercollegiate sports may not:

(a) Prohibit, prevent or restrict a student athlete from exercising the student’s rights.

(b) Penalize or retaliate against a student athlete for exercising the student’s rights.

(c) Prohibit a student athlete from participating in an intercollegiate sport for exercising the student’s rights.

(d) Impose an eligibility requirement on a scholarship or grant that requires a student athlete to refrain from exercising the student’s rights.

(e) Prohibit a student athlete from receiving food, drink, lodging or medical expenses or insurance coverage from a third party as compensation for use of the student’s name, image or likeness.

(3)

(a) A student athlete may not enter into a contract that provides compensation to the student athlete for use of the student athlete’s name, image or likeness if terms of the contract conflict with the student athlete’s team rules or with terms of a contract entered into between the student athlete’s post-secondary institution of education and a third party, except neither the team rules nor a contract entered into between the post-secondary institution of education and a third party may prevent a student athlete from earning compensation for use of the student athlete’s name, image or likeness when not engaged in official team activities, including participating in or being part of an advertisement that was created while not engaged in official team activities but that may otherwise be broadcasted, displayed or disseminated at any time.

702.200 Student athlete rights; name, image or likeness.

- (b) A student athlete who enters into a contract that provides compensation to the student athlete for use of the student athlete's name, image or likeness shall disclose the contract to an official of the post-secondary institution of education designated by the institution if the student athlete is a team member or, if the student athlete is not a team member, at the time the student athlete seeks to become a team member.
- (c) If the post-secondary institution of education asserts that the terms of the contract conflict with the team rules or with terms of a contract entered into between the student athlete's post-secondary institution of education and a third party, the institution shall disclose the specific rules or terms asserted to be in conflict to the student athlete or to the student athlete's professional representative or athlete agent if the student athlete is represented.
- (4) A post-secondary institution of education or an athletic association, conference or organization with authority over intercollegiate sports may not provide to a prospective or current student athlete compensation for use of the student athlete's name, image or likeness.
- (5) A student athlete may not contract with or retain a person as the student athlete's professional representative or athlete agent, if the person represented a post-secondary institution of education at any time in the preceding four years.
- (6) Nothing in this section prohibits a post-secondary institution of education from establishing or enforcing a conduct code that is applicable to all students enrolled at the institution.

History

[2021 c.422, § 1](#), effective June 29, 2021.

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[ORS § 702.991](#)

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702.991 Criminal penalties.

- (1) Violation of [ORS 702.027](#) is a Class A misdemeanor.
- (2) An athlete agent who violates [ORS 702.030](#) (1)(b) is guilty of a Class C felony.
- (3) Violation of the athlete agent's 72-hour notice requirement provided under [ORS 702.054 \(1\)](#) is a Class C felony.
- (4) It is a Class A misdemeanor for any person to conduct business as an athlete agent in the State of Oregon unless the person has a valid certificate of registration issued pursuant to [ORS 702.012](#) or [702.019](#).
- (5) It is a Class A misdemeanor for any person to represent to another person by verbal claim, advertisement, letterhead, business card or any other means that the person is an athlete agent unless the person has a valid certificate of registration issued pursuant to [ORS 702.012](#) or [702.019](#).

History

[1999 c.1079 § 12](#); [2005 c.525 § 20](#); [2017 c.113, § 12](#), effective January 1, 2018; [2019 c.92, § 2](#), effective January 1, 2020.

Annotations

Notes

Amendment Notes

The 2017 amendment by c. 113, § 12 (S.B. 5), effective January 01, 2018 added (1); redesignated former (1) through (4) as (2) through (5); and substituted "ORS 702.030 (2)" for "ORS 702.032" in (2).

The 2019 amendment by c. 92 § 2 (SB 686), effective January 1, 2020, substituted "ORS 702.030 (1)(b)" for "ORS 702.030 (2)" in (2).

Uncodified Provisions

[2017 c.113 § 1](#) provides:

[ORS 702.005](#) to [702.065](#), [702.991](#) and [702.994](#) shall be known and may be cited as the Revised Uniform Athlete Agents Act.

702.991 Criminal penalties.

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ORS § 702.994

Current through statutes enacted in the 2023 Regular Session, pending classification of undesignated material and text revision by the Oregon Reviser

LexisNexis® Oregon Annotated Statutes > Title 52 Occupations and Professions (Chs. 670 — 704) > Chapter 702- Student Athlete Agents (§§ 702.001 — 702.995) > Occupations and Professions (§§ 702.001 — 702.995) > Penalties (§§ 702.991 — 702.995)

702.994 Civil penalties.

- (1) The Department of Education may assess a civil penalty against an athlete agent not to exceed \$ 25,000 for a violation of this section and [ORS 702.005](#) to [702.065](#).
- (2) Civil penalties under subsection (1) of this section shall be imposed in the manner provided in [ORS 183.745](#).
- (3) All civil penalties recovered under this section shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses.

History

[2005 c.525 § 19](#).

Annotations

Notes

Uncodified Provisions

2017 c.113 § 1 provides:

Sec. 1. ORS 702.005 to 702.065, 702.991 and 702.994 shall be known and may be cited as the Revised Uniform Athlete Agents Act.

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141 S.Ct. 2141

Supreme Court of the United States.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner

v.

Shawne ALSTON, et al.;

American Athletic Conference, et al., Petitioners

v.

Shawne Alston, et al.

Nos. 20–512 and 20–520

|

Argued March 31, 2021

|

Decided June 21, 2021 ¹

Synopsis

Background: Current and former collegiate student-athletes who played football and basketball brought putative class action alleging that National Collegiate Athletic Association (NCAA) violated federal antitrust law by limiting compensation they could receive in exchange for their athletic services. Following bench trial, the United States District Court for the Northern District of California, [Claudia Wilken](#), Senior District Judge, [375 F.Supp.3d 1058](#), entered judgment in plaintiffs' favor with respect to NCAA rules limiting education-related benefits, and, [2019 WL 1593939](#), ordered permanent injunction enjoining NCAA from limiting education-related benefits that member conferences or schools could provide. Student-athletes and NCAA appealed. The United States Court of Appeals for the Ninth Circuit, [Thomas](#), Chief Judge, [958 F.3d 1239](#), affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice [Gorsuch](#), held that:

[1] rules limiting education-related benefits were subject to rule of reason analysis;

[2] District Court did not require NCAA, contrary to rule of reason analysis, to show that its rules constituted least restrictive means of preserving consumer demand;

[3] District Court did not engage in impermissible product redesign when analyzing rules under rule of reason; and

[4] scope of permanent injunction was appropriate.

Affirmed.

Justice [Kavanaugh](#) filed concurring opinion.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Permanent Injunction.

West Headnotes (25)

[1] Antitrust and Trade Regulation 🔑 Sports

National Collegiate Athletic Association (NCAA) rules limiting education-related benefits for student-athletes who played football and basketball were subject to rule of reason analysis, rather than a quick look, under Sherman Act section prohibiting undue restraints of trade, even if NCAA was joint venture with its member conferences and schools and some degree of coordination between competitors within sports leagues could be procompetitive, since dispute was over whether and to what extent NCAA's restrictions on education-related compensation or benefits in its labor market yielded benefits to its consumer market that could be attained using substantially less restrictive means, and such dispute presented complex questions requiring more than a blink to answer. Sherman Act § 1, 15 U.S.C.A. § 1.

[4 Cases that cite this headnote](#)**[2] Antitrust and Trade Regulation** 🔑 Rule of reason**Antitrust and Trade Regulation** 🔑 Antitrust Law and Joint Ventures

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which is a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition, especially its capacity to reduce output and increase price. Sherman Act § 1, 15 U.S.C.A. § 1.

[10 Cases that cite this headnote](#)**[3] Antitrust and Trade Regulation** 🔑 "Quick look" and other tests

For those restraints of trade at opposite ends of the competitive spectrum—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation under the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

[7 Cases that cite this headnote](#)**[4] Antitrust and Trade Regulation** 🔑 Illegal Restraints or Other Misconduct

Some restraints of trade may be so obviously incapable of harming competition that they require little scrutiny under the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

[3 Cases that cite this headnote](#)**[5] Antitrust and Trade Regulation** 🔑 Per se**Antitrust and Trade Regulation** 🔑 "Quick look" and other tests

Some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look under the Sherman Act section prohibiting undue restraints of trade. Sherman Act § 1, 15 U.S.C.A. § 1.

[11 Cases that cite this headnote](#)**[6] Antitrust and Trade Regulation** 🔑 Sports

While a quick look will often be enough to approve the restraints necessary to produce a game within a sports league under the Sherman Act, a fuller review may be appropriate for other restraints. Sherman Act § 1, 15 U.S.C.A. § 1.

[2 Cases that cite this headnote](#)

[7] **Antitrust and Trade Regulation** 🔑 Relevant Market

Whether an antitrust violation exists necessarily depends on a careful analysis of market realities.

[3 Cases that cite this headnote](#)

[8] **Antitrust and Trade Regulation** 🔑 Purpose of Antitrust Regulation

The policy of the Sherman Act is one of competition and it precludes inquiry into the question whether competition is good or bad. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

[1 Case that cites this headnote](#)

[9] **Antitrust and Trade Regulation** 🔑 Purpose of Antitrust Regulation

The orderly way to temper the Sherman Act's policy of competition is by legislation and not by court decision. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

[2 Cases that cite this headnote](#)

[10] **Antitrust and Trade Regulation** 🔑 Antitrust Exemptions and Defenses

An argument that a particular industry should be exempt from the usual operation of the antitrust laws because of the special characteristics of the industry is properly addressed to Congress.

[11] **Antitrust and Trade Regulation** 🔑 Purpose of Antitrust Regulation

The Sherman Act is predicated on one assumption alone—that competition is the best method of allocating resources in the national economy. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

[1 Case that cites this headnote](#)

[12] **Antitrust and Trade Regulation** 🔑 Presumptions and burden of proof

An antitrust plaintiff has the initial burden under a rule of reason analysis to prove that the challenged restraint has a substantial anticompetitive effect, and should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint, and if the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

[10 Cases that cite this headnote](#)

[13] **Antitrust and Trade Regulation** 🔑 Rule of reason

What is required under a rule of reason analysis to assess whether a challenged restraint harms competition can vary depending on the circumstances; the whole point of the rule of reason is to furnish an inquiry meet for the case,

looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful.

[10 Cases that cite this headnote](#)

[14] Antitrust and Trade Regulation 🔑 Sports

District Court did not require National Collegiate Athletic Association (NCAA), contrary to rule of reason analysis under Sherman Act, to show that its rules limiting education-related benefits for student-athletes who played football and basketball constituted least restrictive means of preserving consumer demand for amateur athletics; District Court found rules in violation of Sherman Act only after requiring student-athletes to show that there were substantially less restrictive alternative rules that would achieve procompetitive benefits that NCAA had demonstrated. Sherman Act § 1, 15 U.S.C.A. § 1.

[6 Cases that cite this headnote](#)

[15] Antitrust and Trade Regulation 🔑 Rule of reason

Courts performing a rule of reason analysis of a challenged restraint under the Sherman Act should not second-guess degrees of reasonable necessity so that the lawfulness of the conduct turns upon judgments of degrees of efficiency. Sherman Act § 1, 15 U.S.C.A. § 1.

[4 Cases that cite this headnote](#)

[16] Antitrust and Trade Regulation 🔑 Protection of competition rather than competitors

Even under the best of circumstances, applying the antitrust laws can be difficult, and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect.

[2 Cases that cite this headnote](#)

[17] Antitrust and Trade Regulation 🔑 Sports

District Court did not engage in impermissible product redesign when analyzing whether National Collegiate Athletic Association (NCAA) rules limiting education-related benefits for student-athletes who played football and basketball violated Sherman Act section prohibiting restraints of trade under rule of reason; while NCAA had substantial latitude to fashion rules that served legitimate business interests, District Court was not required to defer to NCAA's conception of amateurism, and District Court's findings that NCAA had not adopted any consistent definition of amateurism, that it adopted rules without any reference to considerations of consumer demand, and that rules were not necessary to preserve consumer demand were straightforward application of rule of reason. Sherman Act § 1, 15 U.S.C.A. § 1.

[2 Cases that cite this headnote](#)

[18] Antitrust and Trade Regulation 🔑 Illegal Restraints or Other Misconduct

Firms deserve substantial latitude to fashion agreements that serve legitimate business interests, including agreements that may include efforts aimed at introducing a new product into the marketplace; but none of that means a party can relabel a restraint as a product feature and declare it immune from scrutiny under the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

[1 Case that cites this headnote](#)

[19] Antitrust and Trade Regulation 🔑 **Injunction**

Scope of permanent injunction prohibiting National Collegiate Athletic Association (NCAA) from enforcing rules that limited education-related compensation or benefits that member conferences or schools could provide to student-athletes who played football and basketball was appropriate, as remedy for Sherman Act violation; District Court only enjoined restraints on education-related benefits after finding that relaxing such restrictions would not blur distinction between college and professional sports, injunction did not stop NCAA from continuing to prohibit compensation from any entity other than member conferences or schools, and injunction allowed NCAA to define which benefits did and did not relate to education. Sherman Act § 1, 15 U.S.C.A. § 1.

4 Cases that cite this headnote

[20] Antitrust and Trade Regulation 🔑 **Damages and Other Relief**

In crafting antitrust remedies, judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition.

[21] Antitrust and Trade Regulation 🔑 **Damages and Other Relief**

Judges must be wary when crafting antitrust remedies of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts.

[22] Antitrust and Trade Regulation 🔑 **Damages and Other Relief**

Judges must be open to reconsideration and modification of antitrust remedies in light of changing market realities.

1 Case that cites this headnote

[23] Antitrust and Trade Regulation 🔑 **Damages and Other Relief**

No court should impose a duty when crafting an antitrust remedy that it cannot explain or adequately and reasonably supervise.

1 Case that cites this headnote

[24] Antitrust and Trade Regulation 🔑 **Damages and Other Relief**

Judges crafting antitrust remedies must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives.

1 Case that cites this headnote

[25] Antitrust and Trade Regulation 🔑 **Damages and Other Relief**

Judges crafting antitrust remedies must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare.

2144 Syllabus

Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on “amateur” student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.” 15 U.S.C. § 1. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court “struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.” 958 F.3d 1239, 1263. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the rules that remain in place. The Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

Held: The district court's injunction is consistent with established antitrust principles. Pp. — — —.

(a) The courts below properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a “rule of reason” analysis. In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces “yield the best allocation” of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104, n. 27, 104 S.Ct. 2948, 82 L.Ed.2d 70. The Sherman Act's prohibition on restraints of trade has long been understood to prohibit only restraints that are “undue.” *Ohio v. American Express Co.*, 585 U. S. —, —, 138 S.Ct. 2274, 2283, 201 L.Ed.2d 678. Whether a particular restraint is undue “presumptively” turns on an application of a “rule of reason analysis.” *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1. That manner of analysis generally requires a court to “conduct a fact-specific assessment of market power and market structure” to assess a challenged restraint's “actual effect on competition.” *American Express*, 585 U. S., at —, 138 S.Ct., at 2284. Pp. — — —.

(1) The NCAA maintains the courts below should have analyzed its compensation restrictions under an extremely deferential standard because it is a joint venture among members who must collaborate to offer consumers the unique product of intercollegiate athletic competition. Even assuming the NCAA is a joint venture, though, it is a joint venture with monopoly power in the relevant market. Its restraints are appropriately subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. *American Express*, 585 U. S., at —, 138 S.Ct., at 2284. Circumstances sometimes allow a court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or “quick look.” See *Dagher*, 547 U.S. at 7, n. 3, 126 S.Ct. 1276; *Board of Regents*, 468 U.S. at 109, n. 39, 104 S.Ct. 2948. But not here. Pp. — — —.

(2) The NCAA next contends that the Court's decision in *Board of Regents* expressly approved the NCAA's limits on student-athlete compensation. That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions

on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one “entirely consistent with the goals of the Sherman Act.” *Id.*, at 120, 104 S.Ct. 2948. But that sort of passing comment on an issue not presented is not binding, nor is it dispositive here. Pp. ——— .

(3) The NCAA also submits that a rule of reason analysis is inappropriate because its member schools are not “commercial enterprises” but rather institutions that exist to further the societally important noncommercial objective of undergraduate education. This submission also fails. The Court has regularly refused these sorts of special dispensations from the Sherman Act. See *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 424, 110 S.Ct. 768, 107 L.Ed.2d 851. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that “the special characteristics of [the NCAA's] particular industry” should exempt it from the usual operation of the antitrust laws is “properly addressed to Congress.” *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 689, 98 S.Ct. 1355, 55 L.Ed.2d 637. Pp. ——— .

(b) The NCAA's remaining attacks on the district court's decision lack merit. Pp. ——— .

(1) The NCAA contends that the district court erroneously required it to prove that its rules are the least restrictive means of achieving the procompetitive purpose of preserving consumer demand for college sports. True, a least restrictive means test would be erroneous and overly intrusive. But the district court nowhere expressly or effectively required the NCAA to show that its rules met that standard. Rather, only after finding the NCAA's restraints “patently and inexplicably stricter than is necessary” did the district court find the restraints unlawful. Pp. ——— .

(2) The NCAA contends the district court should have deferred to its conception of amateurism instead of “impermissibly redefin[ing]” its “product.” But a party cannot declare a restraint “immune from § 1 scrutiny” by relabeling it a product feature. *American Needle, Inc. v. National Football League*, 560 U.S. 183, 199, n. 7, 130 S.Ct. 2201, 176 L.Ed.2d 947. Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism. Pp. ——— .

(3) The NCAA disagrees that it can achieve the same pro-competitive benefits using substantially less restrictive alternatives and claims the district court's injunction will “micromanage” its business. Judges must indeed be sensitive to the possibility that the “continuing supervision of a highly detailed decree” could wind up impairing rather than enhancing competition. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415, 124 S.Ct. 872, 157 L.Ed.2d 823. The district court's injunction honored these principles, though. The court enjoined only certain restraints—and only after finding both that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand, and further that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court. Pp. ——— .

958 F.3d 1239, affirmed.

GORSUCH, J., delivered the opinion for a unanimous Court. KAVANAUGH, J., filed a concurring opinion.

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Opinion

Justice GORSUCH delivered the opinion of the Court.

*2147 In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces “yield the best allocation” of the Nation’s resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104, n. 27, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The court refused to disturb the NCAA’s rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court’s judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

*2148 I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation’s first intercollegiate competition—a boat race at Lake Winnepesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, *The Harvard-Yale Boat Race 1852–1924*, pp. 15–16 (1993). He offered the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. See A. Zimbalist, *Unpaid Professionals* 6–7 (1999) (Zimbalist); Rushin, *Inside the Moat*, *Sports Illustrated*, Mar. 3, 1997. The event filled the resort with “life and excitement,” *N. Y. Herald*, Aug. 10, 1852, p. 2, col. 2, and one student-athlete described the “ ‘junktet’ ” as an experience “ ‘as unique and irreproducible as the Rhodian colossus,’ ” Mendenhall, *Harvard-Yale Boat Race*, at 20.

Life might be no “less than a boat race,” Holmes, *On Receiving the Degree of Doctor of Laws*, Yale University Commencement, June 30, 1886, in *Speeches by Oliver Wendell Holmes*, p. 27 (1918), but it was football that really caused college sports to take off. “By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of \$25,000 ... in gate revenues.” Zimbalist 7. Schools regularly had “graduate students and paid ringers” on their teams. *Ibid.*

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. *Ibid.*; see also Needham, *The College Athlete*, *McClure’s Magazine*, June 1905, p. 124. The absence of academic residency requirements gave rise to “ ‘tramp athletes’ ” who “roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better.” F. Dealy, *Win at Any Cost* 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—who, in 1896, transferred to Lafayette

as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn.” *Ibid.* The next week, he “was back at West Virginia’s law school.” *Ibid.* College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that “ ‘Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.’ ” Zimbalist 7.

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players’ light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. *Id.*, at 8. President Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. *Ibid.* Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that “[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession.” Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, § 3 (1906); see also Proceedings of the Eleventh Annual Convention of the National *2149 Collegiate Athletic Association, Dec. 28, 1916, p. 34.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still “sodden with the commercial and the material and the vested interests that these forces have created.” H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California’s athletic revenue was over \$480,000, while Harvard’s football revenue alone came in at \$429,000. *Id.*, at 87. College football was “not a student’s game”; it was an “organized commercial enterprise” featuring athletes with “years of training,” “professional coaches,” and competitions that were “highly profitable.” *Id.*, at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system “under which boys are offered pecuniary and other inducements to enter a particular college.” *Id.*, at xiv–xv. One coach estimated that a rival team “spent over \$200,000 a year on players.” Zimbalist 9. In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. Crabb, [The Amateurism Myth: A Case for a New Tradition](#), 28 Stan. L. & Pol’y Rev. 181, 190 (2017). In the 1940s, Hugh McElhenny, a halfback at the University of Washington, “became known as the first college player ‘ever to take a cut in salary to play pro football.’ ” Zimbalist 22–23. He reportedly said: “ ‘[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can’t afford to graduate.’ ” *Id.*, at 211, n. 17. In 1946, a commentator offered this view: “[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself.” Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the “Sanity Code.” Colleges Adopt the ‘Sanity Code’ To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA’s opposition to “promised pay in any form.” Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes’ tuition. *Ibid.* And it created a new enforcement mechanism—providing for the “suspension or expulsion” of “proven offenders.” Colleges Adopt ‘Sanity Code,’ N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked “the beginning of the NCAA behaving as an effective cartel,” by enabling its member schools to set and enforce “rules that limit the price they have to pay for their inputs (mainly the ‘student-athletes’).” Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and “cash for incidental expenses such as laundry.” [In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.](#), 375 F.Supp.3d 1058, 1063 (ND Cal. 2019) (hereinafter *D. Ct. Op.*). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. Brief for Historians as *Amici Curiae* 10. In *2150 2014, the NCAA “announced it would allow athletic conferences to authorize their member

schools to increase scholarships up to the full cost of attendance.” *O'Bannon v. National Collegiate Athletic Assn.*, 802 F.3d 1049, 1054–1055 (CA9 2015). The 80 member schools of the “Power Five” athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits. *D. Ct. Op.*, at 1064.

In recent years, changes have continued. The NCAA has created the “Student Assistance Fund” and the “Academic Enhancement Fund” to “assist student-athletes in meeting financial needs,” “improve their welfare or academic support,” or “recognize academic achievement.” *Id.*, at 1072. These funds have supplied money to student-athletes for “postgraduate scholarships” and “school supplies,” as well as “benefits that are not related to education,” such as “loss-of-value insurance premiums,” “travel expenses,” “clothing,” and “magazine subscriptions.” *Id.*, at 1072, n. 15. In 2018, the NCAA made more than \$84 million available through the Student Activities Fund and more than \$48 million available through the Academic Enhancement Fund. *Id.*, at 1072. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id.*, at 1073. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments “‘incidental to athletics participation,’ ” including awards for “participation or achievement in athletics” (like “qualifying for a bowl game”) and certain “payments from outside entities” (such as for “performance in the Olympics”). *Id.*, at 1064, 1071, 1074. The NCAA permits its member schools to award up to (but no more than) two annual “Senior Scholar Awards” of \$10,000 for students to attend graduate school after their athletic eligibility expires. *Id.*, at 1074. Finally, the NCAA allows schools to fund travel for student-athletes’ family members to attend “certain events.” *Id.*, at 1069.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id.*, at 1063. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They “can and do enact their own rules.” *Id.*, at 1090.

At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth \$1.1 billion annually. See *id.*, at 1077, n. 20. Its television deal for the FBS conference's College Football Playoff is worth approximately \$470 million per year. See *id.*, at 1063; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) “made more than \$409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding \$650 million that *2151 year.” *D. Ct. Op.*, at 1063. All these amounts have “increased consistently over the years.” *Ibid.*

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly \$4 million per year. Brief for Players Association of the National Football League et al. as *Amici Curiae* 17. Commissioners of the top conferences take home between \$2 to \$5 million. *Ibid.* College athletic directors average more than \$1 million annually. *Ibid.* And annual salaries for top Division I college football coaches approach \$11 million, with some of their assistants making more than \$2.5 million. *Id.*, at 17–18.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the

defendants collectively as the NCAA). The student-athletes challenged the “current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services.” *D. Ct. Op.*, at 1062, 1065, n. 5. Specifically, they alleged that the NCAA’s rules violate § 1 of the Sherman Act, which prohibits “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.” 15 U.S.C. § 1.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not “contest evidence showing” that it and its members have agreed to compensation limits on student-athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits “affect interstate commerce.” *D. Ct. Op.*, at 1066.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA’s challenged restraints. This Court has “long recognized that in view of the common law and the law in this country when the Sherman Act was passed, the phrase ‘restraint of trade’ is best read to mean ‘undue restraint.’ ” *Ohio v. American Express Co.*, 585 U.S. —, —, 138 S.Ct. 2274, 2283, 201 L.Ed.2d 678 (2018) (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act “presumptively” calls for what we have described as a “rule of reason analysis.” *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006); *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 60–62, 31 S.Ct. 502, 55 L.Ed. 619 (1911). That manner of analysis generally requires a court to “conduct a fact-specific assessment of market power and market structure” to assess a challenged restraint’s “actual effect on competition.” *American Express*, 585 U.S., at — – —, 138 S.Ct., at 2284 (internal quotation marks omitted). Always, “[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” *Ibid.* (brackets and internal quotation marks omitted).

In applying the rule of reason, the district court began by observing that the NCAA enjoys “near complete dominance of, and exercise[s] monopsony power in, the relevant market”—which it defined as the market for “athletic services in men’s and women’s Division I basketball and *2152 FBS football, wherein each class member participates in his or her sport-specific market.” *D. Ct. Op.*, at 1097. The “most talented athletes are concentrated” in the “markets for Division I basketball and FBS football.” *Id.*, at 1067. There are no “viable substitutes,” as the “NCAA’s Division I essentially is the relevant market for elite college football and basketball.” *Id.*, at 1067, 1070. In short, the NCAA and its member schools have the “power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance.” *Id.*, at 1070.

The district court then proceeded to find that the NCAA’s compensation limits “produce significant anticompetitive effects in the relevant market.” *Id.*, at 1067. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to “cap artificially the compensation offered to recruits.” *Id.*, at 1097. In a market without the challenged restraints, the district court found, “competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result.” *Id.*, at 1068. “Student-athletes would receive offers that would more closely match the value of their athletic services.” *Ibid.* And notably, the court observed, the NCAA “did not meaningfully dispute” any of this evidence. *Id.*, at 1067; see also Tr. of Oral Arg. 31 (“[T]here’s no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market”).

The district court next considered the NCAA’s procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, *D. Ct. Op.*, at 1070, n. 12, and the NCAA does not pursue them here. The NCAA’s only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA’s seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so. *Id.*, at 1098.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. See *id.*, at 1063–1064, 1072–1073; see also *supra*, at ———. The court noted that the NCAA “nowhere define[s] the nature of the amateurism they claim consumers insist upon.” *D. Ct. Op.*, at 1070. And, given all this, the court struggled to ascertain for itself “any coherent definition” of the term, *id.*, at 1074, noting the testimony of a former SEC commissioner that he’s “‘never been clear on ... what is really meant by amateurism.’” *Id.*, at 1070–1071.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed “to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand.” *Id.*, at 1070. The court observed, for example, that the NCAA's “only economics expert on the issue of consumer demand” did not “study any standard measures of consumer demand” but instead simply “interviewed people connected with the NCAA and its schools, who were chosen for him by defense *2153 counsel.” *Id.*, at 1075. Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. *Id.*, at 1074, 1076. The plaintiffs presented economic and other evidence suggesting as well that further increases in student-athlete compensation would “not negatively affect consumer demand.” *Id.*, at 1076. At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits “may have some effect in preserving consumer demand.” *Id.*, at 1082. Specifically, the court found that rules aimed at ensuring “student-athletes do not receive unlimited payments unrelated to education” could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. *Id.*, at 1083.

The court next required the student-athletes to show that “substantially less restrictive alternative rules” existed that “would achieve the same procompetitive effect as the challenged set of rules.” *Id.*, at 1104. The district court emphasized that the NCAA must have “ample latitude” to run its enterprise and that courts “may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints.” *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes’ challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that “professional-level cash payments ... could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand.” *Ibid.*

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id.*, at 1088. On no account, the court found, could such education-related benefits be “confused with a professional athlete's salary.” *Id.*, at 1083. If anything, they “emphasize that the recipients are students.” *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id.*, at 1088.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to Pet. for Cert. in No. 20–512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently \$5,980 annually). *Id.*, at 168a–169a, ¶5; Order Granting Motion for Clarification of Injunction in No. 4:14–md–02541, ECF Doc. 1329, pp. 5–6 (ND Cal., Dec. 30, 2020). The court added that the NCAA and its members were free to propose a definition of compensation or benefits “‘related to education.’” App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. And the court *2154 explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual

conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id.*, at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those “untethered to education,” like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that “the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.” *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. See, e.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321, 127 S.Ct. 1069, 166 L.Ed.2d 911 (2007); 2A Areeda & Hovenkamp ¶352c, pp. 288–289 (2014); 12 *id.*, ¶2011a, at 132–134.

***2155** Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that “competition in input markets is incommensurable with competition in output markets,” and that a court should not “trade off” sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12. But the parties before us do not pursue this line.

II

A

[1] With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20–512, p. 14, or a " 'quick look,' " Brief for Petitioners in No. 20–520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See *Dagher*, 547 U.S. at 7, 126 S.Ct. 1276; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 22–23, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

[2] But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price. *American Express*, 585 U. S., at ———, 138 S.Ct., at 2284 (internal quotation marks omitted).

[3] Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling of an eye.' " *Board of Regents*, 468 U.S. at 110, n. 39, 104 S.Ct. 2948 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

[4] At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In *2156 *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (CA DC 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market." *Id.*, at 217. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business." *Ibid.*; see also 7 Areeda & Hovenkamp ¶1507a, p. 444 (2017) (If "the exercise of market power is not plausible, the challenged practice is legal"); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 191 (CA7 1985) ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial").

[5] At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher*, 547 U.S. at 7, n. 3, 126 S.Ct. 1276; *California Dental Assn. v. FTC*, 526 U.S. 756, 770, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–887, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 975 (1986) (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion"); see also *infra*, at ——— (further reasons for caution).

None of this helps the NCAA. The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. See *D. Ct. Op.*, at 1067. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents*, 468 U.S. at 101, 104 S.Ct. 2948 (quoting R. Bork, *The Antitrust Paradox* 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the “‘twinkling of an eye.’” *American Needle*, 560 U.S. at 203, 130 S.Ct. 2201.

[6] But this insight does not always apply. That *some* restraints are necessary to create or maintain a league sport does not mean *all* “aspects of elaborate interleague cooperation are.” *2157 *Id.*, at 199 n. 7, 130 S.Ct. 2201. While a quick look will often be enough to approve the restraints “necessary to produce a game,” *ibid.*, a fuller review may be appropriate for others. See, e.g., *Chicago Professional Sports Ltd. Partnership v. National Basketball Assn.*, 95 F.3d 593, 600 (CA7 1996) (“Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players”).

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U.S. at 94, 104 S.Ct. 2948. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to “[h]orizontal price fixing and output limitation[s]” of the sort that are “ordinarily condemned” as “‘illegal *per se.*’” *Id.*, at 100, 104 S.Ct. 2948. The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in “an industry” in which some “horizontal restraints on competition are essential if the product is to be available at all.” *Id.*, at 101–102, 104 S.Ct. 2948. Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation. *Id.*, at 109 n. 39, 104 S.Ct. 2948. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

“The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.” *Id.*, at 120, 104 S.Ct. 2948.

See also *id.*, at 101, 102, 104 S.Ct. 2948 (the NCAA “seeks to market a particular brand of football” in which “athletes must not be paid, must be required to attend class, and the like”). On the NCAA’s telling, *2158 these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA’s restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA’s compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. And the Court made clear it was only assuming the reasonableness of the NCAA’s restrictions: “It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive” *Id.*, at 117, 104 S.Ct. 2948 (emphasis added). Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA’s compensation restrictions procompetitive both in 1984 and forevermore.

[7] Our confidence on this score is fortified by still another factor. Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, e.g., *American Express Co.*, 585 U.S., at ———, 138 S.Ct., at 2285; 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. *D. Ct. Op.*, at 1064. It has increased the size of permissible benefits “incidental to athletics participation.” *Id.*, at 1066. And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over \$100 million to student-athletes. *Id.*, at 1072. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately \$922 million and \$41 million respectively. Brief for Former NCAA Executives as *Amici Curiae* 7. By 2016, NCAA Division I schools raised more than \$13.5 billion. *Ibid.* From 1982 to 1984, CBS paid \$16 million per year to televise the March Madness Division I men’s basketball tournament. *Ibid.* In 2016, those annual television rights brought in closer to \$1.1 billion. *D. Ct. Op.*, at 1077, n. 20.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be “infallible only because we are final,” *Brown v. Allen*, 344 U.S. 443, 540, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Jackson, J., concurring in result), but those sorts of stray comments are neither.

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not “commercial enterprises” and instead oversee intercollegiate athletics “as an integral part of the undergraduate experience.” Brief for Petitioner in No. 20–512, at 31. The NCAA represents that it seeks to “maintain amateurism in college sports as part of serving [the] societally important non-commercial objective” of “higher education.” *Id.*, at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. See *2159 *D. Ct. Op.*, at 1066. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other

nonprofit organizations—and that “the economic significance of the NCAA’s nonprofit character is questionable at best” given that “the NCAA and its member institutions are in fact organized to maximize revenues.” 468 U.S. at 100–101, n. 22, 104 S.Ct. 2948. Nor, on the other side of the equation, does anyone contest that the status of the NCAA’s members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

[8] Take two examples. In *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), a trade association argued that price competition between engineers competing for building projects had to be restrained to ensure quality work and protect public safety. *Id.*, at 679–680, 98 S.Ct. 1355. This Court rejected that appeal as “nothing less than a frontal assault on the basic policy of the Sherman Act.” *Id.*, at 695, 98 S.Ct. 1355. The “statutory policy” of the Act is one of competition and it “precludes inquiry into the question whether competition is good or bad.” *Ibid.* In *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990), criminal defense lawyers agreed among themselves to refuse court appointments until the government increased their compensation. *Id.*, at 414, 110 S.Ct. 768. And once more the Court refused to consider whether this restraint of trade served some social good more important than competition: “The social justifications proffered for respondents’ restraint of trade ... do not make it any less unlawful.” *Id.*, at 424, 110 S.Ct. 768.

To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922), the Court reasoned that “exhibitions” of “base ball” did not implicate the Sherman Act because they did not involve interstate trade or commerce—even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. *Id.*, at 208–209, 42 S.Ct. 465. But this Court has refused to extend *Federal Baseball*’s reasoning to other sports leagues—and has even acknowledged criticisms of the decision as “‘unrealistic’ ” and “‘inconsistent’ ” and “aberration[al].” *Flood v. Kuhn*, 407 U.S. 258, 282, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972) (quoting *Radovich v. National Football League*, 352 U.S. 445, 452, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957)); see also Brief for Advocates for Minor Leaguers as *Amicus Curiae* 5, n. 3 (gathering criticisms). Indeed, as we have seen, this Court has already recognized that the NCAA itself is subject to the Sherman Act.

*2160 [9] [10] [11] The “orderly way” to temper that Act’s policy of competition is “by legislation and not by court decision.” *Flood*, 407 U.S. at 279, 92 S.Ct. 2099. The NCAA is free to argue that, “because of the special characteristics of [its] particular industry,” it should be exempt from the usual operation of the antitrust laws—but that appeal is “properly addressed to Congress.” *National Soc. of Professional Engineers*, 435 U.S. at 689, 98 S.Ct. 1355. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. See, e.g., 7 U.S.C. §§ 291–292 (agricultural cooperatives); 15 U.S.C. §§ 1011–1013 (insurance); 15 U.S.C. §§ 1801–1804 (newspaper joint operating agreements). But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—“competition is the best method of allocating resources” in the Nation’s economy. *National Soc. of Professional Engineers*, 435 U.S. at 695, 98 S.Ct. 1355.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

[12] When describing the rule of reason, this Court has sometimes spoken of “a three-step, burden-shifting framework” as a means for “ ‘distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.’ ” *American Express Co.*, 585 U.S., at —, 138 S.Ct., at 2284. As we have described it, “the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect.” *Ibid.* Should the plaintiff carry that burden, the burden then “shifts to the defendant to show a procompetitive rationale for the restraint.” *Ibid.* If the defendant can make that showing, “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.” *Id.*, at — – —, 138 S.Ct., at 2284

[13] These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See *supra*, at — – —. The whole point of the rule of reason is to furnish “an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint” to ensure that it unduly harms competition before a court declares it unlawful. *California Dental*, 526 U.S. at 781, 119 S.Ct. 1604; see also, e.g., *Leegin Creative*, 551 U.S. at 885, 127 S.Ct. 2705 (“[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition’ ”); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); 7 Areeda & Hovenkamp ¶1507a, at 442–444 (slightly different “decisional model” using sequential questions).

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that “the challenged restraints produce significant anticompetitive effects in the relevant market.” *D. Ct. Op.*, at 1067. This was no slight burden. According to *2161 one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 (“Since 1977, courts decided 90% (809 of 897) on this ground”). This suit proved different. As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes’ labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See *D. Ct. Op.*, at 1067. Perhaps even more notably, the NCAA “did not meaningfully dispute” this conclusion. *Ibid.*

[14] Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id.*, at 1070. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

[15] We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess “degrees of reasonable necessity” so that “the lawfulness of conduct turn[s] upon judgments of degrees of efficiency.” *Rothery Storage*, 792 F.2d at 227; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58, n. 29, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). That would be a recipe for disaster, for a “skilled lawyer” will “have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering “with the legitimate objectives at issue” without “adding that much to competition.” 7 *id.*, ¶1505b, at 435–436.

[16] Even worse, “[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.” *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA1 1983) (BREYER, J.). After all, even “[u]nder the best of circumstances,” applying the antitrust laws “‘can be difficult’”—and mistaken condemnations of legitimate business arrangements “‘are especially costly, because they chill the very’” procompetitive conduct “‘the antitrust laws are designed to protect.’” *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004). Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to “‘[m]ete[r]’ small deviations is not an appropriate antitrust function.” Hovenkamp, *Antitrust Balancing*, 12 N. Y. U. J. L. & Bus. 369, 377 (2016).

***2162** While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See *D. Ct. Op.*, at 1070–1076, 1080–1083. Recall that the court found the NCAA failed “to establish that the challenged compensation rules ... have any direct connection to consumer demand.” *Id.*, at 1070.

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that “some” of those rules “may” have procompetitive effects “to the extent” they prohibit compensation “unrelated to education, akin to salaries seen in professional sports leagues.” *Id.*, at 1082–1083. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes “to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules.” *D. Ct. Op.*, at 1104. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that “substantially less restrictive alternative rules” existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. See, e.g., 7 Areeda & Hovenkamp ¶1505, p. 428 (“To be sure, these two questions can be collapsed into one,” since a “legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative”).

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints “‘patently and inexplicably stricter than is necessary’” to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. *D. Ct. Op.*, at 1104. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

[17] In a related critique, the NCAA contends the district court “impermissibly redefined” its “product” by rejecting its views about what amateurism requires and replacing them with its preferred conception. ***2163** Brief for Petitioner in No. 20–512, at 35–36.

[18] This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. *Supra*, at ———— . But none of that means a party can relabel a restraint as a product feature and declare it “immune from § 1 scrutiny.” *American Needle*, 560 U.S. at 199, n. 7, 130 S.Ct. 2201. In this suit, as in any, the district court had to determine whether the defendants’ agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by “substantially less restrictive alternative” means. *D. Ct. Op.*, at 1104.

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. *Id.*, at 1070. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. *Id.*, at 1071–1074. The court found, too, that the NCAA adopted these restrictions without any reference to “considerations of consumer demand,” *id.*, at 1100, and that some were “not necessary to preserve consumer demand,” *id.*, at 1075, 1080, 1104. None of this is product redesign; it is a straightforward application of the rule of reason.

C

[19] Finally, the NCAA attacks as “indefensible” the lower courts’ holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner in No. 20–512, at 46. The NCAA claims, too, that the district court's injunction threatens to “micromanage” its business. *Id.*, at 50.

[20] [21] [22] [23] Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. See *supra*, at ———— . Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the “continuing supervision of a highly detailed decree” could wind up impairing rather than enhancing competition. *Trinko*, 540 U.S. at 415, 124 S.Ct. 872. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra*, at ———— . Judges must be wary, too, of the temptation to specify “the proper price, quantity, and other terms of dealing”—cognizant that they are neither economic nor industry experts. *Trinko*, 540 U.S. at 408, 124 S.Ct. 872. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for “what we see may vary over time.” *California Dental*, 526 U.S. at 781, 119 S.Ct. 1604. And throughout courts must have a healthy respect for the practical limits of judicial administration: “An antitrust court is unlikely to be an effective day-to-day enforcer” of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko*, 540 U.S. at 415, 124 S.Ct. 872. Nor should any court “ ‘impose a duty ... that it cannot explain or adequately and reasonably supervise.’ ” *Ibid.* In short, judges make for poor “central planners” and *2164 should never aspire to the role. *Id.*, at 408, 124 S.Ct. 872.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. *D. Ct. Op.*, at 1104–1105.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards,

too—so long as those “limits are never lower than the limit” on awards for athletic performance. *D. Ct. Op.*, at 1104; App. to Pet. for Cert. in No. 20–512, at 168a–169a, ¶5. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id.*, at 169a–170a, ¶¶6–7.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. The NCAA even imagines that boosters might promise posteligibility internships “at a sneaker company or auto dealership” with extravagant salaries as a “thinly disguised vehicle” for paying professional-level salaries. Brief for Petitioner in No. 20–512, at 37–38.

This argument rests on an overly broad reading of the injunction. The district court enjoined only restrictions on education-related compensation or benefits “that may be made available *from conferences or schools*.” App. to Pet. for Cert. in No. 20–512, at 167a, ¶1 (emphasis added). Accordingly, as the student-athletes concede, the injunction “does not stop the NCAA from continuing to prohibit compensation from” sneaker companies, auto dealerships, boosters, “or anyone else.” Brief for Respondents 47–48; see also Brief for United States as *Amicus Curiae* 33. The NCAA itself seems to understand this much. Following the district court's injunction, the organization adopted new regulations specifying that only “a conference or institution” may fund post-eligibility internships. See Decl. of M. Boyer in No. 4:14–md–02541, ECF Doc. 1302–2, p. 6 (ND Cal., Sept. 22, 2020) (NCAA Bylaw 16.3.4(d)).

Even when it comes to internships offered by conferences and schools, the district court left the NCAA considerable flexibility. The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits unrelated to legitimate educational activities—thus leaving the league room to police phony internships. As we've observed, the *2165 district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships however they wish. *Id.*, at 169a, ¶6. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for “academic or graduation” achievement no lower than its aggregate limit on parallel athletic awards (currently \$5,980 per year). *Id.*, at 168a–169a, ¶5; *D. Ct. Op.*, at 1104. This, the NCAA asserts, “is the very definition of a professional salary.” Brief for Petitioner in No. 20–512, at 48. The NCAA also represents that “[m]ost” of its currently permissible athletic awards are “for genuine individual or team *achievement*” and that “[m]ost ... are received by only a few student-athletes each year.” *Ibid.* Meanwhile, the NCAA says, the district court's decree would allow a school to pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA. *Ibid.*

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards “is an amount that has been shown not to decrease consumer demand.” *D. Ct. Op.*, at 1088. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their academic and graduation awards. So, once more, if the NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules—and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses on allowing schools to offer scholarships for “graduate degrees” or “vocational school” and to pay for things like “computers”

and “tutoring.” App. to Pet. for Cert. in No. 20–512, at 167a–168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes “ ‘luxury cars’ ” “to get to class” and “other unnecessary or inordinately valuable items” only “nominally” related to education. Brief for Petitioner in No. 20–512, at 48–49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a “no Lamborghini” rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns *2166 in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

[24] [25] When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to “set sail on a sea of doubt.” *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: “ ‘The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.’ ” 958 F.3d at 1265. That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

Justice KAVANAUGH, concurring.

The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation

rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions *2167 under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's remaining compensation rules. As the Court says, “the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.” *Ante*, at ———.

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary “rule of reason” scrutiny under the antitrust laws. The Court makes clear that the decades-old “stray comments” about college sports and amateurism made in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), were dicta and have no bearing on whether the NCAA's current compensation rules are lawful. *Ante*, at ———. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. *Ante*, at ——— – ———; see also *Radovich v. National Football League*, 352 U.S. 445, 449–452, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957). As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA's remaining compensation rules should be subject to ordinary rule of reason scrutiny. See *ante*, at ——— – ———.

Third, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that “customers prefer” to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a “love of the law.” Hospitals cannot agree to cap nurses' income in order to create a “purer” form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a “tradition” of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a “spirit of amateurism” in Hollywood.

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook *2168 antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006). Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13–17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–237, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996); *Wood v. National Basketball Assn.*, 809 F.2d 954, 958–963 (CA2 1987) (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series *2169 in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

All Citations

594 U.S. ----, 141 S.Ct. 2141, 210 L.Ed.2d 314, 2021-1 Trade Cases P 81,685, 391 Ed. Law Rep. 45, 21 Cal. Daily Op. Serv. 5937, 2021 Daily Journal D.A.R. 6071, 28 Fla. L. Weekly Fed. S 915

Footnotes

1 Together with No. 20–520, *American Athletic Conference et al. v. Alston et al.*, also on certiorari to the same court.

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated

Title 47. Telecommunications (Refs & Annos)

Chapter 5. Wire or Radio Communication (Refs & Annos)

Subchapter II. Common Carriers (Refs & Annos)

Part I. Common Carrier Regulation

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Effective: April 11, 2018

[Currentness](#)

(a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of [section 223](#) or [231](#) of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under [section 1595 of Title 18](#), if the conduct underlying the claim constitutes a violation of [section 1591](#) of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 1591 of Title 18](#); or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 2421A of Title 18](#), and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added [Pub.L. 104-104, Title V, § 509](#), Feb. 8, 1996, 110 Stat. 137; amended [Pub.L. 105-277](#), Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739; [Pub.L. 115-164](#), § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13925

[Ex. Ord. No. 13925](#), May 28, 2020, 85 F.R. 34079, which related to moderation of content posted on social media platforms, was revoked by [Ex. Ord. No. 14029](#), § 1, May 14, 2021, 86 F.R. 27025.

[Notes of Decisions \(294\)](#)

Footnotes

1 So in original. Probably should be “subparagraph (A)”.

47 U.S.C.A. § 230, 47 USCA § 230

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Elections Code (Refs & Annos)
Division 20. Election Campaigns (Refs & Annos)
Chapter 1. Endorsements of Candidates (Refs & Annos)

West's Ann.Cal.Elec.Code § 20010

§ 20010. Campaign materials containing materially deceptive audio
or visual media; disclosure; civil action; application of section

Effective: January 1, 2023

[Currentness](#)

<Section added by [Stats.2019, c. 493 \(A.B.730\)](#), § 4, amended by [Stats.2022, c. 745 \(A.B.972\)](#), § 3, operative until Jan. 1, 2027. See, also, § 20010 added by [Stats.1998, c. 718 \(A.B.1233\)](#), § 2, amended by [Stats.2019, c. 493 \(A.B.730\)](#), § 3; [Stats.2022, c. 745 \(A.B.972\)](#), § 4, operative Jan. 1, 2027.>

(a) Except as provided in subdivision (b), a person, committee, as defined in [Section 82013 of the Government Code](#), or other entity shall not, within 60 days of an election at which a candidate for elective office will appear on the ballot, distribute, with actual malice, materially deceptive audio or visual media, as defined in subdivision (e), of the candidate with the intent to injure the candidate's reputation or to deceive a voter into voting for or against the candidate.

(b)(1) The prohibition in subdivision (a) does not apply if the audio or visual media includes a disclosure stating: "This _____ has been manipulated."

(2) The blank in the disclosure required by paragraph (1) shall be filled with whichever of the following terms most accurately describes the media:

(A) Image.

(B) Video.

(C) Audio.

(3)(A) For visual media, the text of the disclosure shall appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media. If the visual media does not include any other text, the disclosure shall appear in a size that is easily readable by the average viewer. For visual media that is video, the disclosure shall appear for the duration of the video.

(B) If the media consists of audio only, the disclosure shall be read in a clearly spoken manner and in a pitch that can be easily heard by the average listener, at the beginning of the audio, at the end of the audio, and, if the audio is greater than two minutes in length, interspersed within the audio at intervals of not greater than two minutes each.

(c)(1) A candidate for elective office whose voice or likeness appears in a materially deceptive audio or visual media distributed in violation of this section may seek injunctive or other equitable relief prohibiting the distribution of audio or visual media in violation of this section. An action under this paragraph shall be entitled to precedence in accordance with [Section 35 of the Code of Civil Procedure](#).

(2) A candidate for elective office whose voice or likeness appears in a materially deceptive audio or visual media distributed in violation of this section may bring an action for general or special damages against the person, committee, or other entity that distributed the materially deceptive audio or visual media. The court may also award a prevailing party reasonable attorney's fees and costs. This subdivision shall not be construed to limit or preclude a plaintiff from securing or recovering any other available remedy.

(3) In any civil action alleging a violation of this section, the plaintiff shall bear the burden of establishing the violation through clear and convincing evidence.

(d)(1) This section shall not be construed to alter or negate any rights, obligations, or immunities of an interactive service provider under [Section 230 of Title 47 of the United States Code](#).

(2) This section does not apply to a radio or television broadcasting station, including a cable or satellite television operator, programmer, or producer, that broadcasts materially deceptive audio or visual media prohibited by this section as part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of bona fide news events, if the broadcast clearly acknowledges through content or a disclosure, in a manner that can be easily heard or read by the average listener or viewer, that there are questions about the authenticity of the materially deceptive audio or visual media.

(3) This section does not apply to a radio or television broadcasting station, including a cable or satellite television operator, programmer, or producer, when it is paid to broadcast materially deceptive audio or visual media.

(4) This section does not apply to an internet website, or a regularly published newspaper, magazine, or other periodical of general circulation, including an internet or electronic publication, that routinely carries news and commentary of general interest, and that publishes materially deceptive audio or visual media prohibited by this section, if the publication clearly states that the materially deceptive audio or visual media does not accurately represent the speech or conduct of the candidate.

(5) This section does not apply to materially deceptive audio or visual media that constitutes satire or parody.

(e) As used in this section, “materially deceptive audio or visual media” means an image or an audio or video recording of a candidate's appearance, speech, or conduct that has been intentionally manipulated in a manner such that both of the following conditions are met:

(1) The image or audio or video recording would falsely appear to a reasonable person to be authentic.

(2) The image or audio or video recording would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content of the image or audio or video recording than that person would have if the person were hearing or seeing the unaltered, original version of the image or audio or video recording.

(f) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(g) This section shall remain in effect only until January 1, 2027, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2027, deletes or extends that date.

Credits

(Added by [Stats.2019, c. 493 \(A.B.730\)](#), § 4, eff. Jan. 1, 2020. Amended by [Stats.2022, c. 745 \(A.B.972\)](#), § 3, eff. Jan. 1, 2023.)

Editors' Notes

REPEAL

<For repeal of this section, see its terms.>

West's Ann. Cal. Elec. Code § 20010, CA ELEC § 20010

Current with Ch. 1 of 2023-24 1st Ex.Sess, and urgency legislation through Ch. 888 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

Helping People Understand When AI is Used In Political or Social Issue Ads

facebook.com/gpa/blog/political-ads-ai-disclosure-policy

Government and nonprofits

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November 8, 2023

Helping People Understand When AI Or Digital Methods Are Used In Political or Social Issue Ads

We're requiring advertisers to disclose when they digitally create or alter a political or social issue ad in certain cases



We're announcing a new policy to help people understand when a social issue, election, or political advertisement on Facebook or Instagram has been digitally created or altered, including through the use of AI. This policy will go into effect in the new year and will be required globally.

Advertisers will have to disclose whenever a social issue, electoral, or political ad contains a photorealistic image or video, or realistic sounding audio, that was digitally created or altered to:

- Depict a real person as saying or doing something they did not say or do; or
- Depict a realistic-looking person that does not exist or a realistic-looking event that did not happen, or alter footage of a real event that happened; or
- Depict a realistic event that allegedly occurred, but that is not a true image, video, or audio recording of the event.

Advertisers running these ads do not need to disclose when content is digitally created or altered in ways that are inconsequential or immaterial to the claim, assertion, or issue raised in the ad. This may include image size adjusting, cropping an image, color correction, or image sharpening, unless such changes are consequential or material to the claim, assertion, or issue raised in the ad.

Meta will add information on the ad when an advertiser discloses in the advertising flow that the content is digitally created or altered. This information will also appear in the [Ad Library](#). If we determine that an advertiser doesn't disclose as required, we will reject the ad and repeated failure to disclose may result in penalties against the advertiser. We will share additional details about the specific process advertisers will go through during the ad creation process.

As always, we remove content that violates [our policies](#) whether it was created by AI or a person. Our independent fact-checking partners review and rate viral misinformation and we do not allow an ad to run if it's rated as False, Altered, Partly False, or Missing Context. For example, fact-checking partners can rate content as "Altered" if they determine it was created or edited in ways that could mislead people, including through the use of AI or other digital tools.

STATE OF NEW YORK

6829--A

Cal. No. 1113

2021-2022 Regular Sessions

IN SENATE

May 18, 2021

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- recommitted to the Committee on Codes in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report

AN ACT to amend the penal law, in relation to establishing the crime of aggravated harassment by means of electronic or digital communication; and to amend the civil rights law, in relation to providing for a private right of action for the unlawful dissemination or publication of deep fakes

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The penal law is amended by adding a new section 240.78 to
2 read as follows:

3 § 240.78 Aggravated harassment by means of electronic or digital commu-
4 nication.

5 1. A person is guilty of aggravated harassment by means of electronic
6 or digital communication when, with the intent to harass, annoy, threat-
7 en or alarm another person, he or she produces, distributes, publishes
8 or broadcasts material that contains a picture, photograph or image of a
9 person or persons or a deep fake into which the image of another person
10 or persons is superimposed as a deep fake.

11 2. For purposes of this section, "deep fake" means a digitized image
12 that is altered to incorporate a person's face or their identifiable
13 body part onto such image, and such image is any printed material,
14 advertisement, movie, video, communication or computer image that
15 depicts a pornographic or lewd sex act as defined pursuant to section
16 245.00 or 130.00 of this part, or graphic violence, that is published
17 without the explicit written permission of the individual or individuals

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD11427-04-2

1 depicted, and for no other legitimate purpose other than to harass,
2 annoy, threaten or alarm another person.

3 Aggravated harassment by means of electronic or digital communication
4 shall be a class A misdemeanor.

5 § 2. Section 52-b of the civil rights law, as added by chapter 109 of
6 the laws of 2019, is amended to read as follows:

7 § 52-b. Private right of action for unlawful dissemination or publica-
8 tion of an intimate image or deep fake. 1. Any person depicted in a
9 still or video image, regardless of whether or not the original still or
10 video image was consensually obtained, shall have a cause of action
11 against an individual who, for the purpose of harassing, annoying or
12 alarming such person, disseminated or published, or threatened to
13 disseminate or publish, such still or video image, where such image or
14 deep fake:

15 a. was a deep fake or was taken when such person had a reasonable
16 expectation that [~~the~~] their image would remain private; and

17 b. depicts (i) an unclothed or exposed intimate part of such person;
18 or (ii) such person engaging in sexual conduct, as defined in subdivi-
19 sion ten of section 130.00 of the penal law, with another person; and

20 c. was disseminated or published, or threatened to be disseminated or
21 published, without the consent of such person.

22 2. In any action commenced pursuant to subdivision one of this
23 section, the finder of fact, in its discretion, may award injunctive
24 relief, punitive damages, compensatory damages and reasonable court
25 costs and attorney's fees.

26 3. This section shall not apply to the following:

27 a. the reporting of unlawful conduct;

28 b. dissemination or publication of an intimate still [~~or~~], video image
29 or deep fake made during lawful and common practices of law enforcement,
30 legal proceedings or medical treatment;

31 c. images involving voluntary exposure in a public or commercial
32 setting; or

33 d. dissemination or publication of an intimate still [~~or~~], video image
34 or deep fake made for a legitimate public purpose.

35 4. Any person depicted in a still or video image or deep fake that
36 depicts an unclothed or exposed intimate part of such person, or such
37 person engaging in sexual conduct as defined in subdivision ten of
38 section 130.00 of the penal law with another person, which is dissem-
39 inated or published without the consent of such person and where such
40 person had a reasonable expectation that the image would remain private,
41 may maintain an action or special proceeding for a court order to
42 require any website that is subject to personal jurisdiction under
43 subdivision five of this section to permanently remove such still [~~or~~],
44 video image or deep fake; any such court order granted pursuant to this
45 subdivision may direct removal only as to images that are reasonably
46 within such website's control.

47 5. a. Any website that hosts or transmits a still or video image or
48 deep fake, viewable in this state, taken or produced under circumstances
49 where the person depicted had a reasonable expectation that the image
50 would remain private, which depicts:

51 (i) an unclothed or exposed intimate part, as defined in section
52 245.15 of the penal law, of a resident of this state; or

53 (ii) a resident of this state engaging in sexual conduct as defined in
54 subdivision ten of section 130.00 of the penal law with another person;
55 and

b. Such still ~~[ex]~~, video image or deep fake is hosted or transmitted without the consent of such resident of this state, shall be subject to personal jurisdiction in a civil action in this state to the maximum extent permitted under the United States constitution and federal law.

6. A cause of action or special proceeding under this section shall be commenced the later of either:

a. three years after the dissemination or publication of an image; or

b. one year from the date a person discovers, or reasonably should have discovered, the dissemination or publication of such image.

6-a. For purposes of this section, the following terms shall have the following meanings:

a. "Individual" means a person, corporation, business entity, firm, association, committee or organization conducting business within the state of New York.

b. "Deep fake" means a digitized image that is altered to incorporate a person's face or their identifiable body part onto such image, and such image is any printed material, advertisement, movie, video, communication or computer image that depicts a pornographic or lewd sex act as defined pursuant to section 245.00 or 130.00 of the penal law, or graphic violence, that is published without the explicit written permission of the individual or individuals depicted, and for no other legitimate purpose other than to harass, annoy, threaten or alarm another person.

7. Nothing herein shall be read to require a prior criminal complaint, prosecution or conviction to establish the elements of the cause of action provided for by this section.

8. The provisions of this section are in addition to, but shall not supersede, any other rights or remedies available in law or equity.

9. If any provision of this section or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

10. Nothing in this section shall be construed to limit, or to enlarge, the protections that 47 U.S.C § 230 confers on an interactive computer service for content provided by another information content provider, as such terms are defined in 47 U.S.C. § 230.

§ 3. Section 52-c of the civil rights law, as added by chapter 304 of the laws of 2020, is amended to read as follows:

§ 52-c. Private right of action for unlawful dissemination or publication of a sexually explicit depiction or deep fake of an individual. 1. For the purposes of this section:

a. "depicted individual" means an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in a performance that was actually performed by the depicted individual but was subsequently altered to be in violation of this section.

b. "digitization" means to realistically depict the nude body parts of another human being as the nude body parts of the depicted individual, computer-generated nude body parts as the nude body parts of the depicted individual or the depicted individual engaging in sexual conduct, as defined in subdivision ten of section 130.00 of the penal law, in which the depicted individual did not engage.

c. "individual" means a natural person.

d. "person" means a human being or legal entity.

1 e. "sexually explicit material" means any portion of an audio visual
2 work, or deep fake, that shows the depicted individual performing in the
3 nude, meaning with an unclothed or exposed intimate part, as defined in
4 section 245.15 of the penal law, or appearing to engage in, or being
5 subjected to, sexual conduct, as defined in subdivision ten of section
6 130.00 of the penal law.

7 f. "deep fake" means a digitized image that is altered to incorporate
8 an individual's face or their identifiable body part onto such image,
9 and such image is any printed material, advertisement, movie, video,
10 communication or computer image that depicts a pornographic or lewd sex
11 act as defined pursuant to section 245.00 or 130.00 of the penal law, or
12 graphic violence, that is published without the explicit written permis-
13 sion of the individual or individuals depicted, and for no other legiti-
14 mate purpose other than to harass, annoy, threaten or alarm another
15 person.

16 2. a. A depicted individual shall have a cause of action against a
17 person who, discloses, disseminates, produces or publishes sexually
18 explicit material or a deep fake related to the depicted individual, and
19 the person knows or reasonably should have known the depicted individual
20 in that material did not consent to its creation, disclosure, dissem-
21 ination, production or publication.

22 b. It shall not be a defense to an action under this section that
23 there is a disclaimer in the sexually explicit material that communi-
24 cates that the inclusion of the depicted individual in the sexually
25 explicit material was unauthorized or that the depicted individual did
26 not participate in the creation or development of the material.

27 3. a. A depicted individual may only consent to the creation, disclo-
28 sure, dissemination, production, or publication of sexually explicit
29 material or a deep fake by knowingly and voluntarily signing an agree-
30 ment written in plain language that includes a general description of
31 the sexually explicit material and the audiovisual work in which it will
32 be incorporated.

33 b. A depicted individual may rescind consent by delivering written
34 notice within three business days from the date consent was given to the
35 person in whose favor consent was made, unless one of the following
36 requirements is satisfied:

37 i. the depicted individual is given at least three business days to
38 review the terms of the agreement before signing it; or

39 ii. if the depicted individual is represented, the attorney, talent
40 agent, or personal manager authorized to represent the depicted individ-
41 ual provides additional written approval of the signed agreement.

42 4. a. A person is not liable under this section if:

43 i. the person discloses, disseminates or publishes the sexually
44 explicit material in the course of reporting unlawful activity, exercis-
45 ing the person's law enforcement duties, or hearings, trials or other
46 legal proceedings; or

47 ii. the sexually explicit material is a matter of legitimate public
48 concern, a work of political or newsworthy value or similar work, or
49 commentary, criticism or disclosure that is otherwise protected by the
50 constitution of this state or the United States; provided that sexually
51 explicit material shall not be considered of newsworthy value solely
52 because the depicted individual is a public figure.

53 5. In any action commenced pursuant to this section, the finder of
54 fact, in its discretion, may award injunctive relief, punitive damages,
55 compensatory damages, and reasonable court costs and attorney's fees.

1 6. A cause of action or special proceeding under this section shall be
2 commenced the later of either:

3 a. three years after the dissemination or publication of sexually
4 explicit material; or

5 b. one year from the date a person discovers, or reasonably should
6 have discovered, the dissemination or publication of such sexually
7 explicit material.

8 7. Nothing in this section shall be read to require a prior criminal
9 complaint, prosecution or conviction to establish the elements of the
10 cause of action provided for in this section.

11 8. The provisions of this section including the remedies are in addi-
12 tion to, and shall not supersede, any other rights or remedies available
13 in law or equity.

14 9. If any provision of this section or its application to any person
15 or circumstance is held invalid, the invalidity shall not affect other
16 provisions or applications of this section which can be given effect
17 without the invalid provision or application, and to this end the
18 provisions of this section are severable.

19 10. Nothing in this section shall be construed to limit, or to
20 enlarge, the protections that 47 U.S.C. § 230 confers on an interactive
21 computer service for content provided by another information content
22 provider, as such terms are defined in 47 U.S.C. § 230.

23 § 4. This act shall take effect immediately.

AN ACT

relating to the creation of a criminal offense for fabricating a deceptive video with intent to influence the outcome of an election.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 255.004, Election Code, is amended by adding Subsections (d) and (e) to read as follows:

(d) A person commits an offense if the person, with intent to injure a candidate or influence the result of an election:

(1) creates a deep fake video; and

(2) causes the deep fake video to be published or distributed within 30 days of an election.

(e) In this section, "deep fake video" means a video, created with the intent to deceive, that appears to depict a real person performing an action that did not occur in reality.

SECTION 2. This Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 751 passed the Senate on April 17, 2019, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendment on May 25, 2019, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 751 passed the House, with amendment, on May 22, 2019, by the following vote: Yeas 141, Nays 3, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Understanding Google Play's AI-Generated Content policy

Google Play's [AI-Generated Content policy](#) aims to ensure that AI-generated content is safe for all users and that developers incorporate user feedback to enable responsible innovation.

Overview

Developers are responsible for ensuring that their generative AI apps do not generate offensive content, including prohibited content listed under Google Play's [Inappropriate Content](#) policies, [content that may exploit or abuse children](#), and [content that can deceive users or enable dishonest behaviors](#). Generative AI apps should also comply with all other policies in our [Developer Policy Center](#).

The AI-Generated Content policy covers AI-generated content that is generated by any combination of text, voice, and image prompt input, including but not limited to the following types of generative AI apps:

- Text-to-text AI chatbot apps, in which the AI generated chatbot interaction is a central feature of the app.
- Text-to-image, voice-to-image, and image-to-image apps that use AI to generate images.
- Apps that create voice and/or video recordings of real-life individuals using AI.

The policy is not intended to cover the following types of limited-scope AI apps at this time:

- Apps that merely host AI-generated content and are unable to create content using AI, such as social media apps that do not contain AI content generation features.
 - UGC apps that host AI-generated content are subject to the [User Generated Content](#) policy.
- Apps that summarize non-AI generated content, such as search result summarization and document summarization (for example, summarizing a book), if the summarization feature is the only feature of the app.
- Productivity apps that use AI to improve an existing feature, such as email apps with AI-suggested email drafts.

Examples of violative AI-generated content include but are not limited to the following:

- AI-generated [non-consensual deepfake sexual material](#).
- Voice or video recordings of real-life individuals that [facilitate scams](#).
- Content generated to encourage harmful behavior (for example, dangerous activities, self harm).
- Election-related content that is demonstrably deceptive or false.
- Content generated to facilitate bullying and harassment.
- Generative AI applications primarily intended to be sexually gratifying.
- AI-generated official documentation that enables dishonest behavior.
- Malicious code creation.

Related content

- [AI-Generated Content policy](#)
- [Restricted Content policies](#)
- [Deceptive Behavior policies](#)
- [Families policies](#)

Need more help?

Try these next steps:

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Get answers from community members

Contact us

Tell us more and we'll help you get there

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*Counsel for Individual and Representative Plaintiffs
 and the Proposed Class*

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

SARAH SILVERMAN, an individual;
 CHRISTOPHER GOLDEN, an individual;
 RICHARD KADREY, an individual;

Individual and Representative Plaintiffs,

v.

OPENAI, INC., a Delaware nonprofit corporation; OPENAI, L.P., a Delaware limited partnership; OPENAI OP Co, L.L.C., a Delaware limited liability corporation; OPENAI GP, L.L.C., a Delaware limited liability company; OPENAI STARTUP FUND GP I, L.L.C., a Delaware limited liability company; OPENAI STARTUP FUND I, L.P., a Delaware limited partnership; and OPENAI STARTUP FUND MANAGEMENT, LLC, a Delaware limited liability company,

Defendants.

Case No.

COMPLAINT

CLASS ACTION

**DEMAND FOR
 JURY TRIAL**

Plaintiffs Sarah Silverman, Christopher Golden, and Richard Kadrey (“Plaintiffs”), on behalf of themselves and all others similarly situated, bring this Class Action Complaint (the “Complaint”) against Defendants OpenAI, Inc., OpenAI, L.P., OpenAI OpCo, L.L.C., OpenAI GP, L.L.C., OpenAI Startup Fund I, L.P., OpenAI Startup Fund GP I, L.L.C. and OpenAI Startup Fund Management, LLC for direct copyright infringement, vicarious copyright infringement, violations of section 1202(b) of the Digital Millennium Copyright Act, unjust enrichment, violations of the California and common law unfair competition laws, and negligence. Plaintiffs seek injunctive relief and to recover damages as a result and consequence of Defendants’ unlawful conduct.

I. OVERVIEW

1. ChatGPT is a software product created, maintained, and sold by OpenAI.

2. ChatGPT is powered by two AI software programs called GPT-3.5 and GPT-4, also known as *large language models*. Rather than being programmed in the traditional way, a large language model is “trained” by copying massive amounts of text and extracting expressive information from it. This body of text is called the *training dataset*. Once a large language model has copied and ingested the text in its training dataset, it is able to emit convincingly naturalistic text outputs in response to user prompts.

3. A large language model’s output is therefore entirely and uniquely reliant on the material in its training dataset. Every time it assembles a text output, the model relies on the information it extracted from its training dataset.

4. Plaintiffs and Class members are authors of books. Plaintiffs and Class members have registered copyrights in the books they published. Plaintiffs and Class members did not consent to the use of their copyrighted books as training material for ChatGPT. Nonetheless, their copyrighted materials were ingested and used to train ChatGPT.

5. Indeed, when ChatGPT is prompted, ChatGPT generates summaries of Plaintiffs’ copyrighted works—something only possible if ChatGPT was trained on Plaintiffs’ copyrighted works.

6. Defendants, by and through the use of ChatGPT, benefit commercial and profit richly from the use of Plaintiffs’ and Class members’ copyrighted materials.

II. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this case arises under the Copyright Act (17 U.S.C. § 501) and the Digital Millennium Copyright Act (17 U.S.C. § 1202).

8. Jurisdiction and venue is proper in this judicial district under 28 U.S.C. § 1391(c)(2) because defendant OpenAI, Inc. is headquartered in this district, and thus a substantial part of the events giving rise to the claim occurred in this district; and because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District, and a substantial portion of the affected interstate trade and commerce was carried out in this District. Each Defendant has transacted business, maintained substantial contacts, and/or committed overt acts in furtherance of the illegal scheme and conspiracy throughout the United States, including in this District. Defendants' conduct has had the intended and foreseeable effect of causing injury to persons residing in, located in, or doing business throughout the United States, including in this District.

9. Under Civil Local Rule 3.2(c) and (e), assignment of this case to the San Francisco Division is proper because defendant OpenAI, Inc. is headquartered in San Francisco, a substantial amount part of the events giving rise to Plaintiffs' claims and the interstate trade and commerce involved and affected by Defendants' conduct giving rise to the claims herein occurred in this Division.

III. PARTIES

A. Plaintiffs

10. Plaintiff Sarah Silverman is a writer and performer who lives in California. Plaintiff Silverman owns a registered copyright in one book, called *The Bedwetter*. This book contains copyright-management information customarily included in published books, including the name of the author and the year of publication.

11. Plaintiff Christopher Golden is a writer who lives in Massachusetts. Mr. Golden owns registered copyrights in several books, including *Ararat*. This book contains the copyright-management information customarily included in published books, including the name of the author and the year of publication.

12. Plaintiff Richard Kadrey is a writer who lives in Pennsylvania. Plaintiff Kadrey owns registered copyrights in several books, including *Sandman Slim*. This book contains the copyright-management information customarily included in published books, including the name of the author and the year of publication.

13. A nonexhaustive list of registered copyrights owned by Plaintiffs is included as **Exhibit A.**

B. Defendants

14. Defendant OpenAI, Inc. is a Delaware nonprofit corporation with its principal place of business located at 3180 18th St, San Francisco, CA 94110.

15. Defendant OpenAI, L.P. is a Delaware limited partnership with its principal place of business located at 3180 18th St, San Francisco, CA 94110. OpenAI, L.P. is a wholly owned subsidiary of OpenAI Inc. that is operated for profit. OpenAI, Inc. controls OpenAI, L.P. directly and through the other OpenAI entities.

16. Defendant OpenAI OpCo, L.L.C. is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI OpCo, L.L.C. is a wholly owned subsidiary of OpenAI, Inc. that is operated for profit. OpenAI, Inc. controls OpenAI OpCo, L.L.C. directly and through the other OpenAI entities.

17. Defendant OpenAI GP, L.L.C. (“OpenAI GP”) is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI GP is the general partner of OpenAI, L.P. OpenAI GP manages and operates the day-to-day business and affairs of OpenAI, L.P. OpenAI GP was aware of the unlawful conduct alleged herein and exercised control over OpenAI, L.P. throughout the Class Period. OpenAI, Inc. directly controls OpenAI GP.

18. Defendant OpenAI Startup Fund I, L.P. (“OpenAI Startup Fund I”) is a Delaware limited partnership with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund I was instrumental in the foundation of OpenAI, L.P., including the creation of its business strategy and providing initial funding. OpenAI Startup Fund I was aware of the unlawful conduct alleged herein and exercised control over OpenAI, L.P. throughout the Class Period.

19. Defendant OpenAI Startup Fund GP I, L.L.C. (“OpenAI Startup Fund GP I”) is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund GP I is the general partner of OpenAI Startup Fund I. OpenAI Startup Fund GP I is a party to the unlawful conduct alleged herein. OpenAI Startup Fund GP I manages and operates the day-to-day business and affairs of OpenAI Startup Fund I.

20. Defendant OpenAI Startup Fund Management, LLC (“OpenAI Startup Fund Management”) is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund Management is a party to the unlawful conduct alleged herein. OpenAI Startup Fund Management was aware of the unlawful conduct alleged herein and exercised control over OpenAI, L.P. throughout the Class Period.

IV. AGENTS AND CO-CONSPIRATORS

21. The unlawful acts alleged against the Defendants in this class action complaint were authorized, ordered, or performed by the Defendants’ respective officers, agents, employees, representatives, or shareholders while actively engaged in the management, direction, or control of the Defendants’ businesses or affairs. The Defendants’ agents operated under the explicit and apparent authority of their principals. Each Defendant, and its subsidiaries, affiliates, and agents operated as a single unified entity.

22. Various persons and/or firms not named as Defendants may have participated as co-conspirators in the violations alleged herein and may have performed acts and made statements in furtherance thereof. Each acted as the principal, agent, or joint venture of, or for other Defendants with respect to the acts, violations, and common course of conduct alleged herein.

V. FACTUAL ALLEGATIONS

23. OpenAI creates and sells artificial-intelligence software products. *Artificial intelligence* is commonly abbreviated “AI.” AI software is designed to algorithmically simulate human reasoning or inference, often using statistical methods.

24. Certain AI products created and sold by OpenAI are known as *large language models*. A large language model (or “LLM” for short) is AI software designed to parse and emit natural language. Though a large language model is a software program, it is not created the way most software programs

are—that is, by human software engineers writing code. Rather, a large language model is “trained” by copying massive amounts of text from various sources and feeding these copies into the model. This corpus of input material is called the *training dataset*. During training, the large language model copies each piece of text in the training dataset and extracts expressive information from it. The large language model progressively adjusts its output to more closely resemble the sequences of words copied from the training dataset. Once the large language model has copied and ingested all this text, it is able to emit convincing simulations of natural written language as it appears in the training dataset.

25. Much of the material in OpenAI’s training datasets, however, comes from copyrighted works—including books written by Plaintiffs—that were copied by OpenAI without consent, without credit, and without compensation.

26. Authors, including Plaintiffs, publish books with certain copyright management information. This information includes the book’s title, the ISBN number or copyright number, the author’s name, the copyright holder’s name, and terms and conditions of use. Most commonly, this information is found on the back of the book’s title page and is customarily included in all books, regardless of genre.

27. OpenAI has released a series of large language models, including GPT-1 (released June 2018), GPT-2 (February 2019), GPT-3 (May 2020), GPT-3.5 (March 2022), and most recently GPT-4 (March 2023). “GPT” is an abbreviation for “generative pre-trained transformer,” where *pre-trained* refers to the use of textual material for training, *generative* refers to the model’s ability to emit text, and *transformer* refers to the underlying training algorithm. Together, OpenAI’s large language models will be referred to as the “OpenAI Language Models.”

28. Many kinds of material have been used to train large language models. Books, however, have always been a key ingredient in training datasets for large language models because books offer the best examples of high-quality longform writing.

29. For instance, in its June 2018 paper introducing GPT-1 (called “Improving Language Understanding by Generative Pre-Training”), OpenAI revealed that it trained GPT-1 on BookCorpus, a collection of “over 7,000 unique unpublished books from a variety of genres including Adventure, Fantasy, and Romance.” OpenAI confirmed why a dataset of books was so valuable: “Crucially, it

1 contains long stretches of contiguous text, which allows the generative model to learn to condition on
2 long-range information.” Hundreds of large language models have been trained on BookCorpus,
3 including those made by OpenAI, Google, Amazon, and others.

4 30. BookCorpus, however, is a controversial dataset. It was assembled in 2015 by a team of
5 AI researchers for the purpose of training language models. They copied the books from a website
6 called Smashwords that hosts self-published novels, that are available to readers at no cost. Those
7 novels, however, are largely under copyright. They were copied into the BookCorpus dataset without
8 consent, credit, or compensation to the authors.

9 31. OpenAI also copied many books while training GPT-3. In the July 2020 paper
10 introducing GPT-3 (called “Language Models are Few-Shot Learners”), OpenAI disclosed that 15% of
11 the enormous GPT-3 training dataset came from “two internet-based books corpora” that OpenAI
12 simply called “Books1” and “Books2”.

13 32. Tellingly, OpenAI has never revealed what books are part of the Books1 and Books2
14 datasets. Though there are some clues. First, OpenAI admitted these are “internet-based books
15 corpora.” Second, both Books1 and Books2 are apparently much larger than BookCorpus. Based on
16 numbers given in OpenAI’s paper about GPT-3, Books1 is apparently about nine times larger; Books2
17 is about 42 times larger. Since BookCorpus contained about 7,000 titles, this suggests Books1 would
18 contain about 63,000 titles; Books2 would contain about 294,000 titles.

19 33. But there are only a handful of “internet-based books corpora” that would be able to
20 deliver this much material.

21 34. As noted in Paragraph 32, *supra*, the OpenAI Books1 dataset can be estimated to contain
22 about 63,000 titles. Project Gutenberg is an online archive of e-books whose copyright has expired. In
23 September 2020, Project Gutenberg claimed to have “over 60,000” titles. Project Gutenberg has long
24 been popular for training AI systems due to the lack of copyright. In 2018, a team of AI researchers
25 created the “Standardized Project Gutenberg Corpus,” which contained “more than 50,000 books.”
26 On information and belief, the OpenAI Books1 dataset is based on either the Standardized Project
27 Gutenberg Corpus or Project Gutenberg itself, because of the roughly similar sizes of the two datasets.

35. As noted in Paragraph 32, *supra*, the OpenAI Books2 dataset can be estimated to contain about 294,000 titles. The only “internet-based books corpora” that have ever offered that much material are notorious “shadow library” websites like Library Genesis (aka LibGen), Z-Library (aka B-ok), Sci-Hub, and Bibliotik. The books aggregated by these websites have also been available in bulk via torrent systems. These flagrantly illegal shadow libraries have long been of interest to the AI-training community: for instance, an AI training dataset published in December 2020 by EleutherAI called “Books3” includes a recreation of the Bibliotik collection and contains nearly 200,000 books. On information and belief, the OpenAI Books2 dataset includes books copied from these “shadow libraries,” because those are the most sources of trainable books most similar in nature and size to OpenAI’s description of Books2.

36. In March 2023, OpenAI’s paper introducing GPT-4 contained no information about its dataset at all: OpenAI claimed that “[g]iven both the competitive landscape and the safety implications of large-scale models like GPT-4, this report contains no further details about . . . dataset construction.” Later in the paper, OpenAI concedes it did “filter[] our dataset . . . to specifically reduce the quantity of inappropriate erotic text content.”

A. Interrogating the OpenAI Language Models using ChatGPT

37. ChatGPT is a language model created and sold by OpenAI. As its name suggests, ChatGPT is designed to offer a conversational style of interaction with a user. OpenAI offers ChatGPT through a web interface to individual users for \$20 per month. Through the web interface, users can choose to use two versions of ChatGPT: one based on the GPT-3.5 model, and one based on the newer GPT-4 model.

38. OpenAI also offers ChatGPT to software developers through an application-programming interface (or “API”). The API allows developers to write programs that exchange data with ChatGPT. Access to ChatGPT via the API is billed on the basis of usage.

39. Regardless of how accessed—either through the web interface or through the API—ChatGPT allows users to enter text prompts, which ChatGPT then attempts to respond to in a natural way, i.e., ChatGPT can generate answers in a coherent and fluent way that closely mimics human language. If a user prompts ChatGPT with a question, ChatGPT will answer. If a user prompts

ChatGPT with a command, ChatGPT will obey. If a user prompts ChatGPT to summarize a copyrighted book, it will do so.

40. ChatGPT's output, like other LLMs, relies on the data upon which it is trained to generate new content. LLMs generate output based on patterns and connections drawn from the training data. For example, if an LLM is prompted to generate a writing in the style of a certain author, the LLM would generate content based on patterns and connections it learned from analysis of that author's work within its training data.

41. On information and belief, the reason ChatGPT can accurately summarize a certain copyrighted book is because that book was copied by OpenAI and ingested by the underlying OpenAI Language Model (either GPT-3.5 or GPT-4) as part of its training data.

42. When ChatGPT was prompted to summarize books written by each of the Plaintiffs, it generated very accurate summaries. These summaries are attached as **Exhibit B**. The summaries get some details wrong. This is expected, since a large language model mixes together expressive material derived from many sources. Still, the rest of the summaries are accurate, which means that ChatGPT retains knowledge of particular works in the training dataset and is able to output similar textual content. At no point did ChatGPT reproduce any of the copyright management information Plaintiffs included with their published works.

VI. CLASS ALLEGATIONS

A. Class Definition

43. Plaintiffs bring this action for damages and injunctive relief as a class action under Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3), on behalf of the following Class:

All persons or entities domiciled in the United States that own a United States copyright in any work that was used as training data for the OpenAI Language Models during the Class Period.

44. This Class definition excludes:

- a. any of the Defendants named herein;
- b. any of the Defendants' co-conspirators;
- c. any of Defendants' parent companies, subsidiaries, and affiliates;

- d. any of Defendants' officers, directors, management, employees, subsidiaries, affiliates, or agents;
- e. all governmental entities; and
- f. the judges and chambers staff in this case, as well as any members of their immediate families.

B. Numerosity

45. Plaintiffs do not know the exact number of members in the Class. This information is in the exclusive control of Defendants. On information and belief, there are at least thousands of members in the Class geographically dispersed throughout the United States. Therefore, joinder of all members of the Class in the prosecution of this action is impracticable.

C. Typicality

46. Plaintiffs' claims are typical of the claims of other members of the Class because Plaintiffs and all members of the Class were damaged by the same wrongful conduct of Defendants as alleged herein, and the relief sought herein is common to all members of the Class.

D. Adequacy

47. Plaintiffs will fairly and adequately represent the interests of the members of the Class because the Plaintiffs have experienced the same harms as the members of the Class and have no conflicts with any other members of the Class. Furthermore, Plaintiffs have retained sophisticated and competent counsel who are experienced in prosecuting federal and state class actions, as well as other complex litigation.

E. Commonality and Predominance

48. Numerous questions of law or fact common to each Class arise from Defendants' conduct:

- a. whether Defendants violated the copyrights of Plaintiffs and the Class when they downloaded copies of Plaintiffs' copyrighted books and used them to train ChatGPT;
- b. whether ChatGPT itself is an infringing derivative work based on Plaintiffs' copyrighted books;

- c. whether the text outputs of ChatGPT are infringing derivative works based on Plaintiffs' copyrighted books;
 - d. whether Defendants violated the DMCA by removing copyright-management information (CMI) from Plaintiffs' copyrighted books.
 - e. Whether Defendants were unjustly enriched by the unlawful conduct alleged herein.
 - f. Whether Defendants' conduct alleged herein constitutes Unfair Competition under California Business and Professions Code section 17200 *et seq.*
 - g. Whether this Court should enjoin Defendants from engaging in the unlawful conduct alleged herein. And what the scope of that injunction would be.
 - h. Whether any affirmative defense excuses Defendants' conduct.
 - i. Whether any statutes of limitation limits Plaintiffs' and the Class's potential for recovery.
49. These and other questions of law and fact are common to the Class predominate over any questions affecting the members of the Class individually.

F. Other Class Considerations

50. Defendants have acted on grounds generally applicable to the Class. This class action is superior to alternatives, if any, for the fair and efficient adjudication of this controversy. Prosecuting the claims pleaded herein as a class action will eliminate the possibility of repetitive litigation. There will be no material difficulty in the management of this action as a class action. Further, final injunctive relief is appropriate with respect to the Class as a whole.

51. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

VII. CLAIMS FOR RELIEF

COUNT I

DIRECT COPYRIGHT INFRINGEMENT

17 U.S.C. § 106

ON BEHALF OF PLAINTIFFS AND THE CLASS

52. Plaintiffs incorporate by reference the preceding factual allegations.

53. As the owners of the registered copyrights in books used to train the OpenAI Language Models, Plaintiffs hold the exclusive rights to those texts under 17 U.S.C. § 106.

54. Plaintiffs never authorized OpenAI to make copies of their books, make derivative works, publicly display copies (or derivative works), or distribute copies (or derivative works). All those rights belong exclusively to Plaintiffs under copyright law.

55. On information and belief, to train the OpenAI Language Models, OpenAI relied on harvesting mass quantities of textual material from the public internet, including Plaintiffs' books, which are available in digital formats.

56. OpenAI made copies of Plaintiffs' books during the training process of the OpenAI Language Models without Plaintiffs' permission. Specifically, OpenAI copied at least Plaintiff Silverman's book *The Bedwetter*; Plaintiff Golden's book *Ararat*; and Plaintiff Kadrey's book *Sandman Slime*. Together, these books are referred to as the **Infringed Works**.

57. Because the OpenAI Language Models cannot function without the expressive information extracted from Plaintiffs' works (and others) and retained inside them, the OpenAI Language Models are themselves infringing derivative works, made without Plaintiffs' permission and in violation of their exclusive rights under the Copyright Act.

58. Plaintiffs have been injured by OpenAI's acts of direct copyright infringement. Plaintiffs are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

COUNT 2
VICARIOUS COPYRIGHT INFRINGEMENT
17 U.S.C. § 106
ON BEHALF OF PLAINTIFFS AND THE CLASS

59. Plaintiffs incorporate by reference the preceding factual allegations.

60. Because the output of the OpenAI Language Models is based on expressive information extracted from Plaintiffs' works (and others), every output of the OpenAI Language Models is an infringing derivative work, made without Plaintiffs' permission and in violation of their exclusive rights under the Copyright Act.

61. OpenAI has the right and ability to control the output of the OpenAI Language Models. OpenAI has benefited financially from the infringing output of the OpenAI Language Models.

Therefore, every output from the OpenAI Language Models constitutes an act of vicarious copyright infringement.

62. Plaintiffs have been injured by OpenAI's acts of vicarious copyright infringement. Plaintiffs are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

COUNT 3
DIGITAL MILLENNIUM COPYRIGHT ACT —
REMOVAL OF COPYRIGHT MANAGEMENT INFORMATION
17 U.S.C. § 1202(B)
ON BEHALF OF PLAINTIFFS AND THE CLASS

63. Plaintiffs incorporate by reference the preceding factual allegations.

64. Plaintiffs included one or more forms of copyright-management information ("CMI") in each of the Plaintiffs' Infringed Works, including: copyright notice, title and other identifying information, the name or other identifying information about the owners of each book, terms and conditions of use, and identifying numbers or symbols referring to CMI.

65. Without the authority of Plaintiffs and the Class, OpenAI copied the Plaintiffs' Infringed Works and used them as training data for the OpenAI Language Models. By design, the training process does not preserve any CMI. Therefore, OpenAI intentionally removed CMI from the Plaintiffs' Infringed Works in violation of 17 U.S.C. § 1202(b)(1).

66. Without the authority of Plaintiffs and the Class, Defendants created derivative works based on Plaintiffs' Infringed Works. By distributing these works without their CMI, OpenAI violated 17 U.S.C. § 1202(b)(3).

67. OpenAI knew or had reasonable grounds to know that this removal of CMI would facilitate copyright infringement by concealing the fact that every output from the OpenAI Language Models is an infringing derivative work, synthesized entirely from expressive information found in the training data.

68. Plaintiffs have been injured by OpenAI's removal of CMI. Plaintiffs are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

COUNT 4
UNFAIR COMPETITION
CAL. BUS. & PROF. CODE §§ 17200, *ET SEQ.*
ON BEHALF OF PLAINTIFFS AND THE CLASS

69. Plaintiffs incorporate by reference the preceding factual allegations.

70. Defendants have engaged in unlawful business practices, including violating Plaintiffs' rights under the DMCA, and using Plaintiffs' Infringed Works to train ChatGPT without Plaintiffs' or the Class's authorization.

71. The unlawful business practices described herein violate California Business and Professions Code section 17200 *et seq.* (the "UCL") because that conduct is otherwise unlawful by violating the DMCA.

72. The unlawful business practices described herein violate the UCL because they are unfair, immoral, unethical, oppressive, unscrupulous or injurious to consumers, because, among other reasons, Defendants used Plaintiffs' protected works to train ChatGPT for Defendants' own commercial profit without Plaintiffs' and the Class's authorization. Defendants further knowingly designed ChatGPT to output portions or summaries of Plaintiffs' copyrighted works without attribution, and they unfairly profit from and take credit for developing a commercial product based on unattributed reproductions of those stolen writing and ideas.

73. The unlawful business practices described herein violate the UCL because consumers are likely to be deceived. Defendants knowingly and secretively trained ChatGPT on unauthorized copies of Plaintiffs' copyright-protected work. Further Defendants deceptively designed ChatGPT to output without any CMI or other credit to Plaintiffs and Class members whose Infringed Works comprise ChatGPT's training dataset. Defendants deceptively marketed their product in a manner that fails to attribute the success of their product to the copyright-protected work on which it is based.

COUNT 5
NEGLIGENCE
UNDER CALIFORNIA COMMON LAW
ON BEHALF OF PLAINTIFFS AND THE CLASS

74. Plaintiffs incorporate by reference the preceding factual allegations.

75. Defendants owed a duty of care toward Plaintiffs and the Class based upon Defendants' relationship to them. This duty is based upon Defendants' obligations, custom and practice, right to control information in its possession, exercise of control over the information in its possession, authority to control the information in its possession, and the commission of affirmative acts that result in said harms and losses. Additionally, this duty is based on the requirements of California Civil Code section 1714, requiring all "persons," including Defendants, to act in a reasonable manner toward others.

76. Defendants breached their duties by negligently, carelessly, and recklessly collecting, maintaining and controlling Plaintiffs' and Class members' Infringed Works and engineering, designing, maintaining and controlling systems—including ChatGPT—which are trained on Plaintiffs' and Class members' Infringed Works without their authorization.

77. Defendants owed Plaintiffs and Class members a duty of care to maintain Plaintiffs' Infringed Works once collected and ingested for training ChatGPT.

78. Defendants also owed Plaintiffs and Class members a duty of care to not use the Infringed Works in a way that would foreseeably cause Plaintiffs and Class members injury, for instance, by using the Infringed Works to train ChatGPT.

79. Defendants breached their duties by, *inter alia*, using Plaintiffs' Infringed Works to train ChatGPT.

COUNT 6
UNJUST ENRICHMENT
UNDER CALIFORNIA COMMON LAW
ON BEHALF OF PLAINTIFFS AND THE CLASS

80. Plaintiffs incorporate by reference the preceding factual allegations.

81. Plaintiffs and the Class have invested substantial time and energy in creating the Infringed Works.

82. Defendants have unjustly utilized access to the Infringed Materials to train ChatGPT.

83. Plaintiffs did not consent to the unauthorized use of the Infringed Materials to train ChatGPT.

84. By using Plaintiffs' Infringed Works to train ChatGPT, Plaintiffs and the Class were deprived of the benefits of their work, including monetary damages.

85. Defendants derived profit and other benefits from the use of the Infringed Materials to train ChatGPT.

86. It would be unjust for Defendants to retain those benefits.

87. The conduct of Defendants is causing and, unless enjoined and restrained by this Court, will continue to cause Plaintiffs and the Class great and irreparable injury that cannot fully be compensated or measured in money.

VIII. DEMAND FOR JUDGMENT

WHEREFORE, Plaintiffs request that the Court enter judgment on their behalf and on behalf of the Class defined herein, by ordering:

- a) This action may proceed as a class action, with Plaintiffs serving as Class Representatives, and with Plaintiffs' counsel as Class Counsel.
- b) Judgment in favor of Plaintiffs and the Class and against Defendants.
- c) An award of statutory and other damages under 17 U.S.C. § 504 for violations of the copyrights of Plaintiffs and the Class by Defendants.
- d) Permanent injunctive relief, including but not limited to changes to ChatGPT to ensure that all applicable information set forth in 17 U.S.C. § 1203(b)(1) is included when appropriate.
- e) An order of costs and allowable attorney's fees under 17 U.S.C. § 1203(b)(4)–(5).
- f) An award of statutory damages under 17 U.S.C. § 1203(b)(3) and 17 U.S.C. § 1203(c)(3), or in the alternative, an award of actual damages and any additional profits under 17 U.S.C. § 1203(c)(2) (including tripling damages under 17 U.S.C. § 1203(c)(4) if applicable).

- 1 g) Pre- and post-judgment interest on the damages awarded to Plaintiffs and the Class, and
2 that such interest be awarded at the highest legal rate from and after the date this class
3 action complaint is first served on Defendants.
- 4 h) Defendants are to be jointly and severally responsible financially for the costs and
5 expenses of a Court approved notice program through post and media designed to give
6 immediate notification to the Class.
- 7 i) Further relief for Plaintiffs and the Class as may be just and proper.

8 **IX. JURY TRIAL DEMANDED**

9 Under Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury of all the claims
10 asserted in this Complaint so triable.

11 Dated: July 7, 2023

12 By: /s/ Joseph R. Saveri
Joseph R. Saveri

13
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*Counsel for Individual and Representative Plaintiffs
 and the Proposed Class*

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

PAUL TREMBLAY, an individual and
 MONA AWAD, an individual,

 Individual and Representative Plaintiffs,

v.

OPENAI, INC., a Delaware nonprofit corporation; OPENAI,
 L.P., a Delaware limited partnership; OPENAI OP CO, L.L.C., a
 Delaware limited liability corporation; OPENAI GP, L.L.C., a
 Delaware limited liability company; OPENAI STARTUP FUND
 GP I, L.L.C., a Delaware limited liability company; OPENAI
 STARTUP FUND I, L.P., a Delaware limited partnership; and
 OPENAI STARTUP FUND MANAGEMENT, LLC, a Delaware
 limited liability company,

Defendants.

Case No.

COMPLAINT

CLASS ACTION

DEMAND FOR JURY TRIAL

Plaintiffs Paul Tremblay and Mona Awad (“Plaintiffs”), on behalf of themselves and all others similarly situated, bring this Class Action Complaint (the “Complaint”) against Defendants OpenAI, Inc., OpenAI, L.P., OpenAI OpCo, L.L.C., OpenAI GP, L.L.C., OpenAI Startup Fund I, L.P., OpenAI Startup Fund GP I, L.L.C. and OpenAI Startup Fund Management, LLC for direct copyright infringement, vicarious copyright infringement, violations of section 1202(b) of the Digital Millenium Copyright Act, unjust enrichment, violations of the California and common law unfair competition laws, and negligence. Plaintiffs seek to recover injunctive relief and damages as a result and consequence of Defendants’ unlawful conduct.

I. OVERVIEW

1. ChatGPT is a software product created, maintained, and sold by OpenAI.

2. ChatGPT is powered by two AI software programs called GPT-3.5 and GPT-4, also known as *large language models*. Rather than being programmed in the traditional way, a large language model is “trained” by copying massive amounts of text and extracting expressive information from it. This body of text is called the *training dataset*. Once a large language model has copied and ingested the text in its training dataset, it is able to emit convincingly naturalistic text outputs in response to user prompts.

3. A large language model’s output is therefore entirely and uniquely reliant on the material in its training dataset. Every time it assembles a text output, the model relies on the information it extracted from its training dataset.

4. Plaintiffs and Class members are authors of books. Plaintiffs and Class members have registered copyrights in the books they published. Plaintiffs and Class members did not consent to the use of their copyrighted books as training material for ChatGPT. Nonetheless, their copyrighted materials were ingested and used to train ChatGPT.

5. Indeed, when ChatGPT is prompted, ChatGPT generates summaries of Plaintiffs’ copyrighted works—something only possible if ChatGPT was trained on Plaintiffs’ copyrighted works.

6. Defendants, by and through the use of ChatGPT, benefit commercial and profit richly from the use of Plaintiffs’ and Class members’ copyrighted materials.

II. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this case arises under the Copyright Act (17 U.S.C. § 501) and the Digital Millenium Copyright Act (17 U.S.C. § 1202).

8. Jurisdiction and venue is proper in this judicial district under 28 U.S.C. § 1391(c)(2) because defendant OpenAI, Inc. is headquartered in this district, and thus a substantial part of the events giving rise to the claim occurred in this district; and because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District, and a substantial portion of the affected interstate trade and commerce was carried out in this District. Each Defendant has transacted business, maintained substantial contacts, and/or committed overt acts in furtherance of the illegal scheme and conspiracy throughout the United States, including in this District. Defendants' conduct has had the intended and foreseeable effect of causing injury to persons residing in, located in, or doing business throughout the United States, including in this District.

9. Under Civil Local Rule 3.2(c) and (e), assignment of this case to the San Francisco Division is proper because defendant OpenAI, Inc. is headquartered in San Francisco, a substantial amount part of the events giving rise to Plaintiffs' claims and the interstate trade and commerce involved and affected by Defendants' conduct giving rise to the claims herein occurred in this Division.

III. PARTIES

A. Plaintiffs

10. Plaintiff Paul Tremblay is a writer who lives in Massachusetts. Plaintiff Tremblay owns registered copyrights in several books, including *The Cabin at the End of the World*. This book contains the copyright-management information customarily included in published books, including the name of the author and the year of publication.

11. Plaintiff Mona Awad is a writer who lives in Massachusetts. Plaintiff Awad owns registered copyrights in several books, including *13 Ways of Looking at a Fat Girl* and *Bunny*. These books contain the copyright-management information customarily included in published books, including the name of the author and the year of publication.

12. A nonexhaustive list of registered copyrights owned by Plaintiffs is included as
Exhibit A.

B. Defendants

13. Defendant OpenAI, Inc. is a Delaware nonprofit corporation with its principal place of business located at 3180 18th St, San Francisco, CA 94110.

14. Defendant OpenAI, L.P. is a Delaware limited partnership with its principal place of business located at 3180 18th St, San Francisco, CA 94110. OpenAI, L.P. is a wholly owned subsidiary of OpenAI Inc. that is operated for profit. OpenAI, Inc. controls OpenAI, L.P. directly and through the other OpenAI entities.

15. Defendant OpenAI OpCo, L.L.C. is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI OpCo, L.L.C. is a wholly owned subsidiary of OpenAI, Inc. that is operated for profit. OpenAI, Inc. controls OpenAI OpCo, L.L.C. directly and through the other OpenAI entities.

16. Defendant OpenAI GP, L.L.C. (“OpenAI GP”) is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI GP is the general partner of OpenAI, L.P. OpenAI GP manages and operates the day-to-day business and affairs of OpenAI, L.P. OpenAI GP was aware of the unlawful conduct alleged herein and exercised control over OpenAI, L.P. throughout the Class Period. OpenAI, Inc. directly controls OpenAI GP.

17. Defendant OpenAI Startup Fund I, L.P. (“OpenAI Startup Fund I”) is a Delaware limited partnership with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund I was instrumental in the foundation of OpenAI, L.P., including the creation of its business strategy and providing initial funding. OpenAI Startup Fund I was aware of the unlawful conduct alleged herein and exercised control over OpenAI, L.P. throughout the Class Period.

18. Defendant OpenAI Startup Fund GP I, L.L.C. (“OpenAI Startup Fund GP I”) is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund GP I is the general partner of OpenAI Startup Fund I. OpenAI Startup Fund GP I is a party to the unlawful conduct alleged herein. OpenAI Startup Fund GP I manages and operates the day-to-day business and affairs of OpenAI Startup Fund I.

19. Defendant OpenAI Startup Fund Management, LLC (“OpenAI Startup Fund Management”) is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund Management is a party to the unlawful conduct alleged herein. OpenAI Startup Fund Management was aware of the unlawful conduct alleged herein and exercised control over OpenAI, L.P. throughout the Class Period.

IV. AGENTS AND CO-CONSPIRATORS

20. The unlawful acts alleged against the Defendants in this class action complaint were authorized, ordered, or performed by the Defendants’ respective officers, agents, employees, representatives, or shareholders while actively engaged in the management, direction, or control of the Defendants’ businesses or affairs. The Defendants’ agents operated under the explicit and apparent authority of their principals. Each Defendant, and its subsidiaries, affiliates, and agents operated as a single unified entity.

21. Various persons and/or firms not named as Defendants may have participated as co-conspirators in the violations alleged herein and may have performed acts and made statements in furtherance thereof. Each acted as the principal, agent, or joint venture of, or for other Defendants with respect to the acts, violations, and common course of conduct alleged herein.

V. FACTUAL ALLEGATIONS

22. OpenAI creates and sells artificial-intelligence software products. *Artificial intelligence* is commonly abbreviated “AI.” AI software is designed to algorithmically simulate human reasoning or inference, often using statistical methods.

23. Certain AI products created and sold by OpenAI are known as *large language models*. A large language model (or “LLM” for short) is AI software designed to parse and emit natural language. Though a large language model is a software program, it is not created the way most software programs are—that is, by human software engineers writing code. Rather, a large language model is “trained” by copying massive amounts of text from various sources and feeding these copies into the model. This corpus of input material is called the *training dataset*. During training, the large language model copies each piece of text in the training dataset and extracts expressive information from it. The large language model progressively adjusts its output to more closely resemble the sequences of words copied from

1 the training dataset. Once the large language model has copied and ingested all this text, it is able to
2 emit convincing simulations of natural written language as it appears in the training dataset.

3 24. Much of the material in OpenAI’s training datasets, however, comes from copyrighted
4 works—including books written by Plaintiffs—that were copied by OpenAI without consent, without
5 credit, and without compensation.

6 25. Authors, including Plaintiffs, publish books with certain copyright management
7 information. This information includes the book’s title, the ISBN number or copyright number, the
8 author’s name, the copyright holder’s name, and terms and conditions of use. Most commonly, this
9 information is found on the back of the book’s title page and is customarily included in all books,
10 regardless of genre.

11 26. OpenAI has released a series of large language models, including GPT-1 (released June
12 2018), GPT-2 (February 2019), GPT-3 (May 2020), GPT-3.5 (March 2022), and most recently GPT-4
13 (March 2023). “GPT” is an abbreviation for “generative pre-trained transformer,” where *pre-trained*
14 refers to the use of textual material for training, *generative* refers to the model’s ability to emit text, and
15 *transformer* refers to the underlying training algorithm. Together, OpenAI’s large language models will
16 be referred to as the “OpenAI Language Models.”

17 27. Many kinds of material have been used to train large language models. Books, however,
18 have always been a key ingredient in training datasets for large language models because books offer the
19 best examples of high-quality longform writing.

20 28. For instance, in its June 2018 paper introducing GPT-1 (called “Improving Language
21 Understanding by Generative Pre-Training”), OpenAI revealed that it trained GPT-1 on BookCorpus,
22 a collection of “over 7,000 unique unpublished books from a variety of genres including Adventure,
23 Fantasy, and Romance.” OpenAI confirmed why a dataset of books was so valuable: “Crucially, it
24 contains long stretches of contiguous text, which allows the generative model to learn to condition on
25 long-range information.” Hundreds of large language models have been trained on BookCorpus,
26 including those made by OpenAI, Google, Amazon, and others.

27 29. BookCorpus, however, is a controversial dataset. It was assembled in 2015 by a team of
28 AI researchers for the purpose of training language models. They copied the books from a website

1 called Smashwords.com that hosts unpublished novels that are available to readers at no cost. Those
2 novels, however, are largely under copyright. They were copied into the BookCorpus dataset without
3 consent, credit, or compensation to the authors.

4 30. OpenAI also copied many books while training GPT-3. In the July 2020 paper
5 introducing GPT-3 (called “Language Models are Few-Shot Learners”), OpenAI disclosed that 15% of
6 the enormous GPT-3 training dataset came from “two internet-based books corpora” that OpenAI
7 simply called “Books1” and “Books2”.

8 31. Tellingly, OpenAI has never revealed what books are part of the Books1 and Books2
9 datasets. Though there are some clues. First, OpenAI admitted these are “internet-based books
10 corpora”. Second, both Books1 and Books2 are apparently much larger than BookCorpus. Based on
11 numbers given in OpenAI’s paper about GPT-3, Books1 is apparently about nine times larger; Books2
12 is about 42 times larger. Since BookCorpus contained about 7,000 titles, this suggests Books1 would
13 contain about 63,000 titles; Books2 would contain about 294,000 titles.

14 32. But there are only a handful of “internet-based books corpora” that would be able to
15 deliver this much material.

16 33. As noted in Paragraph 31, *supra*, the OpenAI Books1 dataset can be estimated to contain
17 about 63,000 titles. Project Gutenberg is an online archive of e-books whose copyright has expired. In
18 September 2020, Project Gutenberg claimed to have “over 60,000” titles. Project Gutenberg has long
19 been popular for training AI systems due to the lack of copyright. In 2018, a team of AI researchers
20 created the “Standardized Project Gutenberg Corpus”, which contained “more than 50,000 books”.
21 On information and belief, the OpenAI Books1 dataset is based on either the Standardized Project
22 Gutenberg Corpus or Project Gutenberg itself, because of the roughly similar sizes of the two datasets.

23 34. As noted in Paragraph 31, *supra*, the OpenAI Books2 dataset can be estimated to contain
24 about 294,000 titles. The only “internet-based books corpora” that have ever offered that much
25 material are notorious “shadow library” websites like Library Genesis (aka LibGen), Z-Library (aka B-
26 ok), Sci-Hub, and Bibliotik. The books aggregated by these websites have also been available in bulk via
27 torrent systems. These flagrantly illegal shadow libraries have long been of interest to the AI-training
28 community: for instance, an AI training dataset published in December 2020 by EleutherAI called

1 “Books3” includes a recreation of the Bibliotik collection and contains nearly 200,000 books. On
2 information and belief, the OpenAI Books2 dataset includes books copied from these “shadow
3 libraries”, because those are the most sources of trainable books most similar in nature and size to
4 OpenAI’s description of Books2.

5 35. In March 2023, OpenAI’s paper introducing GPT-4 contained no information about its
6 dataset at all: OpenAI claimed that “[g]iven both the competitive landscape and the safety implications
7 of large-scale models like GPT-4, this report contains no further details about . . . dataset
8 construction.” Later in the paper, OpenAI concedes it did “filter[] our dataset . . . to specifically
9 reduce the quantity of inappropriate erotic text content.”

10 **A. Interrogating the OpenAI Language Models using ChatGPT**

11 36. ChatGPT is a language model created and sold by OpenAI. As its name suggests,
12 ChatGPT is designed to offer a conversational style of interaction with a user. OpenAI offers ChatGPT
13 through a web interface to individual users for \$20 per month. Through the web interface, users can
14 choose to use two versions of ChatGPT: one based on the GPT-3.5 model, and one based on the newer
15 GPT-4 model.

16 37. OpenAI also offers ChatGPT to software developers through an application-
17 programming interface (or “API”). The API allows developers to write programs that exchange data
18 with ChatGPT. Access to ChatGPT via the API is billed on the basis of usage.

19 38. Regardless of how accessed—either through the web interface or through the API—
20 ChatGPT allows users to enter text prompts, which ChatGPT then attempts to respond to in a natural
21 way, i.e., ChatGPT can generate answers in a coherent and fluent way that closely mimics human
22 language. If a user prompts ChatGPT with a question, ChatGPT will answer. If a user prompts
23 ChatGPT with a command, ChatGPT will obey. If a user prompts ChatGPT to summarize a
24 copyrighted book, it will do so.

25 39. ChatGPT’s output, like other LLMs, relies on the data upon which it is trained to
26 generate new content. LLMs generate output based on patterns and connections drawn from the
27 training data. For example, if an LLM is prompted to generate a writing in the style of a certain author,
28

the LLM would generate content based on patterns and connections it learned from analysis of that author's work within its training data.

40. On information and belief, the reason ChatGPT can accurately summarize a certain copyrighted book is because that book was copied by OpenAI and ingested by the underlying OpenAI Language Model (either GPT-3.5 or GPT-4) as part of its training data.

41. When ChatGPT was prompted to summarize books written by each of the Plaintiffs, it generated very accurate summaries. These summaries are attached as **Exhibit B**. The summaries get some details wrong. These details are highlighted in the summaries. This is expected, since a large language model mixes together expressive material derived from many sources. Still, the rest of the summaries are accurate, which means that ChatGPT retains knowledge of particular works in the training dataset and is able to output similar textual content. At no point did ChatGPT reproduce any of the copyright management information Plaintiffs included with their published works.

VI. CLASS ALLEGATIONS

A. Class Definition

42. Plaintiffs bring this action for damages and injunctive relief as a class action under Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3), on behalf of the following Class:

All persons or entities domiciled in the United States that own a United States copyright in any work that was used as training data for the OpenAI Language Models during the Class Period.

43. This Class definition excludes:

- a. any of the Defendants named herein;
- b. any of the Defendants' co-conspirators;
- c. any of Defendants' parent companies, subsidiaries, and affiliates;
- d. any of Defendants' officers, directors, management, employees, subsidiaries, affiliates, or agents;
- e. all governmental entities; and
- f. the judges and chambers staff in this case, as well as any members of their immediate families.

B. Numerosity

44. Plaintiffs do not know the exact number of members in the Class. This information is in the exclusive control of Defendants. On information and belief, there are at least thousands of members in the Class geographically dispersed throughout the United States. Therefore, joinder of all members of the Class in the prosecution of this action is impracticable.

C. Typicality

45. Plaintiffs' claims are typical of the claims of other members of the Class because Plaintiffs and all members of the Class were damaged by the same wrongful conduct of Defendants as alleged herein, and the relief sought herein is common to all members of the Class.

D. Adequacy

46. Plaintiffs will fairly and adequately represent the interests of the members of the Class because the Plaintiffs have experienced the same harms as the members of the Class and have no conflicts with any other members of the Class. Furthermore, Plaintiffs have retained sophisticated and competent counsel who are experienced in prosecuting federal and state class actions, as well as other complex litigation.

E. Commonality and Predominance

47. Numerous questions of law or fact common to each Class arise from Defendants' conduct:

- a. whether Defendants violated the copyrights of Plaintiffs and the Class when they downloaded copies of Plaintiff's copyrighted books and used them to train ChatGPT;
- b. whether ChatGPT itself is an infringing derivative work based on Plaintiffs' copyrighted books;
- c. whether the text outputs of ChatGPT are infringing derivative works based on Plaintiffs' copyrighted books;
- d. whether Defendants violated the DMCA by removing copyright-management information (CMI) from Plaintiffs' copyrighted books.
- e. Whether Defendants were unjustly enriched by the unlawful conduct alleged herein.
- f. Whether Defendants' conduct alleged herein constitutes Unfair Competition under

California Business and Professions Code section 17200 *et seq.*

- g. Whether Defendants' conduct alleged herein constitutes unfair competition under the common law.
- h. Whether this Court should enjoin Defendants from engaging in the unlawful conduct alleged herein. And what the scope of that injunction would be.
- i. Whether any affirmative defense excuses Defendants' conduct.
- j. Whether any statutes of limitation limits Plaintiffs' and the Class's potential for recovery.

48. These and other questions of law and fact are common to the Class predominate over any questions affecting the members of the Class individually.

F. Other Class Considerations

49. Defendants have acted on grounds generally applicable to the Class. This class action is superior to alternatives, if any, for the fair and efficient adjudication of this controversy. Prosecuting the claims pleaded herein as a class action will eliminate the possibility of repetitive litigation. There will be no material difficulty in the management of this action as a class action. Further, final injunctive relief is appropriate with respect to the Class as a whole.

50. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

VII. CLAIMS FOR RELIEF

COUNT I Direct Copyright Infringement 17 U.S.C. § 106 On Behalf of Plaintiffs and the Class

51. Plaintiffs incorporate by reference the preceding factual allegations.

52. As the owners of the registered copyrights in books used to train the OpenAI Language Models, Plaintiffs hold the exclusive rights to those texts under 17 U.S.C. § 106.

53. Plaintiffs never authorized OpenAI to make copies of their books, make derivative works, publicly display copies (or derivative works), or distribute copies (or derivative works). All those rights belong exclusively to Plaintiffs under copyright law.

54. On information and belief, to train the OpenAI Language Models, OpenAI relied on harvesting mass quantities of textual material from the public internet, including Plaintiffs' books, which are available in digital formats.

55. OpenAI made copies of Plaintiffs' books during the training process of the OpenAI Language Models without Plaintiffs' permission. Specifically, OpenAI copied at least Plaintiff Tremblay's book *The Cabin at the End of the World*; and Plaintiff Awad's books *13 Ways of Looking at a Fat Girl* and *Bunny*. Together, these books are referred to as the **Infringed Works**.

56. Because the OpenAI Language Models cannot function without the expressive information extracted from Plaintiffs' works (and others) and retained inside them, the OpenAI Language Models are themselves infringing derivative works, made without Plaintiffs' permission and in violation of their exclusive rights under the Copyright Act.

57. Plaintiffs have been injured by OpenAI's acts of direct copyright infringement. Plaintiffs are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

COUNT 2
Vicarious Copyright Infringement
17 U.S.C. § 106
On Behalf of Plaintiffs and the Class

58. Plaintiffs incorporate by reference the preceding factual allegations.

59. Because the output of the OpenAI Language Models is based on expressive information extracted from Plaintiffs' works (and others), every output of the OpenAI Language Models is an infringing derivative work, made without Plaintiffs' permission and in violation of their exclusive rights under the Copyright Act.

60. OpenAI has the right and ability to control the output of the OpenAI Language Models. OpenAI has benefited financially from the infringing output of the OpenAI Language Models. Therefore, every output from the OpenAI Language Models constitutes an act of vicarious copyright infringement.

61. Plaintiffs have been injured by OpenAI's acts of vicarious copyright infringement. Plaintiffs are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

COUNT 3
Digital Millenium Copyright Act—Removal of Copyright Management Information
17 U.S.C. § 1202(b)
On Behalf of Plaintiffs and the Class

62. Plaintiffs incorporate by reference the preceding factual allegations.

63. Plaintiffs included one or more forms of copyright-management information ("CMI") in each of the Plaintiffs' Infringed Works, including: copyright notice, title and other identifying information, the name or other identifying information about the owners of each book, terms and conditions of use, and identifying numbers or symbols referring to CMI.

64. Without the authority of Plaintiffs and the Class, OpenAI copied the Plaintiffs' Infringed Works and used them as training data for the OpenAI Language Models. By design, the training process does not preserve any CMI. Therefore, OpenAI intentionally removed CMI from the Plaintiffs' Infringed Works in violation of 17 U.S.C. § 1202(b)(1).

65. Without the authority of Plaintiffs and the Class, Defendants created derivative works based on Plaintiffs' Infringed Works. By distributing these works without their CMI, OpenAI violated 17 U.S.C. § 1202(b)(3).

66. OpenAI knew or had reasonable grounds to know that this removal of CMI would facilitate copyright infringement by concealing the fact that every output from the OpenAI Language Models is an infringing derivative work, synthesized entirely from expressive information found in the training data.

67. Plaintiffs have been injured by OpenAI's removal of CMI. Plaintiffs are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

COUNT 4
Unfair Competition
Cal. Bus. & Prof. Code §§ 17200, et seq.
On Behalf of Plaintiffs and the Class

68. Plaintiffs incorporate by reference the preceding factual allegations.

69. Defendants have engaged in unlawful business practices, including violating Plaintiffs' rights under the DMCA, and using Plaintiffs' Infringed Works to train ChatGPT without Plaintiffs' or the Class's authorization.

70. The unlawful business practices described herein violate California Business and Professions Code section 17200 *et seq.* (the "UCL") because that conduct is otherwise unlawful by violating the DMCA.

71. The unlawful business practices described herein violate the UCL because they are unfair, immoral, unethical, oppressive, unscrupulous or injurious to consumers, because, among other reasons, Defendants used Plaintiffs' protected works to train ChatGPT for Defendants' own commercial profit without Plaintiffs' and the Class's authorization. Defendants further knowingly designed ChatGPT to output portions or summaries of Plaintiffs' copyrighted works without attribution, and they unfairly profit from and take credit for developing a commercial product based on unattributed reproductions of those stolen writing and ideas.

72. The unlawful business practices described herein violate the UCL because consumers are likely to be deceived. Defendants knowingly and secretly trained ChatGPT on unauthorized copies of Plaintiffs' copyright-protected work. Further Defendants deceptively designed ChatGPT to output without any CMI or other credit to Plaintiffs and Class members whose Infringed Works comprise ChatGPT's training dataset. Defendants deceptively marketed their product in a manner that fails to attribute the success of their product to the copyright-protected work on which it is based.

COUNT 5
Negligence
On Behalf of Plaintiffs and the Class

73. Plaintiffs incorporate by reference the preceding factual allegations.

74. Defendants owed a duty of care toward Plaintiffs and the Class based upon Defendants' relationship to them. This duty is based upon Defendants' obligations, custom and practice, right to control information in its possession, exercise of control over the information in its possession, authority to control the information in its possession, and the commission of affirmative acts that result in said harms and losses. Additionally, this duty is based on the requirements of California Civil Code

1 section 1714, requiring all “persons,” including Defendants, to act in a reasonable manner toward
2 others.

3 75. Defendants breached their duties by negligently, carelessly, and recklessly collecting,
4 maintaining and controlling Plaintiffs’ and Class members’ Infringed Works and engineering,
5 designing, maintaining and controlling systems—including ChatGPT—which are trained on Plaintiffs’
6 and Class members’ Infringed Works without their authorization.

7 76. Defendants owed Plaintiffs and Class members a duty of care to maintain Plaintiffs’
8 Infringed Works once collected and ingested for training ChatGPT.

9 77. Defendants also owed Plaintiffs and Class members a duty of care to not use the
10 Infringed Works in a way that would foreseeably cause Plaintiffs and Class members injury, for
11 instance, by using the Infringed Works to train ChatGPT.

12 78. Defendants breached their duties by, *inter alia*, using Plaintiffs’ Infringed Works to train
13 ChatGPT.

14 **COUNT 6**
15 **Unjust Enrichment**
16 **On Behalf of Plaintiffs and the Class**

17 79. Plaintiffs incorporate by reference the preceding factual allegations.

18 80. Plaintiffs and the Class have invested substantial time and energy in creating the
19 Infringed Works.

20 81. Defendants have unjustly utilized access to the Infringed Materials to train ChatGPT.

21 82. Plaintiffs did not consent to the unauthorized use of the Infringed Materials to train
22 ChatGPT.

23 83. By using Plaintiffs’ Infringed Works to train ChatGPT, Plaintiffs and the Class were
24 deprived of the benefits of their work, including monetary damages.

25 84. Defendants derived profit and other benefits from the use of the Infringed Materials to
26 train ChatGPT.

27 85. It would be unjust for Defendants to retain those benefits.

28 86. The conduct of Defendants is causing and, unless enjoined and restrained by this Court,

will continue to cause Plaintiffs and the Class great and irreparable injury that cannot fully be compensated or measured in money.

VIII. DEMAND FOR JUDGMENT

WHEREFORE, Plaintiffs request that the Court enter judgment on their behalf and on behalf of the Class defined herein, by ordering:

- a) This action may proceed as a class action, with Plaintiffs serving as Class Representatives, and with Plaintiffs' counsel as Class Counsel.
- b) Judgment in favor of Plaintiffs and the Class and against Defendants.
- c) An award of statutory and other damages under 17 U.S.C. § 504 for violations of the copyrights of Plaintiffs and the Class by Defendants.
- d) Permanent injunctive relief, including but not limited to changes to ChatGPT to ensure that all applicable information set forth in 17 U.S.C. § 1203(b)(1) is included when appropriate.
- e) An order of costs and allowable attorney's fees under 17 U.S.C. § 1203(b)(4)–(5).
- f) An award of statutory damages under 17 U.S.C. § 1203(b)(3) and 17 U.S.C. § 1203(c)(3), or in the alternative, an award of actual damages and any additional profits under 17 U.S.C. § 1203(c)(2) (including tripling damages under 17 U.S.C. § 1203(c)(4) if applicable).
- g) Pre- and post-judgment interest on the damages awarded to Plaintiffs and the Class, and that such interest be awarded at the highest legal rate from and after the date this class action complaint is first served on Defendants.
- h) Defendants are to be jointly and severally responsible financially for the costs and expenses of a Court approved notice program through post and media designed to give immediate notification to the Class.
- i) Further relief for Plaintiffs and the Class as may be just and proper.

IX. JURY TRIAL DEMANDED

Under Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury of all the claims asserted in this Complaint so triable.

1 Dated: June 28, 2023

2 By: /s/ Joseph R. Saveri
3 Joseph R. Saveri

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

MICHAEL CHABON, DAVID HENRY
HWANG, MATTHEW KLAM, RACHEL
LOUISE SNYDER, AND AYELET
WALDMAN,

individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

OPENAI, INC., OPENAI, L.P., OPENAI
OPCO, LLC, OPENAI GP LLC, OPENAI
STARTUP FUND GP I, LLC, OPENAI
STARTUP FUND I, LP, and OPENAI
STARTUP FUND MANAGEMENT, LLC,

Defendants.

Case No.

CLASS ACTION COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

1 Plaintiffs Michael Chabon, David Henry Hwang, Matthew Klam, Rachel Louise Snyder,
2 and Ayelet Waldman (“Plaintiffs”), individually and on behalf of all others similarly situated,
3 bring this action against Defendants OpenAI, Inc., OpenAI, LP, OpenAI OpCo, LLC, OpenAI
4 GP LLC, OpenAI Startup Fund I, LP, OpenAI Startup Fund GP I, LLC, and OpenAI Startup
5 Fund Management, LLC (collectively, “Defendants” or “OpenAI”). Plaintiffs allege as follows
6 based upon personal knowledge as to themselves and their own acts, and upon information and
7 belief as to all other matters:

8 **NATURE OF ACTION**

9 1. This is a class action lawsuit brought by Plaintiffs on behalf of themselves and a
10 Class of authors holding copyrights in their published works arising from OpenAI’s clear
11 infringement of their intellectual property.

12 2. OpenAI is a research company specializing in the development of artificial
13 intelligence (“AI”) products, such as ChatGPT.

14 3. ChatGPT is an AI chatbot, which produces responses to users’ text queries or
15 prompts in a way that mimics human conversation.

16 4. ChatGPT relies on other OpenAI products to function, namely Generative Pre-
17 trained Transformer (“GPT”) models. “Generative,” in GPT, represents the model’s ability to
18 respond to text inquiries, while “Pre-trained” refers to the model’s use of training datasets to
19 program its responses, and “Transformer” concerns the model’s underlying algorithm allowing
20 it to function.

21 5. OpenAI has released five versions of GPT models, and the current version of
22 ChatGPT runs on GPT-3.5 and GPT-4, depending on whether the user has subscribed to the
23 premium version of ChatGPT. Only the version of ChatGPT that runs on GPT-3.5 is available
24 at no cost to the public.

25 6. OpenAI’s GPT models are types of “large language model,” which is a form of
26 deep-learning algorithm programmed through “training datasets,” consisting of massive
27 amounts of text data copied from the internet by OpenAI. The GPT models extract information
28 from their training datasets in order to learn the statistical relationships between words, phrases,

1 and sentences, which allow them to generate coherent and contextually relevant responses to
2 user prompts or queries.

3 7. A large language model's responses to user prompts or queries are entirely and
4 uniquely dependent on the text contained in its training dataset, necessarily processing and
5 analyzing the information contained in its training dataset to generate responses.

6 8. OpenAI incorporated Plaintiffs' and Class members' copyrighted works in
7 datasets used to train its GPT models powering its ChatGPT product. Indeed, when ChatGPT is
8 prompted, it generates not only summaries, but in-depth analyses of the themes present in
9 Plaintiffs' copyrighted works, which is only possible if the underlying GPT model was trained
10 using Plaintiffs' works.

11 9. Plaintiffs and Class members did not consent to the use of their copyrighted
12 works as training material for GPT models or for use with ChatGPT.

13 10. Defendants, by and through their operation of ChatGPT, benefit commercially
14 and profit handsomely from their unauthorized and illegal use of Plaintiffs' and Class members'
15 copyrighted works.

16 **JURISDICTION AND VENUE**

17 11. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §
18 1331 because this case arises under the Copyright Act (17 U.S.C. § 501) and the Digital
19 Millennium Copyright Act (17 U.S.C. § 1202).

20 12. This Court has personal jurisdiction over Defendants pursuant to 18 U.S.C.
21 §§ 1965(b) & (d), because they maintain their principal places of business in, and are thus
22 residents of, this judicial district, maintain minimum contacts with the United States, this judicial
23 district, and this State, and they intentionally avail themselves of the laws of the United States
24 and this state by conducting a substantial amount of business in California. For these same
25 reasons, venue properly lies in this District pursuant to 28 U.S.C. §§ 1391(a), (b) and (c).
26
27
28

PARTIES

A. Plaintiffs

13. Plaintiff Michael Chabon (“Plaintiff Chabon”) is a resident of California. Plaintiff Chabon is an author who owns registered copyrights in many works, including but not limited to, *The Mysteries of Pittsburgh*, *Wonder Boys*, *The Amazing Adventures of Kavalier & Clay*, *the Yiddish Policemen’s Union*, *Gentlemen of the Road*, *Telegraph Avenue*, *Fight of the Century*, *Kingdom of Olive and Ash*, and *Moonglow*. Plaintiff Chabon is the recipient of the Pulitzer Prize for Fiction, Hugo, Nebula, Los Angeles Times Book Prize, and the National Jewish Book Award, among many others achieved over the span of a writing career spanning more than 30 years. Plaintiff Chabon’s works include copyright-management information that provides information about the copyrighted work, including the title of the work, its ISBN or copyright registration number, the name of the author, and the year of publication.

14. Plaintiff David Henry Hwang (“Plaintiff Hwang”) is a resident of New York. Plaintiff Hwang is a playwright and screenwriter who owns registered copyrights in many works, including but not limited to, *M. Butterfly*, *Chinglish*, *Yellow Face*, *the Dance and the Railroad*, and *FOB*, as well as the Broadway musical, *Flower Drum Song* (2002 revival). Plaintiff Hwang is a Tony Award winner and three-time nominee, a Grammy Award winner who has been twice nominated, a three-time OBIE Award winner, and a three-time finalist for the Pulitzer Prize in Drama. Plaintiff Hwang’s works include copyright-management information that provides information about the copyrighted work, including the title of the work, its ISBN or copyright registration number, the name of the author, and the year of publication.

15. Plaintiff Matthew Klam (“Plaintiff Klam”) is a resident of Washington D.C. Plaintiff Klam is an author who owns registered copyrights in several works, including but not limited to, *Who is Rich?*, and *Sam the Cat and Other Stories*. Plaintiff Klam is a recipient of a Guggenheim Fellowship, a Robert Bingham/PEN Award, a Whiting Writer’s Award, and a National Endowment of the Arts. Plaintiff Klam’s works have been selected as Notable Books of the year by *The New York Times*, *The Los Angeles Times*, *the Kansas City Star*, and the

1 *Washington Post*. Plaintiff Klam’s works include copyright-management information that
2 provides information about the copyrighted work, including the title of the work, its ISBN or
3 copyright registration number, the name of the author, and the year of publication.

4 16. Plaintiff Rachel Louise Snyder (“Plaintiff Snyder”) is a resident of Washington,
5 D.C. Plaintiff Snyder is an author who owns registered copyrights in many works, including but
6 not limited to, *Women We Buried*, *Women We Burned*, *No Visible Bruises – What We Don’t*
7 *Know About Domestic Violence Can Kill Us*, *What We’ve Lost is Nothing*, and *Fugitive Denim:*
8 *A Moving Story of People and Pants in the Borderless World of Global Trade*. Plaintiff Snyder
9 is a Guggenheim fellow and the recipient of the J. Anthony Lukas Work-in-Progress Award, the
10 Hillman Prize, and the Helen Bernstein Book Award, and was a finalist for the National Book
11 Critics Circle Award, *Los Angeles Times* Book Prize, and Kirkus Award. Her work has appeared
12 in *The New Yorker*, *The New York Times*, *Slate*, and in many other publications. Plaintiff
13 Snyder’s works include copyright-management information that provides information about the
14 copyrighted work, including the title of the work, its ISBN or copyright registration number, the
15 name of the author, and the year of publication.

16 17. Plaintiff Ayelet Waldman (“Plaintiff Waldman”) is a resident of California.
17 Plaintiff Waldman is an author and screen and television writer who owns registered copyrights
18 in several works, including but not limited to, *Love and other Impossible Pursuits*, *Red Hook*
19 *Road*, *Love and Treasure*, *Bad Mother*, *Daughter’s Keeper*, *A Really Good Day*, *Fight of the*
20 *Century*, and *Kingdom of Olives and Ash*. Plaintiff Waldman has been nominated for an Emmy
21 and a Golden Globe and is the recipient of numerous awards including a Peabody, AFI award,
22 and a Pen Award, among others. Plaintiff Waldman’s works include copyright-management
23 information that provides information about the copyrighted work, including the title of the
24 work, its ISBN or copyright registration number, the name of the author, and the year of
25 publication.

26 18. At all times relevant hereto, Plaintiffs have been and remain the holders of the
27 exclusive rights under the Copyright Act of 1976 (17 U.S.C. §§ 101, *et seq.* and all amendments
28

thereto) to reproduce, distribute, display, or license the reproduction, distribution, and/or display the works identified in paragraphs 13-17, *supra*.

B. Defendants

19. Defendant OpenAI, Inc. is a Delaware nonprofit corporation with its principal place of business located at 3180 18th St., San Francisco, CA 94110.

20. Defendant OpenAI, LP is a Delaware limited partnership with its principal place of business located at 3180 18th St., San Francisco, CA 94110. OpenAI, LP is a wholly owned subsidiary of OpenAI, Inc. that is operated for profit. OpenAI, Inc. controls OpenAI, LP directly and through the other OpenAI entities.

21. Defendant OpenAI OpCo, LLC is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI OpCo, LLC is a wholly owned subsidiary of OpenAI, Inc. that is operated for profit. OpenAI, Inc. controls OpenAI OpCo, LLC directly and through the other OpenAI entities.

22. Defendant OpenAI GP, LLC is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI GP, LLC is a general partner of OpenAI, LP. OpenAI GP manages and operates the day-to-day business and affairs of OpenAI, LP. OpenAI GP was aware of the unlawful conduct alleged herein and exercised control over OpenAI, LP throughout the Class Period. OpenAI, Inc. directly controls OpenAI GP.

23. Defendant OpenAI Startup Fund I, LP is a Delaware limited partnership with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund I, LP was instrumental in the foundation of OpenAI, LP, including the creation of its business strategy and providing initial funding. OpenAI Startup Fund I was aware of the unlawful conduct alleged herein and exercised control over OpenAI, LP throughout the Class Period.

24. Defendant OpenAI Startup Fund GP I, LLC is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund GP I, LLC is the general partner of OpenAI Startup Fund I.

OpenAI Startup Fund GP I is a party to the unlawful conduct alleged herein. OpenAI Startup Fund GP I manages and operates the day-to-day business and affairs of OpenAI Startup Fund I.

25. Defendant OpenAI Startup Fund Management, LLC is a Delaware limited liability company with its principal place of business located at 3180 18th Street, San Francisco, CA 94110. OpenAI Startup Fund Management, LLC is a party to the unlawful conduct herein. OpenAI Startup Fund Management was aware of the unlawful conduct alleged herein and exercised control over OpenAI, LP throughout the Class Period.

FACTUAL ALLEGATIONS

A. OpenAI’s Artificial Intelligence Products

26. OpenAI researches, develops, releases, and maintains AI products with the intention that its products “benefit all of humanity.”¹

27. ChatGPT is among the products OpenAI has developed, engineered, released, and maintained, which utilizes another OpenAI product, GPT models, to respond to text prompts and queries in a natural, coherent, and fluent way through a web interface.

28. OpenAI has released a series of upgrades to its GPT model, including GPT-1 (released June 2018), GPT-2 (February 2019), GPT-3 (May 2020), GPT-3.5 (March 2022), and most recently, GPT-4 (March 2023)².

29. The current version of ChatGPT utilizes both GPT-3.5 and GPT-4; however, the version of ChatGPT that allows users to choose between using GPT-3.5 and GPT-4 is only available to subscribers at a cost of \$20 per month. Otherwise, users are only able to access the version of ChatGPT that relies on the GPT-3.5 model.³

30. OpenAI makes ChatGPT available to software developers through an application-programming interface (“API”), which allows developers to write software

¹ *About, OpenAI*, <https://openai.com/about>

² Fawad Ali, *GPT-1 to GPT-4: Each of OpenAI’s GPT Models Explained and Compared*, Make Use Of (Apr. 11, 2023) <https://www.makeuseof.com/gpt-models-explained-and-compared/>

³ *Introducing ChatGPT Plus*, OpenAI (Feb. 1, 2023) <https://openai.com/blog/chatgpt-plus>

1 programs that exchange data with ChatGPT.⁴ OpenAI charges developers for access to ChatGPT
2 by the API on the basis of usage.

3 **B. OpenAI Uses Copyrighted Works in its Training Datasets**

4 31. As mentioned in paragraph 6, *supra*, OpenAI pre-trains its GPT models using a
5 dataset consisting of various sources and content types, including books, plays, articles, and
6 webpage and other written works, to respond accurately to users' prompts and queries.

7 32. OpenAI has admitted that, of all sources and content types that can be used to
8 train the GPT models, written works, plays and articles are valuable training material because
9 they offer the best examples of high-quality, long form writing and "contain[] long stretches of
10 contiguous text, which allows the generative model to learn to condition on long-range
11 information."⁵

12 33. Upon information and belief, OpenAI builds the dataset it uses to train its GPT
13 models by scraping the internet for text data.

14 34. While casting a wide net across the internet to capture the most comprehensive
15 set of content available allows OpenAI to better train its GPT models, this practice necessarily
16 leads OpenAI to capture, download, and copy copyrighted written works, plays and articles.

17 35. Among the content OpenAI has scraped from the internet to construct its training
18 datasets are Plaintiffs' copyrighted works.

19 36. In its June 2018 paper introducing the GPT-1 model, *Improving Language*
20 *Understanding by Generative Pre-Training*, OpenAI revealed that it trained the GPT-1 model
21 using two datasets: "Common Crawl," which is a massive dataset of web pages containing
22 billions of words, and "BookCorpus," which is a collection of "over 7,000 unique unpublished
23 books from a variety of genres including Adventure, Fantasy, and Romance."⁶

24
25
26 ⁴ *OpenAI API*, OpenAI (June 11, 2020) <https://openai.com/blog/openai-api>

27 ⁵ Alec Radford, *Improving Language Understanding by Generative-Pre-Training*, OpenAI
28 (June 11, 2018).

⁶ *Id.*; see also Fawad Ali, *GPT-1 to GPT-4: Each of OpenAI's GPT Models Explained and Compared*, Make Use Of (Apr. 11, 2023) <https://www.makeuseof.com/gpt-models-explained-and-compared/>

37. BookCorpus is a controversial dataset, assembled in 2015 by a team of AI researchers funded by Google and Samsung for the sole purpose of training language models like GPT by copying written works from a website called Smashwords, which hosts self-published novels, making them available to readers at no cost.⁷ Despite those novels being largely under copyright, they were copied into the BookCorpus dataset without consent, credit, or compensation to the authors.⁸

38. OpenAI also copied many books while training GPT-3. In the July 2020 paper introducing GPT-3, *Language Models are Few-Shot Learners*, OpenAI disclosed, in addition to using the “Common Crawl” and “WebText” datasets that capture web pages, 16% of the GPT-3 training dataset came from “two internet-based book corpora,” which OpenAI simply refers to as “Books1” and “Books2.”⁹

39. OpenAI has never revealed what books are part of the Books1 and Books2 datasets or how they were obtained. OpenAI has offered a few clues, admitting that these are internet-based datasets that are much larger than BookCorpus.¹⁰ Based on the figures provided in its GPT-3 introductory paper, Books1 is nine times larger than BookCorpus, meaning it contains roughly 63,000 titles, and Books2 is 42 times larger, meaning it contains about 294,000 titles.¹¹

40. A limited number of internet-based book corpora exist that contain this much material, meaning there are only a handful of possible sources OpenAI could have used to train the GPT-3 model.

41. Project Gutenberg is an online archive of e-books whose copyrights have expired. Project Gutenberg has long been popular for training AI systems due to the lack of copyright. In 2018, a team of AI researchers created the “Standardized Project Gutenberg Corpus,” which

⁷ Jack Bandy, *Dirty Secrets of BookCorpus, a Key Dataset in Machine Learning*, Medium (May 12, 2021) <https://towardsdatascience.com/dirty-secrets-of-bookcorpus-a-key-dataset-in-machine-learning-6ee2927e8650>

⁸ *Id.*

⁹ Tom B. Brown, *Language Models are Few-Shot Learners*, OpenAI (July 22, 2020).

¹⁰ *Id.* at 9.

¹¹ *Id.*

1 contained “more than 50,000 books.”¹² On that information and belief, the OpenAI Books1
 2 dataset is based on either the Standardized Project Gutenberg Corpus or Project Gutenberg itself,
 3 because of the roughly similar sizes of the two datasets.

4 42. As for the Books2 dataset, the only “internet-based books corpora” that have ever
 5 offered that much material are infamous “shadow library” websites, like Library Genesis
 6 (“LibGen”), Z-Library, Sci-Hub, and Bibliotik, which host massive collections of pirated books,
 7 research papers, and other text-based materials.¹³ The materials aggregated by these websites
 8 have also been available in bulk through torrent systems.¹⁴

9 43. These illegal shadow libraries have long been of interest to the AI-training
 10 community. For instance, an AI training dataset published in December 2020 by EleutherAI
 11 called “Books3” includes a recreation of the Bibliotik collection and contains nearly 200,000
 12 books.¹⁵ On information and belief, the OpenAI Books2 dataset includes books copied from
 13 these “shadow libraries,” because those are the sources of trainable books most similar in nature
 14 and size to OpenAI’s description of Books2.

15 44. When OpenAI introduced GPT-4 in March 2023, the introductory paper
 16 contained no information about the dataset used to train it.¹⁶ Instead, OpenAI claims that,
 17 “[g]iven both the competitive landscape and the safety implications of large-scale models like
 18 GPT-4, this report contains no further details about . . . dataset construction.”¹⁷

19 45. Regarding GPT-4, OpenAI has conceded that it did filter its dataset “to
 20 specifically reduce the quantity of inappropriate erotic text content,” implying that it again used
 21 a large dataset containing text works.¹⁸

22 **C. OpenAI Unlawfully Infringed Plaintiffs’ Copyrights**

23 ¹² Martin Gerlach, et al., *A standardized Project Gutenberg corpus for statistical analysis of*
 24 *natural language and quantitative linguistics*, Cornell University (Dec. 19, 2018),
<https://arxiv.org/pdf/1812.08092.pdf>

25 ¹³ See Claire Woodcock, ‘Shadow Libraries’ Are Moving Their Pirated Books to The Dark
 Web After Fed Crackdowns, Vice (Nov. 30, 2022).

26 ¹⁴ *Id.*

27 ¹⁵ See Alex Perry, *A giant online book collection Meta used to train its AI is gone over*
 copyright issues, Mashable (Aug. 18, 2023).

28 ¹⁶ *GPT-4 Technical Report*, OpenAI (Mar. 27, 2023).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 61.

1 46. As explained, ChatGPT’s responses to user queries or prompts, like other large
2 language models, rely on the data upon which it is trained to generate responsive content. For
3 example, if ChatGPT is prompted to generate a writing in the style of a certain author, GPT
4 would generate content based on patterns and connections it learned from analysis of that
5 author’s work within its training dataset.

6 47. On information and belief, the reason ChatGPT can generate a writing in the style
7 of a certain author or accurately summarize a certain copyrighted book and provide in-depth
8 analysis of that book is because it was copied by OpenAI and copied and analyzed by the
9 underlying GPT model as part of its training data.

10 48. When ChatGPT is prompted to summarize copyrighted written works authored
11 by Plaintiffs, it generates accurate, in-depth summaries and analyses of their works.

12 49. For example, when prompted, ChatGPT accurately summarized Plaintiff
13 Chabon’s novel *The Amazing Adventures of Kavalier & Clay*. When prompted to identify
14 examples of trauma in the *Amazing Adventures of Kavalier & Clay*, ChatGPT identified six
15 specific examples, including how the main character’s “experiences in Europe, including
16 witnessing the persecution of Jews and the loss of his family, haunt him throughout the story.”
17 When asked to write a paragraph in the style of *The Amazing Adventures of Kavalier & Clay*,
18 ChatGPT generated a passage imitating Plaintiff Chabon’s writing style including references to
19 the characters dealing with “the weight of the world at war.” *Exhibit A*.

20 50. ChatGPT similarly provided in depth summaries and analyses of Plaintiff
21 Hwang’s play, *The Dance and the Railroad*. For example, when prompted, ChatGPT identified
22 five key themes from *The Dance and the Railroad*, including “art and creativity as a form of
23 resistance” and “using art as a form of escape from the harsh realities and dehumanization of
24 labor.” Additionally, when prompted to produce a screenplay in the style of *The Dance and the*
25 *Railroad*, ChatGPT produced a script written in Plaintiff Hwang’s style, which generated a
26 screenplay involving a Chinese laborer toiling on the Central Pacific Railroad that “believe[s]
27 in the power of art to keep [their] spirits alive.” *Exhibit B*.

1 51. Likewise, ChatGPT provided in depth summaries and analyses of Plaintiff
2 Klam's works. For example, when prompted, Chat GPT accurately summarized Plaintiff Klam's
3 novel *Who is Rich?* and correctly analyzed the key relationships between the novel's central
4 character and the other characters in the novel. When asked to identify the main themes in *Who*
5 *is Rich?* Chat GPT accurately identified seven main themes of the novel including "mid-life
6 crisis and identify." Further, when prompted to write a paragraph in the style of *Who is Rich?*,
7 ChatGPT generated random passages authentically written in Plaintiff Klam's writing style,
8 including a reference to navigating the "treacherous waters of midlife." *Exhibit C*.

9 52. In the same vein, after being prompted to summarize Plaintiff Snyder's book,
10 *What We've Lost is Nothing*, ChatGPT accurately identified themes included within the novel,
11 such as "safety, perception, and the fragility of human relationships." Similarly, once prompted,
12 ChatGPT accurately analyzed the theme of safety using a specific example from the text of
13 Plaintiff Snyder's copyrighted work, explaining that "the theme of safety is examined through
14 the lens of a series of burglaries that occur in a suburban neighborhood . . . and how these
15 incidents affect the characters and their perceptions of the world around them." ChatGPT was
16 also able to generate random passages authentically written in Plaintiff Snyder's writing style
17 when prompted. *Exhibit D*.

18 53. Additionally, ChatGPT provided in depth summaries and analyses of Plaintiff
19 Waldman's works. For instance, when prompted to summarize Plaintiff Waldman's novel *Love*
20 *and Other Impossible Pursuits*, Chat GPT accurately provided a summary and analysis of the
21 novel. When prompted to identify specific instances of grief in *Love and other Impossible*
22 *Pursuits*, ChatGPT identified five specific instances of grief, including the protagonist Emelia's
23 loss of her infant daughter, a "loss that occurred before the events of the novel and [that] continue
24 to haunt Emelia, affecting her emotional state and relationships." When prompted to write a
25 paragraph in the style of *Love and Other Impossible Pursuits*, ChatGPT generated a paragraph
26 imitating Plaintiff Waldman's writing style, including references to the "weight of her
27 daughter's absence." *Exhibit E*.

54. At no point did ChatGPT reproduce any of the copyright management information Plaintiffs included with their published works.

55. Furthermore, at no point did Plaintiffs authorize OpenAI to download and copy their protected works, as described above.

CLASS ALLEGATIONS

56. Plaintiffs bring this action pursuant to the provisions of Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of themselves and the following proposed Class:

All persons or entities in the United States that own a United States copyright in any written work that OpenAI used to train any GPT model during the Class Period.

57. Excluded from the Class are Defendant, its employees, officers, directors, legal representatives, heirs, successors, wholly- or partly-owned, and its subsidiaries and affiliates; proposed Class counsel and their employees; the judicial officers and associated court staff assigned to this case and their immediate family members; all persons who make a timely election to be excluded from the Class; governmental entities; and the judge to whom this case is assigned and his/her immediate family.

58. This action has been brought and may be properly maintained on behalf of the Class proposed herein under Federal Rule of Civil Procedure 23.

59. Numerosity. Federal Rule of Civil Procedure 23(a)(1): The members of the Class are so numerous and geographically dispersed that individual joinder of all Class members is impracticable. On information and belief, there are at least tens of thousands of members in the Class. The Class members may be easily derived from Defendants' records.

60. Commonality and Predominance. Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3): This action involves common questions of law and fact, which predominate over any questions affecting individual Class members, including, without limitation:

- a. Whether Defendants engaged in the conduct alleged herein;
- b. Whether Defendants violated the copyrights of Plaintiffs and the Class when they

- downloaded and copied Plaintiffs' and the Class's copyrighted books;
- c. Whether ChatGPT itself is an infringing derivative work based on Plaintiffs' and the Class's copyrighted books;
- d. Whether the text responses of ChatGPT are infringing derivative works based on Plaintiffs' and the Class's copyrighted books;
- e. Whether Defendants violated the DMCA by removing copyright-management information from Plaintiffs' and the Class's copyrighted books;
- f. Whether Defendants were unjustly enriched by the unlawful conduct alleged herein;
- g. Whether Defendants' conduct violates the California Unfair Competition Law;
- h. Whether Plaintiffs and the other Class members are entitled to equitable relief, including, but not limited to, restitution or injunctive relief; and
- i. Whether Plaintiffs and the other Class members are entitled to damages and other monetary relief and, if so, in what amount.

61. Typicality. Federal Rule of Civil Procedure 23(a)(3): Plaintiffs' claims are typical of the other Class members' claims because, among other things, all Class members were comparably injured through Defendants' wrongful conduct as described above.

62. Adequacy. Federal Rule of Civil Procedure 23(a)(4): Plaintiffs are adequate Class representative because their interests do not conflict with the interests of the other members of the Class they seeks to represent; Plaintiff have retained counsel competent and experienced in complex class action litigation; and Plaintiffs intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

63. Declaratory and Injunctive Relief. Federal Rule of Civil Procedure 23(b)(2): Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief with respect to the Class as a whole.

64. Superiority. Federal Rule of Civil Procedure 23(b)(3): A class action is superior

1 to any other available means for the fair and efficient adjudication of this controversy, and no
 2 unusual difficulties are likely to be encountered in the management of this class action. The
 3 damages or other financial detriment suffered by Plaintiffs and the other Class members are
 4 relatively small compared to the burden and expense that would be required to individually
 5 litigate their claims against Defendants, so it would be impracticable for the members of the
 6 Class to individually seek redress for Defendants' wrongful conduct. Even if Class members
 7 could afford individual litigation, the court system could not. Individualized litigation creates a
 8 potential for inconsistent or contradictory judgments, and increases the delay and expense to all
 9 parties and the court system. By contrast, the class action device presents far fewer management
 10 difficulties, and provides the benefits of single adjudication, economy of scale, and
 11 comprehensive supervision by a single court.

12 **CAUSES OF ACTION**

13 **FIRST CAUSE OF ACTION**

14 **DIRECT COPYRIGHT INFRINGEMENT,** 15 **17 U.S.C. § 106, *et seq.***

16 65. Plaintiffs hereby incorporate by reference the allegations contained in the
 17 preceding paragraphs of this Complaint.

18 66. Plaintiffs bring this claim on behalf of themselves and on behalf of the Class
 19 against Defendants.

20 67. As the owners of the registered copyrights in books used to train OpenAI's GPT
 21 models, Plaintiffs and the Class hold the exclusive rights to those works under 17 U.S.C. § 106.

22 68. Plaintiffs have obtained copyright registrations for each of the works identified
 23 in Exhibit B.

24 69. On information and belief, to train OpenAI's GPT models, OpenAI relied on
 25 harvesting mass quantities of content from the public internet, including Plaintiffs' and the
 26 Class's books, which are available in digital formats.

27 70. Because OpenAI's GPT models cannot function without the expressive
 28 information extracted from Plaintiffs' and Class members' works and retained by the GPT

1 models, GPT and ChatGPT are themselves infringing derivative works without Plaintiffs' and
2 Class members' permission and in violation of their exclusive rights under the Copyright Act.

3 71. Plaintiffs and the Class never authorized OpenAI to make copies of their written
4 works, make derivative works, publicly display copies (or derivative works), or distribute copies
5 (or derivative works). Each of those rights belong exclusively to Plaintiffs and Class members
6 under copyright law.

7 72. By and through the actions alleged above, OpenAI has infringed and will
8 continue to infringe Plaintiffs' and the Class's copyrights.

9 73. OpenAI's acts of copyright infringement have been intentional, willful, and in
10 callous disregard of Plaintiffs' and Class members' rights. OpenAI knew at all relevant times
11 that the datasets it used to train its GPT models contained copyrighted materials, and that its acts
12 were in violation of the terms of use of the materials.

13 74. OpenAI engaged in the infringing acts described herein for its own commercial
14 benefit.

15 75. As a direct and proximate result of OpenAI's wrongful conduct, Plaintiffs have
16 been substantially and irreparably injured by OpenAI's acts of direct copyright infringement in
17 an amount not readily capable of determination and, unless permanently enjoined from further
18 acts of infringement and continuing to use and distribute GPT models trained using Plaintiffs'
19 and Class members' copyrighted materials without permission, OpenAI will cause additional
20 irreparable harm for which there is no adequate remedy at law. Plaintiff and the Class are thus
21 entitled to permanent injunctive relief preventing OpenAI from engaging in any further
22 infringement of Plaintiffs' and the Class's copyrighted works.

23 76. Plaintiffs are further entitled to recover statutory damages, actual damages,
24 restitution of profits, and other remedies provided by law.

SECOND CAUSE OF ACTION

VICARIOUS COPYRIGHT INFRINGEMENT

17 U.S.C. § 106

77. Plaintiffs incorporate by reference all allegations of the preceding paragraphs as though fully set forth herein.

78. Plaintiffs bring this claim on behalf of herself and on behalf of the Class against Defendants.

79. Defendant OpenAI, LP is the for-profit subsidiary of Defendant OpenAI, Inc. and is principally responsible for and dedicated to the development of the GPT models and ChatGPT products at issue in this action. Defendant OpenAI Startup Fund Management, LLC exercised control over Defendant OpenAI, LP, along with Defendant OpenAI GP, LLC, which is the general partner of Defendant OpenAI, LP, responsible for managing and operating the day-to-day business affairs of Defendant OpenAI, LP, and is wholly owned and controlled by Defendant OpenAI, Inc., along with Defendant OpenAI OpCo, LLC. Upon information and belief, Defendant OpenAI Startup Fund I, LP played a vital role in the foundation of Defendant OpenAI, LP, including providing initial funding and creating its business strategy, while Defendant OpenAI Startup Fund GP I, LLC is the general partner of Defendant OpenAI Startup Fund I, LP, responsible for managing and operating the day-to-day business affairs of Defendant OpenAI Startup Fund I, LP.

80. Defendant OpenAI, LP directly infringed upon Plaintiffs' and Class members' copyrighted works through the unauthorized use and reproduction of the works, and preparation of derivative works by ChatGPT. As discussed above, Plaintiffs' and Class members' protected works were used to train GPT models. Because the GPT models are based on expressive information extracted from Plaintiffs' and Class members' works, Defendant OpenAI, LP is directly liable for unauthorized use, reproduction, display of copyrighted works, as well as creation of derivative works through ChatGPT's responses. Therefore, Defendant OpenAI, LP directly infringed upon Plaintiffs' and Class members' exclusive rights under 17 U.S.C. § 106.

81. Defendants OpenAI, Inc., OpenAI OpCo, LLC, OpenAI GP, LLC, OpenAI Startup Fund GP I, LLC, OpenAI Startup Fund I, LP, and OpenAI Startup Management LLC are vicariously liable for the infringement alleged herein because they had the right and ability to supervise and control the infringing activity but failed to stop the infringing conduct.

82. Furthermore, Defendants have a direct financial interest in the infringing conduct and received revenue in connection with the development, deployment, and advancement of the GPT models and ChatGPT. Each entity profited from the advancement of GPT models and ChatGPT.

83. These committed acts of copyright infringement were willful, intentional, and malicious and thus subjects Defendants to liability for statutory damages under Section 504(c)(2) of the Copyright Act of up to \$150,000 per infringement.

84. Plaintiffs and Class members have been injured by Defendants' acts of vicarious copyright infringement. Plaintiffs and the Class are entitled to statutory damages, actual damages, restitution of profits, and other remedies provided by law.

THIRD CAUSE OF ACTION

DIGITAL MILLENNIUM COPYRIGHT ACT – REMOVAL OF COPYRIGHT MANAGEMENT INFORMATION 17 U.S.C. § 1202(B)

85. Plaintiffs incorporate by reference all allegations of the preceding paragraphs as though fully set forth herein.

86. Plaintiffs bring this claim on behalf of herself and on behalf of the Class against Defendants.

87. Plaintiffs and Class members included one or more forms of copyright-management information in each of Plaintiffs' and Class members' infringed works, including: copyright notice, title and other identifying information, the name or other identifying information about the owners of each book, terms and conditions of use, and identifying numbers or symbols referring to the copyright-management information.

1 88. Without the authority of Plaintiffs and the Class, OpenAI copied Plaintiffs' and
 2 Class members' works and used them as training data for its GPT software. By design, the
 3 training process does not preserve any copyright-management information. Therefore, OpenAI
 4 intentionally removed copyright-management information from Plaintiffs' and Class members'
 5 works in violation of 17 U.S.C. § 1202(b)(1).

6 89. OpenAI's removal or alteration of Plaintiffs' and the Class's copyright-
 7 management information has been done knowingly and with the intent to induce, enable,
 8 facilitate, or conceal infringement of Plaintiffs' and the Class's copyrights.

9 90. Without the authority of Plaintiffs and the Class, Defendants created derivative
 10 works based on Plaintiffs' and Class members' works. By distributing these works without their
 11 copyright-management information, OpenAI violated 17 U.S.C. § 1202(b)(3).

12 91. OpenAI knew or had reasonable grounds to know that this removal of copyright-
 13 management information would facilitate copyright infringement by concealing the fact that
 14 every output from ChatGPT is an infringing derivative work, synthesized entirely from
 15 expressive information found in the training data.

16 92. Plaintiffs and the Class have been injured by OpenAI's removal of copyright-
 17 management information. Plaintiffs and the Class are entitled to statutory damages, actual
 18 damages, restitution of profits, and other remedies provided by law, including full costs and
 19 attorneys' fees.

20 **FOURTH CAUSE OF ACTION**

21 **VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW** 22 **CAL. BUS. & PROF. CODE §§ 17200, *ET SEQ.***

23 93. Plaintiffs and the Class incorporate by reference each preceding and succeeding
 24 paragraph as though fully set forth at length herein.

25 94. Plaintiffs bring this claim on behalf of herself and on behalf of the Class against
 26 Defendants.

1 95. The California Unfair Competition Law (“UCL”) prohibits acts of “unfair
2 competition,” including any “unlawful, unfair or fraudulent business act or practice” and “unfair,
3 deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200.

4 96. Defendants have engaged in unfair competition and unfair, unlawful or
5 fraudulent business practices by the conduct, statements, and omissions described above because
6 it illegally collected and used Plaintiffs’ and the Class’s copyrighted works to train its GPT
7 models.

8 97. The unlawful business practices described herein violate the UCL because
9 Defendants used Plaintiffs’ and the Class’s protected works to train its GPT software for
10 Defendants’ own commercial profit without Plaintiffs’ and the Class’s authorization.
11 Defendants further knowingly designed ChatGPT to include portions or summaries of Plaintiffs’
12 copyrighted works without attributions in its responses, and they unfairly profit from and take
13 credit for developing a commercial product based on unattributed reproductions of those stolen
14 writing and ideas.

15 98. These acts and practices have deceived Plaintiffs and are likely to deceive the
16 public into believing that Plaintiffs and the Class have granted OpenAI the right to use its
17 copyrighted materials. In failing to disclose the sources of its training datasets and suppressing
18 other material facts from Plaintiffs and Class members as well as the public, Defendant breached
19 its duties to disclose these facts, violated the UCL, and caused injuries to Plaintiffs and Class
20 members. The omissions and acts of concealment by Defendants pertained to information that
21 was material to Plaintiffs and Class members, as it would have been to all reasonable consumers.

22 99. The injuries suffered by Plaintiffs and Class members are not greatly outweighed
23 by any potential countervailing benefit to consumers or to competition, nor are they injuries that
24 Plaintiffs and Class members should have reasonably avoided.

25 100. Defendant’s acts and practices are unlawful because they violate California Civil
26 Code §§ 1668, 1709, 1710, and 1750 *et seq.*, and California Commercial Code § 2313.

27 101. Plaintiffs seek to enjoin further unlawful, unfair and/or fraudulent acts or
28 practices by Defendants, to obtain restitutionary disgorgement of all monies and revenues

1 generated as a result of such practices, and all other relief allowed under California Business &
2 Professions Code § 17200.

3 **FIFTH CAUSE OF ACTION**

4 **NEGLIGENCE**

5 102. Plaintiffs incorporate by reference the allegations of all foregoing paragraphs as
6 if they had been set forth in full herein.

7 103. Plaintiffs bring this claim on behalf of themselves and on behalf of the Class
8 against Defendants.

9 104. Defendants owed a duty of care toward Plaintiffs and the Class in (1) obtaining
10 data to train its GPT models and (2) not using Plaintiffs' and the Class's protected works to train
11 its GPT models.

12 105. Defendants have a common law duty to prevent foreseeable harm to others,
13 including Plaintiffs and members of the Class, who were foreseeable and probable victims of
14 Defendants' unlawful practices.

15 106. Defendants breached their duty to exercise due care by negligently, carelessly,
16 and recklessly collecting, maintaining, and controlling Plaintiffs' and Class members' works
17 and engineering, designing, maintaining, and controlling systems—including ChatGPT—that
18 are trained on Plaintiffs' and Class members' works without their authorization.

19 107. The damages suffered by Plaintiffs and the Class were the direct and reasonably
20 foreseeable result of Defendants' negligent breach of their duties to adequately design,
21 implement, and maintain reasonable practices to avoid infringing protected works without
22 consent of copyright holders.

23 108. Defendants' negligence directly caused significant harm to Plaintiffs and the
24 Class.

25 **SIXTH CAUSE OF ACTION**

26 **UNJUST ENRICHMENT**

27 109. Plaintiffs incorporate by reference all allegations of the preceding paragraphs as
28 though fully set forth herein.

110. By virtue of the unlawful, unfair, and deceptive conduct alleged herein, Defendants knowingly realized substantial revenue from the use of Plaintiffs' and Class members' copyrighted works for the commercial training of its GPT models used to power its ChatGPT product.

111. Defendant knew or should have known that Plaintiffs and the Class have invested substantial time and energy creating the works in which they hold a copyright.

112. Defendants were conferred significant benefits when they downloaded and copied Plaintiffs' and the Class's copyrighted works to train their GPT software without Plaintiffs' and the Class's permission. Defendant knowingly and willingly accepted and enjoyed those benefits.

113. By using Plaintiffs' and the Class's copyrighted works to train ChatGPT, Defendants caused Plaintiffs and the Class to suffer actual damages from the deprivation of the benefits of their work, including monetary damages.

114. Defendants derived profit and other economic benefits from the use of Plaintiffs' and the Class's copyrighted works to train ChatGPT.

115. It would be inequitable and unjust to permit Defendants to retain the enormous economic benefits it has obtained from and/or at the expense of Plaintiffs and Class members.

116. As a direct and proximate cause of Defendants' unjust enrichment, Plaintiffs and the Class are entitled to restitution, attorneys' fees, costs and interest.

117. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Plaintiffs and the Class irreparable injury that cannot be compensated or measured in money.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of members of the Class defined above, respectfully request that the Court enter judgment against Defendants and award the following relief:

A. Certification of this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, declaring Plaintiffs as the representative of the Class, and Plaintiffs'

1 counsel as counsel for the Class;

2 B. An order awarding declaratory relief and temporarily and permanently enjoining
3 Defendant from continuing the unlawful and unfair business practices alleged in this Complaint
4 and to ensure that all applicable information set forth in 17 U.S.C. § 1203(b)(1) is included when
5 appropriate;

6 C. An award of statutory and other damages under 17 U.S.C. § 504 for violations of
7 the copyrights of Plaintiff and the Class by Defendants.

8 D. An award of statutory damages under 17 U.S.C. § 1203(b)(3) and 17 U.S.C. §
9 1203(c)(3), or in the alternative, an award of actual damages and any additional profits under 17
10 U.S.C. § 1203(c)(2);

11 E. A declaration that Defendant is financially responsible for all Class notice and
12 the administration of Class relief;

13 F. An order awarding any applicable statutory and civil penalties;

14 G. An order requiring Defendant to pay both pre- and post-judgment interest on any
15 amounts awarded;

16 H. An award of costs, expenses, and attorneys' fees as permitted by law; and

17 I. Such other or further relief as the Court may deem appropriate, just, and
18 equitable.

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial for all claims so triable.

DATED: September 8, 2023

Respectfully submitted,

/s/ Daniel J. Muller

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

PAUL TREMBLAY, an individual;
MONA AWAD, an individual,

Individual and Representative Plaintiffs,

v.

OPENAI, INC., a Delaware nonprofit corporation;
OPENAI, L.P., a Delaware limited partnership;
OPENAI OPCO, L.L.C., a Delaware limited
liability corporation; OPENAI GP, L.L.C., a
Delaware limited liability company; OPENAI
STARTUP FUND GP I, L.L.C., a Delaware limited
liability company; OPENAI STARTUP FUND I,
L.P., a Delaware limited partnership; and OPENAI
STARTUP FUND MANAGEMENT, LLC, a
Delaware limited liability company,

Defendants.

CASE NO. 3:23-cv-03223-AMO

**DEFENDANTS' NOTICE OF MOTION,
MOTION TO DISMISS, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS**

Date: December 7, 2023
Time: 2:00 pm
Place: Courtroom 10 - 19th Floor
Before: Hon. Araceli Martínez-Olguín

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 7, 2023 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, Courtroom 10, 19th Floor, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendants OpenAI, Inc., OpenAI, L.P., OpenAI OpCo, L.L.C., OpenAI GP, L.L.C., OpenAI Startup Fund GP I, L.L.C., OpenAI Startup Fund I, L.P., and OpenAI Startup Fund Management, LLC (together, “OpenAI”), through their undersigned counsel, will, and hereby do, move to dismiss Counts II through VI of the Class Action Complaint (“Compl.” or “Complaint”) pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(b)(6).

OpenAI’s Motion to Dismiss is based on this Notice, the supporting Memorandum of Points and Authorities, the complete files and records in this action, and any additional material and arguments as may be considered in connection with the hearing on the Motion.

STATEMENT OF RELIEF SOUGHT

OpenAI seeks an order pursuant to FRCP 12(b)(6) dismissing Counts II through VI of the Complaint for failure to state a claim upon which relief can be granted.

ISSUES TO BE DECIDED

The Motion presents the following issues to be decided: (1) Whether Count II of the Complaint, for vicarious copyright infringement, should be dismissed for failure to plead an act of direct infringement and/or failure to plead facts to support the elements of a vicarious infringement claim; (2) Whether Count III of the Complaint, for violation of Section 1202 of the DMCA, *see* 17 U.S.C. § 1202(b), should be dismissed for failure to allege removal or alteration of copyright management information, failure to plead facts to raise a reasonable inference of scienter, and/or failure to allege that OpenAI distributed “cop[ies]” of Plaintiff’s work; (3) Whether Count IV of the Complaint, for violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, should be dismissed for failure to state a predicate violation, failure to allege economic harm, and/or failure to establish that Plaintiff lacks an adequate remedy at law; (4) Whether Count V of the Complaint, for “negligence,” should be dismissed for failure to plead negligence and/or failure to plead facts sufficient to establish that OpenAI owed a duty; (5) Whether Count VI of the Complaint, for

“unjust enrichment,” should be dismissed for failure to plead facts to satisfy the elements of an unjust enrichment claim; and (6) Whether Counts V and VI of the Complaint, for “negligence” and “unjust enrichment,” should be dismissed as preempted by Section 301 of the Copyright Act.

Dated: August 28, 2023

Respectfully submitted,

By: /s/ Joseph C. Gratz

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TABLE OF CONTENTS**Page**

I.	INTRODUCTION	1
II.	FACTS ALLEGED.....	4
III.	LEGAL STANDARD.....	5
IV.	ARGUMENT	6
A.	The Limited Copyright Monopoly.....	6
1.	The Copyright Act Grants Only Specific, Enumerated Rights.....	6
2.	Copyright Does Not Protect Ideas, Facts, or Language.....	6
3.	Substantial Similarity Is Required for Infringement.....	7
4.	Fair Use Is Not Infringement	7
B.	The Bulk of Plaintiffs’ Claims Should Be Dismissed	8
1.	Plaintiffs Fail to State a Vicarious Infringement Claim.....	8
a.	Plaintiffs Have Not Alleged Direct Infringement.....	9
b.	Plaintiffs Have Not Alleged the “Right and Ability to Supervise”	10
c.	Plaintiffs Have Not Alleged “Direct Financial Interest”	11
2.	Plaintiffs Fail to State a Claim under Section 1202(b) of the DMCA.....	11
a.	Copyright Management Information and the DMCA.....	12
b.	Plaintiffs Fail to State a DMCA Claim	13
i.	Section 1202(b)(1)	14
ii.	Section 1202(b)(3)	17
3.	Plaintiffs Fail to State a UCL Claim	18
4.	Plaintiffs Fail to State a Claim for Negligence	20
5.	Plaintiffs Fail to State a Claim for Unjust Enrichment	21
6.	The Negligence and Unjust Enrichment Claims Are Preempted.....	22
V.	CONCLUSION.....	24

TABLE OF AUTHORITIES**Page(s)****CASES**

1	<i>A.V. ex rel. Vanderhye v. iParadigms, LLC</i> ,	
2	562 F.3d 630 (4th Cir. 2009)	2, 8
3	<i>A'Lor Int'l, Ltd. v. Tapper Fine Jewelry, Inc.</i> ,	
4	No. 12-cv-02215, 2012 WL 12921035 (C.D. Cal. Aug. 8, 2012)	18
5	<i>AF Holdings, LLC v. Doe</i> ,	
6	No. 12-cv-2049, 2012 WL 3835102 (N.D. Cal. Sept. 4, 2012)	24
7	<i>Alan Ross Machinery Corp. v. Machinio Corp.</i> ,	
8	No. 17-cv-3569, 2019 WL 1317664 (N.D. Ill. Mar. 22, 2019)	15
9	<i>Armstrong-Harris v. Wells Fargo Bank, N.A.</i> ,	
10	No. 21-cv-07637, 2022 WL 3348426 (N.D. Cal. Aug. 12, 2022)	18, 19
11	<i>Ashcroft v. Iqbal</i> ,	
12	556 U.S. 662 (2009)	5
13	<i>Assessment Technologies of WI, LLC v. WIREdata, Inc.</i> ,	
14	350 F.3d 640 (7th Cir. 2003)	8
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16	608 F. Supp. 2d 454 (S.D.N.Y. 2009)	13, 16
17	<i>Astiana v. Hain Celestial Grp., Inc.</i> ,	
18	783 F.3d 753 (9th Cir. 2015)	21
19	<i>Atari Games Corp. v. Nintendo of Am. Inc.</i> ,	
20	975 F.2d 832 (Fed. Cir. 1992)	8
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22	331 F.3d 988 (D.C. Cir. 2003)	10
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24	804 F.3d 202 (2d Cir. 2015)	2, 7
25	<i>Baiul-Farina v. Lemire</i> ,	
26	804 F. App'x 533 (9th Cir. 2020)	21
27	<i>Bateman v. Mnemonics, Inc.</i> ,	
28	79 F.3d 1532 (11th Cir. 1996)	8
	<i>Bell Atl. Corp. v. Twombly</i> ,	
	550 U.S. 544 (2007)	5, 10
	<i>Bittel Technology, Inc. v. Bittel USA, Inc.</i> ,	
	No. 10-cv-00719, 2010 WL 3221864 (N.D. Cal. Aug. 13, 2010)	21, 22
	<i>Bosco Wai-Choy Chiu v. NBS Default Servs., LLC</i> ,	
	No. 14-cv-05261, 2015 WL 1221399 (N.D. Cal. Mar. 17, 2015)	22

1	<i>Cable v. Agence France Presse,</i>	
2	728 F. Supp. 2d 977 (N.D. Ill. 2010)	12
3	<i>Carlson v. San Mateo Cnty,</i>	
4	103 F.3d 137, 1996 WL 717310 (9th Cir. 1996)	20
5	<i>Castro v. Emeritus Corp.,</i>	
6	No. 11-cv-03504, 2012 WL 601857 (N.D. Cal. 2012)	15
7	<i>Cavalier v. Random House, Inc.,</i>	
8	297 F.3d 815 (9th Cir. 2002)	7
9	<i>Corbello v. Valli,</i>	
10	974 F.3d 965 (9th Cir. 2020)	7
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12	No. 17-cv-02429, 2019 WL 1095837 (N.D. Cal. Jan. 10, 2019)	24
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14	290 F.3d 548 (3d Cir. 2002)	10
15	<i>Davis v. RiverSource Life Ins. Co.,</i>	
16	240 F. Supp. 3d 1011 (N.D. Cal. 2017)	19
17	<i>Del Madera Properties v. Rhodes and Gardner, Inc.,</i>	
18	820 F.2d 973 (9th Cir. 1987)	24
19	<i>Derek Andrew, Inc. v. Poof Apparel Corp.,</i>	
20	528 F.3d 696 (9th Cir. 2008)	18
21	<i>Design Basics, LLC v. WK Olson Architects, Inc.,</i>	
22	No. 17-cv-7432, 2019 WL 527535 (N.D. Ill. Feb. 11, 2019)	18
23	<i>Dielsi v. Falk,</i>	
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25	<i>Doe I v. Github,</i>	
26	No. 22-cv-06823, 2023 WL 3449131 (N.D. Cal. May 11, 2023)	19
27	<i>Dolls Kill, Inc. v. Zoetop Bus. Co.,</i>	
28	No. 22-cv-01463, 2022 WL 16961477 (C.D. Cal. Aug. 25, 2022)	17
	<i>Eldred v. Ashcroft,</i>	
	537 U.S. 186 (2003)	7
	<i>Erickson Prods., Inc. v. Kast,</i>	
	921 F.3d 822 (9th Cir. 2019)	11
	<i>ESG Cap. Partners, LP v. Stratos,</i>	
	828 F.3d 1023 (9th Cir. 2016)	21
	<i>Fashion Nova, LLC v. Blush Mark, Inc.,</i>	
	No. 22-cv-6127, 2023 WL 4307646 (C.D. Cal. June 30, 2023)	15, 16

1	<i>Feist Publications Inc. v. Rural Tel. Serv. Co.</i> ,	
2	499 U.S. 340 (1991).....	6
3	<i>Field v. Google Inc.</i> ,	
4	412 F. Supp. 2d 1106 (D. Nev. 2006).....	2
5	<i>Firoozye v. Earthlink Network</i> ,	
6	153 F. Supp. 2d 1115 (N.D. Cal. 2001).....	24
7	<i>Fisher v. Forrest</i> ,	
8	286 F. Supp. 3d 590 (S.D.N.Y. 2018).....	18
9	<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> ,	
10	76 F.3d 259 (9th Cir. 1996)	10
11	<i>Free Speech Sys. LLC v. Menzel</i> ,	
12	390 F. Supp. 3d 1162 (N.D. Cal. 2019).....	13, 14
13	<i>Frost-Tsuji Architects v. Highway Inn, Inc.</i> ,	
14	No. 13-cv-00496, 2015 WL 263556 (D. Haw. Jan 21, 2015).....	17, 18
15	<i>Fuzzy Logic Prods., Inc. v. Trapflix, LLC</i> ,	
16	No. 15-cv-6203, 2015 WL 12791508 (C.D. Cal. Nov. 20, 2015)	9
17	<i>Google LLC v. Oracle Am., Inc.</i> ,	
18	141 S. Ct. 1183 (2021).....	3, 8
19	<i>In re Gilead Scis. Sec. Litig.</i> ,	
20	536 F.3d 1049 (9th Cir. 2008)	5, 15
21	<i>Jonathan Browning, Inc. v. Venetian Casino Resort, LLC</i> ,	
22	No. 07-cv-3983, 2007 WL 4532214 (N.D. Cal. Dec. 19, 2007).....	24
23	<i>Kelly v. Arriba Soft Corp.</i> ,	
24	336 F.3d 811 (9th Cir. 2003)	2
25	<i>Kelly v. Arriba Soft Corp.</i> ,	
26	77 F. Supp. 2d 1116 (C.D. Cal. 1999)	13, 16
27	<i>Kilina America, Inc. v. Bonded Apparel, Inc.</i> ,	
28	No. 19-cv-3027, 2019 WL 8065854 (C.D. Cal. Nov. 19, 2019)	10
	<i>Kirk Kara Corp. v. W. Stone & Metal Corp.</i> ,	
	No. 20-cv-1931, 2020 WL 5991503 (C.D. Cal. Aug. 14, 2020)	18
	<i>Kodadek v. MTV Networks, Inc.</i> ,	
	152 F.3d 1209 (9th Cir. 1998)	19
	<i>Langan v. United Servs. Auto. Ass'n</i> ,	
	69 F. Supp. 3d 965 (N.D. Cal. 2014)	20
	<i>Laws v. Sony Music Ent., Inc.</i> ,	
	448 F.3d 1134 (9th Cir. 2006)	23, 24

1	<i>Li v. Yellow Cab Co.</i> ,	
2	13 Cal. 3d 804 (1975)	21
3	<i>Litchfield v. Spielberg</i> ,	
4	736 F.2d 1352 (9th Cir. 1984)	9, 10
5	<i>Logan v. Meta Platforms, Inc.</i> ,	
6	636 F. Supp. 3d 1052 (N.D. Cal. 2022)	13
7	<i>Maloney v. T3Media, Inc.</i> ,	
8	853 F.3d 1004 (9th Cir. 2017)	22
9	<i>MDY Indus., LLC v. Blizzard Ent., Inc.</i> ,	
10	629 F.3d 928 (9th Cir. 2010)	9
11	<i>Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd.</i> ,	
12	545 U.S. 913 (2005).....	2
13	<i>Mills v. Netflix, Inc.</i> ,	
14	No. 19-cv-7618, 2020 WL 548558 (C.D. Cal. Feb. 3, 2020)	15
15	<i>Nash v. CBS, Inc.</i> ,	
16	899 F.2d 1537 (7th Cir. 1990)	7
17	<i>New Sensations, Inc. v. Does</i> ,	
18	No. 12-cv-3800, 2012 WL 12898400 (N.D. Cal. Nov. 29, 2012)	21
19	<i>O'Neal v. Sideshow, Inc.</i> ,	
20	583 F. Supp. 3d 1282 (C.D. Cal. 2022)	16
21	<i>Parrish v. Nat'l Football League Players Ass'n</i> ,	
22	534 F. Supp. 2d 1081 (N.D. Cal. 2007)	6, 14
23	<i>Perfect 10, Inc. v. Giganews, Inc.</i> ,	
24	847 F.3d 657 (9th Cir. 2017)	8, 10, 11
25	<i>Reiffer v. NYC Luxury Limousine Ltd.</i> ,	
26	No. 22-cv-2374, 2023 WL 4029400 (S.D.N.Y. June 15, 2023)	13, 17
27	<i>Rentmeester v. Nike, Inc.</i> ,	
28	883 F.3d 1111 (9th Cir. 2018)	24
	<i>Robert L. Stark Enters., Inc. v. Neptune Design Grp., LLC</i> ,	
	No. 16-cv-264, 2017 WL 1345195 (N.D. Ohio Apr. 12, 2017)	17
	<i>Rosal v. First Fed. Bank of Cal.</i> ,	
	671 F. Supp. 2d 1111 (N.D. Cal. 2009)	22
	<i>Schmitt v. SN Servicing Corp.</i> ,	
	No. 21-cv-03355, 2021 WL 3493754 (N.D. Cal. Aug. 2021)	21
	<i>Schneider v. YouTube, LLC</i> ,	
	No. 20-cv-04423, 2023 WL 3605981 (N.D. Cal. May 22, 2023).....	9

1	<i>Sega Enterprises Ltd. v. Accolade, Inc.</i> ,	
2	977 F.2d 1510 (9th Cir. 1992)	2, 8
3	<i>Semore v. Pool</i> ,	
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5	<i>Shade v. Gorman</i> ,	
6	No. 08-cv-3471, 2009 WL 196400 (N.D. Cal. Jan. 28, 2009).....	24
7	<i>Shihab v. Complex Media, Inc.</i> ,	
8	No. 21-cv-6425, 2022 WL 3544149 (S.D.N.Y. Aug. 17, 2022).....	18
9	<i>Silvercrest Realty, Inc. v. Great Am. E&S Ins. Co.</i> ,	
10	No. 11-cv-01197, 2012 WL 13028094 (C.D. Cal. Apr. 4, 2012)	20
11	<i>Silverman v. OpenAI, Inc.</i> ,	
12	No. 23-cv-03416 (N.D. Cal., filed July 7, 2023)	1
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14	952 F.3d 1051 (9th Cir. 2020)	7
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18	203 F.3d 596 (9th Cir. 2000)	2, 8
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21	<i>Tremblay v. OpenAI, Inc.</i> ,	
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STATUTES

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17 U.S.C. § 106	6, 7, 24
17 U.S.C. § 107	7

1	17 U.S.C. § 1202.....	<i>passim</i>
2	17 U.S.C. § 1203.....	18
3	17 U.S.C. § 301.....	22, 23
4	17 U.S.C. § 412.....	18
5	Cal. Bus. & Prof. Code § 17200, <i>et seq.</i>	<i>passim</i>
6	Cal. Civ. Code § 1714.....	21
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9	OTHER AUTHORITIES	
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16	Julie E. Cohen, <i>A Right To Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace</i> , 28 CONN. L. REV. 981, 990 (1996).....	12
17	Mark A. Lemley & Bryan Casey, <i>Fair Learning</i> , 99 TEX. L. REV. 743 (2021)	3
18	Pamela Samuelson, <i>The Quest For A Sound Conception Of Copyright’s Derivative Work Right</i> , 101 GEO. L. J. 1505 (2013)	10
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I. INTRODUCTION

This Motion addresses two near-identical class action complaints seeking to hold OpenAI liable on copyright and other theories for the creation and operation of an artificial intelligence service known as ChatGPT.¹ OpenAI moves for dismissal of most but not all of the claims asserted.

“ChatGPT and other A.I. tools are helping people to save time at work, to code without knowing how to code, to make daily life easier or just to have fun.” *See* Francesca Paris & Larry Buchanan, *35 Ways Real People Are Using A.I. Right Now*, N.Y. Times (Apr. 14, 2023), <https://www.nytimes.com/interactive/2023/04/14/upshot/up-ai-uses.html>. While the technology is still in its early days, some commentators believe that in the future, it may help to remedy “some of the world’s worst inequities,” from unequal access to health care, to global educational disparities, and beyond. *See* Andrew Chow, *Why Bill Gates Believes Generative AI Will Be ‘Revolutionary,’* Time (Mar. 21, 2023), <https://time.com/6264801/bill-gates-ai/>. Others suggest that ChatGPT, in particular, “Heralds an Intellectual Revolution,” representing an innovation whose significance may ultimately prove comparable to “the invention of printing.” *See* Henry Kissinger, Eric Schmidt & Daniel Huttenlocher, *ChatGPT Heralds an Intellectual Revolution*, Wall Street Journal (Feb. 24, 2023), <https://www.wsj.com/articles/chatgpt-heralds-an-intellectual-revolution-enlightenment-artificial-intelligence-homo-technicus-technology-cognition-morality-philosophy-774331c6>.

In its current form, the technology allows users to submit text prompts, and receive back content generated by the software and servers that comprise the ChatGPT service. That service, in turn, works by combining an underlying engine known as a “large language model” with additional measures intended to ensure the accuracy, appropriateness, safety, and utility of the

¹ This brief addresses both complaints and will be filed concurrently on both dockets. The first case was filed on behalf Paul Tremblay and Mona Awad. Complaint in *Tremblay v. OpenAI, Inc.*, No. 23-cv-03223, Dkt. 1 (N.D. Cal., filed June 28, 2023) (“Tremblay Compl.”). The same counsel then filed an identical complaint on behalf of three other plaintiffs, including Sarah Silverman (with Tremblay, “Plaintiffs”). Complaint in *Silverman v. OpenAI, Inc.*, No. 23-cv-03416, Dkt. 1 (N.D. Cal., filed July 7, 2023) (“Silverman Compl.”). This Court granted a motion to relate the cases on July 28, 2023, after which Awad dismissed her claims. No. 23-cv-03223, Dkts. 26, 29. Plaintiffs have not moved to consolidate the cases.

1 outputs presented to users. The large language model is a type of “neural network.” It consists of
 2 a staggeringly large series of statistical correlations that yield rules about the constitutive elements
 3 of human language—correlations and rules the model “learned” by having been shown many,
 4 many examples of text. For the purpose of “training” a model of this type, it is the *volume* of text
 5 used, more than any particular *selection* of text, that really matters, for the simple reason that a
 6 truly massive quantity of samples is required to derive comprehensively accurate statistical
 7 representations of the concepts, grammar, semantics, and quirks that underlie ordinary human
 8 language. “The key,” as one commentator explained, “is scale.” See Cal Newport, *What Kind of*
 9 *Mind Does ChatGPT Have?*, New Yorker (Apr. 23, 2013), [https://www.newyorker.com](https://www.newyorker.com/science/annals-of-artificial-intelligence/what-kind-of-mind-does-chatgpt-have)
 10 [/science/annals-of-artificial-intelligence/what-kind-of-mind-does-chatgpt-have](https://www.newyorker.com/science/annals-of-artificial-intelligence/what-kind-of-mind-does-chatgpt-have).

11 Plaintiffs here are the authors of books. They filed suit for monetary compensation and
 12 other relief, on behalf of themselves and those similarly situated, because they believe their texts
 13 were a tiny part of the dataset that OpenAI used to teach its models to derive the rules underlying
 14 human language in the service of the goals recited above.

15 At the heart of Plaintiffs’ Complaints are copyright claims. Those claims, however,
 16 misconceive the scope of copyright, failing to take into account the limitations and exceptions
 17 (including fair use) that properly leave room for innovations like the large language models now
 18 at the forefront of artificial intelligence. The constitutional purpose of copyright is “[t]o promote
 19 the Progress of Science and useful Arts.” U.S. CONST. Art. 1, § 8, cl. 8. As the Supreme Court
 20 has recognized, “[t]he more artistic protection is favored, the more technological innovation may
 21 be discouraged; the administration of copyright law is an exercise in managing the tradeoff.”
 22 *Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005). Numerous courts
 23 have applied the fair use doctrine to strike that balance, recognizing that the use of copyrighted
 24 materials by innovators in transformative ways does not violate copyright. See *Sega Enterprises*
 25 *Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (videogame development); *Sony Computer*
 26 *Ent., Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) (videogame emulators); *Kelly v. Arriba*
 27 *Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (image search engines), *Field v. Google Inc.*, 412 F. Supp.
 28 2d 1106 (D. Nev. 2006) (web search engines); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562

1 F.3d 630 (4th Cir. 2009) (plagiarism detection tool); *Authors Guild v. Google, Inc. (Google Books)*,
 2 804 F.3d 202 (2d Cir. 2015) (Google Books Project); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct.
 3 1183 (2021) (interfaces for Android operating system); *see generally* Mark A. Lemley & Bryan
 4 Casey, *Fair Learning*, 99 TEX. L. REV. 743 (2021). These are the key legal principles upon which
 5 countless artificial intelligence products have been developed by a wide array of technology
 6 companies.

7 This Motion, however, focuses only on the dismissal of the assortment of ancillary claims
 8 that Plaintiffs included in their Complaints—claims for vicarious copyright infringement, violation
 9 of the Digital Millennium Copyright Act (“DMCA”), unfair competition, “negligence,” and unjust
 10 enrichment. None of these causes of action states a viable claim for relief because none of the
 11 legal theories challenged here actually condemns the conduct alleged with respect to ChatGPT,
 12 the language models that power it, or the process used to create them. It is important for these
 13 claims to be trimmed from the suit at the outset, so that these cases do not proceed to discovery
 14 and beyond with legally infirm theories of liability.

15 With respect to the sole copyright theory challenged here, Plaintiffs’ claims for vicarious
 16 infringement are based on the erroneous legal conclusion that every single ChatGPT output is
 17 necessarily an infringing “derivative work”—which is a very specific term in copyright law—
 18 because those outputs are, in only a remote and colloquial sense, “based on” an enormous training
 19 dataset that allegedly included Plaintiffs’ books. The Ninth Circuit has rejected such an expansive
 20 conception of the “derivative work” right as “frivolous,” holding that a derivative work claim
 21 requires a showing that the accused work shares copyright-protected, expressive elements with the
 22 original. Plaintiffs’ contrary theory is simply incorrect, and would be unworkable were it not.
 23 According to the Complaints, *every single* ChatGPT output—from a simple response to a question
 24 (e.g., “Yes”), to the name of the President of the United States, to a paragraph describing the plot,
 25 themes, and significance of Homer’s *The Iliad*—is necessarily an infringing “derivative work” of
 26 Plaintiffs’ books. Worse still, each of those outputs would simultaneously be an infringing
 27 derivative of *each* of the millions of other individual works contained in the training corpus—
 28 regardless of whether there are any similarities between the output and the training works. That is

not how copyright law works.

The other claims addressed in this Motion are similarly defective. The DMCA claims would ascribe liability to conduct that does not satisfy the detailed statutory elements of the cause of action. The state law claims do not apply to the facts actually alleged: training a large language model to perform as described in the Complaints, for example, is not in any sense “negligence” as tort law defines that term. And those claims are also preempted by federal copyright law.

For these reasons and the others articulated below, OpenAI respectfully seeks dismissal of the claims challenged in this Motion.

II. FACTS ALLEGED

Plaintiffs. Plaintiffs are writers who allege that their books were used to train the language models on which ChatGPT relies. The remaining Plaintiff in the *Tremblay* action is Paul Tremblay, a writer who claims to own a registered copyright in a book titled *The Cabin at the End of the World*. Tremblay Compl. ¶ 10; *see also id.* ¶ 55 (defining “Infringed Works” to mean this book and two others allegedly written by the now-dismissed co-plaintiff, Mona Awad). The three Plaintiffs in the *Silverman* action are writers who claim to own registered copyrights in three books: *The Bedwetter* (Silverman), *Ararat* (Golden), and *Sandman Slim* (Kadrey). Silverman Compl. ¶¶ 10–12; *see also id.* ¶ 56 (defining “Infringed Works” to mean these three books).

Defendants. The defendants in these actions are seven entities that Plaintiffs collectively refer to as “OpenAI.” Tremblay Compl. ¶¶ 13–19, Silverman Compl. ¶¶ 14–20. Plaintiffs allege a series of connections between these entities, *id.*, but do not otherwise distinguish between them.²

Plaintiffs’ Allegations. These lawsuits focus on ChatGPT, an OpenAI service that reads user “text prompts” and generates “answers” and other responses that “mimic human language.” Tremblay Compl. ¶ 38, Silverman Compl. ¶ 39. Plaintiffs allege that ChatGPT relies on one of two “large language models,” referred to as GPT-3.5 and GPT-4. Tremblay Compl. ¶¶ 2, 36, Silverman Compl. ¶¶ 2, 37. They allege that these “large language models” “train” by studying a large amount of “training data,” from which the models derive abstract “patterns and connections”

² Nothing in either Complaint specifies which of these seven entities engaged in the alleged conduct.

1 about language. Tremblay Compl. ¶¶ 2, 39, Silverman Compl. ¶¶ 2, 40. The models then allegedly
 2 repurpose these “patterns and connections” to interpret user prompts and generate “convincingly
 3 naturalistic text outputs.” *Id.* As Plaintiffs acknowledge, the ability of digital software to do so
 4 reflects a legitimate scientific advancement in the field of artificial intelligence, which seeks to
 5 “simulate human reasoning and inference.” Tremblay Compl. ¶ 22, Silverman Compl. ¶ 23.

6 Plaintiffs brought these lawsuits because they suspect that OpenAI used the “patterns and
 7 connections” in their books to teach its models how to “convers[e]” with users. Tremblay Compl.
 8 ¶¶ 36, 39–41, Silverman Compl. ¶¶ 37, 40–42. The basis for that suspicion is that, when Plaintiffs
 9 prompted ChatGPT to “summarize [their books] in detail,” ChatGPT was able to generate more-
 10 or-less “accurate” summaries. Tremblay Compl. ¶ 41 & Ex. B, Silverman Compl. ¶ 42 & Ex. B.
 11 These summaries—which Plaintiffs attached to the Complaints, along with the prompts they used
 12 to create them—resemble book reports or reviews: they summarize the contours of the books’
 13 contents and praise the books’ themes. *See, e.g.*, Tremblay Compl. Ex. B at 1 (“Tremblay skillfully
 14 creates an escalating sense of dread . . . playing with themes of . . . familial love.”).

15 On that basis, Plaintiffs seek to represent a class of “[a]ll” U.S. persons who “own a []
 16 copyright in any work”—not just books—“used as training data for the OpenAI Language
 17 Models.” Tremblay Compl. ¶ 42, Silverman Compl. ¶ 43. They assert six causes of action:
 18 (1) direct copyright infringement (Count I); (2) vicarious infringement (Count II); (3) violation of
 19 Section 1202(b) of the Digital Millennium Copyright Act (“DMCA”) (Count III); (4) unfair
 20 competition under Cal. Bus. & Prof. Code Section 17200 (Count IV); (5) negligence (Count V);
 21 and (6) unjust enrichment (Count VI). OpenAI seeks dismissal of Counts II through VI.

22 **III. LEGAL STANDARD**

23 To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual
 24 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
 25 556 U.S. 662, 678 (2009) (cleaned up). “[A] formulaic recitation of the elements of a cause of
 26 action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court should
 27 disregard conclusory allegations, legal characterizations, unreasonable inferences, and
 28 unwarranted factual deductions. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

In a putative class action prior to certification, each of the named plaintiffs must “show that they have satisfied the pleading requirements” and may not “rely on the alleged injuries of others.” *Parrish v. Nat’l Football League Players Ass’n*, 534 F. Supp. 2d 1081, 1094 (N.D. Cal. 2007).

IV. ARGUMENT

Plaintiffs’ claims arise out of a variety of federal and state laws, but each of the claims at issue relate—directly or indirectly—to the Copyright Act and background principles of copyright law. Several of those principles are discussed briefly below.

A. The Limited Copyright Monopoly

Copyright is a “statutory monopoly” of “limited scope.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). While the Copyright Act “secur[es] for limited times to authors . . . [certain] exclusive right[s] to their respective writings,” it does so in service of a broader goal: “[t]o promote the Progress of Science and useful Arts.” U.S. CONST. Art. 1, § 8, cl. 8; *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“reward to the owner” of a copyrighted work is “secondary” to the “general benefits derived by the public” (citation omitted)). The Copyright Act generally protects “original works of authorship,” 17 U.S.C. § 102(a), but the scope of the monopoly is carefully limited to ensure that copyright serves its intended public purpose.

1. The Copyright Act Grants Only Specific, Enumerated Rights

“The Copyright Act does not give a copyright holder control over all uses of his copyrighted work.” *Aiken*, 422 U.S. at 154–55. “Rather, the Copyright Act grants the copyright holder ‘exclusive’ rights to use and to authorize the use of his work in [six] qualified ways,” enumerated in Section 106 of the Act. *Sony*, 464 U.S. at 432–33. As relevant here, the Act grants the exclusive rights to (1) “reproduce the [] work in copies,” 17 U.S.C. § 106(1); *see also id.* § 101 (defining “copies”); (2) “prepare derivative works,” *id.* § 106(2), *see also id.* § 101 (defining “derivative work”); and (3) “distribute copies . . . of the [] work to the public,” *id.* § 106(3).

2. Copyright Does Not Protect Ideas, Facts, or Language

Copyright protects the particular way an author expresses an idea—not the underlying idea itself, facts embodied within the author’s articulated message, or other building blocks of creative

expression. 17 U.S.C. § 102(b); *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991). As a result, “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Accordingly, while an author may register a copyright in her book, the “statistical information” pertaining to “word frequencies, syntactic patterns, and thematic markers” in that book are beyond the scope of copyright protection. *Google Books*, 804 F.3d at 209; *see also id.* at 220 (tool that extracts “information about the original [work]” does not infringe because it does not “replicat[e] protected expression”). So too for facts conveyed by the book, or its high-level plot or themes.³ These principles are essential to copyright’s overall goal of “[i]ntellectual (and artistic) progress,” which is “possible only if each author [can] build[] on the work of others.” *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990) (Easterbrook, J).

3. Substantial Similarity Is Required for Infringement

These limitations join each other in practice via the doctrine of “substantial similarity,” which is the “hallmark” of any claim of infringement of the rights granted in Section 106. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020). That doctrine requires the court in a copyright case to compare the two works at issue by (1) “disregard[ing] the non-protectible elements” like “stock scenes and themes” and “plot ideas,” and (2) asking whether the remaining “protectible elements, standing alone, are substantially similar.” *Cavalier*, 297 F.3d at 822–23 (citations omitted). If a defendant’s work is not “substantially similar” to an original, it is neither a “copy” nor a “derivative work” for purposes of Section 106. 17 U.S.C. § 106(1)–(3).

4. Fair Use Is Not Infringement

Even where a defendant has *prima facie* infringed one of the Section 106 rights by creating a “substantially similar” copy or derivative work, Section 107 of the Act provides that “the fair use of a copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107. While the fair use doctrine has its roots in the common law and dates back to the 19th century or earlier, Congress codified it in 1976, instructing courts to “free[ly] [] “adapt” the application of fair use in

³ *See Corbello v. Valli*, 974 F.3d 965, 977 (9th Cir. 2020) (“historical fact[s]” and “common . . . jargon” unprotectable (citation omitted)); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823–24 (9th Cir. 2002) (“themes” and “basic plot ideas” unprotectable).

future cases to account for “rapid technological change.” H.R. Rep. 94-1476 at 65–66 (1976). Under the resulting judicial precedent, it is not an infringement to create “wholesale cop[ies] of [a work] as a preliminary step” to develop a new, non-infringing product, even if the new product competes with the original. *Oracle*, 141 S. Ct. at 1199 (summarizing *Accolade*, 977 F.2d at 1521–27); *see also Connectix*, 203 F.3d at 603–08.⁴

B. The Bulk of Plaintiffs’ Claims Should Be Dismissed

This motion seeks dismissal with prejudice of Counts II through VI of each Complaint, alleging vicarious copyright infringement (Count II); violation of Section 1202(b) of the Digital Millennium Copyright Act (“DMCA”) (Count III); unfair competition under Cal. Bus. & Prof. Code Section 17200, *et seq.* (Count IV); negligence (Count V); and unjust enrichment (Count VI). As discussed below, none of these causes of action applies to the conduct alleged. This motion does not seek dismissal of Count I, for direct copyright infringement, which OpenAI will seek to resolve as a matter of law at a later stage of the case.

1. Plaintiffs Fail to State a Vicarious Infringement Claim

Vicarious liability is a legal theory for holding one party responsible for another party’s act of copyright infringement. Because “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” the circumstances under which a non-actor can be held liable are strictly limited. *Sony*, 464 U.S. at 434–35. As relevant here, a defendant may be held “vicariously” liable if it “has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017) (citation omitted).

Plaintiffs’ vicarious infringement claims rest solely on the theory that, “[b]ecause the output” of ChatGPT is “based on expressive information extracted from Plaintiffs’ [books],” “every [such] output . . . is an infringing derivative” of those books. Tremblay Compl. ¶ 59,

⁴ Every other circuit to consider the issue has either endorsed these Ninth Circuit cases explicitly or independently embraced the same principles. *iParadigms*, 562 F.3d at 638–40, 645; *Assessment Technologies of WI, LLC v. WIREDdata, Inc.*, 350 F.3d 640, 643–45 (7th Cir. 2003); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1539 n.18 (11th Cir. 1996); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 836–37, 842–44 (Fed. Cir. 1992). So has the Supreme Court. *Oracle*, 141 S. Ct. at 1198–99, 1208 (approving *Accolade* and *Connectix*).

Silverman Compl. ¶ 60. The theory is *not* that OpenAI is vicariously liable for copyright infringements committed only when users are able to, despite OpenAI’s best efforts, extract particular outputs from ChatGPT that contain copyright-protected expression from another source. It is instead that OpenAI is vicariously liable for the creation of infringing derivative works consisting of every single output that ChatGPT generates in response to user prompts.⁵ Tremblay Compl. ¶¶ 59–60, Silverman Compl. ¶¶ 60–61. These claims fail for three independent reasons.

a. Plaintiffs Have Not Alleged Direct Infringement

First, a defendant cannot be held vicariously liable unless the plaintiff “first demonstrate[s] [that] direct infringement” actually occurred. *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 937 (9th Cir. 2010). Because the derivative-work theory underlying Plaintiffs’ vicarious liability claim is wrong as a matter of law, the Complaints fail to identify any *bona fide* act of direct infringement for which OpenAI could be held liable.

Plaintiffs make no attempt to explain how or why any particular outputs are substantially similar to their books. *Cf. Fuzzy Logic Prods., Inc. v. Trapflix, LLC*, No. 15-cv-6203, 2015 WL 12791508, at *4 (C.D. Cal. Nov. 20, 2015) (dismissing copyright claim where complaint was “devoid of any comparisons of protectable elements”). Instead, in an attempt to avoid the individualized nature of substantial similarity analysis,⁶ Plaintiffs claim that “*every output* of the OpenAI Language Models is an infringing derivative” simply because those outputs are, in a remote and colloquial sense, “*based on* expressive information extracted from Plaintiffs’ [books].” Tremblay Compl. ¶¶ 58–61 (emphasis added); *see also* Silverman Compl. ¶¶ 59–62.

But the Ninth Circuit has squarely rejected the proposition that a secondary work that is “based on” an original is necessarily a derivative work. *See Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (calling this argument “frivolous”). Instead, the Circuit embraced the black-letter principle that “[t]o prove infringement” of any of the rights in Section 106, “one must show

⁵ This distinction is critical *inter alia* because it goes to the heart of the appropriateness of asserting a class action and seeking class certification, which Plaintiffs have done and which will be addressed later in the case. A theory that vicarious liability arises from every single output yields a very different class certification analysis from a theory that vicarious liability requires examining each output to see whether it is, in the copyright-law sense, “substantially similar” to a given input.

⁶ *See Schneider v. YouTube, LLC*, No. 20-cv-04423, 2023 WL 3605981, at *6 (N.D. Cal. May 22, 2023) (similarity is “fact-specific” and generally precludes certification of infringement claims).

substantial similarity.” *Id.*⁷

Every circuit to consider the question has reached the same conclusion: that “[i]n order to infringe the derivative right, there must be substantial similarity in protectible expression.” 4 PATRY ON COPYRIGHT § 12:13 & n.1 (Mar. 2023 update) (citing *Litchfield* along with cases from 5 Second, Fifth, Sixth, Eighth, and Eleventh Circuits); *see also Atkins v. Fischer*, 331 F.3d 988, 993 6 (D.C. Cir. 2003) (derivative work must be “substantially similar” to the original); *Dam Things from Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 565 (3d Cir. 2002) (same); H.R. Rep. 94- 7 1476 at 62 (“[T]o constitute a violation of [the derivative work right], the infringing work must 8 incorporate a portion of the copyrighted work in some form; for example, a detailed commentary 9 on a work or a programmatic musical composition inspired by a novel would not normally 10 constitute infringements.”). Plaintiffs’ theory that “every output . . . is [necessarily] an infringing 11 derivative” is wrong as a matter of law, which means their vicarious liability claim rests on conduct 12 that is not copyright infringement at all. The claim fails for that reason alone.

b. Plaintiffs Have Not Alleged the “Right and Ability to Supervise”

Second, a defendant may only be held “vicariously” liable for another’s direct infringement 15 if it had the “right and ability to supervise” that infringement. *Giganews*, 847 F.3d at 673; *see*, 16 *e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262–63 (9th Cir. 1996) (organizer of 17 swap meet vicariously liable for sale of bootlegs because it “controlled and patrolled” vendors’ 18 booths). All Plaintiffs have pleaded on this score is the conclusory assertion that “OpenAI has the 19 right and ability to control the output of the OpenAI Language Models,” without alleging any 20 supporting facts. Tremblay Compl. ¶ 60, Silverman Compl. ¶ 61. That is not enough to survive a 21 motion to dismiss a vicarious copyright infringement claim. *Kilina America, Inc. v. Bonded 22 Apparel, Inc.*, No. 19-cv-3027, 2019 WL 8065854, at *2 (C.D. Cal. Nov. 19, 2019) (“Merely 23 alleging that the Defendants had the ‘right and ability to supervise the infringing conduct’ lacks 24 the requisite detail to sustain a claim.”); *see also Twombly*, 550 U.S. at 555 (“formulaic recitation 25

⁷ This is the reason “[e]xplanations, commentaries, [or] prefaces” are not derivatives of the material they are “based upon”—absent similarity of “expression,” they do not “fall[] within [copyright’s] derivative work right.” Pamela Samuelson, *The Quest For A Sound Conception Of Copyright’s Derivative Work Right*, 101 GEO. L. J. 1505, 1540 (2013).

of the elements of a cause of action will not do”). This pleading failure is an independent basis on which the claim should be dismissed.

c. Plaintiffs Have Not Alleged “Direct Financial Interest”

Third, a vicarious liability claim requires that the defendant have a “direct financial interest” in the direct infringement at issue. *Giganews*, 847 F.3d at 673. It is not enough that the challenged activity is carried out by users of tools offered for profit by a technology company: rather, to satisfy the “direct financial interest” prong, the material that infringes the plaintiff’s works must “act[] as a draw for [defendant’s] customers” such that there is a direct “causal link between the infringement of the plaintiff’s *own copyrighted works* and any profit to the [defendant].” *Id.* (citation omitted) (emphasis added).

Plaintiffs’ sole allegation with respect to an alleged direct financial benefit is that OpenAI “benefited financially.” Tremblay Compl. ¶ 60, Silverman Compl. ¶ 61. But that alone does not sustain a vicarious copyright infringement claim. *Giganews*, 847 F.3d at 673–74. Nor would it matter if users were “drawn to [OpenAI’s products] to obtain access to infringing material in general.” *Id.* at 673 (cleaned up). The operative pleading standard is materially higher, requiring a closer nexus between the infringement of the plaintiffs’ works and a cognizable financial benefit to the defendant. *See id.*; *see also Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 829–30 (9th Cir. 2019) (rejecting vicarious infringement claim because plaintiff “[did] not contend that anyone visited [defendant]’s website in order to view his photographs or purchased [defendant’s] services because they saw the photographs”). The absence of alleged facts to support the legal conclusion that OpenAI derives the requisite direct financial benefit from infringing activity is a third independent basis on which the vicarious infringement claim should be dismissed.

2. Plaintiffs Fail to State a Claim under Section 1202(b) of the DMCA

Plaintiffs bring claims under Section 1202(b) of the Digital Millennium Copyright Act (“DMCA”), which (as relevant here) prohibits the “intentional[] remov[al] or alter[ation]” of copyright management information (“CMI”), *see* 17 U.S.C. § 1202(b)(1), and the “distribut[ion]” of “works” or “copies of works . . . knowing that [CMI] has been removed or altered,” *see id.* § 1202(b)(3). Plaintiffs allege that OpenAI “intentionally removed CMI from [their] Infringed

Works” during the “training process” in violation of 17 U.S.C. § 1202(b)(1), *see* Tremblay Compl. ¶ 64, Silverman Compl. ¶ 65, and “distribut[ed]” the models’ outputs without Plaintiffs’ CMI in violation of 17 U.S.C. § 1202(b)(3), *see* Tremblay Compl. ¶ 65, Silverman Compl. ¶ 66. These claims are far afield from the statutory language and purpose of Section 1202, which is briefly surveyed below. That background illuminates the flaws in these claims. As addressed below, Plaintiffs’ Section 1202(b)(1) claims fail because (1) Plaintiffs do not plausibly allege that any CMI was removed during the training process, and (2) Plaintiffs do not plead facts sufficient to draw a reasonable inference that OpenAI designed its process with the requisite intent to conceal infringement. And Plaintiffs’ Section 1202(b)(3) claims fail because that provision applies only if the defendant “distribute[d]” the plaintiff’s actual “works” or “copies of [them],” which is not alleged here.

a. Copyright Management Information and the DMCA

Congress enacted Section 1202 of the DMCA as part of a policy initiative to “help copyright owners police their copyrights, in light of the otherwise trivial ease of generating and distributing unauthorized copies of their works throughout cyberspace.” Julie E. Cohen, *A Right To Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 990 (1996); *see also* S. Rep. 105-190 at 8, 11 n.18 (1998) (noting the overarching legislative purpose to “discourage piracy” on the Internet); U.S. Dep’t of Commerce, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 235–36 (1995) (initially proposing Section 1202). To permit copyright owners to “track[] and monitor[]” how their works are used online, Section 1202 encourages owners to affix “copyright management information” or “CMI” to their works, and imposes penalties on defendants who frustrate those efforts by removing or altering that information. S. Rep. 105-190 at 16–17; 17 U.S.C. § 1202(b). Thus, in the typical Section 1202 case, the plaintiff might allege that it published a photograph along with a “photo credit and copyright notice,” and that the defendant both copied that photograph and “deliberately removed” the accompanying CMI—*e.g.*, by cropping out the photo credit—to hide its wrongdoing. *See, e.g., Cable v. Agence France Presse*, 728 F. Supp. 2d 977, 978 (N.D. Ill. 2010); *see also*

1 *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 458 (S.D.N.Y. 2009) (Section
2 1202 claim based on allegation that editors “instructed reporters to remove or alter the
3 identification of the AP as author or copyright holder of [news] articles”).

4 To ensure the statute hewed closely to that purpose, Congress included in Section 1202 a
5 “double-scienter” requirement. Simply removing CMI from a copyrighted work does not yield
6 liability. A Section 1202 plaintiff must also establish both (1) that the removal or alteration was
7 done “intentionally” (or, for distribution-based claims, was done “knowing that [CMI] has been
8 removed or altered”) and (2) that these acts were performed with “reasonable grounds to
9 know . . . that [they] will induce, enable, facilitate, or conceal an infringement [of copyright].” 17
10 U.S.C. § 1202(b). In the typical Section 1202 case, these elements are not difficult to plead. *See*,
11 *e.g.*, *Reiffer v. NYC Luxury Limousine Ltd.*, No. 22-cv-2374, 2023 WL 4029400, at *8 (S.D.N.Y.
12 June 15, 2023) (scienter requirement satisfied because “Defendant saw Plaintiff’s attribution on
13 the Work and removed it before uploading it to its website”). But the double-scienter requirement
14 generally precludes application of the statute in circumstances that do not involve the intentional
15 frustration of copyright management efforts. For example, it precludes liability for the omission
16 of CMI that occurs as an “unintended side effect” of a technological process—like scraping images
17 from the internet without also scraping associated CMI. *Kelly v. Arriba Soft Corp.*, 77 F. Supp.
18 2d 1116, 1122 (C.D. Cal. 1999), *rev’d on other grounds by* 336 F.3d 811 (9th Cir. 2003) (no
19 Section 1202 liability arising from the fact that search engine “crawler did not include [CMI] when
20 it indexed the images”); *see also Logan v. Meta Platforms, Inc.*, 636 F. Supp. 3d 1052, 1064 (N.D.
21 Cal. 2022) (“Unlike editing a plaintiff’s watermark out of a photo, automatically omitting CMI by
22 embedding a photo out of the full context of the webpage where the CMI is found cannot itself
23 plead intentionality as required by the DMCA.”). In other words, the incidental removal of CMI
24 does not raise an inference that the defendant knew its actions would conceal infringement.

25 *b. Plaintiffs Fail to State a DMCA Claim*

26 To state a Section 1202 claim, a plaintiff must *inter alia* allege specific facts regarding
27 “what the removed or altered CMI was.” *Free Speech Sys. LLC v. Menzel*, 390 F. Supp. 3d 1162,
28 1175 (N.D. Cal. 2019) (dismissing claim for failure to do so). Here, Plaintiffs allege that two

pieces of CMI were included in their books: (1) “the name of the author” and (2) “the year of publication.” Tremblay Compl. ¶ 10, Silverman Compl. ¶¶ 10–12.⁸ Plaintiffs allege that this CMI was included on their books’ “title page[s].” Tremblay Compl. ¶ 25, Silverman Compl. ¶ 26. Plaintiffs then allege that OpenAI violated Section 1202(b) in two distinct ways.

i. Section 1202(b)(1)

Plaintiffs allege that OpenAI violated Section 1202(b)(1) by “remov[ing] CMI” from their books during the “training process.” Tremblay Compl. ¶ 64, Silverman Compl. ¶ 65. The Complaints address this issue only in a single paragraph, in which Plaintiffs claim that the training process “does not preserve any CMI” “by design,” and that by running this process, “OpenAI intentionally removed CMI from” the books at issue here. *Id.* Notably, however, Plaintiffs affirmatively plead that the CMI that OpenAI allegedly removed—Plaintiffs’ names and the publication year of their books—was embodied *within* the books themselves. Tremblay Compl. ¶¶ 10, 25, Silverman Compl. ¶¶ 10–12, 26. By alleging that OpenAI “intentionally removed” CMI, Plaintiffs appear to be claiming that OpenAI *deleted* (or somehow redacted) their names and publication years from the “copie[s]” of the books that OpenAI allegedly created when compiling its training dataset. Tremblay Compl. ¶ 64, Silverman Compl. ¶ 65.

Plaintiffs offer no facts that might support such a theory, and instead allege a number of facts that would contradict it. Both Complaints claim that Plaintiffs’ books were “copied by OpenAI” *in their entirety* and “ingested by the underlying OpenAI Language Model.” Tremblay Compl. ¶ 40; Silverman Compl. ¶ 41. The Complaints are completely devoid of any explanation as to (1) how OpenAI might delete author names and publication years from the books in its training data, (2) why OpenAI would do such a thing, or (3) what Plaintiffs’ good-faith basis for

⁸ Other parts of the Complaints vaguely gesture at other forms of CMI, but notably do not specifically allege that the named Plaintiffs included those kinds of CMI in their books. *See, e.g.*, Tremblay Compl. ¶ 63 (“Plaintiffs included one or more forms of [CMI] in each of the Plaintiffs’ Infringed Works, including: copyright notice, title and other identifying information, the name or other identifying information about the owners of each book, terms and conditions of use, and identifying numbers or symbols referring to CMI.”). These allegations are insufficiently tethered to Plaintiffs’ particular works—there is no basis to discern which additional information beyond name and publication year was appended to which books, or whether any such information was included in the named Plaintiffs’ books at all—and the Court should thus disregard them. *Menzel*, 390 F. Supp. 3d at 1175; *see also Parrish*, 534 F. Supp. 2d at 1094 (named plaintiff in putative class action may not “rely on the alleged injuries of others”).

believing this occurred might consist of. The bare speculation that this happened, for no apparent reason and in contravention of the allegation that OpenAI trained its models using entire books obtained from third party sources, *see id.*, is precisely the kind of “unwarranted deduction[] of fact” that this Court must disregard on a motion to dismiss, *Gilead*, 536 F.3d at 105. Plaintiffs’ “suspicion” that OpenAI scrubbed their names and publication years from its set of training data is not enough to “raise a right to relief above the speculative level.” *Castro v. Emeritus Corp.*, No. 11-cv-03504, 2012 WL 601857, at *2 (N.D. Cal. 2012) (cleaned up).

Moreover, Plaintiffs’ own pleadings suggest the exact opposite. The ChatGPT outputs attached to the Complaints include multiple references to the Plaintiffs’ names. *See, e.g.*, Tremblay Compl. Ex. B. at 2 (“Throughout these chapters, Tremblay masterfully maintains the suspense and psychological terror . . .”), Silverman Compl. Ex. B at 1 (“Silverman uses her sharp wit to lend a comedic touch . . .”). This would plainly not be possible if OpenAI had deleted all references to “the name of the author” from each book before using the alleged copies to train the models on which ChatGPT relies.

Separately, even if OpenAI’s training process *did* result in the omission of CMI from the alleged copies in its training dataset, Plaintiffs make no attempt to explain how that omission could “induce, enable, facilitate, or conceal” the alleged copyright infringement, much less how OpenAI could have “known[]” that it would do so. 17 U.S.C. § 1202(b); *see also Mills v. Netflix, Inc.*, No. 19-cv-7618, 2020 WL 548558, at *3 (C.D. Cal. Feb. 3, 2020) (dismissing DMCA claim because the complaint “fails to include specific allegations as to how identifiable infringements will be affected by Defendants’ alleged removing or altering of CMI” or “demonstrat[e] Defendants knew or had reason to know that their actions would cause future infringement” (cleaned up)). “The point of CMI is to inform *the public* that something is copyrighted and to prevent infringement.” *Alan Ross Machinery Corp. v. Machinio Corp.*, No. 17-cv-3569, 2019 WL 1317664, at *2 (N.D. Ill. Mar. 22, 2019) (emphasis added); *see also Fashion Nova, LLC v. Blush Mark, Inc.*, No. 22-cv-6127, 2023 WL 4307646, at *5 (C.D. Cal. June 30, 2023) (“[T]he purpose of CMI is to provide the public with notice that a work is copyrighted.”). But OpenAI’s training dataset is not publicly accessible, as Plaintiffs admit. Tremblay Compl. ¶¶ 31, 35, Silverman Compl. ¶¶ 32, 36.

1 In the typical Section 1202 case, a plaintiff might allege scienter by alleging the defendant
 2 “instructed reporters to remove or alter the identification of the [original publisher]” before
 3 “distribut[ing] its articles to paying clients” who, as a result of the CMI removal, would have no
 4 way to know that the defendant had infringed another publisher’s copyright. *All Headline News*,
 5 608 F. Supp. 2d at 458. In other words, there is a direct and obvious causal connection between
 6 the CMI omission and the “facilitat[ion]” of “infringement” to satisfy the statute’s double-scienter
 7 requirement. 17 U.S.C. § 1202(b); *see also Victor Elias Photography, LLC v. Ice Portal, Inc.*, 43
 8 F.4th 1313, 1325 (11th Cir. 2022) (“[T]he statute’s plain language requires some identifiable
 9 connection between the defendant’s actions and the infringement or the likelihood of
 10 infringement.”); *O’Neal v. Sideshow, Inc.*, 583 F. Supp. 3d 1282, 1287 (C.D. Cal. 2022) (a
 11 “plaintiff must plausibly allege that future infringement is likely . . . to occur *as a result of* the
 12 [alleged DMCA violation]” (cleaned up) (emphasis added)).

13 Here, however, because the CMI was allegedly removed from an *internal* dataset, that
 14 alleged omission has no effect on the public at all. Because that dataset is not publicly accessible,
 15 the inclusion of CMI in that dataset could not “provide the public” with any information about the
 16 works at issue, *Fashion Nova*, 2023 WL 4307646, at *5, nor could the alleged exclusion of CMI
 17 from that dataset withhold any such information from public view. Therefore, even if it were an
 18 “infringement” for OpenAI to create copies of books for its training dataset, the removal of CMI
 19 from those copies could not possibly “induce, enable, facilitate, or conceal” that infringement—
 20 and OpenAI certainly could not have “know[n]” that it would. 17 U.S.C. § 1202(b). Even if the
 21 Court were to assume that OpenAI’s “training process does not preserve any CMI” “by design,”
 22 Tremblay Compl. ¶ 64, Silverman Compl. ¶ 65, that exclusion of CMI would be an “unintended
 23 side effect” of the training process—not a subversive tactic to disguise wrongdoing—which is not
 24 a Section 1202(b)(1) violation, *Kelly*, 77 F. Supp. 2d at 1122. And, in any event, the fact that
 25 ChatGPT readily and repeatedly referenced Plaintiffs’ names in its outputs—and indeed generated
 26 those outputs in response to prompts by Plaintiffs’ counsel based on the allegedly removed CMI—
 27 forecloses any argument that the alleged “removal” of CMI from the training dataset was intended
 28 to facilitate or conceal the creation of supposedly infringing ChatGPT outputs.

ii. Section 1202(b)(3)

Plaintiffs allege that OpenAI violated Section 1202(b)(3) because OpenAI “created derivative works”—*i.e.* ChatGPT outputs—and “distribut[ed] these [derivative] works without [the] CMI” that Plaintiffs included in their books, *i.e.*, without reproducing Plaintiffs’ “name[s]” and “the year of [their books’] publication.” Tremblay Compl. ¶ 65; *see also id.* ¶ 10, Silverman Compl. ¶ 66; *see also id.* ¶¶ 10–12. This claim fails for two independent reasons.

First, even assuming that each and every one of ChatGPT’s outputs is necessarily a “derivative work,” *see* Tremblay Compl. ¶ 65, Silverman Compl. ¶ 66; *but see supra* at 9, the relevant DMCA provision does not apply unless the works “distribute[d]” are the *original* “works” themselves or actual “copies of [them],” 17 U.S.C. § 1202(b)(3). Nothing in the statute prohibits the distribution of derivative works without the CMI that accompanied the original. *See Robert L. Stark Enters., Inc. v. Neptune Design Grp., LLC*, No. 16-cv-264, 2017 WL 1345195, at *11 (N.D. Ohio Apr. 12, 2017) (rejecting Section 1202(b)(3) claim based on contention that alleged infringer “created derivative works without retaining [opponent’s] CMI” because the statute requires that “copies” be distributed); *see also Frost-Tsuji Architects v. Highway Inn, Inc.*, No. 13-cv-00496, 2015 WL 263556, at *4 (D. Haw. Jan 21, 2015), *aff’d*, 600 F. App’x 674 (9th Cir. 2017) (rejecting Section 1202(b) claim because “[a]t most,” defendant “created [a] derivative work,” which does not support claim that it “removed the [CMI] from [plaintiff’s] original work”). Plaintiffs do not allege that OpenAI distributed unaltered “copies” of their books. 17 U.S.C. § 1202(b)(3).

Second, to plead a Section 1202(b)(3) claim, Plaintiffs must establish that the CMI at issue was actually “removed or altered” from the works that OpenAI allegedly “distribute[d].” 17 U.S.C. § 1202(b). In a typical Section 1202 case, a plaintiff might make that showing by pleading that the defendant “cropped the [plaintiff’s] image so that the [CMI] . . . could no longer be seen” before distributing it. *Reiffer*, 2023 WL 4029400, at *1. But there is a legally significant difference between (1) removing or cropping out CMI embedded in a plaintiff’s “work” or an otherwise identical “cop[y]” of it, *see* 17 U.S.C. § 1202(b)(3), and (2) creating a new work that does not include that CMI. Courts have uniformly declined to apply Section 1202 to the latter circumstance because the DMCA “does not prohibit merely omitting CMI from an infringing work.” *Dolls Kill*,

1 *Inc. v. Zoetop Bus. Co.*, No. 22-cv-01463, 2022 WL 16961477, at *3–4 (C.D. Cal. Aug. 25, 2022).
 2 Any contrary rule would mean that every copyright plaintiff—including, for example, a
 3 photographer who claims that an artist’s painting infringed one of her images—could also bring a
 4 claim under Section 1202, along with a demand for statutory damages under that section. *See* 17
 5 U.S.C. § 1203(c)(3)(B) (providing for statutory damages “for each violation . . . of not less than
 6 \$2,500”).⁹ Nothing in the statutory language or legislative history suggests that (incorrect) result.

7 Some courts frame this inquiry by asking whether the infringing work is “identical”—and,
 8 if not, holding there has been no removal or alteration. *Kirk Kara Corp. v. W. Stone & Metal*
 9 *Corp.*, No. 20-cv-1931, 2020 WL 5991503, at *6 (C.D. Cal. Aug. 14, 2020) (dismissing claim
 10 because “while the works may be *substantially similar*, [d]efendant did not make *identical*
 11 copies . . . and then remove engraved CMI”).¹⁰ Because Plaintiffs do not allege that OpenAI
 12 “distributed” works “identical” to their books, they have not stated a Section 1202(b)(3) claim.

13 3. Plaintiffs Fail to State a UCL Claim

14 Plaintiffs also bring state law unfair competition claims under Cal. Bus. & Prof. Code
 15 §§ 17200, *et seq.* (“UCL”). To plead a UCL violation, a plaintiff must allege a “business act or
 16 practice” that is “either ‘unlawful,’ ‘unfair,’ or ‘fraudulent.’” *Armstrong-Harris v. Wells Fargo*

17
 18 ⁹ To provide copyright owners “an incentive to register their copyrights promptly,” *Derek Andrew,*
 19 *Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 700 (9th Cir. 2008), Section 412 of the Copyright Act
 20 generally precludes recovery of statutory damages for copyright infringement unless the plaintiff
 21 registered the work at issue with the U.S. Copyright Office before the infringement “commenced,”
 22 17 U.S.C. § 412. Section 412’s registration bar, however, does not apply to the DMCA’s separate
 23 statutory damages provision. *See Shihab v. Complex Media, Inc.*, No. 21-cv-6425, 2022 WL
 24 3544149, at *8 (S.D.N.Y. Aug. 17, 2022). If every copyright infringement claim necessarily
 25 constituted a separate DMCA violation for CMI removal, plaintiffs could easily avoid the Section
 26 412 registration bar by seeking statutory damages under the DMCA. That would materially
 27 undermine Congress’s attempt to incentivize copyright holders to register their works. *Cf.* H.R.
 28 Rep. No. 94-1476 at 158 (noting the “importan[ce]” of “[c]opyright registration” to “users and the
 public at large”).

¹⁰ *See also Design Basics, LLC v. WK Olson Architects, Inc.*, No. 17-cv-7432, 2019 WL 527535,
 at *5 (N.D. Ill. Feb. 11, 2019) (where complaint “[did] not allege [defendant] directly reproduced
 [plaintiff’s] work without CMI,” dismissing Section 1202(b) claim “with prejudice because further
 amendment would be futile”); *Fisher v. Forrest*, 286 F. Supp. 3d 590, 609 (S.D.N.Y. 2018)
 (because plaintiff’s work was not “substantially or entirely reproduced,” defendant “cannot be said
 to have removed CMI from [plaintiff’s] ‘works’”); *Frost-Tsuji*, 2015 WL 263556, at *3 (no
 Section 1202 claim because defendant’s drawing “is not identical to the drawing by [plaintiff]”);
A’Lor Int’l, Ltd. v. Tapper Fine Jewelry, Inc., No. 12-cv-02215, 2012 WL 12921035, at *10 (C.D.
 Cal. Aug. 8, 2012) (dismissing Section 1202(b) claim with prejudice because “the plain language
 of the statute encompasses only removal and alteration” and does not “include [mere] omissions”).

1 *Bank, N.A.*, No. 21-cv-07637, 2022 WL 3348426, at *2 (N.D. Cal. Aug. 12, 2022) (citation
 2 omitted). Each adjective captures a “separate and distinct theory of liability.” *Id.* Here, Plaintiffs’
 3 UCL claims are based on the UCL’s “unlawful” prong, which “borrows violations of other laws
 4 and treats them as unlawful practices.” *Id.* at *3 (citation omitted); *see also* Tremblay Compl.
 5 ¶ 69, Silverman Compl. ¶ 70. The sole predicate violation alleged in the Complaint is that OpenAI
 6 “violat[ed] the DMCA.” Tremblay Compl. ¶¶ 69–70, Silverman Compl. ¶¶ 70–71.¹¹

7 This claim fails three times over. First, as explained above, Plaintiffs have failed to plead
 8 DMCA claims, which means that “the UCL claim[s] also fail[.]” *Armstrong-Harris*, 2022 WL
 9 3348426, at *3 (citation omitted); *see supra* at 13.

10 Second, Plaintiffs have not alleged an economic injury flowing directly from the alleged
 11 DMCA violations. To plead a UCL claim, a plaintiff must “(1) establish a loss or deprivation of
 12 money or property . . . and (2) show that economic injury was the result of, i.e., *caused by*,” the
 13 alleged predicate violation. *Davis v. RiverSource Life Ins. Co.*, 240 F. Supp. 3d 1011, 1017 (N.D.
 14 Cal. 2017) (emphasis in original); *see also* *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305,
 15 1348 n.31 (2009) (requirement is “more stringent than” that Art. III injury-in-fact inquiry); Cal.
 16 Bus. & Prof. Code § 17204 (permitting relief for “a person who has suffered injury in fact and has
 17 lost money or property as a result of the unfair competition”). As noted above, the two DMCA-
 18 based predicates at issue here are (1) the alleged removal of CMI during the “training process” and
 19 (2) the alleged distribution of supposed “derivative” ChatGPT outputs without Plaintiffs’ CMI.
 20 Tremblay Compl. ¶¶ 64–65, Silverman Compl. ¶¶ 65–66. The only allegation as to harm arising
 21 from these alleged violations is a single sentence included in both Complaints: “Plaintiffs have
 22 been injured by OpenAI’s removal of CMI.” Tremblay Compl. ¶ 67, Silverman Compl. ¶ 68.
 23 Nothing in the Complaint explains how Plaintiffs “lost money or property” in connection with
 24 these claims. Cal. Bus. & Prof. Code § 17204; *see also* *Doe 1 v. Github*, No. 22-cv-06823, 2023

25 ¹¹ Plaintiffs vaguely suggest that this claim is also based on the use of “Plaintiffs’ Infringed Works
 26 to train ChatGPT,” in what appears to be a reference to the copyright infringement claims.
 27 Tremblay Compl. ¶ 69, Silverman Compl. ¶ 70. But the paragraphs that directly address the UCL
 28 claim assert the alleged DMCA violation as the sole predicate. Tremblay Compl. ¶ 70, Silverman
 Compl. ¶ 71. In any case, copyright infringement is not a valid predicate for a UCL claim due to
 Copyright Act preemption. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998)
 (UCL claim “expressly base[d] . . . on . . . the Copyright Act” was “clear[ly]” preempted).

1 WL 3449131, at *14 (N.D. Cal. May 11, 2023) (dismissing UCL claim because “the Court cannot
2 discern how Defendants’ alleged violations of the DMCA have caused or will cause Plaintiffs
3 economic injury”).¹²

4 Third, Plaintiffs have failed to plead facts that would justify any relief under the UCL.
5 “Remedies under the UCL are limited to restitution and injunctive relief, and do not include
6 damages.” *Silvercrest Realty, Inc. v. Great Am. E&S Ins. Co.*, No. 11-cv-01197, 2012 WL
7 13028094, at *2 (C.D. Cal. Apr. 4, 2012). And to state a claim for either form of relief, a plaintiff
8 “must establish that she lacks an adequate remedy at law.” *Sonner v. Premier Nutrition Corp.*,
9 971 F.3d 834, 844 (9th Cir. 2020). Plaintiffs have not done so here. *Silvercrest*, 2012 WL
10 13028094, at *3 (UCL claim “deficient” because plaintiff “fails [to] explain why the damages it
11 seeks elsewhere in its complaint are not adequate to compensate it for its alleged injuries”).

12 4. Plaintiffs Fail to State a Claim for Negligence

13 Count V, asserting “negligence,” also fails. First, the only acts challenged in the
14 Complaints are purportedly intentional, not negligent. “[I]ntentional act[s] with intended
15 consequences [do not] fall[] within the ambit of a negligence cause of action.” *Carlson v. San*
16 *Mateo Cnty*, 103 F.3d 137, 1996 WL 717310 (Table) at *3 (9th Cir. 1996); *see also Semore v.*
17 *Pool*, 217 Cal. App. 3d 1087, 1105 (1990) (dismissing negligence claim because “any actions by
18 the [defendant] were intentional, not negligent”). Indeed, Plaintiffs’ allegations that the challenged
19 conduct was undertaken “negligently” or “recklessly,” Tremblay Compl. ¶ 75, Silverman Compl.
20 ¶ 76, are irreconcilable with their DMCA claims, which require Plaintiffs to establish that the
21 violations were undertaken “intentionally” or “knowing[ly],” *see* 17 U.S.C. § 1202(b).

22 Second, Plaintiffs have not established that OpenAI owes them a duty. “The existence of
23 a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for
24 negligence.” *Langan v. United Servs. Auto. Ass’n*, 69 F. Supp. 3d 965, 987 (N.D. Cal. 2014)
25 (citation omitted). Plaintiffs’ sole basis for alleging the existence of such a duty in support of their
26

27 ¹² The Complaints state that OpenAI “fails to attribute the success of their product to the copyright-
28 injured work on which it is based,” suggesting that Plaintiffs suffer some form of reputational
injury. Tremblay Compl. ¶ 72, Silverman Compl. ¶ 73. But intangible harms do not satisfy the
UCL’s standing requirements. *See Troyk*, 171 Cal. App. 4th at 1348 n.31.

negligence claims lies in a single paragraph that makes vague mention of OpenAI’s “obligations,” “custom and practice,” and control over “information in its possession.” Tremblay Compl. ¶ 74, Silverman Compl. ¶ 75.¹³ Plaintiffs also cite Cal. Civ. Code § 1714, which merely “state[s] the basic rule of negligence.” *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 821 (1975).

None of these allegations suggests OpenAI owed Plaintiffs a duty of care. While Plaintiffs insist that this supposed “duty” is “based on [OpenAI]’s relationship to [Plaintiffs],” Tremblay Compl. ¶ 74, Silverman Compl. ¶ 75, there are no allegations regarding any relationship between the parties that could have given rise to such a duty, *New Sensations, Inc. v. Does*, No. 12-cv-3800, 2012 WL 12898400, at *3 (N.D. Cal. Nov. 29, 2012) (complaint that failed to allege facts to support conclusion that defendants owed a “legal duty” was “not sufficient to support a negligence cause of action”).

5. Plaintiffs Fail to State a Claim for Unjust Enrichment

Count VI, asserting “unjust enrichment,” also fails on the merits. Under California law, a cause of action for “unjust enrichment” is construed “as a quasi-contract claim seeking restitution.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (citation omitted); *see also Baiul-Farina v. Lemire*, 804 F. App’x 533, 537 (9th Cir. 2020) (“Unjust enrichment is not a cause of action under California law.” (cleaned up)). As such, to plead this claim, Plaintiffs must allege that OpenAI “received and unjustly retained a benefit at plaintiff’s expense.” *ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016). Additionally, “a plaintiff must show that the benefit was conferred on the defendant through mistake, fraud, or coercion.” *Bittel Technology, Inc. v. Bittel USA, Inc.*, No. 10-cv-00719, 2010 WL 3221864, at *5 (N.D. Cal. Aug. 13, 2010) (citation omitted).

In a typical case, for example, a plaintiff pleads that the defendant solicited and received some payment from the plaintiff, which the defendant then improperly “retained.” *See, e.g.*,

¹³ Plaintiffs’ allegations regarding OpenAI’s “control” of the “information in its possession” suggests that Plaintiffs are attempting to invoke the duty to safeguard personal identifying information. *See, e.g., Schmitt v. SN Servicing Corp.*, No. 21-cv-03355, 2021 WL 3493754, at *4 (N.D. Cal. Aug. 2021). But the “information” at issue here—published books written by Plaintiffs—is public, not private.

1 *Stratos*, 828 F.3d at 1039 (analyzing claim for mishandling and unlawfully retaining client trust
 2 account). This case looks nothing like that. The core facts appear to be nothing more than those
 3 underlying the copyright infringement claims, re-asserted on a quasi-contract theory. To the extent
 4 that there are any unique factual allegations with respect to the unjust enrichment claim
 5 specifically, they simply parrot the elements of the cause of action via conclusory assertions.
 6 Tremblay Compl. ¶¶ 79–86, Silverman Compl. ¶¶ 80–87. Plaintiffs provide no explanation
 7 whatsoever as to what “benefit” they quasi-contractually “conferred” on OpenAI, or how their
 8 choice to confer that benefit was the result of “mistake, fraud, or coercion.” *Bittel*, 2010 WL
 9 3221874, at *5. The Complaints simply assert, without explanation, that OpenAI “derived profit
 10 and other benefits from the use of the Infringed Materials” and that it would be “unjust” to retain
 11 “those benefits.” Tremblay Compl. ¶¶ 84–85, Silverman Compl. ¶¶ 85–86. Those threadbare
 12 allegations do not state a viable claim for relief. *See Bosco Wai-Choy Chiu v. NBS Default Servs.*,
 13 *LLC*, No. 14-cv-05261, 2015 WL 1221399, at *9 (N.D. Cal. Mar. 17, 2015) (dismissing unjust
 14 enrichment claim “without leave to amend” where allegations were “conclusory and speculative”);
 15 *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1133 (N.D. Cal. 2009) (“conclusory
 16 allegation” that defendants “retain[ed] profits, income and ill-gotten gains at the expense of
 17 plaintiff” was “insufficient”).

18 6. The Negligence and Unjust Enrichment Claims Are Preempted

19 As noted above, Plaintiffs’ negligence and unjust enrichment claims are also overt attempts
 20 to reframe the Complaints’ direct copyright infringement claims in the vernacular of California
 21 common law claims. *See, e.g.*, Tremblay Compl. ¶ 77 (negligence claim based on OpenAI’s use
 22 of Plaintiff’s “Infringed Works” to “train ChatGPT”); *id.* ¶ 81 (unjust enrichment claim based on
 23 OpenAI’s “access to the Infringed Materials to train ChatGPT”); *see also* Silverman Compl. ¶¶ 78,
 24 82. As such, both claims are preempted by Section 301 of the Copyright Act, which bars any state
 25 law claim if (1) the “subject matter” of the claim falls within the “subject matter of copyright as
 26 specified by sections 102 and 103 [of the Act]” and (2) if the rights asserted under state law are
 27 “equivalent to any of the exclusive rights within the general scope of copyright as specified by
 28 section 106 [of the Act].” 17 U.S.C. § 301(a); *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010

(9th Cir. 2017); *see also United States ex rel. Berge v. Bd. Of Tr. of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (“[T]he shadow actually cast by the [Copyright] Act’s preemption is notably broader than the wing of its protection.”).

Subject Matter of Copyright. Plaintiffs explicitly state that both the negligence claims and the unjust enrichment claims are based on OpenAI’s use of the “Infringed Works,” *i.e.*, the books at issue in this lawsuit. *See Tremblay Compl.* ¶¶ 77 (negligence claim), 83 (unjust enrichment claim), 55 (defining “Infringed Works”); *see also Silverman Compl.* ¶¶ 56, 78, 84. Books are “literary works” that fall directly within the “subject matter of copyright” for purposes of preemption. 17 U.S.C. § 101 (defining “literary works”); § 102 (“literary works” are within copyright’s subject matter). The “subject matter” of these claims therefore falls within the “subject matter of copyright as specified by [§] 102.” *Id.* § 301(a).

Equivalent Rights. To survive preemption under the “equivalent rights” prong of Section 301, a plaintiff must show that the asserted state law right is “qualitatively different from” the rights protected by copyright law. *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1143–44 (9th Cir. 2006). “The state right may be narrower, broader, or contain somewhat different elements, yet it will still be preempted if its essence is the same as the federal right.” 6 PATRY ON COPYRIGHT § 18:16. Courts often frame this inquiry as whether the state claim has an “extra element” that is sufficient to “transform the nature of the action.” *Laws*, 448 F.3d at 1144. But the fact that the literal elements of a state law claim “may not be identical to the elements in a copyright action” is not dispositive; what matters is the “underlying nature of [the] state law claims.” *Id.* Where the “essence of [the state law] claim” is the plaintiff’s “object[ion]” to the use of a copyrighted work, the equivalent rights prong is satisfied in favor of preemption. *Id.*

Here, the negligence and unjust enrichment claims are predicated expressly on the “us[e] [of] the Infringed Works to train ChatGPT.” *Tremblay Compl.* ¶ 76 (negligence claim); *see also id.* ¶ 82 (unjust enrichment claim); *Silverman Compl.* ¶¶ 77, 83. According to Plaintiffs, that “us[e]” occurred when OpenAI (1) “cop[ied] . . . text” from their books, (2) “extract[ed] expressive information from [them],” and (3) used that information to create a language model. *Tremblay Compl.* ¶¶ 2, 23, *Silverman Compl.* ¶¶ 2, 24.

But the right to control the creation of “cop[ies]” of a literary work is indistinguishable from copyright’s reproduction right. 17 U.S.C. § 106(1). So is the right to control the extraction of “expressive” information from a work. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1122 (9th Cir. 2018). And the right to control the use of Plaintiffs’ expressive content to create a new product is functionally equivalent to the exclusive right to prepare derivative works. 17 U.S.C. § 106(2); *see also* Tremblay Compl. ¶ 56 (alleging that the language models “are themselves infringing derivative works”), Silverman Compl. ¶ 57 (same). The mere fact that the Complaints feature the word “use” instead of the word “copy” is not enough to save these claims from preemption. *See Laws*, 448 F.3d at 1144 (focusing on the “underlying nature” of [the] state law claims”); *see also Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (unjust enrichment claim based on allegedly improper “use” of map preempted); *Shade v. Gorman*, No. 08-cv-3471, 2009 WL 196400, at *5 (N.D. Cal. Jan. 28, 2009) (unjust enrichment claim based on “use[]” of “plaintiff’s [] footage” to create new work preempted); *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1128 (N.D. Cal. 2001) (unjust enrichment claim, which “at its core alleges that the defendants unfairly benefitted from their unauthorized use” of plaintiff’s work, was “equivalent” to copyright claim and preempted).

While Plaintiffs seek to reframe these allegations in the language of state law negligence or unjust enrichment caselaw, “[s]imply recharacterizing the claim as one of ‘negligence’ [or unjust enrichment] does not add a legally cognizable additional element” sufficient to survive preemption. *AF Holdings, LLC v. Doe*, No. 12-cv-2049, 2012 WL 3835102, at *4 (N.D. Cal. Sept. 4, 2012) (negligence claim preempted).¹⁴

V. CONCLUSION

For the foregoing reasons, OpenAI requests dismissal of Counts II through VI of the Complaints.

¹⁴ *See also Cromwell v. Certified Forensic Loan Auditors*, No. 17-cv-02429, 2019 WL 1095837, at *11 (N.D. Cal. Jan. 10, 2019) (negligence claim preempted); *Jonathan Browning, Inc. v. Venetian Casino Resort, LLC*, No. 07-cv-3983, 2007 WL 4532214, at *9 (N.D. Cal. Dec. 19, 2007) (unjust enrichment claim preempted); *Dielsi v. Falk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996) (rejecting attempt to “merely recharacterize[] a copyright infringement claim as one for negligence”).

Dated: August 28, 2023

Respectfully submitted,

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ATTESTATION

I, Andrew M. Gass, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(h)(3), I attest that all signatories to this document have concurred in its filing.

Dated: August 28, 2023

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