UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EVOX PRODUCTIONS LLC, a Delaware limited liability company,

Plaintiff,

v.

AOL INC., a Delaware corporation; OATH INC., a Delaware corporation; VERIZON MEDIA INC., a Delaware corporation; and DOES 1-10,

Defendants.

Case No. 2:20-cv-02907-JWH(JEMx)

ORDER ON MOTION OF DEFENDANTS TO DISMISS THIRD AMENDED COMPLAINT [ECF No. 91]

Before the Court is the motion of Defendants AOL Inc., Oath Inc., and Verizon Media Inc. to dismiss the copyright infringement claim of Plaintiff Evox Productions LLC.[1] The Court finds this matter appropriate for resolution without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support and in opposition,[2] the Court orders that the Motion is **DENIED**, for the reasons set forth herein.

I. BACKGROUND

On March 15, 2021, Evox filed its Second Amended Complaint, which included two claims for relief: (1) copyright infringement; and (2) trademark infringement.[3] On June 25, 2021, this Court ruled on Defendants' motion for judgment on the pleadings,[4] dismissing the first claim for relief in Evox's SAC with leave to amend and dismissing its trademark claim without leave to amend.[5]

In their Rule 12(c) Motion on the SAC, Defendants argued that Evox failed to state a claim for copyright infringement because Evox's claim was based on a "making available" theory.[6] Evox did not aver what "use" means, other than making the copyrighted works available.[7] To plead a viable claim for

---

[1] Mot. of Defs. to Dismiss the Third Amended Complaint (the "Motion") [ECF No. 91].

[2] The Court considered the following papers: (1) Third Am. Compl. (the "TAC") [ECF No. 87]; (2) the Motion; (3) Pl.'s Opp'n to the Motion (the "Opposition") [ECF No. 92]; (4) Defs.' Reply in Supp. of the Motion (the "Reply") [ECF No. 94]; (5) Defs.' Suppl. Authority in Supp. of Defs.' Mot. to Dismiss Third Am. Compl. (and attachments) (the "Supplement") [ECF No. 95]; (6) Pl.'s Response to Defs.' Notice of Suppl. Authority in Support of their Mot. to Dismiss Third Am. Compl. (the "Response") [ECF No. 96]; (7) Pl.'s Notice of Suppl. Authority in Opp'n to the Motion [ECF No. 100]; and (8) Response of Defs. to Pl.'s Notice of Suppl. Authority [ECF No. 101].

[3] Second Am. Compl. (the "SAC") [ECF No. 53].

[4] Mot. of Defs. for J. on the Pleadings (the "Rule 12(c) Motion") [ECF No. 59].

[5] Order on Mot. to Am. Scheduling Order (the "Minute Order") [ECF No. 83].

[6] Rule 12(c) Motion at 9:16-13:5.

[7] Tr. of Mot. Proceedings (the "Hearing Transcript") [ECF No. 89] at 5:24-25.

copyright infringement, this Court held Evox was required to allege in a "nonconclusory fashion" that some individual "actually viewed or was served a copyrighted image."[8] However, the Court granted Evox leave to amend its SAC to correct that infirmity.[9]

Evox filed its TAC on July 9, 2021, in which it asserted only a copyright infringement claim.[10] Defendants filed the instant Motion on July 23, 2021. Evox filed its Opposition on August 6, 2021, and 10 days later Defendants filed their Reply.

The parties are already familiar with the alleged facts with respect to Evox's automobile Images, the License Agreement it entered into with Defendant AOL Inc., and the subsequent termination of that Agreement in 2017.[11] As relevant to the Motion, the TAC alleges that two months after AOL terminated the Agreement, Evox personnel discovered that AOL was still displaying Evox Images on the Autoblog.[12] As a result, Evox engaged a third-party consultant to visit a random sample of pages on the Autoblog website, and the consultant confirmed that Evox Images "were still being served and displayed well after the Agreement was terminated."[13] The consultant then conducted an automatic scan and confirmed that "links to 299,507 EVOX Images were still active across 14,907 pages" of the Autoblog website.[14]

In its TAC, Evox further alleges that the Autoblog self-reports that it has six million visitors to its website per month and that the "compare feature"—an

---

[8] *Id.* at 6: 11-12.

[9] Minute Order at 1; *see also Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)).

[10] Third Am. Compl. (the "TAC") [ECF No. 87].

[11] TAC at ¶¶ 32, 34-37, 46, 52, & 56.

[12] *Id.* at ¶ 36.

[13] *Id.* at ¶ 63.

[14] *Id.* at ¶ 64.

online tool that allows users to view multiple interior and exterior Images of vehicles, and, crucially, where Evox's Images are allegedly displayed—accounts for 3% of web traffic, or about 150,000 visitors per month.[15] Therefore, because Defendants continue "to display EVOX Images on 14,907 pages of the Autoblog website after the license for Images was terminated," upon Evox's "information and belief, the Defendants' infringement of EVOX's copyrights was willful."[16]

Furthermore, Evox alleges that Defendants allowed to be destroyed some of the records (*i.e.*, server logs) that would have demonstrated the number of times that the Images were displayed.[17] The TAC states that an alternative record source—page view analytics—would quantify how many times users visited the Autoblog's "compare feature."[18] It is Evox's belief that the Autoblog's page view analytics will show that there were approximately 900,000 visits to the "compare feature," where Evox's Images were displayed after the Agreement was terminated.[19]

II. LEGAL STANDARD

Defendants move to dismiss Evox's copyright infringement allegation for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A claim should be dismissed under Rule 12(b)(6) where the plaintiff fails to assert a "cognizable legal theory" or the complaint contains "[in]sufficient facts . . . to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss, the complaint must allege "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550

---

15 *Id.* at ¶¶ 53 & 78.

16 *Id.* at ¶¶ 90 & 91.

17 *Id.* at ¶ 92.

18 *Id.* at ¶¶ 74-77; *see also* Hearing Transcript at 21:1 (described as a "two-page document").

19 *Id.* at ¶ 79.

U.S. 544, 555 (2007). The claim must be pleaded with "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and that rises "above the speculative level," *Twombly*, 550 U.S. at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Importantly, the Court must construe all factual allegations and "draw all reasonable inferences from them ***in favor of*** the nonmoving party." *Tinoco v. San Diego Gas & Elec. Co.*, 327 F.R.D. 651, 656 (S.D. Cal. 2018) (emphasis added) (quoting *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996)); *see also Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

III. DISCUSSION

Defendants argue that Evox's copyright infringement claim fails as a matter of law because Evox failed to allege that Defendants served even a single Evox Image to a substantial number of people after February 2017.[20] To state a claim for infringement under the Copyright Act, a copyright owner must "demonstrate that the alleged infringers violated at least one exclusive right granted to copyright holders under 17 U.S.C. § 106" and "show causation (also referred to as 'volitional conduct') by the defendant[s]." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 647, 666 (9th Cir. 2017). In the TAC, Evox alleges that Defendants displayed Evox Images on 14,907 pages of the Autoblog website after the license for the Images was terminated.[21] However, under the "server test" adopted by the Ninth Circuit, a digital image is displayed only when a "computer owner . . . uses the computer to fill [another person's] computer

[20] Motion at 1: 8-10

[21] TAC at ¶¶ 89 & 90

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.