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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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11 EVOX PRODUCTIONS LLC, a
12 Delaware limited liability company,

13 Plaintiff,

14 v.

15 AOL INC., a Delaware corporation;
16 OATH INC., a Delaware corporation;
17 VERIZON MEDIA INC., a Delaware
18 corporation; and
19 DOES 1-10,

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

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

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

7 **I. BACKGROUND**

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

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

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

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

28 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

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

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

9 The parties are already familiar with the alleged facts with respect to
10 Evox’s automobile Images, the License Agreement it entered into with
11 Defendant AOL Inc., and the subsequent termination of that Agreement in
12 2017.¹¹ As relevant to the Motion, the TAC alleges that two months after AOL
13 terminated the Agreement, Evox personnel discovered that AOL was still
14 displaying Evox Images on the Autoblog.¹² As a result, Evox engaged a third-
15 party consultant to visit a random sample of pages on the Autoblog website, and
16 the consultant confirmed that Evox Images “were still being served and
17 displayed well after the Agreement was terminated.”¹³ The consultant then
18 conducted an automatic scan and confirmed that “links to 299,507 EVOX
19 Images were still active across 14,907 pages” of the Autoblog website.¹⁴

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

22 ⁸ *Id.* at 6: 11-12.

23 ⁹ Minute Order at 1; *see also Knappenberger v. City of Phoenix*, 566 F.3d 936,
24 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.
2000)).

25 ¹⁰ Third Am. Compl. (the “TAC”) [ECF No. 87].

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

27 ¹² *Id.* at ¶ 36.

28 ¹³ *Id.* at ¶ 63.

¹⁴ *Id.* at ¶ 64

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

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

15 II. LEGAL STANDARD

16 Defendants move to dismiss Evox's copyright infringement allegation for
17 failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil
18 Procedure. A claim should be dismissed under Rule 12(b)(6) where the plaintiff
19 fails to assert a “cognizable legal theory” or the complaint contains
20 “[in]sufficient facts . . . to support a cognizable legal theory.” *Navarro v. Block*,
21 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss, the
22 complaint must allege “more than labels and conclusions, and a formulaic
23 recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550

24 ¹⁵ *Id.* at ¶¶ 53 & 78.

25 ¹⁶ *Id.* at ¶¶ 90 & 91.

26 ¹⁷ *Id.* at ¶ 92.

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

28 ¹⁹ *Id.* at ¶ 79.

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

8 Importantly, the Court must construe all factual allegations and “draw all
9 reasonable inferences from them *in favor of* the nonmoving party.” *Tinoco v.*
10 *San Diego Gas & Elec. Co.*, 327 F.R.D. 651, 656 (S.D. Cal. 2018) (emphasis
11 added) (quoting *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir.
12 1996)); *see also Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

13 III. DISCUSSION

14 Defendants argue that Evox’s copyright infringement claim fails as a
15 matter of law because Evox failed to allege that Defendants served even a single
16 Evox Image to a substantial number of people after February 2017.²⁰ To state a
17 claim for infringement under the Copyright Act, a copyright owner must
18 “demonstrate that the alleged infringers violated at least one exclusive right
19 granted to copyright holders under 17 U.S.C. § 106” and “show causation (also
20 referred to as ‘volitional conduct’) by the defendant[s].” *Perfect 10, Inc. v.*
21 *Giganews, Inc.*, 847 F.3d 647, 666 (9th Cir. 2017). In the TAC, Evox alleges that
22 Defendants displayed Evox Images on 14,907 pages of the Autoblog website
23 after the license for the Images was terminated.²¹ However, under the “server
24 test” adopted by the Ninth Circuit, a digital image is displayed only when a
25 “computer owner . . . uses the computer to fill [another person’s] computer
26

27 ²⁰ Motion at 1: 8-10

28 ²¹ TAC at ¶¶ 89 & 90

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