

Finally, the Court SETS a telephonic case management conference on March 8, 2022, at 2:00 p.m. All counsel shall use the following dial-in information to access the call:

Dial-In: 888-808-6929;

Passcode: 6064255

For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines. The parties shall file a joint case management statement no later than one week before the case management conference. This Order TERMINATES Docket Nos. 14 and 34.

IT IS SO ORDERED.



Walter N. O'NEAL, III, Plaintiff,

v.

SIDE SHOW, INC., et al., Defendants.

CV 21-7735 DSF (PLAx)

United States District Court,
C.D. California.

Signed January 26, 2022

Background: Artist brought action against his former employer, its president, and book publisher asserting claims for copyright infringement under Visual Artists Rights Act (VARA), and removal of copyright management information. Defendants moved to dismiss.

Holdings: The District Court, Dale S. Fischer, J., held that:

(1) artist's sculptures were not "works of visual art" subject to protection under VARA;

Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998) ("Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any

- (2) employer's alteration of images of artist's sculptures without his permission or proper attribution for use in book did not violate Digital Millennium Copyright Act (DMCA); and
- (3) artist failed to satisfy knowledge requirement for DMCA copyright management information (CMI) removal claim.

Motion granted.

1. Copyrights and Intellectual Property

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Sculptures that artist designed during his employment with specialty manufacturer of collectible action figures were not "works of visual art" subject to protection under Visual Artists Rights Act (VARA), absent allegation that works existed in single copy or in limited edition of 200 copies or fewer. 17 U.S.C.A. § 106A(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Copyrights and Intellectual Property

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To establish copyright management information (CMI) claim under Digital Millennium Copyright Act (DMCA), plaintiff must plead (1) existence of CMI on infringed work, (2) removal or alteration of that information, and (3) that removal or alteration was done intentionally. 17 U.S.C.A. § 1202.

3. Copyrights and Intellectual Property

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Digital Millennium Copyright Act (DMCA) provision prohibiting intentional removal or alteration of copyright management information (CMI) required that accused work be identical to copyrighted

amendment would be an exercise in futility, or where the amended complaint would also be subject to dismissal.") (citations omitted).

work, and thus collectible action figure manufacturer's alteration of images of artist's sculptures without his permission or proper attribution for use in book did not violate DMCA, despite artist's contention that sculptures were not altered in substance, but rather in opacity and position. 17 U.S.C.A. § 1202.

4. Copyrights and Intellectual Property

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To state claim for violation of Digital Millennium Copyright Act (DMCA) provision prohibiting intentional removal or alteration of copyright management information (CMI), plaintiff must plausibly allege that future infringement is likely, albeit not certain, to occur as result of removal or alteration of copyright. 17 U.S.C.A. § 1202(b)(1).

5. Copyrights and Intellectual Property

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Artist failed to satisfy knowledge requirement for his claim that collectible action figure manufacturer's removal of his copyright management information (CMI) from images of his sculptures for use in book violated Digital Millennium Copyright Act (DMCA) provision prohibiting intentional removal or alteration of CMI, despite artist's contention that manufacturer's president was aware that artist did not give his permission, absent allegation regarding anything with respect to manufacturer's or its president's knowledge that removal or alteration of artist's CMI would likely result in future infringement. 17 U.S.C.A. § 1202(b)(1).

Order GRANTING Defendants' Motion to Dismiss (Dkt. 23)

DALE S. FISCHER, United States District Judge

Defendants Sideshow, Inc., Insight Editions, L.P., and Greg Anzalone move to dismiss Plaintiff Walter N. O'Neal III's claims for copyright infringement under 17 U.S.C. § 106A against all Defendants; violations of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202, against Sideshow and Anzalone; and statutory damages and attorneys' fees, 17 U.S.C. § 412. Dkt. 23 (Mot.). O'Neal opposes. Dkt. 27 (Opp'n). The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons stated below, Defendants' motion is GRANTED.

I. BACKGROUND

O'Neal is a freelance artist and sculptor "in the 'high-end' entertainment/pop culture collectible industry." Dkt. 22 (FAC) ¶ 10. From the end of 2009 to August 2011, O'Neal engaged in discussions with David Igo, an agent/employee of Sideshow, to obtain freelance work for Sideshow with the goal of securing full-time employment. Id. ¶ 11. During that time, O'Neal sent Igo samples of his work, including "rough sketches of project ideas," and intermittently completed freelance work for Sideshow. Id. ¶¶ 12-13. Some of O'Neal's works have been registered with the Copyright Office under registration numbers VA0002225067 (I-4 Batman Statue Design); VA0002258765 (I-4 Green Lantern Statue (Rough)); VA0002258766 (1-4 Sinestro Statue); VA0002255383 (1-2 Batman Statue); VA0002255381 (1-4 Batman Statue Design (Front View)); VA0002255380 (1-1 Superman Bust); VA0002255378 (1-1 Green Lantern Bust); VA0002225062 (1-1 Joker Bust (Final)); VA0002225063 (1-1

Gretchen Virginia O'Neal, Peoria, AZ, for Plaintiff.

Margo J. Arnold, Jordan David Susman, Nolan Heimann LLP, Encino, CA, for Defendants Sideshow, Inc., Insight Editions, Greg Anzalone.

Batman Bust) (collectively, the Works). *Id.* ¶ 14.

In August 2011, Sideshow hired O’Neal for a “full-time position as a concept artist.” *Id.* ¶ 13. At an indeterminate time after August 2011, Sideshow and Anzalone “conceived of a book that was to include images and descriptive narratives regarding a collection of works manufactured and sold by Sideshow featuring characters from the DC Comics ‘universe’ of superheroes and villains.” *Id.* ¶ 16. The book titled, “DC: Collecting the Multiverse: The Art of Sideshow” was released on November 17, 2020 (the DC Book). *Id.* The DC Book was published by Insight pursuant to its license agreement with DC Comics and was offered for sale through Sideshow and Insight. *Id.* ¶ 17.

In connection with the DC Book, O’Neal was interviewed to provide descriptions for the pieces he designed during his employment at Sideshow. *Id.* ¶ 18. However, “[u]nbeknownst to [O’Neal],” the DC Book also included work he sent to Igo prior to his employment at Sideshow. *Id.* ¶ 19. O’Neal alleges that the DC Book infringes on his Works because (1) he was not given proper attribution for his Works in the DC Book and (2) Defendants modified or altered his Works without his permission. See *id.* ¶¶ 20, 22, 24, 29-30, 33, 40. In addition, O’Neal alleges Sideshow and Anzalone removed any information regarding the titles of the Works or any mention of O’Neal’s name. *Id.* ¶¶ 24, 39-40. Based on the alleged conduct, O’Neal brings claims for (1) copyright infringement under the Visual Artists Rights Act (VARA), 17 U.S.C. § 106A, and (2) removal of copyright management information.

II. LEGAL STANDARD

Rule 12(b)(6) allows an attack on the pleadings for failure to state a claim on which relief can be granted. “[W]hen ruling on a defendant’s motion to dismiss, a

judge must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam). However, a court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955). A complaint must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. This means that the complaint must plead “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, 129 S.Ct. 1937. There must be “sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively . . . and factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Ruling on a motion to dismiss will be “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2)).

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. Fed. R. Civ. P. 15(a).

III. DISCUSSION

A. Request for Judicial Notice

The Court GRANTS Defendants' unopposed request, dkt. 23-1, that the Court take judicial notice of O'Neal's copyright registrations. See Fed. R. Evid. 201(b).

B. Copyright Infringement – Violation of the Visual Artists Rights Act

As an initial matter, it is unclear whether O'Neal is bringing a copyright infringement claim based solely on a violation of the VARA. On one hand, O'Neal's First Cause of Action against Defendants is for "directly, vicariously and/or contributorily infring[ing] . . . Plaintiff's copyrights by reproducing, displaying and publicly distributing for profit the Works for purposes of trade in violation of 17 U.S.C. § 501, et seq." FAC ¶ 29. This suggests O'Neal intended to bring a copyright infringement claim pursuant to 17 U.S.C. § 106. However, O'Neal also states he "was denied the opportunity to attribute the work to himself, and to approve or refuse the modifications to his original designs," in violation of the VARA. Id. ¶ 33. O'Neal's attempt to clarify his cause of action is unhelpful because he simply reiterates that he is bringing a copyright infringement claim pursuant to 17 U.S.C. § 501, et seq., Opp'n at 1; however, Section 501 applies to copyright infringement claims brought under the VARA and claims brought under sections 106 through 122. See 17 U.S.C. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . . is an infringer of the copyright or right of the author.") (emphasis added).

1. To the extent O'Neal intended also to bring a claim for copyright infringement under Sec-

O'Neal seeks leave to amend to clarify his VARA claim – as opposed to clarifying a copyright infringement claim brought under Sections 106 through 122 – should the Court dismiss the claim. Opp'n at 5. Therefore, the Court construes the FAC to bring a single count of copyright infringement under VARA.¹

O'Neal alleges that Defendants violated his rights of attribution and integrity under Section 106A and that Defendants violated his attribution rights by failing to credit him properly for his Works. FAC ¶¶ 24, 33, 40. In addition, O'Neal claims Defendants violated his right of integrity by altering or modifying his Works published in the DC Book without his permission. Id. ¶¶ 20, 22, 24, 33. Defendants seek dismissal of O'Neal's VARA claim on the grounds that O'Neal's Works are not "work[s] of visual" art, and therefore are not protected by Section 106A. Mot. at 1, 4-5.

The VARA is designed to protect the artistic and reputational rights of the author. See 17 U.S.C. § 106A(a). This conclusion is supported by the text of the VARA itself, which explains that an artist has VARA rights "whether or not the author is the copyright owner." 17 U.S.C. § 106A(b).

Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art –

- (1) shall have the right--
 - (A) to claim authorship of that work, and
 - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
- (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modifica-

tion 106, O'Neal should amend his complaint to make that clear.

tion of the work which would be prejudicial to his or her honor or reputation; and

...

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

17 U.S.C. § 106A(a), (c).

As the text of the statute shows, the VARA applies only to "work[s] of visual art." The statute does not define "work of visual art," but "the VARA is part of the Copyright Act, which defines 'work of visual art' in the affirmative and in the negative." *Cheffins v. Stewart*, 825 F.3d 588, 592 (9th Cir. 2016). The Copyright Act defines a "work of visual art" as "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author" or "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer." *Id.* (quoting 17 U.S.C. § 101).

[1] O'Neal does not plausibly allege whether the Works are a "work of visual art." Specifically, he does not plead that the Works exist "in a single copy [or] in a limited edition of 200 copies or fewer." *Cheffins*, 825 F.3d at 592. Therefore, O'Neal has not adequately pled a VARA violation. Defendants' motion to dismiss O'Neal's First Cause of Action for a violation of the VARA is GRANTED.

C. DMCA Violations

O'Neal next brings claims against Sideshow and Anzalone for relief under 17 U.S.C. § 1202. Section 1202(a) of the DMCA provides that "no person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—(1) provide copyright management information that is false, or (2) distribute or import for distribution copyright management information that is false." 17 U.S.C. § 1202(a).

Section 1202(b) provides that:

No person shall, without the authority of the copyright owner or the law--

(1) intentionally remove or alter any copyright management information, . . . , or

(3) distribute, import for distribution or publicly perform works [or] copies of works, . . . knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

Section 1202(c) defines "copyright management information" (CMI) as including, among other things, any of the following:

(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

(2) The name of, and other identifying information about, the author of a work.

(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright

[2] To establish a claim for a CMI violation, a plaintiff must plead (1) the existence of CMI on the infringed work, (2) removal or alteration of that informa-

tion, and (3) that the removal or alteration was done intentionally. *Craig v. UMG Recordings, Inc.*, 380 F. Supp. 3d 324, 337 (S.D.N.Y. 2019). O'Neal alleges that he provided a title for each of the Works "on the face of the Work" and Sideshow and Anzalone "intentionally removed any information regarding the titles of the Works [and] failed to attribute the Works to Plaintiff as the author and copyright holder, including intentionally removing his name from a quote by a third-party indicating Plaintiff was the designer of a work." FAC ¶¶ 39-40. O'Neal's DMCA claim fails for the reasons set forth below.

1. Existence of CMI and its Removal or Alteration

[3] Sideshow and Anzalone argue that O'Neal's claim fails as a matter of law because removal of CMI requires the work used by a defendant to be identical, and O'Neal alleges the Works were "altered" or "modified." Mot. at 1 (citing FAC ¶ 20).

The Court agrees. Courts have held that "no DMCA violation exists where the works are not identical." *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. CV 20-1931-DMG, 2020 WL 5991503, at *6 (C.D. Cal. Aug. 14, 2020) (citing cases). On this point, O'Neal argues that the Works "were not altered in substance, but rather in opacity and position." Opp'n at 4. However, O'Neal fails to explain why this distinction

2. Moreover, O'Neal draws a series of legal conclusions – both here and virtually everywhere in his opposition – without providing any supporting authority. O'Neal appears to misunderstand the motion process. It is not Court's role to research independently and develop answers to legal questions that the parties have not adequately addressed. See *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) ("Courts need not 'manufacture arguments' for al[] [party], and a bare assertion does not preserve a claim."); *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003) ("However much we may importune lawyers to be brief

is relevant as a matter of law for purposes of determining whether the Works and the images in the DC Book are identical or were modified or altered.² Because it appears O'Neal concedes that the Works were modified or altered, he fails to state a DMCA claim for removing or altering CMI.

2. Required Mental State

[4] Section 1202(b)(1) requires a plaintiff to plead that the defendant "intentionally remove[d] or alter[ed]" his CMI with the knowledge that it would "induce, enable, facilitate, or conceal an infringement of" the plaintiff's copyright. 17 U.S.C. § 1202(b)(1). Section 1202(b)(3) also contains a knowledge requirement. See 17 U.S.C. § 1202(b)(3). In the Ninth Circuit, the plaintiff must "make an affirmative showing, such as demonstrating a past 'pattern of conduct' or 'modus operandi,' that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions." *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 674 (9th Cir. 2018). In other words, the plaintiff must plausibly allege that "future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI." *Id.*

[5] Here, O'Neal has satisfied the intent requirement in Section 1202(b)(1) by

and to get to the point, we have never suggested that they skip the substance of their argument in order to do so We require contentions to be accompanied by reasons."); *Mahaffey v. Ramos*, 588 F.3d 1142, 1146 (7th Cir. 2009) ("Perfunctory, undeveloped arguments without discussion or citation to pertinent legal authority are waived"); *Bretford Mfg., Inc. v. Smith Sys. Mfg. Corp.*, 419 F.3d 576, 581 (7th Cir. 2005) ("It is not our job to do the legal research that [the plaintiff] has omitted."); see also *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

alleging that Anzalone “was aware that Plaintiff did not give permission to Sideshow for his involvement . . . with the DC Book” and Anzalone “expressly ordered his employees to remove all mention of Plaintiff’s name from the DC Book, including removal of his name from a quote attributing him credit for his design work on the Batman Bust.” FAC ¶¶ 22, 24. However, O’Neal has not satisfied the knowledge requirement. In fact, O’Neal has not alleged anything with respect to Sideshow and Anzalone’s knowledge that removal or alteration of O’Neal’s CMI would likely result in future infringement. See Stevens, 899 F.3d at 674. Therefore, O’Neal’s claim for DMCA violations fails as a matter of law. Defendants’ motion to dismiss O’Neal’s Second Cause of Action is GRANTED.³

IV. CONCLUSION

Defendants’ motion to dismiss O’Neal’s First Cause of Action for copyright infringement under the VARA and Second Cause of Action for Removal of Copyright Management Information is GRANTED. O’Neal’s FAC is DISMISSED with leave to amend. An amended complaint must be filed no later than February 23, 2022. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims, with the exception of clarifying O’Neal’s claim for copyright infringement. Leave to add new defendants or new claims must be sought by a properly noticed motion.

IT IS SO ORDERED.



3. Because the Court grants Defendants’ motion to dismiss all of O’Neal’s causes of action, Defendants’ motion to dismiss O’Neal’s request for statutory damages and attorneys’

Gianfranco RUFFINO, Plaintiff,

v.

UNITED STATES of America,
Defendant.

No. 2:16-cv-02719-KJM-CKD

United States District Court,
E.D. California.

Signed 02/01/2022

Filed 02/02/2022

Background: Claimant sued the United States under the Federal Tort Claims Act (FTCA) after he was severely burned when his sled ran into a patch of smoldering brush hidden beneath snow where the Forest Service was conducting a controlled burn. The United States moved for summary judgment based on discretionary function exception to waiver of its sovereign immunity.

Holdings: The District Court, Kimberly J. Mueller, C.J., held that qualified level-three burn boss was performing discretionary functions.

Motion granted.

1. Federal Civil Procedure 2470.1

On a motion for summary judgment, the threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. Fed. R. Civ. P. 56(a).

2. Federal Civil Procedure 2544

Party moving for summary judgment bears the initial burden of showing that there is an absence of evidence to support

fees is moot. It is axiomatic that a plaintiff is not entitled to an award of statutory damages or attorneys’ fees when all of his claims are dismissed.