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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18

19 JOSEPH TIERNEY, professionally known
as "Rime," an individual;

20 Plaintiff,

21 v.

22 MOSCHINO S.P.A., an Italian corporation;
JEREMY SCOTT, an individual; and
23 DOES 1-10 inclusive.

24 Defendants.

Case No. 2:15-cv-05900-SVW (PJWx)
Hon. Stephen V. Wilson

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS MOSCHINO S.P.A.
AND JEREMY SCOTT'S JOINT
MOTION FOR SUMMARY
JUDGMENT AS TO PLAINTIFF'S
COMPLAINT**

Date: May 23, 2016
Time: 1:30 p.m.
Courtroom: 6 – 2nd Floor

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. BACKGROUND FACTS..... 2

4 III. LEGAL STANDARD 4

5 IV. ARGUMENT..... 4

6 A. Plaintiff Lacks Standing to Bring His Infringement Claims as a Matter

7 of Law. 4

8 1. As a Brazenly Unlawful and Felonious Act, “Vandal Eyes” Is

9 Not Entitled to Copyright Protection. 4

10 a. Tierney’s “Vandal Eyes” Was an Unapologetic Act of

11 Trespass and Vandalism. 5

12 b. Works that Are the Product of Illegal Conduct Are Not

13 Entitled to Copyright Protection..... 5

14 2. Plaintiff Lacks Standing Since He Is, by His Own Admission,

15 Not the Owner of the Copyright to “Vandal Eyes” 8

16 B. The Undisputed Facts Show that Jeremy Scott Did Not Engage in

17 Sufficient Volitional Conduct, as a Matter of Law, to Face Direct

18 Infringement Liability for the Design of the Allegedly Infringing

19 Collection. 9

20 C. Plaintiff’s § 1202 Claim Fails as a Matter of Law..... 10

21 1. Defendant Cannot and Does Not Show that Defendants Acted

22 Knowingly and with Intent to Facilitate Copyright Infringement,

23 as Required by the Plain Language of the Statute for Any Claim

24 under § 1202..... 10

25 2. If Tierney is the Author and Copyright Holder of “Vandal

26 Eyes,” Then “Vandal Eyes” Did Not Contain Any CMI and

27 There Is No Cognizable Act of CMI Falsification or Removal. 12

28 D. Defendants are Entitled to Summary Judgment as a Matter of Law on

Tierney’s Trademark and Unfair Competition Claims as the

Undisputed Facts Demonstrate That Their Actions Are Insulated from

Liability under Both the *Rogers* Defense and the Nominative Fair Use

Defense..... 13

1. Defendants’ Activities Are Squarely Protected under the *Rogers*

Defense..... 13

2. Defendants’ Activities Are Also Protected as Nominative Fair

Use..... 16

E. Plaintiff’s Section 3344 Claim Fails..... 18

1 1. Plaintiff Cannot, as Required, Show Defendants
2 Misappropriated Any Elements of Tierney’s Identity
3 Knowingly..... 18
4 2. Defendants’ Activities Constitute Transformative Use Protected
5 under *Saderup* and its Progeny. 20
6 1. Any Use by Defendants Is Incidental and, Therefore, Not
7 Actionable. 22
8 F. Plaintiff’s Negligence Claim Fails..... 22
9 V. CONCLUSION..... 23
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

1

2

3 *Addisu v. Fred Meyer,*

4 198 F.3d 1130 (9th Cir. 2000) 4

5 *Affiliated Enters., Inc. v. Gantz,*

6 86 F.2d 597 (10th Cir. 1936) 7

7 *Aligo v. Time-Life Books, Inc.,*

8 1994 WL 715605 (N.D. Cal. Dec. 19, 1994)..... 22

9 *Anderson v. Liberty Lobby, Inc.,*

10 477 U.S. 242 (1986)..... 4

11 *Anderson v. Stallone,*

12 1989 U.S. Dist. LEXIS 11109; 11 U.S.P.Q.2D (BNA) 1161 (C.D. Cal. 1989)..... 6

13 *Brown v. Elec. Arts, Inc.,*

14 724 F.3d 1235 (9th Cir. 2013) 13, 14, 15, 16

15 *Cairns v. Franklin Mint Co.,*

16 292 F.3d 1139 (9th Cir. 2002) 16, 17, 18

17 *Celotex Corp. v. Catrett,*

18 477 U.S. 317 (1986)..... 4

19 *Cleary v. News Corp.,*

20 30 F.3d 1255 (9th Cir. 1994) 13

21 *Comedy III Productions, Inc. v. Gary Saderup, Inc.,*

22 21 P.3d 797 (Cal. 2001) 20

23 *Devils Films, Inc. v. Nectar Video,*

24 29 F.Supp.2d 174 (S.D.N.Y. 1998) 6, 7

25 *Downing v. Abercrombie & Fitch,*

26 265 F.3d 994 (9th Cir. 2001) 18

27 *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.,*

28 547 F.3d 1095 (9th Cir. 2008) 14, 16

Eden Toys, Inc. v. Florelee Undergarment Co.,

697 F.2d 27 (2d Cir. 1982)..... 6

1 *Fox Broad. Co., Inc. v. Dish Network L.L.C.*,
 747 F.3d 1060 (9th Cir. 2013) 9

2

3 *Gracen v. Bradford*,
 798 F.2d 300 (7th Cir. 1983) 6

4

5 *Hoffman v. Le Traunik*,
 209 F. 375 (N.D.N.Y. 1913)..... 7

6

7 *Louis Vuitton Mallatier S.A. v. Warner Bros. Entert. Inc.*,
 868 F. Supp. 2d 172 (S.D.N.Y. 2012) 16

8

9 *Mastrovincenzo v. City of New York*,
 435 F.3d 78 (2d Cir. 2006)..... 13

10 *Mattel, Inc. v. MCA Records, Inc.*,
 296 F.3d 894 (9th Cir. 2002) 13

11

12 *McCormick v. Amir Const. Inc.*,
 279 Fed. Appx. 470 (9th Cir. 2008)..... 8

13

14 *Merideth v. Chicago Tribune Co.*,
 2014 WL 87518 (N.D. Ill. Jan. 9, 2014)..... 10

15

16 *New Kids on the Block v. News Am. Pub., Inc.*,
 971 F.2d 302 (9th Cir. 1992) 16, 17

17

18 *Novalogic, Inc. v. Activision Blizzard*,
 41 F. Supp. 3d 885 (C.D. Cal. 2013) 16

19

20 *Perfect 10, Inc. v. Cybernet Ventures, Inc.*,
 213 F. Supp. 2d 1146 (C.D. Cal. 2002) 19

21

22 *RDF Media Ltd. v. Fox Broad. Co.*,
 372 F. Supp. 2d 556 (C.D. Cal. 2005) 13

23

24 *Religious Tech. Center v. Netcom On-Line Comm. Serv., Inc.*,
 907 F. Supp. 1361 (N.D. Cal. 1995)..... 9

25

26 *Richmark Corp. v. Timber Falling Consultants*,
 959 F.2d 1468 (9th Cir. 1992) 3

27

28 *Rivera v. Philip Morris, Inc.*,
 395 F.3d 1142 (9th Cir. 2005) 4

1 *Rogers v. Grimaldi*,
 875 F.2d 994 (2d Cir.1989)..... 13

2

3 *Ross v. Roberts*,
 166 Cal. Rptr. 3d 359 (Cal. App. 2013)..... 21

4

5 *Roxbury Entm’t v. Penthouse Media Grp., Inc.*,
 669 F. Supp. 2d 1170 (C.D. Cal. 2009) 16

6

7 *Saxon v. Blann*,
 968 F.2d 676 (8th Cir. 1992) 7

8

9 *Silvers v. Sony Pictures Entertainment, Inc.*,
 402 F.3d 881 (9th Cir. 2005) 8

10 *Sony Corp. of Am. v. Universal City Studios, Inc.*,
 464 U.S. 417 (1984)..... 5

11

12 *Stone & McCarrick, Inc. v. Dugan Piano Co.*,
 220 F. 837 (5th Cir. 1915) 7

13

14 *Taylor v. List*,
 880 F.2d 1040 (9th Cir.1989) 4

15

16 *Villa v. Pearson Education, Inc.*,
 No 03-C3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003)..... 6

17

18 *Watson v. Buck*,
 313 U.S. 387 (1941)..... 5

19

20 *Yeager v. Cingular Wireless LLC*,
 673 F. Supp. 2d 1089 (E.D. Cal. 2009) 22

21 **Statutes**

22 17 U.S.C. § 1202..... 2

23 17 U.S.C. § 1202(a) 10

24 17 U.S.C. § 1202(b)(1)..... 10

25 17 U.S.C. § 1202(c) 12

26 17 U.S.C. § 1202(c) 12

27 17 U.S.C. § 1202(c)(1)-(8)..... 12

28 17 U.S.C. § 1202(c)(2)-(3)..... 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Other Authorities

H.R. Rep. 94-1476, 94th Cong., 2d Sess. 1976, 1976 U.S.S.C.A.N. 5659, 5671 6

Rules

Fed. R. Civ. P. 56(c)..... 4

Treatises

1-3 NIMMER ON COPYRIGHT, § 13.09[B]..... 7

1-3 NIMMER ON COPYRIGHT, § 3.06 6

Constitutional Provisions

U.S. Const. Art. I, § 8, cl. 8..... 5

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

As one of the greatest unsolved mysteries in Los Angeles history, the Black Dahlia murder continues to stir the public imagination and, in this case, provides a useful illustration of the most essential thing Plaintiff is lacking: a valid copyright. The Black Dahlia’s killer was, no doubt, a felon. But was he also a valuable copyright holder as a result of his illegal activities? Plaintiff Tierney’s theory of this case necessarily concludes so, and, in the process, he reveals the manifest untenability of his claims.

The Black Dahlia’s killer, of course, famously hacked up the bodies of his victims in a particularly original and artistic way. So when photographs of the killer’s criminal handiwork were distributed by police and media, could the Black Dahlia’s killer sue them for copyright infringement, claiming that the photographs unlawfully reproduced his copyrighted work—his fixation of an original series of markings into the tangible medium of a victim’s body—without authorization or payment to him? In a word: no.

Such an audacious claim would properly be rejected. After all, copyright is a government-granted monopoly, a privilege given only to those who “promote the Progress of Science and useful Arts.” U.S. Const. Art. I, § 8, cl. 8. And there is no basis to think that felons should be rewarded with a government-sanctioned monopoly for the tangible fixation of their felonious activity. In short, brazen and willful violations of the law cannot and, indeed, should not result in the award of copyright privileges.

The undisputed evidence in this suit shows that Plaintiff Joseph Tierney committed a felony in creating the subject matter of this lawsuit: the graffiti work known as “Vandal Eyes.” As the very name of his graffiti work (and the video Tierney has posted on his website about his creation) admits, “Vandal Eyes” was an unapologetic act of vandalism and trespass. And, contrary to his conclusory and unsupported allegation in his Complaint, Tierney unequivocally did not seek or obtain any permission for his actions from the owner of the building at 4559 Wesson Street, Detroit, Michigan 48210 which “Vandal Eyes” defaced. In short, true to its title, “Vandal Eyes” was a felony. And, as a basic matter of

1 public policy, respect for the law, and congressional intent on copyrightable subject matter,
2 felons do not get copyrights in their illegal actions. As such, Tierney’s claims necessarily
3 fail as a matter of law.

4 Putting aside this basic flaw in Tierney’s entire case, his separate causes of action
5 also cannot proceed on a number of independent, additional grounds. Plaintiff’s copyright
6 claim against Jeremy Scott and Moschino S.p.A. (collectively, “Defendants”) fails as a
7 matter of law because the undisputed facts show that Plaintiff lacks standing. Plaintiff
8 cannot even identify proper CMI and does not (and cannot) show the necessary *mens rea*
9 requirement to state a § 1202 claim. Plaintiff’s trademark and unfair competition claims fail
10 as a matter of law because Defendants’ activities are, inter alia, protected under the *Rogers*
11 and nominative fair use defenses as a matter of law. Plaintiff does not (and cannot) show
12 that Defendants acted knowingly to state a proper claim under § 3344. And, even if he can,
13 Defendants’ activities constitute transformative use as a matter of law. And even if Plaintiff
14 can overcome each and every hurdle as to his claims against Moschino, his claims against
15 Defendant Jeremy Scott still fail because Scott did not engage in the necessary volitional
16 conduct required for an infringement claim. In short, Defendants are entitled to summary
17 judgment on Tierney’s claims *in toto*.

18 **II. BACKGROUND FACTS**

19 In 2012, Plaintiff Tierney spray-painted graffiti on the side of a building in Detroit.
20 *See* Declaration of Joseph Tierney in Support of Plaintiff’s Opposition to Defendants’
21 Motion to Dismiss (Dkt. #33-2) (hereinafter, “Tierney Decl.”), ¶ 4. To do so, he trespassed
22 on the property located at 4559 Wesson St., Detroit, MI 48210, and he even recorded the
23 surreptitious incursion on a video that he placed on his website. *See* Declaration of
24 Elizabeth Mattie in Support of Defendant Jeremy Scott’s Motion for Summary Judgment
25 (hereinafter, “Mattie Decl.”), ¶¶5-8, 13-20. He proceeded to vandalize the building by
26 spray-painting, on its walls, graffiti that (appropriately) spelled out the portmanteau
27 “Vandal Eyes.” *Id.*

1 Now, as an unabashed felon, he comes to federal court seeking to assert a purported
2 copyright interest in the graffiti by suing Defendants Moschino and Jeremy Scott and
3 seeking damages by claiming, inter alia, that Moschino and Scott’s designs allegedly using
4 his graffiti in a fashion collection constitutes an infringement of Tierney’s rights.

5 It is undisputed that Scott had no role whatsoever in the actual design and selection
6 of the images and prints used in the allegedly infringing fashion collection. There is
7 therefore no factual basis to support Tierney’s claims of liability against Scott. Tierney’s
8 dramatic (and unnecessary) service of process of the Complaint in this suit at the premiere
9 of Scott’s fashion documentary *Jeremy Scott: The People’s Designer* by a process server
10 posing as an autograph seeker betrays the real reason for Tierney’s involvement of Scott in
11 this suit: as a ploy to generate publicity for the case. See Declaration of John Tehranian in
12 Support of Defendants Moschino S.p.A. and Jeremy Scott’s Joint Motion for Summary
13 Judgment (hereinafter, “Tehranian Decl.”), ¶6.

14 Scott now files this Motion for Summary Judgment according to the Court’s Order
15 dated January 13, 2016 (Dkt #49), at 12, in which the Court held that “many of the
16 aforementioned issues [raised in Defendants’ Motion to Dismiss], along with Defendant’s
17 affirmative defenses, may be suitable for determination on an expedited basis” and ordered
18 Defendants to file a motion for summary judgment by April 18, 2016.¹

19
20 ¹ Although Scott and Moschino have attempted to conduct discovery in the intervening
21 time since the Court’s Order, counsel for Plaintiff Tierney has declined numerous requests
22 to provide dates upon which Mr. Tierney will be available for deposition. Tehranian Decl.,
23 ¶2. In addition, Tierney has not provided any responses to either Scott’s Requests for
24 Production of Documents, which were served on February 24, 2016 and due on March 28,
25 2016, Scott’s Interrogatories, which were served on February 24, 2016 and due on March
26 28, 2016, Moschino’s Requests for Production of Documents, which were served on
27 February 12, 2016 and due on March 12, 2016, Moschino’s Requests for Admission, which
28 were served on February 12, 2016 and due on March 12, 2016, or Moschino’s
Interrogatories, which were served on February 12, 2016 and due on March 12, 2016. *Id.*
at ¶¶3-4, 7-9. Of course, Tierney has now waived all objections to the Requests and the
Interrogatories due to the lack of any timely response. See *Richmark Corp. v. Timber
Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (“It is well established that a
failure to object to discovery requests within the time required constitutes a waiver of any
objection;” finding that a party who failed to timely object to interrogatories and document
production requests waived any objections). And, he still has an obligation to produce all
responsive documents and answer the interrogatories, something he has entirely failed to
do. Tehranian Decl., ¶3-4, 7-9. For this and other reasons, Defendants reserve their right to

1 **III. LEGAL STANDARD**

2 A motion for summary judgment should be granted if there is no genuine issue of
3 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
4 P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). If the moving
5 party has the burden of proof and meets its initial burden, the nonmoving party must
6 identify specific facts, drawn from the materials on file, that show that an issue is genuinely
7 disputed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A nonmoving party
8 cannot avoid summary judgment by relying solely on conclusory allegations that are
9 unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989).
10 Likewise, a scintilla of evidence or evidence that is merely colorable or not significantly
11 probative does not present a genuine issue of material fact. *Addisu v. Fred Meyer*, 198 F.3d
12 1130, 1134 (9th Cir. 2000) Thus, the moving party will win summary judgment unless
13 there is “evidence on which a jury could reasonably find for the non-moving party.” *Rivera*
14 *v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005).

15 **IV. ARGUMENT**

16 **A. Plaintiff Lacks Standing to Bring His Infringement Claims as a Matter of**
17 **Law.**

18 **1. As a Brazenly Unlawful and Felonious Act, “Vandal Eyes” Is Not**
19 **Entitled to Copyright Protection.**

20 Tierney’s graffiti is the product of illegal trespass and vandalism and, therefore, does
21 not enjoy the privilege of federal copyright protection.

22
23
24 _____
25 bring alternative bases for summary judgment at a later date, if the circumstances should
26 necessitate it.

27 In addition, counsel for Scott has made Scott available for deposition but Tierney has
28 declined to take the deposition. For example, counsel for Scott specifically agreed to make
Scott available, at opposing counsel’s request, for deposition on March 22, 2016 after
confirming, on March 3, 2016, with opposing counsel that March 22, 2016 worked for
them. On March 21, 2016, however, opposing counsel confirmed that it would not, in fact,
be taking Mr. Scott’s deposition. *Tehrani Decl.*, ¶5. As a result, Tierney has declined to
take Scott’s deposition despite having had every opportunity to do so.

1 **a. Tierney’s “Vandal Eyes” Was an Unapologetic Act of**
2 **Trespass and Vandalism.**

3 In 2012, Plaintiff Tierney created the work known as “Vandal Eyes,” which forms
4 the subject matter of this suit. Tierney Decl. ¶4. To do so, Tierney trespassed on privately
5 owned land located at 4559 Wesson St., Detroit, MI 48210 (“the Property”) and defaced
6 the building in an act of vandalism. Mattie Decl. ¶¶5-8, 13-20. His trespass and vandalism
7 was captured in a video entitled “Rime, VandalEYES Detroit” (the “Video”), which can be
8 found, *inter alia*, at his webpage located at [http://jerseyjoeart.com/2012/02/14/rime-](http://jerseyjoeart.com/2012/02/14/rime-vandaleyes-detroit/)
9 [vandaleyes-detroit/](http://jerseyjoeart.com/2012/02/14/rime-vandaleyes-detroit/). *Id.* at ¶¶6-8. Thus, as the undisputed facts confirm, “Vandal Eyes” was
10 created when it was spray painted on the building located at the Property. *Id.*

11 The Property was owned by the Angel Group at the time. *Id.* at ¶¶9-12. The Angel
12 Group did not grant permission to anyone, including but not limited to Tierney, to access
13 the property and spray-paint it. *Id.* at ¶¶13-20. The resulting “Vandal Eyes” is, therefore,
14 an act of trespass and vandalism, as confirmed by the Angel Group. *Id.* at ¶¶1-3, 13-20.

15 **b. Works that Are the Product of Illegal Conduct Are Not**
16 **Entitled to Copyright Protection.**

17 As the Supreme Court has repeatedly held, federal copyright protection is a
18 privilege, not a right. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S.
19 417, 421 (1984) (referring to intellectual property protection for creative works as the
20 “copyright privilege”); *Watson v. Buck*, 313 U.S. 387, 404 (1941) (deeming exclusive
21 rights secured by authors under the Copyright Act as “copyright privileges”). And, it is
22 axiomatic that copyright protection operates as a quid-pro-quo to serve the public weal; in
23 return for “promot[ing] the Progress of Science and useful Arts,” authors are granted a
24 limited monopoly to the fruits of their creativity. U.S. Const. Art. I, § 8, cl. 8. By
25 definition, illegal activities do not serve the public interest and, quite to the contrary,
26 actively undermine it. As a result, as a matter of public policy and basic logic, it would
27 make no sense to grant legal protection to work that is created entirely illegally.
28

1 First, Tierney must show that he has a valid copyright, and there do not appear to be
2 any cases, precedential or otherwise, reported or not, ruling that works that constitute
3 trespass and vandalism can qualify for copyright protection. Meanwhile, the only court² to
4 be posed the question of copyright protection for illegal graffiti strongly implied that the
5 graffiti placed on a building without permission of a property owner **would not** be entitled
6 to copyright protection. *See Villa v. Pearson Education, Inc.*, No 03-C3717, 2003 WL
7 22922178, *2-3 (N.D. Ill. Dec. 9, 2003) (noting that determination of whether a mural “is
8 not protected copyright . . . because it is illegal graffiti . . . turns on questions of fact,”
9 namely “the legality of the circumstances under which the mural was created”).

10 Furthermore, analogous case law makes clear that illegal works are not the proper
11 subject matter of copyright protection. It is black letter copyright law, for example, that
12 works that are infringements themselves (*i.e.*, unlawful) are not entitled to copyright
13 protection. 1-3 NIMMER ON COPYRIGHT, § 3.06. Thus, works that constitute unauthorized
14 derivatives do not receive copyright protection, no matter how original or meritorious they
15 might be. *See Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109, *29; 11 U.S.P.Q.2D
16 (BNA) 1161 (C.D. Cal. 1989) (“no part of an infringing derivative work should be granted
17 copyright protection”); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 n.6
18 (2d Cir. 1982); *Gracen v. Bradford*, 798 F.2d 300, 303 (7th Cir. 1983). The legislative
19 history behind the 1976 Copyright Act firmly supports this position. As the House of
20 Representatives noted “the bill prevents an infringer from benefiting, through copyright
21 protection, from committing an unlawful act.” H.R. Rep. 94-1476, 94th Cong., 2d Sess.
22 1976, 1976 U.S.S.C.A.N. 5659, 5671.

23 In addition, courts have previously held that works that are deemed legally obscene
24 (*i.e.*, illegal) are not entitled to copyright protection. For example, in *Devils Films, Inc. v.*
25 *Nectar Video*, 29 F.Supp.2d 174 (S.D.N.Y. 1998), the court refused to exercise its equitable
26

27 ² Not surprisingly, the case law on this issue is thin as it was not until recently that vandals dared
28 show their faces, let alone had the chutzpah to sue, in federal court, by claiming copyright
protection over their graffiti. Many graffiti artists, including Banksy, continue to assiduously
guard their real identity.

1 powers to issue a preliminary injunction against the infringement of a pornographic film
2 and “commit the resources of the United States Marshal’s Service to support the operation
3 of plaintiff’s pornography business” on the grounds that the films were “obscene” and
4 being illegally distributed. *Id.* at 175–77.

5 Finally, the adoption of the unclean hands doctrine in prior precedent makes clear
6 that the illegal conduct of a plaintiff can and should invalidate his copyrights, particularly
7 where, as here, there is a strong nexus between the illegal conduct and the copyrights. *See*
8 *Saxon v. Blann*, 968 F.2d 676, 680 (8th Cir. 1992) (affirming, based on plaintiff’s illicit
9 conduct, application of unclean hands defense against enforcement of copyright in
10 infringement suit); *Affiliated Enters., Inc. v. Gantz*, 86 F.2d 597, 599 (10th Cir. 1936)
11 (holding that the purportedly copyrighted subject matter was “too closely akin [to an illegal
12 lottery] to have the protection and assistance of a court of equity”); *Stone & McCarrick,*
13 *Inc. v. Dugan Piano Co.*, 220 F. 837, 841 (5th Cir. 1915) (rejecting copyright protection in
14 “advertising matter the effect of which is to mislead and deceive the public”); *Hoffman v.*
15 *Le Traunik*, 209 F. 375, 379 (N.D.N.Y. 1913) (“to be entitled to be copyrighted, the
16 composition must be . . . free from illegality”). As NIMMER ON COPYRIGHT notes, when a
17 plaintiff commits wrongdoing “of serious proportions,” the unclean hand defense precludes
18 enforcement of what would otherwise have been a valid copyright. *See* 1-3 NIMMER ON
19 COPYRIGHT, § 13.09[B]. Felonious trespass and vandalism committed in the very fixation
20 of the plaintiff’s work in a tangible medium undoubtedly constitute wrongdoing of a
21 serious proportion.

22 In short, regardless of how much the literati and cognoscenti may romanticize
23 graffiti, it is not entitled to copyright protection if it constitutes vandalism and trespass.
24 After all, graffitiists shun respect for the property rights of those who own the defaced
25 buildings upon which they scrawl graffiti without permission. It would be perverse,
26 indeed, to allow such purveyors of graffiti to start enforcing their own purported
27 intellectual property rights when they do not demonstrate respect for the property rights of
28 others. Moreover, it would make little sense to incentivize, through the grant of a copyright

1 monopoly, the creation of more illegal graffiti. As such, “Vandal Eyes” is not entitled to
2 copyright protection and, as a result, Tierney’s claims fail.³

3 **2. Plaintiff Lacks Standing Since He Is, by His Own Admission, Not**
4 **the Owner of the Copyright to “Vandal Eyes”**

5 Tierney’s admissions on the issue of the purported Copyright Management
6 Information (“CMI”) in his work “Vandal Eyes” create an elemental standing issue on
7 Tierney’s copyright claims. In his filed declaration before this Court, Tierney has stated
8 that “Vandal Eyes” contains CMI by way of a “symbol that looks something like an
9 asterisk” which “indicates that the work comes from an artist’s collective [sic]” named The
10 Seventh Letter. Tierney Decl., ¶5. He further adds that the symbol indicates “that the
11 Seventh Letter is the source of the artwork.” *Id.* CMI, of course, is information identifying
12 the copyright owner or author of a work. 17 U.S.C. § 1202(c)(2)-(3). As a result, such
13 statements create a fundamental standing problem for Tierney on his copyright claims.

14 If the Seventh Letter symbol is CMI, the Seventh Letter is the copyright
15 owner/author of “Vandal Eyes.” As a result, the entity known as the Seventh Letter—and
16 not Tierney—is the appropriate plaintiff/copyright holder⁴ in this suit. And it is an
17 axiomatic rule of copyright law that a plaintiff who does not hold copyright ownership has
18 no standing to bring an infringement claim. *See McCormick v. Amir Const. Inc.*, 279 Fed.
19 Appx. 470 (9th Cir. 2008) (“Section 501(b) [of the Copyright Act] grants standing to sue
20 under the Copyright Act only to one owning a copyright”) (citing *Silvers v. Sony Pictures*
21 *Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)). As such, based on Tierney’s own
22 admissions, he does not have standing to bring his infringement claim. Tierney’s
23 infringement claim is properly dismissed as a matter of law.

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27 ³ Defendant’s illegality/unclean hands defense applies similarly to Tierney’s other claims
which are, inter alia, grounded in trademark and unfair competition law.

28 ⁴ If one exists, as “Vandal Eyes” is actually an illegal work of trespass and vandalism that
is not subject to copyright protection.

1 **B. The Undisputed Facts Show that Jeremy Scott Did Not Engage in**
2 **Sufficient Volitional Conduct, as a Matter of Law, to Face Direct**
3 **Infringement Liability for the Design of the Allegedly Infringing**
4 **Collection.**

5 Plaintiff’s claims against Jeremy Scott are grounded entirely in the assertion that
6 Scott is “responsible for the design of the infringing collection under the Moschino label.”
7 Compl. ¶12. But “responsibility” in the infringement context requires action by the
8 defendant in the violation of a plaintiff’s exclusive rights under the Copyright Act. Thus, as
9 courts have repeatedly held, to bring a claim for direct copyright infringement against
10 someone, a plaintiff must show that there was volitional conduct by the defendant himself;
11 imputation of conduct does not suffice for direct infringement liability. *See Religious Tech.*
12 *Center v. Netcom On-Line Comm. Serv., Inc.*, 907 F. Supp. 1361, 1381-82 (N.D. Cal. 1995)
13 (dismissing direct infringement claims against defendant on the grounds that “there are no
14 allegations in the complaint to overcome the missing volitional or causal elements
15 necessary to hold a [defendant] directly liable.”); *Fox Broad. Co., Inc. v. Dish Network*
16 *L.L.C.*, 747 F.3d 1060, 1067 (9th Cir. 2013) (noting that direct liability “compromises a
17 requirement that the defendant *cause* the copying”) (emphasis added).

18 As the undisputed facts show, however, Scott did not actually cause the particular
19 design at issue to be placed on the allegedly infringing Moschino collection. Admittedly,
20 Mr. Scott had the idea of doing a graffiti-based collection that subverted the seriousness of
21 traditional black-tie fashion while also commenting on the way in which society objectifies
22 women by literally imposing cultural symbols and meaning upon them by using the
23 medium of graffiti. Declaration of Jeremy Scott in Support of Defendant’s Motion for
24 Summary Judgment (hereinafter, “Scott Decl.”), ¶2. However, Mr. Scott ***did not*** design or
25 select the actual print on the dress and suit at issue in this suit. *Id.* at ¶3. And he ***did not***
26 design or select the RIME graphics on the two items reproduced in the Plaintiff’s
27 Complaint ¶2. *Id.* at ¶4. All of these graphics and prints were selected and created by a
28 graphic artist at Moschino completely independently of Mr. Scott. *Id.* at ¶5. As such, Scott

1 plainly lacks the volitional conduct to be held personally liable for any claim of direct
2 infringement stemming from the creation of the allegedly infringing products in the
3 Moschino collection.

4 **C. Plaintiff’s § 1202 Claim Fails as a Matter of Law.**

5 **1. Defendant Cannot and Does Not Show that Defendants Acted**
6 **Knowingly and with Intent to Facilitate Copyright Infringement, as**
7 **Required by the Plain Language of the Statute for Any Claim under**
8 **§ 1202.**

9 A falsification claims requires plaintiff to show that defendant “knowingly and with
10 the intent to induce, enable, facilitate or conceal infringement . . . provide[d] copyright
11 management information that is false,” 17 U.S.C. § 1202(a). Similarly, a
12 removal/alteration claim requires plaintiff to show that defendant “intentionally remove[d]
13 or alter[ed] copyright management information . . . knowing . . . that it will induce, enable,
14 facilitate or conceal an infringement,” 17 U.S.C. § 1202(b)(1). Thus, falsification and
15 removal/alteration claims have a strict *scienter* requirement that necessitates Plaintiff to
16 demonstrate that Defendant had a particular mens rea—*i.e.*, acted **knowingly** and **with**
17 **intent** to facilitate infringement.

18 Plaintiff does not (and, in fact, **cannot**) provide any facts to support the notion that
19 Defendants performed the acts complained of “knowingly and with the intent to induce,
20 enable, facilitate or conceal” infringement. And, the burden of proof squarely lies on the
21 plaintiff to show that knowledge and intent in the falsification and removal actions of the
22 defendant. *See, e.g., Merideth v. Chicago Tribune Co.*, 2014 WL 87518, at *3 (N.D. Ill.
23 Jan. 9, 2014) (noting the requirement under § 1202 claims that defendant acted knowingly
24 and intentionally and dismissing claims that fail to provide specific facts so demonstrating).

25 There is no evidence whatsoever to suggest that Defendants acted knowingly and
26 intentionally to either remove CMI by not placing the Seventh Letter symbol on the dress
27 and suit at issue in this case or falsify CMI by adding the word “MOSCHINO” to the
28 graphic design on the dress and suit at issue in this case, as Plaintiff has apparently

1 alleged.⁵ Further, as to defendant Scott individually, the undisputed facts show that Scott
2 was not even personally involved in the creation or selection of the materials used to create
3 the actual print on the dress and suit at issue in this suit. Scott Decl., ¶3. Indeed, the print at
4 issue was selected and created by a graphic artist at Moschino completely independent of
5 him. Scott Decl., ¶5. He had no knowledge of or involvement in the alleged failure to
6 place the Seventh Letter symbol on the dress and suit at issue in this case, as, among other
7 things, he had never seen “Vandal Eyes” or the Seventh Letter symbol. Scott Decl., ¶8. In
8 fact, he had never even seen Tierney’s “Vandal Eyes” work until Tierney’s allegations of
9 infringement were raised against him. Scott Decl., ¶9. And, he had had no knowledge of
10 or involvement in the alleged placing of the word “MOSCHINO” on the graphic design on
11 the dress and suit or on any graphic in the allegedly infringing collection. Scott Decl., ¶10.
12 Thus, the undisputed facts show that he did not ever have personal involvement in the
13 alleged removal or falsification of CMI, let alone possess the requisite knowledge and
14 intent to state a claim under § 1202.⁶ As a result, Plaintiff’s § 1202 claims resoundingly
15 fail as a matter of law.

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21 ⁵ These allegations were not clearly made in Plaintiff’s Complaint, but, rather, were
22 provided in Plaintiff’s Opposition to Defendants’ Motion to Dismiss, at 6-7 (Dkt. #32), as
23 the basis for his CMI claims.

24 ⁶ In fact, if anything, Plaintiff’s factual allegations actively undermine his own clam.
25 Specifically, Plaintiff states that Defendants have “falsely used Plaintiff’s art pseudonym,
26 ‘Rime,’ trade name, and professional signature on various items throughout the [allegedly
27 infringing] Collection,” Comp. ¶43, and, as a result, falsely created the impression that the
28 Collection was made by Plaintiff, Comp. ¶¶48, 59, and misappropriated Plaintiff’s name
and likeness, Comp. ¶70, thereby allegedly engaging in unfair competition, trademark
infringement and a violation of the right of publicity. However, Plaintiff cannot
simultaneously complain that Defendant gave him appropriate credit (thereby respecting
any CMI, if any existed in the first place) while also complaining that Defendant removed
and altered his credit. If Plaintiff were trying to conceal any infringement by removing
“Plaintiff’s signature,” Comp. ¶¶35-36, from the allegedly infringing works, then it makes
no sense that they would be using Plaintiff’s “professional signature” to give credit to
Plaintiff, Comp. ¶43, at the very same time.

1 **2. If Tierney is the Author and Copyright Holder of “Vandal Eyes,”**
2 **Then “Vandal Eyes” Did Not Contain Any CMI and There Is No**
3 **Cognizable Act of CMI Falsification or Removal.**

4 Tierney’s Complaint fails to clearly state just what CMI was actually contained in
5 the work at issue, “Vandal Eyes.” Since this is a necessary element of any § 1202 claim, in
6 the course of the briefing of the Motion to Dismiss heard in January 2016, Plaintiff
7 attempted to address this fundamental problem by protesting that “Vandal Eyes” did in fact
8 contain CMI: an asterisk-like symbol which “indicates that the work comes from an artist’s
9 collective [sic] named The Seventh Letter and that the symbol indicates “that the Seventh
10 Letter is the source of the artwork.” Tierney Decl., ¶5. On one hand, if this symbol
11 constitutes CMI, it means that The Seventh Letter (and not Tierney) holds the copyright to
12 “Vandal Eyes” and, therefore, Tierney does not have standing to bring this suit, as argued
13 *supra*. On the other hand, if Tierney maintains that (somehow) that he is, in fact, the
14 copyright holder to “Vandal Eyes,” then the symbol of The Seventh Letter—an entity that
15 is not a copyright holder or author of the work—does not and cannot constitute CMI as the
16 term is understood for the purposes of § 1202. ***Plaintiff cannot have it both ways.***

17 Specifically, if Tierney (and not the Seventh Letter) is the author/copyright holder of
18 the work “Vandal Eyes,” then the Seventh Letter symbol does not meet the definition of
19 CMI in the DMCA. CMI is limited to the eight forms of information listed in 17 U.S.C. §
20 1202(c)(1)-(8). The Seventh Letter symbol is not the title of the work, does not provide
21 identifying information about the copyright owner or author of the work (unless Tierney
22 admits that he is not the copyright owner) and is not otherwise any of the forms of
23 copyright-related information dictated in 17 U.S.C. § 1202(c).

24 All told, therefore, by Plaintiff’s own admission and according to the undisputed
25 facts, “Vandal Eyes” did not contain any cognizable CMI which Defendants could remove
26 or falsify. As such, Plaintiff’s § 1202 claims fail as a matter of law.

1 **D. Defendants are Entitled to Summary Judgment as a Matter of Law on**
2 **Tierney’s Trademark and Unfair Competition Claims as the Undisputed**
3 **Facts Demonstrate That Their Actions Are Insulated from Liability**
4 **under Both the *Rogers* Defense and the Nominative Fair Use Defense.**

5 The Ninth Circuit has consistently held that state common law claims of unfair
6 competition and actions pursuant to California Business and Professions Code § 17200 are
7 “substantially congruent” to claims made under the Lanham Act.” *Cleary v. News Corp.*,
8 30 F.3d 1255, 1262-63 (9th Cir. 1994). Thus, “Plaintiff’s state law claims for unfair
9 competition must fail [if] they are based on Plaintiff’s defective Lanham Act claims.” *RDF*
10 *Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 565 (C.D. Cal. 2005). And, since
11 Defendants’ actions are immunized from Lanham Act liability under both the *Rogers*
12 defense and the nominative fair use defense, Plaintiff’s Lanham Act, statutory and common
13 law unfair competition claims all necessarily fail.

14 **1. Defendants’ Activities Are Squarely Protected under the *Rogers***
15 **Defense.**

16 Under *Rogers v. Grimaldi*, which has been expressly adopted by the Ninth Circuit,
17 *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (adopting the *Rogers* test in
18 the Ninth Circuit), a defendant cannot face liability for unauthorized use of a mark in an
19 expressive work works ‘unless the [use of the trademark] has ***no artistic relevance to the***
20 ***underlying work whatsoever***, or, if it has some artistic relevance, unless the [use of
21 trademark or other identifying material] explicitly misleads as to the source or the content
22 of the work.’” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013) (citing
23 *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir.1989)) (emphasis added).

24 Clothing designs, including those covered with graffiti designs, are undoubtedly
25 artistic and expressive works. See *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97
26 (2d Cir. 2006) (finding that pieces of clothing covered in graffiti designs are expressive
27 works). And Defendants’ alleged use of RIME’s purported trademark in its artistic work
28 was undoubtedly relevant. As the Ninth Circuit has held, the “‘level of [artistic] relevance

1 [of the trademark or other identifying material to the work] merely must be above zero’ for
2 the trademark or other identifying material to be deemed artistically relevant.” *Brown*, 724
3 F.3d. at 1243. This “black-and-white rule” intentionally “limit[s] [the Court’s] need to
4 engage in artistic analysis” and “more or less automatically protects expressive works
5 regardless of the deception involved.” *Id.* at 1245. Thus, to avoid automatic dismissal
6 under *Rogers*, a plaintiff must provide facts demonstrating that the use “has *no artistic*
7 *relevance to the underlying work whatsoever.*” *Id.* Of course, Plaintiff does not and cannot
8 do so.

9 Defendants more than meet the low threshold to show any “artistic relevance.”
10 Tierney’s Complaint alleges that the allegedly infringing works at issue this suit sought to
11 “put[] graffiti—or “street” art—on ultra-expensive clothing,” Compl. ¶3. Thus, using
12 graffiti tags, like Tierney’s alleged RIME mark, is “[p]ossibly the only way, and certainly a
13 reasonable way,” of achieving a graffiti/street-art aesthetic. *E.S.S. Ent. 2000, Inc. v. Rock*
14 *Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008) (finding artistic relevance when the
15 accused infringer used the name and logo of plaintiff’s strip club to create an urban “look
16 and feel.”). Plaintiff’s statements regarding his prominence as a “well-known artist,”
17 Compl. ¶1, and highly credible purveyor of street art, Compl. ¶6, only support the idea that
18 use of his mark would be artistically relevant to someone trying to evoke the street-art
19 aesthetic. After all, Scott and Moschino came up with a concept for a graffiti-based
20 collection that subverted the seriousness of traditional black-tie fashion while also
21 commenting on the way in which society objectifies women by literally imposing cultural
22 symbols and meaning upon them. Scott Decl. ¶2. They used the medium of graffiti, and
23 the way in which street artists impose cultural symbols and meaning upon the vernacular
24 landscape, to create a metaphor of a sophisticated woman literally tagged with graffiti,
25 much like any light pole, brick wall or mail box on the street corner. *Id.* Thus, the alleged
26 use of the RIME mark certainly constitutes artistic relevance “above zero.”

27 Meanwhile, Plaintiff does not (and cannot) show that Defendants’ alleged use of his
28 mark “*explicitly misleads* as to the source or content of the work.” *E.S.S.*, 547 F.3d at 1100

1 (emphasis added). It is insufficient for Plaintiff to demonstrate mere “likelihood of
2 confusion” to get around the *Rogers* defense. *Brown*, 724 F.3d at 1242. Instead, Plaintiff
3 must provide facts showing “an ‘explicit indication,’ overt claim,’ or ‘explicit
4 misstatement’ that caused . . . consumer confusion.” *Id.* Plaintiff here can do no such
5 thing. In *Brown*, for example, the plaintiff put forth four different arguments to make such
6 a showing, yet all were rejected by the Ninth Circuit when affirming dismissal on a Rule 12
7 motion. *Brown* offered a consumer survey indicating actual consumer confusion,
8 highlighted specific statements by the defendant stating the work included the plaintiff,
9 pointed out that defendant made several small changes to his likeness, and pointed to
10 specific statements the defendant made claiming they had “obtained written authorization”
11 from the plaintiff. *Id.* at 1245-47. The Ninth Circuit still upheld the dismissal, finding
12 none of these facts sufficiently showed the creator *explicitly* misled consumers, even in
13 toto. In fact, the Ninth Circuit noted that the defendants making small modifications to the
14 plaintiff’s likeness “could only make consumers *less* likely to believe that [plaintiff]
15 endorsed” defendant’s product. *Id.*

16 Tierney has come nowhere near as close as the plaintiff in *Brown* (whose case was
17 dismissed at the Rule 12 stage) to demonstrating that Defendants explicitly mislead
18 consumers. Tierney has not shown that any single individual has been confused, when
19 even a consumer survey demonstrating actual consumer confusion would (per *Brown*) be
20 insufficient. He has not shown any instance of Defendants actually stating that Tierney
21 authorized the collection or highlighting the word “Rime” in any product, when even
22 explicit written and oral statements stating the use was authorized (per *Brown*) would be
23 insufficient. Indeed, Tierney has an entire claim based on the premise that Defendants had
24 removed identifying information, which directly cuts against any argument of efforts to
25 explicitly mislead that he was endorsing the works at issue. Compl. ¶¶ 34-41. Finally, as
26 in *Brown*, Tierney’s claim that Defendants had made changes such as “add[ing] certain of
27 their own graphic design,” and using a “fake signature” “could only make consumers *less*
28 likely to believe that [plaintiff] endorsed” Defendants’ products. At most, Tierney only

1 alleges that Defendants used his purported RIME mark; but “the mere use of a trademark
2 alone cannot suffice to make such use explicitly misleading.” *Brown*, 724 F.3d at 1245.

3 All told, federal courts have repeatedly invoked the *Rogers* defense to deny claims
4 involving the use of trademarks in artistic content. *See, e.g., Louis Vuitton Mallatier S.A. v.*
5 *Warner Bros. Entert. Inc.*, 868 F. Supp. 2d 172, 180 (S.D.N.Y. 2012) (rejecting trademark
6 claim for using knock-off Louis Vuitton in motion picture); *E.S.S.*, 547 F.3d at 1099
7 (rejecting trademark claim for depiction of Play Pen Gentlemen’s club in video game);
8 *Roxbury Entm’t v. Penthouse Media Grp., Inc.*, 669 F. Supp. 2d 1170, 1175-76 (C.D. Cal.
9 2009) (finding defendant’s use of trademark in title of pornographic film falls outside the
10 Lanham Act); *Novalogic, Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885 (C.D. Cal. 2013)
11 (finding that video game’s use of “Delta Force” mark could not give rise to Lanham Act
12 violation). Thus, *Rogers* precludes Plaintiff’s trademark and unfair competition claims.

13 2. Defendants’ Activities Are Also Protected as Nominative Fair Use.

14 Plaintiff’s trademark and unfair competition claims also fail since Defendants’
15 actions are protected, as a matter of law, under the nominative fair use doctrine. “The
16 nominative fair use analysis is appropriate where a defendant has used the plaintiff’s mark
17 to describe the plaintiff’s product, *even if the defendant’s ultimate goal is to describe his*
18 *own product.*” *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002)
19 (emphasis in original). A defendant’s use falls under nominative fair use if “the [plaintiff’s]
20 product or service in question [is] one not readily identifiable without use of the trademark;
21 second, only so much of the mark or marks [is] used as is reasonably necessary to identify
22 the [plaintiff’s] product or service; and third, the user [did] nothing that would, in
23 conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.”
24 *Cairns*, 292 F.3d at 1151 (9th Cir. 2002). Nominative use is “best understood as involving
25 a non-trademark use of a mark—a use to which the infringement laws simply do not apply .
26 . . [and] lies outside the strictures of trademark law.” *New Kids on the Block v. News Am.*
27 *Pub., Inc.*, 971 F.2d 302, 307-08 (9th Cir. 1992).

1 To begin with, Tierney has not pled or provided any facts or evidence to allege that
2 Defendant have made use of his alleged mark beyond nominative fair use. In fact, he
3 repeatedly alleges that Defendants’ use of RIME is specifically done to refer to him in his
4 street artist capacity. *See e.g.* Compl. ¶24. Thus, any use of the word RIME by Defendants
5 would only be to specifically refer to Tierney as a noted street artist known for his graffiti
6 (and not as a mark to designate source or origin). Compl. ¶23. Indeed, Plaintiff’s product
7 or service is one that is not readily identifiable without use of the trademark. *Cairns*, 292
8 F.3d at 1151 (9th Cir. 2002). In *Cairns*, the court found that “Princess Diana’s person is not
9 readily identifiable without use of her name,” even though one could refer to “the English
10 princess who died in a car crash.” *Id.* at 1143. Likewise, although “one might refer to ‘the
11 two-time world champions’ or ‘the professional basketball team from Chicago,’ but it’s far
12 simpler (and more likely to be understood) to refer to the Chicago Bulls.” *New Kids*, 971
13 F.2d at 306 (9th Cir. 1992). Similarly, here, Tierney as a street artist is not readily
14 identifiable without use of the term RIME. As noted by Tierney himself, his “respective
15 artistic product” is his “artwork,” and “street cred” and his “pseudonymous name and
16 signature [is] recognized by the public as associated with Plaintiff.” Compl. ¶¶23-24, 44-
17 45.

18 Second, Defendants, like other defendants successfully drawing on the nominative
19 fair use doctrine, only makes so much use of the plaintiff’s mark “as is reasonably
20 necessary to identify the [Plaintiff’s] product or service.” *Cairns*, 292 F.3d at 1153 (9th
21 Cir. 2002). In *Cairns*, the Ninth Circuit noted that repeated use of the name “Diana” was
22 “reasonably necessary” to identify Princess Diana, and that “there is no allegation that
23 [Defendant] used any ‘distinctive lettering’ . . . intimately associated with [Plaintiff].” *Id.*
24 at 1154. As in *Cairns*, Tierney has not alleged that Defendants have used any “distinctive
25 lettering” associated with Tierney’s use of RIME and Defendants made no use of any
26 distinctive lettering in RIME’s purported mark. In fact, Tierney repeatedly alleges how
27 Defendants’ styling is different, calling it a “fake signature.” Compl. ¶2. Indeed, as shown
28 in Tierney’s pleadings, Defendants’ use of the word RIME was limited in scope and only

1 appeared grouped together with other graffiti tags, Compl. ¶2—just enough as is
2 reasonably necessary to reference Tierney as one of many popular graffiti artists.

3 Finally, to qualify for a nominative fair use defense, “the user must do nothing that
4 would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark
5 holder.” *Cairns*, 292 F.3d at 1151 (9th Cir. 2002). In *Cairns*, the Ninth Circuit noted how
6 none of plaintiff’s advertisements “claim that these products are sponsored or endorsed by
7 the [Plaintiff].” The Ninth Circuit also noted that the defendant’s “advertisements for some
8 of its other celebrity-related products in the same catalogue *do* state that they are authorized
9 by a trademark holder . . . [and] [t]he absence of similar statements in [defendant’s]
10 advertisements” for the allegedly infringing products “suggests that they are *not* sponsored
11 or endorsed” by the plaintiff. *Id.* at 1154-55. Similarly, Tierney has not and cannot allege
12 that Defendants have ever claimed sponsorship or endorsement by Tierney in its
13 advertisements. Tierney claims only that the word RIME appears as part of the design on
14 clothing and that the clothing that incidentally included his name was advertised. Compl.
15 ¶2. In addition, Tierney extensively alleges that Defendants “prominent[ly]”
16 “embellish[ed]” the allegedly infringing items by “includ[ing] the brand name “Moschino,”
17 which also shows that Defendants had explicitly disclaimed any sponsorship or
18 endorsement by Tierney. Compl. ¶19. Thus, Tierney’s admissions and the undisputed
19 facts demonstrate that, as a matter of law, Defendants engaged in nominative fair use of the
20 word RIME to reference him as a graffiti artist to establish the overall urban design of the
21 collection.

22 **E. Plaintiff’s Section 3344 Claim Fails.**

23 **1. Plaintiff Cannot, as Required, Show Defendants Misappropriated**
24 **Any Elements of Tierney’s Identity Knowingly.**

25 To establish a claim under § 3344, a plaintiff must, among other things, allege “a
26 knowing use [of his identity] by defendant.” *Downing v. Abercrombie & Fitch*, 265 F.3d
27 994 (9th Cir. 2001). To satisfy “knowing use,” actual knowledge of an unauthorized use is
28 required. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1183 (C.D.

1 Cal. 2002). Although Tierney’s Complaint pleads “unauthorized use” in conclusory
2 fashion, *he does not even attempt to plead “knowing” unauthorized use, a required*
3 *element of the tort.* Compl. ¶¶70-73. And he fails to do so for good reason: the
4 undisputed facts show that Defendants had no knowledge of the purported use of Tierney’s
5 publicity rights (i.e., the “forgery of Plaintiff’s signature and Plaintiff’s name ‘Rime’” on
6 two items in the allegedly infringing collection, Comp. ¶¶17). As such, his § 3344 claim is
7 defeated as a matter of law.

8 Plaintiff ties Jeremy Scott to the putative acts of infringement only by stating that
9 “On information and belief, Scott was responsible for the design of the infringing collection
10 under the Moschino label. The basis for Plaintiff’s belief that Mr. Scott is responsible for
11 the designs in question is his position at Moschino, as well as media photographs,
12 information posted on Moschino’s website and social media accounts; and Jeremy Scott’s
13 social media accounts.” Compl. ¶12. However, such allegations only speak to agency and
14 Plaintiff’s (unsubstantiated and conclusory) belief that Scott is somehow responsible for
15 Moschino’s activities, including its apparent placement of the word RIME (the basis of
16 Plaintiff’s § 3344 claim) on the designs of two products. They say nothing about actual
17 knowledge, which is required for a cognizable § 3344 action. Nor can they.

18 As noted in the Declaration of Jeremy Scott in support of this Motion, Scott did not
19 design the RIME graphics in the two items reproduced in the Complaint ¶2. Scott Decl.,
20 ¶¶3-5. Those graphics were selected and created by a graphic artist at Moschino completely
21 independently of Mr. Scott. *Id.* As such, Scott did not possess any knowledge regarding
22 the alleged unauthorized use of Mr. Tierney’s pseudonym/false signature on two alleged
23 Moschino products. *Id.* at ¶6. Indeed, as there are hundreds of graffiti elements on each
24 item to given them a layered effect of being tagged and tagged again over time, he had
25 never observed the actual use of the word RIME on the graphics in the two items
26 reproduced in the Complaint ¶2 until seeing the Complaint. *Id.* at ¶7.

27 Similarly as to Moschino, Plaintiff pleads only (and conclusorily) that there was
28 “unauthorized use” but does not make any allegations as to “knowing” use. Compl. ¶¶ 70-

1 73. Nowhere does Plaintiff make any allegation to demonstrate how Moschino, a “high-
2 end apparel brand based in Italy,” would have knowledge of a graffiti artist living in
3 Brooklyn or that the Brooklyn based graffiti artist was connected to graffiti on an
4 abandoned building in Detroit, or the word RIME appearing on graffiti elsewhere. Such
5 actual knowledge as needed for a cognizable § 3344 action defies knowledge, and simply
6 has not and cannot be shown by Plaintiff.

7 As a result, the undisputed facts show that Defendants had no knowledge of any
8 alleged infringement of Tierney’s publicity rights. Since there no genuine issue of material
9 fact showing actual knowledge, Tierney’s § 3344 claim fails as a matter of law.

10 **2. Defendants’ Activities Constitute Transformative Use Protected**
11 **under *Saderup* and its Progeny.**

12 As with the Lanham Act claims, Tierney’s misappropriation claims are precluded by
13 the First Amendment under the California Supreme Court’s transformative-use defense.
14 *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (noting
15 that works “contain[ing] significant transformative elements [are] especially worthy of First
16 Amendment protection” and exempt from claims under § 3344). The relevant inquiry for
17 transformative use “is whether the celebrity likeness is one of the ‘raw materials’ from
18 which an original work is synthesized, or whether the depiction or imitation of the celebrity
19 is the very sum and substance of the work in question. We ask, in other words, whether a
20 product containing a celebrity's likeness is so transformed that it has become primarily the
21 defendant's own expression rather than the celebrity's likeness.” *Id.* at 809. As the
22 California Supreme Court has noted, “[w]hen the value of the work comes principally from
23 some source other than the fame of the celebrity—from the creativity, skill, and reputation
24 of the artist—it may be presumed that sufficient transformative elements are present to
25 warrant First Amendment protection.” *Id.* at 810. Thus, even where a defendant has
26 “initially gained some exposure through use of [plaintiff’s] name . . . and the reputation it
27 carried,” a defendant’s use is sufficiently transformative and exempt from § 3344 liability
28

1 when the primary reason for the success is not “appropriation of plaintiff’s name.” *Ross v.*
2 *Roberts*, 166 Cal. Rptr. 3d 359, 368 (Cal. App. 2013).

3 Tierney’s pleadings demonstrate that any use Defendants may have made of the
4 word RIME and Tierney’s alleged fake signature was transformative and therefore
5 protected by the First Amendment. Tierney does not claim that the word RIME is the
6 “very sum and substance of the work in question,” and, in fact, the very uses Tierney
7 alleges demonstrate that the word RIME was synthesized in an overall, transformative
8 design. Compl. ¶2. As the two photos alleging misappropriation in the Complaint indicate,
9 any use of the word RIME and Tierney’s alleged fake signature was merely as a
10 transformative part of the overall work. *Id.* Indeed, the word RIME and Tierney’s alleged
11 fake signature is embedded amongst an overall, graffiti-riddled design surrounded by a
12 plethora of other “graffiti” tags. At most, any use of RIME occurred only to create an urban
13 feel in furtherance of the independently creative “idea of putting graffiti—or “street” art—
14 on ultra-expensive clothing.” Compl. ¶3. As in *Ross*, where a criminal’s name and
15 reputation was used to create an aura of criminality in defendant’s rap music, the use of the
16 word RIME here was only used to create an urban aura in the Defendant’s graphic designs.
17 *See Scott*. Decl. ¶2. Also, going even further than *Ross*, where the plaintiff’s identity (his
18 name, reputation and elements of his life) was entirely adopted by defendant, Moschino’s
19 use of the word RIME is limited only to inclusion in an overall design with other graffiti
20 tags.

21 Furthermore, Tierney has not pled that the value of Defendants’ clothing comes
22 principally from any association with the word RIME. Instead, Tierney alleged that
23 “Moschino” is “among fashion’s most prominent names.” Compl. ¶11. After all, the
24 success of Defendants’ fashion items is no doubt attributable to the very brand-and-design
25 prominence and success of the Defendants that Plaintiff trumpets in his Complaint. Compl.
26 ¶12. Even if Tierney’s claims can be construed to allege that Defendants’ products initially
27 gained some exposure through the use of RIME, the court can “safely assume,” as in *Ross*,
28 that when individuals purchase “ultra-expensive clothing,” from a “high-end apparel

1 brand,” they generally do so because they like the design and the cachet associated with
2 Defendants, not because it had the word RIME as part of an overall graffiti theme. Compl.
3 ¶¶3, 11. Defendants’ purported use of Plaintiff’s pseudonym and fake signature is
4 transformative and therefore not subject to § 3344 liability.

5 **1. Any Use by Defendants Is Incidental and, Therefore, Not**
6 **Actionable.**

7 Tierney’s § 3344 claim should also be denied as incidental as a matter of law.
8 “[I]ncidental use of a plaintiff’s name or likeness does not give rise to [§ 3344] liability”
9 *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009). Incidental
10 use is “determined by the role that the use of plaintiff’s name or likeness plays in the main
11 purpose and subject of the work at issue;” “a plaintiff’s name is not appropriated by mere
12 mention of it.” *Id.* When a plaintiff’s picture was “one of dozens” used and the use was
13 “insignificant to the commercial purpose of selling the music anthology,” use was deemed
14 incidental. *Aligo v. Time-Life Books, Inc.*, 1994 WL 715605, at *3 (N.D. Cal. Dec. 19,
15 1994). Here, similarly, the word RIME was just one of many graffiti tags used to create a
16 urban-themed design, and the use was insignificant to the commercial purpose of creating a
17 high-end clothing collection by Moschino, one of “fashion’s most prominent names.”
18 Compl. ¶¶2, 11.

19 **F. Plaintiff’s Negligence Claim Fails.**

20 To the extent that Plaintiff’s negligence claim is grounded in violations of Tierney’s
21 purported copyright interests, this court has already agreed that the claim is pre-empted
22 under the federal Copyright Act. *See* Court Order dated January 13, 2016 (Dkt. #49), at 9.
23 To the extent that the negligence claim can be based on Defendants’ alleged trademark
24 infringement, there is no trademark violation (as, among other things, any use of the
25 trademark is protected under the *Rogers* and nominative fair use defenses). As such,
26 Plaintiff’s negligence claim fails as a matter of law.
27
28

1 **V. CONCLUSION**

2 Since Tierney has no evidence to support his claims against Scott or Moschino and
3 his claims fail as a matter of law, Defendants entitled to summary judgment as to all causes
4 of action. In the alternative, this Court should grant Defendants' partial summary judgment
5 as to any defective causes of action.

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7 Dated: April 18, 2016

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