

1 KELLY M. KLAUS (SBN 161091)
kelly.klaus@mto.com
2 ROHIT K. SINGLA (SBN 213057)
rohit.singla@mto.com
3 ELIA HERRERA (SBN 293278)
elia.herrera@mto.com
4 MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
5 San Francisco, California 94105-2907
Telephone: (415) 512-4000
6 Facsimile: (415) 512-4077

7 GLENN D. POMERANTZ (SBN 112503)
glenn.pomerantz@mto.com
8 JOHN L. SCHWAB (SBN 301386)
john.schwab@mto.com
9 MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
10 Los Angeles, California 90071-3426
Telephone: (213) 683-9100
11 Facsimile: (213) 687-3702

12 *Attorneys for Defendants*

13

14

UNITED STATES DISTRICT COURT

15

NORTHERN DISTRICT OF CALIFORNIA

16

SAN FRANCISCO DIVISION

17

REARDEN LLC and REARDEN MOVA
LLC,

Case Nos. 3:17-cv-04006-JST
3:17-cv-04191-JST
3:17-cv-04192-JST

18

Plaintiffs,

19

vs.

**NOTICE OF MOTIONS AND MOTIONS
FOR PARTIAL DISMISSAL OF FIRST
AMENDED COMPLAINTS PURSUANT
TO FED. R. CIV. P. 12(b)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

20

THE WALT DISNEY COMPANY, WALT
21 DISNEY MOTION PICTURES GROUP,
INC., BUENA VISTA HOME
22 ENTERTAINMENT, INC., MARVEL
STUDIOS, LLC, and MANDEVILLE
23 FILMS, INC.,

Date: June 14, 2018
Time: 2:00 p.m.
Judge: Hon. Jon S. Tigar
Ctrm.: 9 (19th Floor)

24

Defendants.

25

26

27

28

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

REARDEN LLC and REARDEN MOVA
LLC,

Plaintiffs,

vs.

TWENTIETH CENTURY FOX FILM
CORPORATION and TWENTIETH
CENTURY FOX HOME
ENTERTAINMENT LLC,

Defendants.

REARDEN LLC and REARDEN MOVA
LLC,

Plaintiffs,

vs.

PARAMOUNT PICTURES
CORPORATION and PARAMOUNT
HOME ENTERTAINMENT
DISTRIBUTION INC.

Defendants.

NOTICE OF MOTIONS AND MOTIONS TO DISMISS

To Plaintiffs Rearden LLC and Rearden MOVA LLC (“Rearden”) and their counsel of record:

PLEASE TAKE NOTICE that on June 14, 2018, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom No. 9 of the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, all defendants in Case No. 3:17-cv-04006-JST (The Walt Disney Company, Walt Disney Motion Pictures Group, Inc., Buena Vista Home Entertainment, Inc., Marvel Studios, LLC and Mandeville Films, Inc.) (collectively, “Disney”); both defendants in Case No. 3:17-cv-04191-JST (Twentieth Century Fox Film Corporation and Twentieth Century Fox Home Entertainment LLC) (jointly, “Fox”); and both defendants in Case No. 3:17-cv-04192-JST (Paramount Pictures Corporation and Paramount Home Entertainment Distribution Inc.) (jointly, “Paramount”) (Disney, Fox and Paramount are referred to collectively as “Defendants” or “Studios”), will and hereby do move the Court for an Order dismissing in part and with prejudice Rearden’s First Amended Complaints (“FACs”) against each Defendant pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically, Defendants move for an Order dismissing with prejudice:

[1] Rearden’s First and Second Causes of Action against Disney; Rearden’s First Cause of Action against Fox; and Rearden’s First Cause of Action against Paramount on the grounds that Rearden fails to allege the required elements for vicarious or contributory copyright infringement.

[2] Rearden’s Third, Fourth, Fifth, Sixth, and Seventh Causes of Action against Disney, insofar as those Causes of Action fail to allege the required elements for a claim of direct infringement of the patents in suit.

These Motions are based upon these Notices of Motions and Motions; the attached Memorandum of Points and Authorities¹; all other materials supporting these Motions or the

¹ Defined terms in these Notices of Motions and Motions (e.g., “Rearden,” “Studios”) are also used in the accompanying Memorandum of Points and Authorities.

1 Reply brief filed in support thereof; all pleadings on file in this matter; and any other materials or
2 arguments the Court may receive at or before the hearing on these Motions.

3
4 DATED: April 5, 2018

MUNGER, TOLLES & OLSON LLP

5

6

7

By: /s/ Kelly M. Klaus
 KELLY M. KLAUS

8

Attorneys for Defendants

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

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

	Page
INTRODUCTION.....	1
SUMMARY OF FIRST AMENDED COMPLAINTS.....	2
I. Secondary Copyright Infringement—Against All Defendants	2
II. Direct Patent Infringement—Against Disney Only	5
STANDARD OF REVIEW	5
ARGUMENT	6
I. Rearden Fails To Allege Secondary Copyright Liability Based On Any Studio’s Vendor-Vendee Relationship With DD3	6
A. The Studios Are Not Vicariously Liable For DD3’s Use Of Unlicensed Software	6
1. Rearden Does Not Allege That Any Studio Had Both The Legal Right And Practical Ability To Supervise DD3’s Use Of Infringing Software	7
2. Rearden Does Not Allege That Any Studio Obtained A Direct Financial Benefit From DD3’s Loading Of Unlicensed Software Into RAM	9
B. The Studios Are Not Liable For Contributory Copyright Infringement	11
1. Hiring A Vendor Does Not Materially Contribute To The Vendor’s Infringing Use Of Unlicensed Software.....	11
2. Rearden Fails To Allege The Requisite Knowledge By The Studios Of Infringing Activity	13
(a) Rearden’s General Allegations Common To All Studios Do Not Establish Knowledge.....	13
(b) Rearden’s Additional Allegations Specific To Individual Studios Do Not Establish Knowledge.....	16
II. Rearden’s Amendments Do Not Cure Its Failure To Allege Direct Patent Infringement	17
CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	6, 7, 13
<i>Arista Records LLC v. Lime Group LLC</i> , 784 F. Supp. 2d 398 (S.D.N.Y. 2011).....	6
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	5
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5
<i>Brown v. Electronic Arts, Inc.</i> , 724 F.3d 1235 (9th Cir. 2013).....	6
<i>Centillion Data Systems, LLC v. Qwest Communications International, Inc.</i> , 631 F.3d 1279 (Fed. Cir. 2011).....	17, 18
<i>Demetriades v. Kaufman</i> , 690 F. Supp. 289 (S.D.N.Y. 1988).....	12
<i>Ellison v. Robertson</i> 357 F.3d 1072 (9th Cir. 2004).....	11
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996).....	<i>passim</i>
<i>Grecia v. McDonald’s Corp.</i> , No. 2017-1672, 2018 WL 1172580 (Fed. Cir. Mar. 6, 2018).....	18
<i>Intellectual Ventures I LLC v. Motorola Mobility LLC</i> , 870 F.3d 1320 (Fed. Cir. 2017).....	18
<i>Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.</i> , 658 F.3d 936 (9th Cir. 2011).....	11
<i>Luvdarts, LLC v. AT & T Mobility, LLC</i> , 710 F.3d 1068 (9th Cir. 2013).....	13, 16
<i>Med-Systems, Inc. v. Masterson Marketing, Inc.</i> , No. 11CV695 JLS (BLM), 2011 WL 5873399 (S.D. Cal. Nov. 23, 2011)	12
<i>Oracle America, Inc. v. Hewlett Packard Enterprise Co.</i> , No. 16-cv-01393-JST, 2017 WL 2672113 (N.D. Cal. Jan. 19, 2017)	9

TABLE OF AUTHORITIES
(continued)

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

Page(s)

Oracle America, Inc. v. Hewlett Packard Enterprise Co.,
No. 16-cv-01393-JST, 2016 WL 3951653 (N.D. Cal. July 22, 2016)1, 8, 13

Perfect 10, Inc. v. Amazon.com, Inc.,
508 F.3d 1146 (9th Cir. 2007).....7, 8

Perfect 10, Inc. v. Visa International Service Association,
494 F.3d 788 (9th Cir. 2007).....7, 12, 13

Rouse v. U.S. Department of State,
567 F.3d 408 (9th Cir. 2009).....19

Shapiro, Bernstein and Co. v. H.L. Green Co.,
316 F.2d 304 (2d Cir. 1963).....6

Viesti Associates, Inc. v. Pearson Education, Inc.,
No. 12-cv-02240-PAB-DW, 2013 WL 4052024 (D. Colo. Aug. 12, 2013)12

FEDERAL STATUTES

17 U.S.C. § 1062

35 U.S.C. § 271(a).....18

FEDERAL RULES

Rule 12(b)(6)5

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

1 Searching for some theory by which to ensnare the Studios in a claim for the profits on
2 their motion pictures, Rearden has substituted an implausible set of copyright claims for claims the
3 Court dismissed in its February 21, 2018 Order (Dkt. 60) (“Order”).¹ Rearden originally asserted
4 that its claimed copyright in the MOVA Contour software program extended to the output files
5 those programs generate. The Court dismissed that claim because it was implausible that the
6 software program, as opposed to the director’s direction and the actor’s facial performance,
7 accounted for “‘the lion’s share of the creativity’ in creating the outputs.” *Id.* at 7 (citation
8 omitted).

9 Rearden responds with First Amended Complaints (“FACs”) alleging that each Studio is
10 liable under different liability theories from those previously asserted and for different acts of
11 infringement. Rearden now alleges that the Studios’ special effects vendor—Digital Domain 3.0
12 (“DD3”)—directly infringed the copyright in the MOVA Contour program every time it loaded a
13 copy of that software from the hard drive of the computer DD3 operated into random access
14 memory (“RAM”). Rearden then claims that each Studio, by virtue of contracting with DD3 to
15 provide facial motion capture and other special effects services, is liable under theories of
16 vicarious liability and contributory copyright infringement for DD3’s unlicensed use of that
17 software.

18 Rearden’s copyright claims have no basis in the doctrines of secondary liability. Like the
19 plaintiff before this Court in *Oracle America, Inc. v. Hewlett Packard Enterprise Company*, No.
20 16-cv-01393-JST, 2016 WL 3951653 (N.D. Cal. July 22, 2016), Rearden offers no “authority for
21 the proposition that allegations of a contractor-subcontractor relationship alone are sufficient to
22 plead a claim for vicarious copyright infringement.” *Id.* at *6. Rearden tries to bolster its claims
23 with allegations that the Studios directed the actor’s facial performance. But directing a
24

25
26
27 ¹ Docket citations are to the entries in Case No. 3:17-cv-04006-JST (Disney); the same documents
28 have parallel (by date) entries in Nos. 3:17-cv-04191-JST (Fox) and 3:17-cv-04192-JST
(Paramount).

1 performance by a human actor is entirely different from directing the technology vendor's choice
2 in selecting, licensing (or not), and using the software to capture the human performance. Based
3 on the allegations of the FACs, it is clear that DD3's use of unlicensed software was a matter
4 entirely within the control and conduct of DD3, a special effects service provider that offers its
5 services to Defendants and other studios. If Rearden's theory were right, then anytime a vendee
6 used a third-party vendor to provide software-based services—whether having a vendor retouch
7 pictures using Adobe Photoshop or create a document using Microsoft Word—the vendee would
8 face potential copyright liability if it turned out that the vendor failed to obtain a license to the
9 software it uses to provide those services. Rearden's theory finds no support in the well-
10 established law concerning secondary copyright infringement and would create chaos in the
11 marketplace.

12 Rearden's FAC against Disney tries to resuscitate its dismissed claim for direct patent
13 infringement against Disney. The amended claim remains deficient because Rearden does not and
14 cannot allege that Disney, rather than DD3, used the MOVA system or interacted with it in any
15 way.

16 The foregoing claims should be dismissed with prejudice.

17 SUMMARY OF FIRST AMENDED COMPLAINTS

18 The Court is familiar with the background of these cases and Rearden's restated allegations
19 about the MOVA Contour system, the *SHST v. Rearden* litigation, and Rearden's claims for
20 induced patent infringement (against Disney) and trademark infringement (against all Defendants).

21 This motion addresses Rearden's new theories of secondary copyright infringement
22 (against all Defendants) and its restated claim for direct patent infringement (against Disney).

23 **I. Secondary Copyright Infringement—Against All Defendants**

24 Having failed to extend the copyright in MOVA Contour to the program's output, Rearden
25 now alleges infringement of the MOVA Contour program itself. But Rearden does not allege that
26 any Studio infringed that copyright. Nor could it, since no Studio exercised any of the rights
27 under 17 U.S.C. § 106 (e.g., copying or distributing) in that software.

28

1 Rearden instead alleges that a different party, DD3, infringed the copyright in the software
2 program. Rearden claims that DD3 violated the exclusive right of reproduction, *id.* § 106(1),
3 every time the MOVA system that DD3 operated made an unlicensed “copy of the [MOVA]
4 Contour program in” the RAM of the MOVA computer. Disney FAC ¶¶ 129, 160; Fox FAC ¶
5 125; Paramount FAC ¶ 107.

6 The FACs make clear that DD3 was the only party that did operate, or that could have
7 operated, the MOVA hardware and software. The FACs allege that the MOVA Contour system
8 “has no ‘operating manual,’” that it “must be used carefully with knowledge of its operation for it
9 to function correctly and safely,” and that it was operated by “former Rearden employees,” i.e.,
10 Greg LaSalle. Disney FAC ¶ 60; Fox FAC ¶ 61; Paramount FAC ¶ 58.

11 Rearden does not allege that any Studio employee had anything to do with selecting the
12 software to be used in the motion capture process; licensing (or not licensing) such software;
13 loading any software from any CPU into RAM; or operating any hardware, software, or other
14 equipment involved in the MOVA Contour system. Rearden instead seeks to hold the Studios
15 secondarily liable based on the role the directors they hired played in directing the actor’s facial
16 performance and selecting particular takes (what the FACs call “Selects”) to use in connection
17 with DD3’s special effects services. *See, e.g.,* Disney ¶¶ 133, 134, 136; Fox FAC ¶¶ 129, 130,
18 132; Paramount FAC ¶¶ 111, 112, 114 (Studios “supplied a director to control and direct the
19 actions of DD3 in providing facial performance capture using the [MOVA] Contour program”;
20 “the director controlled and directed DD3’s use of the Contour program by starting and
21 terminating each session, starting and stopping each take”; Studios “relied on the presence of a
22 clapperboard operated by defendants’ film crew . . . to show that the facial performance sessions
23 were superintended and directed by persons provided” by the Studios; Studios or “entities subject
24 to their direction and control” “chose specific [MOVA] Contour program output works and
25 designated them as ‘Selects,’ and caused DD3 to use the [MOVA] Contour program to further
26 process the Selects to create new output works that were used to animate [computer-generated]
27 [“CG”] characters”). None of these alleged acts show the requisite right and ability to control
28 DD3’s claimed infringement when one of its employees loaded unlicensed software from a CPU

1 into the RAM of the system DD3 operated (necessary for a claim of vicarious liability); or that any
2 Defendant did anything to materially contribute to DD3's infringement through the loading of
3 unlicensed software (necessary for a claim of contributory infringement). *See* Argument Sections
4 I.A.1 and I.B.1, *infra*.

5 The FACs likewise fall short of alleging the required facts necessary to establish additional
6 elements of secondary liability claims. For vicarious liability, Rearden must plausibly plead that
7 each Studio derived a direct financial benefit from DD3 loading unlicensed software from the
8 CPU into RAM. Rearden does not allege that any such act was the direct cause of any Studio
9 making more money or the reason they chose to contract with Rearden was because it was using
10 unlicensed software. Rearden instead alleges a highly attenuated chain between the loading of
11 software into RAM and the generation of revenue: that the Studios used the output files from the
12 MOVA Contour system (as to which Rearden has no copyright) in a multi-step process from facial
13 performance, to output file, to retargeting onto a 3D computer bust, to the extensive involvement
14 of graphic artists in creating a CG character, to embodiment in a completed motion picture, to an
15 audience paying to see a finished movie comprised of countless additional images, words, and
16 acting performances. *See* Argument Section I.A.2, *infra*. Under Rearden's theory, any
17 commercial venture that contracts with a service provider receives the necessary financial benefit
18 because the services provided are undertaken to benefit the customer's bottom line. Rearden is
19 wrong; that is not the kind of direct financial benefit required to state a claim for vicarious liability
20 under the copyright laws.

21 The contributory infringement claim also requires as an additional element that Rearden
22 plead facts showing that each Defendant knew DD3 was using unlicensed software. The common
23 element to Rearden's claim of each Defendant's knowledge is that it must have seen the very fine
24 print that Rearden alleges comprises "the first frame" of any "Skin Texture" or "Makeup Pattern"
25 output file, alleged by Rearden to be a copyright notice asserting Rearden's claim to the copyright
26 not in the output files—which was Rearden's original theory in this case—but in the underlying
27 MOVA Contour software program. Disney FAC ¶ 44; Fox FAC ¶ 44; Paramount FAC ¶ 42.
28 Rearden makes the copyright notice visible only by blowing up a static single frame shot. *Id.*

1 Rearden does not allege any Defendant isolated the frame in this way or blew the frame up on a
2 screen or put it under a magnifying glass. Critically, Rearden does not allege any fact justifying
3 the inference that, even if a director hired by a Studio did see the copyright notice when looking at
4 the output files to review the day's filming, the Studio would have known from seeing that notice
5 that DD3 was using unlicensed software.

6 The remainder of Rearden's knowledge allegations are based on generic assertions of each
7 Studio purportedly having conducted "IP due diligence" or otherwise having known about
8 Rearden or its dispute with DD3. Those contentions are insufficient for the reasons set forth
9 below. *See* Argument Section I.B.2, *infra*.

10 **II. Direct Patent Infringement—Against Disney Only**

11 Rearden originally alleged that Disney directly infringed by being "a customer of" DD3,
12 "contract[ing] for 'the ability to place the [MOVA Contour] system as a whole into service,'" and
13 "direct[ing] and control[ing] DD3's conduct." Dkt. 47 at 14–15, 16–17. The Court dismissed the
14 claim because Rearden admitted that Disney itself used no part of the claimed system: "DD3
15 practiced all limitations of the claims of the patents-in-suit subject to Disney's direction and control."
16 Order at 10 (quoting Dkt. 47 at 23 n.35). Disney "didn't 'use' the MOVA system or interact with it
17 in any way." *Id.* at 11.

18 Rearden still does not allege that Disney used the technology or that it interacted with it in any
19 way. Instead, parroting the allegations of its secondary copyright infringement claims, Rearden alleges
20 that Disney controlled the actor's facial performance in each motion capture session. Disney FAC
21 ¶¶ 198-200. These allegations do not state a claim for direct patent infringement. *See* Argument
22 Section II, *infra*.

23 **STANDARD OF REVIEW**

24 To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter,
25 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556
26 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court
27 need not "accept any unreasonable inferences or assume the truth of legal conclusions cast in the
28

1 form of factual allegations.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013)
2 (quotation omitted).

3 ARGUMENT

4 **I. Rearden Fails To Allege Secondary Copyright Liability Based On Any Studio’s** 5 **Vendor-Vendee Relationship With DD3**

6 The crux of Rearden’s new copyright claims is that each Studio is liable for DD3’s alleged
7 use of unlicensed “MOVA Contour” software because the Studio contracted with DD3 to provide
8 facial motion capture services. Under this theory, not only would all DD3 customers be liable for
9 copyright infringement, but any customer of a service that uses software to provide that service
10 would be exposed to infringement liability for the vendor’s use of unlicensed software. There is
11 no legal support for such an expansion of secondary copyright liability.

12 **A. The Studios Are Not Vicariously Liable For DD3’s Use Of Unlicensed** 13 **Software**

14 Vicarious liability developed “as an outgrowth of the agency principles of respondeat
15 superior.” *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261-62 (9th Cir. 1996). From its
16 inception, the doctrine distinguished between straightforward contractual relationships, such as
17 that of “a landlord who lacked knowledge of the infringing acts of its tenants and exercised no
18 control over the leased premises,” and was not vicariously liable; and dance-hall operators, who
19 “had the power to cease the conduct” of infringing performers and who “derived an obvious and
20 direct financial benefit from” the paying customers drawn to the dance halls by the infringing
21 performances. *Id.* at 262 (citing *Shapiro, Bernstein and Co. v. H.L. Green Co.*, 316 F.2d 304 (2d
22 Cir. 1963)). More recently, courts have found online services like Napster vicariously liable
23 because those actors provided and had the ability to police the “site and facilities” for mass
24 copying and distribution of copyrighted works—infringement that inured directly to the services’
25 financial benefit. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir.
26 2001); *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 435-36 (S.D.N.Y. 2011).
27 Conversely, the Ninth Circuit has declined to find credit card processing services vicariously liable
28 based on the court’s conclusion that those services could not “take away the tools” that the third-

1 party websites whose payments the defendants processed used to infringe copyright. *Perfect 10,*
2 *Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 804 (9th Cir. 2007).

3 To state a claim for vicarious liability, Rearden must allege facts plausibly showing that
4 the defendants had “(1) the right and ability to supervise the infringing conduct and (2) a direct
5 financial interest in the infringing activity.” *Visa*, 494 F.3d at 802. Rearden cannot shoehorn the
6 facts regarding the Studios’ vendor-vendee relationship with DD3 into either of the required
7 elements.

8 **1. Rearden Does Not Allege That Any Studio Had Both The Legal Right**
9 **And Practical Ability To Supervise DD3’s Use Of Infringing Software**

10 The “right and ability” test of the first element of vicarious liability has two components,
11 both of which Rearden must satisfy. Rearden must plausibly allege that each Studio had the “legal
12 right to stop or limit [DD3’s] directly infringing conduct;” and that each Studio had “the practical
13 ability to do so.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173-74 (9th Cir. 2007).

14 Rearden’s allegations fail on both counts.

15 With respect to the “legal right,” Rearden alleges only that DD3 provided its services
16 pursuant to “contracts” that allegedly gave each Studio “the unrestricted right to cancel ‘any
17 portion of the Services.’” Disney FAC ¶¶ 137, 168; Fox FAC ¶ 133; Paramount FAC ¶ 115. But
18 that is true of virtually every service agreement. The Ninth Circuit held in *Amazon.com* that, even
19 though Google had the legal right under its “AdSense” agreements to “terminate partnerships with
20 entities that violate others’ copyrights,” that contractual power did “not give Google the right to
21 stop direct infringement by third-party websites.” 508 F.3d at 1173-74 (internal quotations
22 omitted). The court held that Google was differently situated from Napster, which had both the
23 right and ability to stop its users’ infringements through the service by terminating their accounts
24 and blocking their access to the service. *Id.* (citing *Napster*, 239 F.3d at 1023-23).

25 In this case, Rearden does not allege that any Studio had the contractual right to control the
26 selection or operation of the software DD3 used or otherwise had any involvement in the process
27 of operating the equipment that DD3 used to supply its services.

28

1 Rearden similarly fails to allege that any Studio had the *practical ability* to supervise the
2 loading of MOVA Contour into RAM. *Amazon.com* makes clear that the existence of a
3 contractual right to terminate a contract based on a counter-party's infringing conduct is not the
4 same thing as the practical ability to police that conduct. 508 F.3d at 1174. Here, the FACs allege
5 only that the Studios (through the directors) had the practical ability to and did control the actor's
6 facial performance, not that they policed or controlled the selection, licensing, or operation of the
7 MOVA Contour software. For example, the FACs allege that the Studios "initiated and scheduled
8 each facial *performance*," "supplied *performers* to provide *facial performances* for capture by
9 DD3 using the [MOVA] Contour program," "supplied a *director* to control and direct the actions
10 of DD3 in providing facial performance capture using the [MOVA] Contour program," the
11 director controlled the beginning and ending of each *take*, and the Studios (or persons or entities
12 working on their behalf, i.e., the director or other creative personnel) chose the specific "Selects"
13 from among the output files. Disney ¶¶ 131-133, 136; Fox FAC ¶¶ 127-129, 132; Paramount FAC
14 ¶¶ 109-111, 114 (emphases added). Rearden also points to the Studios' argument against the
15 original copyright claims that the director and actor provide "the lion's share of the creativity" in
16 creating the expressive components of the output file, which were the facial performances. Disney
17 FAC ¶ 133; Fox FAC ¶ 129; Paramount FAC ¶ 111.

18 Rearden does not allege that any Studio had any interaction with the technical aspect of the
19 MOVA Contour system or the software itself. On the contrary, all of the practical hands-on
20 involvement is alleged to rest, and could only rest, with the vendor, DD3. Rearden specifically
21 alleges that the MOVA "Contour system has no 'operating manual'" and that DD3 was only able
22 to use it because it hired former Rearden employees. Disney FAC ¶ 60; Fox ¶ 61; Paramount ¶
23 58. It is not plausible that the Studios had the practical ability to supervise the technical aspects of
24 the facial motion capture or DD3's actions in selecting, licensing, or operating the software it uses
25 to provide services to its customers.

26 Rearden tries to rely on this Court's opinions in *Oracle v. Hewlett Packard* as support for
27 its claims. See Disney FAC at p.60, n.44; *id.* at p.68, n.53. But those opinions underscore the
28 deficiency in Rearden's claims. Oracle alleged HP was vicariously liable for the provision of

1 infringing copies of Oracle software by an HP subcontractor, Terix, to customers jointly serviced
2 by HP and Terix. The Court dismissed Oracle’s original vicarious liability claim because it
3 premised HP’s practical ability to control Terix’s alleged infringement simply on the fact that
4 “HP took no steps to stop its subcontractor” from infringing. *Oracle*, 2016 WL 3951653, at *6
5 (quoting Oracle Compl.). Oracle then amended its complaint to allege that HP “had the authority
6 and practical ability *to observe and evaluate* services provided by Terix” and “to require Terix to
7 remedy the services or (at HP’s discretion) to terminate Terix’s provision of services to the
8 customer.” *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-cv-01393-JST, 2017 WL
9 2672113, at *3 (N.D. Cal. Jan. 19, 2017) (emphasis added). HP had the ability “to observe and
10 evaluate” because HP and Terix jointly serviced the customer accounts where the direct
11 infringements occurred. In this respect, HP’s alleged “right and ability” was similar to that of the
12 swap meet operator in *Fonovisa*, where the Ninth Circuit emphasized the operator was alleged to
13 “wield[]” control over the swap meet vendors’ direct infringement because it could “police” those
14 vendors’ conduct. *See id.* at *2 (discussing *Fonovisa*, 76 F.3d at 263).

15 Rearden, in contrast, does not and cannot allege that the Studios had any opportunity “to
16 observe and evaluate” or ability to “police” DD3’s selection, licensing, or operation of the MOVA
17 Contour software. Rearden does not allege that any Studio knew what software DD3 was using or
18 whether it was licensed, or that any Studio interacted with the software at all. As noted, all of the
19 allegations about the director’s involvement in the facial motion capture process involve only
20 directing the facial performance and selecting from output file images.

21 Rearden’s “right and ability” allegations fail to satisfy the control standards, and its
22 vicarious liability claims therefore fail.

23 **2. Rearden Does Not Allege That Any Studio Obtained A Direct Financial**
24 **Benefit From DD3’s Loading Of Unlicensed Software Into RAM**

25 The direct financial benefit prong requires that the defendant’s “economic interests” be
26 “intertwined with the direct infringer’s,” such as where the infringing material acts as a “draw” for
27 the defendant’s customers. *Fonovisa*, 76 F.3d at 262, 263.

28

1 Rearden makes the bald assertion that the Studios had an “obvious and direct financial
2 interest in exploitation of Rearden’s copyright.” Disney FAC ¶¶ 138, 169; Fox FAC ¶ 134;
3 Paramount FAC ¶ 116. But Rearden fails to allege a *direct* connection between the alleged
4 infringement, namely, DD3 loading unlicensed software into RAM, and the alleged financial
5 benefit, “draw[ing] a wider audience to” the Studios’ movies. Disney FAC ¶¶ 138, 169; Fox FAC
6 ¶ 134; Paramount FAC ¶ 116.

7 The relationship that the FACs assert between loading the MOVA Contour into RAM and
8 the ultimate appearance on screen of “believable and compelling” CG characters that “draw a
9 wider audience to” theaters is highly attenuated. Disney FAC ¶¶ 138, 169; Fox FAC ¶ 134;
10 Paramount FAC ¶ 116. The MOVA Contour software does not load into RAM and capture a
11 facial performance that is then pasted into a movie. Far from it. First, the software must be loaded
12 into RAM when DD3 starts the MOVA system. Disney FAC ¶ 28; Fox FAC ¶ 28; Paramount
13 FAC ¶ 26. Then, an actor must provide his or her facial performance, which the MOVA system
14 must capture. Disney FAC ¶ 33; Fox FAC ¶ 33; Paramount FAC ¶ 31. Then, the performance
15 must be processed into a Tracking Mesh output file, i.e., a computer file that, when rendered on
16 screen, plots the points of a 3D mesh of the actor’s facial movements. Disney FAC ¶¶ 33, 35; Fox
17 FAC ¶¶ 33, 35; Paramount FAC ¶¶ 31, 33. Then, the Tracking Mesh must be “retargeted,” i.e.,
18 used as a point of reference for the actor’s facial movements onto a 3D computer bust. Disney
19 FAC ¶¶ 36, 43; Fox FAC ¶¶ 36, 43; Paramount FAC ¶¶ 34, 41. Then, the retargeted 3D bust must
20 be processed by computer artists using different computers.

21 Rearden tries to minimize much of this work as mere “texturing and lighting.” Disney
22 FAC ¶ 55; Fox FAC ¶ 55; Paramount FAC ¶ 53. But the materials the FACs incorporate by
23 reference highlight that finalizing the 3D bust involves a tremendous number of additional steps.
24 *See* Dkt. 37, Ex. 4 (*Deadpool* Blu-ray featurette (incorporated into Fox FAC), describing the
25 extensive process to create CG Colossus character); *id.* Ex. 10 (“Ted” talk on “How Benjamin
26 Button Got His Face,” incorporated into all FACs, describing extensive process after MOVA
27 facial captures for transforming Brad Pitt into CG Benjamin Button);
28 https://www.youtube.com/watch?v=DKlbaU_uWpI&feature=youtu.be (“Terminator: Genisys:

1 Creating a Fully Digital Schwarzenegger,” incorporated into Paramount FAC ¶ 95 & n.30,
2 illustrating extensive process of creating CG face). The results of those many processes then must
3 go through multiple other processes until final images are shown on a movie screen in conjunction
4 with the actor’s overall performance and numerous additional elements that go into making a
5 movie. There is nothing “direct” about the linkage between loading a software program into RAM
6 and a Studio generating revenue from a completed motion picture.

7 At bottom, Rearden’s contention is that the Studios received a “direct financial benefit”
8 because they used DD3 as a vendor for doing work on movies the Studios hoped would draw
9 consumers. The same can be said for any party that goes to a vendor to provide services for its
10 business. Rearden has not plausibly alleged that DD3’s use of unlicensed software “constitutes a
11 draw” for moviegoers, as opposed to providing “an added” (and extremely attenuated) “benefit” to
12 the finished movie, or that any Studio was drawn to use DD3 as a vendor because it was using
13 unlicensed software. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (vicarious liability
14 claim failed because AOL did not “attract[] or retain[] subscriptions because of” infringement of
15 plaintiff’s works).

16 **B. The Studios Are Not Liable For Contributory Copyright Infringement**

17 “Contributory infringement originates in tort law and stems from the notion that one who
18 directly contributes to another’s infringement should be held accountable.” *Fonovisa*, 76 F.3d at
19 264. To plead a claim for contributory copyright infringement, Rearden must plausibly allege that
20 each Studio (1) “induce[d], cause[d], or materially contribute[d] to” DD3’s alleged infringing
21 conduct, and that it did so with (2) “knowledge of [DD3’s] infringing activity.” *Visa*, 494 F.3d at
22 795. Rearden fails to plead sufficient facts on either prong.

23 **1. Hiring A Vendor Does Not Materially Contribute To The Vendor’s** 24 **Infringing Use Of Unlicensed Software**

25 Under Ninth Circuit law, “material contribution turns on whether the activity in question
26 ‘substantially assists’ direct infringement.” *Louis Vuitton Malletier, S.A. v. Akanoc Solutions,*
27 *Inc.*, 658 F.3d 936, 943 (9th Cir. 2011).
28

1 Rearden alleges that each Studio did various things to direct actors' facial performances
2 and contract with DD3 for special effects services. None of these alleged acts did anything to
3 substantially assist DD3's use of unlicensed software. Rearden asserts that the Studios
4 "contracted with DD3 for facial performance capture services," "initiated and scheduled each
5 facial performance capture session with DD3 using the [MOVA] Contour program," provided
6 performers and directors for the facial performance, decided when to start and end each take, and
7 chose output files ("Selects") for further processing. Disney FAC ¶¶ 141-150, 172-181; Fox FAC
8 ¶¶ 136-145; Paramount FAC ¶¶ 118-127. None of this conduct, however, involved the selection,
9 licensing, or operation of software, or facilitated or induced DD3's infringement. DD3 loaded the
10 Contour software program into computers' RAM without any knowledge, assistance, or
11 encouragement from any Studio.

12 The Studios' involvement with DD3 does not come close to constituting substantial
13 assistance. In other cases, courts have held that a defendant's conduct with a far greater
14 connection to a third-party's infringement did not constitute a material contribution. In *Visa*, for
15 example, Perfect 10 alleged that the defendants' processing of payments to third-party sites that
16 hosted infringing images materially contributed to that infringement. The Ninth Circuit, however,
17 held that although the defendants' conduct was alleged to "make it easier for websites to profit
18 from this infringing activity," the defendants did not materially contribute to the infringement
19 because they "do not help locate and are not used to distribute the infringing images." *Visa*, 494
20 F.3d at 796.² Rearden's claim similarly fails because it alleges material contribution only from the
21 Studios doing business with DD3 and hiring directors to direct actors' facial performances.

22

23 ² See also *Demetriades v. Kaufman*, 690 F. Supp. 289, 293-94 (S.D.N.Y. 1988) (fact that realty
24 firm and real estate agent brokered a real estate transaction that ultimately was connected to
25 infringement was not enough to constitute a material contribution); *Viesti Assocs., Inc. v. Pearson*
26 *Educ., Inc.*, No. 12-cv-02240-PAB-DW, 2013 WL 4052024, at *7 (D. Colo. Aug. 12, 2013)
27 (holding that allegations that defendant transmitted infringing photographs to third parties who
28 reproduced them was not sufficient to establish material contribution); *Med-Systems, Inc. v.*
Masterson Mktg., Inc., No. 11CV695 JLS (BLM), 2011 WL 5873399, at *7 (S.D. Cal. Nov. 23,
2011) (no material contribution by CEO of company alleged to have infringed plaintiff's
photograph where allegations only showed that defendant was "involved in all of the contracting"
with plaintiff and conclusorily stated that he "authorized all of the unauthorized usage of images").

1 Rearden does not allege that the Studios directed DD3 to select or license any type of software for
2 its facial motion capture services, or that the Studios had any involvement with DD3's claimed
3 infringing use of the software. If the Studios' relationship with DD3 suffices to constitute material
4 contribution, it is difficult to imagine a vendee whose commercial relationship with a software-
5 using vendor would not similarly amount to a material contribution. *See id.* at 800 (cautioning
6 against expanded conception of material contribution that would expose "peripherally-involved
7 third parties" to claims of contributory infringement).

8 In sum, Rearden fails to allege material contribution, which requires dismissal of its
9 contributory copyright infringement claims.

10 **2. Rearden Fails To Allege The Requisite Knowledge By The Studios Of**
11 **Infringing Activity**

12 "Contributory liability requires that the secondary infringer 'know or have reason to know'
13 of direct infringement." *Napster*, 239 F.3d at 1020. *Luvdarts, LLC v. AT & T Mobility, LLC*, 710
14 F.3d 1068, 1073 (9th Cir. 2013). In *Oracle*, the complaint was "replete with specific factual
15 allegations including quotes from [defendant's] internal presentations and HP's employee's
16 emails, from which [defendant's] actual knowledge of [the direct infringer's] infringing acts
17 [could] be plausibly inferred." 2016 WL 3951653, at *5. That is not the case here.

18 (a) *Rearden's General Allegations Common To All Studios Do Not*
19 *Establish Knowledge*

20 Rearden alleges the Studios had actionable knowledge that DD3 was loading unlicensed
21 software into RAM because they (1) reviewed output files marked with a MOVA Contour
22 copyright notice, (2) performed unspecified "intellectual property due diligence" before
23 contracting with Rearden or DD3, and (3) continued to contract with DD3 even after Rearden
24 alleged ownership of MOVA Contour in the *SHST v. Rearden* litigation. Disney ¶¶ 3,100, 108,
25 116; Fox FAC ¶¶ 6, 98, 107, 117; Paramount FAC ¶¶ 5, 92. None of these allegations,
26 individually or in combination, establishes the requisite knowledge.

27 First, Rearden makes much about the purported presence of a Rearden copyright notice in
28 what the FACs describe as "the first frame" of Skin Texture and Makeup Pattern output files.

1 Disney FAC ¶¶ 44, 100, 108, 116; Fox FAC ¶¶ 44, 98, 107, 117; Paramount FAC ¶¶ 42, 92. Even
2 assuming that Rearden plausibly alleged a director saw the claimed copyright notice—an
3 implausible contention, as discussed below—that would provide information only that Rearden
4 claimed copyright over some aspect of the computer software. It would not tell the person seeing
5 the notice anything about whether the person using software had licensed it. Moreover, the
6 Court’s Order makes clear that the MOVA Contour software is *not* the same thing as the output
7 files. Order at 7. Accordingly, a copyright notice affixed to an output file would not provide
8 notice to anyone, much less creative personnel alleged to have reviewed output files, that Rearden
9 was claiming copyright on the underlying MOVA Contour software program rather than the
10 output file. Moreover, a notice indicating a *Rearden* copyright on an output file is misleading,
11 given that Rearden has no copyright claim in the output file. So Rearden’s allegations about
12 directors or other creative personnel having seen the alleged “first frame” notices do not plead any
13 plausible level of knowledge that DD3 was using unlicensed software.

14 The FACs do not even plausibly plead that a director or other Studio representative
15 actually saw such a notice. The FACs are cryptic about who would actually see these “first frame”
16 notices, or when or how they would see them. A document constructed for the FACs—and
17 included in all three FACs—juxtaposes a panel with 25 of these “first frames” with what appear to
18 be 25 separate images of the actor Dan Stevens that the FACs describe as “the second frame.”
19 Disney FAC ¶ 44; Fox FAC ¶ 44; Paramount FAC ¶ 42.³ Rearden says that the “copyright notice”
20 and “date and time stamping” on the “first frame” would be available to “any *Contour program*
21 *end-user*,” which presumably would mean DD3 personnel using the MOVA Contour system. The
22 FACs also do not say how these “first frame” “notices” would be displayed. The FACs appear to
23 suggest that directors and other Studio personnel reviewed Skin Texture and Makeup Pattern
24 output files as moving images, e.g., in “QuickTime video file[s].” Paramount FAC ¶ 96 (allegedly

25 _____
26 ³ It appears from the clapperboard time in front of each photographic image of Mr. Stevens that
27 these are photos taken simultaneously from each of the cameras mounted on the MOVA rig. The
28 FACs do not explain whether the “first frame” that corresponds to each of these photographic
images is displayed when the image is displayed on screen, or whether that “first frame” data
(including Rearden’s copyright notice) is metadata that is not ordinarily visible to someone
looking at an image generated using computer software.

1 showing photographs of Paramount animation team “in a projection room viewing faces on a
 2 screen”). If directors or other creative types were reviewing moving picture files, then the “first
 3 frame” “notice”—even assuming it was displayed—would have gone by in a nanosecond. Motion
 4 pictures generally move at a minimum of 24 frames *per second*; Rearden alleges that “all
 5 subsequent frames” (after the “first frame”) would include only the actor’s facial performance.
 6 Disney FAC ¶ 44; Fox FAC ¶ 44; Paramount FAC ¶ 42. *See also* Disney FAC ¶ 122 (“The *still*
 7 images of video clips . . . do not convey the extraordinary results achieved *in motion*” from using
 8 the MOVA Contour system) (emphasis in original). It is implausible that the first frame would
 9 even be viewed by a director reviewing “Makeup Pattern” or “Skin Texture” video clips, even if
 10 the copyright notice and other technical information on the first frame were displayed. It is even
 11 more implausible that a director reviewing such clips for their creative properties would stop to
 12 read the tiny notice on that first frame.⁴

13 Second, Rearden’s allegations about Studio IP “due diligence” do not suffice to establish
 14 knowledge that DD3 was loading unlicensed software into RAM. Disney ¶¶ 100, 108, 116; Fox
 15 FAC ¶¶ 98, 107, 117; Paramount FAC ¶¶ 92. A copyright registration on MOVA Contour
 16 software did not even issue to Rearden until February 2016. FACs Ex. 1. Only two of the movies
 17 in issue (*Beauty and the Beast* and *Deadpool*) are even alleged to have involved some ongoing
 18 services as of February 2016, and for both movies, Rearden alleges the contractual relationship
 19 with DD3 started three years earlier. Disney FAC ¶ 112; Fox FAC ¶ 112. Moreover, the FACs
 20 allege that ownership of the MOVA Contour assets (including the software) changed hands at
 21 least three times between August 2012 and April 2013, *see* Disney FAC ¶¶ 76-83; Fox FAC ¶¶ 78-
 22 85; Paramount FAC ¶¶ 74-81, which would make tracking licensing of the software a fool’s
 23 errand. Rearden’s “IP due diligence” allegation does not plausibly establish any Studio’s

24 _____

25 ⁴ Similarly, while Rearden asserts the Studios deliberately “removed” Rearden’s copyright notice
 26 and replaced it with their own, Disney FAC ¶ 121; Fox FAC ¶¶ 114-116; Paramount FAC ¶¶ 95-
 27 96, Rearden actually is alleging nothing more than the Studios put their own copyright notices on
 28 their movies or DVD featurettes. Rearden does not allege that the Studios went into the header or
 other metadata portion of any output file and replaced Rearden’s copyright notice with their own.
 The fact that a Studio would put its own copyright notice on a movie or DVD does not indicate
 any knowledge that its vendor is using unlicensed software to provide its services.

1 knowledge that DD3 was loading unlicensed software into RAM. Nor is it plausible that a
2 customer would check whether the software a vendor uses is licensed.

3 Third, the existence of the *SHST v. Rearden* litigation did not give the Studios notice that
4 DD3 was using unlicensed software. The Court did not announce its tentative conclusions that
5 Rearden owned the MOVA assets until the conclusion of the bench trial in December 2016, and
6 did not issue its final decision until August 2017, which was after all the movies in issue had been
7 released.

8 (b) *Rearden's Additional Allegations Specific To Individual Studios Do*
9 *Not Establish Knowledge*

10 **Disney:** Rearden alleges that Disney had actionable knowledge that DD3 was using
11 unlicensed software based on its purportedly being notified of the March 2013 letter from
12 Rearden's counsel to La Salle three years before Rearden registered its software. Disney FAC
13 ¶ 100. Even if the March 2013 letter had been sent and received, it did not put Disney on notice of
14 the infringement of any copyright, much less a purported copyright in the MOVA Contour
15 software program (which was not even registered until 2016, *id.* Ex. 1). In *Luvdarts*, the plaintiff
16 sent the defendants a list "of every title copyrighted by [plaintiff]" without identifying "which of
17 [the] titles were infringed, who infringed them, or when the infringement occurred." 710 F.3d at
18 1072-73. The Ninth Circuit held this notice was insufficient to give a defendant notice for
19 purposes of contributory infringement. *Id.* at 1073. The same is true of the March 2013 letter.
20 Aside from being sent nearly three years before Rearden registered a copyright, the letter says
21 nothing about software being infringed.

22 **Fox:** Rearden alleges that Fox had actionable knowledge because Tim Miller, the director
23 of *Deadpool*, knew Mr. Perlman and had worked with Rearden in 2011 (years before the filming
24 of *Deadpool* or the *SHST v. Rearden* litigation) on a project called *Batman: Arkham City*. Fox
25 FAC ¶ 117. These allegations show nothing about Mr. Miller or Fox knowing that DD3 was using
26 unlicensed MOVA Contour software. Rearden alleges only that Mr. Miller "notified Mr. Perlman
27 of movie and VFX projects he had been working on." *Id.* Rearden conspicuously does not allege
28

1 that Mr. Perlman told Mr. Miller (or anyone affiliated with Fox) anything about Rearden's
2 contention that DD3 was using unlicensed software.

3 **Paramount:** Rearden does not allege any additional facts regarding Paramount's
4 knowledge. Hence, Rearden's contention that Paramount knew DD3 was loading unlicensed
5 software into RAM fails for the reasons discussed in the preceding subsection.

6 **II. Rearden's Amendments Do Not Cure Its Failure To Allege Direct Patent**
7 **Infringement**

8 Rearden's original complaint alleged that Disney directly infringed the Rearden patents
9 because it "was a customer of" DD3, "contracted for 'the ability to place the [MOVA Contour]
10 system as a whole into service,'" and "directed and controlled DD3's conduct." Dkt. 47 at 14-15,
11 16-17. The Court dismissed the claim because Rearden admitted that Disney itself used no part of
12 the claimed system: "DD3 practiced all limitations of the claims of the patents-in-suit subject to
13 Disney's direction and control." Order at 10 (quoting Dkt. 47 at 23 n.35). The Court rejected
14 Rearden's reliance on *Centillion Data Systems, LLC v. Qwest Commc'ns Int'l, Inc.*, 631 F.3d
15 1279, 1284 (Fed. Cir. 2011), because in that case, the infringing "customers 'used' the system"
16 themselves by creating queries that were executed by the back-end system. Order at 11. Disney,
17 by contrast, "didn't 'use' the MOVA system or interact with it in any way." *Id.* *Centillion* is
18 irrelevant in this case.

19 Rearden's amended direct infringement claim does not allege that Disney practiced the
20 MOVA system or any part of it. Rearden instead repeats its prior allegation that Disney should be
21 directly liable because it hired DD3 and told DD3 personnel when to start and stop taking a facial
22 motion capture. These are a reprise of Rearden's allegations about Disney's purported "right and
23 ability" and "material contribution" on the secondary copyright claims. *See* Disney FAC
24 ¶¶ 198-200 (alleging Disney "transmitted a request to DD3 to initiate and schedule each facial
25 performance capture session" and "supplied a director to control and direct the actions of DD3" in
26 using MOVA). These allegations do not state a claim for direct infringement.

27 First, Rearden has not added anything new to its prior deficient claim for direct
28 infringement. Rearden alleged in its original complaint that Disney directed and controlled DD3's

1 conduct because it “had the right and ability to supervise and control the infringing conduct.” Dkt.
2 ¶ 121. Adding more words to describe Disney’s purported direction and control does not supply
3 the key missing allegation for a direct infringement claim: that Disney itself used the MOVA
4 system. Rearden cannot cite any Federal Circuit case finding direct infringement against a party
5 like Disney that practiced no part of the invention.

6 Second, Rearden cannot overcome the deficiency in its pleading by parroting the language
7 of *Centillion*. When the Federal Circuit explained that a *Centillion* customer “puts the system as a
8 whole into service, *i.e.*, controls the system and obtains benefit from it”, the court was speaking of
9 the customer’s direct control of the patented system. *Centillion*, 631 F.3d at 1285. The customer
10 in *Centillion* directly controlled one element of the patented invention—the personal computer—
11 and used that element in order to put the system into service. The customer sat down at a terminal,
12 initiated a query or subscription, sent it over the internet to the phone company computer, and
13 caused that computer to infringe. The *Centillion* customers would not have infringed had they
14 possessed no part of the claimed system and, instead, called the phone company and asked
15 customer service representatives to run reports on the infringing system. Rearden alleges only that
16 Disney requested DD3 to perform facial capture. That is not direct infringement.

17 Third, the Federal Circuit has made clear that *Centillion* addresses a particular
18 circumstance and should not be read broadly to create a new form of infringement. Specifically,
19 the Federal Circuit has explained that “it was undisputed in *Centillion* that different parties
20 possessed different claim elements.” *Grecia v. McDonald’s Corp.*, No. 2017-1672, 2018 WL
21 1172580, at *3 (Fed. Cir. Mar. 6, 2018). *See also Intellectual Ventures I LLC v. Motorola*
22 *Mobility LLC*, 870 F.3d 1320, 1328 (Fed. Cir. 2017) (*Centillion* “resolve[d] infringement of
23 ‘system comprising’ claims where components of the claimed system were ‘in the possession of
24 more than one actor.’”). *Centillion* does not apply where a defendant like Disney is not “in
25 possession of any” part of the claimed system. *Grecia*, 2018 WL 1172580, at *3 (“We decline the
26 parties’ invitations to expand our doctrine on the control aspect of ‘use’ of system claims under §
27 271(a)”). Permitting Rearden’s claim to proceed would dramatically expand the scope of what
28 constitutes direct infringement under 35 U.S.C. § 271(a).

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

There is no basis in the law for a direct infringement claim against a party, such as Disney, that practiced no part of the patents-in-suit and possessed no part of the system allegedly covered by the patents-in-suit. The claim should be dismissed with prejudice.

CONCLUSION

Rearden’s claims for secondary copyright infringement and direct patent infringement should be dismissed. Because Rearden has been granted leave to amend already, and because any further amendment would be futile, the claims should be dismissed with prejudice. *Rouse v. U.S. Dep't of State*, 567 F.3d 408, 418–19 (9th Cir. 2009) (dismissal without leave to amend is appropriate where “any attempt to amend would be futile”).

DATED: April 5, 2018

MUNGER, TOLLES & OLSON LLP

By: /s/ Kelly M. Klaus
 KELLY M. KLAUS

Attorneys for Defendants