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14

15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**
17 **WESTERN DIVISION**

18 ALFONSO RIBEIRO,
19 Plaintiff,

20 v.

21 TAKE-TWO INTERACTIVE
SOFTWARE, INC.; 2K SPORTS,
22 INC.; 2K GAMES, INC.; VISUAL
CONCEPTS ENTERTAINMENT;
23 and Does 1 through 50,
24 Defendants.

CASE NO. 2:18-cv-10417 RGK (ASx)
The Honorable R. Gary Klausner

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS’ MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM AND SPECIAL MOTION
TO STRIKE (ANTI-SLAPP)
PLAINTIFF’S COMPLAINT**

Complaint Filed: December 17, 2018
Hearing Date: March 18, 2019
Time: 9:00 a.m.
Courtroom: 850, 255 East Temple St.

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1 This lawsuit suffers from a host of issues ranging from a lack of plausible
2 ownership, to a lack of substantial similarity, to preemption by the Copyright Act.
3 Fundamentally, it conflicts with the First Amendment as it attempts to impose
4 liability, and thereby chill creative expression, by claiming rights that Plaintiff does
5 not hold. It should be dismissed. **First**, Plaintiff admits to creating the alleged
6 “Dance” for the *Fresh Prince of Bel-Air* series, but did not try to register that “Dance”
7 with the Copyright Office—presumably because he knows that he does not own the
8 copyright. The copyright notice for the episode in which it first appeared (as alleged
9 in the Complaint) lists solely “National Broadcasting Company, Inc.” Thus,
10 Plaintiff’s copyright claims fail as his allegation that the “Dance” was created for an
11 episode owned by NBC means that he has not plausibly alleged ownership of a valid
12 copyright. Indeed, the Copyright Office knows such performances are not owned by
13 the performers. When Plaintiff tried to register Variation A of the alleged dance, the
14 Office raised a similar question because it was a performance of Plaintiff on *Dancing*
15 *with the Stars*, to which it was implausible that Plaintiff owned the copyright.¹

16 **Second**, the movements that are the sole basis for Plaintiff’s copyright claims
17 are not protectable. **Indeed: the Copyright Office already has rejected Plaintiff’s two**
18 **copyright applications (Variations B and C) that only show the movements at issue**
19 **(rather than additional content) because each is “a simple dance routine” that “is**
20 **not registrable as a choreographic work.”** Cendali Decl. Exs. M, N. This is because
21 individual dance steps and simple dance routines made up of multiple steps are
22 building blocks of free expression, and they are not copyrightable. Rather, they are
23 free for all to use, perform, and enjoy. Yet, contrary to the Copyright Office’s
24 decision, Plaintiff seeks to monopolize simple movements by arguing that Take-
25 Two’s basketball video game, *NBA 2K*, infringes his rights because of its So Fresh
26 celebratory dance (one of many tiny customizations that the in-game basketball

27 ¹ Declaration of Dale M. Cendali, dated Feb. 13, 2019, (“Cendali Decl.”) Ex. L. To
28 Take-Two’s knowledge, the Office has not taken action on the application for
Variation A because it is waiting for a response from Plaintiff as to his ownership.

1 players may perform). Plaintiff does not claim that *NBA 2K*'s players resemble him or
2 that any other parts of the game infringe his rights.

3 Importantly, none of the "Variations" are substantially similar to *NBA 2K*.
4 When comparing two works, courts filter out unprotectable elements, and then
5 compare any protectable ones that remain. As an initial matter, any material that
6 Plaintiff does own must be filtered out. Thus, as it is not plausible that he owns the
7 "Dance," which admittedly premiered on *Fresh Prince*, the "Dance" cannot be
8 considered in determining substantial similarity.

9 Moreover, regardless of ownership, it is well-established that the building
10 blocks of expression—words and short phrases, geometric shapes, colors, and dance
11 steps and simple routines—are not copyrightable as protecting them would prevent
12 others from creating new works in contravention of the Constitutional mandate from
13 which copyright springs. In dance, this is apparent from (a) the legislative history of
14 the Copyright Act, which expressly states that "simple [dance] routines" are not
15 copyrightable; (b) the Copyright Office's regulations, which do not permit individual
16 dance steps or simple routines to be registered (as occurred here); and (c) Ninth
17 Circuit case law holding that such elements are not protectable. The Copyright
18 Office's refusal to register the dance at issue here reflects this principle.

19 Further, copyright does not protect mere ideas and concepts, but rather only the
20 expression of those ideas. The general concept of Plaintiff's alleged dance is just such
21 an unprotectable idea as Ninth Circuit courts have held in similar situations. As the
22 movements are not protectable as a matter of law, there is nothing to compare to *NBA*
23 *2K*, and the works necessarily are not substantially similar.

24 In addition, even without this filtering, comparing the three "Variations" and
25 *NBA 2K* shows that there is no substantial similarity. The Variations are (A) Plaintiff
26 performing on *Dancing with the Stars*, (B) Plaintiff appearing on the *Graham Norton*
27 *Show*, and (C) Plaintiff playing golf at the American Century Celebrity Golf
28 Tournament. Plaintiff only claims infringement for the short movements at issue.

1 *NBA 2K*, by contrast, is a basketball simulation video game with myriad basketball
 2 players, arenas, and movements, none of which Plaintiff has accused of infringement.
 3 The works, thus, cannot be substantially similar as a whole. Further, each variation of
 4 the movements at issue is different from Take-Two's So Fresh celebratory dance as
 5 the arm and leg movements differ. The differences are particularly pronounced given
 6 how short the movements are. The works are not substantially similar.²

7 **Third**, Plaintiff's non-copyright claims are unavailing. Under California's anti-
 8 SLAPP statute, when state law claims are asserted against an expressive work like
 9 *NBA 2K*, it is *plaintiff's* burden to prove a probability of prevailing to avoid chilling
 10 the valid exercise of free speech rights.³ Plaintiff cannot do so:

- 11 • All of the non-copyright claims involve the same steps and seek to address the
 12 same alleged copying as Plaintiff's copyright claims and, thus, they are
 13 preempted by the Copyright Act and should be dismissed for this reason alone.
- 14 • Plaintiff's right of publicity claims also are barred by the First Amendment
 15 under California's Transformative Use test as *NBA 2K* has distinctive and
 16 expressive content beyond the alleged use of the steps.
- 17 • Plaintiff's unfair competition claims similarly are barred by the First
 18 Amendment based on *Rogers v. Grimaldi* principles because So Fresh is
 19 artistically relevant to *NBA 2K*, and Plaintiff does not point to any expressly
 20 misleading conduct by Take-Two beyond its alleged use of the steps.

21 **Finally**, Plaintiff's overreaching extends to the remedies he seeks: (a) punitive
 22 damages are not available on his federal claims; (b) California's unfair competition
 23 law only provides for the award of restitution, not general damages; and (c) because
 24 Plaintiff applied to register his copyrights only after the alleged infringement
 25 commenced, attorney's fees are not available on his copyright claims.

26 ² Similarly deficient, Plaintiff asserts that the game in which So Fresh first appeared
 27 was released in 2015 and Variation C was created in 2016. There can be no
 infringement of Variation C as So Fresh *predates* it.

28 ³ The federal unfair competition claim fails for the same reasons as the state claims.

1 Take-Two respectfully requests that the Complaint be dismissed with prejudice
2 as Plaintiff chose not to amend it after being informed of the bases for this Motion.

3 I. STATEMENT OF ALLEGED FACTS

4 Plaintiff alleges that he created a dance in 1991 and “performed it on *The Fresh*
5 *Prince of Bel-Air* during the episode *Will’s Christmas Show*.” Compl. ¶ 15. He did
6 not attempt to register it, likely because he does not own the copyright—the episode
7 has a copyright notice that lists solely “National Broadcasting Company, Inc.”
8 Cendali Decl. ¶ 8, Ex. I. Instead, he sought to register three subsequent “Variations,”
9 *id.* Exs. L–N, two of which the Copyright Office has *refused* to register due to a lack
10 of copyrightability. Rejected were, Variation B—a clip from the *Graham Norton*
11 *Show*, in which the “Dance” appears 12 seconds into the video for 21 seconds, *id.* Ex.
12 E—and Variation C—a video taken during the American Century Celebrity Golf
13 Tournament, in which the “Dance” is performed for 6 seconds, *id.* Ex. H. Variation
14 A is a one-minute, 20-second routine that Plaintiff performed on *Dancing With the*
15 *Stars*, which includes dance movements not claimed to be infringed here. *Id.* Ex. B.
16 The “Dance” appears 54 seconds into the video, and is performed for 10 seconds.

17 Plaintiff alleges that So Fresh in *NBA 2K* infringes his rights. Compl. ¶ 1. *NBA*
18 *2K* is a basketball simulation video game series, wherein players can explore the
19 game’s narrative and play virtual basketball against a variety of opponents. Cendali
20 Decl. Ex. J. Within the game and its narratives, users create and customize their
21 fictional player, who competes against real-world players. During the game, users
22 may unlock and use celebratory dances like So Fresh. *Id.*⁴

23 II. LEGAL STANDARDS

24 A Complaint “must contain sufficient factual matter, accepted as true, to ‘state a
25 claim to relief that is plausible on its face,’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678

26 ⁴ Plaintiff references a movement called “Ride the Wave,” Compl. ¶ 3, but it is not
27 part of his claims, *id.* ¶¶ 38–91, and Take-Two is unsure of the reference. Thus,
28 Plaintiff has not alleged it infringes. See *Richtek Tech. Corp. v. UPI*
Semiconductor Corp., No. 09 Civ. 05659, 2011 WL 166292, at *2–3 (N.D. Cal.
Jan. 19, 2011) (complaint dismissed that failed to identify alleged infringement).

1 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), and plead
 2 “factual content that allows the court to draw the reasonable inference that the
 3 defendant is liable for the misconduct alleged.” *Id.* “The Court must disregard
 4 allegations that are legal conclusions, even when disguised as facts.” *Hall v. Swift*,
 5 No. 17 Civ. 6882, 2018 WL 2317548, at *3 (C.D. Cal. Feb. 13, 2018). It, however,
 6 may consider works referenced in the Complaint. *See Zindel v. Fox Searchlight*
 7 *Pictures, Inc.*, No. 18 Civ. 1435, 2018 WL 3601842, at *3 (C.D. Cal. July 23, 2018);
 8 Req. J. Notice, at 1. Plaintiff cannot plead facts sufficient to support his claims.

9 Moreover, as to the state law claims, Plaintiff’s pleading failures violate
 10 California’s anti-SLAPP statute, which subjects to a special motion to strike any
 11 “cause of action against a person arising from any act of that person in furtherance of
 12 the person’s right of . . . free speech . . . in connection with a public issue.” Cal. Civ.
 13 Proc. Code § 425.16(b)(1). Such motions require a two-part analysis, both of which
 14 are satisfied here. **First**, the court determines whether “the challenged cause of action
 15 arises from activity protected under the statute.” *Baez v. Pension Consulting Alliance,*
 16 *Inc.*, No. 2:17 Civ. 01938, 2017 WL 9500979, at *2 (C.D. Cal. July 20, 2017).
 17 “California courts have interpreted this piece of the defendant’s threshold showing
 18 rather loosely . . . and have held that a court must generally presume the validity of the
 19 claimed constitutional right in the first step of the anti-SLAPP analysis.” *Greater L.A.*
 20 *Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 422 (9th Cir.
 21 2014) (internal quotation marks omitted). Here, the United States Supreme Court has
 22 held that “video games qualify for First Amendment protection,” *Brown v. Entm’t*
 23 *Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011),⁵ and all of Plaintiff’s claims hinge on
 24

25 ⁵ Creative works, like video games, routinely satisfy step one. *See Cusano v. Klein*,
 26 473 F. App’x 803, 804 (9th Cir. 2012) (first prong satisfied by television programs
 27 and video games); *see also E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547
 28 F.3d 1095, 1099 (9th Cir. 2008) (*Grand Theft Auto: San Andreas* video game
 protected); *see also Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1009 (9th Cir. 2017)
 (photographs); *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1195 (C.D.
 Cal. 2011), *aff’d*, 462 F. App’x 709 (9th Cir. 2011) (television); *de Havilland v. FX*
Networks, LLC, 21 Cal. App. 5th 845, 856 (Ct. App. 2018) (same).

1 NBA 2K’s inclusion of the “Dance,” which Plaintiff touts as being of public interest.
 2 See Compl. ¶¶ 15–18. Thus, Plaintiff’s claims are based on acts taken in furtherance
 3 of Take-Two’s free speech rights. **Second**, the burden shifts to the plaintiff to
 4 “demonstrate[] a probability of prevailing on the merits of its” claims. *GLAAD*, 742
 5 F.3d at 425. Plaintiff cannot do so. See *infra* 15–20.

6 III. ARGUMENT

7 A. Plaintiff Cannot State Direct or Contributory Copyright Claims

8 Plaintiff’s first and second causes of action assert direct and contributory
 9 copyright infringement, respectively. To state a claim of copyright infringement,
 10 Plaintiff must allege “(1) ownership of a valid copyright, and (2) copying of
 11 constituent elements of the work that are original.” *Feist Pubs., Inc. v. Rural Tel.*
 12 *Serv. Co.*, 499 U.S. 340, 361 (1991). Moreover, one of the required elements of a
 13 contributory copyright infringement claim is an underlying direct infringement claim.
 14 *Boost Beauty, LLC v. Woo Signatures, LLC*, No. 2:18 Civ. 02960, 2018 WL 5099258,
 15 at *5 (C.D. Cal. Oct. 15, 2018). Plaintiff cannot satisfy either element.

16 **As to the first element**, the Complaint refers to a single “Dance,” Compl. ¶ 1,
 17 but Plaintiff cannot plausibly allege ownership of it, which is his “burden.” See
 18 *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 962 (9th Cir. 2011); *Choyce*
 19 *v. SF Bay Area Indep. Media Ctr.*, No. 13 Civ. 01842, 2014 WL 2451122, *4–5 (N.D.
 20 Cal. June 2, 2014) (dismissing with prejudice copyright with no “well-pled factual
 21 allegations . . . that Plaintiff himself owns a valid copyright”). He claims to have
 22 created the “Dance” in 1991 for *Fresh Prince*, Compl. ¶¶ 2, 39, but the Ninth Circuit
 23 has recognized that a show’s *producers* own performances of the actors.⁶ See *Garcia*
 24 *v. Google, Inc.*, 786 F.3d 733, 743 (9th Cir. 2015) (en banc) (“The reality is that
 25 contracts and the work-made-for-hire doctrine govern much of the big-budget
 26 Hollywood and production world.”); *Lesley v. Spike TV*, 241 F. App’x 357, 358 (9th

27 ⁶ And when Plaintiff tried to register Variation A—which also was performed on a
 28 “nationally televised show”—the Copyright Office questioned Plaintiff’s
 ownership as it was likely “a work made for hire.” Cendali Decl. Ex. L.

1 Cir. 2007) (actor’s performance owned by producer as “work made for hire”).
 2 Likewise, here, the episode in which Plaintiff alleges the Dance first appeared has a
 3 copyright notice listing solely “National Broadcasting Company, Inc.” Cendali Decl.
 4 ¶ 8, Ex. I. Thus, the Complaint does not plausibly allege his ownership.

5 **As to the second element**, the works are not “substantially similar” under the
 6 two-part analysis used by courts in this Circuit—consisting of the “extrinsic test” and
 7 the “intrinsic test.” The extrinsic test requires courts to “‘filter out’ the unprotectable
 8 elements of the plaintiff’s work—primarily ideas and concepts, material in the public
 9 domain, and *scènes à faire* (stock or standard features that are commonly associated
 10 with the treatment of a given subject)”—and then compare the “protectable elements
 11 that remain” to “corresponding elements of the defendant’s work to assess similarities
 12 in the objective details of the works.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118
 13 (9th Cir. 2018). “The intrinsic test requires a more holistic, subjective comparison of
 14 the works to determine whether they are substantially similar in ‘total concept and
 15 feel.’” *Id.* A motion to dismiss should be granted where, after comparing the works,
 16 the extrinsic test is not satisfied. *Id.* (affirming dismissal where photographs were not
 17 substantially similar despite similar subject matter and pose).⁷

18 Here, Plaintiff conclusorily asserts that “players can have their characters
 19 perform the dance within the game.” Compl. ¶ 42. Yet, “the works themselves
 20 supersede any contrary allegations, conclusions or descriptions of the works contained
 21 in the pleadings.” *Chey v. Pure Flix Entm’t LLC*, No. 16 Civ. 164362, 2017 WL
 22 5479640, at *4 (C.D. Cal. Feb. 10, 2017). Once the unprotectable elements are
 23 filtered out, the works are not substantially similar as a matter of law.

24 1. Plaintiff’s Movements Are Not Protected by Copyright

25 Here, Plaintiff’s “Dance” is not protectable and, thus, there is nothing to
 26

27 ⁷ See also *White v. Twentieth Century Fox Corp.*, 572 F. App’x 475, 477 (9th Cir.
 28 2014); *Wild v. NBC Universal*, 513 F. App’x 640, 642 (9th Cir. 2013); *Thomas v.*
Walt Disney Co., 337 F. App’x 694, 694 (9th Cir. 2009); *Christianson v. West Pub.*
Co., 149 F.2d 202, 203 (9th Cir. 1945).

1 compare to assess substantial similarity. *The Copyright Office already has found*
 2 *that the “Dance” is not copyrightable* as reflected by its refusal to register Variations
 3 B and C (in which the “Dance” is the only alleged choreography). Cendali Decl. Exs.
 4 M, N.⁸ The basis for Copyright Office’s decision is clear: the “Dance” “is a simple
 5 dance routine” and, as such, “it is not registrable as a choreographic work.” *Id.*

6 The Copyright Office’s determination in this case is consistent with the long-
 7 held articulation of copyrightability used by the courts, Congress, and the Copyright
 8 Office. Courts recognize that works have elements that are not protectable as they are
 9 building blocks of creative expression that, if protected, would inhibit the creation of
 10 new works. For example, “words and short phrases” are not protectable. *Zhang v.*
 11 *Heineken N.V.*, No. 08 Civ. 06506, 2010 WL 11596643, at *4 (C.D. Cal. Sept. 29,
 12 2010). This is because “even if the word or short phrase is novel or distinctive or
 13 lends itself to a play on words,” it contains “a *de minimis* amount of authorship.” U.S.
 14 Copyright Office, Compendium of U.S. Copyright Office Practices § 313.4(C) (3d ed.
 15 2017) (“Compendium”). Similarly, “variations of long-established Chinese word
 16 characters” were not protectable as doing so would “effectively give [plaintiff] a
 17 monopoly on renditions of these five Chinese characters.” *Zhang*, 2010 WL
 18 11596643, at *5 (dismissal on the pleadings). “[B]lank forms which do not convey
 19 information are not copyrightable” as they are where information is recorded, and do
 20 not convey information themselves. *Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d
 21 1104, 1106 (9th Cir. 1990). And “mere changes in color are generally not subject to
 22 copyright protection.” *Express, LLC v. Forever 21, Inc.*, No. 09 Civ. 4514, 2010 WL
 23 3489308, at *6 (C.D. Cal. Sept. 2, 2010).⁹

24 ⁸ Variation A’s application remains pending as it is part of a longer *Dancing with the*
 25 *Stars* routine, for which the Office questioned Plaintiff’s ownership. *Id.* Ex. L.

26 ⁹ See also *Lorenzana v. S. Am. Rests. Corp.*, 799 F.3d 31, 34 (1st Cir. 2015)
 27 (affirming dismissal as recipe instructions and name not protectable); *Southco, Inc.*
 28 *v. Kanebridge Corp.*, 390 F.3d 276, 287 (3d Cir. 2004) (“part numbers” not
 protectable); *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504,
 1520 (1st Cir. 1996) (“ordinary employment phraseology” not protectable); *Aaron*
Basha Corp. v. Felix B. Vollman, Inc., 88 F. Supp. 2d 226, 230 (S.D.N.Y. 2000)

1 This principle applies with equal force to the field of dance. The Copyright Act
 2 of 1976’s list of works of authorship includes only “choreographic works.” 17 U.S.C.
 3 § 102(a)(4). As explained in the Compendium of U.S. Copyright Office Practices—
 4 the Office’s substantive manual for its staff on the contours of copyright law and
 5 Office policies—choreography is the “composition and arrangement of ‘a related
 6 series of dance movements and patterns organized into a coherent whole.’”
 7 Compendium § 805.1 (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir.
 8 1986)). Thus, the Copyright Office would register a “choreographed music video for
 9 a song titled ‘Made in the USA’” if the dance “is a complex and intricate work
 10 performed by a troupe of professional dancers.” *Id.* § 805.5(A).

11 In recognition that the constituent parts of a choreographic work must be
 12 available for others to use in order to foster continued creativity, Congress was
 13 explicit that “simple routines” are neither choreographic works nor copyrightable,
 14 H.R. Rep. 94-1476, at 53 (1976), and the Copyright Office’s Compendium explains
 15 that “[i]ndividual movements or dance steps by themselves are not copyrightable.”
 16 Compendium § 805.5(A). Thus, although the “Made in the USA” dance above might
 17 be registered as a whole, if “[d]uring the chorus, the dancers form the letters ‘U, S, A’
 18 with their arms . . . the Office would reject a claim limited to the ‘U, S, A’ gesture.”
 19 *Id.* Other examples of unprotectable movements include “the basic waltz step, the
 20 hustle step, the grapevine, or the second position in classical ballet.” *Id.* Further, the
 21 Copyright Office has made clear that “short dance routines consisting of only a few
 22 movements or steps with minor linear or spatial variations, *even if the routine is novel*
 23 *or distinctive,*” are not protectable. *Id.* (citing C.F.R. § 202.1(a) (emphasis added)).

24 This approach makes sense as “[i]ndividual dance steps and short dance

25 (not protectable to use “decorative features . . . commonly used throughout the
 26 jewelry business,” such as “precious metals, gemstones, and enamel”); *Skinder-*
 27 *Strauss Assocs. v. Mass. Continuing Legal Educ., Inc.*, 914 F. Supp. 665, 674 (D.
 28 Massachusetts, 1995) (“a standard calendar, a list of important holidays, a map of
 Massachusetts, a national map including time zones, and a date calculation chart”
 not protectable); *DBC of N.Y., Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416
 (S.D.N.Y. 1991) (“Familiar symbols or designs” not protectable).

1 routines are the building blocks of choreographic expression, and allowing copyright
2 protection for these elements would impede rather than foster creative expression.”
3 *Id.* (citing *Horgan*, 789 F.2d at 161). Thus, “individual elements of a dance are not
4 copyrightable for the same reason that individual words, numbers, notes, colors, or
5 shapes are not protected by the copyright law.” *Id.* As discussed above, courts
6 routinely hold that these types of elements are unprotectable, and will dismiss
7 copyright claims based on them at the pleadings stage. *See supra* 7.

8 In applying this standard, the Copyright Office’s Compendium provides the
9 following strikingly on point example of an unprotectable dance: “Butler Beauchamp
10 is a wide receiver for a college football team. Whenever he scores a touchdown,
11 Butler performs a celebratory dance in the endzone.” Compendium § 805.5(A). In
12 this example, although the dance is comprised of multiple movements of multiple
13 body parts, it is not protectable because it “merely consists of a *few movements of the*
14 *legs, shoulders, and arms.*” *Id.* (emphasis added). Likewise, the Copyright Office
15 refused registration of a dance routine by world-renowned modern dance company
16 Pilobolus titled “Five-Petal Flower,” which it described as:

17 On the left-hand side is the silhouette of a woman facing the right side of the
18 screen. On the right-hand side several people quickly tumble onto the stage,
19 forming the silhouette of a five-petal flower with their intertwined bodies.
20 Simultaneously, the silhouette of a giant hand moves from the left to the
21 right side of the screen, and appears to pull at the top of the five-petal
22 flower. The hand then points at the flower formation in a common gesture
23 that means “stay put.” The flower formation stays still for the remainder of
24 the video. The hand moves back to the left side of the screen and appears to
25 pluck off the head of the woman, who shrugs her arms and slightly kicks her
26 legs outward as if stunned. Her hands reach for the headless top of her body
27 to feel for the head, and then return to her sides. The giant hand moves over
28 the woman’s body and her head reappears; the hand moves again and most

1 of her body disappears underneath the hand. The woman remains near-
2 motionless before the video abruptly ends.

3 Letter from U.S. Copyright Office to Puo-I “Bonnie” Lee (dated July 14, 2016),
4 *available at* [https://www.copyright.gov/rulings-filings/review-board/docs/five-petal-](https://www.copyright.gov/rulings-filings/review-board/docs/five-petal-flower.pdf)
5 [flower.pdf](https://www.copyright.gov/rulings-filings/review-board/docs/five-petal-flower.pdf). Despite the detailed description of Pilobolus’ dance, the Copyright Office
6 concluded that the routine was “*de minimis*” because it consisted of “simple
7 movements” that were “insufficient to enable copyright registration.” *Id.* at 4.

8 The Copyright Office’s guidance is critical as the Ninth Circuit has held that,
9 “[w]hen interpreting the Copyright Act,” courts should “defer to the Copyright
10 Office’s interpretations,” *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041
11 (9th Cir. 2014), because of its “body of experience and informed judgment.” *Garcia*,
12 786 F.3d at 742. For example, the Office has determined that “examples of works not
13 subject to copyright” include “[w]ords and short phrases such as names, titles, and
14 slogans.” Material Not Subject to Copyright, 37 C.F.R. § 202.1(a) (2018). Courts
15 routinely dismiss cases on the pleadings relying solely on this regulation. *See*
16 *Zekkariyas v. Universal Music-MGB Songs*, No. 11 Civ. 2912, 2011 WL 13220325, at
17 *2 (C.D. Cal. June 6, 2011) (granting Rule 12(b)(6) motion based solely on
18 regulation); *Zhang*, 2010 WL 11596643, at *5 (quoting regulation for proposition that
19 “‘words and short phrases’ are not copyrightable”); *see also Southco*, 390 F.3d at 286
20 (same); *CMM*, 97 F.3d at 1520 (same).¹⁰

21 Consistent with the foregoing, in *Bikram’s Yoga College of India, L.P. v.*
22 *Evolution Yoga, LLC*, the court held that a “Sequence of 26 yoga poses” was too
23 simple to qualify as a choreographic work. No. 2:11 Civ. 5506, 2012 WL 6548505, at
24 *4 (C.D. Cal. Dec. 14, 2012). On appeal, the Ninth Circuit acknowledged the
25 touchstones of dance copyright discussed above, but focused its analysis on the fact
26 that the yoga poses were uncopyrightable under 17 U.S.C. § 102(b). *Bikram’s Yoga*

27 ¹⁰ *Cf. Naruto v. Slater*, No. 15 Civ. 04324, 2016 WL 362231, at *4 (N.D. Cal. Jan.
28 28, 2016) (relying on Copyright Office analysis of authorship for copyrightability
of photograph taken by a monkey), *aff’d*, 888 F.3d 418 (9th Cir. 2018).

1 *Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1043 (9th Cir. 2015).

2 Plaintiff's movements are even simpler, shorter, and less protectable than the 26
3 poses in *Bikram's*, the endzone dance in the Copyright Office's example, and
4 Pilobolus' intricate modern dance piece. They merely consist of different variations
5 of an arm swing wherein the arms swing side to side while the legs step back and forth
6 to the side, and an arm extension wherein the arms begin bent inwards to the chest and
7 then extend out to the side of the body while stepping back twice on each side. That is
8 why the Copyright Office refused to register Variations B and C, finding that they
9 consist of "simple routine[s] that [are] not registrable as [] choreographic work[s]." *Cendali Decl. Exs. M, N*. To hold otherwise would cause every person who performs
10 these short movements on television, at a wedding, or in any other public place to be
11 susceptible to a copyright infringement claim.
12

13 2. Plaintiff's Movements Are Mere Ideas

14 The movements also are unprotectable ideas. *See* 17 U.S.C. § 102(b);
15 *Bikram's*, 803 F.3d at 1040 (sequence of yoga steps unprotectable under § 102(b)). In
16 *Rentmeester*, the Ninth Circuit affirmed dismissal due to a lack of substantial
17 similarity, holding that the plaintiff did not own the "general 'idea' or 'concept' . . . of
18 [Michael] Jordan in a leaping, *grand jeté*-inspired" movement. 883 F.3d at 1121; *see*
19 *also Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 774 (9th Cir. 2018) (dolphins'
20 pose unprotectable). In *Reece v. Island Treasures Art Gallery, Inc.*, the court held that
21 the "idea of a hula dancer performing an 'ike movement in the hula kahiko style from
22 the noho position is not protected." 468 F. Supp. 2d 1197, 1206 (D. Haw. 2006).¹¹
23

24 ¹¹ *See also Blehm v. Jacobs*, 702 F.3d 1193, 1201 (10th Cir. 2012) ("a copyright
25 owner has no monopoly over the idea of a muscular doll in a standard pose");
26 *Cabell v. Sony Pictures Entm't, Inc.*, 425 F. App'x 42 (2d Cir. 2011) ("brandishing
27 a blow dryer as a weapon" and "fighting poses" were "unprotectable ideas");
28 *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983)
("Though the dolls' bodies are very similar, nearly all of the similarity can be
attributed to the fact that both are artist's renderings of the same unprotectable
idea—a superhuman muscleman crouching in what since Neanderthal times has
been a traditional fighting pose."); *Int'l Biotical Corp. v. Associated Mills, Inc.*,
239 F. Supp. 511, 514 (N.D. Ill. 1964) (various poses were unprotectable ideas).

1 3. The Works Are Not Substantially Similar

2 Once “the unprotectable elements have [been] identified” and “filtered,” the
3 works are “considered as a whole.” *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d
4 1435, 1443 (9th Cir. 1994); *See v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983)
5 (analyzing works “as a whole” to consider similarities “in context”). Here, there are
6 no protectable elements to consider as the movements are not protectable (as the
7 Copyright Office found) and, even if they were, it is not Plaintiff that owns them. *See*
8 *supra* 6. Without similar elements to compare, dismissal is required. *See*
9 *Christianson*, 149 F.2d at 204 (affirming dismissal where only similarities between
10 two maps were unoriginal or mere ideas); *Hall*, 2018 WL 2317548, at *8 (granting
11 Rule 12(b)(6) motion where “only thing that Plaintiffs allege Defendants copied” in
12 Taylor Swift’s song was “too brief, unoriginal, and uncreative to warrant protection”).

13 Moreover, as the only part of *NBA 2K* that Plaintiff alleges is similar to his
14 movements is *So Fresh*, he tacitly concedes that the other elements in *NBA 2K* do not
15 infringe his rights—not *NBA 2K*’s basketball games, players, settings, themes, or
16 moods. But as noted above, Plaintiff’s case is based solely on the simple movements.

17 Although Plaintiff only refers to the “Dance” in his Complaint, he actually
18 sought to register three specific “Variations” with the Copyright Office, each of which
19 is somewhat different. This only serves to underscore that Plaintiff is seeking to
20 monopolize a broad and chilling swath of movement. But in any case, each of the
21 variations is substantially different from *So Fresh*:

- 22 • Variation A’s arm swing features the arms swinging behind the body with a
23 step to the side where the leading leg bends at the knee, and then the feet
24 consistently meet at the heels. *In contrast*, *So Fresh*’s arm swing features the
25 arms swinging to the side of the body with a step to the side where the leading
26 leg straightens while the other leg bends as it comes into the body, and the feet
27 do not consistently meet at the heels, but rather begin far apart and only
28 gradually travel closer as the steps continue. Similarly, Variation A’s arm

1 extension features the arms opening and closing symmetrically, with the wrists
2 crossing in front of the chest, while stepping back twice on each side by
3 bending both legs and having the torso remain centered. *In contrast*, So Fresh's
4 arm extension features the arms opening and closing asymmetrically, without
5 the wrists crossing in front of the chest, while stepping back twice on the left
6 side and then only once on the right side by bending only the leading leg and
7 having the torso leaning into the side step. *Compare* Cendali Decl. Ex. C with
8 Ex. K.

- 9 • Variation B's arm swing features the arms swinging in front of the body with a
10 step to the side where the leading leg bends at the knee, and then the feet
11 consistently meet at or close to the heels. *In contrast*, the arm swing in So
12 Fresh features the arms swinging to the side of the body with a step to the side
13 where the leading leg straightens while the other leg bends as it comes into the
14 body, and the feet do not meet consistently at or close to the heels, but rather
15 begin far apart and only gradually travel closer as the steps continue. Similarly,
16 the arm extension in Variation B features the arms opening and closing
17 symmetrically, with the wrists crossing in front of the chest, while stepping to
18 the side twice on each side by bending both legs and having the torso remain
19 centered. *In contrast*, the arm extension in So Fresh features the arms opening
20 and closing asymmetrically, without the wrists crossing in front of the chest,
21 while stepping back twice on the left side and then only once on the right side
22 by bending only the leading leg and having the torso leaning into the side step.
23 *Compare id.* Ex. F with Ex. K.

- 24 • Variation C's arm swing features the body rotating to the side with the arm
25 swing, while the feet take small steps to the side, with a tap of the foot. *In*
26 *contrast*, So Fresh's arm swing features the body remaining frontward-facing,
27 while the feet take large steps back, without a tap of the foot. Similarly,
28 Variation C does not include an arm extension. *In contrast*, So Fresh does.

1 Compare *id.* Ex. H with Ex. K.

2 Especially given the short nature of the movements, any copyright would be
3 thin at best, requiring “virtually identical” copying. *Century Tile, Inc. v. Hirsch Glass*
4 *Co.*, 467 F. App’x 651, 652 (9th Cir. 2012). As a result, “even relatively small
5 differences . . . may exclude copyright infringement.” *Masterson Mktg., Inc. v. KSL*
6 *Recreation Corp.*, 495 F. Supp. 2d 1044, 1048 (S.D. Cal. 2007). Thus, Counts I and II
7 should be dismissed as the works are not substantially similar.¹²

8 **B. Plaintiff’s Remaining Claims Are Preempted by the Copyright Act**

9 Plaintiff’s non-copyright claims (Counts III through VI) should be dismissed
10 because they are preempted by the Copyright Act. A state law claim is preempted if
11 (1) the work is the type of work protected by copyright and (2) the claim seeks to
12 vindicate rights equivalent to those protected by copyright. 17 U.S.C. § 301(a); *Laws*
13 *v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006).

14 As to Prong One, Plaintiff’s non-copyright claims are based on the same steps
15 as his copyright claim. See Compl. ¶¶ 63, 71, 79, 87. As choreography is the subject
16 matter of copyright, 17 U.S.C. § 102(a)(4), Prong One is satisfied. *Cusano*, 473 F.
17 App’x at 804 (satisfied by types of works listed in 17 U.S.C. § 102(a)). Indeed, like
18 Plaintiff here, the plaintiff in *Lions Gate Entertainment Inc. v. TD Ameritrade*
19 *Services Co.* asserted federal and state unfair competition claims **based on the use of**
20 **the dance lift** from *Dirty Dancing*. 170 F. Supp. 3d 1249, 1254 (C.D. Cal. 2016).
21 The claims were preempted. *Id.* at 1264 (dance lift subject matter of copyright).¹³

22 As to Prong Two, no extra element makes Plaintiff’s claims different from a
23

24 ¹² Plaintiff’s claims as to Variation C can be dismissed for the additional reason that
25 Plaintiff asserts that So Fresh was added to *NBA 2K* with the release of *NBA 2K16*
26 on September 29, 2015. Compl. ¶ 31. He also alleges that Variation C was created
27 in 2016. *Id.* ¶ 16. As Variation C was created **after** So Fresh was included in the
28 game, there can be no copyright infringement. See *Oskar Sys., LLC v. Club Speed,*
Inc., 745 F. Supp. 2d 1155, 1163 (C.D. Cal. 2010) (dismissing claim as alleged
infringement occurred “before the [registered] version of the work even existed”).

¹³ If the steps are unprotectable, they still fall “within the ‘subject matter of
copyright’ for the . . . preemption analysis” as even unprotected subject matter
counts. *Entous v. Viacom Int’l, Inc.*, 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001).

1 copyright claim as the allegedly infringing act is copying. Compl. ¶¶ 63, 75, 79. Such
 2 claims are preempted. *See Maloney*, 853 F.3d at 1019 (affirming grant of special
 3 motion to strike and dismissal of right of publicity and unfair competition claims
 4 where use was not “independent of the display, reproduction, and distribution of the
 5 copyrighted material”); *Lewis v. Activision Blizzard, Inc.*, 634 F. App’x 182, 184 (9th
 6 Cir. 2015) (affirming dismissal as right of publicity claim based on use in video game
 7 preempted); *Laws*, 448 F.3d at 1144 (right of publicity claims preempted).

8 Moreover, the “Supreme Court has extended this principle of copyright
 9 preemption to the Lanham Act and federal trademark protection.” *Lions Gate Entm’t*,
 10 170 F. Supp. 3d at 1264 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*,
 11 539 U.S. 23, 33–38 (2003)). Plaintiff’s Lanham Act claim is based on “Defendant’s
 12 copying and relabeling of Ribeiro’s *The Dance* . . . creati[ng] the false and misleading
 13 impression that Defendants were the creators of *The Dance*.” Compl. ¶ 87. The
 14 Supreme Court, however, has held that the Lanham Act’s phrase “origin of goods”
 15 “refers to the producer of the tangible goods that are offered for sale, and not to the
 16 author of any idea, concept, or communication embodied in those goods.” *Dastar*,
 17 539 U.S. at 37. Thus, when a “claim is more accurately conceived of as attacking
 18 unauthorized copying,” courts dismiss such claims. *Slep-Tone Entm’t Corp. v. Wired*
 19 *for Sound Karaoke & DJ Servs., LLC*, 845 F.3d 1246, 1250 (9th Cir. 2017);
 20 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008); *Marcus*
 21 *v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1072 (C.D. Cal. 2017).

22 C. Plaintiff’s Right of Publicity Claims Violate the First Amendment

23 Plaintiff’s right of publicity claims also are barred by the First Amendment
 24 under California’s Transformative Use test. A right of publicity claim does not lie
 25 where a “celebrity likeness is one of the ‘raw materials’ from which an original work
 26 is synthesized” or the “product containing a celebrity’s likeness is so transformed that
 27 it has become primarily the defendant’s own expression rather than the celebrity’s
 28 likeness.” *Winter v. DC Comics*, 30 Cal. 4th 881, 888 (2003). To apply the test,

1 courts “examine and compare the allegedly expressive work with the [use of the
 2 plaintiff’s identity] to discern if the defendant’s work contributes significantly
 3 distinctive and expressive content.” *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47,
 4 61 (2006). “When the value of the work comes principally from some source other
 5 than the fame of the celebrity—from the creativity, skill, and reputation of the artist—
 6 it may be presumed that sufficient transformative elements are present to warrant First
 7 Amendment protection.” *Arenas*, 881 F. Supp. 2d at 1191. Thus, the “reach of the
 8 transformative use defense is broad.” *Id.* at 1190.

9 *Kirby* is particularly instructive. The plaintiff alleged her likeness had been
 10 used in a video game to create a character named Ulala. 144 Cal. App. 4th at 51. The
 11 court held that Ulala was transformative, relying primarily on differences in physical
 12 characteristics. *Id.* at 59. The court also considered the game’s setting as Ulala was
 13 “a space-age reporter in the 25th century,” and the plaintiff was not. *Id.*

14 Similarly, here, So Fresh can be used with any *NBA 2K* player, none of which
 15 share Plaintiff’s physical characteristics. *See supra* 2. And Plaintiff is not a
 16 basketball player. Compl. ¶ 2. These additional elements make So Fresh
 17 transformative. 144 Cal. App. 4th at 59; *see also Sivero v. Twentieth Century Fox*
 18 *Film Corp.*, No. B266469, 2018 WL 833696, at *10 (Cal. Ct. App. Feb. 13, 2018)
 19 (“Simpsonized” character with different characteristics from plaintiff transformative).

20 Further, it also supports a transformative finding that So Fresh is a miniscule
 21 part of *NBA 2K*. *See supra* 4. In *Arenas*, the use of a likeness that was “incidental to
 22 the show’s plot” was transformative. 881 F. Supp. 2d at 1191. In *de Havilland*, even
 23 though the plaintiff’s likeness was depicted realistically, because it constituted only
 24 “4.2 percent” of the defendant’s series, the use was transformative. 21 Cal. App. 5th
 25 at 864. And in *Sivero*, the court held that *The Simpsons*’ use of the plaintiff’s likeness
 26 was transformative because the allegedly infringing character was “a minor character
 27 in the overall constellation of Simpsons characters.” 2018 WL 833696, at *10.

28 Finally, Plaintiff concedes that *NBA 2K*’s value comes from Take-Two’s

1 creativity, skill, and reputation, unassociated with the steps. Compl. ¶ 4 (*NBA 2K* is
 2 the “most popular sports video game franchise in the world”). This too shows its
 3 transformative use. *See de Havilland*, 21 Cal. App. 5th at 864 (transformative use
 4 shown by successfulness of series’ “screenwriter, director, and producer”;
 5 “[a]ccomplished writers”; and “[h]ighly-regarded and award-winning actors”); *Sivero*,
 6 2018 WL 833696, at *10 (transformative use as “success of *The Simpsons*” does not
 7 derive “primarily from Sivero’s fame”). Thus, the right of publicity claims fail.¹⁴

8 **D. *Rogers v. Grimaldi* Principles Bar the Unfair Competition Claims**

9 Plaintiff’s unfair competition claims (Counts V and VI) also are barred by the
 10 First Amendment, which permits expressive works, like *NBA 2K*, *see supra* 5, to use
 11 trademarks as part of their artistic message. To assess such protection in this context,
 12 the Ninth Circuit has “adopted the Second Circuit’s approach from *Rogers v.*

13 *Grimaldi*,” *E.S.S.*, 547 F.3d at 1099 (citing 875 F.2d 994, 999 (2d Cir. 1989)), which
 14 “is relatively straightforward to apply, and is very protective of speech.” *Novalogic,*
 15 *Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885, 900 (C.D. Cal. 2013). The approach,
 16 which applies to “the use of a trademark in the body of the work,” has two prongs:

17 An artistic work’s use of a trademark that otherwise would violate the Lanham
 18 Act is not actionable unless the use of the mark has no artistic relevance to the
 19 underlying work whatsoever, or, if it has some artistic relevance, unless it
 20 explicitly misleads as to the source or the content of the work.

21 *E.S.S.*, 547 F.3d at 1099 (internal quotation marks and alterations omitted). It applies
 22 to both federal and state unfair competition claims. *See id.* at 1099, 1101.

23 **As to Prong One**, “only the use of a trademark with *no* artistic relevance to the
 24 underlying work *whatsoever* does not merit First Amendment protection.” *Id.* at 1100
 25 (internal quotation marks omitted). “[T]he level of relevance merely must be above
 26 zero,” and a video game is not required to be “about” the mark. *Id.* “This black-and-

27
 28 ¹⁴ Satisfaction of the Transformative Use test also requires dismissal of Plaintiff’s
 unfair competition claims. *Kirby*, 144 Cal. App. 4th at 61.

1 white rule has the benefit of limiting [courts'] need to engage in artistic analysis in
2 this context.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013).

3 Here, *So Fresh* is artistically relevant as it is one of the celebrations that the in-
4 game basketball players can perform, *see supra* 4, and Plaintiff admits the artistic
5 relevance by acknowledging that the dances in *NBA 2K* “are incredibly popular.”
6 Compl. ¶ 29. This is more than sufficient to qualify as even a “tenuous” association
7 satisfies Prong One. *Roxbury Entm’t v. Penthouse Media Grp., Inc.*, 669 F. Supp. 2d
8 1170, 1176 (C.D. Cal. 2009); *see E.S.S.*, 547 F.3d at 1100 (video game’s inclusion of
9 strip club with similar name to plaintiff’s trademark relevant to goal of parodying East
10 Los Angeles); *Novalogic*, 41 F. Supp. 3d at 900–01 (artistic relevance where use
11 added “to the enjoyment users receive from playing the complicated game”).

12 **As to Prong Two**, a work can be subject to an unfair competition claim only “if
13 the creator uses the mark or material to explicitly mislead consumers as to the source
14 or the content of the work.” *Brown*, 724 F.3d at 1245 (requiring “explicit indication,”
15 “overt claim,” or “explicit misstatement”; internal quotation marks and alterations
16 omitted). The “mere use of a trademark alone cannot suffice to make such use
17 explicitly misleading.” *E.S.S.*, 547 F.3d at 1100. Yet, Plaintiff identifies no
18 misleading conduct by *Take-Two* other than use of the steps. Further, *So Fresh* is
19 only a tiny part of *NBA 2K*, *see supra* 4, which further militates against a finding that
20 the game is explicitly misleading as to its source. *See VIRAG, S.R.L. v. Sony Comput.*
21 *Entm’t Am. LLC*, 699 F. App’x 667, 668 (9th Cir. 2017) (affirming grant of Rule
22 12(b)(6) motion where trademark was used in video game because the plaintiff did not
23 allege an “explicit indication, overt claim, or explicit misstatement”). As *NBA 2K* is
24 protected by the First Amendment, dismissal is appropriate. *See id.*; *Brown*, 724 F.3d
25 at 1247–48 (affirming grant of motion to dismiss); *Metrano v. Twentieth Century Fox*
26 *Film Corp.*, No. 08 Civ. 086314, 2009 WL 10672576, at *5 (C.D. Cal. July 16, 2009)
27 (granting Rule 12(b)(6) motion to dismiss).

28

1 **E. Plaintiff Is Not Entitled to the Relief Requested in the Complaint**

2 Plaintiff’s remedy requests are similarly contradicted by established law. *First*,
 3 Plaintiff requests “punitive and/or exemplary damages” for his federal claims, Compl.
 4 21:7, 21:14, 22:11, but such relief is not available. *See Abbywho, Inc. v. Interscope*
 5 *Records*, No. 06 Civ. 0672, 2008 WL 11406099, at *5 (C.D. Cal. Jan. 7, 2008) (no
 6 punitive damages for Lanham Act claims); *Saregama India Ltd. v. Young*, No. 02 Civ.
 7 9856, 2003 WL 25769784, at *1 (C.D. Cal. Mar. 11, 2003) (no punitive damages for
 8 copyright claims). *Second*, Plaintiff requests “an award of damages” for his state law
 9 unfair competition claim, Compl. 22:5, but “California law does not recognize the
 10 recovery of damages by individuals for unfair business practices.” *Kates v. Crocker*
 11 *Nat. Bank*, 776 F.2d 1396, 1398 (9th Cir. 1985). *Third*, Plaintiff requests “attorney’s
 12 fees” for his copyright claims, Compl. 21:8, 21:15, but “no award of . . . attorney’s
 13 fees . . . shall be made for . . . any infringement of copyright commenced after first
 14 publication of the work and before the effective date of its registration, unless such
 15 registration is made within three months after the first publication of the work.” 17
 16 U.S.C. § 412. Plaintiff is not entitled to attorney’s fees as he did not apply to register
 17 his works until December 15, 2018, Compl. ¶ 41, and *NBA 2K16* was released on
 18 September 29, 2015. *Id.* ¶ 31; *see Derek Andrew, Inc. v. Poof Apparel Corp.*, 528
 19 F.3d 696, 702 (9th Cir. 2008) (attorney’s fees not available where “infringement
 20 commenced prior to . . . registration date”); *see also Solid Oak Sketches, LLC v. 2K*
 21 *Games, Inc.*, No. 16 Civ. 724, 2016 WL 4126543, at *2 (S.D.N.Y. Aug. 2, 2016).¹⁵

22 **IV. CONCLUSION**

23 As Take-Two informed Plaintiff of the Complaint’s deficiencies before filing
 24 this Motion and Plaintiff did not amend, Take-Two seeks dismissal with prejudice.

25
 26
 27 ¹⁵ Plaintiff also would not benefit from the three-month publication safe harbor as the
 28 Variations were published in 2014, 2014, and 2012 respectively. Cendali Decl.
 Exs. A, D, G, but he did not apply to register them until 2018. Compl. ¶ 41.

1 DATED: February 13, 2019

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