

No. 22-15899

In the United States Court of Appeals
for the Ninth Circuit

BEST CARPET VALUES, INC. AND THOMAS D. RUTLEDGE, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

GOOGLE LLC,
Defendant-Appellant.

On Review under 28 U.S.C. 1292(b)
From an Order of the U.S. District Court for the Northern District of California
Case No. 5:20-cv-04700-EJD
Hon. Edward J. Davila

OPENING BRIEF OF GOOGLE LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant-Appellant states that Google LLC is a subsidiary of XXVI Holdings Inc., which is a subsidiary of Alphabet Inc., a publicly traded company, and that no publicly traded company holds 10% or more of Alphabet Inc.'s stock.

Dated: October 24, 2022

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INTRODUCTION AND SUMMARY OF ARGUMENT

The California Supreme Court has cautioned against expanding property tort law beyond “the traditional understanding of the tort,” particularly when it would “transform” other types of “claims into torts.” *Voris v. Lampert*, 7 Cal.5th 1141, 1162 (2019). Plaintiffs’ lawsuit threatens precisely that. Plaintiffs seek to transform the tort of trespass-to-chattels into a right to control the farthest reaches of electronic media: “the *copies* of websites displayed on a [person’s] screen” when she uses an internet browser to visit the website. (ER-5 [1292(b) Order 3] [emphasis added].)¹ Plaintiffs “are trying to fit [this] square peg in a round hole” of California property law, *cf. Saved Mag. v. Spokane Police Dep’t*, 19 F.4th 1193, 1199 (9th Cir. 2021), because the subject matter of their claims—the way websites are reproduced and displayed—is the stuff of copyright law and preempted. Even while denying Google’s motion to dismiss, the district court recognized that Plaintiffs’ square-peg claims raised “novel and difficult” issues and certified its order for interlocutory review. (ER-7 [1292(b) Order 5].) Because the district court got each controlling question of law wrong here, this Court should reverse.

Plaintiffs, a putative class of website owners, challenge how Google’s Search App displayed their websites. Search App is an application that Android

¹ “Order” refers to the Order granting and denying in part Google’s Motion to Dismiss; and “1292(b) Order” refers to the order certifying the Order for interlocutory appeal.

mobile phone owners can use to run Google searches directly from their phones' home screens, without opening Google's internet browser. When someone uses Search App to open a website, Search App—like any internet browser—“obtains a copy of the requested website page from the host web server” and “recreat[es] the website page on the user's computer monitor or mobile device screen.” (ER-117 [Compl. ¶ 39].) Plaintiffs sued Google in tort because Search App framed visited websites, including Plaintiffs' sites, with a Google-branded footer or “leaderboard” running across the bottom of the screen saying, “View 15 Related Pages.” (ER-124 [*Id.* ¶ 73].) If the user chose to click on the footer's button, Search App would “superimpose” links to related pages over the website, including competitor websites and “news stories about the website's owner.” (ER-126 [*Id.* ¶¶ 75-78].)

Plaintiffs aver that because Search App's footer covered a part of the displayed website copy, Google is liable to them, in tort, for *trespass-to-chattels*. Plaintiffs expressly disclaim any “trespass on the source websites located on the [Plaintiffs' host] web servers.” (ER-149 [Compl. ¶ 173].) Rather, we are told Google “trespassed on the *copies* of their websites that were loaded onto internet users' Android phones” (*id.* [emphasis added]), meaning the “chattels” here consist in “the copies of their websites that appear on internet users' monitors and screens” (ER-119 [Compl. ¶ 53]). Search App “trespassed” on this supposed property right, the theory runs, because the leaderboard footer was “superimposed” over a portion

of the displayed website copies. (ER-124 [*Id.* ¶ 73].) Plaintiffs further claimed that the footer “occup[ied] valuable space” on their website, giving Google an “unjust free advertising benefit[,]” and making Google liable for unjust enrichment. (ER-143–144 [*Id.* ¶¶ 137, 146].)

If upheld, the district court’s order would give website owners a new property interest any time someone visited their website. A website owner could assert that interest to bar any application that changed the way their website appeared, even if it merely allowed a user to increase the size of text, translate it, or screen images for children. Nothing in the law of property torts or unjust enrichment supports that result.

Trespass-to-Chattels: The trespass-to-chattels tort lies for “interference with possession of personal property,” *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1350-51 (2003), and embraces intangible property only if, like stock shares, it is sufficiently definite and exclusive to be “susceptible of possession or disposition,” *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (quoting *Downing v. Mun. Ct.*, 88 Cal.App.2d 345, 350 (1948)). No California Court—or, to our knowledge, any other—has held that this common law tort may lie to protect the copy of a website that is viewed by someone, on their own device, while running an internet search. This theory would unmoor trespass-to-chattels from its common law anchor, applying a possession-based tort to an electronic thing (a website copy)

that the plaintiffs do not possess (because it exists on the user's device) or exclusively control (because the copies are rendered on user devices by third-party internet browsers), and which is too indefinite to be fixed or represented in a certificate or document (like stock shares). And while trespass-to-chattels requires a showing of actual "injury" or "damage" to the property, *Intel* 30 Cal.4th at 1347, the only cognizable property interests Plaintiffs arguably *did* have in their websites were undamaged by Search App. As the district court noted, "[n]one of Plaintiffs' websites, files, or data were physically altered in any way, ... [n]or were their servers disrupted." (ER-16 [Order 8].)

The district court nonetheless deemed Plaintiffs' asserted interest actionable under this Court's decision in *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003). *Kremen* upheld a California-law claim for conversion of a website's "domain name" or registered address, concluding that the website owner "had an intangible property right in his domain name." 337 F.3d at 1030. The court below reasoned that Plaintiffs "have property rights to their websites for the same reasons a registrant has property rights to a domain name," but acknowledged that "there remains substantial ground for disagreement" on that issue and, specifically, "[w]hether *Kremen* [] should be extended to protect as chattel the copies of websites displayed on a user's screen." (ER-5 [1292(b) Order 3]; ER-17 [Order 9].) The answer to that question is "no."

First, Plaintiffs cannot plead facts showing the requisite “*possession* of [the] personal property” they claim, *i.e.*, the website copies displayed on user phones. *See Intel*, 30 Cal.4th at 1350 (emphasis added). Plaintiffs admit that these copies are created by and rendered on users’ devices using third-party internet browsers. And far from pleading a possessory right to those copies, Plaintiffs “in fact plead ... [that] they *want and expect* Google to copy and display their websites in Google’s Chrome browser and Search App.” (ER-88.)

Second, Plaintiffs lack any cognizable property interest under either the three-part test applied in *Kremen* or the traditional merger test. Plaintiffs’ interest in the ways website copies are displayed on users’ computers and devices is not “capable of precise definition” because they necessarily vary with users’ devices, internet browsers, and settings. *Cf. Kremen*, 337 F.3d at 1030. Those copies are not “capable of exclusive possession” because users possess and control them when viewing the websites. *Cf. id.* Indeed, a website copy lasts only as long as the user views the website—then it disappears. Nor do Plaintiffs have “a legitimate claim to exclusivity,” since user choices and their devices, internet browsers, and configurations affect the way website copies are displayed. *Cf. id.*

In all these respects, Plaintiffs’ asserted interest differs critically from the *Kremen* plaintiff’s interest in his domain name, which was clearly fixed and subject to exclusive possession both practically and legally. The same result

obtains under the merger requirement, which recognizes “intangible rights of the kind customarily merged in a document,” like stock shares. Restatement (Second) of Torts § 242 (1965). There is no interest in the website copy displayed on a phone screen that is “customarily” embodied or reflected in any document. Although *Kremen* questioned the viability of the merger rule, in dicta, two decades ago, 337 F.3d at 1031, recent California Supreme Court decisions reflect fidelity to common law limitations on property torts.

Third, Plaintiffs cannot plead the requisite “injury to the[ir] personal property or legal interest therein,” *Intel*, 30 Cal.4th at 1348, for their own allegations refute any “physical harm to their websites” or “functional harm or disruption” to them. (ER-5 [1292(b) Order 3].) While recognizing that “[n]one of Plaintiffs’ websites, files, or data were physically altered in any way” (ER-16 [Order 8]), the district court concluded that Plaintiffs alleged “functional harm *or* disruption” to “the websites’ *published output*”—*i.e.*, the way copies appear on *users’* screens. (ER-20–21 [Order 12-13] [emphasis added]). But that conflates the distinction, recognized by Plaintiffs themselves, between their website as “located on [Plaintiffs’] web servers” and the copies “loaded onto internet users’ Android phones.” (*Cf.* ER-116 [Compl. ¶ 173].) By Plaintiffs’ own admission, Search App caused no injury to their source websites, even if the website itself constitutes cognizable intangible property. Conversely, the things that Plaintiffs *do*

allege were damaged, the “copies,” are not the subject of any possessory or property interest held by Plaintiffs. And even if Plaintiffs did have such an interest, there is no allegation that Search App corrupted the website copies or prevented users from scrolling through and viewing them in their entirety.

Copyright Preemption: To the extent Plaintiffs have any state-law property interest in “how their websites are displayed on a user’s screen,” their trespass-to-chattels claim, along with their unjust enrichment claim, would be subject to “preemption by federal copyright law.” (ER-5 [1292(b) Order 3].) Copyright preemption applies if “the ‘subject matter’ of the state law claim falls within the subject matter of copyright,” and “the rights asserted under state law are equivalent to ... exclusive rights of copyright holders.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (citation omitted). The district court correctly concluded that the subject of Plaintiffs’ state-law claims, “websites and the manner in which they are displayed[,] fall within the subject matter of copyright,” but erred in deeming the second preemption element unsatisfied (ER-22–23 [Order 14-15].)

Plaintiffs’ allegations confirm that they assert a right equivalent to the “‘exclusive rights’ to display, perform, [and] reproduce works” protected by copyright law. *Cf. Maloney*, 853 F.3d at 1010 (quoting 17 U.S.C. § 106). On Plaintiffs’ own reckoning, they have “rights and “interests in the *copies* of their websites,” and Search App interferes with those rights by “superimpos[ing]” ads

onto them. (ER-119 [Compl. ¶ 53 [emphasis added]). The district court stressed that Plaintiffs “are not asserting *infringement* of any right to the reproduction ... or display of their websites” and “want and expect Google to copy and display their websites.” (ER-23 [Order 15] [emphasis added]). But neither of these things matter; “[t]he shadow actually cast by the Act’s preemption is notably broader than the wing of its protection,” *Montz v. Pilgrim Films & TV, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011) (citation omitted), and it is enough that Plaintiffs assert the right to control the duplication or copying of their websites. At a minimum, Plaintiffs’ asserted rights map directly onto the Copyright-protected right “to prepare derivative works,” 17 U.S.C. § 106, which embraces “recast[ing], transform[ing] or adapt[ing]” a work, *id.* § 101. In averring that Search App rendered copies of their websites with a superimposed footer, Plaintiffs are asserting a right against “recast[ing]” or “transform[ing]” their works.

The district court was equally wrong in surmising that Plaintiffs’ unjust enrichment claim somehow included “extra elements” that rendered the claim “qualitatively different” from copyright rights. (ER-23 [Order 15].) Unjust enrichment lies for “receipt of a benefit and unjust retention of the benefit,” *Pro. Tax Appeal v. Kennedy-Wilson Holdings, Inc.*, 29 Cal.App.5th 230, 238 (2018), and the advertising benefits that Google allegedly derived from Search App are bound up with Plaintiffs’ asserted right “to control how their websites are

displayed on a user’s screen” (ER-5 [1292(b) Order 3]). The same is true of Plaintiffs’ trespass-to-chattels claim, which, to the extent it is even viable as a state-law matter, necessarily rests on the same asserted website display and “published output” rights. (ER-20 [Order 12].) Because both of Plaintiffs’ claims rest on rights sounding in copyright law, they are preempted.

The First Amendment: Finally, even if Plaintiffs were able to state a non-preempted claim to control how their websites are displayed, that claim would contravene “Google’s First Amendment right to suggest search results” and exercise editorial judgment. (ER-5 [1292(b) Order 3].) As the district court noted, “the First Amendment protects search engine output results.” (ER-7 [*Id.* at 5].) That protection extends to the Search App footer giving users the option of “view[ing] 15 related pages,” and, when activated by users, the larger banner.

Plaintiffs nowhere suggest that their attempts to control Google’s editorial judgments satisfy strict scrutiny. Instead, Plaintiffs argued, and the district court concluded, that strict scrutiny was inapplicable because the Search App leaderboard was mere “commercial speech” that may be regulated if “false, deceptive or misleading.” (ER-28 [Order 20].) But commercial speech is speech that does “no more than propose a commercial transaction,” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), and the “related pages” referenced by the leaderboard include noncommercial speech,

including “news articles disparaging [Plaintiffs’] businesses” or links to “detractors’ websites.” (ER-111 [Compl. ¶ 6].) Critical commentary from journalists and detractors does more than “propose a commercial transaction,” *Va. Pharmacy*, 425 U.S. at 762, and garners full First Amendment protection.

This Court should reverse.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiffs’ action under 28 U.S.C. § 1332(d)(2). On September 24, 2021, the court issued its Order granting in part and denying in part Google’s motion to dismiss. (Dkt. 41.) On May 2, 2022, the court granted Google’s motion for permission to appeal under 28 U.S.C. § 1292(b) and certified its Order for interlocutory appeal. (Dkt. 51.) On June 15, 2022, this Court granted Google’s petition for permission to appeal.

STATEMENT OF ISSUES

The issues identified in the district court’s certification order are these:

“(1) Whether *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), should be extended to protect as chattel the copies of websites displayed on a user’s screen.”

(2) Whether trespass to chattels can be based on “functional harm *or* disruption” to a website even though there is no “physical harm to their websites”;

(3) Whether website owners can invoke state law to control how their websites are displayed on a user’s screen without preemption by federal copyright law; and

(4) Whether the risk consumers may be confused or misled by deceptive advertising defeats Google’s First Amendment right to suggest search results to users interested in viewing a particular website.”

(ER-5 [1292(b) Order 3].)

STATEMENT OF THE CASE

I. Procedural History

On July 14, 2020, Plaintiffs filed their complaint. (ER-109–154.) After Google filed its motion to dismiss (Dkt. 19), Plaintiffs filed their opposition (ER-76–108), and Google filed its reply (Dkt. 28). On December 3, 2020, the district court held a hearing on the motion. (ER-30–75.) The court issued its Order granting the motion in part and denying it in part on September 24, 2021. (ER-9–29.)

On October 29, 2021, Google moved to stay the case and certify the court’s Order for interlocutory appeal. (Dkt. 44.) After briefing was completed (Dkt. 46, 47), the district court issued its order granting the motion, staying the case, and certifying its order for interlocutory appeal (ER-3–8).

Google petitioned this Court for permission to appeal on May 12, 2022, and this Court granted the petition on June 15, 2022. (ER-155.)

II. Statement of Facts

A. Internet Websites

Plaintiffs are business owners operating U.S.-based websites. (ER-110 [Compl. ¶ 1].) Best Carpet owns bestcarpetvalue.com and Rutledge owns

thomasrutledgelaw.com. (ER-112 [*Id.* ¶ 9].) A website is an interactive electronic document that is housed on, and operated from, a “web server” controlled or owned (at least in part) by the website’s owner. (ER-116 [*Id.* ¶¶ 34-35].) Websites typically have a unique domain name or “URL” (Uniform Resource Locator) that directs internet users to the website’s host server. (*Id.*) To view a website, a person using a computer or device connected to the internet can input the website’s URL into a web “browser” or search engine such as Google Chrome or Apple Safari. (ER-116 [*Id.* ¶¶ 37-38].) Alternatively, internet users can find and access the website by entering search terms into the browser, reviewing the search results, and clicking on a link or hyperlink to the website. (*Id.*)

When a user opens a website, the browser connects to the server hosting the website and “obtains a copy of the requested website page from the host web server.” (ER-117 [Compl. ¶ 39].) The browser then downloads or “delivers the copy to the user by translating the website’s codes and recreating the website page on the user’s computer monitor or mobile device screen.” (*Id.*) The browser displays the website’s homepage, which in turn may display links to additional pages that users can click and access. (ER-116 [*Id.* ¶ 36].) As this Court has explained,

A person who wishes to view the website types the domain name into a computer connected to the internet. This is essentially a request to the server to make an electronic copy of the website (or at least the first page or “home page”) and send it to the user’s computer. After

this electronic information reaches the user's computer, it is downloaded for viewing on the user's screen.

Konop v. Haw. Airlines, Inc., 302 F.3d 868, 875 (9th Cir. 2002). When users click through different pages within the website, they “interact[] with the copy of the website on their screen,” and those clicks and selections “are transmitted back over the internet to the host web server, from which the hosted website can then transmit responsive information.” (ER-117 [Compl. ¶ 41].)

B. Google's Search App

Google provides a variety of internet-related products and services, including a leading internet browser, Google Chrome, and leading internet search engine, google.com. (ER-119 [Compl. ¶¶ 57-58].) It also offers internet-based advertising products and services, including Google Ads (providing advertising on Google's search results pages), and AdSense (website advertising services). (*Id.*)

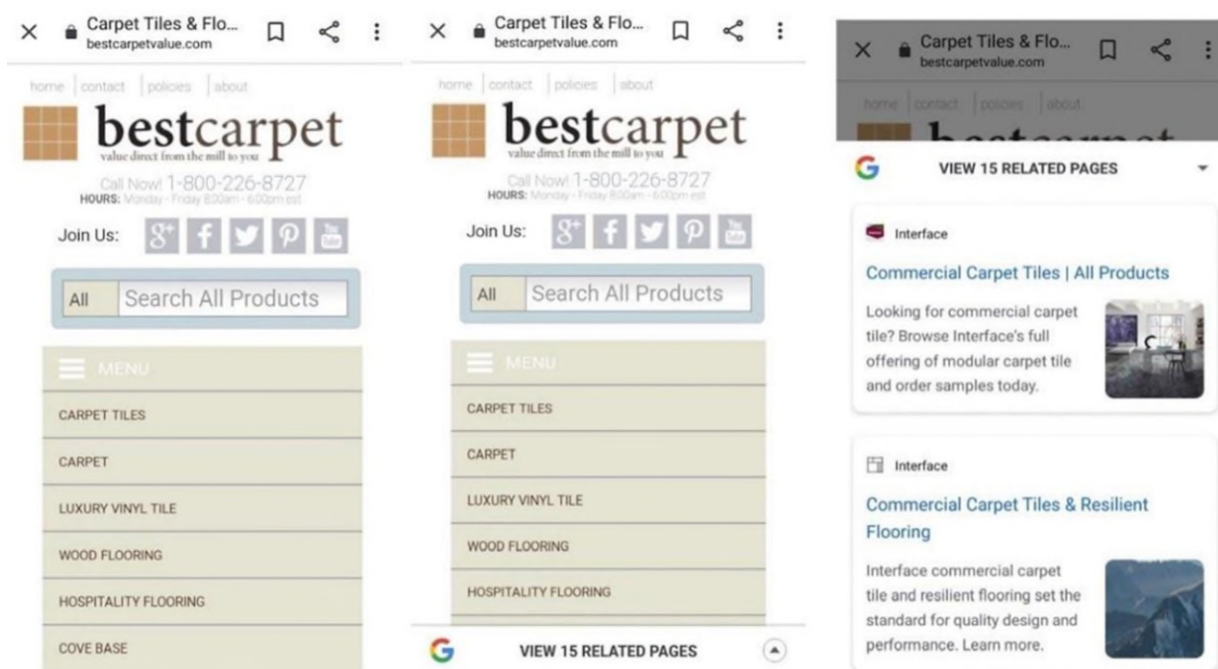
Plaintiffs' action centers on Google's Search App, an application used on Android mobile phone devices. (ER-110–111 [Compl. ¶¶ 3-6].) Google produces the operating system and other software applications for Android mobile phones. (ER-119 [*Id.* ¶ 56].) Search App is integrated into the Android software platform, and permits users to conduct internet searches and input search terms without opening a separate browser. (ER-119 [*Id.* ¶¶ 59-60].) During the relevant period (March 2018-April 2020), Search App automatically appeared as a search bar at the top of the home screens of Android mobile phones. (ER-120–121 [*Id.* ¶¶ 61,

66].) This gave an Android phone user two different ways of accessing a website or conducting an internet search: she could input the address or search terms directly into Search App, or open a web browser (like Google Chrome) and input the information there. (*Id.*)

Plaintiffs challenge the way their websites appeared in Search App. They allege that when a user pulled up their websites, Search App framed their webpage with a Google “leaderboard” footer running along the bottom of the screen stating “VIEW 15 RELATED PAGES.” (ER-123–124 [Compl. ¶¶ 72-73].) For example, when an Android user pulled up Best Carpet’s website, their website was displayed on the phone screen, but the bottom of the screen was overlaid with the footer saying “VIEW 15 RELATED PAGES.” (*Id.*) The website’s menu and product links would be displayed on the screen, but the bottom link (“Cover Base”) was “blocked” or covered by the leaderboard. (*Id.*) Plaintiffs do not contend that the leaderboard prevented the user from navigating within the website or scrolling down to see the bottom link. (*See id.*)

The leaderboard footer included a button giving the user the option of exploring the referenced “15 RELATED PAGES.” (ER-125–126 [Compl. ¶¶ 74-76].) If the user chose to click on the button, the leaderboard expanded to half-page “banners” or digests of related websites that were layered over the host website. (*Id.*) These banners or digests were not paid advertisements, but

automatically generated by Google’s algorithms and “artificial intelligence program[s].” (ER-126–127 [*Id.* ¶¶ 76, 82].) The user could choose to scroll through these related banners or digests with the visited website in the background. (*Id.*) According to Plaintiffs, “[w]hen the pop-up button [on the leaderboard] was clicked,” the banners or digests that appeared “blocked 80% of Best Carpet’s [website].” (ER-125 [*Id.* ¶ 74].) If the user chose to click on any of these banners or digests, the browser would navigate to the selected website. (*Id.*) The stages of this functionality are illustrated in the complaint:



(ER-124–125 [*Id.* ¶¶ 73-74].)

Plaintiffs allege that the banner and digests revealed when users clicked the footer button included links to “the host website’s *competitors*” (ER-126 [Compl. ¶ 77]), and “news stories about the website’s owner” (ER-126 [*id.* ¶ 78]). The

news digests sometimes referenced “negative stories” about the host website’s business (*id.*).

C. Plaintiffs’ Lawsuit

The gravamen of Plaintiffs’ suit is that Google’s Search App altered the way copies of their websites were displayed to Android users, and interfered with their purported “proprietary content.” (ER-125 [Compl. ¶ 74].) They allege that the leaderboard footer that appeared when people used Search App “block[ed] the bottom of Best Carpet’s homepage” and “Invited Best Carpet’s visitors to instead ‘VIEW 15 RELATED PAGES.’” (ER-124 [*Id.* ¶ 73].) In Plaintiffs’ view, this “intruded on website owners’ limited space” on the screen “and created immediate distractions.” (ER-128 [*Id.* ¶ 88].) If a user clicked on the leaderboard button, the banners and digests that popped up “obscure[d] the host’s website entirely from view.” (*Id.*)

While acknowledging that Search App’s functions and user activity “occurred on the copy of Best Carpet’s homepage that was reproduced on the Android user’s screen,” Plaintiffs alleged that the “copy is Best Carpet’s property, not Google’s property.” (ER-126 [Compl. ¶ 75].) By “superimposing” the leaderboard footer over the bottom of Android screens, Google purportedly “occup[ied] valuable space on Plaintiffs’ and the Class’s websites” and “obtain[ed] all the benefits of advertising” without paying website owners. (ER-143 [*Id.*

¶ 137].) Because, Plaintiffs aver, the leaderboard space amounted to advertising on host websites, Google was obligated to engage in “arms-length negotiations” with the website owners and pay “homepage” advertising rates. (ER-144 [*Id.* ¶¶ 145-147].) As Plaintiffs would have it, Google should have treated, and paid for, the leaderboard space on user’s screens as though it were advertising on Plaintiffs’ websites.

Plaintiffs filed a putative class action lawsuit, asserting California state law claims for trespass-to-chattels, implied-in-law contract and unjust enrichment, and purported violations of California’s Unfair Competition Law (UCL). (ER-150–153 [Compl. ¶¶ 176-198].) The putative class includes all U.S. owners of websites, active between March 2018 and April 2020, on which Google’s “Related Pages” banner appeared when their websites were viewed by Android mobile phone users via Search App. (ER-146 [Compl. ¶ 156].)

D. Google’s Motion to Dismiss

Google moved to dismiss the complaint, arguing that Plaintiffs had failed to establish that website owners had a right, cognizable in state property law, “to control the surrounding screen environment when users of Google’s Search App display Plaintiffs’ websites on their own phones.” (Dkt. 19, at 2.) Plaintiffs’ trespass-to-chattels claim did not lie, Google argued, for allegedly “interfer[ing] with or disrupt[ing] the display of [an] owner’s website on a person’s computer or

device.” (Dkt. 29, at 4.)

Google explained that “[t]he displayed copies of the websites themselves are not tangible property” (Dkt. 19, at 6-7), and the law did not support “the proposition that harm to intangible property via a purely electronic contact is actionable” (Dkt. 28, at 8). The unjust enrichment action was preempted, Google argued, because “Plaintiffs are seeking to control how copies of their websites are displayed,” a right that sounds in the “display” right protected by the Copyright Act, and is thus “protected, if at all, by copyright law.” (Dkt. 19, at 9.) And to the extent the UCL claim was not entirely derivative of the trespass and unjust enrichment claims, it failed to allege an incipient violation of the antitrust laws, as required by California law. (Dkt. 19, at 10-12.)

Google argued that Plaintiffs’ claims were independently barred by the First Amendment. (*Id.* at 12-13.) By seeking to control the display of the information that Google chooses to suggest, and users choose to view, Plaintiffs’ claims threatened to burden “important free speech rights.” (*Id.* at 14).

E. The District Court’s Motion To Dismiss Order

The district court dismissed Plaintiffs’ claim under the UCL’s “unfair” prong, but otherwise permitted Plaintiffs’ claims to proceed. (ER-29 [Order 21].)

Trespass-to-Chattels: The district court concluded “that a website can be the subject of a trespass to chattels claim.” (ER-16 [Order 8].) Citing this Court’s

decision in *Kremen*, the court reasoned that “domain names are subject to conversion in California,” and “Plaintiffs have property rights to their websites for the same reasons a registrant has property rights to a domain name.” (ER-16–17 [Order 8-9].) The court determined that Plaintiffs adequately pled that Google’s Search App “interfered with and impair[ed] their websites’ published output” by alleging that the leaderboard footer “obscured” a portion of their websites, such as the Best Carpet website’s links to its “Cove Base” product. (ER-20–21 [Order 12-13].)

Implied-In-Law Contract/Unjust Enrichment: The district court concluded that Plaintiffs’ claim for implied contract or unjust enrichment was not preempted by the copyright laws. (ER-21–26 [Order 13-18].) The court deemed “the first [preemption] condition satisfied” because the subject of Plaintiffs’ claim, “websites and the manner in which they are displayed[,] fall within the subject matter of copyright.” (ER-22 [Order 14].) But in the court’s view, Plaintiffs’ unjust enrichment theory did not meet the second preemption requirement: that the plaintiff assert rights “equivalent to those protected by the Act in section 106 in works of authorship that are fixed in tangible medium of expression.” (ER-21 [Order 13].) The court reasoned that Plaintiffs’ unjust enrichment claim “requires an extra element ‘instead of or in addition to the acts of reproduction, performance, distribution or display,’” because Plaintiffs allege that Google “covered up or

obscured a portion of Plaintiffs’ websites from Android phone users for financial benefit.” (ER-23–24 [Order 15-16] [citation omitted].)

Section 17200: The district court dismissed Plaintiffs’ claim under the UCL’s unfair prong because Plaintiffs had failed to allege “an incipient violation of an antitrust law,” but deemed its claim under the UCL’s unlawful prong sufficient based upon Plaintiffs’ predicate trespass-to-chattels and unjust enrichment theories. (ER-26–27 [Order 18-19].)

First Amendment: The district court rejected Google’s First Amendment defense. (ER-28–29 [Order 20-21].) While recognizing that “search-engine results may constitute speech protected by the First Amendment,” the court concluded that “Plaintiffs are not challenging Google’s search engine results.” (*Id.*) The court further reasoned that “the First Amendment defense is not absolute,” and Plaintiffs challenged “Google’s leadership and banner ads” as misleading “commercial speech.” (*Id.*)

The district court’s order sparked immediate academic criticism. Stanford Law Professor Mark Lemley tweeted “[t]he nutty Internet ‘trespass to chattels’ theory is back ... [a]nd this time it’s worse.” @marklemley, Twitter (Sept. 28, 2021, 8:24 AM), <https://twitter.com/marklemley/status/1442872861140520967> (“Just wait until the court finds out about the ‘resize windows’ button.”). A more extensive critical analysis was then published by Santa Clara Law Professor Eric

Goldman. See Eric Goldman, “If ‘Trespass to Chattels’ Isn’t Limited to ‘Chattels,’ Anarchy Ensues—Best Carpet Values v. Google,” Technology & Marketing Law Blog (Oct. 19, 2021), <https://blog.ericgoldman.org/archives/2021/10/if-trespass-to-chattels-isnt-limited-to-chattels-anarchy-ensues-best-carpet-values-v-google.htm>.

F. Google’s Motion for 1292(b) Certification

Google moved to certify the district court’s Order for interlocutory appeal under 28 U.S.C. § 1292(b), arguing that the Order raised the four controlling questions of law presented for appeal. (*Supra* at 10-11.)

In granting the motion, the court observed that these were “novel and difficult questions,” that together were “potentially dispositive” of Plaintiffs’ trespass-to-chattels and unjust enrichment claims (and thus their UCL claim). (ER-5–7 [1292(b) Order 3-5].)

STANDARD OF REVIEW

This Court “review[s] de novo a district court’s denial of a motion to dismiss under Rule 12(b)(6).” *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018).

ARGUMENT

I. Plaintiffs’ Trespass-To-Chattels Claim Fails As A Matter Of Law.

“Under California law, trespass to chattels ‘lies where [1] an intentional interference with [2] the possession of personal property *has* [3] *proximately*

caused injury.” *Intel*, 30 Cal.4th at 1350-51 (quoting *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal.App.4th 1559, 1566 (1996)). As the district court recognized, Plaintiffs’ trespass-to-chattels action is ultimately premised on a purported property interest in “the copies of websites displayed on a user’s screen” when viewing the website on the Search App for Android devices. (ER-5 [1292(b) Order 3].)

Plaintiffs cannot satisfy the elements of a trespass-to-chattels action for three reasons, each related to Plaintiffs’ attempt to extend common law property protections to a *display* interest that is both inherently varying and contingent on third-party actions. First, Plaintiffs all but concede they do not possess the website copies displayed on user devices, which means they lack the possessory interest necessary to plead a trespass-to-chattels claim. That alone forecloses Plaintiffs from invoking trespass-to-chattels, as applied in *Kremen*, as an action “to protect as chattel the copies of websites displayed on a user’s screen.” (ER-5 [1292(b) Order 3].) Second, Plaintiffs have no cognizable property interest in the website copy drawn and displayed on user devices. Under blackletter principles, a property right must be susceptible of precise definition, exclusive control, and a legitimate claim to exclusivity. Plaintiffs’ own allegations make clear that they cannot satisfy these requirements as to the website copy displayed on users’ devices. Even if they could plead those requirements, the website copies are too intangible to be personal property because they are not customarily embodied in any instrument or

other document recognizing them. Third, Plaintiffs have failed to allege “functional harm or disruption,” or any other actionable interference, with whatever possessory interest they may have in the website copies. (ER-5 [1292(b) Order 3].)

A. Plaintiffs Fail To Allege The Requisite Possessory Interest In The Website Copies Displayed On Android Users’ Devices.

The California Supreme Court has explained that trespass-to-chattels lies for “interference with *possession* of personal property not amounting to conversion.” *Intel*, 30 Cal.4th at 1351 (emphasis added); *see also Jamgotchian v. Slender*, 170 Cal.App.4th 1384, 1400 (2009) (trespass-to-chattels “lies where an intentional interference with the possession of personal property has proximately caused injury”). This possession requirement is fundamental to trespass-to-chattels; for more than a century, it has been “settled [in California] that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property.” *Triscony v. Orr*, 49 Cal. 612, 617 (1875).

Triscony well illustrates this point. There, the plaintiff leased a herd of sheep to a third party. *Id.* at 612. The defendants allegedly took the sheep from the third-party lessee and failed to feed the sheep. *Id.* at 613. The plaintiff sued for trespass-to-chattels, seeking to recover “for the injury caused to the sheep by defective feeding.” *Id.* at 617. The California Supreme Court held the claim

legally deficient because “[t]he alleged trespass was committed during the term [of the lease], when the lessee was in the actual, and was entitled to the exclusive possession as against the plaintiff, his lessor.” *Id.* “If th[e] injury was caused while the lessee was entitled to the possession under the lease, the right of action was in him, and not in the plaintiff.” *Id.*

The original common law rule, which “required that the plaintiff be in possession of the chattel at the time of the trespass,” has been “relaxed slightly” to “allow trespass to be maintained by one who is entitled to possession immediately, or upon demand.” Prosser and Keeton on Torts (5th ed. 1984) § 14, pp. 87-88. The modern rule remains the same, requiring “interference[] with *possession* of personal property.” *Intel*, 30 Cal.3d at 1351 (emphasis added); *see also Itano v. Colonial Yacht Anchorage*, 267 Cal.App.2d 84, 90 (1968) (explaining that “there must be substantial evidence that there was intentional interference with the possession of [the plaintiff]”).

Plaintiffs’ own allegations confirm they do not have actual possession of the websites displayed to users. The complaint recognizes that when a user views Plaintiffs’ websites on Search App, they view a “copy,” which is “loaded into the computers of internet users who access the website.” (ER-116 [Compl. ¶ 36].) This is true whenever a user visits a website using an internet browser or search engine; “[t]he browser then obtains a copy of the requested website page from the

host web server and delivers the copy to the user by translating the website's codes and recreating the website page on the user's computer monitor or mobile device screen." (ER-117 [*Id.* at ¶ 39].); *accord Konop*, 302 F.3d at 875.

The complaint makes equally clear that Plaintiffs' trespass theory centers on the website *copy* displayed on Android user screens and not the actual website maintained on Plaintiffs' servers. Plaintiffs acknowledge that "Google did not trespass on the source websites located on the Class and Subclass's web servers, but rather, trespassed on the copies of their websites that were loaded onto internet users' Android phones." (ER-149 [Compl. ¶ 173].) Plaintiffs assert "property rights, free speech rights and commercial interests in the *copies* of their websites that appear on internet users' monitors and screens." (ER-119 [Compl. ¶ 53] [emphasis added].) They aver that when users viewed their websites on Search App, the App's "Related Pages" frame "block[ed] the bottom of Best Carpet's homepage entirely from view" (ER-124 [*Id.* ¶ 73]) "occluding," and "obscuring ... the contents of [their] website homepages when viewed on Android's Search App" (ER-151 [*Id.* ¶¶ 185-186]). On Plaintiffs' own reckoning, the purported interference or intermeddling "technically ... occurred on the copy of [plaintiffs'] homepage that was reproduced on the Android user's screen." (ER-126 [Compl. ¶ 75].) This is not a case, then, where the plaintiffs allege that the defendants interfered with the use of files, data, or systems on their own computers. *Cf. Intel*,

40 Cal.4th at 1354 (distinguishing cases involving data mining that undermined “the functioning of a Webs site’s computer equipment”).

Plaintiffs plainly do not have actual possession of the website copies located on users’ computers and devices. The website copies are drawn “on users’ monitors and screens” (ER-118 [*Id.* ¶ 47]), which belong to users, not Plaintiffs. Plaintiffs acknowledge that a user must “toggle” over the website copies before the leaderboard footer appears (ER-124 [*Id.* ¶ 73]), and must “click” on the footer button to expand the leaderboard (ER-125 [*Id.* ¶ 74]), confirming that it is the users who possess and control the copies of Plaintiffs’ websites on their devices.

Likewise, plaintiffs do not own or have the right to possession of the copies that reside on users’ devices. Plaintiffs freely and intentionally permit their websites to be copied by users without condition; they “in fact plead ... [that] they *want and expect* Google to copy and display their websites in Google’s Chrome browser and Search App and that Google has license to do so.” (ER-88; *see also* ER-98 (conceding that “Plaintiffs granted Google the right to display their websites”).) While Plaintiffs purport to allege ownership of the copies (*see* ER-126 [Compl. ¶ 75]), that “ownership” allegation is “a contention and a conclusion of law,” *Moore v. Regents of Univ. of Cal.*, 51 Cal.3d 120, 136 n.19 (1990), and “courts need not accept as true legal conclusions,” *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1176 (9th Cir. 2021). Plaintiffs assert no independent legal basis

for their asserted “ownership” over the website copies, much less a right to *possess* the copies qua “images and sounds on users’ monitors and screens.” (ER-118 [Compl. ¶ 47].) And it is hard to imagine how such a property interest would even work; the owner’s possessory interest would be created by the *user*’s visit to their website, would attach to a copy on the *user*’s device, and be destroyed by the *user* when she navigated away (or deleted her browser history).

To be sure, a person might by contract secure rights to property in possession of another, but Plaintiffs do not allege any such contract or any other potential source of possessory rights. And a website owner might have intellectual property rights—such as a copyright—to the extent their website satisfies the requirements for protection. (*See infra* at 50-52.) But copyright interests are not possessory in nature; a copyright is “no ordinary chattel,” rather, it “comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.” *Dowling v. United States*, 473 U.S. 207, 216-217 (1985). “[T]he property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple ‘goods, wares, [or] merchandise,’ for the copyright holder’s dominion is subjected to precisely defined limits.” *Id.* And Plaintiffs disclaim whatever copyright interests they have in their websites *simpliciter*. (*E.g.*, ER-90 (“The subject matter of Plaintiffs’ claim is not their copyrightable websites. ...”).)

Because Plaintiffs cannot allege that they possess, or have a legal right to possess, the asserted “chattel” here, their trespass-to-chattels claim fails. On this score, *Kremen* undercuts, rather than supports, the “extension” of property protections to “the copies of websites displayed on a user’s screen” (ER-5 [1292(b) Order 3]). There, this Court held that a website owner had adequately pled a conversion claim against the domain name registrar for improperly transferring their domain name. *Kremen*, 337 F.3d at 1030-36. In contrast to the display interest Plaintiffs assert here, a domain name is “capable of exclusive possession or control,” and a website owner has “a legitimate claim to exclusivity” over its domain name. *Id.* at 1030. As this Court explained, a website domain name is unique, and “[r]egistering a domain name [with the registrar] is like staking a claim to a plot of land at the title office.” *Id.* A website’s display copy is neither unique nor “capable of exclusive possession or control.” *Cf. id.* To the contrary, each time a user calls up the website on their computer or handheld device, it is duplicated, displayed anew, and subject to the *user’s* control.

B. Plaintiffs Cannot Plead A Cognizable Property Interest Under California Law In Website Copies Displayed On User Devices.

Even if Plaintiffs could somehow plead that they had possession over the website copies displayed on users’ devices, their claim would still fail. Plaintiffs have not alleged, and cannot establish, a cognizable property interest in the website copies drawn by users’ computers and devices when visiting Plaintiffs’ websites.

First, the complaint's allegations confirm they cannot satisfy the test applied in *Kremen* "to determine whether a property right exists." 337 F.3d at 1030. Plaintiffs' purported interest in how website copies are displayed is incapable of precise definition and, as noted above, is neither "capable of exclusive possession or control" nor subject to "a legitimate claim of exclusivity." *Id.* (quoting *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 903 (9th Cir. 1992)). Second, Plaintiffs' asserted display interest is too tenuous to satisfy the blackletter requirement that intangible property be merged into, or represented by, a document such as a stock certificate.

1. Plaintiffs Cannot Plead A Cognizable Property Right Under *Kremen*'s Property Rights Test.

In *Kremen*, this Court applied "three criteria" to determine whether the plaintiff had a cognizable property interest in their website's domain names: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." 337 F.3d at 1030 (quoting *Rasmussen*, 958 F.2d at 903). Plaintiffs' asserted interest in the website copies displayed on users' devices cannot satisfy these criteria.

First, Plaintiffs' display interest is not capable of precise definition. There is no single, fixed way to display a website. *See Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 742 (E.D. Mich. 2003) ("wide variety" of factors affects

“the ultimate appearance of the webpage on the user’s screen”). As Plaintiffs recognize, “[m]ost website owners design a version of their websites specifically for mobile devices, which have different display parameters than desktop computers” (ER-128 [Compl. ¶ 87].) Even beyond this, however, there is inherent variation in the way websites are viewed. Websites must be viewed through browsers (like Chrome, Safari, Firefox, or Internet Explorer), which obtain a copy of the webpage and “translat[e] the website’s codes and recreat[e] the website page on the user’s computer monitor or mobile device screen.” (ER-116–117 [*Id.* ¶¶ 37, 39].) As Professor Eric Goldman explained, different browsers will translate the codes and display websites in different ways, and the display can be further configured by users:

Every browser software makes its own choices about how to render a page; every browser software frames every web page with its software features; and every browser software lets users configure the display in ways that affect website owners’ expectations. As just one example of the latter point, browser software programs let users magnify or shrink the display size, so what appears above/below the fold critically depends on user configuration, not just the website operator’s choices.

Goldman, *supra*; accord *Wells Fargo & Co.*, 293 F. Supp. 2d at 742 (“The HTML code identifies various elements that help determine how the webpage will ultimately be rendered on a computer user’s screen, but it does not provide an actual pixel-by-pixel mapping for rendering the webpage. A wide variety of other factors will have a significant effect on the ultimate appearance of the webpage on

the user’s screen, including the user’s ability to customize the browser’s settings.” (citations omitted); Tim Berners-Lee, HTML+ (Nov. 8, 1993), https://www.w3.org/MarkUp/HTMLPlus/htmlplus_7.html (“HTML+ leaves out the processing instructions that determine the precise appearance, for instance the font names and point size, the margins, tab settings and how much white space to leave before and after different elements. The rendering software makes these choices for itself (perhaps guided by user preferences).”). Professor Mark Lemley struck a similar note, writing of the decision below, “Just wait until the court finds out about the ‘resize windows’ button.” “@marklemley, Twitter (Sept. 28, 2021, 11:24 AM), <https://twitter.com/marklemley/status/1442872861140520967>. Indeed, by making their websites available on the internet with the expectation and intent that the websites be rendered by browsers (ER-117 [Compl. ¶ 39]), Plaintiffs surrendered control over their websites’ precise appearance. Without knowing what Plaintiffs’ websites must look like, it is impossible to precisely define their interest.

An example from Plaintiffs’ complaint highlights this problem. Plaintiffs allege that when the Best Carpet homepage was loaded onto a “user’s mobile screen,” it displayed several “links to specialized pages within Best Carpet’s site for each product.” (ER-124 [Compl. ¶ 73].) And Plaintiffs allege that the Search App’s leaderboard footer, when engaged by the user, “blocked” one such link for

its “Cove Base” products. (*Id.*; *see supra* at 15.) But that Cove Base link might not be blocked if the website was viewed on a desktop computer, or a different browser, or if the user’s phone screen is a different size, or the user employs accessibility features on their phones that make text and images larger and easier to see.

Second, Plaintiffs’ websites are not capable of exclusive possession or control. As noted, Plaintiffs did not, and cannot, allege that they exclusively possess or control the copies of their websites on users’ devices. Nor could they, given that the webpages cannot be viewed except through browsers and devices that are possessed and controlled by others. (*See* ER-116–117 [Compl. ¶¶ 36-41].); *see also State v. Perry*, 697 N.E.2d 624, 631 (Ohio 1998) (“A copyright holder does not have exclusive dominion over the thing owned.”). Indeed, Plaintiffs’ theory of harm recognizes users’ ultimate control over their browsers and searches, for they allege that Search App “nudge[d]” users to explore related pages and, purportedly, to navigate away from their webpages. (ER-111 [*Id.* ¶ 5].) “[U]sers input internet search terms into the Search App’s search bar”; they “click a website’s name if they want to visit that site”; they may choose to “click[]” the “pop-up button” that opens up the expanded leaderboard; they may then “scroll[] through Google’s expanded leaderboard”; and they may choose to “click[]” the

links and navigate “to another web page.” (ER-122–126 [Compl. ¶¶ 69, 70, 74, 76].)

Ultimately, users control how websites are displayed to them. Users choose which browser to use. Users further configure how websites are displayed to them. Indeed, displayed website copies last only as long as the *user* views the website. This third-party control over Plaintiffs’ purported property undermines any finding of “exclusive possession or control.” *Monster Energy Co. v. Vital Pharms., Inc.*, 2019 WL 2619666, at *13 (C.D. Cal. May 20, 2019) (concluding plaintiff lacked exclusive possession and control over shelving space that was guaranteed by contract because “retail store employees, stocking clerks, and retail customers all regularly exercise[d] control and possession over the shelving space in dispute”).

Third, Plaintiffs have no legitimate *claim* to exclusive control over the display of their websites. While Plaintiffs surely invested resources in developing their websites (*see* ER-118 [Compl. ¶ 49]), they admit that they are not exclusively responsible for how their websites are displayed (*see* ER-115–117, ER-126 [Compl. ¶¶ 27-32, 37-41, 75]). Internet browsers are responsible for “obtain[ing] a copy of the requested website page from the host web server,” “deliver[ing] the copy to the user,” “translating the website’s codes,” “recreating the website page,” and “enable[ing] two-way communications [between] internet users” and websites.

(ER-117 [Compl. ¶ 39].) And it is users who ultimately control their browsers and devices.

In these respects, Plaintiffs’ asserted display right is closer to the “interests in privacy and confidentiality” that the courts have uniformly rejected “as a basis for [a] claim of trespass to chattels.” *See Casillas v. Berkshire Hathaway Homestate Ins. Co.*, 79 Cal.App.5th 755, 765-66 (2022) (collecting cases). Like “personal information” or privacy interests, Plaintiffs’ interest in how website copies are displayed cannot be precisely defined, for it varies with multiple factors, from browser configurations to device settings to user preferences. *See In re iPhone Application Litig.*, 844 F.Supp.2d 1040, 1075 (N.D. Cal. 2012) (Koh, J.) (rejecting conversion claim because “personal information” is not “an interest capable of precise definition”). And because a website’s display depends on the interplay among the website, users’ choices, and software and hardware, “it is difficult to see how” the display “is capable of exclusive possession or control.” *Id.*

Conversely, Plaintiffs’ asserted display rights are fundamentally different from the domain names this Court deemed property in *Kremen*. This Court held that a domain name was a cognizable property interest because (1) it was a definite, unchanging, “particular name” that “decides” precisely “where on the Internet those who invoke that particular name—whether by typing it into their

web browsers, by following a hyperlink, or by other means—are sent”; (2) “[o]wnership is exclusive in that the registrant alone makes that [naming] decision,” and registered domain names are “valued, bought and sold” and even “subject to in rem jurisdiction”; and (3) “registrants have a legitimate claim to exclusivity” because they “[r]egister[] a domain name,” thereby “staking a claim” to it. *Kremen*, 337 F.3d at 1030.

Plaintiffs’ interest in the displayed copies of their websites is nothing like an exclusive, “well-defined” domain name. *Cf. id.* First, there is no one “particular” way to display a website. A website’s appearance on a given device may vary depending on what the user—rather Plaintiffs—“decides” in the way of device, browser, and configurations. *Id.* Second, Plaintiffs do not exclusively own or control the way a website appears on users’ devices, for website owners do not “alone make[] th[e] decision” about how the website is rendered. Nor are website copies sufficiently defined and unique that they are subject to in rem jurisdiction. *See* 15 U.S.C. § 1125. Third, in contradistinction to domain names, websites pages are not registered anywhere, and their display on user devices requires investment and resources not only by Plaintiffs, but also by browser developers and device manufacturers.

Because Plaintiffs have no cognizable property interest in their websites, their claims for trespass-to-chattels fails.

2. Plaintiffs Cannot Plead A Cognizable Property Right Under The Merger Rule.

The tenuous nature of Plaintiff's interest in website copies displayed on user devices also comes into focus when viewed under the common law's merger framework. Although this Court questioned the ongoing validity of the merger requirement in *Kremen*, recent California Supreme Court decisions suggest its common law roots remain vital, and that, under an *Erie* analysis, the Court would apply the modern merger requirement set out in the Restatement (Second) of Torts. And Plaintiff's claim would fail even under *Kremen*'s "minimal" and "vestigial" formulation of the rule, for the website copy displayed on a user's phone is itself untethered to any "document or tangible object." 337 F.3d at 1033.

Conversion and trespass-to-chattels trace their origins to trover, which "lay only for tangible property, capable of being identified and taken into actual possession." *Payne v. Elliot*, 54 Cal. 339, 340 (1880). Just as trespass-to-chattels has evolved from "the asportation of another's tangible property" to "the unauthorized use of personal property," *Thrifty-Tel*, 46 Cal.App.4th at 1566, so has the tangible property restriction "been greatly eroded," *Silvaco Data Sys. v. Intel Corp.*, 184 Cal.App.4th 210, 239 n.21 (2010). Originally, "[s]hares of stock, and such things, did not belong to that class of property known as chattels; they were considered incorporeal, intangible things," and "were incapable of being subjected to actual possession." *Payne*, 54 Cal. at 340. But the California Supreme Court

has joined most courts in applying conversion to “shares of stock” even where the tangible stock certificate was not itself purloined, reasoning that “the certificate is only evidence of the property.” *Id.* at 342. Since *Payne*, it has become the “uniform rule of law that shares of stock in a company are subject to an action in conversion,” because “they are represented by certificates which are evidence of a definite interest.” *Olschewski v. Hudson*, 87 Cal.App. 282, 288 (1927). At the same time, the intermediate California appellate courts have deemed other forms of intangible property, such as laundry lists, too indefinite for protection, distinguishing them from “a tangible right which may be handled and transferred like stocks, bonds” and comparing them “to the goodwill of a business.” *Id.* at 286. Under this “merger doctrine,” property torts lay “where the plaintiff’s intangible property interests are merged with a document.” *Casillas*, 79 Cal.App.5th at 765.

Plaintiffs’ asserted interest in the display of website copies raises anew the question of whether California continues to follow the merger doctrine and, if so, how strictly. Under *Erie* principles, this Court must resolve this question by “apply[ing] the law as it believes the California Supreme Court would apply it.” *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). Absent a controlling California Supreme Court decision, the Court “must predict how the California Supreme Court would decide the issue, using

intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids.” *Id.*

This Court last considered the merger doctrine’s ongoing validity in California in *Kremen*. The Court noted the modern articulation of that rule in the ALI’s Restatement:

- (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
- (2) One who effectively prevents the exercise of intangible rights of the kind customarily *merged in a document* is subject to a liability similar to that for conversion, *even though the document is not itself converted.*”

Kremen, 337 F.3d at 1031 (quoting Restatement (Second) of Torts § 242 (1965)) (emphasis added). *Kremen* concluded that “California does not follow the *Restatement*’s strict merger requirement that some document must actually represent the owner’s intangible property right.” *Id.* at 1033. In arriving at that conclusion, the Court cited the California Supreme Court’s *Payne* decision holding that “shares in a corporation (as opposed to the share certificates themselves) could be converted.” *Id.* at 1031. *Kremen* recognized that this “outcome might be reconcilable with the *Restatement*[’s]” merger requirement, but pointed to dicta in *Payne* characterizing trover as “a remedy for the conversion of every species of personal property.” *Id.* (quoting *Payne*, 54 Cal. at 341). After canvassing subsequent lower-court authorities, the Court found no need to adopt this broad-

based rule, holding instead that California “at most requires only *some* connection to a document or tangible object—not representation of the owner’s intangible interest in the strict *Restatement* sense.” *Id.* at 1033. The Court reasoned that the plaintiff’s domain name satisfied this requirement because his ownership of that name was registered in the Domain Name System. *Id.*

Kremen is not binding on this Court, and there is good reason to think the California Supreme Court would follow the *Restatement’s* modern merger rule, limiting intangible property rights actionable in tort to those that “are customarily represented by and merged in a document.” *See* Restatement § 242 cmt. f. This Court has held that its interpretations of California law are “only binding in the absence of any subsequent indication from the California courts that our interpretation was incorrect.” *In re Watts*, 298 F.3d 1077, 1083 (9th Cir. 2002) (overruling prior holding inconsistent with two intervening cases from the California Court of Appeal). Since *Kremen*, the California Supreme Court has issued two decisions declining to further expand property torts and instead adhering to blackletter limitations. The first decision, *Intel Corp. v. Hamidi*, 30 Cal.4th 1342 (2003), is discussed in detail below, and held that trespass-to-chattels did not encompass emails that “neither damage[d] [the plaintiff’s] computer system nor impair[ed] its functioning.” *Id.* at 1347. The plaintiff asked the Supreme Court to “expand California law” and create a special rule “for owners of

a particular species of personal property, computer servers,” that would make unwanted emails actionable even if they cause no actual injury to those servers. *Id.* at 1360. The Court rejected that invitation, instead hewing to the common law requirement that the defendant’s “intermeddling [be] harmful” to the property, as explained in the *Restatement (Second) of Torts*. *Id.* at 1351 (quoting § 242 cmt. f).

In the second decision, *Voris v. Lampert*, 7 Cal.5th 1141 (2019), the California Supreme Court refused to extend conversion beyond “the traditional understanding of the conversion tort,” to encompass an employee’s unpaid wages where the claim was not based on “certain identifiable monies,” 7 Cal.5th at 1149, 1153. The plaintiff urged the Court to “expand the scope of conversion” to further “public policy” objectives. *Id.* at 1156. But even while recognizing that “intangible property interests, too, can be converted,” the Court enforced the longstanding rule requiring “interfere[nce] with the plaintiff’s *possessory* interest in a specific, identifiable sum.” *Id.* at 1151.

Taken together, *Intel* and *Voris* suggest the Supreme Court would exercise greater restraint and caution in departing from settled property tort limitations than *Kremen* assumed. Consistent with both the actual holding of *Payne* and the Restatement’s formulation, the Supreme Court would likely limit trespass-to-chattels to intangible property of a “kind customarily represented by ... a document,” Restatement § 242 cmt. f, such as stock shares, *Payne*, 54 Cal. at 342

(certificates are “evidence of title”). Because *Payne* centered on this paradigmatic example of merged property, it had no occasion to “reject the tangibility requirement altogether” as part of its holding. Cf. *Kremen*, 337 F.3d at 1031. *Payne*’s broad language characterizing trover as “develop[ing] into a remedy for the conversion of every species of personal property” is followed by enumerated “personal property” examples consistent with the Restatement’s modern merger requirement: “It lies for bank notes sealed in a letter; for negotiable instruments; for a judgment; for a promissory note which has been paid; for copies of a creditor’s account; for a writ of execution issued on a judgment; and for certificates of shares of stock.” *Payne*, 54 Cal. at 341 (citations omitted). That is why many cases have treated *Payne*’s broad language as dicta. See *Olschewski*, 87 Cal.App. at 288 (noting that “this is too broad a statement as to the application of the doctrine of conversion or trover, and it was unnecessary to the determination of the issue in that case”); *Thompson v. UBS Fin. Servs.*, 115 A.3d 125, 136 (Md. Ct. App. 2015) (suggesting that *Payne*’s language minimizing the significance of stock certificates was dicta).

In the wake of *Kremen*, the California Court of Appeal has cautioned that the merger doctrine has not “been destroyed,” *Silvaco*, 184 Cal.App.4th at 239 n.21, and continued to apply the modern version of the merger doctrine, see *Thrifty-Tel*, 46 Cal.App.4th at 1565 (“Courts have traditionally refused to

recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible”); *cf.* Restatement § 242 cmt. f (“Thus far the liability stated in Subsection (2) has not been extended beyond the kind of intangible rights which are customarily represented by and merged in a document.”). While one post-*Kremen* Court of Appeal decision extended the conversion tort to intangible net operating losses not “somehow merged or reflected in a document,” even that decision recognized that conversion “may be inappropriate for some modern intangible personal property.” *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal.App.4th 97, 124-25 (2007). And a recent decision suggesting that the merger doctrine “now has little or no significance” said so only in declining to apply the doctrine to *expand* trespass-to-chattels by “allow[ing] [Plaintiffs] to convert privacy harms into property harms.” *Casillas*, 79 Cal.App.5th at 764-66 (holding that trespass to chattels does not lie for “alleged copying of electronic files”).

If, as *Intel* and *Hamidi* suggest, the California Supreme Court would apply the “traditional understanding” of the merger doctrine, Plaintiffs lack a cognizable property interest. The copy of a website displayed on a user’s device is not the kind of interest “customarily represented by and merged in a document.” Restatement § 242 cmt. f. Even assuming a “document” embodying an intangible property interest can be electronic “rather than on ink and paper,” *Kremen* 337

F.3d at 1034, there is no such document, electronic or otherwise, representing a website owner's interest in the copy rendered on users' devices. That copy's appearance is subject to the user's control, and turns on the user's browser, device settings, and other factors outside the website owner's control. On this score, the district court's conclusion that "a website is a form of intangible property that has a connection to ... a digital document built with software and housed on a computer called a 'web server'" (ER-18 [Order 10]) misses the point. The interest asserted by Plaintiffs here is in the copy displayed on user devices, not the website itself "housed" on a "web server."

Even under the "minimal" merger requirement applied in *Kremen*, requiring "only *some* connection to a document or tangible object," 337 F.3d at 1033, Plaintiffs' asserted interest would still fail. The website copy drawn by a user's phone turns on too many variables to be connected to a particular "document or tangible object." Indeed, when a user calls up a particular web gate, their browser typically receives the data it uses to draw the page from multiple, constantly varying servers. *See In re Google Inc.*, 806 F.3d 125, 130 (3d Cir. 2015) ("webpages appear on browsers as integrated collages of text and images" but "this content is delivered and aggregated from multiple independent servers"). And a website copy is far removed from the Domain Name Registry relied upon by

Kremen, which represents only the domain name for a particular site—not the countless copies generated by users on their own computers and devices.

C. Plaintiffs Have Failed To Plead The “Functional Harm or Disruption” To Their Websites, Or Even Displayed Website Copies, Required For Trespass to Chattels.

Despite recognizing that Plaintiffs’ claims centered on “the copies of websites displayed on a user’s screen” (ER-5 [1292(b) Order 3]; *see also* ER-20 [Order 12]), the district court elsewhere suggested that the relevant property interest here is Plaintiffs’ “property rights to their websites” (ER-17 [Order 9]). But to the extent Plaintiffs assert that Search App trespassed on their website itself, their claim fails because Plaintiffs do not allege “functional harm or disruption,” much less “physical harm,” to their websites. (ER-5 [1292(b) Order 3].)

Intel Corp. v. Hamidi, 30 Cal.4th 1342 (2003), controls this case. There, a former employee used Intel’s email system to send emails criticizing Intel to thousands of Intel employees. 30 Cal.4th at 1348-49. There was no evidence that the emails “damaged Intel’s computer system or slowed or impaired its functioning,” but employees asked the company “to stop the messages,” and Intel “staff time was consumed in attempts to block further messages,” causing economic loss. *Id.*

The California Supreme Court rejected a trespass-to-chattels claim. It held that “some actual injury must have occurred in order for a trespass to chattels to be

actionable,” and that “the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning.” *Id.* at 1351, 1347. While the emails may have been disruptive, injuring “economic” or “privacy” interests, that was “an injury entirely separate from, and not directly affecting, the possession or value of personal property.” *Id.* at 1347-48.

Here, as in *Intel*, Plaintiffs have alleged no damage to, or functional impairment of, their computer systems. There is no allegation here that Google “damage[d] the actual website (by slowing it down, for example).” *Discovery Educ., Inc. v. SchoolsPLP, LLC*, 2021 WL 2292223, at *3 (D. Del. June 4, 2021) (Bibas, J.). As the district court noted, “[n]one of Plaintiffs’ websites, files, or data were physically altered in any way. Nor were Plaintiffs’ servers disrupted.” (ER-16 [Order 8].) Plaintiffs acknowledge that that “Google did not trespass on the source websites located on the Class and Subclass’s web servers, but rather, trespassed on the copies of their websites that were loaded onto internet users’ Android phones throughout the nation.” (ER-149 [Compl. ¶ 173].)

The district court distinguished *Intel* on the ground that Plaintiffs “allege functional harm or disruption” to “the websites’ *published output*”—i.e., the way it appears on user screens. (ER-20 [Order 12] [emphasis added]). But that conflates the distinction, recognized by Plaintiffs themselves, between their website as

“located on [Plaintiffs’] web servers” and the copies “loaded onto internet users’ Android phones.” (Cf. ER-149 [Compl. ¶ 173].) By their own admission, Search App caused no injury to Plaintiffs’ website, even if the website itself constitutes cognizable intangible property. And the thing that Plaintiffs *do* allege was damaged, the “copies of their websites,” are not cognizable for the reasons noted above. What property interest Plaintiffs arguably have was uninjured by Search App; and what was injured is not a property interest.

Indeed, even if the “copies of [Plaintiffs’] websites that were loaded onto internet users’ Android phones” are cognizable property (ER-149 [Compl. ¶ 173]), Plaintiffs cannot allege that Search App “damage[d]” the electronic website copy or “impair[ed] its functioning,” *Intel*, 30 Cal.4th at 1347, and the decision in *Casillas v. Berkshire Hathaway Homestate Insurance Company*, 79 Cal.App.5th 755 (2022) shows why. In *Casillas*, the court applied *Intel* to a claim that the defendants had hacked a third-party computer system and copied plaintiffs’ electronic litigation files. The court rejected a trespass-to-chattels claim because the plaintiffs had “not allege[d] damage or disruption to the computer system, as required by *Intel*.” *Id.* at 757. The plaintiff tried to distinguish *Intel* on the ground that the defendant there “did not copy electronic files,” but the court held that “*Intel*’s injury requirement [still applies] to claims based on the copying of electronic files or information.” *Id.* at 764.

The *Casillas* court went on to hold, in the alternative, that “[e]ven had *Intel* not required ... allege[d] damage or disruption to the [computer] system,” plaintiffs had “failed to allege any actionable injury to the copied files or their asserted property interests therein.” *Id.* at 764-65. The files “had not been corrupted, and [plaintiffs’] own access to the files had not been impaired.” *Id.* at 765. “Because the copying did not affect the files or [their] ability to use them,” the copying “caused no actionable injury to [their] asserted property interests.” *Id.* And while Plaintiffs asserted an injury to their “privacy and confidentiality” in the files, those were not cognizable property interests under *Intel*. *Id.*

Any claim that Search App damaged Plaintiffs’ property interest in the website copies displayed on users’ phones fails under *Casillas*. Plaintiffs have not alleged, and cannot assert, that Search App damaged their website copies as “electronic files.” 79 Cal.App.5th at 764. There is no suggestion that Search App somehow corrupted their website copies or impaired, disabled, or deactivated any part of them. Nor have Plaintiffs alleged any *functional* changes to their websites as displayed to users. There is no allegation that Google blocks users from scrolling through or viewing the entirety of the websites (should users so wish).

Again, Plaintiffs’ claim of injury reduces to the way their website copies are displayed on certain user devices. That claim rests not on an impairment of the website’s functionality, but on “the inviolability of chattels,” which *Intel* held “not

sufficiently important” to be actionable. 30 Cal.4th at 1352 (quoting Prosser & Keeton, Torts, *supra*, § 14, p. 87 (emphasis omitted)). The fact that the Search App leaderboard obscures one link on the website copy “merely interferes without doing any harm,” which is simply not enough for trespass-to-chattels. *Id.* Some measure of such interference from website browsers is unavoidable and justified by browser owners’ exercise of their own rights. *Cf. U-Haul Int’l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 730 (E.D. Va. 2003) (pop-up advertising software “no different tha[n] when a notice generated by the user’s computer system pops-up in front of all of the windows the user may have open at the time”). After all, internet browsers and search engines may also be afforded patent, copyright, and other protections for which they qualify. *E.g., R2 Sols. LLC v. Deezer S.A.*, 2022 WL 36240, at *3 (E.D. Tex. Jan. 4, 2022) (construing patent for “ranking documents in response to a search query”). And Plaintiffs concede that “they want and expect Google to copy and display their websites ... and that Google has license to do so.” (ER-88; *see also* ER-23 [Order 15].) To the extent Plaintiffs have an interest in how their websites are displayed, that interest sounds in federal copyright law, and is no more protected by California trespass-to-chattels law than the “economic” interests or “privacy and confidentiality” interests held insufficient in *Intel* and *Casillas*. *Intel*, 30 Cal.4th at 1350-51; *Casillas*, 79 Cal.App.5th at 765.

If upheld, the district court’s trespass-to-chattels ruling would wreak havoc on software and applications facilitating internet access. Anytime someone visited their website, the website owner would obtain a new property right in the displayed copy. The website owner could assert that right to bar any change to the way their website appeared, even software used to make websites more accessible. This could include browser software that changes website colors for colorblind users, enables dyslexic users to change font size and letter formatting, or disables flashing website elements that may trigger seizures. Plaintiffs could potentially leverage their supposed property interest to control the way users configure their screens, browsers, and device settings. The Court should avoid these anomalies and reverse.

II. Plaintiffs’ State-Law Claims Are Preempted By The Copyright Act.

Plaintiffs’ unjust enrichment claim fails because it is preempted by the Copyright Act. To the extent Plaintiffs’ trespass-to-chattels claim extends to their asserted display interest, it is preempted too. That is because the answer to the third certified question—“[w]hether website owners can invoke state law to control how their websites are displayed on a user’s screen without preemption by federal copyright law”—is “no.” (ER-5 [1292(b) Order 3].)

The Copyright Act grants “copyright owners the ‘exclusive rights’ to display, perform, reproduce, or distribute copies of a copyrighted work, to

authorize others to do those things, and to prepare derivative works based upon the copyrighted work.” *Maloney*, 853 F.3d at 1010 (quoting 17 U.S.C. § 106). Congress chose to expressly preempt “all legal or equitable rights that are equivalent” to these exclusive rights and “within the subject matter of copyright.” 17 U.S.C. § 301(a). Under § 301, copyright preemption applies if (1) “the ‘subject matter’ of the state law claim falls within the subject matter of copyright,” and (2) “the rights asserted under state law are equivalent to ... exclusive rights of copyright holders.” *Maloney*, 853 F.3d at 1010 (citation omitted).

As the district court recognized, the subject matter of Plaintiffs’ claims is their “websites and the manner in which they are displayed,” which “fall within the subject matter of copyright.” (ER-22 [Order 14].) And because Plaintiffs’ claims challenge the way Search App displays, and purportedly changes, copies of their websites, they necessarily assert rights equivalent to copyright-protected rights to “display [and] reproduce” works “to prepare derivative works.” 17 U.S.C § 106.

A. The Website Copies Grounding Plaintiffs’ Claims Fall Within The Subject Matter Of Copyright.

Under “the first prong, the subject matter of copyright encompasses ‘original works of authorship fixed in any tangible medium of expression.’” *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1069 (9th Cir. 2018) (quoting 17 U.S.C. § 102(a)). The district court correctly determined that “websites and the manner in which they are displayed fall within the subject matter of copyright.” (ER-22 [Order 14].)

Plaintiffs concede that their websites are “copyrightable” (ER-90), and the “law is clear that websites fall within the subject matter of copyright” (ER-7 [1292(b) Order 5]). Because they are “original works of authorship fixed in a[] tangible medium of expression,” 17 U.S.C. § 102(a), ““commercial website[s] readily qualif[y] for copyright protection.”” (ER-22 [Order 14] [quoting *Ticketmaster LLC v. Prestige Entm’t W., Inc.*, 315 F.Supp.3d 1147, 1160-61 (C.D. Cal. 2018)]); *see also Blue Nile, Inc. v. Ice.com, Inc.*, 478 F.Supp.2d 1240, 1248 (W.D. Wash. 2007); *Integrative Nutrition, Inc. v. Acad. of Healing Nutrition*, 476 F.Supp.2d 291, 296 (S.D.N.Y. 2007). The same is true of “the copies of [Plaintiffs’] websites that were loaded onto internet users’ Android phones,” which are the focus of Plaintiffs’ claims. (ER-149 [Compl. ¶ 173].)

Plaintiffs’ suggestion that the subject matter of their claims is “Google’s ads (and not the websites)” (ER-22 [Order 14]) is refuted by their own allegations. Plaintiffs’ core theory is that Search App alters the way copies of their websites are displayed, purportedly “obscuring and blocking” them in part (ER-151–152 [Compl. ¶ 186]) and “superimposing” ads over them (ER-150 [Compl. ¶ 178]). Nor does it matter that the copies appear within the framework of Google’s own app, for the law is clear that preemption applies even if the work is used in “a different product.” *See Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1144 (9th Cir. 2006). Because Plaintiffs’ websites, as “translate[d]” and “recreate[d]” on

user screens, form the heart of their claims (ER-117 [Compl. ¶ 39]), the district court properly rejected Plaintiffs' argument.

B. Plaintiffs' Asserted Right To Control How Copies Of Their Websites Are Displayed Is Equivalent To Exclusive Copyright Rights.

At the second prong, courts must “determine whether the rights plaintiffs assert under state law are ‘equivalent to rights within the general scope of copyright as specified by section 106 of the Copyright Act.’” *Maloney*, 853 F.3d at 1019 (citation omitted). The enumerated rights include “the ‘exclusive rights’ to display, perform, reproduce, or distribute copies of a copyrighted work, ... and to prepare derivative works.” *Id.* (quoting 17 U.S.C. § 106). “‘To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights’” and “‘have an extra element which changes the nature of the action.’” *Id.* (citation omitted).

Plaintiffs assert a right equivalent to a copyright right to “display” or “reproduce” copies of its website on users' screens. *Cf. id.* This is clear from Plaintiffs' complaint, which asserts “property rights, free speech rights and commercial interests *in the copies* of their websites that appear on internet users' monitors and screens.” (ER-119 [Compl. ¶ 53] [emphasis added]). Again, Plaintiffs' theory is that Search App “substantially interfered with and impaired” their rights by “obscuring and blocking” these rendered copies. (ER-151–152

[Compl. ¶ 186].) This is, in substance, a right to exclusively control the display and reproduction of website copies. That right not only sounds in copyright, but lies at its core.

The district court reasoned that “Plaintiffs are not asserting *infringement* of any right to the reproduction, performance, distribution, or display of their websites” because they “want and expect Google to copy and display their websites” and “acknowledge that Google has a license to do so.” (ER-23 [Order 15] [emphasis added].) But preemption does not turn on infringement, for “the scope of the subject matter of copyright law is broader than the protections it affords.” *Montz*, 649 F.3d at 979. And copyright law protects not only against outright copying, but also against reproducing or displaying a work in an unauthorized *manner*. The claim that a licensee “act[ed] outside the scope of the license” is a classic claim for “copyright infringement,” *see MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 939 (9th Cir. 2010), and a reproduction or display that is of poor quality, or materially distorts the work, may likewise be actionable in copyright, *see Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1150 (9th Cir. 2010) (recognizing infringement claim against “inferior” low “quality” counterfeits and finding related misappropriation claim preempted).

At all events, Plaintiffs’ asserted right against obscuring or altering the display of website copies maps onto the § 106 right “to prepare derivative works.”

A “derivative work” is “a work based upon one or more preexisting works” in any “form in which a work may be recast, transformed or adapted,” including “editorial revisions, annotations, elaborations, or other modifications.” 17 U.S.C. § 101. Because derivative works are “based upon” other works, infringement of the derivative works right “is necessarily also an infringement of either the reproduction or performance right” in the original work. 2 Nimmer on Copyright § 8.09 (2022); *see also Benny v. Loew’s, Inc.*, 239 F.2d 532 (9th Cir. 1956) (burlesque or parody of work held both “other version” and infringing “copy”). Such infringement includes “mak[ing] another version of” a copyrighted work “without the consent of a copyright proprietor.” *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343 (9th Cir. 1988).

On Plaintiffs’ own theory, Search App allegedly rendered a copy of their websites that was an unauthorized variation—one that “superimposed Google’s leaderboard” over the website at the bottom of the screen. (ER-124–25 [Compl. ¶¶ 73-74]); *see also* (ER-150 [*id.* ¶ 178]). That is qualitatively identical to a claim based upon the right to prepare derivative works—*viz.*, it challenges Google’s ability to “recast, transform[,], adapt[.],” “revis[e], annotat[e], elaborat[e]” or otherwise “modif[y]” their websites. 17 U.S.C. § 101. Plaintiffs allege that, “without the[ir] consent,” Google “ma[d]e another version of” Plaintiffs’ websites with ads superimposed. *See Mirage Editions, Inc.*, 856 F.2d at 1343.

Jarvis v. K2 Inc., 486 F.3d 526 (9th Cir. 2007), is instructive on this point. There, the plaintiff photographer supplied photographs to the defendant sporting goods company for limited use in advertising. *Id.* at 527. The defendant then created collage ads that “shrank, expanded, distorted, overlaid and otherwise edited the [plaintiff’s] original images, while also combining them with photos taken by other photographers, additional graphics, the [defendant’s] logo and marketing slogans.” *Id.* at 531. This Court held that the collage ads were “derivative” works, and, having exceeded the scope of the defendant’s license, infringed the plaintiff’s copyrights. *Id.* at 532.

The display rights asserted here are substantively the same. As in *Jarvis*, Plaintiffs contend Google exceeded the scope of its license to render and display copies of their websites. As in *Jarvis*, Plaintiffs maintain that Google “overlaid” other content over, and “combin[ed]” it with, their putative work. *Cf. id.* at 531. And as in *Jarvis*, the claim falls within the scope of copyright’s right to prepare derivative works.

It is of no moment that “Plaintiffs do not rely on copyright protection for their websites in pleading their claim.” (ER-24 [Order 16].) Preemption analysis looks to substance, not form: “preemption cannot be avoided simply by labeling a claim” as something other than a copyright claim or interest. *Universal Instruments Corp. v. Micro Sys. Eng’g, Inc.*, 924 F.3d 32, 48 (2d Cir. 2019)

(citation omitted)). If copyright preemption applied only where the plaintiff also asserted a copyright claim, plaintiffs could readily plead around it. Neither the plain language of § 301 nor this Court's cases permit such pleading subterfuge. *Maloney*, 853 F.3d at 1011-12 (deeming California-law right of publicity claims preempted even though plaintiffs asserted no copyright interests).

C. Plaintiffs' Unjust Enrichment Claim Does Not Include An Extra Element.

The district court concluded that Plaintiffs' unjust enrichment claim was not preempted because it had "extra elements 'instead of or in addition to' the acts giving rise to a copyright infringement claim." (ER-23 [Order 15] [citation omitted].) But the court never identified what that element was; there is none.

"The elements of a cause of action for unjust enrichment are simply stated as 'receipt of a benefit and unjust retention of the benefit at the expense of another.'" *Pro. Tax Appeal*, 29 Cal.App.5th at 238. The purported benefit that Google allegedly received here is interwoven with Plaintiffs' claim that Google violated their purported right to control the way their websites were duplicated and displayed, as well as derivatives made from those copies. Such unjust enrichment claims are "not materially different from a claim for copyright infringement." *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 432 (2d Cir. 2012); *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) ("unjust enrichment claim" preempted); *Melchior v. New Line Prods.*,

Inc., 106 Cal.App.4th 779, 793 (2003) (same). An “unjust enrichment” claim “requires no extra element.” *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 459 (6th Cir. 2001). Even assuming that “enrichment” were an additional element, it would not “make the unjust enrichment claim qualitatively different from a copyright infringement claim.” *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). As a leading treatise concluded, “a state-law cause of action for unjust enrichment or *quasi contract* should be regarded as an ‘equivalent right’ and, hence, preempted.” 1 Nimmer on Copyright § 1.15 (2022).

To the extent that Plaintiffs’ claim rests on some unpleaded “implied promise”—such as an implied promise not to modify the websites—that “implied promise ... is equivalent to the protection provided by section 106 of the Copyright Act.” *Del Madera Properties*, 820 F.2d at 977. “[F]inancial benefit” from “cost savings” or “profits” (ER-24 [Order 16]) does not supply an extra element either; infringers necessarily realize cost savings from not purchasing a license and infringers are liable for the “owner’s actual damages and any additional profits.” 17 U.S.C. § 504(a)(1).

The district court reasoned that “[w]hat matters for purposes of Plaintiffs’ claim is that their websites are potential revenue-generating advertising space, and not that they display copyrightable content.” (ER-25 [Order 17].) But that misapprehends both the preemption inquiry and the nature of Plaintiffs’ claims.

The question is not the economic value or purpose of the plaintiff's work; it is whether the work, and the right asserted to protect it, sound in copyright. *See Maloney*, 853 F.3d at 1010. Those requirements are both met here. And Plaintiffs' contention that Google interfered with their websites' "potential revenue-generating advertising space" (ER-25 [Order 17]) is bound up with their asserted "rights" and "interests in the copies of their websites that appear on internet users' monitors and screens" (ER-119 [Compl. ¶ 53]).

Nor can Plaintiffs avoid the substance of their claims by analogizing to "superimposing ads" on a "storefront," "marketing brochures," and "print advertisements." (ER-24–25 [Order 16-17] [quoting Compl. ¶ 17].) The centerpiece of their lawsuit is a class of work potentially protectable in copyright (website) and concerns a core copyright interest (controlling the work's display, duplication, or variation). The purported advertising space exists solely because Google has "reproduce[d]" the websites when making the "derivative" versions with superimposed ads. 17 U.S.C. § 106; (*see* ER-84 [Compl. ¶ 39]). Recharacterizing Plaintiffs' claims as advertising claims does not "qualitatively distinguish" the underlying rights from § 106 rights or "transform the nature of the action." *See Laws*, 448 F.3d at 1144. Indeed, if it makes sense to draw a brick-and-mortar analogy, it would be placing a logo sticker on a user's mobile phone screen.

The district court’s observation that “a website with trivial or no content at all could support a claim for implied contract/unjust enrichment” (ER-25 [Order 17]) is both irrelevant and wrong. It is irrelevant because Plaintiffs’ claims do not rest on bare-bones websites, but on websites that, like Best Carpet’s website, “enable internet users to make purchases and transact other business.” (ER-118 [Compl. ¶ 47]; *see also* ER-124–125 [*id.* ¶¶ 73-74].) It is wrong because preemption applies to “works of authorship ... even if federal law does not afford protection to them.” *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (Easterbrook, J.); *see also Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997) (preemption applies “to uncopyrightable as well as copyrightable elements.”). As long as a work fits within copyright subject-matter, the “failure to meet the required standards for federal protection cannot negate preemption.” 1 Nimmer on Copyright § 1.16 (2022).

D. Any Cognizable Trespass-To-Chattels Claim Is Equivalent To A Copyright Claim.

To the extent Plaintiffs’ trespass-to-chattels claim is viable under California property law, it would, in equal measure, fall within the scope of copyright preemption alongside their unjust enrichment claim. *See Firoozye v. Earthlink Network*, 153 F.Supp.2d 1115, 1129-30 (N.D. Cal. 2001) (deeming claim for conversion of software preempted because conversion elements are identical to elements of claim for copyright infringement under federal law).

If Plaintiffs have any cognizable interest in the copies of their websites displayed on user devices, it “is the property right conferred by copyright law.” *See Perry*, 697 N.E.2d at 632 (holding preempted a state criminal charge for unauthorized uploading of computer software). Plaintiffs’ asserted right—to not have copies of their websites blocked, shadowed or obscured—necessarily rests on the exclusive right to control display and duplication of the website copies, *see Jules Jordan Video, Inc.*, 617 F.3d at 1150 (recognizing infringement claim against “inferior” low “quality” counterfeits), and the derivative works right to not have their work “shrank,” “distorted,” and “overlaid,” *cf. Jarvis*, 486 F.3d at 527, 531. The alleged changes to the display copies of Plaintiffs’ websites are “editorial revisions[] ... or other modifications” plainly within the scope of the derivative works right. 17 U.S.C. § 101; *see also Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 18, 21 (2d Cir. 1976) (“unauthorized editing” of a television show to “make time for commercials” and remove “offensive” matter infringed).

Nor is there any “extra element” to Plaintiffs’ trespass claim that “changes the nature of the action.” *Maloney*, 853 F.3d at 1019. As construed by the district court, Plaintiffs’ trespass-to-chattels claim rests on their allegations that Google “obscured and blocked their websites, which if true, would interfere with and impair their websites’ published output.” (ER-20 [Order 12].) That is

indistinguishable from a copyright infringement claim based on unauthorized duplication, display, or derivative work creation.

True, a mine-run trespass-to-chattels claim might survive copyright preemption. Trespass-to-chattels involving “tangible property” in the plaintiff’s possession would not be preempted. *See Oddo v. Ries*, 743 F.2d 630, 635 (9th Cir. 1984). But Plaintiffs disclaim any reliance on injury to their tangible property; the asserted injury is to the published output of website copies possessed by users. (ER-86 [Compl. ¶ 53].)

As a leading treatise explains in the context of the related tort of conversion, “it is generally held that an action for conversion will lie only for wrongful possession of the tangible embodiment of a work, whereas a copyright action must be brought for wrongful use of the intangible artistic property contained therein.” 1 Nimmer on Copyright § 1.15 (2022). Indeed, courts regularly hold that “claims for conversion of intangible property are preempted.” *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 597-98 (5th Cir. 2015) (citation omitted); *see also Bokenfohr v. Gladen*, 828 F. App’x 485, 486 (9th Cir. 2020) (claim for conversion of “personal electronic data” preempted); *Melchior*, 106 Cal.App.4th at 792 (claim for conversion of movie script preempted). Courts have held that intangible property may be converted only in unusual circumstances, such as the

use of intangible property “to obtain an airworthiness certificate from the [Federal Aviation Administration].” *See G.S. Rasmussen*, 958 F.2d at 904.²

Because Plaintiffs’ state law claims are nothing more than disguised copyright claims, they are preempted by the Copyright Act.

III. The First Amendment Bars Plaintiffs’ Claims.

Even if Plaintiffs have somehow stated non-preempted claims under California law, they cannot invoke this court’s power to impose liability against Google without violating the First Amendment. Google’s exercise of editorial judgment in displaying search results and information in its own Search App is protected speech. The same is true of a user’s choice to search the internet, to view a website using Google’s Search App, and to engage the Google Search App’s leaderboard listing related pages. That right bars Plaintiffs’ attempts to invoke state law to control Google’s display of information and to compel Google to display their websites in a particular way.

The First Amendment protects the right of private parties to exercise editorial judgment in deciding what content to offer. The Supreme Court has

² *G.S. Rasmussen* has been repeatedly distinguished and criticized. *See, e.g., Daboub v. Gibbons*, 42 F.3d 285, 289 (5th Cir. 1995) (distinguishing *G.S. Rasmussen* as involving “the use of copyrighted material in order to obtain a regulatory permit”); *United States ex Rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1464 (4th Cir. 1997) (same); *Perry*, 697 N.E.2d at 630 (same); 1 Nimmer on Copyright § 1.15 (2022) (stating that *G.S. Rasmussen*’s reasoning “may be questioned”).

recognized First Amendment protection for editorial judgments in a wide range of contexts, from a newspaper's article selection, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), to a utility company's mailings, *see Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986), to a cable operator's selection of channels, *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)), and a parade organizer's decisions about whom to allow in the parade (*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995)).

No less than the editorial judgments made in these other contexts, Google's leaderboard offering users the option to "view 15 related pages," (ER-124 [*Id.* ¶ 73]), and the results reflected in those pages, constitute speech protected by the First Amendment. Indeed, many courts have dismissed a variety of claims against search engines that would have abridged these constitutionally-protected editorial rights. *See, e.g., Zhang v. Baidu.com, Inc.*, 10 F.Supp.3d 433, 435 (S.D.N.Y. 2014) (dismissing civil rights claims against a search engine for blocking pro-democracy search results as barred by the First Amendment); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) (dismissing unfair competition and tortious interference claim); *Langdon v. Google*, 474 F.Supp.2d 622, 629-30 (D. Del. 2007) (dismissing First Amendment, fraud, and deceptive business practices claims); *Search King, Inc. v. Google Tech.*,

Inc., 2003 WL 21464568, at *3-4 (W.D. Okla. 2003) (dismissing tortious-interference claim).

Users of Google’s Search App likewise have a First Amendment right to click on the leaderboard and view the “15 related pages.” “It is well established that the right to hear—the right to receive information—is no less protected by the First Amendment than the right to speak.” *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002). The First Amendment “protects the right to receive information and ideas,” *see Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and that protection “is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom,” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

Any abridgment of a speaker’s right to exercise editorial judgment must survive “strict scrutiny,” *i.e.*, it must be “justified by a compelling government interest and ... narrowly drawn to serve that interest.” *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011). Neither the district court nor Plaintiffs have ever offered any theory as to how strict scrutiny is satisfied. The district court suggested that Plaintiffs’ claims guard against “the risk consumers may be confused or misled by deceptive advertising,” but that purported interest cannot “defeat[] Google’s First Amendment right to suggest search results to users interested in viewing a particular website.” (ER-5 [1292(b) Order 3]); *cf. Dr.*

Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 462 (9th Cir. 2020) (the right to speak outweighs concerns about confusion or deception under trademark law except where “explicitly misleading”).

The district court concluded that strict scrutiny was inapplicable because the Search App leaderboard was mere “commercial speech” that may be regulated if “false, deceptive or misleading.” (ER-28 [Order 20].) But for First Amendment purposes, commercial speech is speech that does “no more than propose a commercial transaction.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Plaintiffs’ own allegations demonstrate that the “related pages” referenced by the leaderboard include noncommercial speech, including “news articles disparaging their businesses” or links to “detractors’ websites.” (ER-111 [Compl. ¶ 6] (emphasis omitted); *see also* ER-126 [*id.* ¶ 78] [“Google’s non-consensually imposed half-page banner ads were also often links to news stories about the website’s owner....”].) Critical commentary from journalists and detractors does more than “propose a commercial transaction,” *Va. Pharmacy*, 425 U.S. at 762, and garners full First Amendment protection.

The district court never applied the *Virginia Pharmacy* test for commercial speech, and instead assumed the leaderboard involved only commercial speech because it featured “ads” used “to generate profits for Google.” (ER-28 [Order

20].) But commercial speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech,” *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988), and the Complaint shows that the “related pages” curated by Search App include articles and commentary. And even purely commercial speech still garners some constitutional protection. *E.g., Va. State Bd. of Pharmacy*, 425 U.S. at 762.

The district court was equally wrong in concluding that Search App’s leaderboard could be regulated as “deceptive advertising” because it “misleadingly impl[ies] that [Plaintiffs] endorse Google’s ads or were compensated by Google for placing the ads.” (ER-28 [Order 20] [quoting Compl. ¶¶ 75, 85].) The complaint itself alleges that the “leaderboard [is] emblazoned with Google’s multicolored logo” and “widely recognized logo,” which purportedly “catch[es] a website viewer’s eye and entice[s] them to ‘View’ supposedly ‘Related Pages’ by clicking a pop-up button.” (ER-123 [Compl. ¶ 72]; ER-128 [*id.* ¶ 88].) No factual allegation supports the inference that users of *Google’s* Search App who use *Google’s* search engine and click on a pop-up button emblazoned with *Google’s* logo to see *Google* search results would think those elements are part of Plaintiffs’ websites, especially since clicking the pop-up button emblazoned with *Google’s* logo allegedly “block[s] 80% of” of Plaintiffs’ websites and “simultaneously shadow[s] and obscure[s] the” rest. (ER-125 [Compl. ¶ 74].)

* * *

Plaintiffs' remaining claim under the UCL's unlawful prong depends on the survival of the predicate trespass-to-chattels and unjust enrichment claims. (*See* ER-5 [1292(b) Order 2]; ER-26 [Order 18].) Because those claims should be dismissed, Plaintiffs' UCL lawful prong claim should be dismissed too. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008) (plaintiff could not meet unlawful prong when unable to state claim for any other violation of statute or common law).

CONCLUSION

This Court should reverse.

DATED: October 24, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**ADDENDUM OF STATUTORY AUTHORITIES
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17 U.S.C. § 101

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

[...]

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

[...]

17 U.S.C. § 106

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 301

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) Notwithstanding the provisions of section 303, and in accordance with chapter 14 no sound recording fixed before February 15, 1972, shall be subject to copyright under this title. With respect to sound recordings fixed before February 15, 1972, the preemptive provisions of subsection (a) shall apply to activities that are commenced on and after the date of enactment of the Classics Protection and Access Act. Nothing in this subsection may be construed to affirm or negate the preemption of rights and remedies pertaining to any cause of action arising from the nonsubscription broadcast transmission of sound recordings under the common law or statutes of any State for activities that do not qualify as covered activities under chapter 14

undertaken during the period between the date of enactment of the Classics Protection and Access Act and the date on which the term of prohibition on unauthorized acts under section 1401(a)(2) expires for such sound recordings. Any potential preemption of rights and remedies related to such activities undertaken during that period shall apply in all respects as it did the day before the date of enactment of the Classics Protection and Access Act.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)

(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.