

1 A. Louis Dorny (SBN 212054)
ldorny@tesla.com
2 Terry W. Ahearn (SBN 216543)
tahearn@tesla.com
3 Krista M. Carter (SBN 225229)
kricarter@tesla.com
4 TESLA, INC.
5 3000 Hanover St.
Palo Alto, CA 94304
6 Tel: (510) 298-8516

7 Christopher S. Marchese (SBN 170239)
marchese@fr.com
8 FISH & RICHARDSON P.C.
9 4695 MacArthur Court, Suite 1100
Newport Beach, CA 92660
10 Tel: (213) 533-4240 / Fax: (858) 678-5099

11 *Additional counsel listed on signature page*

12
13 Attorneys for Defendants
Tesla, Inc. and Elon Musk

14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

17 ALCON ENTERTAINMENT, LLC,
18 a Delaware Limited Liability Company,

19 Plaintiff,

20 v.
21

22 TESLA, INC., a Texas Corporation;
23 ELON MUSK, an individual;
24 WARNER BROS. DISCOVERY, INC.,
a Delaware Corporation,

25 Defendants.
26
27
28

Case No. 2:24-cv-09033-GW-RAO

**REPLY IN SUPPORT OF
DEFENDANTS TESLA, INC. AND
ELON MUSK'S MOTION TO
DISMISS TO FIRST AMENDED
COMPLAINT**

Hearing Date: April 7, 2025

Hearing Time: 8:30 a.m.

Courtroom: 9D

Judge: Hon. George H. Wu

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT.....	1
A. Plaintiff Fails to State a Claim for Direct Copyright Infringement	1
1. Actual Copying Is Not Germane to This Motion	1
2. Plaintiff’s Allegations of Literal Copying Are Implausible.....	3
3. “Referencing” or “Gating” Infringement Is Not a Theory of Copyright Infringement	4
4. There Is No Substantial Similarity	7
B. Plaintiff Fails to State a Claim for Vicarious Copyright Infringement	12
C. Plaintiff Fails to Address the Deficiencies in Its Lanham Act Claim	13
1. Plaintiff Conflates the Secondary Meaning and Likelihood of Confusion Elements	13
2. Plaintiff Fails to Plead Trade Dress Rights	14
3. Plaintiff Fails to Distinguish Well-Settled Case Law Dismissing Copyright-Type Lanham Act Claims	15
4. Plaintiff Cannot Plead Trademark Rights in “Blade Runner”	16
D. Plaintiff Fails to Meet Its Burdens on the Nominative Fair Use and First Amendment Defenses	16
1. Defendants’ Criticism of the Future Depicted in “Blade Runner” Is Nominative Fair Use	16
2. The Court Should Apply <i>Rogers</i> and Find that Plaintiff Has Not Met Its Burden to Sustain Its Lanham Act Claim.....	18
E. The Court Should Not Allow Plaintiff to Amend Its Already Amended Complaint	21
III. CONCLUSION	22

CERTIFICATE OF COMPLIANCE.....23

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Abdin v. CBS Broad. Inc.</i> , 971 F.3d 57 (2d Cir. 2020)	7
<i>AMF Inc. v. Sleekcraft Boats</i> , 599 F.2d 341 (9th Cir. 1979)	13, 16
<i>Anderson v. Stallone</i> , No. 87-cv-00592-WDK-Gx, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989)	6, 8
<i>Applied Underwriters, Inc. v. Lichtenegger</i> , 913 F.3d 884 (9th Cir. 2019)	18
<i>Basile v. Warner Bros. Ent.</i> , No. 15-cv-05243-DMG-MRWx, 2016 WL 5867432 (C.D. Cal. Jan. 4, 2016)	10
<i>Benay v. Warner Bros. Ent.</i> , 607 F.3d 620 (9th Cir. 2010)	9
<i>Bolger v. Youngs Drug Prods. Corp.</i> , 463 U.S. 60 (1983)	20
<i>Brown v. Elec. Arts, Inc.</i> , 724 F.3d 1235 (9th Cir. 2013)	20
<i>Champion v. Moda Operandi, Inc.</i> , 561 F. Supp. 3d 419 (S.D.N.Y. 2021)	17, 21
<i>Collier v. McKay</i> , No. 2:23-cv-10227-SPG-DFM, 2025 WL 101646 (C.D. Cal. Jan. 7, 2025)	7
<i>Comedy III Prods., Inc. v. New Line Cinema</i> , 200 F.3d 593 (9th Cir. 2000)	15
<i>Corbello v. Valli</i> , 974 F.3d 965 (9th Cir. 2020)	2

1	<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> ,	
2	539 U.S. 23 (2003).....	15
3	<i>Disc Golf Ass’n v. Champion Discs, Inc.</i> ,	
4	158 F.3d 1002 (9th Cir. 1998)	13
5	<i>Dish Network LLC v. Jadoo TV, Inc.</i>	
6	No. 20-cv-01891-CRB, 2023 WL 4004115 (N.D. Cal. 2023)	12
7	<i>Gibson Brands, Inc. v. John Hornby Skewes & Co.</i> ,	
8	No. 14-cv-00609-DDP-SS, 2015 WL 4651250 (C.D. Cal. Aug. 4,	
9	2015)	18
10	<i>Goldberg v. Cameron</i> ,	
11	787 F. Supp. 2d 1013 (N.D. Cal. 2011).....	9
12	<i>Hoffman v. Capital Cities/ABC, Inc.</i> ,	
13	255 F.3d 1180 (9th Cir. 2001)	21
14	<i>Jack Daniel’s Props., Inc. v. VIP Prods. LLC</i> ,	
15	599 U.S. 140 (2023).....	19, 20
16	<i>Kassel v. Moynihan</i> ,	
17	No. 1:23-cv-06958-JLR, 2024 WL 2832813 (S.D.N.Y. June 3,	
18	2024)	8
19	<i>Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery</i> ,	
20	150 F.3d 1042 (9th Cir. 1998)	14
21	<i>Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.</i> ,	
22	964 F.2d 965 (9th Cir. 1992)	5
23	<i>Lions Gate Ent. Inc. v. TD Ameritrade Servs. Co.</i> ,	
24	170 F. Supp. 3d 1249 (C.D. Cal. 2016)	15, 16
25	<i>Lions Gate Ent., Inc. v. TD Ameritrade Servs. Co.</i> ,	
26	No. 2:15-cv-05024-DDP-E, 2017 WL 4621541 (C.D. Cal. Oct. 16,	
27	2017)	15, 16
28	<i>Litchfield v. Spielberg</i> ,	
	736 F.2d 1352 (9th Cir. 1984)	6, 11
	<i>Mallery v. NBC Universal, Inc.</i> ,	
	No. 07-cv-02250-DLC, 2007 WL 4258196 (S.D.N.Y. Dec. 3, 2007)	9

1	<i>Mattel, Inc. v. MCA Recs., Inc.</i> ,	
2	296 F.3d 894 (9th Cir. 2002)	20, 21
3	<i>Mattel, Inc. v. MGA Ent., Inc.</i> ,	
4	616 F.3d 904 (9th Cir. 2010)	11
5	<i>Mattel, Inc. v. Walking Mountain Prods.</i> ,	
6	353 F.3d 792 (9th Cir. 2003)	17, 18
7	<i>McGillvary v. Netflix, Inc.</i> ,	
8	No. 2:23-cv-01195-JLS-SK, 2024 WL 3588043 (C.D. Cal. July 30,	
9	2024)	19
10	<i>Micro Star v. Formgen Inc.</i> ,	
11	154 F.3d 1107 (9th Cir. 1998)	5
12	<i>Nielsen Consumer LLC v. LiveRamp Holdings, Inc.</i> ,	
13	No. 24-cv-07355-SVK, 2025 WL 604665 (N.D. Cal. Feb. 25, 2025)	18
14	<i>Paramount Pictures Corp. v. Axanar Prods., Inc.</i> ,	
15	No. 2:15-cv-09938-RGK-E, 2017 WL 83506 (C.D. Cal. Jan. 3,	
16	2017)	2, 6
17	<i>Pepperdine Univ. v. Netflix, Inc.</i> ,	
18	No. 2:25-cv-01429-CV-ADSx, 2025 WL 632983 (C.D. Cal. Feb.	
19	26, 2025)	19
20	<i>Reaper v. ACE Am. Ins. Co.</i> ,	
21	No. 23-15178, 2024 WL 810697 (9th Cir. Feb. 27, 2024)	3
22	<i>Rentmeester v. Nike, Inc.</i> ,	
23	883 F.3d 1111 (9th Cir. 2018)	2, 8
24	<i>Satava v. Lowry</i> ,	
25	323 F.3d 805 (9th Cir. 2003)	11
26	<i>Shame on You Prods., Inc. v. Banks</i> ,	
27	120 F. Supp. 3d 1123 (C.D. Cal. 2015)	8
28	<i>Toyota Motor Sales, U.S.A., Inc. v. Tabari</i> ,	
	610 F.3d 1171 (9th Cir. 2010)	17
	<i>Twentieth Century Fox Television v. Empire Distrib., Inc.</i> ,	
	875 F.3d 1192 (9th Cir. 2017)	19

1	<i>VIP Prods. LLC v. Jack Daniel’s Props., Inc.</i> ,	
2	953 F.3d 1170 (9th Cir. 2020)	20
3	<i>Warner Bros. v. Am. Broad. Cos.</i> ,	
4	720 F.2d 231 (2d Cir. 1983)	8
5	<i>Wozniak v. Warner Bros. Ent.</i> ,	
6	726 F. Supp. 3d 213 (S.D.N.Y. 2024)	2, 6
7	Other Authorities	
8	Fed. R. Civ. P. 8.....	10
9	3 Patry on Copyright § 9:4.10.....	2
10	4 Nimmer on Copyright § 13D.06.....	4
11	4 Patry on Copyright § 12:13.....	6
12	4 Patry on Copyright § 12:19.....	5

1 **I. INTRODUCTION**

2 Despite Plaintiff's convoluted and free-association Opposition, Defendants'
3 Motion is straightforward and their request for relief is quite simple. Once the
4 unprotectable concepts of Plaintiff's BR2049 film are filtered out, an objective
5 comparison of the parties' works shows they are not substantially similar. As a result,
6 the copyright claims can be dismissed. Defendants' passing reference to "Blade
7 Runner" and purported use of BR2049 imagery was not misleading, did not imply an
8 endorsement or brand affiliation, and is classic fair use that is also protected by the
9 First Amendment. Thus, the trademark claim can, likewise, be dismissed.¹

10 **II. ARGUMENT**

11 **A. Plaintiff Fails to State a Claim for Direct Copyright Infringement**

12 **1. Actual Copying Is Not Germane to This Motion**

13 Plaintiff argues it pled actual copying based on a so-called "'asserted truths'
14 doctrine" and through a variety of "circumstantial facts." Opp. 6:22-7:16. The Court
15 need not address Plaintiff's arguments on actual copying for the purpose of deciding
16 this Motion because the parties' works are not substantially similar. Nevertheless,
17 Defendants address them here.

18 *First*, Musk did not "effectively state[]" to the audience that the Exhibit C
19 image² was supposed to be an illustration of BR2049." Opp. 7:1-5 (emphasis
20 original).³ The FAC quotes what Musk said—"I love 'Blade Runner.'" FAC ¶ 106.

22 ¹ Because the relevant facts for this Motion are those alleged in the FAC, we do not
23 specifically address the self-serving "Facts" section of Plaintiff's Opposition (Dkt.
24 52; "Opp.") 1:5-2:26.

25 ² The Exhibit C image attached to the FAC is the still image shown for eleven seconds
26 during the "We, Robot" event. The recording of the "We, Robot" event, including the
27 Exhibit C image, is the Accused Work and lodged at Dkt. 25 as Exhibit 2. In the FAC,
28 Plaintiff alleges the Exhibit C image and "We, Robot" recording are two "infringing
works." FAC ¶ 126.

³ All quotations cleaned up and emphasis added unless otherwise noted.

1 Even if the Court accepts that Musk intended to refer to BR2049, this is not an
2 admission that Defendants actually copied. This is a far cry from the facts in *Wozniak*
3 *v. Warner Bros. Entertainment*, relied on by Plaintiff, where the accused infringer
4 explicitly conceded that he “wrote a ‘Batman story.’” 726 F. Supp. 3d 213, 230
5 (S.D.N.Y. 2024).⁴ Neither *Wozniak* nor *Paramount Pictures Corp. v. Axanar*
6 *Productions, Inc.*, No. 2:15-cv-09938-RGK-E, 2017 WL 83506 (C.D. Cal. Jan. 3,
7 2017), another case cited by Plaintiff, support any “estoppel-type bar.” Opp. 17:13-
8 16. Defendants make no admission of copying, and Musk’s expressed enthusiasm as
9 a fan of the film and commentary on its bleak future cannot reasonably be interpreted
10 as conceding copying. Even if it is, substantial similarity still must be found under the
11 extrinsic test. *Axanar*, 2017 WL 83506, at *6. Depicting an image inspired by a
12 copyrighted work is perfectly acceptable. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111,
13 1116 (9th Cir. 2018) (finding no infringement where Nike’s image was “obviously
14 inspired by Rentmeester’s”).

15 **Second**, with respect to the “circumstantial facts,” Defendants dispute that they
16 engaged in actual copying because they did, in fact, independently create the Exhibit
17 C image. Opp. 7:8-16; Mot. 14:14-16. But the Court need not resolve this factual
18 dispute now. 3 Patry on Copyright § 9:4.10 (“if copying is established, the plaintiff
19 must still prove that what was copied resulted in a material appropriation of
20 expression”); *Rentmeester*, 883 F.3d at 1117 (explaining the difference between
21 “copying” and “unlawful appropriation,” finding plaintiff plausibly alleged the first
22 but not the second, and affirming dismissal of copyright claim). Whether Defendants
23 copied **protected** elements of the expression of BR2049 is the ultimate question. Once
24 the parties’ works are viewed together and the unprotectable concepts and scènes-à-
25

26 ⁴ On this point, Plaintiff also relies on *Corbello v. Valli*, which explains that an “author
27 who holds their work out as nonfiction...cannot later claim, in litigation, that aspects
28 of the work were actually made up and so are entitled to full copyright protection.”
974 F.3d 965, 978 (9th Cir. 2020). This doctrine is inapplicable here.

1 faire of BR2049 are excluded—a required step of the extrinsic test—the answer to
2 this question is a resounding “no.”

3 2. Plaintiff’s Allegations of Literal Copying Are Implausible

4 Plaintiff claims to have plausibly pled a “literal copying” theory of its
5 reproduction right by pointing to far-fetched and unsupported “alternative theories”
6 of literal copying, which are based on inputting an infringing image or clip into an AI
7 image generator to create the Exhibit C image. Opp. 7:27-8:7. Plaintiff states that
8 these theories “seem entirely plausible,” but then suggests a new and unpled
9 hypothetical that it could plead “[i]f necessary, on amendment.” *Id.* 8:8-16. This does
10 not adequately address the deficiencies in the FAC outlined by Defendants.

11 As noted in Defendants’ Motion (Dkt. 48-1; “Mot.”) 14:3-22, Plaintiff’s two
12 alternate theories of literal copying are alleged entirely on “information and belief,”
13 with no credible, factual basis. FAC ¶¶ 103-104. They are convoluted and phrased
14 hesitantly with alternate “possibl[e]” facts within each theory that “seem[] likely” to
15 have occurred “or something closely akin to it” and are, frankly, implausible. *Id.*
16 ¶ 103.

17 Plaintiff does not address the case law Defendants cited (Mot. 14:4-12) that
18 instructs that pleading on information and belief does not create an exception to the
19 normal federal pleading standards requiring plausibility. *Reaper v. ACE Am. Ins. Co.*,
20 No. 23-15178, 2024 WL 810697, at *1 (9th Cir. Feb. 27, 2024). All Plaintiff says is
21 “[t]he allegations seem entirely plausible.” Opp. 8:8. This conclusory assertion is
22 belied by what Plaintiff does next: conjure up a new hypothetical that “Musk **might**
23 **have put** BR2049 or parts of it into Grok.” *Id.* 8:11-16.⁵

24
25 ⁵ The Court should disregard Plaintiff’s argument that Defendants’ “factual
26 explanation” of the generation of the Exhibit C image is “inconsistent with observable
27 facts” from the We, Robot recording. Opp. 8:19-26. Plaintiff adopted and pled
28 Defendants’ “factual explanation” as a partial basis for Plaintiff’s “Exhibit C AI

1 Through only far-fetched speculation, Plaintiff asks this Court to forego a
2 substantial similarity analysis and allow this case to proceed on its literal copying
3 theories, despite that the Accused Work, including the Exhibit C image displayed
4 therein, is **not** alleged to be a literal copy of BR2049. Opp. 7:27-9:1. This is the
5 ultimate reason why Plaintiff's theories of literal copying (FAC ¶¶ 103-104, 127(a)-
6 (b)) are so implausible. Without a literal copy accused, the Court cannot test the
7 plausibility of these allegations. *See* 4 Nimmer on Copyright § 13D.06 ("the
8 similarities that are pertinent here are those that exist between plaintiff's actual work
9 and defendant's allegedly infringing copy"). While the untenable and far-fetched
10 nature of these allegations should bar Plaintiff's claim of literal copying (Opp. 7:27-
11 9:1), the Court can still compare the parties' works and determine as a matter of law
12 that the Accused Work, including the Exhibit C image, does not infringe BR2049
13 under the extrinsic test.

14 **3. "Referencing" or "Gating" Infringement Is Not a Theory of**
15 **Copyright Infringement**

16 Plaintiff's non-literal copying theories are similarly far-fetched and
17 implausible. At the outset, there is no such thing as "'referencing' (or 'gating')
18 infringement;" nor is there any such thing as a "reference leveraging claim." Opp.
19 10:23, 11:12. This is why Defendants' Motion did not address it. The essence of
20 Plaintiff's manufactured theory (as best as can be understood) is that the Accused
21 Work uses a small, allegedly protectable portion of BR2049 that "evokes" "all the
22 protected elements (or a set of them) in the whole movie." Opp. 9:13-21, 11:1-6.
23 Stated another way, Plaintiff seems to be claiming that all of the protectable elements
24 are infringed, in Plaintiff's view, merely because they "exist" in BR2049 despite that
25 most (or even all) **are not present** in the Accused Work. *Id.* 11:1-6. This theory has
26

27 _____
28 Image Generation Alternative Theory 2." FAC ¶ 104. Plaintiff cannot now argue its
own pleaded facts are implausible.

1 no basis in copyright law. “The legislative history of the Copyright Act explains, in
2 order to be ‘based upon’ the preexisting work, that new, derivative work ‘must
3 **incorporate** a portion of the copyrighted work in some form.’ In addition to
4 incorporating a portion of the preexisting work, an infringing derivative work must
5 also, as the definition of derivative work states, ‘recast, transform, or adapt’ the
6 copyrightable expression of the preexisting work.” 4 Patry on Copyright § 12:19
7 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62 (1976); S. Rep. No. 473, 94th
8 Cong., 1st Sess. 58 (1975); *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir.
9 1998)).

10 Unsurprisingly, none of Plaintiff’s cases support its argument that a mere
11 reference is infringement. Opp. 9:21-10:21, 11:7-11. *Micro Star* does not stand for
12 the proposition that a determination of copyright infringement is based on “elements
13 [not] ‘physically’ present” in an accused work. *Id.* 10:7-10. The court in *Micro Star*
14 found infringement because Micro Star used FormGen’s MAP files that described “in
15 painstaking detail” “what to put where” to tell the game engine to create Micro Star’s
16 audiovisual game display using artwork from FormGen’s source art library. 154 F.3d
17 at 1110. Micro Star’s software enabled players to create **concrete and permanent**
18 audiovisual displays using FormGen’s artwork to create new levels of game play and
19 thereby created “sequels” that told “somewhat repetitive tales” of the adventures of
20 FormGen’s main character. *Id.* at 1110-12; *see also Lewis Galoob Toys, Inc. v.*
21 *Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992) (“A derivative work must
22 incorporate a protected work in some concrete or permanent ‘form.’...The examples
23 of derivative works provided by the [Copyright] Act all physically incorporate the
24 underlying work or works.”). The “exact, down to the last detail, description of [the]
25 audiovisual display” made it permanent or concrete, similar to how sheet music
26 describes in precise detail the way a copyrighted melody sounds. *Micro Star*, 154 F.3d
27 at 1111-12.

1 *Axanar*, cited at Opp. 11:8-10, likewise, fails to support Plaintiff's unfounded
2 argument. In *Axanar*, the court found the defendants "use[d] many elements from the
3 Star Trek universe," including a live character and two fictional species with distinct
4 physical and conceptual qualities (Klingons and Vulcans), battleships including the
5 U.S.S. Enterprise, plot points, sequence of events, and dialog, "down to excruciating
6 details." 2017 WL 83506, at *4-6. Their use was so "extensive" that defendants
7 created an infringing "Star Trek prequel." *Id.* at *6. The court did not say that mere
8 referencing alone is infringement or that use of a small aspect of a plaintiff's work
9 may trigger infringement of all protectable elements of an entire film, as Plaintiff
10 suggests. Opp. 10:7-10.

11 There is no mention of the "reference leveraging" theory in *Wozniak* either.
12 The *Wozniak* court found infringement on summary judgment where even a high-
13 level review of the plaintiff's Batman story revealed that its characters were "not
14 merely substantially similar" to DC Comics' protected characters, including Batman,
15 the Batmobile, and Bruce Wayne, "they *are* those characters." 726 F. Supp. 3d at 231
16 (emphasis original) (citing *Anderson v. Stallone*, No. 87-cv-00592-WDK-Gx, 1989
17 WL 206431, at *8 (C.D. Cal. Apr. 25, 1989)).

18 There is simply no support for Plaintiff's reference leveraging theory. The
19 dispositive question is whether there is substantial similarity. *See Litchfield v.*
20 *Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (affirming holding of no copyright
21 infringement and noting that plaintiff's "novel proposition" that a derivative work is
22 one merely "based on" a copyrighted work was wrong because "a work is not
23 derivative unless it has been substantially copied from the prior work"). "In order to
24 infringe the derivative right, there must be substantial similarity in protectible
25 expression between the parties' works." 4 Patry on Copyright § 12:13. As discussed
26 below, there is no substantial similarity between BR2049 and the Accused Work.

1 **4. There Is No Substantial Similarity**

2 Plaintiff does not dispute that the Court can decide the issue of substantial
3 similarity now by comparing the parties' works. Opp. 4:15-19. Viewing the works, it
4 is clear there is no substantial similarity. *Compare* Ex. 2 (We, Robot recording), *and*
5 Ex. C to FAC, *with* Ex. 3 (BR2049).

6 Integral to this analysis is the basic and undisputed premise that copyright law
7 does not protect ideas or concepts, like “the general idea for a story” or “situations
8 and incidents which flow naturally from a basic plot premise, so-called scenes a faire.”
9 *Collier v. McKay*, No. 2:23-cv-10227-SPG-DFM, 2025 WL 101646, at *4 (C.D. Cal.
10 Jan. 7, 2025). Nor is the “general mood that flows naturally from unprotectable basic
11 plot premises” protectable. *Id.* at *5.

12 **Character K**: The description of K as a “duster-clad man with close-cropped
13 hair viewed in silhouette or near-silhouette, surveying or exploring a post-apocalyptic
14 ruined cityscape bathed in orange light” (FAC ¶ 71(b)) is too generic and conceptual
15 to be protectable. *See, e.g., Abdin v. CBS Broad. Inc.*, 971 F.3d 57, 67, 72 (2d Cir.
16 2020) (“generic and generalized traits such as race, gender, and hair color are not
17 protectible”). To try to make K appear protectable, Plaintiff argues that K satisfies the
18 “story being told” test for copyrightability and recounts the details of said story. Opp.
19 13:16-27. But Plaintiff admits these character traits of K—the very essence of what
20 makes K allegedly copyrightable—are **not** “physically present” in the Accused Work.
21 *Id.* 13:27-14:2.

22 To try to overcome the fact that anything arguably copyrightable about K is not
23 present in the Accused Work, Plaintiff resorts to its reference leveraging theory.⁶ A
24 defendant who “means to be understood as including plaintiff’s actual character” has
25 infringed, according to Plaintiff, “without any need for [a] substantial similarity

26 ⁶ Here, Plaintiff uses even more confusing terminology to refer to its reference
27 leveraging theory such as “arguably” “semiotically reference-leverag[ing]” and
28 “linking admission principle.” Opp. 13:27-14:12.

1 comparison.” Opp. 14:3-7 (citing *Anderson*, 1989 WL 206431, at *8). This is wrong.
2 In *Anderson*, the court forewent a substantial similarity analysis because there was
3 “literal similarity” as it was “uncontroverted that the characters were lifted lock, stock,
4 and barrel from the prior Rocky movies” and thus “they *are* Stallone’s characters.”
5 1989 WL 206431, at *8. Here, Plaintiff does not allege literal copying of K; it argues
6 that K appears only “partially ‘physically’” in the Accused Work (Opp. 13:3-4) or not
7 at all.

8 The law is clear that anyone may properly take inspiration from a copyrighted
9 work. *Rentmeester*, 883 F.3d at 1122-23. In fact, copyright “encourage[es] others to
10 build freely upon the idea and information conveyed by a work.” *Id.* at 1123 (citing
11 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)). Thus,
12 “[s]tirring one’s memory of a copyrighted character is not the same as appearing to
13 be substantially similar to that character, and only the latter is infringement.” *Warner*
14 *Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983).

15 **Setting**: Here too, Plaintiff’s setting is too generic to be protectable.⁷ Plaintiff
16 claims that Defendants failed to consider that the urban ruin was “about to be explored
17 by a blade runner in a duster shown in silhouette or near silhouette,”⁸ but that is
18 irrelevant since “[c]ourts regularly find that works with significantly more
19 specificity...encompass unprotectable concepts or scenes a faire.” *Kassel v.*
20 *Moynihn*, No. 1:23-cv-06958-JLR, 2024 WL 2832813, at *6 (S.D.N.Y. June 3,
21 2024) (collecting cases); *Shame on You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123,
22 1159 (C.D. Cal. 2015) (finding two works that include a “gentleman’s room where
23

24 ⁷ It is described as a “post-apocalyptic urban ruin, specifically as a place that holds
25 answers or important information about the Human-AI Relationship Question, bathed
26 in orange light, and especially one that is about to be explored by a blade runner in a
27 duster shown in silhouette or near-silhouette.” FAC ¶ 71(e).

28 ⁸ The latter part of this description of the setting, a blade runner in a duster, is also
repetitive of the allegedly protectable aspects of the character K.

[a] one-night-stand takes place, a tow yard, a place of worship, a spa, city streets..., an outdoor chase on wheels, and a helicopter ride” were not substantially similar), *aff’d*, 690 F. App’x 519 (9th Cir. 2017); *Benay v. Warner Bros. Ent.*, 607 F.3d 620, 627-28 (9th Cir. 2010) (“Given that both works involve an American war veteran who travels to Japan to help the Emperor fight a samurai rebellion, it is not surprising that they share certain settings: a scene of the protagonist sailing into Japan, scenes in the Imperial Palace, scenes on the Imperial Army’s training grounds, and battle scenes in various places in Japan. These are all scenes-a-faire[.]”); *Mallery v. NBC Universal, Inc.*, No. 07-cv-02250-DLC, 2007 WL 4258196, at *6 (S.D.N.Y. Dec. 3, 2007) (“(1) [P]ainting a future in which tragic and destructive events take place, such as the destruction of landmark buildings in New York City; (2) having a prediction confirmed by a newspaper report; and (3) making an attempt to prevent a tragic event in light of a prediction of the future, are simply *scenes a faire*, or sequences of events that necessarily result from the choice of a setting or situation, which do not enjoy copyright protection.” (emphasis original)).

Again, Plaintiff admits that its setting appears only “partially” in the Accused Work. Opp. 14:14-16. ***At most***, an objective comparison of the parties’ works shows overlap in the unprotectable idea of a post-apocalyptic urban ruin, orange light, and a non-descript man in a long coat in near-silhouette. Ex. C. These concepts are unoriginal and flow naturally from their shared idea: a pessimistic view of a post-apocalyptic city. *See Goldberg v. Cameron*, 787 F. Supp. 2d 1013, 1020 (N.D. Cal. 2011) (finding “the general idea of a futuristic conflict between man and machines, specifically computers and robots” is unprotectable).

Theme & Mood: Here, again, Plaintiff resorts to its “referencing-leveraging” argument, which is not cognizable for the reasons already stated. Opp. 15:10-13, 20-23.⁹ And again, Plaintiff relies on concepts that are unprotectable and/or not in the

⁹ For these same reasons, expert testimony will not help. Opp. 15:10-1.

1 Accused Work. Opp. 14:24-25, 15:15-16; *see Basile v. Warner Bros. Ent.*, No. 15-cv-
2 05243-DMG-MRWx, 2016 WL 5867432, at *12 (C.D. Cal. Jan. 4, 2016) (finding
3 works that share “an apocalyptic mood in which the hero(es) must defy the odds in
4 order to save innocent people” were not substantially similar), *aff’d*, 678 F. App’x
5 604 (9th Cir. 2017). Plaintiff fails to address its own allegation that none of its
6 identified “themes or moods are themselves protectable by any intellectual property
7 law.” Mot. 7:7-8; FAC ¶ 121. Instead, Plaintiff argues that Musk “took BR2049,”
8 which “argues for protectability.” Opp. 15:7-10. But that is not the law. Defendants’
9 alleged actions do not make Plaintiff’s alleged theme or mood protectable. Nor do
10 they make the parties’ works similar in expression. There is no “urgent human-AI
11 decision point” or mood of “anxiety, fear, or urgency” expressed in the Accused
12 Work. Opp. 14:24-15:23; Mot. 7:7-27. The “We, Robot” recording (Exhibit 2) shows
13 this is not a “factual dispute” as Plaintiff claims. Opp. 15:22-23.

14 **Selection & Arrangement:** As a fallback position, Plaintiff attempts to add
15 specificity to its vague allegation that Defendants infringed a combination of
16 elements, even if one or more of its alleged elements is unprotected on its own. FAC
17 ¶¶ 71(f), 127(d); Opp. 15:24-17:1. It articulates, *for the first time*, 14 elements that it
18 purports are selected and arranged together. This theory is rife with issues. Several of
19 these elements, such as “(11) switching between non-orange light, orange light, and
20 back to non-orange light” to indicate decisions, are not pled as infringed in the FAC
21 at all, contrary to Plaintiff’s claim. Opp. 16:14-23. Tellingly, Plaintiff does not even
22 identify which elements are *in the Accused Work*, arguing instead that “the FAC
23 articulates a ‘selection and arrangement’ of elements that appear, including
24 “physically,” *in BR2049 and/or* the [A]ccused [W]orks.” Opp. 16:11-12; FAC
25 ¶ 127(d) (alleging vaguely that the Exhibit C image incorporates a “Combination of
26 Elements, as alleged in paragraph 71f of this FAC”). Without knowing what elements
27 Plaintiff claims are in the Accused Work, this allegation fails to meet Rule 8.

1 The list of elements also is artificially inflated. Elements 1-7, for example, are
2 merely the descriptions of K and the BR2049 setting broken into minute fragments to
3 create an illusion of volume. And nowhere does Plaintiff articulate how their
4 combination constitutes an original work of authorship. *See Satava v. Lowry*, 323 F.3d
5 805, 811 (9th Cir. 2003) (“a combination of unprotectable elements is eligible for
6 copyright protection only if those elements are numerous enough and their selection
7 and arrangement original enough that their combination constitutes an original work
8 of authorship”).

9 Lastly, Alcon is not entitled to any special “plaintiff-favorable treatment.” Opp.
10 12:9-12.¹⁰ Like any other copyright claimant, Plaintiff must plead copying of
11 ***protectable expression*** to sustain a claim for infringement. Whether two works are
12 substantially similar is the dispositive question; not whether Exhibit C merely “***looks***
13 ***like*** it is a scene from BR2049[.]” as Plaintiff improperly proposes. Opp. 17:19-22. As
14 the Ninth Circuit has stated is “too often the case,” Plaintiff’s claims are premised
15 “partly upon a wholly erroneous understanding of the extent of copyright protection;
16 and partly upon that obsessive conviction, so common among authors and composers,
17 that all similarities between their works and any others which appear later must
18 inevitably be ascribed to plagiarism.” *Litchfield*, 736 F.2d at 1358. In sum, there is
19 neither substantial similarity in individual elements nor the “selection and
20 arrangement” thereof.

21
22
23
24
25 ¹⁰ *Mattel, Inc. v. MGA Entertainment, Inc.* does not state that all science fiction motion
26 pictures are given “the most plaintiff-favorable treatment.” Opp. 12:9-12. In
27 comparing works with a wide versus narrow range for expression, the court stated,
28 “[i]f there’s a wide range of expression (for example, there are gazillions of ways to
make an aliens-attack movie), then copyright protection is ‘broad[.]’” 616 F.3d 904,
913-14 (9th Cir. 2010).

B. Plaintiff Fails to State a Claim for Vicarious Copyright Infringement

Plaintiff criticizes Defendants’ Motion for reading vicarious copyright infringement rules “too narrowly” yet does not address any of the case law cited by Defendants. Opp. 18:4-21. This includes cases that explain a plaintiff must plausibly allege more than a defendant’s alleged infringement “*generally* acted as a draw for [defendant’s] business,” that a benefit is not “direct” if it would reach the defendant “only incidentally,” and that a direct infringer’s avoidance of fees alone cannot satisfy the requirement of a direct financial benefit to the vicarious infringer.” *See* Mot. 15:18-23 (citing *Bell v. Pac. Ridge Builders, Inc.*, No. 19-cv-01307-JST, 2019 WL 13472127, at *6 (N.D. Cal. June 4, 2019) (emphasis original); *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019)). Based on the cases cited by Defendants and ignored by Plaintiff, Plaintiff’s allegation that Defendants “used the semiotic BR2049 reference to push the audience emotionally into a space more receptive to Musk and Tesla’s commercial message” (Opp. 2:16-18, 18:9-11) is insufficient to plead a direct financial benefit.¹¹

Further, Plaintiff fails to explain how its allegation that Musk’s mere *belief* that the purported BR2049 reference would lead Tesla to sell more “Cybercabs” and increase Tesla’s stock price suffices as an allegation that Musk received an *actual* direct financial benefit from the alleged infringement. Mot. 15:23-17:7. Instead, Plaintiff responds to an argument about Musk’s potential individual liability that Defendants never made. Opp. 18:12-21. Defendants did not challenge Musk’s potential liability based on his status as the CEO and controlling shareholder of Tesla, as Plaintiff suggests. *Id.* Rather, Musk is not liable for direct or vicarious infringement because there is no substantial similarity and the FAC’s allegations of Musk’s *belief*

¹¹ *Dish Network LLC v. Jadoo TV, Inc.*, cited at Opp. 18:5-9, is inapposite. The defendants in that case did not contest that the infringement attracted additional users to buy defendants’ products and use their services. No. 20-cv-01891-CRB, 2023 WL 4004115, at *14 (N.D. Cal. 2023).

1 that a BR2049 reference would increase interest in Tesla “Cybercabs” is insufficient
2 to plead that Musk received a direct financial benefit from the alleged infringement.

3 **C. Plaintiff Fails to Address the Deficiencies in Its Lanham Act Claim**

4 **1. Plaintiff Conflates the Secondary Meaning and Likelihood of**
5 **Confusion Elements**

6 Plaintiff purports to respond to Defendants’ argument that Plaintiff’s
7 allegations of secondary meaning for *all* the alleged marks or trade dress are
8 speculative (Mot. 17:21-18:21), but Plaintiff’s argument is about an entirely separate
9 element of its Lanham Act claim—likelihood of confusion. Opp. 19:5-14. Plaintiff
10 responds that it is not required to plead it is a commercial source of cars because the
11 likelihood of confusion element may be met by confusion as to sponsorship or
12 association. Opp. 19:5-12 (quoting *PetConnect*’s discussion of likelihood of
13 confusion test). But secondary meaning and likelihood of confusion are separate
14 elements, each of which Plaintiff must plausibly plead to state a Lanham Act claim.
15 *Disc Golf Ass’n v. Champion Discs, Inc.*, 158 F.3d 1002, 1005 (9th Cir. 1998)
16 (discussing elements). The likelihood of confusion test that Plaintiff cites has no
17 bearing on secondary meaning.

18 With respect to Defendants’ actual argument—Plaintiff’s allegations of
19 secondary meaning are speculative and focused on different goods than the cars at
20 issue here—Plaintiff does not even attempt to identify any factual support for its
21 conclusory allegations of secondary meaning. Opp. 19:5-14. Plaintiff merely states,
22 “[t]he FAC pleads all elements,” and cites more than one-third of the FAC. *Id.* 19:14.¹²

23
24 ¹² While Defendants’ argument concerns secondary meaning rather than likelihood of
25 confusion, Defendants note that Plaintiff’s claim that it pleads all the *Sleekcraft*
26 likelihood of confusion factors (Opp. 19:13-14) is false at least because it does not
27 plead proximity of the goods. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th
28 Cir. 1979). None of the FAC paragraphs cited at Opp. 19:14 plead that the goods
Plaintiff has offered under its BLADE RUNNER 2049 mark, such as comic books
and video games (FAC ¶ 77) are related to Tesla’s “Cybercabs.”

1 Plaintiff is unable to support its conclusory allegations that its marks and trade dress
2 are recognized by “major car manufacturers and car brands as connoting affiliation
3 with or sponsorship by Alcon” (FAC ¶ 73) with *facts*.

4 **2. Plaintiff Fails to Plead Trade Dress Rights**

5 Plaintiff’s purported response to Defendants’ argument that Plaintiff fails to
6 plead trade dress rights (Mot. 18:22-20:9) once again conflates this separate, threshold
7 requirement with the likelihood of confusion element. Opp. 20:2-16. Defendants
8 argue that Plaintiff fails to allege distinctiveness and non-functionality and to
9 specifically define the list of elements that comprise its purported trade dress—all
10 requirements to plead protectable trade dress. Mot. 18:22-20:9. Plaintiff responds by
11 claiming, incorrectly, that Defendants argue that a Lanham Act violation can only be
12 established by pleading and proving defendant’s use of plaintiff’s “exact mark or
13 exact trade dress,” and by asserting that likelihood of confusion is tested under all
14 circumstances. Opp. 20:2-9. But ownership of protectable trade dress and a likelihood
15 of confusion are two separate elements, each of which Plaintiff must plausibly plead
16 to state a Lanham Act claim. *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*,
17 150 F.3d 1042, 1046-47 (9th Cir. 1998) (describing claim elements). The likelihood
18 of confusion test that Plaintiff cites has no bearing on trade dress rights.

19 As to Defendants’ actual argument that Plaintiff fails to plead trade dress rights,
20 Plaintiff’s only response is a conclusory statement that it has pled trade dress with
21 specificity. Opp. 20:10-12. But the FAC paragraphs cited belie this for the reasons
22 explained in Defendants’ Motion, including that Plaintiff does not explain what
23 portions (if any) of the entire BR2049 film, other than the Exhibit A and Exhibit B
24 images, are part of the purported trade dress. *Id.* 20:12 (citing FAC ¶¶ 74-76, 79-81).
25 Plaintiff’s attempt to distinguish *Sleep Science Partners* as factually different from
26 this case fails. The legal requirement to specifically identify trade dress is not limited
27
28

1 to that fact pattern. And Plaintiff does not even attempt to distinguish the other cases
2 cited by Defendants (Mot. 20:1-9).

3 **3. Plaintiff Fails to Distinguish Well-Settled Case Law**
4 **Dismissing Copyright-Type Lanham Act Claims**

5 Plaintiff's attempts to factually distinguish *Dastar*, *Comedy III*, and *Lions Gate*,
6 all fail, and Plaintiff does not cite a single case decided in its favor. Opp. 19:15-20:1.
7 Plaintiff argues *Dastar* and *Comedy III* are inapposite because the defendants in those
8 cases marketed expressive works—a television series and a motion picture,
9 respectively—whereas here Defendants are marketing automobiles and robots. *Id.*
10 19:15-19. However, neither court's analysis considered whether the **defendant's work**
11 was expressive. Rather, each decision turned on the fact that the **plaintiff's work** was
12 protected by copyright and therefore did not give rise to a Lanham Act claim. *Dastar*
13 *Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31-38 (2003); *Comedy III*
14 *Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595-96 (9th Cir. 2000). Nevertheless,
15 Plaintiff ignores Defendants' argument that the Accused Work **is** expressive. Mot.
16 24:18-25:3.

17 Plaintiff argues *Lions Gate* is inapplicable because that court “ultimately rested
18 its ruling” on the fact that the plaintiff had not pled it was in the business of licensing
19 its work to market the financial services the defendant was marketing, whereas here,
20 Plaintiff pled it is in the business of licensing BR2049 for automotive brand
21 partnerships. Opp. 19:20-20:1. But Plaintiff does not address Defendants' argument
22 that Plaintiff's allegations about licensing are speculative. Mot. 18:4-11. And the
23 *Lions Gate* ruling actually rested on the fact that the plaintiff's Lanham Act claim was
24 based on the same allegations as its copyright infringement claim. *Lions Gate Ent.*
25 *Inc. v. TD Ameritrade Servs. Co.*, 170 F. Supp. 3d 1249, 1267-68 (C.D. Cal. 2016).
26 The court noted that “the ‘type’ of good or service” is just “**one of several factors** to
27 be considered in deciding whether there is a likelihood of consumer confusion.” *Lions*
28

1 *Gate Ent., Inc. v. TD Ameritrade Servs. Co.*, No. 2:15-cv-05024-DDP-E, 2017 WL
2 4621541, at *3 (C.D. Cal. Oct. 16, 2017). Plaintiff also contends that *Lions Gate* is “a
3 troubled opinion” that “was wrongly decided,” but Plaintiff does not explain why or
4 cite a single case supporting its argument. Opp. 19:20-22. In fact, several district
5 courts have cited *Lions Gate*, and undersigned counsel is not aware of any decision
6 criticizing *Lions Gate* as wrongly decided.

7 Plaintiff does not even attempt to distinguish *Rice*, *Slep-Tone*, or *Carranza*
8 (Mot. 20:16-20, 21:8-15), nor cite a single case where a Lanham Act claim based on
9 the same allegations as a copyright infringement claim survived a 12(b)(6) motion.

10 **4. Plaintiff Cannot Plead Trademark Rights in “Blade Runner”**

11 Plaintiff claims it could plead trademark rights in “Blade Runner,” but it chose
12 not to do so in its original complaint or the FAC, and it does not bother to explain
13 what facts it could plead should it choose to do so. Opp. 20:17-23. The Court should
14 not allow Plaintiff any more opportunities to amend.

15 Plaintiff’s argument that it is not required to plead ownership of the “Blade
16 Runner” word mark because Defendants evoked BR2049 rather than the 1982 film
17 only highlights the duplicative nature of Plaintiff’s copyright and Lanham Act claims.
18 As Plaintiff states, this case is about Defendants’ alleged taking of the BR2049 film.
19 *Id.* 20:17-23.

20 **D. Plaintiff Fails to Meet Its Burdens on the Nominative Fair Use and**
21 **First Amendment Defenses**

22 **1. Defendants’ Criticism of the Future Depicted in “Blade**
23 **Runner” Is Nominative Fair Use**

24 Plaintiff has not met—and cannot meet—its burden of establishing that any
25 trademark or trade dress use by Defendants is *not* nominative fair use.¹³ Defendants

26

¹³ Nominative fair use “replaces” *Sleekcraft* as the proper test for likely consumer
27 confusion whenever [a] defendant asserts to have referred to the trademarked good
28

1 met their burden of showing that they used the words “Blade Runner” and the Exhibit
2 C image to reference the film’s (the original Blade Runner and/or BR2049) version
3 of the future, i.e., to refer to the allegedly trademarked product. *Toyota*, 610 F.3d. at
4 1183; Mot. 23:17-24. The burden then reverted to Plaintiff to show a likelihood of
5 confusion. *Toyota*, 610 F.3d at 1183. None of Plaintiff’s arguments meet its burden.

6 **First**, there are no fact issues precluding resolution at the 12(b)(6) stage
7 because the Court can view the Accused Work and see exactly how much of the
8 alleged marks and trade dress Defendants used. *See* Opp. 20:24-21:7; *see also* Ex. 2,
9 5:35-6:10; *Champion v. Moda Operandi, Inc.*, 561 F. Supp. 3d 419, 438 (S.D.N.Y.
10 2021) (dismissal of trademark claims appropriate “where simply looking at the
11 work...and [its] context...demonstrates how implausible it is that a viewer will be
12 confused into believing that the plaintiff endorsed the defendant’s work”).

13 **Second**, Plaintiff’s argument that Defendants’ use is not “nominative” because
14 Musk used the term “Blade Runner” and not the term “Blade Runner 2049” (Opp.
15 21:7-8) contradicts Plaintiff’s argument that the use of “Blade Runner” alone infringes
16 its rights in the BR2049 title. Nominative fair use applies where a defendant has “used
17 the plaintiff’s mark to describe the plaintiff’s product.” *Mattel, Inc. v. Walking*
18 *Mountain Prods.*, 353 F.3d 792, 809 (9th Cir. 2003). By arguing that Defendants’ use
19 is not “nominative,” Plaintiff is arguing that “Blade Runner” does not describe
20 BR2049. But the entire basis of Plaintiff’s Lanham Act claim is that Musk “meant to
21 evoke BR2049” when he said the words “Blade Runner.” *E.g.*, FAC ¶ 107. Plaintiff
22 cannot have it both ways.

23
24
25 itself.” *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1182 (9th Cir.
26 2010). Plaintiff bears the burden because “[a] finding of nominative fair use is a
27 finding that the plaintiff has failed to show a likelihood of confusion as to sponsorship
28 or endorsement[,]” and “the Lanham Act always places the ‘burden of proving
likelihood of confusion...on the party charging infringement.’” *Id.* at 1182-83.

1 **Third**, Musk’s statement that he “love[s] ‘Blade Runner’” is a classic fair use
2 reference. Opp. 21:8-12. Plaintiff claims incorrectly that the Motion argues Musk
3 “was criticizing BR2049 as a product.” *Id.* In fact, the Motion argues—and the
4 Accused Work shows—that Musk criticized a “dark and dismal” dystopian future,
5 not either of the movies as a product, just like the defendant in *Walking Mountain*
6 criticized the message that Mattel’s Barbie doll conveys, not the plastic dolls
7 themselves. 353 F.3d at 802. Plaintiff does not address that case, and also ignores
8 facts that the FAC alleges which provide helpful context, including Musk’s statement
9 that he did **not** want to live in the future depicted in “Blade Runner” and the words
10 “NOT THIS” shown on Exhibit C.¹⁴ FAC ¶¶ 102, 106. Plaintiff’s Opposition ignores
11 the words “TESLA LIVE” shown on Exhibit C as well. These are exactly the kinds
12 of facts that have been found to constitute nominative fair use on a motion to dismiss,
13 and Plaintiff does not even attempt to distinguish the case Defendants cited. *Applied*
14 *Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 897 (9th Cir. 2019) (district court
15 properly found nominative fair use on 12(b)(6) motion “based on the critical nature
16 of the presentation, the disclaimer included in the text, and the fact that Defendants
17 advertised the seminar under [their own] banner”); *see also Gibson Brands, Inc. v.*
18 *John Hornby Skewes & Co.*, No. 14-cv-00609-DDP-SS, 2015 WL 4651250, at *4
19 (C.D. Cal. Aug. 4, 2015) (dismissal appropriate where pleadings fail to allege
20 trademark use beyond nominative fair use).

21 **2. The Court Should Apply *Rogers* and Find that Plaintiff Has**
22 **Not Met Its Burden to Sustain Its Lanham Act Claim**

23 Plaintiff only argues that *Rogers* does not apply and makes no attempt to meet
24 its burden on either of the two prongs of the *Rogers* test. Opp. 21:13-27. While
25 Defendants bear the burden of establishing that *Rogers* applies, once Defendants meet

26 ¹⁴ “NOT THIS” starkly contrasts with “Powered By Label Insight [plaintiff’s
27 platform]” in *Nielsen Consumer LLC v. LiveRamp Holdings, Inc.*, No. 24-cv-07355-
28 SVK, 2025 WL 604665, at *7 (N.D. Cal. Feb. 25, 2025), cited at Opp. 20:24-27.

1 that burden, which they have, Plaintiff’s Lanham Act claim is precluded unless it
2 shows that at least one of the *Rogers* prongs is met. *Pepperdine Univ. v. Netflix, Inc.*,
3 No. 2:25-cv-01429-CV-ADSx, 2025 WL 632983, at *3 (C.D. Cal. Feb. 26, 2025);
4 *McGillvary v. Netflix, Inc.*, No. 2:23-cv-01195-JLS-SK, 2024 WL 3588043, at *13
5 (C.D. Cal. July 30, 2024). Plaintiff does not address either *Rogers* prong, so the Court
6 only needs to decide if *Rogers* applies and dismiss Plaintiff’s Lanham Act claim if
7 so.¹⁵ Both of Plaintiff’s arguments against applying *Rogers* here fail.

8 ***First***, *Jack Daniel’s Properties, Inc. v. VIP Products LLC* is not as broad as
9 Plaintiff claims. *Jack Daniel’s* held that the *Rogers* inquiry “is not appropriate when
10 the accused infringer has used a trademark to designate the source of its own goods—
11 in other words, has used a trademark as a trademark.” 599 U.S. 140, 145 (2023). As
12 Defendants explained in their Motion—and Plaintiff ignores—Defendants’
13 references to “Blade Runner” were to criticize a “dark and dismal” dystopian future
14 and juxtapose that to a brighter future, not to identify the source of their products.
15 Mot. 24:8-9, 24:18-22; *Pepperdine*, 2025 WL 632983, at *3-4 (discussing *Jack*
16 *Daniel’s* and collecting cases applying *Rogers*). As the Court can plainly observe from
17 the Accused Work, Tesla—not Plaintiff—is the source of the autonomous vehicles
18 and humanoid robots discussed therein.

19 ***Second***, Plaintiff’s argument that the Accused Work is commercial speech that
20 is not entitled to First Amendment protection fails because the Accused Work
21 includes protected expression. Plaintiff does not address Defendants’ argument that
22 the Accused Work is an expressive work that “is entitled to full First Amendment
23 protection” because it “does more than propose a commercial transaction” and is not
24
25

26 ¹⁵ Whether *Rogers* applies is a legal question that the Court may decide now. *See*
27 *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192, 1196 (9th
28 Cir. 2017).

1 “purely commercial,” such as by expressing criticism and commentary.¹⁶ *Mattel, Inc.*
2 *v. MCA Recs., Inc.*, 296 F.3d 894, 906 (9th Cir. 2002). In determining whether a work
3 is expressive, courts in the Ninth Circuit analyze whether the work is “communicating
4 ideas or expressing points of view.” *VIP Prods. LLC v. Jack Daniel’s Props., Inc.*,
5 953 F.3d 1170, 1174 (9th Cir. 2020) (quoting *MCA*, 296 F.3d at 900), *vacated on*
6 *other grounds*, 599 U.S. 140 (2023). “A work need not be the expressive equal of
7 *Anna Karenina* or *Citizen Kane* to satisfy this requirement and is not rendered non-
8 expressive simply because it is sold commercially.” *Id.* at 1175. As the Ninth Circuit
9 has explained, the Supreme Court has contemplated that, like books, plays, and
10 movies, other kinds of works that “communicate ideas—and even social messages—
11 through many familiar literary devices (such as characters, dialogue, plot, and music)”
12 also warrant First Amendment protection as expressive works. *Brown v. Elec. Arts,*
13 *Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013) (discussing videogames; citing *Brown v.*
14 *Ent. Merchants Ass’n*, 564 U.S. 786, 790 (2011)). As another example, a work that
15 conveys “a simple” message by “juxtaposing the irreverent representation of the
16 trademark with the idealized image created by the mark’s owner” is expressive. *VIP*,
17 953 F.3d at 1175 (quoting *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34
18 (1st Cir. 1987)).

19 The Accused Work is not merely a commercial advertisement—like Plaintiff
20 self-servingly claims **only** on page 21 of its Opposition. It is a speech that explores,
21 optimistically, themes of the future of society, technology, artificial intelligence,
22

23 ¹⁶ Plaintiff does not address any of the cases cited in the First Amendment section of
24 Defendant’s Motion (24:3-25:15) except *Rogers*. Plaintiff accuses Defendants of
25 ignoring *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (Opp. 21:20-
26 21), but *MCA* quoted *Bolger* in explaining that “the ‘core notion of commercial
27 speech’ is that it ‘does no more than propose a commercial transaction.’” 296 F.3d at
28 906. And contrary to Plaintiff’s assertion, under *Bolger*, “[t]he mere fact that [speech
is an] advertisement[.]...clearly does not compel the conclusion that [it is] commercial
speech.” 463 U.S. at 66.

1 autonomous vehicles, and robots. Plaintiff’s characterizations of the Accused Work
2 to support its copyright claim (FAC ¶¶ 99-106) are a stark contradiction to its
3 characterization of the Accused Work as a “car advertisement” to support its
4 trademark claim. Opp. 21:14-15. Accepting Plaintiff’s copyright allegations
5 describing the Accused Work as true, the Accused Work is not “purely commercial”
6 and thus “is entitled to full First Amendment protection” under Ninth Circuit law.
7 *MCA*, 296 F.3d at 906; *see also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180,
8 1185-86 (9th Cir. 2001) (for-profit magazine’s article that served a commercial
9 purpose was “not a simple advertisement” or “pure commercial speech” because it
10 commented on films and actors); *Champion*, 561 F. Supp. 3d at 434-35 (online
11 editorial with “commercial hyperlinks” to buy advertised clothing on retailer’s
12 website and that commented on current fashions was expressive).

13 **E. The Court Should Not Allow Plaintiff to Amend Its Already**
14 **Amended Complaint**

15 Plaintiff’s Opposition mentions only three potential amendments: that Musk
16 owns Grok AI and used it here (Opp. 8:11-16); that “perhaps” the character K appears
17 in more than one of Plaintiff’s works (*id.* 13:13-15); and that it has a “Lanham Act-
18 cognizable ownership interest in the word mark ‘Blade Runner’” (*id.* 20:19-20). These
19 proposed amendments would be futile. That Musk owns a company that runs the
20 “Grok” AI assistant is far from plausibly pleading that Musk “might have put BR2049
21 or parts of it into Grok for image generation.” *Id.* 8:11-16. This is just another
22 fabricated allegation from Plaintiff’s imagination. And even if Plaintiff could allege
23 that K has appeared in more of Plaintiff’s works, what is still glaringly missing is
24 Plaintiff’s use of K in connection with the goods at issue—cars, or even any related
25 goods. Plaintiff’s claim that it can plead ownership in the word mark “Blade Runner”
26 is doubtful given the lack of facts offered in the Opposition. Regardless, such an
27 allegation would not cure Plaintiff’s failure to plead secondary meaning, or the fact
28

1 that Plaintiff is impermissibly attempting to use the Lanham Act to circumvent
2 copyright law. Because giving Plaintiff a second opportunity to amend its pleading
3 would be futile, the Court should deny leave to amend.

4 **III. CONCLUSION**

5 For the reasons stated above and in Defendants' Motion, the Court should
6 dismiss the FAC with prejudice.

7
8 Dated: March 24, 2025

FISH & RICHARDSON P.C.

9
10 By: /s/ Kristen McCallion

Christopher S. Marchese (SBN 170239)

marchese@fr.com

FISH & RICHARDSON P.C.

4695 MacArthur Court, Suite 1100

Newport Beach, CA 92660

Tel: (213) 533-4240

Fax: (858) 678-5099

15 John S. Goetz (*pro hac vice* forthcoming)

goetz@fr.com

16 Kristen McCallion (*pro hac vice*)

mccallion@fr.com

17 Vivian Cheng (*pro hac vice*)

cheng@fr.com

FISH & RICHARDSON P.C.

7 Times Square, 20th Floor

New York, NY 10036

Tel: (212) 765-5070

Fax: (212) 258-2291

22 Matthew A. Colvin (*pro hac vice*)

colvin@fr.com

FISH & RICHARDSON P.C.

1717 Main Street, Suite 5000

Dallas, TX 75201

Tel: (214) 747-5070

Fax: (214) 747-2091

27 Kayleigh E. McGlynn (*pro hac vice*)

mcglynn@fr.com

1 FISH & RICHARDSON P.C.
2 One Marina Park Drive, Suite 1700
3 Boston, MA 02210
4 Tel: (617) 542-5070
5 Fax: (617) 542-8906

6 A. Louis Dorny (SBN 212054)
7 ldorny@tesla.com
8 Terry W. Ahearn (SBN 216543)
9 tahearn@tesla.com
10 Krista M. Carter (SBN 225229)
11 kricarter@tesla.com
12 TESLA, INC.
13 3000 Hanover St.
14 Palo Alto, CA 94304
15 Tel: (510) 298-8516

16 Attorneys for Defendants
17 Tesla, Inc. and Elon Musk

18 **CERTIFICATE OF COMPLIANCE**

19 The undersigned, counsel of record for Defendants Tesla, Inc. and Elon Musk,
20 certifies that this brief contains 6,990 words, which complies with the word limit of
21 L.R. 11-6.1.

22 /s/ Kristen McCallion
23 Kristen McCallion
24
25
26
27
28