

ANNETTE L. HURST (SBN 148738)
ahurst@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105-2669
Telephone: +1 415 773 5700
Facsimile: +1 415 773 5759

WILLIAM W. OXLEY (SBN 136793)
woxley@orrick.com
ALYSSA CARIDIS (SBN 260103)
acaridis@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
355 S. Grand Avenue
Los Angeles, CA 90071
Telephone: +1 213 629 2020
Facsimile: +1 213 612 2499

Attorneys for GitHub, Inc. and Microsoft Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

J. DOE 1, et al.,
Individual and
Representative Plaintiffs,
v.
GITHUB, INC., et al.,
Defendants

Case No. 4:22-cv-6823-JST

Consolidated with Case No. 4:22-cv-7074-JST

**DEFENDANTS GITHUB AND
MICROSOFT'S NOTICE OF MOTIONS
AND MOTIONS TO DISMISS
OPERATIVE COMPLAINT IN
CONSOLIDATED ACTIONS**

TABLE OF CONTENTS

1	TABLE OF AUTHORITIES	iii
2	NOTICE OF MOTIONS AND MOTIONS	viii
3	MEMORANDUM OF POINTS AND AUTHORITIES	1
4	INTRODUCTION AND SUMMARY OF ISSUES.....	1
5	ALLEGATIONS OF THE OPERATIVE COMPLAINT	2
6	A. OpenAI Develops A Generative AI Tool Called Codex.....	2
7	B. GitHub Offers Copilot, A Code Completion Tool Built On Codex.	3
8	C. Plaintiffs Sue Based On An Attribution Theory.....	4
9	ARGUMENT	5
10	I. PLAINTIFFS LACK ARTICLE III STANDING AND THEREFORE SUBJECT MATTER JURISDICTION BECAUSE THEY HAVE NOT ALLEGED ACTUAL OR THREATENED INJURY	5
11	A. Plaintiffs' Lack-Of-Attribution Theory Is Insufficient To Confer Standing.	6
12	B. Plaintiffs Also Do Not Allege Privacy-Based Injury.....	8
13	II. PLAINTIFFS FAIL TO STATE A DMCA CLAIM.....	8
14	A. Plaintiffs Cannot Allege The Required Likelihood Of Infringement.	9
15	B. Count I Impermissibly Lumps Together Multiple Defendants, Claims, And Theories Of Liability.....	12
16	C. Plaintiffs Have Not Plausibly Alleged That GitHub Or Microsoft Intentionally Or Knowingly Removes Or Alters CMI Under § 1202(b).....	13
17	D. Plaintiffs Have Not Plausibly Alleged That GitHub Or Microsoft Provide, Distribute, Or Import For Distribution Any False CMI.....	14
18	III. PLAINTIFFS FAIL TO STATE A BREACH-OF-LICENSE CLAIM.	15
19	A. Plaintiffs Fail To Specify The Contract Provisions Allegedly Breached.	16
20	B. To The Extent Count II Is Based On Training Copilot With Code Found In Public Repositories, It Is Foreclosed By GitHub's Terms Of Service.....	16
21	C. Plaintiffs Have Not Plausibly Alleged Breach Based On An Output Theory.....	17
22	IV. PLAINTIFFS' TORT AND UCL CLAIMS FAIL.....	18
23	A. Plaintiffs' Tort And UCL Claims Are Preempted By The Copyright Act.....	18

1	B. Plaintiffs Do Not Plausibly Allege A Contract Or Business Expectancy, Nor Defendants' Knowledge Of One As Required For An Interference With Economic Advantage Claim.....	20
2		
3	C. Plaintiffs' Fraud Claim Against GitHub Is Barred By The Economic Loss Rule And Fails Rule 9.	21
4		
5	D. Plaintiffs Lack Standing To Bring A UCL Unlawful Competition Claim And Fail To State A Claim.....	22
6		
V.	PLAINTIFFS' REVERSE PASSING OFF CLAIM IS BARRED UNDER <i>DASTAR</i>	23
7		
VI.	PLAINTIFFS' PRIVACY CLAIMS AGAINST GITHUB FAIL.....	23
8		
VII.	PLAINTIFFS' UNJUST ENRICHMENT, CONSPIRACY, AND DECLARATORY RELIEF ALLEGATIONS FAIL ALONG WITH THE UNDERLYING CLAIMS.....	25
9		
CONCLUSION	25	
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 TABLE OF AUTHORITIES
23 Page(s)
45 Cases
6

	Page(s)
<i>Apple Computer, Inc. v. Microsoft Corp.</i> , 35 F.3d 1435 (9th Cir. 1994).....	11
<i>Applied Equip. Corp. v. Litton Saudi Arabia Ltd.</i> , 7 Cal. 4th 503 (1994)	25
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	8, 21, 23
<i>Author's Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015).....	6
<i>Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners</i> , 52 Cal. App. 4th 867 (1997).....	20
<i>Bosinger v. Belden CDT, Inc.</i> , 358 F. App'x 812 (9th Cir. 2009)	25
<i>Bounce Exchange, Inc. v. Zeus Enter. Ltd.</i> , No. 15cv3268, 2015 WL 8579023 (S.D.N.Y. Dec. 9, 2015).....	14
<i>Cork v. CC-Palo Alto, Inc.</i> , 534 F. Supp. 3d 1156 (N.D. Cal. 2021)	25
<i>Crafty Prods., Inc. v. Fuqing Sanxing Crafts Co.</i> , 839 F. App'x 95 (9th Cir. 2020)	19
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003)	23
<i>Davis v. Federal Election Comm'n</i> , 554 U.S. 724 (2008).....	6
<i>Design Basics, LLC v. WK Olson Architects, Inc.</i> , No. 17 C 7432, 2019 WL 527535 (N.D. Ill. Feb. 11, 2019).....	14
<i>Destfino v. Reiswig</i> , 630 F.3d 952 (9th Cir. 2011).....	12
<i>Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.</i> , 596 F.3d 1036 (9th Cir. 2010).....	8
<i>Does v. Advanced Textile Corp.</i> , 214 F.3d 1058 (9th Cir. 2000).....	7, 8

1	<i>Falkner v. Gen. Motors LLC,</i> 393 F. Supp. 3d 927 (C.D. Cal. 2018).....	13, 14
2	<i>Faulkner Press, L.L.C. v. Class Notes, L.L.C.,</i> 756 F. Supp. 2d 1352 (N.D. Fl. 2010)	14
4	<i>Frost-Tsuji Architects v. Highway Inn, Inc.,</i> No. CIV. 13-00496 SOM, 2015 WL 263556 (D. Haw. Jan. 21, 2015), <i>aff'd</i> , 700 F. App'x 674 (9th Cir. 2017)	14
6	<i>Giddings v. Vison House Prod., Inc.,</i> No. CV 05-2963, 2007 WL 2274800 (D. Ariz. Aug. 7, 2007)	20
8	<i>Google LLC v. Oracle Am., Inc.,</i> 141 S. Ct. 1183 (2021).....	6, 11, 19
10	<i>Harper & Row Publishers, Inc. v. Nation Enters.,</i> 723 F.2d 195 (2d Cir. 1983).....	19
11	<i>Harrington v. Pinterest, Inc.,</i> No. 20-cv-05290, 2021 WL 4033031 (N.D. Cal. Sept. 3, 2021)	10
13	<i>Hobbs v. Sprague,</i> 87 F. Supp. 2d 1007 (N.D. Cal. 2000)	25
14	<i>I.C. v. Zynga, Inc.,</i> 600 F. Supp. 3d 1034 (N.D. Cal. 2022)	8
16	<i>Idema v. Dreamworks, Inc.,</i> 162 F. Supp. 2d 1129 (C.D. Cal. 2001).....	19
18	<i>In re iPhone Application Litig.,</i> No. 11-MD-02250, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011)	12
19		
20	<i>Ixchel Pharma, LLC v. Biogen, Inc.,</i> 9 Cal. 5th 1130 (2020)	20, 21
21		
22	<i>Jacobsen v. Katzer,</i> 535 F.3d 1373 (Fed. Cir. 2008).....	11
23		
24	<i>Kelly v. Arriba Soft Corp.,</i> 336 F.3d 811 (9th Cir. 2003).....	6
25		
26	<i>Kelly v. Arriba Soft Corp.,</i> 77 F. Supp. 2d 1116 (C.D. Cal. 1999).....	10, 14
27		
28	<i>Kodadek v. MTV Networks, Inc.,</i> 152 F.3d 1209 (9th Cir. 1998).....	20

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.