

1 NICOLAS A. JAMPOL (State Bar No. 244867)  
nicolasjampol@dwt.com  
2 CRISTINA M. SALVATO (State Bar No. 295898)  
tinasalvato@dwt.com  
3 DAVIS WRIGHT TREMAINE LLP  
865 South Figueroa Street, 24th Floor  
4 Los Angeles, California 90017-2566  
Telephone: (213) 633-6800  
5 Fax: (213) 633-6899

6 *Attorneys for Defendant*  
7 *Legend Pictures, LLC*

8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 SUMMIT KAIJU LLC d/b/a SUMMIT  
KAIJU INTERNATIONAL,

13 Plaintiff,

14 vs.

15 LEGEND PICTURES, LLC d/b/a  
16 LEGENDARY ENTERTAINMENT,

17 Defendant.

Case No. 21-cv-09779-PA-AS

**DEFENDANT’S NOTICE OF  
MOTION AND MOTION TO  
DISMISS**

Date: March 21, 2022  
Time: 1:30 p.m.  
Ctrm: 9A

1 **TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on March 21, 2022 at 1:30 p.m. or as soon as  
3 the matter may be heard in Courtroom 9A of the United States District Court for the  
4 Central District of California, First Street Courthouse, 350 West First Street, Los  
5 Angeles, California 90012, defendant Legend Pictures, LLC (“Legendary”) will and  
6 hereby does move this Court for an order dismissing with prejudice the complaint  
7 filed by plaintiff Summit Kaiju LLC (“Plaintiff”).

8 This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) on  
9 the grounds that Plaintiff’s complaint fails to state a claim. Plaintiff’s claim for  
10 copyright infringement fails because Plaintiff cannot establish copyright protection  
11 for its alleged “Batholith” character and, in any event, it is not substantially similar  
12 to Legendary’s “Methuselah” monster in its film and novelization *Godzilla: King of*  
13 *the Monsters*. Because Plaintiff’s claim for direct infringement fails, so too does its  
14 claim for secondary infringement.

15 This motion is based on this notice of motion, the memorandum of points and  
16 authorities, the notice of lodging with exhibits, all other matters of which this Court  
17 may take judicial notice, the pleadings, files, and records in this action, and on any  
18 argument heard by this Court.

19 This motion is made following the conference of counsel pursuant to Local  
20 Rule 7-3, which took place on February 3, 2022.

21  
22 DATED: February 18, 2022

DAVIS WRIGHT TREMAINE LLP  
NICOLAS A. JAMPOL  
CRISTINA M. SALVATO

23  
24  
25 By:  /s/ Nicolas A. Jampol  
Nicolas A. Jampol

26 *Attorneys for Defendant*  
27 *Legend Pictures, LLC*  
28

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff Summit Kaiju LLC (“Plaintiff”) asserts copyright infringement claims against defendant Legend Pictures, LLC (“Legendary”) based on its mistaken belief that it owns the idea of an enormous creature with a mountain on its back. Plaintiff’s own side-by-side comparisons of its supposed character “Batholith” and Legendary’s “Methuselah” monster from *Godzilla: King of the Monsters* (the “Film”) reveal that Plaintiff’s claims are based on nothing more than the unprotectable concept of a mountain creature. *See* Compl. ¶ 33. Indeed, there is *nothing* similar – let alone substantially similar – between Batholith and Methuselah other than this shared premise. Under well-established Ninth Circuit law, Plaintiff’s claims lack any merit whatsoever and should be dismissed with prejudice.

### II. FACTUAL BACKGROUND

#### A. Plaintiff’s Alleged Batholith Character

Plaintiff describes itself as a Denver-based media company that is active in the “Godzilla-fan community.” Compl. ¶ 9. It alleges that it “created, owns, and registered a copyright for the character Batholith.” *Id.* ¶ 7. Plaintiff describes its alleged Batholith character as a “living mountain kaiju made in part of stone”<sup>1</sup> with “recognizable character traits and distinctive and unique elements of expression” (although it does not identify those traits or unique elements). *Id.* ¶¶ 13, 18.

Plaintiff claims to own a registration “for the character Batholith” (Compl. ¶ 7) and describes its copyright registration as a “Character Design” (*id.* ¶ 13). Plaintiff includes six images of Batholith in the complaint (*id.* ¶¶ 7, 15, 30, 33-35), but appears to have registered only one of those images (*id.* ¶ 7). Each of the images depict Batholith as an enormous mountain creature, although they differ in various respects, including some in which Batholith has red eyes (*id.* ¶¶ 7, 30) and

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<sup>1</sup> Plaintiff alleges that the “Japanese term ‘kaiju’ translates as ‘strange beast’ in English and is a staple of the Godzilla-fan community lexicon.” *Id.* ¶ 12.

1 | some with black eyes (¶ 15), or, more noticeably, some in which Batholith has a tail  
2 | (¶ 33) and some without (¶¶ 7, 15).

### 3 | **B. Legendary’s Methuselah Monster**

4 | The Film is the third movie in Legendary’s “MonsterVerse” franchise  
5 | (following *Godzilla* and *Kong: Skull Island*). The Film portrays the awakening of  
6 | multiple ancient monsters, which wreak havoc across the planet as they battle each  
7 | other until Godzilla emerges victorious. *See* Salvato Decl., Ex. A. In the Film,  
8 | Methuselah awakens from its dormant state – a forested mountain – and attacks the  
9 | nearby city of Munich before traveling to Boston to witness Godzilla’s battle and  
10 | pay homage to the “King of the Monsters.” *Id.*

11 | Methuselah is briefly visible (and often barely recognizable) at three points in  
12 | the Film: (1) approximately 10 seconds during a montage of the Godzilla monsters  
13 | awakening, Salvato Decl., Ex. A at 1:06:30-41; (2) a few seconds on a split screen  
14 | showing the monster rampaging through Munich, *id.* at 1:12:46-48 (*see also* Compl.  
15 | ¶ 31); and (3) approximately 5 seconds during the Film’s final scene, *id.* at 1:59:46;  
16 | 2:00:26-31 (*see also* Compl. ¶ 33). Methuselah has a forest on its back, white eyes,  
17 | and appears in one scene to have horns.

18 | In connection with the Film, Titan Books published the “official  
19 | novelization” of the Film, which provides added detail and backstory to the  
20 | narrative and each of the characters (the “Book”). *See* Salvato Decl., Ex. B. There  
21 | are no images of Methuselah in the Book. *Id.* The Book describes Methuselah as a  
22 | mountain “standing up on four immense legs” with a “forest growing on its rocky  
23 | back” and “a face and horns like a bull from some ancient hell.” *Id.* at 166-168.  
24 | The Book later describes Methuselah as “as a monster that looked like a bull with a  
25 | mountain on its back.” *Id.* at 297.<sup>2</sup>

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27 | <sup>2</sup> In assessing motions to dismiss, courts can consider the works as  
28 | incorporated by reference into the complaint. *See, e.g., Brown v. Electronic Arts*,  
724 F.3d 1235, 1248 n.7 (9th Cir. 2013) (noting that the district court properly  
considered defendant’s work “as part of the complaint itself through the

**C. Complaint**

Plaintiff filed the complaint on December 17, 2021 (Dkt. 1) alleging claims against Legendary for (1) copyright infringement; (2) indirect copyright infringement; (3) violation of the Visual Artists Rights Act (17 U.S.C. § 106A); and (4) false designation of origin under 15 U.S.C. § 1125(a). Yesterday, Plaintiff voluntarily dismissed the third and fourth causes of action. Dkt. 11. Legendary now moves to dismiss the remaining claims with prejudice.

**III. PLAINTIFF’S COPYRIGHT INFRINGEMENT CLAIM FAILS**

To state a claim for copyright infringement, Plaintiff must allege “(1) ownership of a valid copyright and (2) copying by the defendant of protectable elements of the work.” *CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999). Absent evidence of direct copying, a plaintiff must demonstrate that the defendant had access to plaintiff’s work and that there is substantial similarity of protected expression between the works. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).<sup>3</sup> Plaintiff’s copyright claim fails because Plaintiff does not own a protectable “character copyright” and, separately, Plaintiff cannot show substantial similarity of protected expression as a matter of law.

**A. Plaintiff Cannot Establish Copyright Protection in Batholith**

Plaintiff claims that it registered a copyright in the “character design” for Batholith. *See* Compl. ¶¶ 7, 13. The Copyright Office, however, does not register copyrights in characters. *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.4(H) (noting that a copyright registration extends only to the expression in the deposit copy, and not the concept of the character more

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‘incorporation by reference’ doctrine,” and that “[w]e do the same”); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018) (considering photographs at issue on appeal from dismissal). The Film and Book are referenced extensively throughout the complaint and thus are incorporated by reference. *See* Compl., “Nature of the Action” & ¶¶ 8, 19-22, 26, 31-33.

<sup>3</sup> Though Legendary disputes Plaintiff’s allegations regarding access, solely for the purposes of this motion, Legendary does not challenge access.



1 generally).<sup>4</sup> Instead, plaintiffs asserting a character copyright must allege sufficient  
2 facts to plausibly support the inference that the character warrants copyright  
3 protection. *See Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp.  
4 3d 1167, 1173-1174 (N.D. Cal. 2015).

5 Importantly, “characters are ordinarily not afforded copyright protection.”  
6 *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003); *see also DC Comics v.*  
7 *Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015) (“Not every comic book, television, or  
8 motion picture character is entitled to copyright protection.”). To establish  
9 copyright protection in a character, the Ninth Circuit requires that the character: (1)  
10 “have physical as well as conceptual qualities”; (2) “be sufficiently delineated to be  
11 recognizable as the same character whenever it appears”; *and* (3) “be especially  
12 distinctive and contain some unique elements of expression.” *Towle*, 802 F.3d at  
13 1021 (internal quotations omitted).

14 Based on its allegations in the complaint, Plaintiff fails to meet this test.  
15 First, while the complaint contains visual depictions of Batholith, it is nearly devoid  
16 of factual allegations concerning Batholith’s specific physical or conceptual  
17 qualities. Plaintiff describes Batholith merely as a “living mountain kaiju made in  
18 part of stone” (Compl. ¶ 13) that is depicted “rampaging through a city street” (*id.*  
19 ¶ 30). Plaintiff declares that “Batholith’s physical and conceptual qualities are  
20 consistently recognizable as a living mountain kaiju, with recognizable character  
21 traits and distinctive and unique elements of expression,” but fails to identify those  
22 supposed traits and unique elements. Compl ¶ 18. This conclusory allegation is  
23 insufficient to establish a character copyright. *See, e.g., Blizzard*, 149 F. Supp. 3d at  
24 1174 (finding conclusory statements insufficient to allege copyright protection in  
25 videogame characters); *Identity Arts v. Best Buy Enter. Servs. Inc.*, 2007 WL  
26 1149155, at \*15 (N.D. Cal. Apr. 18, 2007) (dismissing claim where complaint was  
27

28 \_\_\_\_\_  
<sup>4</sup> Available at <https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf>.

1 devoid of facts identifying the character “by attribute or demeanor, or any other  
2 characteristic that would allow the court to extend copyright protection”).

3 Second, Plaintiff has not shown that its character is sufficiently delineated to  
4 be recognizable whenever it appears. *Rice*, 330 F.3d at 1175 (finding magician  
5 character who had appeared in only one home video had not “displayed consistent,  
6 widely identifiable traits” like those of other copyrightable characters such as  
7 Godzilla, James Bond, and Rocky Balboa); *Daniels v. Walt Disney Co.*, 2018 WL  
8 3533363, at \*2 (C.D. Cal. May 9, 2018) (finding characters that appeared in only  
9 two works “lacked specific traits on par with those of the iconic characters that had  
10 achieved independent copyrightability, such as Sherlock Holmes, Tarzan,  
11 Superman, and James Bond” and “did not engender the kind of widely identifiable  
12 recognition of the characters’ traits envisioned by the Ninth Circuit), *aff’d*, 952 F.3d  
13 1149 (9th Cir. 2020), *opinion amended and superseded on denial of reh’g*, 958 F.3d  
14 767 (9th Cir. 2020).

15 Putting aside Batholith’s recognizability, its features are not consistently  
16 depicted, for example sometimes having red eyes (*id.* ¶¶ 7, 30) and sometimes black  
17 eyes (¶ 15), or sometimes with a tail (¶ 33) and sometimes not (¶¶ 7, 15). Plaintiff’s  
18 inconsistent depictions alone prevent protection of the alleged character. *See*  
19 *Walker v. Viacom Int’l, Inc.*, 2008 WL 2050964, at \*6 (N.D. Cal. May 13, 2008)  
20 (no protection for sponge character who was inconsistently depicted with different  
21 features and colors), *aff’d*, 362 F. App’x 858 (9th Cir. 2010).

22 Third, the Batholith image is not especially distinctive with unique elements  
23 of expression. Batholith’s consistent attributes – its colossal size, four large legs,  
24 and the fact that it has a mountain on its back – are not protectable. These attributes  
25 flow from the basic, unprotectable concept of a large mountain creature. *See*,  
26 *e.g.*, *Rice*, 330 F.3d at 1175-1176 (finding magician dressed in a tuxedo revealing  
27 magic tricks was not an “especially distinctive” character warranting copyright  
28

1 protection). Because Plaintiff cannot establish copyright protection in its Batholith  
2 character, its claim for copyright infringement fails.

3 **B. Plaintiff Cannot Show Substantial Similarity of Protected Expression**

4 To the extent that Plaintiff bases his copyright claim on the single registered  
5 work alleged in the complaint (Compl. ¶ 7), its claim still fails for lack of  
6 substantial similarity as a matter of law.<sup>5</sup>

7 **1. The Court Can Assess Substantial Similarity at the Pleading Stage**

8 It is well-established that a court may compare the works at issue in a  
9 copyright-infringement claim and dismiss the claim as a matter of law if the works  
10 are not substantially similar. *Rentmeester v. Nike*, 883 F.3d 1111, 1123 (9th Cir.  
11 2018) (affirming dismissal where the works were before the court “and thus capable  
12 of examination and comparison”). For nearly 75 years, “courts have followed this  
13 rather obvious principle and dismissed copyright claims that fail from the face of  
14 the complaint (and in light of all matters properly considered on a motion to  
15 dismiss).” *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130 (C.D. Cal. 2007).

16 Here, by comparing Plaintiff’s registered image with the Film and Book, this  
17 Court can and should find that the two works share, at most, only unprotectable  
18 attributes, and certainly are not substantially similar in their protectable expression.

19 **2. The Alleged Similarities Are Unprotectable**

20 To assess substantial similarity on a motion to dismiss, the Ninth Circuit uses  
21 the “extrinsic test,” which focuses on the works’ objective “articulable similarities.”  
22 *Zella*, 529 F. Supp. 2d at 1133. In assessing similarity, “a court must filter out and  
23 disregard the non-protectible elements.” *Cavalier v. Random House, Inc.*, 297 F.3d  
24 815, 822 (9th Cir. 2002). *See also Rentmeester*, 883 F.3d at 1118 (explaining that  
25 the court “must filter out the unprotectable elements of plaintiff’s work” and then  
26

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27 <sup>5</sup> Plaintiff cannot claim infringement of any of the other images of Batholith  
28 in the complaint because Plaintiff does not allege such images are registered. *See*  
17 U.S.C. § 411(a).

1 the “protectable elements that remain are then compared to corresponding elements  
 2 of the defendant’s work to assess similarities in the objective details of the works”)  
 3 (internal quotations omitted); *Funky Films v. Time Warner*, 462 F.3d 1072, 1077  
 4 (9th Cir. 2006) (explaining that the court compares “the actual concrete elements”  
 5 of the works). Indeed, courts “may place *no* reliance upon any similarity in  
 6 expression resulting from unprotectable elements.” *Apple v. Microsoft*, 35 F.3d  
 7 1435, 1446 (9th Cir. 1994) (emphasis in original) (internal quotations omitted).

8 Ideas are unprotectable as a matter of law. *See* 17 U.S.C. § 102(b). “It is an  
 9 axiom of copyright law that the protection granted to a copyrighted work extends  
 10 only to the particular expression of the idea and never to the idea itself.” *Sid &*  
 11 *Marty Krofft Television Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir.  
 12 1977). *Rentmeester* is instructive on this point. In that case, the Ninth Circuit  
 13 compared two similar-looking photos of “Michael Jordan attempting to dunk in a  
 14 pose inspired by ballet’s *grand jeté*; an outdoor setting stripped of most of the  
 15 traditional trappings of basketball; [and] a camera angle that captures the subject  
 16 silhouetted against the sky.” *Id.* at 1123. The court held that “*Rentmeester* cannot  
 17 claim an exclusive right to ideas or concepts at that level of generality, even in  
 18 combination.” *Id.*

19 Beyond ideas, courts also filter out so-called *scenes a faire*, or elements that  
 20 flow naturally from a basic premise. *Cavalier*, 297 F.3d at 823. For example, in  
 21 *Benay v. Warner Brothers*, the plaintiffs pointed to a litany of purported similarities  
 22 between their work and the movie *The Last Samurai*:

23 Both have identical titles; both share the historically unfounded premise  
 24 of an American war veteran going to Japan to help the Imperial Army  
 25 by training it in the methods of modern Western warfare for its fight  
 26 against a samurai uprising; both have protagonists who are authors of  
 27 non-fiction studies on war and who have flashbacks to battles in  
 28 America; both include meetings with the Emperor and numerous battle  
 scenes; both are reverential toward Japanese culture; [] both feature the  
 leader of the samurai rebellion as an important foil to the protagonist[;]  
 and] in both works the American protagonist is spiritually transformed  
 by his experience in Japan.

1 607 F.3d 620, 625 (9th Cir. 2010). In rejecting the plaintiffs’ claims, the Ninth  
 2 Circuit disregarded those similarities as flowing from the works’ shared “basic plot  
 3 premise” of “an American war veteran [who] travels to Japan in the 1870s to train  
 4 the Imperial Army in modern Western warfare.” *Id.*

5 Courts also routinely filter out generic or common elements before analyzing  
 6 for substantial similarity. *See, e.g., Washington v. ViacomCBS*, 2020 WL 5823568,  
 7 at \*2, 4 (C.D. Cal. Aug. 20, 2020) (“[I]nvestigations into the disappearance of a  
 8 young woman or teenage girl,” “that paparazzi would surround and photograph a  
 9 celebrity,” and “that friends or family might take advantage of a famous  
 10 protagonist” were unprotectable as “common tropes”); *Fillmore v. Blumhouse*  
 11 *Prods.*, 2017 WL 4708018, at \*3 (C.D. Cal. July 7, 2017) (“[d]ream sequences” and  
 12 “[b]ringing the dead back to life” are unprotectable concepts).

13 *All* of the alleged similarities between Batholith and Methuselah are  
 14 unprotectable ideas or *scenes a faire*. There cannot be any reasonable dispute that  
 15 an enormous mountain creature is a basic, unprotectable idea.<sup>6</sup> *Scenes a faire* that  
 16 flow from this idea include the general shape of a mountain on the creature’s back,  
 17 being constituted of rock or earth, a colossal size, and large legs to support that  
 18 size.<sup>7</sup> Because each of these elements are unprotectable, Batholith and Methuselah  
 19 lack substantial similarity as a matter of law.

### 20 **3. Any Protectable Elements Are Not Substantially Similar**

21 After filtering out the unprotectable elements, there is nothing similar  
 22 between the registered Batholith image and Methuselah. As an initial matter,  
 23

24 \_\_\_\_\_  
 25 <sup>6</sup> Particularly one named Batholith, which, as Plaintiff’s website explains, is a  
 geology term that refers to a “huge expanse of granite rock.”  
<https://www.summitkaiju.com/kaiju>.

26 <sup>7</sup> In addition, while not relevant to the registered image, certain elements flow  
 27 from the idea of a creature in the Godzilla universe, including causing destruction,  
 rampaging through cities, and a shot of the monster from an upward angle as though  
 28 viewed from the ground (by the people who are about to get trampled). Compl.  
 ¶¶ 30-31. Plaintiff cannot claim ownership of these elements.

1 Methuselah appears in the Film for approximately twenty seconds and is never seen  
2 clearly. Salvato Decl., Ex. A at 1:06:30-41; 1:12:46-48; 1:59:46, 2:00:26-31.

3 Unlike the Batholith image, the Film shows Methuselah rising up from a state of  
4 dormancy with a green forest on its back, as opposed to Batholith's gray, barren  
5 rocky surface. *Id.* at 1:06:30-41. Batholith is shown with bright red eyes (Compl.  
6 ¶ 7) unlike Methuselah's white eyes (Salvato Decl., Ex. A at 1:12:48). And the  
7 shapes of the creatures' mountainous backs are different—with Batholith's  
8 appearing as a jagged ridgeline and Methuselah's as symmetrical and rounded. *Id.*,  
9 Ex. A at 2:00:26-31. Despite Plaintiff's allegation that the images in Paragraph 33  
10 of the complaint are strikingly similar, there is no similarity between them  
11 whatsoever except for a vague (and different) mountain shape.

12 Plaintiff's allegation that the Book infringes its alleged copyright in Batholith  
13 (Compl. ¶ 40) is beyond frivolous – *there are no images of Methuselah in the Book*  
14 *at all*. Moreover, the Book reveals that Methuselah has “horns like a bull” and  
15 confirms that it has a “forest growing on its rocky back,” which is nothing like  
16 Batholith. Salvato Decl., Ex. B at 168. There is no similarity in protectable  
17 elements between the registered image of Batholith and Methuselah as shown in the  
18 Film and described in the Book.

19 Finally, even if Plaintiff could establish copyright protection in its Batholith  
20 character, which it cannot (*see* Section III.A), Plaintiff cannot show that the  
21 Batholith and Methuselah characters are substantially similar. “When analyzing  
22 whether two protectable characters are substantially similar, courts require a very  
23 high degree of similarity between characters,” and “only protectable elements  
24 standing alone may be compared when determining substantial similarity.” *Silas v.*  
25 *Home Box Office Inc.*, 201 F. Supp. 3d 1158, 1177 (C.D. Cal. 2016), *aff'd*, 713 F.  
26 App'x 626 (9th Cir. 2018). Similarity must lie in the characters' concrete attributes;  
27 even minor differences can defeat similarity claims. *Id.* at 1178 (similarity defeated  
28 in part because one character was an active professional football player who owns a

1 nightclub, and the other was a retired professional football player who worked for a  
2 financial management company). Here, the only similarities between the  
3 “characters” of Batholith and Methuselah are unprotectable ideas and *scenes a faire*.  
4 Their specific expressive elements are different, including the shape of the  
5 mountain and the terrain on the surface of the mountain.

6 Because Plaintiff cannot show substantial similarity of protected expression  
7 between the Batholith image and the depiction of Methuselah in either the Film or  
8 the Book, Plaintiff’s copyright infringement claim fails and should be dismissed  
9 with prejudice.

10 **IV. PLAINTIFF’S INDIRECT INFRINGEMENT CLAIM FAILS**

11 Plaintiff alleges that Legendary is also liable for secondary copyright  
12 infringement by materially contributing to and inducing infringement by Warner  
13 Bros., Toho, and Titan Books (collectively the “Distributors”). Compl. ¶¶ 43-53. It  
14 is ironic that Plaintiff contends that Toho – *the owner of Godzilla* – is a direct  
15 infringer of Plaintiff’s alleged character, which it alleges it created as part of the  
16 “Godzilla universe.” Compl. ¶ 13. Regardless, because Plaintiff’s claim of direct  
17 infringement fails for lack of substantial similarity, Plaintiff’s claim for secondary  
18 infringement fails as well. *See Fox Broad. Co. v. Dish Network*, 747 F.3d 1060,  
19 1068 (9th Cir. 2014) (“Secondary liability for copyright infringement does not exist  
20 in the absence of direct infringement by a third party.”).

21 **V. CONCLUSION**

22 Plaintiff does not own the idea of a mountain creature. Its claims should be  
23 dismissed with prejudice and Legendary be awarded its reasonable attorneys’ fees.

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DAVIS WRIGHT TREMAINE LLP  
NICOLAS A. JAMPOL  
CRISTINA M. SALVATO

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27 By: /s/ Nicolas A. Jampol  
Nicolas A. Jampol  
Attorneys for Defendant  
Legend Pictures, LLC  
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