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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID LEW, an individual, a/k/a)	Case No. 20-cv-10948 DDP (PLAx)
SHARK TOOF)	
)	ORDER GRANTING
Plaintiff,)	DEFENDANTS' MOTION TO
v.)	DISMISS
)	
THE CITY OF LOS ANGELES, a)	[Dkts. 19, 20, 21, 22]
government entity; EL PUEBLO DE LOS)	
ANGELES, business form unknown;)	
CHINESE AMERICAN MUSEUM,)	
business form unknown; FRIENDS OF)	
THE CHINESE AMERICAN MUSEUM,)	
INC., a California corporation; and)	
DOES 1 through 30, inclusive,)	
)	
Defendants.)	

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2 Presently before the court is Defendant the City of Los Angeles (“City”) and
3 Defendant Friends of the Chinese American Museum Inc. (“FCAM”) (collectively,
4 “Defendants”)’ Motion to Dismiss the Complaint. (Dkts. 19, 20, 21, 22.) Having
5 considered the submissions of the parties and heard oral argument, the court grants the
6 motion and adopts the following order.

7 **I. BACKGROUND**

8 David Lew (“Plaintiff”) is “an internationally known professional artist and
9 muralist of worldwide repute and reputation” also known as “Shark Toof.” (Dkt. 1,
10 Compl. ¶ 11.) Plaintiff’s “paintings as well as his outdoor murals have been featured
11 around the world and his original artwork has been sought by a diverse range of clients,
12 as well as displayed at art shows in museums across the country.” (*Id.*) Defendants are
13 the City of Los Angeles (“City”), El Pueblo de Los Angeles (“El Pueblo”), the Chinese
14 American Museum (“CAM”), and the Friends of the Chinese American Museum
15 (“FCAM”) (collective, “Defendants”). (*Id.* ¶¶ 4, 5, 6, 7.) “In 2018, CAM began a multi-
16 month exhibition called ‘Don’t Believe the Hype: LA Asian Americans in Hip Hop.’” (*Id.*
17 ¶ 13.) Plaintiff alleges that the exhibition “examined resistance, refuge, and reinvention
18 for Asian Americans living in the Los Angeles region through art and had site-specific
19 immersive spaces created by graffiti artists and muralists.” (*Id.*) CAM invited Plaintiff to
20 showcase his original art at the exhibition along with other renowned artists. (*Id.* ¶ 14.)
21 At the time Plaintiff was invited, “one of [Plaintiff’s] works was already in CAM’s
22 permanent collection.” (*Id.*)

23 Plaintiff “created 88 original pieces of artwork to be shown at CAM’s exhibition.”
24 (*Id.* ¶ 15.) Plaintiff “chose [to create] 88 [pieces] given the special reverence and meaning
25 of the number eight in the Chinese Culture.” (*Id.*) Plaintiff’s “art creations were placed
26 on tote bags, which were to be hung outside CAM on clotheslines as performative art
27 that echoed the experience of Chinese Americans in Los Angeles and as a whole the

1 pieces looked like a series of red lanterns.” (*Id.*) Plaintiff named the exhibition of his
2 artwork: Year of the Shark Red Packet. (*Id.*)

3 “In December 2018, [Defendants] collectively removed the art without giving
4 notice to [Plaintiff].” (*Id.* ¶ 17.) According to Plaintiff, Defendants “sent trash removal
5 crews” to remove his art; “the trash crews proceeded to take down, discard, and destroy
6 the original art, and irretrievably and literally dumped the original pieces in the trash.”
7 (*Id.* ¶ 20.) Plaintiff alleges that Defendants ordered the removal without having
8 “qualified or authorized representatives to oversee and manage the art removal,
9 preservation, and protection process” —contrary to, as Plaintiff alleges— “a standard
10 practice in the art world.” (*Id.* ¶ 19.) Plaintiff further alleges that Defendants knew that
11 Plaintiff’s art “was deeply important to him and imbued with personal meaning . . .
12 [Defendants] were also profoundly aware of the meaning of the work to the broader
13 public, including the Chinese American Community.” (*Id.* ¶ 18.) Plaintiff learned about
14 Defendant’s removal and subsequent destruction of his work in late December 2018 and
15 expressed “horror and shock.” (*Id.* ¶ 20.)

16 Plaintiff alleges that the City’s general manager Chris Espinosa through El Pueblo
17 “admitted fault after the art had been destroyed. CAM’s curator Justin Hoover also
18 admitted fault.” (*Id.* ¶ 21.) Plaintiff alleges, however, that Defendants have not returned
19 any of Plaintiff’s original pieces and have never formally apologized for “the destruction
20 of [Plaintiff’s] work. (*Id.* ¶ 22, 24.) Plaintiff filed a “formal claim” with the City and “also
21 sought redress from CAM/FCAM and its purported insurance carrier.” (*Id.* ¶ 23.)
22 According to Plaintiff, the City, “[i]n bad faith, . . . failed to even address [Plaintiff’s]
23 claim on its merits because it said CAM/FCAM had advised it that it had insurance, and
24 told [Plaintiff] to look to CAM/FCAM for relief.” (*Id.*) Plaintiff alleges that “[a]fter being
25 advised by its insurance carrier that [Plaintiff’s] claim was not covered, CAM/FCAM
26 dishonestly claimed that it had done nothing wrong and that Lew should look only to the
27 City for compensation.” (*Id.*)

1 Based on the allegations above, Plaintiff asserts the following federal and state
2 causes of action against Defendants: (1) Violations of the Visual Artists Rights Act
3 (“VARA”) and Right of Integrity (17 U.S.C. § 106A); (2) Intentional Desecration of Fine
4 Art (Cal. Civ. Code §§ 987(c)(1), (e)); (3) Grossly Negligent Desecration of Fine Art (Cal.
5 Civ. Code §§ 987(c)(2), (e)); (4) Conversion; (5) Negligence; and (6) Unfair, Unlawful
6 Practices (Cal. Bus. & Prof. Code § 17200 *et seq.*).

7 Presently, Defendants move to dismiss the complaint under Federal Rule of Civil
8 Procedure 12(b)(6) and 12(b)(1). (Dkt. 20, Mot.)

9 **II. LEGAL STANDARD**

10 A complaint will survive a motion to dismiss when it contains “sufficient factual
11 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
12 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
13 When considering a Rule 12(b)(6) motion, a court must “accept as true all allegations of
14 material fact and must construe those facts in the light most favorable to the plaintiff.”
15 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include
16 “detailed factual allegations,” it must offer “more than an unadorned, the-defendant-
17 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Conclusory allegations or
18 allegations that are no more than a statement of a legal conclusion “are not entitled to the
19 assumption of truth.” *Id.* at 679. In other words, a pleading that merely offers “labels
20 and conclusions,” a “formulaic recitation of the elements,” or “naked assertions” will not
21 be sufficient to state a claim upon which relief can be granted. *Id.* at 678 (citations and
22 internal quotation marks omitted).

23 “When there are well-pleaded factual allegations, a court should assume their
24 veracity and then determine whether they plausibly give rise to an entitlement of relief.”
25 *Id.* at 679. Plaintiffs must allege “plausible grounds to infer” that their claims rise “above
26 the speculative level.” *Twombly*, 550 U.S. at 555, 556. “Determining whether a complaint
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1 states a plausible claim for relief” is a “context-specific task that requires the reviewing
2 court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

3 III. DISCUSSION

4 A. Visual Artists Rights Act (“VARA”)

5 a. There is No Registration Requirement under VARA

6 As an initial matter, Defendants argue that there is no subject matter jurisdiction
7 because Plaintiff did not obtain a copyright registration prior to filing suit. (Mot. at 8-9.)
8 According to Defendants, the “narrow” exception to the registration requirement under
9 Section 411(a) of the Copyright Act, providing that “[e]xcept for an action brought for a
10 violation of the rights of the author under section 106A(a),” only applies to “injunctive
11 relief actions to *prevent* injury to artwork, not actions to recoup damages for allegedly
12 injured copyright after the fact.” (*Id.* at 9 (citing 17 U.S.C. § 411(a), §§ 106A(a)(3)(A))).
13 However, Defendants have not pointed to any authority supporting this narrow reading
14 of Section 411(a)’s exception as it applies to the VARA.

15 Section 411(a) is clear: “[A]ctions brought for a violation of the rights of the author
16 under section 106A(a)” are excluded from Section 411(a)’s registration requirement. 17
17 U.S.C. § 411(a). Section 106A(a)(3)(A) provides that an author of a visual shall have the
18 right to “*prevent* any intentional distortion, [or] mutilation” and that “any intentional
19 distortion, [or] mutilation . . . *is a violation* of that right . . .” 17 U.S.C. § 106A(3)(A)
20 (emphasis added). Thus, Section 106A permits authors of visual works of art to bring
21 actions to prevent distortion or mutilation and actions for damages for the intentional
22 distortion or mutilation of the visual work. Actions brought under Section 106A, as is the
23 case here, do not require copyright registration. *See Cohen v. G & M Realty L.P.*, 988 F.
24 Supp. 2d 212, 216 (E.D.N.Y. 2013) (“copyright registration is not required to bring a
25 VARA infringement action, ‘or to secure statutory damages and attorney’s fees.’”
26 (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995))).

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1 **b. Exclusions under the VARA**

2 i. “Applied Art”

3 Defendants argue that Plaintiff cannot state a claim for relief under the VARA
4 because Plaintiff’s works are “applied art” under the Ninth Circuit’s test established in
5 *Cheffins v. Stewart*, 825 F.3d 588 (9th Cir. 2016). (Mot. at 7-8.) Defendants contend that
6 Plaintiff merely “placed artistic creations on tote bags” and “[t]hese tote bags did not
7 ‘cease’ to have their utilitarian function as tote bags simply because of [Plaintiff’s] claims
8 of artistic merit.” (*Id.* at 6.) In opposition, Plaintiff argues that the tote bags were a
9 medium and “ceased serving any utilitarian function/master when they became one-of-a-
10 kind rare art” (Opp. at 15.) According to Plaintiff “the question of whether the 88
11 unique works at issue in this case ceased to be art and were really utilitarian is, at best, a
12 factual question.” (*Id.* at 15.)

13 “The purpose of VARA is to protect two ‘moral rights’ of artists—the rights of
14 ‘integrity’ and ‘attribution.’” *Cort v. St. Paul Fire & Marine Ins. Companies, Inc.*, 311 F.3d
15 979, 984 (9th Cir. 2002) (citing H.R. Rep. No. 101-154, at 5 (1990)). “The right of integrity
16 allows the artist to prevent any deforming or mutilating changes to his work, even after
17 title in the work has been transferred.” *Id.* (internal alterations omitted) (citation
18 omitted). “The right of attribution allows the artist to be recognized by name as the
19 creator of a work. It includes an artist’s right to prevent the use of his or her name on
20 distorted pieces of art originally produced by him or her.” *Id.*

21 The VARA provides, in relevant part:

22 (a) Rights of attribution and integrity the author of a work
23 of visual art—

24 . . .

25 (3) subject to the limitations set forth in section 113(d), shall
26 have the right

27 (A) to prevent any intentional distortion, mutilation, or other
28 modification of that work which would be prejudicial to his

1 or her honor or reputation, and any intentional distortion,
2 mutilation, or modification of that work is a violation of that
3 right,

4 17 U.S.C. § 106A(a)(3)(A). The Copyright Act defines a “work of visual art” as: “(1) a
5 painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200
6 copies or fewer that are signed and consecutively numbered by the author. . . .” 17 U.S.C.
7 § 101. The Act also provides that a “work of visual art does not include” “any poster,
8 map, globe, chart, technical drawing, diagram, model, applied art, motion picture or
9 other audiovisual work, book, magazine, newspaper, periodical, . . . or similar
10 publication; [or] . . . any merchandising item or advertising, promotional, descriptive,
11 covering, or packaging material or container” 17 U.S.C. § 101.

12 In *Cheffins*, the issue before the Ninth Circuit was “whether the [VARA] applie[d]
13 to a used school bus transformed into a mobile replica of a 16th-century Spanish galleon
14 [“(La Contessa”).” 825 F.3d at 592. The case was before the Court after the district court’s
15 grant of summary judgment against the creators of the mobile replica because it
16 concluded that the *La Contessa* was “applied art” under the VARA. *Id.* The Ninth
17 Circuit, after noting that federal courts had rarely had occasion to interpret the meaning
18 of “applied art” under the VARA, held that “an object constitutes a piece of ‘applied art’
19 –as opposed to a ‘work of visual art’—where the object initially served a utilitarian
20 function and the object continues to serve such a function after the artist made
21 embellishments or alterations to it.” *Id.* at 594. The Court went on to explain that
22 “‘applied art’ would not include a piece of art whose function is purely aesthetic or a
23 utilitarian object which is so transformed through the addition of artistic elements that its
24 utilitarian functions cease.” *Id.* The Ninth Circuit also explained: “[O]ur focus is on
25 objects that *in fact* continue to serve real utilitarian functions (as opposed to those which
26 may retain the ability to serve utilitarian functions, or those which at one point in history
27 served such functions []).” *Id.* at 594 n.7 (emphasis in original).

1 Based on the record before the Court, the Ninth Circuit concluded that the artists'
2 chosen medium, a school bus, continued to *in fact* be used for its utilitarian function. *Id.*
3 at 595. The *La Contessa* continued to be used for “transportation, providing rides to
4 festival-goers, hosting musical performances and weddings, and serving as a stage for
5 poetry and acrobatics shows.” *Id.* There was also evidence that the *La Contessa* was at
6 one point “banned from the [Burning Man] Festival [] because its unsafe driving
7 practices far exceeded community tolerance and out-weighed the visual contribution it
8 made.” *Id.* The Ninth Circuit described the *La Contessa* as having “many artistic
9 qualities” but, based on the undisputed evidence, held that it “retained a largely practical
10 function”¹ *Id.*

11 Here, Plaintiff alleges that in 2018, the CAM began an exhibition in which he was
12 “was one of the Asian American artists asked to showcase original art.” (Compl. ¶ 14.)
13 “[Plaintiff] created 88 original pieces of artwork to be shown at [the] exhibition.” (*Id.* ¶
14 15.) “[Plaintiff’s] 88 art creations were placed on tote bags, which were to be hung
15 outside CAM on clotheslines as performative art that echoed the experience of Chinese
16 Americans in Los Angeles and as a whole looked like a series of red lanterns.” (*Id.*) The
17 Complaint includes photographs depicting Plaintiff’s artwork hanging from clotheslines
18 in the CAM courtyard. (*Id.* ¶ 16.) Plaintiff also argues that his art was not a “tote bag
19 that continued to serve a ‘significant utilitarian purpose’ . . . rather, it served only the

21 ¹ It is noteworthy that the Ninth Circuit was not concerned with whether the *La Contessa*
22 retained the physical characteristics of a bus, such as a motor, tires, or the dimensions
23 which made it look like a bus. Those characteristics, under Defendant’s reading of
24 *Cheffins*, would be sufficient to conclude that the *La Contessa* was applied art. (See Reply
25 “[Plaintiff] has not asserted that the bags could not function as tote bags before or after
26 the print was applied, nor have the tote bags lost their pre-application function after the
27 print is applied. . . . [T]he photos show normal-looking tote bags decorated with a print.”)
28 Instead, the Ninth Circuit’s analysis centered on whether the *La Contessa* “continue[d] to
serve such a function” —not whether it could conceivably continue to serve such a
function or whether the *La Contessa* looked like a bus. *Cheffins*, 825 F.3d at 594.

1 purpose of constituting an exhibited art work at a prestigious museum and, . . . it was to
2 be sold as art to art collectors in limited edition . . . not as a grocery bag.” (*Id.* at 10.)
3 Plaintiff notes that his art was “part of a larger cultural art showcase for the public to
4 celebrate the Chinese community” and Plaintiff “chose to display his art in this public
5 performance manner to echo the experience of Chinese Americans in Los Angeles—the
6 use of clothes lines and laundry clips hanging the art was reminiscent of Chinese laundry
7 facilities that are part of the historical Chinese-American experience in the laundry
8 trade” (*Id.* at 12-13.) The complaint, however, does not allege this information.

9 The plausible inference from the allegations and the photographs is that the
10 objects were used as canvases with handles on which Plaintiff placed his work of art.
11 The handles were simply used as a method of display. Plaintiff’s choice of medium had
12 the potential to be tote bags, but the utilitarian function appears to have never occurred
13 or certainly ceased at the time the art was hung from the clotheslines at CAM—the
14 objects were above the public in the museum’s courtyard serving no function other than
15 performative art. However, the court notes that there are no allegations clearly setting
16 forth the nature of the objects before or after Plaintiff completed his creation.²

17 The court finds that, although the allegations are not deficient, in light of the
18 extensive discussion at oral argument and the court’s discussion of *Cheffins* above, it
19 would be appropriate to amend the complaint in order to clarify the substance of the
20 allegations. Further clarification on the nature of Plaintiff’s work of art would focus
21 future arguments by the parties. The focus, as articulated in *Cheffins*, is whether the
22 objects—the tote bags—“*in fact* continue[d] to serve real utilitarian functions.” *See*

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25 ² The complaint also does not set forth the precise nature of Plaintiff’s art. For example,
26 in the opposition, Plaintiff states that “[e]ach bag’s art was individually painted by
27 [Plaintiff] as a unique individualized version of each of the shark drawings by personal
28 artistic touches of the artist.” (Opp. at 19.) However, this information is not set forth in
the complaint. (*See* Compl. ¶ 15.)

1 *Cheffins*, 825 F.3d at n.7. The fact that artists use various medium which all potentially
2 can be reserviced at some future date or reverted to be used in a utilitarian function is
3 immaterial. Many items are used as canvases. We must be cautious that the label we
4 place on the object itself does not answer the question without doing the analysis. Great
5 pieces of art have certainly been painted on wood. Even though the wood could
6 theoretically be repurposed as a fence post or a door, no reasonable argument could be
7 made that because of that “potential” the object ceases to be protectable as a work of
8 visual art.

9 On amendment, Plaintiff is to focus the allegations on the nature of his alleged
10 works of visual art and, importantly, whether the objects were in fact continued to serve
11 a real utilitarian function.

12 ii. “Merchandising items”

13 Defendants next argue that Plaintiff’s art falls outside of the scope of the VARA as
14 “merchandising items” based on a Vendor Application Form, a Form that is not part of
15 the Complaint. (Mot. at 6.) Even if the Vendor Application Form is properly subject to
16 judicial notice, at this stage the Form does not establish that Plaintiff’s works of art were
17 in fact “merchandising items” under the VARA. (See Dkt. 21-1, RJN, Ex. 1.) It appears
18 that Defendants’ argument is based on the premise that every item sold through its gift
19 shop is inherently a merchandising item. The court does not agree. As alleged by
20 Plaintiff, Plaintiff was “asked to showcase [his] original art” and his creations were
21 “performative art” as part of an art exhibition. (Compl. ¶¶ 14, 15.) That Plaintiff’s works
22 of art were later to be sold through the museum’s gift shop does not automatically
23 convert the alleged art pieces into merchandising items. The court declines to dismiss
24 based on the “merchandising items” exclusion under the VARA.

25 **B. Timeliness of the State Law Claims**

26 Defendants next move to dismiss Plaintiff’s state law claims based on timeliness.
27 Defendants argue that Plaintiff is barred from pursuing the state law causes of action

1 because Plaintiff failed to file suit within six months of the City's denial of Plaintiff's
2 formal complaint to the City. (Mot. at 9-10; RJN, Exs. 5, 6.)³ The City records show that
3 the City denied Plaintiff's claim on June 14, 2019. (Ex. 6.) Plaintiff filed this action more
4 than six months after the City's denial, on December 2, 2020. (See dkt.) Plaintiff avers in
5 opposition to the motion that he can assert "estoppel, waiver and misrepresentation to
6 that defense if pled by the City." (Opp. at 21-22.)

7 The California Government Claims Act requires that suit be commenced against a
8 public entity "not later than six months after the date such [denial notice] is personally
9 delivered or deposited in the mail." Cal. Gov't Code § 945.6(a)(1); *see also* § 913.

10 However,

11 [a] public entity may be estopped from asserting the
12 limitations of the tort claims statutes where its agents or
13 employees have prevented or deterred the filing of a timely
14 claim by some affirmative act. The required elements for an
15 equitable estoppel are: (1) the party to be estopped must be
16 apprised of the facts; (2) the party to be estopped must intend
17 his or her conduct shall be acted upon, or must so act that the
18 party asserting the estoppel had a right to believe it was so
19 intended; (3) the other party must be ignorant of the true state
20 of facts; and (4) the other party must rely upon the conduct to
21 his or her injury.

19 *J.J. v. Cty. of San Diego*, 223 Cal. App. 4th 1214, 1227 (2014), as modified on denial of reh'g
20 (Mar. 7, 2014) (citations omitted); *see also Ovando v. City of Los Angeles*, 92 F. Supp. 2d

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23 ³ The court grants judicial notice of Exs. 5 and 6. Courts "may take judicial notice of court
24 filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442
25 F.3d 741, 746 n.6 (9th Cir. 2006); *see also* Fed. R. Evid. 201(b) ("The court may judicially
26 notice a fact that is not subject to reasonable dispute because it: (1) is generally known
27 within the trial court's territorial jurisdiction; or (2) can be accurately and readily
28 determined from sources whose accuracy cannot reasonably be questioned.").

1 1011, 1024 (C.D. Cal. 2000) (“A public entity may be estopped from asserting non-
2 compliance with the [California’s Government Claims Act] when affirmative acts of its
3 agents, especially authority figures, deterred the filing of a timely claim.”). “An estoppel
4 defense is available in all circumstances where the government has acted in an
5 unconscionable manner or attempted to take unfair advantage of the claimant. The issue
6 is determined from the totality of the circumstances.” *Ramirez v. Cty. of Los Angeles*, 397 F.
7 Supp. 2d 1208, 1229 (C.D. Cal. 2005) (internal alterations and citations omitted).

8 As currently pled, Plaintiff’s allegations are insufficient to plausibly allege
9 estoppel against the City. The court grants Plaintiff leave to amend to sufficiently allege
10 estoppel, including affirmative acts of City agents which deterred Plaintiff’s timely filing
11 of this action. Because the court dismisses for failure to allege compliance or estoppel,
12 the court does not reach whether Plaintiff sufficiently alleged the state law causes of
13 action against the City.

14 **C. California Art Preservation Act (“CAPA”)**

15 Defendants next contend that Plaintiff’s second and third causes of action under
16 CAPA are preempted by VARA. (Mot. at 10.) Plaintiff argues that the VARA does not
17 preempt CAPA because VARA only protects “destruction [that] is ‘prejudicial to his or
18 her honor or reputation.’” (Opp. at 17 (quoting 17 U.S.C. § 106A(a)(3)(A)&(B)). Whereas,
19 according to Plaintiff, CAPA protects “damage to the property itself—irrespective of the
20 honor/reputation injury to the artist” (*Id.*) Plaintiff further argues that if a jury were
21 to find that Plaintiff’s art is “applied art,” it would fall outside of VARA, but would be
22 eligible for protection under CAPA as a “work of fine art.” (*Id.* at 18.)

23 Courts in the Ninth Circuit apply a two-part test to determine whether a state law
24 is preempted by the Copyright Act. *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1137 (9th
25 Cir. 2006); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001); *Whalen v.*
26 *United Food & Com. Workers Loc. 135*, No. 14-CV-3017 W BLM, 2015 WL 4659213, at *2
27 (S.D. Cal. Aug. 5, 2015). First, the court must determine whether “the ‘subject matter’ of

1 the state law claim falls within the subject matter of [federal copyright law].” *Laws*, 448
2 F.3d at 1137. Second, the court must determine “whether the rights asserted under state
3 law are equivalent to the rights contained in [federal copyright law]” *Id.*

4 The court rejects Plaintiff’s reading of the VARA. The VARA does not require a
5 showing that the destruction of a work of visual art be prejudicial to an artists’ honor or
6 reputation. Rather, the VARA provides that “any intentional distortion, mutilation, or
7 modification of [a work of visual art] is a violation of that right” — the right to prevent the
8 destruction of a work of visual art that would be prejudicial to the artists’ reputation or
9 honor. 17 U.S.C. § 106A (emphasis added). In other words, by statute, the intentional
10 destruction of a work of visual art is by definition prejudicial to the artists’ honor or
11 reputation. Thus, VARA preempts CAPA, whereas here, Plaintiff’s claim under CAPA is
12 based on the same right of integrity protected under the VARA. (*See* Compl. ¶ 28 (“ . . . in
13 violation of [Plaintiff’s] rights including his right of integrity therein, as set forth in Title
14 17, Section 106A(a)(3)(A) and Section 106A(a)(3)(B)”); ¶ 33 (“ . . . in violation of
15 [Plaintiff’s] rights including his right of integrity therein under Cal. Civil Code § 987.”).
16 *See Whalen*, 2015 WL 4659213, at *2; *Cort v. St. Paul Fire & Marine Ins. Companies, Inc.*, 311
17 F.3d 979, 984 n.1 (9th Cir. 2002) (noting that “it appears that CAPA may have been
18 preempted by VARA.”) (citing *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 531
19 (1996)).

20 At this stage, the court finds that the parties have insufficiently briefed
21 preemption as it relates whether Plaintiff’s art could fall outside of the VARA as “applied
22 art” but still be protected under CAPA as “fine art.” *See* Cal. Civ. Code § 987(b)(2) (“Fine
23 art” means an original painting, . . . of recognized quality, but shall not include work
24 prepared under contract for commercial use by its purchaser.”). In any event, Plaintiff
25 has not sufficiently alleged that his work is an “original painting” as he argues in his
26 opposition. Therefore, the court does not reach whether CAPA is preempted by the
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1 VARA in such a case. The court grants Plaintiff leave to amend expressing no opinion as
2 to the validity of such a claim.

3 **IV. CONCLUSION**

4 For the reasons set forth above, the court grants Defendants' motion. The court
5 grants Plaintiff leave to amend. Any amendment must be filed within fourteen days
6 from the date of this order.

7 **IT IS SO ORDERED.**

8 Dated: August 31, 2021

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12 DEAN D. PREGERSON
13 UNITED STATES DISTRICT JUDGE
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