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28UNITED STATES DISTRICT COURT  
For the Northern District of California

## UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

ALEXANDRE FAYCAL JOUDE, et al.,

No. C 14-01656 LB

Plaintiffs,

**ORDER GRANTING DEFENDANT'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS**

v.

WORDPRESS FOUNDATION, et al.,

[Re: ECF No. 11]

Defendants.  

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**INTRODUCTION**

Plaintiffs Alexandre Fayçal Joude and Daniel Joude sued WordPress Foundation and Automattic, Inc. to compel them to take down an anonymously-written blog about Plaintiffs and their family. Complaint, ECF No. 1.<sup>1</sup> Plaintiffs dismissed WordPress from the action on April 2, 2014. Motion, ECF No. 11, at 8 n.1. Automattic removed the action to this court and now moves for an order granting judgment on the pleadings. *Id.* at 6. The court **GRANTS** Automattic's motion and dismisses all three claims.

**STATEMENT****I. BACKGROUND**

Plaintiffs, both private individuals, are citizens and residents of France. Complaint, ECF No. 1-

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<sup>1</sup> Citations are to the Electronic Case File ("ECF") with pin cites to the electronically-generated page numbers at the top of the document.

1 2, ¶¶ 5-6. Defendant Automattic, a Delaware corporation with its principal place of business in  
2 California, hosts, maintains, and operates Wordpress.com. *Id.* ¶ 3.

3 **A. The Blog**

4 In March 2014, Plaintiffs learned of a blog at the web address <http://thejoudes.wordpress.com>  
5 (“the Blog”). *Id.* ¶ 11. Titled “The Hoodwankers,” the Blog is about Plaintiffs and other members  
6 of the Joude family and published anonymously. *Id.* ¶¶ 11, 13. From February 27, 2014 to March 8,  
7 2014, an anonymous contributor posted a total of twelve separate entries. *See* McCoy Declaration,  
8 Ex. A, ECF No. 1-4, at 35-43. While some of the entries appear to state plain facts about Plaintiffs’  
9 family history, others contain negative remarks. *Id.* For example, a March 3, 2014 entry titled  
10 “God’s Fundraisers” states that “We [the Joudes] obtain funds through deceit and fraud . . .” and  
11 “have defrauded victims out of at least 30 million Euros . . .” to support the “Legionnaires of  
12 Christ.” *Id.* at 41.

13 Although all of the Blog’s entries purport to be written by plaintiff Alexandre Fayçal Joude,  
14 Alexandre claims that he did not publish these entries and has never authorized anyone else to do so.  
15 Complaint, ECF No. 1-2, ¶¶ 21-22. On March 6, 2014, plaintiff Alexandre sent an email to  
16 Automattic via WordPress requesting that they take down the Blog because “the author of this blog  
17 has usurped my identity to publish defamatory information about family members with photos that I  
18 do not know how he was able to obtain.” *Id.* ¶ 14; 3/7/14 Email, ECF No. 1-4, at 7. Later the same  
19 day, Automattic responded that they “were in no position to arbitrate content disputes” but would  
20 remove any content “found to be defamatory or illegal by a U.S. court of law” in a formal order from  
21 a United States court. *Id.*

22 **B. The French Defamation Order**

23 On March 12, 2014, through counsel in France, Plaintiffs sought an order from the Tribunal de  
24 Grande Instance de Paris (the “High Court of Paris”) directing Automattic and WordPress to remove  
25 the Blog. Compl., ECF No. 1-2, ¶ 15; Davis Declaration, Ex. A, ECF No. 1-3 at 17, *translated at*  
26 Ex. B., ECF No. 1-3, at 24. In their request, Plaintiffs stated that “the blog concerned lets it be  
27 imagined that it was written by one of the petitioners, in the current case, Mr. Alexandre Fayçal  
28 Joude. This is false, as Alexandre Fayçal Joude also affirms in the certification that he [wrote] on

1 March 7th, 2014 . . .” *Id.* at 17-21, *translated at* ECF No. 1-3 at 25-26. Their request also stated  
2 that “the blog concerned is manifestly malicious” and contains “statements without the slightest  
3 element of proof in support.” *Id.* at 26. Plaintiffs further characterized the Blog’s statements as  
4 “purely and simply injurious,” “false[,]” and aimed at “harm[ing] the petitioners.” *Id.* Plaintiffs also  
5 expressed concern regarding private family photos posted to the Blog and asserted that “[their]  
6 placement online . . . constitutes an infringement on the rights to the image on both of the  
7 petitioners . . .” *Id.* Finally, Plaintiffs stated that they were both “businessmen with honorable  
8 reputations” and “families and . . . children” and thus had a particular interest in seeing the Blog  
9 removed. *Id.* at 27.

10 On the same day the Plaintiffs filed their request, the High Court of Paris granted it and issued an  
11 order stating that Automattic and WordPress must “take all necessary or useful measures for the  
12 immediate removal of the blog entitled ‘Alexandre Fayçal Joude/the Hoodwankers’ and ‘Danny  
13 Joude/the Hoodwankers’” within three months. Complaint, Ex. A, ECF No. 1-2, at 12, *translated at*  
14 Ex. B., ECF No. 1-2 at 14.

15 **C. Wordpress.com Terms of Service**

16 The WordPress.com Terms of Service state that “Automattic will not be liable for any acts or  
17 omissions by You, including any damages of any kind incurred as a result of such acts or  
18 omissions.” McCoy Declaration, Ex. B, ECF No. 1-4, at 46, ¶ 1. Regarding the “Responsibility of  
19 Contributors,” the Terms of Service provide that blog operators are “entirely responsible for the  
20 content of, and any harm resulting from, that Content. . . . By making the Content available, you  
21 represent and warrant that . . . your blog is not named in a manner that misleads your readers into  
22 thinking that you are another person or company.” *Id.* at 46, ¶ 2.

23 The Terms of Service reserve Automattic’s authority to remove harmful or objectionable blog  
24 content:

25 Automattic has the right (though not the obligation) to, in Automattic’s sole discretion (i) refuse  
26 or remove any content that, in Automattic’s reasonable opinion, violates any Automattic policy  
27 or is in any way harmful or objectionable, or (ii) terminate or deny access to and use of the  
Website to any individual or entity for any reason, in Automattic’s sole discretion.

28 *Id.* at 46-47, ¶ 2. Concerning the “Responsibility of Website Visitors,” the Terms of Service also

1 disclaim responsibility for the content of material posted to WordPress.com:

2 Automattic has not reviewed, and cannot and cannot review, all of the material, including  
3 computer software, posted to the Website, and cannot therefore be responsible for that material's  
4 content, use or effects. By operating the Website, Automattic does not represent or imply that  
5 it endorses the material there posted, or that it believes such material to be accurate, useful or  
6 nonharmful. . . . Automattic disclaims any responsibility for any harm resulting from the use by  
7 visitors of the Website, or from any downloading by those visitors of content there posted.

8 *Id.* at 47-48, ¶ 6. Finally, Automattic states that they are not liable for user costs, damages, or  
9 fees:

10 In no event will Automattic, or its suppliers or licensors, be liable with respect to any subject  
11 matter of this agreement under any contract, negligence, strict liability or other legal or equitable  
12 theory for: (i) any special, incidental or consequential damages; (ii) the cost of procurement for  
13 substitute products or services; (iii) for interruption of use or loss or corruption of data; or (iv)  
14 for any amounts that exceed the fees paid by you to Automattic under this agreement during the  
15 twelve (12) month period prior to the cause of action.

16 *Id.* at 49, ¶ 17.

## 17 **II. PROCEDURAL HISTORY**

18 On March 24, 2014, Plaintiffs filed this suit in the Superior Court of the State of California for  
19 San Francisco County, raising three causes of action. Complaint, ECF No. 1-2, at 3. Plaintiffs seek  
20 declaratory relief (1) recognizing and enforcing the French Order directing Automattic and  
21 WordPress to remove the Blog, *id.* ¶¶ 25-30, and (2) establishing that Automattic and WordPress are  
22 bound by their own Terms of Service, *id.* ¶¶ 31-37. Plaintiffs' third cause of action alleges  
23 misappropriation of likeness. *Id.* ¶¶ 38-43. On March 25, 2014, Plaintiffs applied to the Superior  
24 Court for a temporary restraining order ("TRO") and an order to show cause requiring Automattic  
25 and WordPress to remove the Blog. Morton Declaration, Ex. 2, ECF No. 1-3, at 2-4. Automattic  
26 opposed the application, and the court denied it without issuing a written order. Notice of Removal,  
27 ECF No. 1, ¶ 2. On April 2, 2014, Plaintiffs dismissed WordPress without prejudice. Morton  
28 Declaration, Ex. 2, ECF No. 1-5, at 2-3.

On April 10, 2014, Automattic removed the Action to this court. Notice of Removal, ECF No. 1.  
Automattic asserted federal question jurisdiction for the first claim pursuant to the Securing the  
Protection of our Enduring and Established Constitutional Heritage ("SPEECH") Act, 28 U.S.C.  
§§ 4101, *et seq.* *Id.* ¶¶ 8-11. Automattic asserted supplemental jurisdiction for the second two

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1 causes of action. *Id.* at 4. Now pending before the court is Automatic’s motion for judgment on  
2 the pleadings as to all three claims. Motion, ECF No. 11.

3 **ANALYSIS**

4 **I. FEDERAL RULE OF CIVIL PROCEDURE 12(c)**

5 “After the pleadings are closed—but early enough not to delay trial—a party may move for  
6 judgment on the pleadings.” Fed. R. Civ. P. 12(c). “[T]he same standard of review applicable to a  
7 Rule 12(b) motion applies to its Rule 12(c) analog,” because the motions are “functionally  
8 identical.” *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). A Rule 12(c)  
9 motion may thus be predicated on either (1) the lack of a cognizable legal theory or (2) insufficient  
10 facts to support a cognizable legal claim. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699  
11 (9th Cir. 1990). When considering a motion to dismiss under Rule 12(c), the court “must accept all  
12 factual allegations in the complaint as true and construe them in the light most favorable to the  
13 non-moving party.” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). “A judgment on the  
14 pleadings is proper if, taking all of [plaintiff]’s allegations in its pleadings as true, [defendant] is  
15 entitled to judgment as a matter of law.” *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181,  
16 1185 (9th Cir. 2010).

17 Although a court is generally confined to the pleadings on a Rule 12(c) motion, “[a] court may,  
18 however, consider certain materials—documents attached to the complaint, documents incorporated  
19 by reference in the complaint, or matters of judicial notice—without converting the motion to  
20 dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.  
21 2003). The Ninth Circuit has “extended the ‘incorporation by reference’ doctrine to situations in  
22 which the plaintiff’s claim depends on the contents of a document, the defendant attaches the  
23 document to its motion to dismiss, and the parties do not dispute the authenticity of the document,  
24 even though the plaintiff does not explicitly allege the contents of that document in the complaint.”  
25 *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

26 In its motion for judgment on the pleadings, Automatic asks the court to consider (1) an email to  
27 Automatic from plaintiff Alexandre Fayçal Joude and Automatic’s response. (2) Plaintiffs’ request  
28 to the High Court of Paris, (3) the French Order, and (4) Automatic’s Terms of Service. Motion,

1 ECF Nos. 11-3, 11-4. Because the French Order is attached to the complaint, *see* Complaint, Ex. A,  
2 ECF No. 1-2, at 12, *translated at* Ex. B., ECF No. 1-2 at 14, the court may consider it without taking  
3 judicial notice of the copy attached to Automattic’s Motion. As for the remaining documents  
4 Automattic urges the court to consider, because they are each referenced in the Complaint, form the  
5 basis of allegations contained therein, and their authenticity is not disputed by Plaintiffs, the court  
6 takes judicial notice of them.

7 **II. PLAINTIFFS’ CLAIM TO ENFORCE THE FRENCH DEFAMATION JUDGMENT**  
8 **IS DISMISSED, AND THE COURT WILL EXERCISE SUPPLEMENTAL**  
9 **JURISDICTION OVER PLAINTIFFS’ REMAINING STATE LAW CLAIMS**

10 Plaintiffs’ first claim is for declaratory relief to enforce the French Order to remove the Blog. In  
11 their opposition, Plaintiffs state that they do not oppose Defendants’ motion for judgment on the  
12 pleadings with respect to Plaintiffs’ first claim. Opp’n to Motion, ECF No. 13 at 4. Furthermore,  
13 Plaintiffs are willing to dismiss this claim with prejudice. *Id.* Accordingly, the court grants  
14 Automattic’s motion with respect to Plaintiffs’ first claim and dismisses it with prejudice.<sup>2</sup>

15 Automattic removed the case to this court and asserted federal question jurisdiction based on the  
16 SPEECH Act of 2010, a federal statute which governs the enforcement of foreign defamation  
17 judgments in U.S. courts. *See* Notice of Removal, ECF No. 1, ¶¶ 8-11. Automattic alleged the court  
18 had supplemental jurisdiction over Plaintiffs’ two other state law claims as those allegations “arise  
19 from the same common nucleus of operative fact” and that “[the] claims are so interrelated that  
20 Plaintiff[s] would ordinarily be expected to try them all in the same judicial proceeding.” *Id.* ¶¶ 12-  
21 13.

22 Having dismissed the only claim over which it has original jurisdiction, the court therefore has  
23 discretion to exercise supplemental jurisdiction over the remaining claims. *See* 28 U.S.C. § 1367(a)  
24 (providing that “district courts shall have supplemental jurisdiction over all other claims that are so  
25 related to claims in the action within such original jurisdiction that they form part of the same case  
26 or controversy”); *see also* Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro.*  
27 *Before Trial* § 2:571 (explaining that where the court dismisses the claim giving rise to original

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28 <sup>2</sup> Given that Plaintiffs agree to dismiss this claim, the court need not decide whether the  
SPEECH Act prohibits enforcement of the French Order.

1 jurisdiction, supplemental jurisdiction continues with the court's discretion). The court finds that  
2 these two claims are so related to Plaintiff's first claim that they form part of the same case or  
3 controversy. Additionally, as discussed below, Plaintiffs' third claim implicates federal law, namely  
4 Section 230 of the Communications Decency Act of 1996. *See generally* Motion, ECF No. 11; 47  
5 U.S.C. § 230. Accordingly, the court will use its discretion to exercise supplemental jurisdiction  
6 over the remaining state law claims to determine whether Automattic is entitled to judgment as a  
7 matter of law.

8 **III. PLAINTIFFS' CLAIM FOR BREACH OF CONTRACT FAILS**

9 Based on a theory of breach of contract, Plaintiffs' second claim is that Automattic failed to  
10 abide by their own Terms of Service by failing to remove the Blog once they were informed it was  
11 written by an impostor. Complaint, ECF No. 1-2, ¶¶ 31-37. To state a claim for breach of contract  
12 in California, a plaintiff must allege the following elements: (1) existence of a contract; (2)  
13 plaintiff's performance or excuse for non-performance; (3) defendant's breach; and (4) resulting  
14 damage. *See Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011).

15 Plaintiffs allege that they entered into a contractual relationship with Automattic when they  
16 agreed to the Terms of Service by using and accessing WordPress.com. Complaint, ECF No. 1-2,  
17 ¶¶ 32-33; Opp'n to Motion, ECF No. 13, at 5. Plaintiffs take the position that Automattic breached  
18 that contract by refusing to remove the Blog once informed that it was written by someone posing as  
19 plaintiff Alexandre. *Id.* ¶ 35. Finally, Plaintiffs contend that their personal and professional  
20 reputations have been damaged by Automattic's failure to remove the Blog. *Id.* ¶ 23-24.  
21 Alternatively, Plaintiffs claim that they are third-party beneficiaries of a contract between  
22 Automattic and the anonymous blogger. Opp'n to Motion, ECF No. 13 at 5. In that scenario,  
23 Plaintiffs allege that Automattic breached their Terms of Service contract with the anonymous blog  
24 owner by failing to remove the offending content. *Id.*

25 Plaintiffs fail to state a claim for breach of contract. A plaintiff cannot predicate a breach of  
26 contract claim on a defendant's terms of service where those terms did not commit the defendant to  
27 performing any particular action. *Anthony v. Yahoo Inc.*, 421 F. Supp. 2d 1257, 1260-61 (N.D. Cal.  
28 2006); *see also Souza v. Westlands Water Dist.*, 135 Cal. App. 4th 879, 892 (2006) (holding that a

1 contract may provide a basis of liability for a defendant’s violation of its terms only when the  
2 defendant has promised to abide by them). In *Anthony*, a subscriber to an online dating service  
3 maintained by Yahoo! Inc. sued Yahoo for breach of contract for, inter alia, “creating and  
4 forwarding false and/or nonexistent [online dating] profiles.” *Anthony*, 421 F. Supp. 2d at 1260.  
5 *Anthony* alleged that by creating false profiles, Yahoo! breached its own terms of service, which  
6 stated that “[j]ust like a real community, different people may have different opinions and  
7 personalities in Yahoo! Personals.” *Id.* *Anthony* also claimed that by sending him unsolicited  
8 emails containing false profiles, Yahoo! violated its “Community Guidelines” which stated that  
9 “[y]ou’ll be happy to know that we do not allow spam, information gathering, or escort services.”  
10 *Id.* at 1261. Yahoo! moved to dismiss *Anthony*’s breach of contract claim. Granting Yahoo!’s  
11 motion to dismiss, the court found that the “real community” “language upon which *Anthony* relies  
12 merely describes Yahoo!’s dating service and does not commit Yahoo! to performing or not  
13 performing any particular action.” *Id.* at 1260. The court also found that the Yahoo!’s Community  
14 Guidelines “restrict[] what subscribers—not Yahoo!—can do on the site.” *Id.* at 1261.

15 Here, Plaintiffs allege that they entered into a contract with Automattic by accessing  
16 WordPress.com, performed by abiding by the Terms of Service, and suffered harm to their  
17 reputations as a result. This does not establish a contract. Even assuming that Plaintiff adequately  
18 pled the existence of a contract, the court concludes that Automattic did not breach the contract as a  
19 matter of law because it never promised to remove blogs which mislead readers by impersonation.  
20 The relevant portion of Automattic’s Terms of Service under “Responsibility of Contributors” states  
21 that “[b]y making Content available, you represent and warrant that: . . . your blog is not named in a  
22 manner that misleads your readers into thinking that you are another person or company . . .”  
23 McCoy Declaration, Ex. B, ECF No. 1-4, at 46 ¶ 2. The Terms of Service go on to state that  
24 “*Automattic has the right (though not the obligation) to, in Automattic’s sole discretion* (i) refuse or  
25 remove content that, in Automattic’s reasonable opinion, violates any Automattic policy or is in any  
26 way harmful or objectionable . . .” *Id.* (emphasis added). Viewed in context, these terms are not  
27 promises to remove content violating Automattic policy. By expressly asserting their discretion to  
28 remove content, Automattic made clear that they did not intend to commit themselves to a particular



1 course of action. Finally, the provision concerning the impersonation of others is titled  
2 “Responsibility of Contributors” and specifically restricts WordPress.com bloggers, not Automattic  
3 itself. Nowhere in this provision does Automattic promise or otherwise obligate themselves to  
4 remove such content.

5 Plaintiffs’ failure to articulate a cognizable legal theory with respect to Automattic’s alleged  
6 breach is fatal to this claim. *See Balistreri*, 901 F.2d at 699. Plaintiffs cite no authorities to support  
7 their proposition that a plaintiff can predicate a breach of contract claim on a defendant’s non-  
8 promissory representations. *See Opp’n to Motion*, ECF No. 13. Plaintiffs instead refer to a 2012  
9 interview with the general counsel of Automattic regarding the company’s complaint process and  
10 attach an exhibit in support. *Opp’n to Motion*, ECF No. 13 at 5-6. The court does not consider the  
11 document, which was not part of the complaint or otherwise incorporated by reference, *see Horsley*,  
12 304 F.3d at 1135, and it does not alter the outcome in any event.

13 Finally, Plaintiffs’ alternative theory that they are third-party beneficiaries also fails because  
14 even if Automattic committed to remove blogs violating the impersonation rules, Automattic did not  
15 promise to do so for the benefit of those impersonated or Plaintiffs in particular. *See Souza*, 135 Cal.  
16 App. 4th at 891 (stating that “[t]he test for determining whether a contract was made for the benefit  
17 of a third person is whether an intent to benefit a third person appears from the terms of the  
18 contract.”).

19 In sum, the court finds that Plaintiffs have not stated a claim for breach of contract for the time  
20 period alleged in the complaint.<sup>3</sup>

21 The issue is whether the dismissal should be with or without prejudice. These allegations do not  
22 establish a contract or a breach or even a promise. The court cannot conceive of an amendment that  
23 would cure the shortcomings. *See Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007). That  
24 being said, ordinarily a court should dismiss a complaint without prejudice unless it determines that  
25 the pleadings could not possibly be cured by the allegation of other facts. *See Lopez v. Smith*, 203

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27 <sup>3</sup> As Plaintiffs’ second claim regarding the Terms of Service is not sufficiently pled under a  
28 theory of breach of contract, the court need not address Automattic’s argument that Section 230 of  
the Communications Decency Act of 1996 (CDA § 230) precludes this claim. *See* 47 U.S.C. § 230.

1 F.3d 1122, 1127 (9th Cir. 2000). For some of the equitable reasons discussed at the hearing, the  
2 ongoing nature of the issue, and the standard in *Lopez*, the court dismisses the claim without  
3 prejudice. The claim looks to be a claim that ought to be made against the blogger, however, not  
4 Automattic.

5 **IV. PLAINTIFFS' CLAIM FOR MISAPPROPRIATION OF LIKENESS FAILS**

6 Plaintiffs allege that Automattic commercially benefitted from misappropriating the Joudes'  
7 names, likenesses, and identities by maintaining and hosting the Blog. Compl., ECF No. 1-2, ¶ 40.

8 To state a common law claim for misappropriation of likeness in California, a plaintiff must  
9 allege the following: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of  
10 plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of  
11 consent; and (4) resulting injury." *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1918 (1996).

12 Therefore, Plaintiffs must provide some factual allegations about Automattic's use of Plaintiffs'  
13 identities, Automattic's appropriation of Plaintiffs' names or likenesses to Automattic's advantage,  
14 Plaintiffs' lack of consent, and information on Plaintiffs' harm resulting from Automattic's  
15 misappropriation.

16 Plaintiffs allege that by "maintaining, commenting on, hosting, and editing the Blog, Automattic  
17 used the Joudes' names and likenesses, and identities . . ." Compl., ECF No. 1-2, ¶ 39. Plaintiffs go  
18 on to claim that Automattic gained, among other advantages, a commercial benefit by using the  
19 names, likenesses, and identities of Plaintiffs. *Id.* ¶ 40. Plaintiffs also contend that there was a lack  
20 of consent as the misappropriation took place without Plaintiffs' involvement or permission. *Id.*  
21 Finally, Plaintiffs allege that Automattic's misappropriation of likeness and subsequent failure to  
22 remove the Blog has harmed the reputations of the Plaintiffs and their family. *Id.*

23 Assuming without deciding that Plaintiffs have sufficiently pled misappropriation of likeness,  
24 their claim nevertheless fails as a matter of law because Section 230 of the Communications  
25 Decency Act of 1996 grants immunity to providers like Automattic for publishing content created by  
26 third parties. *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)  
27 (stating that Section 230 "provides broad immunity for publishing content provided primarily by  
28 third parties").

1 Under Section 230, “[n]o provider or user of an interactive computer service shall be treated as  
2 the publisher or speaker of any information provided by another information content provider.” 47  
3 U.S.C. § 230(c)(1). The statute further provides that “[n]o cause of action may be brought and no  
4 liability may be imposed under any State or local law that is inconsistent with [Section 230].”  
5 § 230(e)(3). Put another way, computer services merely hosting and providing third-party content  
6 are generally immune to state law claims that treat those providers as the “publisher” or “speaker” of  
7 that content.

8 Section 230 immunity is limited by an intellectual property provision which states that  
9 “[n]othing in [Section 230] shall be construed to limit or expand any law pertaining to intellectual  
10 property.” 47 U.S.C. § 230(e)(2). The Ninth Circuit has nevertheless held that state intellectual  
11 property claims against service providers are also precluded by CDA § 230. *See Perfect 10, Inc. v.*  
12 *CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007); *see also Perfect 10, Inc. v. Giganews, Inc.*, No. C  
13 11-07098 AHM SHX, 2013 WL 2109963, at \*15-16 (C.D. Cal. Mar. 8, 2013) (finding claims  
14 against service providers for violation of publicity rights under California law barred by Section  
15 230); *but see Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008) (declining  
16 to follow the Ninth Circuit and permitting a state-based right of publicity claim that would otherwise  
17 be precluded by Section 230).

18 In *CCBill*, plaintiff Perfect 10, Inc., a magazine publisher, sued defendant CCBill, Inc., an online  
19 credit card processing company. *CCBill*, 488 F.3d at 1108. Claiming that CCBill improperly used  
20 Perfect 10's copyrighted photos, Perfect 10 brought several state intellectual property claims against  
21 CCBill, including an alleged violation of publicity rights of the models in those photos. *Id.* CCBill  
22 raised Section 230 as a defense to this claim but the district court denied them immunity. *Id.* On  
23 appeal, the Ninth Circuit reversed and held CCBill was entitled to Section 230 immunity against all  
24 of Perfect 10's state claims, reasoning that because intellectual property laws vary considerably  
25 across states, “permitting the reach of any particular state’s definition of intellectual property to  
26 dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of  
27 insulating the development of the Internet from the various state-law regimes.” *Id.* at 1118.

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1 Here, Plaintiffs allege misappropriation of likeness, also known as the violation of one’s right of  
2 publicity. Complaint, ECF No. 1-2, ¶¶ 38-43. The right of publicity is intellectual property.  
3 *Hebrew Univ. of Jerusalem v. Gen. Motors LLC*, 878 F. Supp. 2d 1021, 1027 (C.D. Cal. 2012)  
4 (citing *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322-23 (11th Cir. 2006) (collecting cases and  
5 authority for the proposition that the right of publicity is intellectual property)). Because computer  
6 service providers in this circuit are entitled to immunity from state intellectual property claims,  
7 including the right of publicity, Automattic enjoys immunity from all state claims treating  
8 Automattic as a publisher, including Plaintiffs’ allegation of misappropriation of likeness.

9 Plaintiffs’ reliance on *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011), to  
10 refute Automattic’s claim to Section 230 immunity is misplaced. In *Fraley*, under a theory of  
11 misappropriation of likeness, plaintiffs sued defendant Facebook for using their identities, images,  
12 and likenesses to generate targeted advertising. Facebook argued that because it is an “interactive  
13 computer service,” Section 230 precluded plaintiffs’ claim. Ruling against Facebook on Section 230  
14 immunity, the court found that Facebook was liable because plaintiffs were not accusing Facebook  
15 of “publishing tortious content, but rather of creating and developing commercial content that  
16 violates their statutory right of publicity.” *Fraley*, 830 F. Supp. 2d at 801. *Fraley* further held that  
17 an “interactive computer service provider” may still be liable for state claims if they are also acting  
18 as an “information content provider.” *Id.* at 802.

19 *Fraley* is thus distinguishable from the instant case in that Plaintiffs do not allege that Automattic  
20 had a role in “creating or developing” the Blog, commercially or otherwise. *See* Compl., ECF No.  
21 1-2, ¶ 38-43. Nor do Plaintiffs claim that Automattic is the Blog’s anonymous writer. *Id.* Indeed,  
22 by their own allegations, Automattic’s role here was limited to “host[ing], maintain[ing], and  
23 administer[ing]” the Blog. Compl., ECF No. 1-2, ¶ 39. As a publisher, Automattic has Section 230  
24 immunity from Plaintiffs’ misappropriation of likeness claim relating to content created by the  
25 anonymous blogger. *See, e.g., Evans v. Hewlett-Packard Co.*, No. C 13-02477 WHA, 2013 WL  
26 4426359, at \*3 (N.D. Cal. Aug. 15, 2013) (granting defendant’s motion to dismiss under Section 230  
27 where plaintiffs sued for statutory misappropriation of likeness and defendant was a service provider  
28 that did not create content in question).

1 Plaintiffs' reliance on their breach of contract allegations to support their misappropriation of  
2 likeness claim is also unpersuasive. First, as discussed above, Automattic did not breach their Terms  
3 of Service because they never promised to remove content violating their rules against  
4 impersonation. Second, even assuming that Automattic breached the Terms of Service, Plaintiffs  
5 cite no authority to support their proposition that Automattic should therefore also lose their  
6 immunity against misappropriation of likeness claims.

7 In sum, the court finds that Plaintiffs' misappropriation of likeness claim fails. Finding that  
8 amending the complaint would be futile, the court dismisses Plaintiffs' third claim with prejudice.  
9 *See Swartz*, 476 F.3d at 761.

10 **CONCLUSION**

11 Accepting all of the complaint's factual allegations as true and construing them in the light most  
12 favorable to Plaintiffs, the court **GRANTS** Automattic's motion, dismisses claims one and three  
13 with prejudice, and dismisses claim two without prejudice. Because claim two is a contract claim  
14 that—if viable—would be a state law claim that would not be barred by section 230 of the  
15 Communications Decency Act, *see Barnes*, 570 F.3d at 1108-09, the court declines to exercise  
16 supplemental jurisdiction over any amended complaint raising only the state claim. Any amended  
17 claim should be brought in state court.

18 This disposes of ECF No. 11. The clerk shall close the file.

19 **IT IS SO ORDERED.**

20 Dated: July 3, 2014



21 \_\_\_\_\_  
22 LAUREL BEELER  
23 United States Magistrate Judge  
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