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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MEDIA.NET ADVERTISING FZ-LLC,  
Plaintiff,  
v.  
NETSEER, INC.,  
Defendant.

Case No. [14-cv-03883-EMC](#)

**ORDER DENYING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING IN PART  
DEFENDANT’S MOTION TO DISMISS**

Docket No. 36

**I. INTRODUCTION**

Plaintiff Media.net Advertising FZ-LLC initiated this lawsuit against Defendant NetSeer, Inc. The First Amended Complaint (“FAC”) asserts two claims of copyright infringement, as well as claims of intentional interference with business contract, intentional interference with prospective business relationship, and violations of California’s Unfair Competition Law (“UCL”), California Business and Professions Code section 17200 *et seq.* Docket No. 32.

Defendant moves for summary judgment on the copyright infringement claims and to dismiss the state law claims. Docket No. 36. In the alternative, Defendant seeks dismissal of the copyright claims or a more definite statement. *Id.* Having considered the parties’ briefs and oral argument, as well as the relevant legal authority, the Court hereby **DENIES** Defendant’s Motion for Summary Judgment and **GRANTS IN PART** Defendant’s Motion to Dismiss.

**II. BACKGROUND**

Plaintiff is a leading provider of online contextual-advertising services and offers its customers a website-based advertisement creation platform (the “Platform”) which allows its users to create custom advertisements. *Id.* ¶¶ 1, 21, 24. Website publishers using the Platform can place

1 a Media.net ad unit on their websites so that when a website visitor clicks on the ad unit, the  
2 visitor is taken to a “search-results page” which displays relevant advertisements. *Id.* ¶ 26. For  
3 example, if a website visitor clicked on a keyword relating to travel, the search results page could  
4 show advertisements promoting deals on hotel rooms. *See, e.g.,* Ex. C, FAC. Plaintiff published  
5 the original version of its search results page (“Original Media.net Results Page”) on February 1,  
6 2014. *Id.* ¶ 28. On May 28, 2014, Plaintiff published a revised search results page (“Revised  
7 Media.net Results Page”), which is derivative of the Original. *Id.* ¶¶ 33-34.

8 Plaintiff obtained a copyright registration for its Original Media.net Results Page with  
9 registration number TX 7-896-126 (the “126 Registration”) and for its Revised Media.net Results  
10 Page with registration number TX 7-896-131 (the “131 Registration”). *Id.* ¶¶ 32, 37; Exs. A-B,  
11 FAC. Both registrations became effective on August 16, 2014. ’126 Reg.; ’131 Reg. The  
12 certificates list “Media.Net Software Services (India) Private Limited” as the author, which  
13 created “HTML Code and text,” and list “Media.net Advertising FZ-LLC” as the claimant. *Id.*

14 Defendant is a competing contextual-advertising provider. FAC ¶¶ 38-39. Defendant also  
15 provides advertising units that its customers can place on their websites. *Id.* ¶ 39. Like Plaintiff’s  
16 Platform, when a user clicks on Defendant’s advertising unit, the user is directed to a search-  
17 results page that offers relevant advertisements. *Id.* ¶ 40. Plaintiff alleges Defendant directly  
18 copied Plaintiff’s hypertext markup language (“HTML”) code, including arbitrarily-named  
19 variables and portions of the code that have no function, and used it to create Defendant’s own  
20 search results page. *Id.* ¶¶ 42-46.

21 Plaintiff further alleges Defendant’s unauthorized use of the HTML code allowed it to gain  
22 an unfair competitive advantage. *Id.* ¶ 58. In particular, Plaintiff claims Defendant undermined  
23 Plaintiff’s relationship with Microsoft by representing that Defendant’s products could work just  
24 as well as Plaintiff but at a lower cost. *Id.* ¶¶ 60-61. Defendant’s infringement improved its  
25 position in the contextual-advertising market and allowed it to earn revenue from customers it  
26 obtained as a result of using Plaintiff’s product. *Id.* ¶ 67-69. Consequently, Plaintiff was forced to  
27 lower the rates it charged its customers, causing it to lose millions of dollars in revenue. *Id.* ¶ 65.  
28 Plaintiff’s reputation as the leader in contextual-advertising services has diminished. *Id.* ¶ 71.

1 **III. LEGAL STANDARD**

2 A. Motion for Summary Judgment

3 Under Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment if  
 4 the “movant shows that there is no genuine dispute as to any material fact.” The movant bears the  
 5 burden of “identifying those portions of the pleadings, depositions, answers to interrogatories, and  
 6 admissions on file, together with the affidavits, if any, which it believes demonstrate the absence  
 7 of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quotation  
 8 marks omitted). A material fact is one that may affect the outcome of the case. *George v. Morris*,  
 9 736 F.3d 829, 834 (9th Cir. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
 10 (1986)). A genuine dispute as to material fact exists if there is sufficient evidence such that a  
 11 reasonable jury could find for the non-moving party. *Anderson*, 477 U.S. at 248. This requires  
 12 more than a “mere existence of a scintilla of evidence in support of the plaintiff’s position[.]” *Id.*  
 13 at 252.

14 When determining whether there is a genuine issue of material fact, “a court must view the  
 15 evidence ‘in the light most favorable to the opposing party.’” *Tolan v. Cotton*, 134 S. Ct. 1861,  
 16 1866 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). Courts should also  
 17 draw reasonable inferences in favor of the non-moving party. *Tolan*, 134 S. Ct. at 1868. “Where  
 18 the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,  
 19 there is no genuine issue for trial.” *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049-  
 20 50 (9th Cir.) *cert. denied sub nom. SQM N. Am. Corp. v. City of Pomona, Cal.*, 135 S. Ct. 870, 190  
 21 L. Ed. 2d 703 (2014) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.  
 22 574, 587 (1986)).

23 If the moving party has “the burden of proof on an issue at trial, the movant must  
 24 affirmatively demonstrate that no reasonable trier of fact could find other than for the moving  
 25 party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If, on the other  
 26 hand, the burden of proof rests on the non-moving party, “the movant can prevail merely by  
 27 pointing out that there is an absence of evidence to support the nonmoving party’s case.” *Id.* “A  
 28 party opposing a properly supported motion for summary judgment may not rest upon mere

1 allegation or denials of his pleading, but must set forth specific facts showing there is a genuine  
2 issue for trial.” *Anderson*, 477 U.S. at 256.

3 B. Motion to Dismiss

4 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss  
5 on the failure to state a claim upon which relief may be granted. A Rule 12(b)(6) motion tests the  
6 sufficiency of a complaint by failing to allege “enough facts to state a claim to relief that is  
7 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial  
8 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
9 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
10 678 (2009) (citing *Twombly*, 550 U.S. at 556). Although a complaint need not contain “detailed  
11 factual allegations,” a complaint that contains merely “a formulaic recitation of the elements of a  
12 cause of action will not do.” *Twombly*, 550 U.S. at 555. Rather, “[f]actual allegations must be  
13 enough to raise a right to relief above the speculative level.” *Williams v. Gerber Prod. Co.*, 552  
14 F.3d 934, 938 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555). “A claim has facial  
15 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
16 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678; *see also*  
17 *Twombly*, 550 U.S. at 556. “The plausibility standard is not akin to a ‘probability requirement,’  
18 but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

19 In ruling on a Rule 12(b)(6) motion, courts “accept factual allegations in the complaint as  
20 true and construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v.*  
21 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Courts may dismiss a claim  
22 “only if it appears beyond doubt that the plaintiff could prove no set of facts in support of his  
23 claim which would entitle him to relief.” *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011)  
24 (quotation marks omitted). Courts should grant the plaintiff leave to amend “‘if it appears at all  
25 possible that the plaintiff can correct the defect.’” *Crowley v. Bannister*, 734 F.3d 967, 977 (9th  
26 Cir. 2013) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc)).

1 **IV. DISCUSSION**

2 A. **The Compendium**

3 The United States Copyright Office is “the governmental agency that possesses special  
4 expertise in determining the bounds of copyright protection.” *Garcia v. Google, Inc.*, 786 F.3d  
5 733, 741 n.7 (9th Cir. 2015) (quoting 2 Nimmer on Copyright § 7.16[B][3][b][vi]). In addition to  
6 administering the system of copyright registration, the Copyright Office works closely with  
7 Congress on matters relating to copyright laws. 17 U.S.C. § 701(a); 2 Nimmer on Copyright §  
8 7.26; *see* 17 U.S.C. § 701(b)(2) (“[T]he Register of Copyrights shall . . . [a]dvice Congress on  
9 national and international issues relating to copyright, other matters arising under this title, and  
10 related matters”); *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354-55 (1991) (“When  
11 Congress decided to overhaul the copyright statute and asked the Copyright Office to study  
12 existing problems, . . . the Copyright Office promptly recommended that Congress clear up the  
13 confusion in the lower courts as to the basic standards of copyrightability.” (citation omitted));  
14 *Mills Music v. Snyder*, 469 U.S. 153, 159-61 (1985) (describing Copyright Office and Congress’s  
15 general revision of copyright law in 1955); S. Rep. No. 101-268, at 6 (1990) (“Congress relies  
16 extensively on the Copyright Office to provide its technical expertise in the legislative process.”).

17 The Copyright Office publishes an administrative manual that contains, *inter alia*, legal  
18 interpretations and guidance regarding copyright registrations. *See* U.S. Copyright Office,  
19 Compendium of Copyright Practices (3d ed. 2014) (“Compendium (Third)”). The Compendium  
20 “provides guidance to copyright applicants, practitioners, scholars, the courts, and members of the  
21 general public regarding institutional practices and related principles of law.” *Id.* Intro. at 1. The  
22 Copyright Office first published the Compendium in 1967 and released the second edition  
23 (“Compendium II”) in 1984. *Id.* Intro. at 4. It revised the Compendium II first in 1988 and again  
24 in 1998. *See* U.S. Copyright Office, Compendium of Copyright Practices (2d ed. 1984).

25 The Copyright Office released a draft of third edition of the Compendium on August 19,  
26 2014. U.S. Copyright Office, U.S. Copyright Office Announcement Regarding Release of a Draft  
27 of the Compendium of U.S. Copyright Office Practices, Third Edition (Aug. 19, 2014),  
28 <http://copyright.gov/newsnet/2014/555.html>. This draft was the first major revision of the

1 Compendium in over twenty years, and it took the Copyright Office over two years to complete.  
 2 *Id.* The Compendium remained in draft form for approximately 120 days, during which time the  
 3 Copyright Office accepted feedback on the draft from the public. *Id.* The Copyright Office  
 4 released the final version of the third edition on December 22, 2014, and it became effective  
 5 immediately. Compendium (Third) Intro. at 1.

6 The Ninth Circuit has held that the Copyright Office’s decisions and opinions are not  
 7 entitled to the level of deference afforded under *Chevron U.S.A. Incorporated v. Natural*  
 8 *Resources Defense Council, Incorporated*, 467 U.S. 837 (1984).<sup>1</sup> *Inhale, Inc. v. Starbuzz*  
 9 *Tobacco, Inc.*, 755 F.3d 1038, 1041 (9th Cir. 2014), *as amended* July 9, 2014, *cert. denied*, 135 S.  
 10 Ct. 758 (2014) (“Because *Chevron* deference does not apply to internal agency manuals or opinion  
 11 letters, we defer to the Copyright Office’s views expressed in such materials “only to the extent  
 12 that those interpretations have the ‘power to persuade.’”). Instead, the Ninth Circuit has long held  
 13 that the Copyright Office’s interpretations of copyright law are entitled to the lower level of  
 14 deference applicable under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See United States*  
 15 *v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“[A]gencies charged with applying a statute necessarily  
 16 make all sorts of interpretive choices, and while not all of those choices bind judges to follow  
 17 them, they certainly may influence courts facing questions the agencies have already answered.”).  
 18 Under *Skidmore*, the degree to which a court defers to an agency’s opinion or interpretation “will  
 19 depend upon the thoroughness evident in its consideration, the validity of its reasoning, its  
 20 consistency with earlier and later pronouncements, and all those factors which give it power to  
 21 persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140; *see Christensen v. Harris*

22 \_\_\_\_\_  
 23 <sup>1</sup> *Chevron* deference is appropriate “[w]hen Congress has explicitly left a gap for an agency to fill,  
 24 [and] there is an express delegation of authority to the agency to elucidate a specific provision of  
 25 the statute by regulation[.]” *Mead Corp.*, 533 U.S. at 227 (quotations and citation omitted).  
 26 Under those circumstances, “any ensuing regulation is binding in the courts unless procedurally  
 27 defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” *Id.* An  
 28 agency’s interpretation of a statute “certainly may influence courts facing questions the agencies  
 have already answered.” *Id.* Courts may defer to an agency’s interpretation in the absence of  
 “express [congressional] delegation of specific interpretative authority” where the agency’s  
 authority and other circumstances otherwise make it apparent “that Congress would expect the  
 agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills  
 a space in the enacted law, even one about which ‘Congress did not actually have an intent’ as to a  
 particular result.” *Id.* at 229 (quoting *Chevron*, 467 U.S. at 845).

1 *Cnty.*, 529 U.S. 576, 587 (2000) (holding agency manuals are entitled to *Skidmore* deference, “but  
 2 only to the extent that those interpretations have the power to persuade.”). *See also Inhale, Inc.*,  
 3 755 F.3d at 1041 (“When interpreting the Copyright Act, we defer to the Copyright Office’s  
 4 interpretations in the appropriate circumstances” but “only to the extent that those interpretations  
 5 have the power to persuade” (internal quotations omitted)); *Batjac Prods. Inc. v. GoodTimes*  
 6 *Home Video Corp.*, 160 F.3d 1223, 1231 (9th Cir. 1998) (concluding interpretation set forth in  
 7 Compendium II was “reasonable and consistent” and thus “entitled to deference.”); *Marascalco v.*  
 8 *Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991) (“We agree with the D.C. Circuit that the Register  
 9 has the authority to interpret the copyright laws and that its interpretations are entitled to judicial  
 10 deference if reasonable.” (citing *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*,  
 11 836 F.2d 599, 607-10 (D.C. Cir. 1988)). In doing so, the Ninth Circuit notes “[t]he Copyright  
 12 Office’s well-reasoned position reflects a body of experience and informed judgment to which  
 13 courts and litigants may properly resort for guidance.” *Garcia v. Google, Inc.*, 786 F.3d 733, 741-  
 14 42 (9th Cir. 2015) (quotation marks omitted).<sup>2</sup>

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15  
 16 <sup>2</sup> The Ninth Circuit’s position is consistent with its sister courts. Other Courts of Appeal also  
 17 defer to the Copyright Office’s interpretations and practices, and while the degree of deference  
 18 varies somewhat between the circuits, none have applied *Chevron* deference. The Second, Sixth,  
 19 and Eleventh, and District of Columbia Circuits, like the Ninth, afford the Copyright Office’s  
 20 interpretations *Skidmore* deference. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536  
 21 F.3d 121, 129 (2d Cir. 2008) (“We assume, as the parties do, that the Copyright Office’s  
 22 pronouncement deserves only *Skidmore* deference, deference based on its ‘power to persuade.’”);  
 23 *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 479-81 (6th Cir. 2015) (collecting cases  
 24 and holding that Copyright Office’s determination that work is protectable is entitled to *Skidmore*  
 25 deference); *Olem Shoe Corp. v. Wash. Shoe Corp.*, 591 F. App’x 873, 882 (11th Cir. 2015) (giving  
 26 *Skidmore* deference to Compendium’s interpretation “as the copyright law is ‘highly detailed’ and  
 27 it is apparent that the Copyright Office ‘can bring the benefit of specialized experience to bear on  
 28 the subtle questions in this case.’” (quoting *Mead Corp.*, 533 U.S. at 235)); *Cablevision Sys.*, 836  
 F.2d at 610 (D.C. Cir. 1988) (Copyright Office’s “interpretations are therefore due the same  
 deference given those of any other agency.”). The Third Circuit has also deferred to the Copyright  
 Office but did so without stating to what degree. *See Southco, Inc. v. Kanebridge Corp.*, 390 F.3d  
 276, 286 n.5 (3d Cir. 2004) (en banc) (noting “the practice of the Copyright Office reflects a body  
 of experience and informed judgment to which courts and litigants may properly resort for  
 guidance” but declining to “decide what degree of deference is warranted under the  
 circumstances” (quotation omitted)). *Cf. De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956),  
 (while the Court “would ordinarily give weight to the interpretation of an ambiguous statute by the  
 agency charged with its administration, . . . [it thought] the Copyright Office’s explanation of its  
 practice deprives the practice of any force as an interpretation of the statute, and [it] therefore d[id]  
 not rely on it in th[at] instance.”) (citation omitted)).

1           Accordingly, the Court affords the Compendium *Skidmore* deference and adopts the  
2 Copyright Office’s interpretations of copyright law where it finds them reasonable and persuasive.  
3 Here, neither party disputes the interpretations at issue contained in the most recent Compendium  
4 and the Court finds those interpretations reasonable.

5       B.     Copyright Infringement Claims

6           1.     Motion for Summary Judgment

7           In order to prevail on its copyright infringement claims, Plaintiff must prove “(1)  
8 ownership of a valid copyright, and (2) copying of constituent elements of the work that are  
9 original.” *Feist Publ’n*, 499 U.S. at 361. Defendant’s Motion is based on the first element;  
10 Defendant seeks summary judgment on the basis that Plaintiff’s copyright registrations do not  
11 contain copyrightable material.<sup>3</sup> Mot. at 3-7. In part, Defendant argues it is entitled to summary  
12 judgment because the look and feel of Plaintiff’s webpages is not entitled to copyright protection.  
13 Mot. at 13-17.

14           Plaintiff’s FAC alleges Defendant infringed the look and feel of Plaintiff’s webpages, as  
15 well as other elements of those pages. *See* FAC ¶ 2 (“Net[S]eer . . . misappropriated Media.net’s  
16 copyrighted search-results pages’ code, design, and look and feel in creating its own results  
17 pages.”); *id.* ¶ 57 (“Net[S]eer stole the look and feel of Media.net’s advertisement creatives and  
18 search-results pages. . . .”); *id.* ¶ 98 (“Defendants intentionally induced a disruption of the business  
19 relationship . . . by stealing the Media.net Results Pages’ source code, design, and look and  
20 feel . . . .”). Plaintiff now acknowledges that the look and feel of its search results page is not  
21 subject to copyright protection. Opp’n at 9 (“Media.net did not seek a copyright in the content  
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23           <sup>3</sup> In an infringement action, the Court must address the threshold question of the ownership of a  
24 valid copyright. *Topolos v. Caldewey*, 698 F.2d 991, 994 (9th Cir. 1983) (holding “district court  
25 erred in concluding it lacked jurisdiction over . . . actions for infringement because it was first  
26 required to resolve a threshold question of copyright ownership which in turn called for  
27 interpretation of a contract.”); *Jonathan Browning, Inc. v. Venetian Casino Resort LLC*, 2009 WL  
28 1764652, at \*1 (N.D. Cal. June 18, 2009) (“Determinations of copyrightability are indeed  
questions of law reserved for the judge, not the jury.”); 2 Nimmer on Copyright § 12.10[B]  
 (“[C]ertain . . . matters are reserved to the judge. Included are determinations of copyrightability  
in all instances.”). Defendant does not contest ownership for purposes of this Motion, but it  
reserves the right to so challenge if the Court denies the motion. *See* Mot. at 4 n.4; pg. 17 of this  
Order.

1 that one perceives on [its search results] pages. As a result, Plaintiff’s copyrights do not grant it  
2 the exclusive right to the layout, format, or look and feel of its search results pages. [ ] Anyone –  
3 including NetSeer – is free to make pages that look like Media.net’s.”); *id.* at 13 (“The Media.net  
4 Registrations only claim protection in HTML code and accompanying text – they do not claim  
5 copyright protection in the resulting webpage. NetSeer’s arguments about website look and feel  
6 are irrelevant.”). Plaintiff’s current position reflects the views of the Copyright Office: the  
7 Compendium makes it clear that a website’s look and feel is not copyrightable subject matter.  
8 Compendium (Third) § 1007 (“Examples of uncopyrightable material include . . . [t]he layout,  
9 format, or ‘look and feel’ of a website.”); *id.* § 1007.4 (“The copyright law does not protect the  
10 overall look and feel of a website.”).

11 Instead, Plaintiff has now clarified that its copyright claim is based on its hypertext markup  
12 language (“HTML”) code that underlies its websites, contending that the HTML’s code, not the  
13 look and feel of the website itself, is copyrightable subject matter.

14 a. Presumption of Validity

15 The Copyright Act, 17 U.S.C. §§ 100-810, protects “original works of authorship fixed in  
16 any tangible medium of expression, now known or later developed, from which they can be  
17 perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or  
18 device.” 17 U.S.C. § 102(a). The Copyright Act charges the Register of Copyrights to determine  
19 if a submission “constitutes copyrightable subject matter and [to ensure] that the other legal and  
20 formal requirements of this title have been met.” *Id.* at § 410(a). This process is more than a  
21 “mere clerical function of recording application. Instead, the Register makes a judgment after  
22 examining an application.” *Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co.*, 747 F.3d  
23 673, 683 (9th Cir. 2014). If the Register determines a submission is copyrightable and the other  
24 requirements are fulfilled, “the Register shall register the claim and issue to the applicant a  
25 certificate of registration under the seal of the Copyright Office.” 17 U.S.C. § 410(a). If,  
26 however, a submission “does not constitute copyrightable subject matter or . . . the claim is invalid  
27 for any other reason, the Register shall refuse registration and shall notify the applicant in writing  
28 of the reasons for such refusal.” *Id.* § 410(b).

1           “A copyright registration is ‘prima facie evidence of the validity of the copyright and the  
2 facts stated in the certificate’” and creates a rebuttable presumption of validity. *United Fabrics  
3 Int’l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011) (quoting 17 U.S.C. § 410(c)).  
4 The party disputing validity “must simply offer some evidence or proof to dispute or deny the  
5 plaintiff’s prima facie case of infringement.” *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345  
6 F.3d 1140, 1144 (9th Cir. 2003) (quotation omitted). If that party successfully rebuts the  
7 presumption, the burden shifts back to the plaintiff to demonstrate a valid copyright. *See Entm’t  
8 Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1218 (9th Cir. 1997) (finding, where  
9 defendant “had rebutted the statutory presumption, . . . the district court properly shifted the  
10 burden of proving validity—the threshold issue for copyright infringement lawsuits—back to [the  
11 plaintiff].”).

12           The FAC alleges Plaintiff holds copyright registrations for the Original and Revised  
13 Media.net Results Pages, and the two registration certificates are attached as exhibits. FAC ¶¶ 31-  
14 37; see ’126 Reg.; ’136 Reg. These certificates create a presumption that Plaintiff’s ’126 and ’131  
15 copyright registrations are valid. Compendium II, which was first published in 1984 and was  
16 effective at the time Plaintiff submitted its copyright applications, is silent as to the question of the  
17 copyrightability of HTML code. Nevertheless, the Copyright Office had likely contemplated the  
18 issue when it evaluated Plaintiff’s applications and decided to issue the registrations. The Court  
19 notes that the Copyright Office spent two and a half years revising the Compendium and released  
20 the final version on December 22, 2014, approximately four months after Plaintiff’s ’126 and ’131  
21 copyright registrations became effective. *See* Compendium (Third) Acknowledgments, Intro. In  
22 addition, on August 19, 2014, the Copyright Office released a public draft of the Compendium, a  
23 mere three days after Plaintiff’s copyright registrations went into effect. Given the Copyright  
24 Office’s decision to issue Plaintiff copyright registrations and also the proximity between the  
25 Compendium’s release and Plaintiff’s registrations, Plaintiff’s copyright registrations are clearly  
26 entitled to a presumption of validity. It is fair to infer that the Copyright Office’s decision to issue  
27 to registrations were consistent with its views expressed in Compendium (Third) issued shortly  
28 thereafter.

1                   b.       Copyrightable Subject Matter

2                   Defendant argues Plaintiff’s copyright registrations are invalid because they do not contain  
3 copyrightable subject matter. Specifically, Defendant asserts Plaintiff’s HTML code consists  
4 solely of uncopyrightable Cascading Style Sheets (“CSS”), which renders Plaintiff’s copyright  
5 registrations invalid. Mot. at 3-4, 15-17. Defendant presents as support the Declaration of  
6 Edward R. Tittel, a business and computing technology author and consultant. Tittel Decl. ¶ 2,  
7 Ex. 2, Mot. Having examined the HTML code at issue, Mr. Tittel opines that “[t]he accused  
8 markup occurs in the context of [a] pair of . . . HTML[] documents.” *Id.* ¶ 7. However, “that  
9 accused markup consists almost entirely of Cascading Style Sheet markup, enclosed between a  
10 pair of HTML elements that denote an embedded style sheet within an HTML document[.]” *Id.*

11                   In response, Plaintiff argues its copyright registrations are valid because its HTML code is  
12 a “literary work” under section 102(a) of the Copyright Act. Opp’n at 11; *see* 17 U.S.C. §  
13 102(a)(1) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible  
14 medium of expression . . . . Works of authorship include . . . literary works[.]”). Plaintiff offers  
15 the declaration of Dr. John C. Mitchell,<sup>4</sup> a professor of computer science at Stanford University,  
16 who examined Plaintiff’s HTML code. Mitchell Decl., Docket No. 53. Dr. Mitchell opines that  
17 the code “contain a substantial amount of expressive conduct.” *Id.* ¶ 41. In particular, he points to  
18 names of class styles in CSS; a programmer can name a class style however he so desires. *Id.* ¶  
19 43. Plaintiff essentially argues that this infuses the HTML code with creativity sufficient to  
20 establish copyrightability.

21                   2.       HTML & CSS

22                   HTML “is the standard markup language used in the design of websites” and “establishes  
23 the format and layout of text and graphics when a user views a website by instructing the user’s  
24

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25 <sup>4</sup> Defendant objects to Dr. Mitchell’s testimony and alleges Dr. Mitchell examined materials not  
26 made available to Defendant. Docket No. 57. In his Declaration, Dr. Mitchell refers to “deposit  
27 materials.” *Id.* at 1. Defendant contends it requested the deposit materials and that counsel for  
28 Plaintiff assured Defendant those materials had been produced. *Id.* However, because Dr. Mitchell  
does not refer to Exhibits C or D, Defendant argues it cannot be certain what Dr. Mitchell  
reviewed. *Id.* At the December 7 hearing, Plaintiff’s counsel represented that it is simply a matter  
of terminology – the deposit materials are in fact Exhibits C and D, which were available to  
Defendant. There is no evidence to the contrary. Defendant’s objection is overruled.

1 browser to present material in a specified manner.” Compendium (Third) § 1002.4. HTML is  
 2 contained between the start tag <html> and closing tag </html>. At the hearing, Barry Shelton<sup>5</sup>  
 3 explained that HTML originally had two functions: (1) to present content and (2) to include  
 4 information about how to present that content, such as font, size, color, and margins. In 1996,  
 5 however, web developers began using CSS to separate a webpage’s content from its presentation.  
 6 CSS thus controls the content of a webpage – that is, the look and feel to the user – without  
 7 containing content. CSS are “a method of presenting structured documents [] used to format and  
 8 layout the organization and a uniform presentation of webpages in a written markup language,  
 9 such as HTML.” Compendium (Third) § 1002.5. CSS begin with the opening tag <style> or  
 10 <style type=”text/css”> and end with the tag </style>. Tittel Decl. ¶ 7.

11 Mr. Shelton pointed out that the at-issue CSS are not part of HTML. Although CSS is  
 12 often used with HTML, CSS have their own specifications. CSS control how styles are inherited;  
 13 in other words, they create rules that specify how a style will cascade or flow through other  
 14 elements of the webpage.

15 A style is demarcated with opening and closing braces (“{” and “}”). Styles begin with a  
 16 selector, which indicates which elements of HTML are automatically assigned a particular style.  
 17 A style may, for instance, define the color (which can be expressed using hexadecimal notation<sup>6</sup> or  
 18 by simply writing the color name), the font family (size, weight, etc.), text alignment, and  
 19 background color.

20 A “class” is a style that starts with a period – for example, “.demo”. The user defines the  
 21 name that follows the period (in the foregoing example, “demo”). This name is arbitrary, but Mr.  
 22 Shelton explained that the name is generally functional or scripted so that the user later knows to  
 23 what the class refers. For instance, Mr. Shelton presented as an example the class “.inset”.  
 24 Although he chose “inset” as the class name because it suggests a particular function/location, Mr.

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25  
 26 <sup>5</sup> Mr. Shelton is an electrical engineer who has been coding in CSS and HTML since the mid-  
 27 1990s. He presented a demonstration on the process of creating a webpage pursuant to this  
 Court’s December 2, 2015 Order in Preparation of Summary Judgment Hearing (Docket No. 63).

28 <sup>6</sup> A hexadecimal notation formats a red, green, and blue (“RGB”) color value. It is written as three  
 double-digit numbers and begins with a “#” sign.

1 Shelton showed that he could have chosen any name – such as “xyz” – without impacting the style  
2 assigned to that class. Nevertheless, Mr. Shelton explained that the name is generally functional  
3 or scripted so that the user later knows to what the class refers.

4 There are different ways to build CSS into HTML. Both Dr. Mitchell and Mr. Shelton  
5 explain that CSS are not typically contained in the same document as the HTML code but instead  
6 may be stored in a different file. Mitchell Decl. ¶ 50. In this case, the CSS is an external file  
7 which is imported into the HTML file. *See id.* ¶ 50 (CSS can be connected to an HTML page  
8 using an external style sheet that is imported into the webpage). Consequently, there is only  
9 HTML and content within the webpages; the presentation of the content is contained elsewhere. If  
10 there is no style defined (pursuant to the CSS or in the HTML code itself), the web browser uses  
11 its default style settings.

12 Developers may also insert “comments” in both HTML and CSS for other developers to  
13 see. Comments are not visible on the webpage itself; a person must examine the HTML code in  
14 order to read a comment. Comments within CSS begin with “/\*” and end with “\*/”. Comments  
15 within HTML are found between the tags `<!-->` and `<-->`.

### 16 3. Copyrightability

17 “The *sine qua non* of copyright is originality.” *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*,  
18 499 U.S. 340, 345 (1991). Originality means that (1) the author independently created the work,  
19 and (2) the work “possesses at least some minimal degree of creativity.” *Id.* at 345. The required  
20 amount of creativity is “extremely low; even a slight amount will suffice.” *Id.* Because of this  
21 low standard, “[t]he vast majority of works make the grade quite easily, as they possess some  
22 creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Ets-Hokin v. Skyy Spirits,*  
23 *Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (quoting *Feist Publ’n*, 499 U.S. at 345). Nevertheless,  
24 the degree of creativity “is not negligible.” *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).  
25 “There must be something more than a ‘merely trivial’ variation, something recognizably the  
26 artist’s own.” *Id.* (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir. 2000)).

27 “The Copyright Office continually engages in the drawing of lines between that which may  
28 be and that which may not be copyrighted.” *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632

1 F.2d 989, 994 (2d Cir. 1980). The Copyright Office has drawn such a line here. The Office will  
2 register HTML code as a literary work if it was created by a human being and if it “contain[s] a  
3 sufficient amount of creative expression.” Compendium (Third) § 1006.1(A). Evidently, the fact  
4 that an HTML code produces a webpage, the look and feel of which is not subject to copyright  
5 protection, does not preclude its registration. Presumably, this is because there are multiple ways  
6 of writing the HTML code to produce the same ultimate appearance of the webpage. That  
7 presumably is why the Copyright Office requires the HTML code have a “sufficient amount of  
8 creative expression” to be registrable. In contrast, “[b]ecause procedures, processes, and methods  
9 of operation are not copyrightable, the Office generally will refuse to register claims based solely  
10 on CSS.” Compendium (Third) § 1007.4.

11 The Court finds that portions of Plaintiff’s HTML code meet the requisite level of  
12 creativity to be copyrightable. Specifically, Plaintiff’s HTML code employs classes, which  
13 provides the opportunity for a developer to express creativity. At the hearing, Mr. Shelton  
14 presented “.inset” as an example of a class name. As noted above, Mr. Shelton demonstrated that  
15 he could have chosen any name for the class – such as “xyz” – without impacting the style itself.  
16 Plaintiff has similarly elected to use certain class names, such as “spons-link” and “results li”. Ex.  
17 C at 2-3; Ex. D at 2-3; Mitchell Decl. ¶¶ 54, 56-57. Choosing these names requires a certain  
18 amount of creativity. Moreover, Defendants produce no facts suggesting there is a convention or  
19 tradition to naming classes that renders the process of choosing a class name “so mechanical or  
20 routine as to require no creativity whatsoever.” *Feist Publ’n*, 449 U.S. at 362.

21 Plaintiff’s HTML code also contains comments. Opp’n at 6; App’x D, Tittel Decl.  
22 (explaining parts of HTML code and identifying comments); *see* Exs. C, D. The Original Search-  
23 Results Page, for instance, has the comments “/\*spons-link css\*/” and “/\*footer css\*/”. Ex. C at 2,  
24 4. Like class names, a developer can write anything in a comment. This again requires some  
25 creative thinking on the part of the developer, as a comment may contain notations or thoughts for  
26 others to use. Defendants have presented no facts showing the comments here contain information  
27 that is so standard or formulaic as to require no creativity whatsoever.

28 The creativity employed in formulating the HTML code and comments here, though

1 arguably minimal, stands in contrast to, *e.g.*, the alphabetical listing of basic information in a  
2 telephone directory which is formulaic. *Feist Publ'n*, 499 U.S. at 361-64. In *Feist Publications*, a  
3 public utility and publisher of a telephone directory sued the defendant for copyright infringement  
4 after the defendant used and published the plaintiff's telephone listings. *Id.* at 342. The Court  
5 noted that "[t]he end product [of the plaintiff's work was] a garden-variety white pages directory,  
6 devoid of even the slightest trace of creativity." *Id.* at 362. The plaintiff's selection of data lacked  
7 creativity: publishing a person's name, town, and phone number was "basic information" that  
8 "lack[ed] the modicum of creativity necessary to transform mere selection into copyrightable  
9 expression." *Id.* Nor was the plaintiff's decision to alphabetize the names a sign of creativity.  
10 Rather, the Court stated that alphabetization "[was] an age-old practice, firmly rooted in tradition  
11 and so commonplace that it has come to be expected as a matter of course." *Id.* at 363. As such,  
12 the Court found the copied information lacked originality and therefore not protected by copyright.  
13 *Id.* Here, as noted, at least some degree of creativity was involved in formulating the HTML code.

14         It should be noted that the choice of class name has a consequence for both the HTML  
15 code and the CSS. When the developer seeks to refer to a class in the HTML document, the  
16 names must match: In other words, when the developer incorporates the class into the HTML, the  
17 developer must use the name that he gave the class in the CSS in the HTML. The developer  
18 cannot build a style into its HTML code without referencing the class name that was established in  
19 the CSS. In this way, CSS and the HTML are so inextricably linked that it is impossible to  
20 evaluate one without the other. For instance, the Original Media.net Results Page uses ".spons-  
21 link" as a class name. Ex. C at 1, FAC. In order to incorporate the style created in the ".spons-  
22 link" class into the HTML, Plaintiff had to cross-reference "spons-link" in the HTML. *Id.* at 6.  
23 Notably, Plaintiff's copyright registrations contain both HTML and CSS, with the HTML  
24 referring to the class names in the CSS. Because class names, a form of creative expression, are  
25 found both in HTML as well as in the CSS, copyright protection obtains in the entirety of the  
26 HTML code, even though it incorporates CSS.

27         This result is not inconsistent with the Copyright Office's view that generally, CSS alone is  
28 not copyrightable. A CSS that simply defines the layout of text is not entitled to copyright

1 protection, as this would constitute a “method of formatting” or “method of operation.” *See*  
2 Compendium (Third) § 1007.4. That is not the case here: the HTML and the CSS are closely  
3 related and together are infused with creativity.

4 Accordingly, the Court finds Plaintiff’s copyright registrations contain copyrightable  
5 subject matter and are valid.

6 4. Motion to Dismiss

7 Defendant alternatively seeks dismissal of the copyright claims pursuant to Federal Rule of  
8 Civil Procedure 12(b)(6), arguing Plaintiff’s FAC fails to identify which portions of the HTML  
9 code Defendant allegedly copied. Mot. at 17. As noted earlier, a prima facie case of copyright  
10 infringement requires the plaintiff to show (1) “ownership of the allegedly infringed material” and  
11 (2) a violation of “at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.”  
12 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

13 a. Ownership

14 Plaintiff must first show that it owns a valid copyright. *See OpenMind Solutions, Inc. v.*  
15 *Does 1-39*, 2011 WL 3740714, at \*3 (N.D. Cal. Aug. 23, 2011) (finding plaintiff satisfied first  
16 element of copyright infringement where complaint alleged plaintiff’s work was subject to  
17 copyright registration application and plaintiff was exclusive rightsholder of distribution and  
18 reproduction rights); *DC Comics v. Towle*, 2012 WL 630206, at \*1 (C.D. Cal. Jan. 26, 2012)  
19 (finding plaintiff satisfied first element where plaintiff specifically pled it owned the disputed  
20 “copyright design”). As discussed above, Plaintiff’s HTML code is copyrightable subject matter.  
21 Plaintiff’s FAC alleges as much, stating that “[t]he Original Media.net Results Page contains  
22 copyrightable subject matter under 17 U.S.C. § 102(a).” FAC ¶ 74. Plaintiff makes the same  
23 allegation about the Revised Media.net Results Page. *Id.* ¶ 85.

24 Plaintiff further alleges that “Media.net is the owner of all exclusive and substantial rights  
25 and privileges in the Original Media.net Results Page” and in the Revised Media.net Results Page.  
26 *Id.* ¶¶ 73, 84. Additionally, the FAC asserts Plaintiff “is the exclusive assignee of the entire  
27 copyright interest in the Original Media.net Results Page” as well as “the exclusive assignee of the  
28 entire copyright interest in the Revised Media.net Results Page.” *Id.* ¶¶ 31, 36. Plaintiff also

1 offers its '126 and '131 Registrations, both of which list Plaintiff as the claimant. '126 Reg.; '131  
2 Reg. As such, Plaintiff has likely adequately pled the first element for both of its copyright  
3 infringement claims.

4 b. Copying of Original Constituent Elements

5 Plaintiff alleges Defendant's Results Page "was directly copied" and "is substantially  
6 similar to the copyrighted Media.net Results pages." FAC ¶¶ 42-43. Specifically, Plaintiff alleges  
7 Defendant "directly copied a substantial portion of the underlying HTML source code" and  
8 "copied original elements" from both the Original and Revised Media.net Results Pages. *Id.* ¶¶  
9 44, 77, 88. As a result, Plaintiff contends Defendant "violated Media.net's exclusive rights in the  
10 Original Media.net Results Page[,] as well as the Revised Media.net Results Page by using  
11 copying Plaintiff's HTML code and using it to create its own results page. *Id.* ¶¶ 40, 44, 78, 89.

12 A plaintiff establishes infringement by showing the defendant copied the work. *Kamar*  
13 *Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981). "Because 'the actual act of  
14 copying is rarely witnessed, copying is ordinarily established indirectly.'" *Jordan-Benel v.*  
15 *Universal City Studios, Inc.*, 2015 WL 3888149, at \*9 (C.D. Cal. June 24, 2015) (quoting *Kamar*  
16 *Int'l*, 657 F.2d at 1062). As such, "the plaintiff must establish infringement by showing both  
17 access to its copyrighted material on the part of the alleged infringer and substantial similarity  
18 between the copyrighted work and the alleged infringing work." *Kwan Software Eng'g, Inc. v.*  
19 *Foray Techs., LLC*, 2014 WL 572290, at \*11 (N.D. Cal. Feb. 11, 2014) (quoting *N. Coast Indus.*  
20 *v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992)).

21 Plaintiff's FAC describes with sufficient particularity the works that Defendant allegedly  
22 infringed – the HTML code – and the work that allegedly infringed them – Defendant's search-  
23 results page. See *Richtek Tech. Corp. v. UPI Semiconductor Corp.*, 2011 WL 166292, at \*2 (N.D.  
24 Cal. Jan. 19, 2011) (dismissing copyright infringement claim under 12(b)(6) where complaint  
25 failed to "provid[e] any factual allegations to identify [the defendant's] allegedly infringing acts or  
26 works"). Plaintiff also alleges Defendant's "Results Page is substantially similar to the  
27 copyrighted Media.net Results Pages" and provides a line-by-line comparison of Plaintiff's and  
28 Defendant's HTML codes. FAC ¶¶ 43, 47.

1           The problem is that the FAC fails to set forth facts that explain how Defendant copied the  
 2 copyrighted material. Plaintiff's FAC does not describe how Defendant had access to Plaintiff's  
 3 HTML code. It instead makes conclusory assertions that Defendant copied the HTML code from  
 4 Plaintiff's search results pages and does not explain how Defendant had access to it. *See Jordan-*  
 5 *Benel*, 2015 WL 3888149, at \*10 ("To allege access, [the p]laintiff must allege facts suggesting a  
 6 'reasonable opportunity' or 'reasonable possibility' of viewing the plaintiff's work." (quoting  
 7 *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000)). In addition, the FAC does  
 8 not list every portion of Plaintiff's HTML code that Defendant allegedly infringed. At the  
 9 hearing, counsel for Plaintiff represented that the list contained in the FAC is not an exclusive list,  
 10 but merely provides examples of the alleged infringement. *See* FAC ¶ 47. Given this  
 11 representation, it appears there may be other portions of the HTML code that Defendant allegedly  
 12 copied. Dismissal is thus warranted as Plaintiff fails to identify which sections it alleges  
 13 Defendant copyrighted. *See Reinicke v. Creative Empire*, 2013 WL 275900, at \*6-7 (N.D. Cal  
 14 2013 Jan. 24, 2013) (dismissing complaint where the plaintiff failed to identify which portions of  
 15 the work the defendant allegedly infringed).

16           The Court grants Defendant's motion to dismiss but grants Plaintiff leave to amend to  
 17 identify each portion of the HTML code Defendant allegedly infringed and to allege facts  
 18 regarding Defendant's access to Plaintiff's HTML code.

19 C.     State Law Claims

20           Defendant also argues the Court should dismiss Plaintiff's state law claims because the  
 21 Copyright Act preempts those claims. Mot. at 17-19. Plaintiff asserts three claims under  
 22 California law: (1) intentional interference with business contract, (2) intentional interference with  
 23 prospective business relationship, and (3) violation of California's Unfair Competition Law  
 24 ("UCL"), California Business and Professions Code section 17200 et seq. FAC ¶¶ 94-123.

25           "It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art.  
 26 VI, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough*  
 27 *Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quotations omitted).  
 28 Congress may, for instance, "pre-empt state law by so stating in express terms." *Id.* Such is the

1 case in the Copyright Act, which explicitly preempts

2  
3 all legal or equitable rights that are equivalent to any of the  
4 exclusive rights within the general scope of copyright as specified  
5 by section 106 in works of authorship that are fixed in a tangible  
6 medium of expression and come within the subject matter of  
7 copyright as specified by sections 102 and 103.

8 17 U.S.C. § 301(a); *see Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 760 (9th Cir.) cert. denied,  
9 136 S. Ct. 267 (2015) (“[The [exclusive] rights protected under the Copyright Act include the  
10 rights of reproduction, preparation of derivative works, distribution, and display.” (quoting *Altera*  
11 *Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005))).

12 “Copyright preemption is both explicit and broad: 17 U.S.C. § 301(a) prohibits state-law  
13 protection for any right equivalent to those in the Copyright Act.” *G.S. Rasmussen & Assoc., Inc.*  
14 *v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992). However, “[c]opyright law does  
15 not preempt state laws with respect to ‘activities violating legal or equitable rights that are not  
16 equivalent to any of the exclusive rights within the general scope of copyright as specified by  
17 section 106.’”<sup>7</sup> *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1150 (9th Cir. 2008)  
18 (quoting 17 U.S.C. § 301(b)(3)). Two conditions must be met in order for the Copyright Act to  
19 preempt a state law. *Id.* “First, the content of the protected right must fall within the subject  
20 matter of copyright as described in 17 U.S.C. §§ 102 and 103. Second, the right asserted under  
21 state law must be equivalent to the exclusive rights contained in section 106 of the Copyright

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<sup>7</sup> Under 17 U.S.C. § 106, the owner of a copyright has the exclusive right

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

1 Act.” *Id.* (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001). In  
 2 other words, “[i]f a state law claim includes an ‘extra element’ that makes the right asserted  
 3 *qualitatively different* from those protected under the Copyright Act, the state law claim is not  
 4 preempted by the Copyright Act.” *Altera Corp.*, 424 F.3d at 1089 (emphasis added). The extra  
 5 element in state law must effectively change “the nature of the action so that it is qualitatively  
 6 different from a copyright infringement claim.” *Summit Mach. Tool Mfg. Corp. v. Victor CNC*  
 7 *Sys., Inc.*, 7 F.3d 1434, 1440 (9th Cir. 1993) (quotations and edits omitted).

8 Defendant makes the same argument as to each of the three state law claims: “[t]he  
 9 gravamen of all three challenged [state] claims is the alleged misappropriation of Plaintiff’s  
 10 intellectual property (*i.e.*, its ‘source code, design and look and feel’ of its Search Results Page).”  
 11 Mot. at 18 (citing FAC ¶¶ 2, 6, 98, 109, 118). In response, Plaintiff argues its claims include extra  
 12 elements that prevent preemption, though it does not specify what those elements are. Opp’n at  
 13 18-19. Plaintiff further contends the Copyright Act does not address Plaintiff’s contracts with  
 14 third parties. *Id.*

15 As established earlier, Plaintiff’s HTML code is within the subject matter of copyright.  
 16 *See Brackett v. Hilton Hotel Corp.*, 619 F. Supp. 2d 810, 822 (N.D. Cal. 2008) (finding subject  
 17 matter of intentional interference with contract claim was plaintiff’s painting, a copyrightable  
 18 work under 17 U.S.C. § 102 and the basis for plaintiff’s copyright infringement claims); *Firoozye*  
 19 *v. Earthlink Network*, 153 F. Supp. 2d 1115, 1124-25 (N.D. Cal. 2001) (finding computer program  
 20 fell within scope of 17 U.S.C. §§ 102 and 103 and thus satisfied first prong of preemption test).  
 21 As such, the first prong of the preemption test is satisfied. Whether the Copyright Act preempts  
 22 Plaintiff’s state law claims therefore depends on whether the asserted right is qualitatively  
 23 different than those protected by the Copyright Act.

24 a. Intentional Interference Claims

25 A plaintiff who seeks to prevail on a claim of intentional interference with a contract under  
 26 California law must prove

- 27  
 28 (1) a valid contract between plaintiff and a third party; (2)  
 defendant’s knowledge of this contract; (3) defendant’s intentional

1 acts designed to induce a breach or disruption of this contractual  
 2 relationship; (4) actual breach or disruption of the contractual  
 relationship; and (5) resulting economic damage.

3 *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990).

4 The Sixth Circuit has stated that “[g]enerally, tortious interference claims (with contract or  
 5 prospective economic advantage) are held to be preempted because the rights asserted in such  
 6 claims are not qualitatively different from the rights protected by copyright.” *Stromback v. New*  
 7 *Line Cinema*, 384 F.3d 283, 306 (6th Cir. 2004) (collecting cases). The *Stromback* court followed  
 8 this reasoning to likewise find the Copyright Act preempts a tortious interference claim that “is  
 9 based upon activity which constitutes copyright infringement . . . because it is not ‘qualitatively  
 10 different’ from a copyright infringement claim.” *Id.* at 307.

11 The Second Circuit has also held that the Copyright Act preempt a claim of tortious  
 12 interference with contractual relations because “[i]n both cases, it is the act of unauthorized  
 13 publication which causes the violation. The enjoyment of benefits from derivative use is so  
 14 intimately bound up with the right itself that it could not possibly be deemed a separate element.”  
 15 *Harper & Row Publishers, Inc. v. Nation Enter.*, 723 F.2d 195, 201 (2d Cir. 1983) *rev’d on other*  
 16 *grounds*, 471 U.S. 539 (1985). These rights are so inextricably linked that “[i]f there is a  
 17 qualitative difference between the asserted right and the exclusive right under the Act of preparing  
 18 derivative works based on the copyrighted work, [the court is] unable to discern it.” *Id.* Put  
 19 another way,

20  
 21 [i]nsofar as unauthorized reproduction, distribution, performance, or  
 22 display causes the plaintiff to lose the benefits that would flow from  
 23 an actual or prospective contract whereby plaintiff would authorize  
 24 any such acts, the rights created by the tort of contract interference  
 25 to the text of the note do not appear to differ qualitatively from  
 26 rights under copyright; copyright also contemplates loss of actual or  
 27 prospective contract benefits by reason of such unauthorized acts.  
 Pre-emption in this context would, then, appear to be justified. The  
 fact that the tort, unlike copyright infringement, requires awareness  
 of the conflicting contract and an intentional interference with it  
 merely means that the state-created right is narrower than its  
 copyright counterpart, not that it is qualitatively different so as to  
 preclude pre-emption.

28 1 Nimmer on Copyright § 1.01. In short, the core of the state claim on which the state claim is

1 based depends is the copyright violation.

2 Although the Ninth Circuit has not had the occasion to expressly embrace the Second and  
3 Sixth Circuits' approach to copyright preemption, there appears to be no Ninth Circuit precedent  
4 to the contrary.<sup>8</sup> The instances where the Ninth Circuit has considered and found against  
5 preemption are inapposite. In *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079 (9th Cir. 2005), the  
6 plaintiff manufactured semiconductor chips which customers, using the plaintiff's software, could  
7 program to perform various logic functions. *Id.* at 1081-82. In order to use the software,  
8 customers agreed to the terms of a license agreement that limited the use of the software to "the  
9 sole purpose of programming logic devices manufactured by [the plaintiff] and sold by [the  
10 plaintiff] or its authorized distributors[.]" *Id.* at 1082. Customers using the plaintiff's software  
11 created a bitstream, a file containing information on the chip's use. *Id.* The defendant was a  
12 competing manufacturer of semiconductor chips, but it used a different business model. *Id.*  
13 Rather than using its own software to program customers' chips, the defendant asked its customers  
14 to use the plaintiff's software and send the bitstream to the defendant, which the defendant then  
15 used to create a chip that was compatible with the plaintiff's products. *Id.* The plaintiff asserted,  
16 among others, a copyright infringement claim and a state law claim of intentional interference  
17 with contractual relations. *Id.* The latter claim was based on the plaintiff's allegation that the  
18 defendant caused customers to use the plaintiff's software in violation of the license agreement by  
19 providing the bitstream to the defendant. *Id.* at 1089.

20 The Ninth Circuit held that the Copyright Act did not preempt the plaintiff's intentional  
21 interference with contract claim. *Id.* at 1089. Specifically, the "state law intentional interference  
22 claims based on the 'sole use' provision . . . included an 'extra element' not included within the  
23 Copyright Act's protections." *Id.* at 1089. The court specified that "[t]he right at issue is not the  
24 reproduction of the software as [the plaintiff] argues, but is more appropriately characterized as  
25 the use of the bitstream." *Id.* The court thus held that "[a] state law tort claim concerning the  
26 unauthorized use of the software's end-product is not within the rights protected by the federal  
27

28 <sup>8</sup> Indeed, no circuits have held to the contrary.

1 Copyright Act.” *Id.* at 1090. In short, the core of the state claim was a licensing violation rather  
2 than a copyright violation.

3 The Ninth Circuit addressed again addressed this issue in *MDY Indus., LLC v. Blizzard*  
4 *Entm’t, Inc.*, 629 F.3d 928, 957 (9th Cir. 2010), *as amended on denial of reh’g* (Feb. 17, 2011),  
5 *opinion amended and superseded on denial of reh’g*, 2011 WL 538748 (9th Cir. Feb. 17, 2011).  
6 Like *Altera*, *MDY Industries* involved a license agreement which prohibited users of an online  
7 computer game from using robots or “bot” to play the game.<sup>9</sup> *Id.* at 938. The defendant, the  
8 game’s creator, filed a countersuit against the plaintiff, a distributor of a software bot that played  
9 early levels of the game, and alleged copyright infringement and tortious interference with  
10 contract. *Id.* at 935-36. The court “conclude[d] that since [the game’s creator sought] to enforce  
11 contractual rights (*i.e.*, not to “use . . . bots . . . or any other third-party software designed to  
12 modify the [game’s] experience.” *Id.* at 938) that are not equivalent to any of its exclusive rights  
13 of copyright, the Copyright Act d[id] not preempt its tortious interference claim.” *Id.* at 957.

14 *Altera Corporation* and *MDY Industries* are distinguishable from the instant action. Both  
15 involved a breach of a licensing agreement where the copyright holder limited the party’s use a  
16 copyrighted work to specific circumstances, and a third party used the copyrighted work outside  
17 that scope of the license. *See Altera Corp.*, 424 F.3d at 1082 (agreement restricting use of  
18 plaintiff’s software to plaintiff’s products); *MDY Indus.*, 629 F.3d at 938 (agreement prohibiting  
19 players from using robots to play game). The Ninth Circuit could therefore look to specific  
20 provisions of those agreements that created rights in the parties. The contractual rights at issue  
21 were qualitatively different and not the equivalent of a copyright infringement claim; thus, the  
22 Copyright Act did not preempt such state law claims. *See Altera Corp.*, 424 F.3d at 1089; *MDY*  
23 *Indus.*, 629 F.3d at 957; 17 U.S.C. § 106.

24 Unlike *Altera Corporation* and *MDY Industries*, Plaintiff’s claim of tortious interference is  
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26 <sup>9</sup> That provision stated “You agree that you will not . . . (ii) create or use cheats, bots, ‘mods,’  
27 and/or hacks, or any other third-party software designed to modify the World of Warcraft  
28 experience; or (iii) use any third-party software that intercepts, “mines,” or otherwise collects  
information from or through the Program or Service.” *MDY Indus., LLC*, 629 F.3d at 938 (edits in  
the original).

1 not based on Defendant's breach of contract or licensing agreement; the core of Plaintiff's claim is  
2 based on copying its registered HTML code in violation of Plaintiff's copyright. Hence, the Ninth  
3 Circuit's acknowledgement that "[m]ost courts have held that the Copyright Act does not preempt  
4 the enforcement of contractual rights" is inapplicable to this case. *Altera Corp.*, 424 F.3d at 1089.  
5 The right at issue is not a contract right, but rather Plaintiff's right to reproduce its copyrighted  
6 HTML code. Because the Copyright Act protects that right, the nature of Plaintiff's intentional  
7 interference with contract claim is not qualitatively different from its copyright infringement  
8 claims.<sup>10</sup>

9 To the extent Plaintiff argues there is an extra element of intent, Plaintiff still cannot avoid  
10 preemption. The question is whether the added element *qualitatively* changes the nature of the  
11 claim. *See Altera Corp.*, 424 F.3d at 1089. Defendants' alleged intent does not qualitatively  
12 change the nature of the claim here which is predicated on a copyright violation. *See Worth v.*  
13 *Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 822 (C.D. Cal. 1997) (finding additional element of  
14 intent did not change nature of intentional interference with prospective economic advantage  
15 claim, such that "[the] claim [was] directly related to copyright infringement, the subject area of  
16 the Copyright Act."); *Zito v. Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1027 (N.D. Cal.  
17 2003) ("[C]onversion claims generally are preempted even though there is an additional element  
18 of intent. [] The extra element in a conversion claim does not necessarily change the nature of the  
19 underlying rights at issue." (citation omitted)); *Firoozye*, 153 F. Supp. 2d at 1125-26 ("Generally  
20 speaking, the defendant's allegedly wrongful intent does not add an element qualitatively  
21 changing the state claim from one of unauthorized copying[.]" (quotations omitted)).

22 Accordingly, the Court finds the Copyright Act preempts Plaintiff's intentional  
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24 <sup>10</sup> Plaintiff's reliance on *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810 (N.D. Cal. 2008),  
25 where the court found the Copyright Act did not preempt the plaintiff's state law claims of  
26 intentional interference with prospective economic advantage and contract relations, is misplaced.  
27 In *Brackett*, the defendant had permission to purchase the plaintiff's artwork, but was explicitly  
28 prohibited from reproducing or selling them. *Id.* at 814. He exceeded the scope of his permitted  
use of the work when he reproduced them and sold them to a hotel, despite the fact the plaintiff  
had expressly forbidden him to do so. *Id.* at 814-15. The case is analogous to *Altera Corp.* and  
*MDY Industries* in that the core violation was a breach of contractual limitation owed to the  
plaintiff.

1 interference with contract claim.

2 b. Intentional Interference with Prospective Business Relationship

3 In order to establish a claim of intentional interference with prospective economic  
4 advantage,<sup>11</sup> a plaintiff must show

5 (1) an economic relationship between the plaintiff and a third party,  
6 with a probability of future economic benefit to the plaintiff; (2) the  
7 defendant's knowledge of this relationship; (3) intentional and  
8 wrongful conduct on the part of the defendant, designed to interfere  
9 with or disrupt the relationship; (4) actual disruption or interference;  
and (5) economic harm the plaintiff as a proximate result of the  
defendant's wrongful conduct.

10 *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 713 (2007). Plaintiff  
11 argues this claim should not be preempted because in addition to infringing Plaintiff's copyrights,  
12 Defendant also interfered with Plaintiff's existing contractual relations with Microsoft. Opp'n at  
13 24. Plaintiff contends that it "may . . . pursue a claim . . . for intentionally interfering with  
14 prospective economic relations in an independently wrongful manner by violating the UCL." *Id.*

15 The Court disagrees that this is sufficient to avoid preemption. Like the previous claim,  
16 Plaintiff's intentional interference with economic advantage claim is predicated on Defendant's  
17 unauthorized copying of Plaintiff's HTML code, in violation of its statutory rights under the  
18 Copyright Act. *See* 17 U.S.C. § 106. As a result, it is not qualitatively different from Plaintiff's  
19 copyright infringement claims. *See Stromback*, 384 F.3d at 307 ("The bottom line is that the  
20 foundation of [the] claim is . . . violation of rights that are granted under and protected by the  
21 Copyright Act."). Nor are there extra elements to the claim that qualitatively change its nature.  
22 *See Aagard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1219 (E.D. Cal. Nov. 16, 2004)  
23 (rejecting argument that loss of business resulting from defendant's sale of plaintiff's copyrighted  
24 work was extra element to intentional interference with prospective economic relations claim  
25 because "federal copyright laws already protect the exclusive right of distribution."). As such, the

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27  
28 <sup>11</sup> The FAC describes this claim as intentional interference with business relationship. FAC ¶¶  
105-16. In its Reply, Plaintiff refers to the claim as one of intentional interference with  
prospective economic advantage. Reply at 23-24.

1 Court finds the Copyright Act preempts Plaintiff's intentional interference with prospective  
2 economic advantage claim.

3 c. California Business and Professions Code section 17200

4 The UCL broadly prohibits "any unlawful, unfair, or fraudulent business act or practice."  
5 Cal. Bus. & Prof. Code § 17200. "By proscribing 'any unlawful' business practice, section 17200  
6 borrows violations of other laws and treats them as unlawful practices that the unfair competition  
7 law makes independently actionable." *Cel-Tech. Comm., Inc. v. Los Angeles Cellular Tele. Co.*,  
8 20 Cal. 4th 163, 180 (1999) (quotations omitted). "Because the statute is written in the  
9 disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs."  
10 *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). A determination of whether  
11 the Copyright Act preempts a UCL claim "requires analysis of each theory of unfair competition  
12 to determine whether it contains the necessary qualitatively different extra element distinguishing  
13 it from copyright . . . protection." *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d  
14 1434, 1440 (9th Cir. 1993) (quotations and edits omitted).

15 Plaintiff asserts violations of all three prongs.<sup>12</sup> FAC ¶ 122. "To the extent that Plaintiff  
16 brings this [UCL] claim based on conduct involving subject matter covered by the Copyright Act,  
17 the claim is preempted if it implicates rights contained in that Act." *Sleep Sci. Partners v.*  
18 *Lieberman*, 2010 WL 1881770, at \*10 (N.D. Cal. May 10, 2010). The Ninth Circuit addressed  
19 this issue in *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir. 1998). The plaintiff in  
20 *Kodadek* asserted a UCL claim based on the defendant's allegedly unauthorized publication and  
21 sale of the plaintiff's copyrighted drawings. *Id.* at 1212-13. The Ninth Circuit held that the  
22 plaintiff "expressly base[d] his unfair competition claim on rights granted by the Copyright Act."  
23 *Id.* at 1213. In particular, the court noted the Copyright Act grants a copyright's holder the right to  
24 reproduce, distribute, and display the work, as well as the right to prepare derivative works. *Id.*  
25 (quoting 17 U.S.C. § 106). Publication and sale are two acts that fell within the scope of those

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26  
27 <sup>12</sup> The FAC asserts "Defendant[']s conduct constitutes unlawful, unfair, or fraudulent business  
28 acts or practices and is therefore unfair competition in violation of California Business and  
Professions Code § 17200." *Id.* ¶ 122. In its Opposition, however, Plaintiff only addresses the  
unfair and unlawful prongs. *See* Opp'n.

1 rights. As such, the court found “it [was] clear that [the plaintiff’s] state law unfair competition  
2 claim [was] based solely on rights equivalent to those protected by the federal copyright laws” and  
3 the Copyright Act preempted the UCL claim. *Id.*

4 Plaintiff concedes there is preemption to the extent the state law claim is based on  
5 copyright infringement, but it argues its UCL claim is not based solely on Defendant’s copyright  
6 infringement. Opp’n at 22. However, the FAC asserts “Defendant[’s] unauthorized copying and  
7 use of Media.net’s Results Pages’ material for the purpose of competing with Media.net and  
8 seeking business from Media.net’s customers harmed Media.net’s business, reputation, and  
9 competitive standing in the contextual advertising business.” FAC ¶ 118. This conduct, Plaintiff  
10 contends, “constitutes unlawful, unfair, or fraudulent business acts or practices and is therefore  
11 unfair competition in violation of California Business and Professions Code § 17200.” *Id.* ¶ 122.  
12 The FAC does not allege a UCL violation that does not depend on copying in violation of the  
13 Copyright Act. Plaintiff does not include any additional allegations or facts in the UCL claim that  
14 are not asserted in its copyright infringement or state law claims. *See Young Money Entm’t, LLC*  
15 *v. Digerati Holdings, LLC*, 2012 WL 5571209, at 9 (C.D. Cal. Nov. 15, 2012) (finding Copyright  
16 Act preempted UCL claim where plaintiff did not allege additional fact but merely incorporated  
17 facts regarding copyright infringement). “Where, as here, ‘the improper business act complained  
18 of is based on copyright infringement,’ a UCL claim is ‘properly dismissed because it is  
19 preempted.’” *Epikhin v. Game Insight N. Am.*, 2015 WL 2412357, at \*5 (N.D. Cal. May 20, 2015)  
20 (quoting *Sybersound*, 517 F.3d at 1152). To the extent Plaintiff’s UCL claim is based on its  
21 intentional interference claims, the Court has found the Copyright Act preempts those claims.  
22 Because the Copyright Act preempts these claims when they are asserted independently, they  
23 cannot also provide a basis for a UCL without escaping preemption. Accordingly, the Court finds  
24 the Copyright Act preempts Plaintiff’s UCL claim.

25 D. Motion for More Definite Statement

26 Rule 12(e) allows a party to “move for a more definite statement of a pleading to which a  
27 responsive pleading is allowed but which is so vague or ambiguous that the party cannot  
28 reasonably prepare a response.” Fed. R. Civ. P. 12(e). “If a pleading fails to specify the

1 allegations in a manner that provides sufficient notice, a defendant can move for a more definite  
2 statement under [Federal Rule of Civil Procedure] 12(e) before responding.” *Swierkiewicz v.*  
3 *Sorema N.A.*, 534 U.S. 506 (2002). Rule 12(e) motions are “disfavored and [are] proper only if  
4 the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being  
5 asserted.” *Craigslist, Inc.*, 2009 WL 890896 at \*4. Rule 12(e) motions are “ordinarily restricted  
6 to situations where a pleading suffers from unintelligibility rather than want of detail.” *Medrano*  
7 *v. Kern Cnty. Sheriff’s Officer*, 921 F. Supp. 2d 1009, 1013 (E.D. Cal. 2013) (quoting *Dri-Eaz*  
8 *Prod., Inc. v. Nguyen*, 2012 WL 1537598, at \*1 (W.D. Wash. May 1, 2012)).

9 In the alternative, Defendant seeks a more definite statement pursuant to Federal Rule of  
10 Civil Procedure 12(e). Mot. at 23. As the Copyright Act preempts Plaintiff’s state law claims, the  
11 Court only addresses Defendant’s request with regard to the copyright claims. Defendant argues  
12 “Plaintiff should be compelled to make a straightforward substantive and understandable to the  
13 Court statement of the basis for its claims.” *Id.* at 24. However, Plaintiff’s FAC does not sink to  
14 the level of unintelligibility that Defendant so claim. The FAC is coherent enough such that  
15 Defendant can ascertain “a fair idea of the basis of the complaint and legal grounds claimed for  
16 recovery.” *Whiteway v. FedEx Kinko’s Office & Print Serv., Inc.*, 2005 WL 3095864, at \*2 (N.D.  
17 Cal. Nov. 14, 2005). Defendant’s Motion in fact demonstrates that it is aware of the basis of  
18 Plaintiff’s claims—namely, the alleged infringement and misappropriation of Plaintiff’s HTML  
19 code. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412  
20 U.S. 669, 689 n.15 (1973) (party could have moved for more definite statement if “allegations . . .  
21 were wholly barren of specifics”). “The inability to ascertain all of the facts from a complaint is  
22 not an adequate ground for a more definite statement, as these concerns can be addressed through  
23 discovery.” *Whiteway v. FedEx Kinko’s Office & Print Serv., Inc.*, 2005 WL 3095864, at \*1 (N.D.  
24 Cal. Nov. 14, 2005).

25 In any event, in the one aspect in which the Court has found the FAC incomplete – failure  
26 to identify which portions of the HTML code Defendant is alleged to have copied and the facts  
27 regarding Defendant’s access to the code – the Court has granted Defendant’s motion to dismiss  
28 with leave to amend. This moots Defendant’s motion for a more definite statement. It is therefore

1 denied.

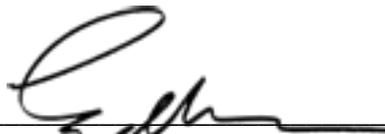
2 **V. CONCLUSION**

3 For the foregoing reasons, the Court **DENIES** (1) Defendant's Motion for Summary  
4 Judgment as to Plaintiff's copyright infringement claims and (2) Defendant's Motion for a More  
5 Definite Statement. However, the Court **GRANTS** (1) Defendant's Motion to Dismiss the  
6 copyright infringement claims with leave to amend and (2) Defendant's Motion to Dismiss  
7 Plaintiff's state law claims with prejudice, except that Plaintiff may amend its UCL claim to the  
8 extent it can allege such a claim independent of a copyright violation.

9 This order disposes of Docket No. 36.

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11 **IT IS SO ORDERED.**

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13 Dated: January 12, 2016

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16 EDWARD M. CHEN  
17 United States District Judge  
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