

HONORABLE RICARDO MARTINEZ

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

LEOPONA, INC. (D.B.A. AUDIOSOCKET),
a Delaware corporation; SARAH
SCHACHNER, a California resident; BRAD
COUTURE, a New Hampshire resident;

Plaintiffs,

v.

CRUZ FOR PRESIDENT, a Texas nonprofit
corporation; MADISON McQUEEN, a
California limited liability company;

Defendants.

NO. 2:16-CV-00658

PLAINTIFFS' RESPONSE TO
DEFENDANTS MOTION TO DISMISS FOR
JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

After repeated, express notice by Plaintiff Audiosocket, a promoter, provider, distributor and licensor of Plaintiff Sarah Schachner's and Brad Couture's copyrighted music, that Defendants could not use Schachner's and Couture's songs for political purposes or on cable television, Defendants proceeded to do so tens of thousands of times. Defendants Madison McQueen and Cruz for President published Schachner's and Couture's songs as the soundtracks for online and cable television ads supporting the Ted Cruz campaign. Each time they

1 improperly used Schachner's and Couture's songs, Defendant Madison McQueen not only
 2 breached the express terms of its contracts with Audiosocket whereby it was able to purchase
 3 and instantly download the artists' works, Defendants infringed the artists' copyrights and
 4 eroded the value of each improperly-used track. Now, Defendants seek to avoid responsibility
 5 for their actions by conjuring up purported pleading deficiencies that do not exist and seeking
 6 dismissal of all of Plaintiff's claims without any discovery or any hearing on the merits. But
 7 Plaintiffs have asserted claims upon which relief may be granted and have plead sufficient facts
 8 to meet the lenient 12(b)(6) pleading standards under *Iqbal* and *Twombly*, and Ninth Circuit
 9 authority governing copyright actions. Granting Defendants' unprecedented request for such
 10 extraordinary relief would result in obvious injustice to the Plaintiffs. To the extent the Court
 11 believes even more specific allegations are necessary, dismissal of Plaintiffs' claims is not the
 12 answer. Rather, the Court should permit Plaintiffs to amend their Complaint so they may seek
 13 damages for Defendants' brazen infringement of Schachner's and Couture's copyrights and
 14 breaches of Audiosocket's contracts.
 15

17 II. STATEMENT OF FACTS

18 Plaintiffs Audiosocket, Sarah Schachner, and Brad Couture incorporate by reference the
 19 factual allegations in the Complaint (Dkt. 1) as though fully set forth herein.

20 A. Sarah Schachner's and Brad Couture's Copyrights

21 Schachner and Couture are two of the artists represented by Audiosocket. *See* Dkt. 1 ¶¶
 22 20, 28. Schachner and Couture are, respectively, the creators of the sound recordings entitled
 23 "Lens" and "Fear of Complacency." *Id.* Schachner and Couture have each filed a US copyright
 24 application for their respective works. *Id.*
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1 **B. Audiosocket's Contractual Rights**

2 Audiosocket is a music licensing, promotion, and distribution company that has curated a
3 catalog of music created and produced by independent musicians and composers. Dkt. 1 ¶ 8.
4 Audiosocket is also a music publisher whose primary purpose is to locate and secure the
5 placement of artists' music in films, television shows, ad campaigns, video games and digital
6 media. Dkt. 1 ¶ 9. Audiosocket obtains permission from artists to promote their music on a
7 "pre-cleared" basis, which allows licensees like ad agencies to acquire music quickly and meet
8 their tight production deadlines. Dkt. 1 ¶ 11.

10 While some of the artists Audiosocket represents have contracts with independent labels,
11 most of them operate without a label or serve as their own label. Dkt. 1 ¶ 8. Thus,
12 Audiosocket's Standard Artist Agreement allows the artists it represents to retain ownership of
13 both the master sound recording and the publishing rights in their music composition. While
14 some artists choose exclusive agreements with Audiosocket, others are represented on a non-
15 exclusive basis. *Id.* Audiosocket holds non-exclusive licenses to allow third parties to perform
16 and/or use these works that are owned by Schachner and Couture. *See* Dkt. 1 ¶¶ 20, 28.

18 Audiosocket is able to serve the needs of artists like Schachner and Couture and licensees
19 like Defendant Madison McQueen through its MaaS (music as a service) technology which
20 allows media companies to search Audiosocket's catalog and then immediately download and
21 license the music each licensee needs. Dkt. 1 ¶ 14. Audiosocket's technology allows marketing
22 companies like Defendant Madison McQueen to immediately sample, identify, license, and
23 download music they otherwise would have to find and obtain from individual copyright holders.
24

25 Because of Audiosocket, artists like Schachner and Couture gain more exposure and
26 licensees receive instant access and license rights through license agreements like those to which

1 Defendant Madison McQueen agreed. Audiosocket is compensated for its services through
2 licensing fees, as it retains 50% of the gross licensing revenue and 50% of all performance
3 royalty revenue, which is paid via performing rights societies such as ASCAP, BMI and SESAC.
4 Dkt. 1 ¶ 9. Artists receive 50% of the gross licensing revenue generated by their music. Dkt. 1
5 ¶ 10.

6
7 To ensure it is paid for its unique access, download and licensing services, Audiosocket
8 requires licensees to enter into license agreements that, depending upon the revenues of the
9 licensee and use to which a licensee intends to put a music track, set the price for the use, limit
10 the uses of the licensed track, and require the payment of liquidated damages if the licensee
11 breaches the agreements. *See* Dkt. 1 ¶¶ 21-24.

12 C. **Defendants Madison McQueen’s and Cruz for President’s Complete Disregard and**
13 **Violations of Sarah Schachner’s Copyright and Audiosocket’s Contractual Rights**

14 Through the LicenseID technology described in the Complaint, Audiosocket has
15 confirmed that Defendant Madison McQueen employee Robert Perkins downloaded Schachner’s
16 “Lens” on September 17, 2015. Dkt. 1 ¶ 20. It was not until December 23, 2015 that Madison
17 McQueen entered into a Small Business Licensing Agreement with Audiosocket for use of
18 “Lens.” Dkt. 1 ¶ 21. As is the case with all Audiosocket license agreements, the Lens Licensing
19 Agreement prohibited Madison McQueen from using “Lens” for any political purpose. Dkt. 1
20 ¶ 23. The Agreement also prohibited Madison McQueen from using “Lens” on television. *Id.*
21 In exchange for Audiosocket’s services, Madison McQueen agreed to pay liquidated damages of
22 \$25,000 for any breach of the Lens License Agreement. Dkt. 1 ¶ 24.

23
24 Despite this clear prohibition on political use, three days after entering into the Lens
25 Licensing Agreement, Defendants began broadcasting “Victories,” an acclaimed political ad
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1 promoting and supporting U.S. Presidential candidate Ted Cruz, on YouTube and Defendant
2 Cruz for President’s website. Dkt. 1 ¶¶ 25, 26. “Victories” uses “Lens” as its soundtrack
3 throughout the entirety of the video. *Id.* Audiosocket has confirmed, through LicenseID, that
4 “Victories” uses Audiosocket’s unique watermarked version of “Lens” that Schachner composed
5 and licensed to Audiosocket and for which Defendant Madison McQueen’s employee Robert
6 Perkins purchased a license after agreeing to the terms of the Lens Licensing Agreement. *Id.*

7
8 Defendant Madison McQueen didn’t stop there, however. On February 24, 2016, nearly
9 two months after Defendants first went live with their unauthorized political use of “Lens,”
10 Madison McQueen employee Justin Folk contacted Audiosocket to obtain a license that would
11 expand the permissible use of “Lens” to include broadcast on cable television. Dkt. 1 ¶ 28.
12 When Folk disclosed that “Victories” was a political ad, Audiosocket became aware – for the
13 first time – that Madison McQueen intended to use “Lens” for a political purpose, in violation of
14 the Lens License Agreement. *Id.* Audiosocket reminded Folk of its prohibition on political uses
15 of “Lens.” *Id.* Despite Madison McQueen’s clear violation of the Lens License Agreement,
16 Audiosocket attempted to accommodate Madison McQueen’s request for the political use of
17 “Lens” and to broadcast it on cable television by asking Schachner if she was willing to permit
18 the political use of her song. *Id.* She declined. *Id.* Madison McQueen nevertheless forged
19 ahead, again ignored the Lens License Agreement’s political use prohibition, chose to ignore the
20 Agreement’s additional television broadcast restriction, and proceeded to cause “Lens” to be
21 broadcast on cable channel Fox Business News no fewer than 86 times. *Id.*

1 **D. Defendants Madison McQueen’s and Cruz for President’s Complete Disregard and**
 2 **Violations of Brad Couture’s Copyright and Audiosocket’s Contractual Rights**

3 Defendants’ were not through with their willful disregard of artists’ copyrights and
 4 Audiosocket’s contractual rights. Again, through the use of LicenseID, Audiosocket confirmed
 5 that, on September 17, 2015, Madison McQueen employee Robert Perkins downloaded the
 6 Audiosocket-licensed track of Brad Couture’s “Fear of Complacency.” Dkt. 1 ¶ 29. Madison
 7 McQueen did not purchase a license to use “Fear of Complacency” until January 25, 2016. *Id.*
 8 Like the Lens Licensing Agreement, the Fear of Complacency Licensing Agreement expressly
 9 prohibited Madison McQueen from using “Fear of Complacency” for any political purpose.
 10 Dkt. 1 ¶ 30. Despite this express prohibition, of which Madison McQueen was now well aware,
 11 Madison McQueen used “Fear of Complacency” to support Ted Cruz’s presidential campaign.
 12 In fact, before it even entered into the Fear of Complacency Licensing Agreement, Madison
 13 McQueen posted another Cruz ad on YouTube called “Best to Come” with “Fear of
 14 Complacency” as its soundtrack. Dkt. 1 ¶¶ 29, 32. “Best to Come” was viewed over 12,000
 15 times. *Id.* Audiosocket has confirmed that “Best to Come” uses Audiosocket’s unique,
 16 watermarked version of “Fear of Complacency.” *Id.*

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 19 **E. Plaintiffs’ Damages**

20 As a result of Defendants’ egregious copyright infringements and license agreement
 21 breaches, Plaintiffs’ filed their Complaint. The Complaint describes Defendants’ conduct in
 22 detail. Plaintiffs’ identified the existence of Audiosocket’s and Defendant Madison McQueen’s
 23 agreed liquidated damages clauses. Dkt. 1 ¶¶ 24, 31. Audiosocket stated it was entitled to
 24 “damages arising from Madison McQueen’s breaches of the Lens [and Fear of Complacency]
 25 License Agreement[s] in an amount to be determined at trial.” Dkt. 1 ¶¶ 37, 42. Sarah
 26

1 Schachner and Brad Couture stated they were entitled to “damages in an amount that is presently
2 unknown, but which exceeds \$75,000” and “for injunctive relief.” Dkt. 1 ¶¶ 46, 47, 51, 52.
3 Plaintiffs’ never stated they were entitled to over \$2 billion in damages and simply stated that
4 their damages under the Copyright Act and the Lens and Fear of Complacency License
5 Agreements would be proven at trial.
6

7 III. QUESTION PRESENTED

8 Should Defendants’ motion to dismiss be denied when Plaintiffs state claims upon which
9 relief can be granted and the claims are supported by sufficient facts in the Complaint?

10 Answer: Yes.

11 IV. AUTHORITY AND ARGUMENT

12 A. The 12(b)(6) Standard

13 Defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(6), 12(c) and 12(f). As
14 Defendants admit in their Motion, the analysis for dismissal under Rule 12(c) is “substantially
15 identical” to the analysis under Rule 12(b)(6). Dkt. 4 p. 6. (Citing *Chavez v. United States*, 683
16 F.3d 1102, 1108 (9th Cir. 2012). Thus, Defendants’ motion is rightfully viewed as a 12(b)(6)
17 motion to dismiss and should be analyzed as such by this Court.
18

19 When considering a 12(b)(6) motion, the Court must take all material allegations in the
20 complaint as true and must construe those facts in the light most favorable to the plaintiff. *Zito v.*
21 *Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1025 (N.D. Cal. 2003). To survive a 12(b)(6)
22 motion, a complaint need not contain detailed factual allegations; rather, a complaint need only
23 state a claim for relief that is *plausible on its face*. *Haley v. TalentWise, Inc.*, 9 F. Supp. 3d
24 1188, 1191 (W.D. Wash. 2004) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937,
25 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when – as here – the plaintiff pleads
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1 factual content from which the court can draw the reasonable inference that the defendant is
2 liable for the misconduct alleged. *Id.* In drawing inferences from the facts alleged in the
3 complaint, the court engages in a “context-specific task” that draws on “its judicial experience
4 and common sense.” *Iqbal*, 556 at 679. Thus, dismissal under Rule 12(b)(6) is proper only in
5 “extraordinary” cases. *U.S. v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). Unless the
6 Court determines that the pleading could not possibly be cured by the allegation of other facts,
7 the Court should grant the plaintiff leave to amend the complaint. *Westcott v. Wells Fargo Bank*,
8 *N.A.*, 862 F. Supp. 2d 1111, 1115 (W.D. Wash. 2012) (citing *Lopez v. Smith*, 203 F.3d 1122,
9 1127 (9th Cir. 2000)).
10

11 12(f) motions to strike are even more strongly disfavored. *See King County, Washington*
12 *v. Merrill Lynch & Co., Inc.*, No. 2:10-CV-01156-RSM, 2012 WL 2389998, at *1 (W.D. Wash.
13 June 25, 2012) (citations omitted). Courts tend to view 12(f) motions as dilatory or harassing.
14 *Id.* “Courts will not grant motions to strike unless ‘there are no questions of fact, . . . any
15 questions of law are clear and not in dispute, and . . . under no set of circumstance could the
16 claim or defense succeed.’ ” *Sifferman v. Sterling Financial Corp.*, No. C13-183 MJP, 2014 WL
17 28854, at *1 (W.D. Wash. Jan. 2, 2014) (citations omitted). In deciding a motion to strike, the
18 court must view the pleading in the light most favorable to the pleading party. *The Chef’n Corp.*
19 *v. Progressive Intern. Corp.*, No. C14-68 RAJ (W.D. Wash. May 19, 2014) (citations omitted).
20
21

22 Plaintiffs’ allegations have met the lenient 12(b)(6) threshold and the even lower 12(f)
23 threshold. When this Court views the facts alleged in the Complaint in the light most favorable
24 to Plaintiffs – as it must – Plaintiffs have unquestionably plead claims upon which it is plausible
25 that relief can be granted and have asserted sufficient facts on the face of their Complaint to
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1 survive Defendants’ motion for dismiss. Defendants’ motion should therefore be denied, on all
2 grounds.

3 **B. Schachner and Couture Have Stated Claims upon Which Relief May Be Granted,**
4 **and Have Plead Sufficient Facts to Support Copyright Infringement Claims**

5 Under the Ninth Circuit’s copyright infringement pleading standard, Schachner and
6 Couture have plead sufficient facts to support their copyright infringement claims. Schachner
7 plead that she is the sole owner of the musical composition and sound recording “Lens” and has
8 filed a United States copyright application for those works. Dkt. 1 ¶ 44. Likewise, Couture
9 plead that he is the sole owner of the musical composition and sound recording “Fear of
10 Complacency” and that he has filed a U.S. copyright application for those works. Dkt. 1 ¶ 49.
11 When the Court accepts these facts as true, views them in the light most favorable to Plaintiffs,
12 and draws reasonable inferences from them – as it must at this 12(b)(6) stage – Plaintiffs have
13 stated copyright claims upon which relief may be granted and which clear the relatively low bar
14 set by the Ninth Circuit.
15

16 Under 17 U.S.C. § 411(a), registration of a copyright is a pre-requisite to bringing a
17 copyright infringement suit. In the Ninth Circuit, the registration element is satisfied simply
18 when “the Copyright Office receives the copyright holder’s application.” *Cosmetic Ideas, Inc. v.*
19 *IAC/Interactive Corp.*, 606 F.3d 612, 615 (9th Cir. 2010) (citations omitted). This mere
20 application approach does away with “needless formality” Congress worked to eliminate with
21 the Copyright Act, and avoids unnecessary delay in otherwise valid copyright infringement
22 litigation. *Id.* at 619, 620.
23

24 Defendants seek to impose needless formality and delay by arguing for the kind of
25 registration technicality rejected by the Ninth Circuit and the leading case cited by Defendants.
26

1 In *Cosmetic Ideas* the Ninth Circuit found that the plaintiff had satisfied the § 411(a) registration
2 requirement by alleging in the complaint that the Copyright Office received plaintiff's completed
3 application and denied a Rule 12(b)(6) motion. *Cosmetic Ideas*, 606 at 621. *Cosmetic Ideas*
4 does not support the proposition that a complaint failing to plead basic elements, to the extent
5 there are any, should be dismissed. Dkt. 4 p. 6. Further, the Ninth Circuit's lenient approach to
6 meeting the § 411(a) registration requirement does not require a plaintiff to plead any specific
7 words or phrases to assert a claim upon which relief may be granted. Rather, Schachner and
8 Couture need only assert a claim that is plausible on its face and factual content from which the
9 Court can draw a reasonable inferences that Defendants are liable for the alleged misconduct.
10 *Haley*, 9 F. Supp. 3d at 1191. Schachner and Couture have done so here.

11
12 Schachner and Couture specifically plead they are the sole owners of their respective
13 sound recordings and copyrights and that they have filed US copyright applications. Dkt. 1 ¶¶
14 20, 28, 44, 49. The only reasonable inference from those allegations is that the Copyright Office
15 has received those applications; copyright applications may only be filed with the Copyright
16 Office, and filing with the Copyright Office is the only way one can complete the application
17 process. Requiring a more formalistic approach to pleading under § 411(a), as Defendants
18 maintain, would change the Ninth Circuit's settled approach to § 411(a). There is no basis for
19 this Court to do so.
20

21
22 Even if the Court were to accept Defendants' argument that Plaintiffs' Complaint is
23 insufficient, dismissal is not the appropriate remedy. The Ninth Circuit allows parties to cure a
24 pleading registration deficiency by amending their complaint. In a case where the copyright
25 owner failed even to file a copyright registration application or allege that a filing occurred
26 before filing a copyright infringement lawsuit, the court found that those significant failures can

1 be cured if the plaintiff registers the copyright, files an amended complaint and includes an
 2 allegation that the copyrighted work is registered. *Zito*, 267 F. Supp. 2d at 1026. This is
 3 consistent with the general rule that courts liberally grant leave to amend complaints in order to
 4 cure any alleged pleading deficiencies. *See Westcott*, 862 F. Supp. 2d at 1115. In the unlikely
 5 event that the Court accepts Defendants' attempt to broaden the Ninth Circuit's § 411(a)
 6 pleading standard, and the standard under *Iqbal* and *Twombly* generally, the Court should still
 7 deny Defendants' motion to dismiss and permit Plaintiffs' to amend the Complaint.
 8

9 **C. Audiosocket's State Contract Claims are Distinct from Schachner's and Couture's**
 10 **Copyright Claims, They Are Not Preempted, and Audiosocket Has Alleged Facts**
 11 **Sufficient to Support Its Contract Claims**

12 Audiosocket's state contract claims are not preempted by the Copyright Act for at least
 13 two reasons. First, as merely a non-exclusive licensor, Audiosocket does not have standing to
 14 bring a copyright claim and second, the service Madison McQueen contracted for and received
 15 from Audiosocket is separate, distinct and in addition to the right to use Schachner's and
 16 Couture's music and thus satisfies the two prong test for related claims that are not preempted by
 17 the Copyright Act.

- 18 1. Preemption does not apply to Audiosocket's claims: as a licensor holding a non-
 19 exclusive right, Audiosocket is not an injured plaintiff for purposes of the
 20 Copyright Act.

21 The exclusive rights of copyright owners granted by Congress under 17 U.S.C. § 106 of
 22 the Copyright Act may only be enforced by an owner or *exclusive* licensor of the right. 17
 23 U.S.C. § 501 (b) ("the legal or beneficial owner of exclusive right under copyright is entitled . . .
 24 to institute an action for any infringement"); *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d
 25 1137, 1150 (9th Cir. 2008) (citations omitted). As alleged in Plaintiffs' Complaint, Audiosocket
 26 is not an owner or exclusive licensor of the right to the "Lens" and "Fear of Complacency"

1 works at issue in this case. Audiosocket is a music promotion, distribution and licensing service
 2 for owners of copyrights and those who wish to locate and use copyrighted music. Dkt. 1 ¶ 8.
 3 For this reason, Audiosocket has no standing to bring a copyright claim and its only remedy for
 4 Defendant Madison McQueen's breaches of the Lens and Fear of Complacency License
 5 Agreements is to bring the state contract claims it has plead in the Complaint.
 6

7 Defendants' preemption claim leads to the absurd result: Defendant Madison McQueen
 8 may freely ignore written restrictions on its use of the tracks, even after those restrictions were
 9 repeatedly and expressly restated in Madison McQueen's conversations with Audiosocket after
 10 Madison McQueen had accepted Audiosocket's services and signed the License Agreements,
 11 and leave Audiosocket with no remedy. Defendants *may* have had a preemption argument if the
 12 copyright holders, Schachner and Courture, had brought contract claims with their copyright
 13 claims, but they have not. This fact is borne out by the fact that the only two cases Defendants'
 14 rely upon for their pre-emption argument¹ involve plaintiffs who brought *both* copyright and
 15 contract claims. Only Audiosocket, with a non-exclusive license and an enforceable contract
 16 with Madison McQueen, has brought a contract claim. Preemption of Audiosocket's contract
 17 claim is unprecedented because it is impossible.
 18

- 19 2. Even if preemption could apply here, Audiosocket has plead sufficient facts to
 20 create the inference that Audiosocket meets the extra element test, thus making
 21 preemption inappropriate.

22 Even if preemption was possible, and it is not, the facts asserted in the Complaint
 23 demonstrate that Audiosocket has met the two part test used by the Ninth Circuit to determine
 24 whether the Copyright Act preempts state claims. *See Del Madera Props. v. Rhodes & Gardner,*
 25

26 ¹ *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987) and *Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp.2d 419, 444 (S.D.N.Y. 2011)

1 *Inc.*, 820 F.2d 973, 976 (9th Cir. 1987) (*overruled on other grounds by Fogerty v. Fantasy, Inc.*,
2 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994)).

3 First, the Court determines whether the work at issue is a copyrightable subject matter,
4 and second, the Court determines whether the state law at issue is equivalent to any of the
5 exclusive rights within the general scope of copyright. *Del Madera Props.* 820 F.2d at 976.
6 Preemption will not occur if the stated cause of action must protect rights which are qualitatively
7 different from the copyright rights. *Id.* at 977.

9 Defendants' quote Professor Nimmer entirely out of context, implying without any basis
10 that every contract related in any way to a copyright is preempted. Dkt 4 at 18. In fact,
11 Professor Nimmer repeatedly states the opposite, that state law contract claims are not
12 preempted:

13
14 “[A] breach of contract action ... is not predicated upon a right that is ‘equivalent to any
15 of the exclusive rights within the general scope of copyright’ This for the reason that a
16 contract right may not be claimed unless there exists an element in addition to the mere
17 acts of reproduction, performance, distribution or display. That additional element is a
18 promise (express or implied) upon the part of the defendant.” 4 *Nimmer on Copyright*
19 (2002) (“*Nimmer*”)§ 16.04[C], p. 16-25, fns. omitted.

18
19 “Without a promise there is no contract, while a promise on the part of one who engages
20 in unlicensed reproduction or distribution is not required in order to constitute him a
21 copyright infringer.” 1 *Nimmer*, supra, at § 1.01[B][1][a], p. 1-15, fns. omitted.

20 Although the preemption language of the Act is arguably broad enough to refer to breach
21 of contract causes of action, because contract rights are founded on promises, they are not
22 equivalent to copyright. *Id.* at p. 1-15, fn. 68.1.

22 Most courts have followed this rule, rather than Defendants' exception, that the
23 Copyright Act does not preempt the enforcement of contractual rights by copyright holders or
24 those with exclusive license rights. *See Bowers v. Baystate Techs. Inc.*, 320 F.3d 1317, 1324-25
25 (Fed. Cir. 2003) (noting that “most courts to examine this issue have found that the Copyright
26

1 Act does not preempt contractual constraints on copyrighted articles”); *ProCD, Inc. v.*
2 *Zeidenberg*, 86 F.3d 1447 (7th Cir.1996) (noting that “courts usually read preemption clauses to
3 leave private contracts unaffected”).

4 Here, although the songs at issue are copyrightable subject matter, the contract rights
5 *Audiosocket* asserts are not equivalent to *Schachner’s and Couture’s* separate copyright interests.
6 First and foremost, the License Agreements are between Audiosocket and Defendant Madison
7 McQueen only and Audiosocket seeks relief under those contracts only against Madison
8 McQueen. Plaintiffs Schachner and Couture are not parties to the Agreements and there is no
9 contractual privity between Defendant Madison McQueen and Plaintiffs Schachner and Couture.
10 While Defendants’ actions damaged Audiosocket, Schachner and Couture, Audiosocket’s sole
11 remedy lies under its contracts with Madison McQueen. The Plaintiffs’ claims are not
12 equivalent.
13

14 Audiosocket has plead that it is not a copyright owner, and it provides the necessary
15 nexus between a copyright owner and a user of a copyrighted work. Assuming only for this
16 Response that Audiosocket must satisfy the “extra element test,” which it does not,
17 Audiosocket’s pleading creates a reasonable inference that Audiosocket provides a service
18 separate and apart from a copyright and thus meets the extra element test. Audiosocket’s website
19 was the only way Defendant Madison McQueen could have quickly discovered, sampled,
20 downloaded and licensed “Lens” and “Fear of Complacency.” In the same way that Amazon is
21 not a product manufacturer, but a non-exclusive marketplace to find, purchase and obtain
22 delivery of products, and has enforceable rights and liabilities that are separate and distinct from
23 a product manufacturer who sells products through Amazon, Audiosocket provides a service
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1 related to copyrights but has enforceable rights that are separate and distinct from copyright
2 owners.

3 The facts plead in the Complaint by Audiosocket support a plausible claim that
4 Audiosocket provided Madison McQueen with a service that is not equivalent to any of the
5 exclusive rights within the Copyright Act and that Madison McQueen agreed to pay for that
6 service and abide by the terms under which that service was provided. Audiosocket's breach of
7 licensing agreement claims are additional layers upon and "extra elements" to Schachner's and
8 Couture's copyrights that were also infringed. Dismissal of Audiosocket's distinct state claims is
9 inappropriate and Defendants' motion should be denied.
10

11 3. If Audiosocket's state claims are dismissed, they will be re-filed and consolidated
12 with the remaining claims.

13 In the unlikely event this Court nevertheless determines that Audiosocket's state claim is
14 preempted by the Copyright Act, Audiosocket will re-file its contract claim in this Court.
15 Because nearly identical facts underpin both Audiosocket's and Schachner's and Couture's
16 claims, Audiosocket's contract claims will be consolidated with Schachner's and Couture's
17 remaining copyright claims.
18

19 The current Complaint confirms that diversity exists between Audiosocket and Defendant
20 Madison McQueen. Dkt. 1 ¶¶ 1, 5. It also confirms that Defendant Madison McQueen agreed to
21 venue in this court. Dkt. 1 ¶ 7. The facts alleged to support Audiosocket's contract claims and
22 Schachner's and Couture's Copyright Act claims confirm that these claims arise from essentially
23 the same factual controversy: Defendants Madison McQueen's and Cruz for President's brazen
24 disregard for both Schachner's and Couture's property rights and Audiosocket's licensing
25 agreement conditions through their broadcast of Ted Cruz political ads online and on the Fox
26

1 Business Channel. Because Schachner’s and Couture’s copyright claims and Audiosocket’s
 2 contract claims share the same facts, if forced to re-file a separate action in this Court,
 3 Audiosocket and Schachner and Couture will ask this Court to consolidate these intimately-
 4 related actions. The propriety of consolidation rests within the sound discretion of the trial
 5 judge. *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991). The court considers a
 6 number of factors including judicial economy, whether consolidation would expedite resolution,
 7 whether separate cases may yield inconsistent results, and the potential prejudice to a party
 8 opposing consolidation. *Ultimate Timing, LLC v. Simms*, 2010 WL 1881868, at *2 (W.D. Wash.
 9 May 10, 2010) (citing 8 MOORE’S FEDERAL PRACTICE – CIVIL § 42.10(4 – 5)). All of
 10 these factors militate in favor of consolidation.²

11
 12 Assuming only for purposes of this Response that preemption is appropriate, and it is not,
 13 there is no practical reason for separating the trial of Audiosocket’s contract claims from
 14 Schachner’s and Couture’s Copyright Act claims. Doing so will only unnecessarily duplicate the
 15 trial of claims that arise from the same nucleus of operative fact and risk inconsistent results.
 16 The separation that Defendants seek will only cause delay and increased litigation costs.
 17 Defendants’ preemption argument is not only wrong, it would lead to absurd results that
 18
 19

20
 21 ² Even if there was not a basis for Audiosocket to bring its state law claims in this Court because of diversity
 22 pursuant to pursuant to 28 U.S.C. §1332(a)(1) and 28 U.S.C §1338, this Court would have supplemental jurisdiction
 23 under 28 U.S.C. ¶ 1367(a). The same, basic principles of judicial economy, convenience and fairness apply in both
 24 circumstances. Where a district court has § 1331 jurisdiction (as this Court does here under the Copyright Act), it
 25 also has the discretion to hear related claims under its supplemental jurisdiction powers under 28 U.S.C. § 1367(a)
 26 when state and federal claims “derive from a common nucleus of operative fact.” *United Mine Works of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966). Justification for supplemental jurisdiction is based upon “judicial economy, convenience and fairness to litigants.” *Id.* (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. (1188)). This Court has confirmed: “judicial economy and the avoidance of piecemeal jurisdiction strongly weighs in favor of this court’s exercise of jurisdiction.” *Gen Ads, LLC v. Breietbart*, 435 F. Supp. 2d 1116, 1123 (W.D. Wash. 2006).

1 ultimately would need to be cured by useless re-filing and consolidation. This is but another
2 reason why Defendants' Motion to Dismiss should be denied.

3 **D. Audiosocket Has Plead Sufficient Facts to Support a Claim for Liquidated Damages**

4 Audiosocket is not claiming over \$2 billion in damages. Audiosocket realizes the amount
5 of its damages must be ultimately proven and decided by the Court. Dkt. 1 ¶¶ 24, 31, 37, 42.
6 The amount of damage will depend upon how many times this Court determines Defendant
7 Madison McQueen breached the two Licensing Agreements. Defendant Madison McQueen has
8 manufactured an outrageous sum in a desperate attempt to not only avoid liability under the
9 liquidated damages clauses but to avoid the need to *even litigate* the application and
10 enforceability of the liquidated damages clauses. It is not at all surprising that Defendant
11 Madison McQueen contests the application and enforceability of the liquidated damages clauses,
12 but it cannot cite to a single case where a liquidated damages clause has been extinguished
13 before any evidence relating to the applicability or enforceability of the clause has even been
14 considered. The validity of a liquidated damages provision is a fact-based inquiry not
15 appropriately determined in a motion to dismiss. *Bayol v. Zipcar, Inc.*, 78 F. Supp. 3d 1252,
16 1255 (N.D. Cal. 2015) (concerning a California statute, which essentially codifies Washington's
17 common law, two prong approach to liquidated damages clause enforceability). Further,
18 Washington law favors the enforcement of liquidated damages clauses. *Perry v. Moran*, 111
19 Wash.2d 885, 886, 766 P.2d 1096 (1989). Liquidated damages agreements fairly entered into by
20 experienced, equal parties with awareness of just compensation for the anticipated loss should be
21 enforced. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wash.2d 881, 887, 881 P.2d 1010, 1014
22 (1994) (citing *Walter Implement, Inc. v. Focht*, 107 Wash.2d 553, 558, 730 P.2d 1340 (1987))
23 (citations omitted).
24
25
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1 Washington courts use a two-part test to determine whether liquidated damages clauses
2 are enforceable. “First, the amount fixed must be a reasonable forecast of just compensation for
3 the harm that is caused by the breach. Second, the harm must be such that it is incapable or very
4 difficult of ascertainment.” *Walter Implement*, 107 Wash.2d at 559. The difficulty of estimating
5 damages is to be assessed at time of contracting. *Wallace Real Estate Inv.*, 124 Wash.2d at 890.
6 Probable injury largely determines whether a pre-estimate of injury is reasonable. *Id.* at 881.

8 Audiosocket has sufficiently plead facts in the Complaint to support the plausible
9 conclusion that the liquidated damages clauses contained in Audiosocket’s and Defendant
10 Madison McQueen’s Licensing Agreements are enforceable. The fact that Madison McQueen
11 consented, without protest, to agreements containing these clauses alone supports the reasonable
12 inference at this very preliminary stage that Madison McQueen agreed that the \$25,000
13 liquidated damage amount was a reasonable forecast of just compensation for the harm that
14 would be caused by Madison McQueen’s unlawful use of the tracks and that the harm could not
15 or was very difficult to ascertain at the time the parties entered into the License Agreements. It
16 can be reasonably inferred that the cost of enforcement with the LicenseID technology
17 Audiosocket used to definitively confirm that Madison McQueen breached its License
18 Agreements and the costs of this lawsuit are significant and were impossible or very difficult to
19 quantify at the time Madison McQueen entered into the License Agreements. It can be
20 reasonably inferred that Defendants’ repeated unauthorized use of the “Lens” and “Fear of
21 Complacency” tracks to promote Ted Cruz’s political campaign will discourage nearly every
22 other ad agency to whom Audiosocket has the right to distribute and license these tracks from
23 using them. It can be similarly reasonably inferred that Defendant Madison McQueen’s
24 devaluation of these tracks that Audiosocket contracted to distribute and license is significant
25
26

1 and was impossible or very difficult to quantify at the time Madison McQueen entered into the
 2 Licensing Agreements. The Complaint pleads facts from which it can be reasonably inferred
 3 that \$25,000 per breach, however many breaches are proven, was a reasonable estimate of the
 4 significant damage caused by Defendant Madison McQueen's repeated, unlawful use of the
 5 tracks Audiosocket licensed to Madison McQueen to promote Ted Cruz for president. The
 6 Complaint's allegations create, at the very least, the reasonable inference that the liquidated
 7 damages clauses to which Defendant Madison McQueen consented satisfy Washington's two-
 8 prong test and are enforceable.

10 **E. Plaintiffs Have Pleaded Sufficient Facts to Support a Claim For Injunctive Relief**

11 Finally, Plaintiffs have a plausible claim for injunctive relief. Defendants attack
 12 Plaintiffs' request for injunctive relief by violating Rule 12 and looking outside the Complaint,
 13 citing to a newspaper article and asking the Court to take judicial notice of their claim that Ted
 14 Cruz has "terminated" his presidential campaign. Dkt. 4 at 18.³ Defendants have not properly
 15 noted a Rule 56 motion and their entire Motion should be denied for that reason alone. Whether
 16 Defendants' inadmissible evidence is true or not, the issue of injunctive relief is far from "moot,"
 17 as Defendants' claim. *Id.* at 19. Defendants neglect to acknowledge that the Complaint confirms
 18 Defendants posted their unlawful ads online. Whether they continue to actively promote a
 19 presidential candidate or not, the Court can take judicial notice of the fact that the suspension of
 20 the Cruz campaign does nothing to ensure anyone that the unlawful use of "Lens" and "Fear of
 21 Complacency" continues online. The prospects for reposting Defendants' unlawful uses is
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25 ³ Although not relevant to this Motion, Ted Cruz has in fact only confirmed a suspension of his campaign. "So with
 26 a heavy heart but with boundless optimism for the long-term future of our nation, we are suspending our campaign."
 Maeve Reston, *Ted Cruz Drops Presidential Bid*, CNN (May 4, 2016, 9:37 AM),
<http://www.cnn.com/2016/05/03/politics/ted-cruz-drops-out>.

1 nearly infinite. Defendants remain responsible for cleaning up their mess and the Court can
2 reasonably infer that it will need to order them to do so by granting Plaintiffs' prayer for
3 injunctive relief.

4 The plausibility of preliminary injunctive relief in a copyright action rests upon a party
5 demonstrating either: "(1) a combination of probably success on the merits and the possibility of
6 irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its
7 favor." *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1153 (9th Cir.
8 2006) (citing *A & M Records Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001))
9 (citations omitted). A showing of a reasonable likelihood of success on the merits raises a
10 presumption of irreparable harm." *Id.*, citing *Johnson Controls, Inc. v. Phoenix Control Sys.,*
11 *Inc.* 886 F.2d 1173, 1174 (9th Cir. 1989) (citations omitted). A plaintiff's burden for obtaining a
12 preliminary injunction in copyright cases "collapses to a showing of likelihood of success on the
13 merits, without a detailed showing of danger of irreparable harm." *LGS Architects, Inc.*, 434
14 F.3d at 1156.

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17 Plaintiffs have alleged facts in the Complaint to sufficiently indicate that Plaintiffs would
18 succeed on the merits. Schachner and Couture are the rightful copyright owners and as copyright
19 owners, they hold the exclusive right to perform the copyrighted material or provide permission
20 to third parties to perform copyrighted material under 17 U.S.C. § 106(4). Schachner and
21 Couture have plead volumes of facts showing Defendants' infringement of their copyrights.
22 Schachner and Couture have plead enough to make it plausible that they could win on the merits
23 of their copyright infringement claims.

24
25 The cases relied upon by the Defendants in support of their mootness argument are too
26 factually different to be applicable. In *CF v. Capistrano Unified Sch. Dist.*, the plaintiff had

1 already graduated from the defendant's class and was barred from repeating the class where the
2 plaintiff might be subject to the defendant's remarks. 647 F. Supp. 2d 1187, 1195, 1198, (C.D.
3 Cal. 2009). Unlike the plaintiff in *CF*, there is no guarantee that the unlawful use of Schachner's
4 and Couture's tracks is not continuing online. *Native Vill. Of Noatake v. Blatchford* is also
5 inapposite because the statute the plaintiff challenged in that case had been amended and there
6 was absolutely no way for the defendant to harm the plaintiff under the old statute. 38 F.3d
7 1505, 1511 (9th Cir. 1994). In contrast, Defendants may need to be ordered to ensure no further
8 unlawful use of the music at issue continues online. In addition, particularly given the current
9 chaos in the presidential campaigns and the fact that the parties' conventions have not yet
10 occurred, it is plausible that Ted Cruz could restart his suspended campaign and Defendants
11 could renew their infringements and breaches. It is not clear at this very early stage that the
12 Defendants have or will cease their unlawful behavior. The only way to ensure a cessation of
13 that behavior may be with the issuance of injunctive relief. There simply is no basis now to
14 prevent Plaintiffs from pursuing injunctive relief.
15

17 V. CONCLUSION

18 As indicated above, Plaintiffs have properly pled their copyright and contract claims,
19 preemption does not apply, the parties' liquidated damages clauses are facially enforceable, and
20 the issue of injunctive relief is not moot. This Court should deny the Defendants' motion to
21 dismiss. To the extent the Court believes any Plaintiffs could plead any additional necessary
22 facts to support their claims then it should allow Plaintiffs to amend their Complaint. To
23 conclude otherwise leaves the injured Plaintiffs without legal remedies and allows Defendants to
24 escape responsibility for their actions without any consideration of what will be an extensive
25 record of misconduct.
26

1 DATED this 27th day of June, 2016.

2 CAIRNCROSS & HEMPELMANN, P.S.

3
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CERTIFICATE OF SERVICE

1
2
3 I, Gail Glosser, certify under penalty of perjury of the laws of the State of Washington
4 that on June 27, 2016, I electronically filed the foregoing with the Clerk of the Court using the
5 CM/ECF system and I hereby served a true and correct copy of the document on the following
6 individual(s) via the Court's ECF system:

7 Michael G. Atkins
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9 113 Cherry Street #18483
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DATED this 27th day of June, 2016, at Seattle, Washington.

/s/ Gail Glosser

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