

1 FRANCIS M. GREGOREK (144785)
 gregorek@whafh.com
 2 BETSY C. MANIFOLD (182450)
 manifold@whafh.com
 3 RACHELE R. RICKERT (190634)
 rickert@whafh.com
 4 MARISA C. LIVESAY (223247)
 livesay@whafh.com
 5 WOLF HALDENSTEIN ADLER
 FREEMAN & HERZ LLP
 6 750 B Street, Suite 2770
 San Diego, CA 92101
 7 Telephone: 619/239-4599
 8 Facsimile: 619/234-4599

9 Interim Lead Class Counsel for Plaintiffs and Proposed Class
 10 [Additional Counsel Appear on Signature Page]

11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**
 13 **WESTERN DIVISION**

14
 15 GOOD MORNING TO YOU
 PRODUCTIONS CORP.; *et al.*,

16 Plaintiffs,

17 v.

18 WARNER/CHAPPELL MUSIC,
 19 INC., *et al.*,

20 Defendants.

) Lead Case No. CV 13-04460-GHK
 (MRWx)

) **PLAINTIFFS' OPPOSITION TO**
) **DEFENDANTS' MOTION TO**
) **DISMISS SECOND AMENDED**
) **CONSOLIDATED CLASS ACTION**
) **COMPLAINT**

) Date: September 30, 2013

) Time: 9:30 a.m.

) Room: 650 (Roybal)

) Judge: Hon. George H. King, Chief Judge

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This action challenges the purported copyright claim of defendants
4 Warner/Chappel Music, Inc. (“Warner”), and Summy-Birchard, Inc. (“Summy-
5 Birchard”) (collectively “Defendants”), to world’s most popular song, *Happy*
6 *Birthday to You* (“*Happy Birthday*” or the “Song”). The Song is a spontaneous,
7 popular adaptation of *Good Morning to All*, a children’s kindergarten song written
8 by Mildred J. Hill and Patty Smith Hill (collectively, the “Hill Sisters”) in or around
9 1893. See Second Amended Consolidated Class Action Compl. (“SAC”) (ECF Nos.
10 57, 59) ¶ 16. There is no known copyright for the Song itself, even though the
11 public began singing it no later than the early 1900s. See SAC ¶ 41. The *only*
12 known copyrights related to the Song are specific piano *arrangements*: a solo piano
13 arrangement filed on December 29, 1934 (SAC ¶¶ 75-76); a four-hand piano
14 arrangement filed on February 18, 1935 (SAC ¶¶ 79-80); a second piano part
15 arrangement filed on April 5, 1935 (SAC ¶¶ 83 and 84); and finally, a six-hand
16 piano arrangement also filed on April 5, 1935 (SAC ¶¶ 87-88). Although they have
17 never identified any particular copyright, Defendants nevertheless have asserted
18 copyrights to the Song itself (*i.e.*, words and music) and have demanded license fees
19 from Plaintiffs and thousands of others for use of the Song.

20 However, as Plaintiffs allege in formidable detail in the SAC, *no one* owns
21 the copyright to *Happy Birthday*.¹ Plaintiffs seek to have this Court declare that the
22 world’s most famous song is in the public domain for all to enjoy and use without
23 being subject to Defendants’ improper claims of ownership and fees.

24 Notably, Defendants have not moved to dismiss either of Plaintiffs’ two
25 federal claims – conceding that Plaintiffs have adequately pled claims upon which

26 _____
27 ¹ Plaintiffs are Good Morning to You Productions (“GMTY”), Robert Siegel
28 (“Siegel”), Rupa Marya d/b/a Rupa Marya & The April Fishes (“Rupa”); and Majar
Productions LLC (“Majar”) (collectively “Plaintiffs”).

1 declaratory relief may be granted. Instead, Defendants have moved to dismiss only
2 Plaintiffs’ related state law claims, arguing in the first instance that those state law
3 claims are preempted under Section 301(a) of the Copyright Act, 17 U.S.C. §
4 301(a), or alternatively that Plaintiffs have not sufficiently pled their state law
5 claims. These arguments fail.

6 As alleged in the SAC, *Happy Birthday* is neither copyrighted nor
7 copyrightable. For that reason, Plaintiffs do not allege that Defendants have
8 violated any provision of the Copyright Act. No party to this case claims that any
9 other party has infringed *any* copyright. Quite simply, the Song itself – as opposed
10 to the four piano arrangements – is *not* “within the subject matter of copyright.” 17
11 U.S.C. § 301(a). As Defendants concede, when a matter is not “within the subject
12 matter of copyright,” preemption cannot apply. *See* Defs. Mem. at 1. Even if the
13 Song were within the subject-matter of copyright, the rights Plaintiffs assert under
14 state law are not equivalent to the narrow set of rights conferred upon copyright
15 holders under Section 106 of the Copyright Act, 17 U.S.C. § 106. For these reasons,
16 Plaintiffs’ state law claims are not preempted by Section 301(a).

17 Plaintiffs have more than adequately alleged each of their state law claims in
18 the detail-rich SAC. Each of those claims is plausibly – indeed, convincingly –
19 alleged in the meticulously researched pleading. Plaintiffs have set forth highly
20 detailed allegations that Defendants improperly asserted copyright ownership to the
21 Song when, in fact, they have no such rights, and have extracted fees from Plaintiffs
22 under the threat of prosecution for copyright infringement, and induced them to
23 enter licensing agreements lacking in consideration. Plaintiffs have not pled a claim
24 for fraud, and none of their state law claims “sound in fraud.” Plaintiffs have met
25 the specific pleading requirements for each of their state law claims and, for that
26 additional reason, Defendants’ motion to dismiss Plaintiffs’ state law claims should
27 be denied.

28 ///

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Procedural Background**

3 In the SAC, Plaintiffs assert claims for declaratory and corollary injunctive
4 relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, declaring that
5 the Song is dedicated to public use and in the public domain and that the Copyright
6 Act does not give Defendants the rights they have asserted and enforced against
7 Plaintiffs and the other members of the Class.² SAC ¶¶ 4, 148. Plaintiffs also seek
8 a declaratory judgment (a) enjoining Defendants from asserting similar rights in the
9 future, (b) ordering Defendants to make restitution to Plaintiffs and the other
10 members of the Class for the license fees paid by them for the right to use the Song;
11 and (c) an accounting for all monetary benefits Defendants have obtained from their
12 claim of ownership of the purported copyright. SAC ¶ 172. In addition, Plaintiffs
13 assert related claims under state law, including California’s Unfair Competition
14 Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (“UCL”) and False Advertising Law,
15 Cal. Bus. & Prof. Code §§ 17500 *et seq.* (“FAL”). As stated above, Defendants
16 seek to dismiss only the state law claims in their motion.

17 **B. Factual Background**

18 Prior to 1893, the Hill Sisters wrote a manuscript containing sheet music for
19 73 songs, including the song *Good Morning to All*. SAC ¶¶ 16-17. Thereafter, the
20

21 ² Pursuant to the parties’ stipulation and order issued *nunc pro tunc* by this
22 Court on August 30, 2013, Case No. CV 13-04460-GHK (MRWx) (*Marya et al. v.*
23 *Warner/Chappell Music, Inc.*) and Case No. CV 13-05164-GHK (MRWx) (*Majar v.*
24 *Warner/Chappell Music, Inc. and Summy-Birchard, Inc.*) were consolidated for all
25 purposes and Plaintiffs were directed to file a consolidated complaint on or before
26 September 4, 2013. *See* Order on Stipulation, ECF No. 56 (“Consolidation Order”).
27 In accordance with the Court’s Consolidation Order, L.R. 15-1 and L.R. 3-2,
28 Plaintiffs manually filed the SAC on September 4, 2013. As the parties have
agreed, Defendants’ Motion to Dismiss (ECF Nos. 52-55) and the accompanying
Memorandum of Points and Authorities references the parties, causes of action, and
paragraph numbers of the SAC.

1 Hill Sisters assigned the manuscript to Clayton F. Summy (“Summy”)³ who in 1893
2 published the manuscript (including the song *Good Morning to All*) in a songbook
3 titled *Song Stories for the Kindergarten*. SAC ¶¶ 18-19. Summy registered *Song*
4 *Stories for the Kindergarten* with the Copyright Office in October 1893. SAC ¶ 20.
5 The lyrics to *Happy Birthday* were **not** included in *Song Stories for the*
6 *Kindergarten*. SAC ¶¶ 24-26. Summy subsequently republished *Good Morning to*
7 *All* on at least three occasions in 1896, 1899 and 1907.⁴ SAC ¶¶ 28, 34, 43. The
8 lyrics to *Happy Birthday* were **not** published in any of those republications of *Good*
9 *Morning to All* . SAC ¶¶ 33, 40, 45.

10 Even though the lyrics to *Happy Birthday* and the Song itself had not been
11 fixed in a tangible medium of expression by the Hill Sisters (or by any other author),
12 the public began singing *Happy Birthday* in the early 1900s. SAC ¶¶ 41-42, 46, 66.
13 The lyrics to *Happy Birthday* and the suggestion that they be sung to the melody of
14 *Good Morning to All* were first published (although not in sheet music form) in
15 1911 by the Board of Sunday Schools of the Methodist Episcopal Church in a
16 copyrighted work entitled *The Elementary Worker and His Work*. SAC ¶¶ 41-42,
17 46-50. The Hill Sisters had not fixed the lyrics to *Happy Birthday* in a tangible

20 ³ Summy incorporated the Clayton F. Summy Company (“Summy Co.”) in
21 Illinois in 1895 and assigned *Song Stories for the Kindergarten* to it. SAC ¶ 27.
22 Summy Co. was dissolved in 1920, and Summy incorporated a new Clayton F.
23 Summy Co. (“Summy Co. II”) in Illinois in 1925. SAC ¶ 52. Summy Co. II was
24 dissolved in 1933 for failure to pay taxes, and a third Clayton F. Summy Co.
25 (“Summy Co. III”) was incorporated in Delaware in 1931. SAC ¶¶ 61, 68-69.
26 Defendants concede that “[t]hese and other allegations regarding the provenance of
27 Clayton F. Summy Co. ... are not pertinent to” their motion to dismiss. Defs. Mem.
28 at 3 n.2. For convenience, Summy, Summy Co. I, Summy Co. II, and Summy Co.
III will be referred to collectively as “Summy.”

⁴ Summy registered the three works with the Copyright Office. SAC ¶¶ 29, 35,
44.

1 medium of expression prior to publication of *The Elementary Worker and His Work*.
2 SAC ¶ 66.

3 The copyright for *Song Stories for the Kindergarten* expired on October 21,
4 1921. SAC ¶¶ 54-56. As a result, the songbook *Song Stories for the Kindergarten*
5 (and the individual song *Good Morning to All*) became dedicated to public use and
6 fell into the public domain no later than October 21, 1921. SAC ¶ 56. After *Good*
7 *Morning to All* fell into the public domain, the melody and lyrics to *Happy Birthday*
8 were published together in sheet music form in the 1924 songbook *Harvest Hymns*⁵
9 and again in the 1928 songbook *Children's Praise and Worship*.⁶

10 In 1934 and 1935, Jessica Hill sold six piano arrangements for *Good Morning*
11 *to All* to Summy. SAC ¶ 74. Between December 1934 and April 1935, Summy
12 filed copyright applications for four piano arrangements for the song "*Happy*
13 *Birthday*" that did not contain any lyrics. SAC ¶¶ 75-90. In December 1935,
14 Summy filed two additional copyright applications for piano arrangements for the
15 song "*Happy Birthday to You*" that contained the *Happy Birthday* lyrics. (Reg. Nos.
16 E51988 and E51990). SAC ¶¶ 91-100. None of the six piano arrangements credited
17 the Hill Sisters with writing the *Happy Birthday* lyrics. SAC ¶¶ 92-93, 97-98. All
18 six works registered with the Copyright Office in 1934 and 1935 were eligible for
19 copyright protection only as to the piano arrangements because the melody was

21 ⁵ The song published in *Harvest Hymns* was entitled "*Good Morning to You!*"
22 and included the lyrics to *Happy Birthday* as alternate lyrics. SAC ¶¶ 58-59. A
23 copyright registration for *Harvest Hymns* was filed by Robert H. Coleman in 1924
24 and renewed by the Sunday School Board of the Southern Baptist Convention in
25 1952. SAC ¶ 60.

26 ⁶ The song published in *Children's Praise and Worship* is entitled *Happy*
27 *Birthday to You* and was the first time the Song was published in sheet music form
28 under the title *Happy Birthday to You*. SAC ¶ 62. A copyright registration for
Children's Praise and Worship was filed by Gospel Trumpet Co. in 1928. SAC ¶
63. The copyright application did not attribute authorship or identify any copyright
for *Happy Birthday*. SAC ¶ 65.

1 already in public domain, the *Happy Birthday* lyrics were not authored by the Hill
2 Sisters, and the combination of the melody and lyrics had been published previously
3 in sheet music form. SAC ¶¶ 56, 58, 62, 66.

4 In 1962, Summy (renamed Summy-Birchard Company) filed renewals for
5 each of the six copyrights it obtained in 1934 and 1935, and each renewal was
6 specifically and expressly confined just to the piano arrangements. SAC ¶¶ 107-
7 109. Through a series of name changes and corporate acquisitions in the 1970s and
8 1990s, Warner currently claims ownership of the 1934 and 1935 copyrights. SAC
9 ¶¶ 6, 106, 110. Based on those limited copyrights to the piano arrangements,
10 Warner has demanded at least \$2 million per year in licensing fees for the Song for
11 many years, and it continues to do so today. SAC ¶ 184.

12 **III. DEFENDANTS’ MOTION TO DISMISS SHOULD BE DENIED**

13 **A. Standards Governing A Motion To Dismiss**

14 A complaint should not be dismissed if it “give[s] the defendant fair notice of
15 what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
16 *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) (internal quotations omitted).
17 All well-pled factual allegations are accepted as true, *Zucco Partners, LLC v.*
18 *Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009), and are construed in a light
19 most favorable to the plaintiff. *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970,
20 976 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 758 (Dec. 3, 2012). A plaintiff need
21 only plead “enough facts to state a claim to relief that is plausible on its face.”
22 *Twombly*, 550 U.S. at 570. The “plausibility” standard is “not akin to a probability
23 requirement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937 (2009)
24 (citing *Twombly*, 550 U.S. at 556); *Anthony v. Lockerby*, No. CV 12-1702-SJO
25 (SHx), 2013 U.S. Dist. LEXIS 40521, at *8 (C.D. Cal. Mar. 15, 2013) (citations
26 omitted). It is met when the complaint contains “factual content that allows the
27 court to draw the reasonable inference that the defendant is liable for the misconduct
28 alleged.” *Iqbal*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 556).

1 The highly detailed SAC easily satisfies those pleadings standards.

2 **B. The Copyright Act Does Not Preempt Plaintiffs’ State Law Claims**

3 With little more than a cursory recital of case law, Defendants argue that
4 Plaintiffs’ state law claims are preempted by the Copyright Act. Despite
5 Defendants’ argument to the contrary, the Copyright Act does not preempt every
6 state law claim whenever a pleading makes incidental use of the term “copyright.”
7 *See* 17 U.S.C. § 301(a). Copyright preemption is limited. It applies only when a
8 state law repackages one of the exclusive rights provided in the Copyright Act.
9 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001). There are no
10 Copyright Act claims in this case. According to Defendants, “Plaintiffs contend that
11 Warner/Chappell’s copyright is invalid.” Defs. Mem. at 12. That assertion is
12 inaccurate. Plaintiffs do not contend that Defendants’ copyright is invalid, but
13 rather that Defendants have *no copyright to the Song*, nor could they.

14 Under binding Ninth Circuit precedent, Section 301(a) preempts state law
15 claims only when two mandatory conditions are met. “First, the content of the
16 protected right must fall within the *subject matter of copyright* as described in 17
17 U.S.C. §§ 102 and 103.” *Downing*, 265 F.3d at 1003 (emphasis added). “Second,
18 the right asserted under state law must be *equivalent to the exclusive rights*
19 contained in section 106 of the Copyright Act.” *Id.* (emphasis added). The second
20 condition is not met if the “state law claim includes an ‘extra element’ that makes
21 the right asserted qualitatively different from those protected [by] the Copyright
22 Act.” *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005)
23 (citation omitted).

24 Because neither required condition for preemption is met here, Defendants’
25 preemption argument must fail.

26 **1. The Song Does Not Fall Within the Subject-Matter of**
27 **Copyright**

28 As a preliminary matter, Defendants’ preemption argument fails because the
Song does not fall within the “subject matter” of copyright. *See Downing*, 265 F.3d

1 at 1003 (Copyright Act only preempts claims based on “subject matter” within
2 scope of Copyright Act). Because the Song does not meet the definitions of
3 Sections 102 or 103 of the Copyright Act, 17 U.S.C. §§ 102-103, it does not fall
4 within the “subject matter” of copyright.

5 Under Section 102 of the Copyright Act, 17 U.S.C. § 102, copyright
6 protection subsists “in original works of authorship, fixed in any tangible medium of
7 expression.” 17 U.S.C. § 102(a). Plaintiffs allege, however, that *Happy Birthday* is
8 **not** an “original work of authorship,” but rather is a popular adaptation of another
9 song, *Good Morning to All*. See SAC ¶ 38 (“the public began singing *Happy*
10 *Birthday to You* no later than the early 1900s”); SAC ¶ 39 (“in the January 1901
11 edition of *Inland Educator and Indiana School Journal*, the article entitled ‘First
12 Grade Opening Exercises’ described children singing the words ‘happy birthday to
13 you’”). Further, Plaintiffs allege that if the Song had ever been “fixed in a tangible
14 medium of expression,” it was only after the song had been performed publicly for
15 nearly two decades. See SAC ¶ 62 (“the Hill Sisters had not fixed the lyrics to
16 *Happy Birthday to You* or the song *Happy Birthday to You* in a tangible medium of
17 expression, if ever, at any time before Gospel published *Children’s Praise and*
18 *Worship* in 1928”).

19 In a similar vein, Section 103 of the Copyright Act provides that “copyright in
20 a compilation or derivative work extends **only to the material contributed by the**
21 **author of such work**, as distinguished from the preexisting material employed in the
22 work, and does not imply any exclusive right in the preexisting material.” 17 U.S.C.
23 § 103 (emphasis added). Here, Plaintiffs allege that in 1934 and 1935, Jessica Hill
24 sold six piano arrangements of *Good Morning to All* to Summy. SAC ¶ 74.
25 Plaintiffs further allege in detail that Summy filed separate copyright applications
26 **for the six piano arrangements** in 1934 and 1935, in which it did not attribute
27 authorship of the *Happy Birthday* lyrics to the Hill Sisters or claim any copyright **in**
28 **the Song itself**. SAC ¶¶ 75-95. Thus, as alleged in the SAC, the only copyrighted

1 works were the *arrangements*, not the Song (*i.e.*, the preexisting material). *Id.* At
2 most, the six copyrights extend just to the right to reproduce and distribute the six
3 specific piano arrangements. *Id.*

4 For these reasons, *Happy Birthday* does not come within the “subject matter
5 of copyright.” *See Downing*, 265 F.3d at 1003. To be sure, Defendants have not
6 identified a single piece of evidence, written or otherwise, to the contrary. Standing
7 alone, this is a sufficient basis to find that Plaintiffs’ state law claims are not
8 preempted by the Copyright Act.

9 **2. Plaintiffs’ State Law Claims Assert Rights That Are**
10 **Fundamentally Different From the Exclusive Rights**
11 **Enumerated in Section 106**

12 Even if the state law rights at issue could possibly fall within Sections 102
13 and 103 of the Copyright Act – which they do not – Defendants’ preemption
14 challenge must still fail because those state rights are not equivalent to the rights
15 protected under the Copyright Act. *See Downing*, 265 F.3d at 1003. Rather, each
16 state law claim “contains an element not shared by the federal law, an element
17 which changes the nature of the action so that it is *qualitatively different from a*
18 *copyright infringement claim.*” *See Summit Mack Tool Mfg. Corp. v. Victor CNC*
19 *Sys.*, 7 F.3d 1434, 1439 (9th Cir. 1993) (emphasis added) (citation omitted).⁷
20 Section 106 of the Copyright Act, 17 U.S.C. § 106, grants a copyright owner certain

21 _____
22 ⁷ Although this Court has subject-matter jurisdiction over this action with
23 respect to claims seeking declaratory and other relief “arising under,” *inter alia*, the
24 Copyright Act, 17 U.S.C. §§ 101 *et seq.*, Plaintiffs do not assert a single substantive
25 claim under the Copyright Act. *See Leeson v. Transamerica Disability Income*
26 *Plan*, 671 F.3d 969, 974-75 (9th Cir. 2012) (“federal courts have broad adjudicatory
27 authority over ‘all civil actions arising under the Constitution, laws, or treaties of the
28 United States’”) (*citing* 28 U.S.C. § 1331); *Forester v. Chertoff*, 500 F.3d 920, 929
(9th Cir. 2007) (district courts are broadly authorized to exercise subject matter
jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of
the United States [as set forth in 28 U.S.C. § 1331]”).

1 exclusive rights, including the right to reproduce, prepare derivative works,
2 distribute, and display copyrighted works. *See* 17 U.S.C. § 106. Significantly, ***no***
3 ***part of the Copyright Act protects a party’s right to be free from the unlawful***
4 ***assertion of copyright.*** Plaintiffs’ state law claims therefore, are fundamentally
5 separate and distinct from the exclusive rights enumerated in Section 106.

6 Courts generally apply a presumption against preemption of state law,
7 particularly in realms traditionally associated with state police powers such as
8 consumer protection. *See New York v. FERC*, 535 U.S. 1, 18, 122 S. Ct. 1012
9 (2002) (“*FERC*”) (courts “start[] with the assumption that the historic police powers
10 of the States [are] not to be superseded . . . unless that was the clear and manifest
11 purpose of Congress”) (quotation omitted); *Cipollone v. Liggett Group, Inc.*, 505
12 U.S. 504, 517, 112 S. Ct. 2608 (1992) (statute is construed “in light of the
13 presumption against the pre-emption of state police power regulations”). Plaintiffs
14 assert claims pursuant to California’s unfair competition and false advertising laws
15 based on allegations of Defendants’ unfair business practices and deceptive conduct.
16 *See, e.g.*, SAC ¶ 169 (“Defendant Warner/Chappell’s conduct in exerting control
17 over exclusive copyright ownership to *Happy Birthday to You* to extract licensing
18 fees is deceptive and misleading because Warner/Chappell does not own the rights
19 to *Happy Birthday to You.*”); SAC ¶ 184 (“Defendant Warner/Chappell publicly
20 disseminated advertising which contained statements which were untrue and
21 misleading and which concerned the composition *Happy Birthday to You*, for which
22 they improperly sought and received licensing fees.”). Dismissal of Plaintiffs’ FAL
23 and UCL claims would frustrate the guiding precept of preemption, which is to
24 protect the state’s right to regulate issues of public policy affecting its citizens. *See*
25 *FERC*, 535 U.S. at 18.

26 Significantly, the Copyright Act has no provision prohibiting anyone from
27 falsely claiming to own a copyright. Indeed, the Copyright Act does not contain any
28 provision involving deceit or misrepresentation. Its focus is the innocent or willful

1 copying of another’s copyrighted work. Thus, federal courts in California routinely
2 deny preemption challenges when the state claims involve allegations of deceit or
3 misrepresentation on the ground that such claims are not equivalent to any exclusive
4 right protected by the Copyright Act. *See, e.g., Baekert Progressive Composites v.*
5 *Wave Cyber Ltd.*, No. 06-cv-2440 (LAB)(LSP), 2007 U.S. Dist. LEXIS 25817, at
6 *10 (S.D. Cal. Apr. 5, 2007) (false advertising claim was not preempted by
7 Copyright Act because claim included element of misrepresentation) (*citing*
8 *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989) (fraud claim
9 was not substantially equivalent to any right protected under Copyright Act because
10 it required proof of misrepresentation); *see also Educ. Testing Serv. v. Simon*, 95 F.
11 Supp. 2d 1081, 1091 (C.D. Cal. 1999) (UCL claim not preempted because
12 Copyright Act preempts only those state laws that are “equivalent to” copyrights).

13 One of the cases Defendants cited, *Idema v. Dreamworks, Inc.*, 162 F. Supp.
14 2d 1129 (C.D. Cal. 2001) (Defs. Mem. at 9), did not even assert FAL or UCL
15 claims, it involved no allegations of deceptive or misleading conduct, and it does not
16 support Defendants’ argument that such allegations are insufficient to avoid
17 preemption. All six of the other cases cited by Defendants on this point were
18 infringement cases by owners of copyrights, asserting infringement claims under the
19 Copyright Act. In *Kodadek v. MTV Networks*, 152 F.3d 1209, 1213 (9th Cir. 1998),
20 for example, the Ninth Circuit found preemption where the plaintiff “expressly
21 base[d] his unfair competition claim on rights granted by the Copyright Act.” The
22 Ninth Circuit concluded that the plaintiff’s UCL claim was “based solely on rights
23 equivalent to those protected by the federal copyright laws.” *Id.*⁸; *see also Del*
24 *Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987)
25 (California UCL claim preempted because it did not add “extra element” to

26
27 ⁸ As discussed above, the Copyright Act has no provision prohibiting false claims of
28 copyright ownership, and thus provides no rights equivalent to those protected by
the UCL or the FAL.

1 plaintiff's infringement claim); *TeraRecon v. Fovia*, No. 05-C-4407 (CW), 2006
2 U.S. Dist. LEXIS 48833 (N.D. Cal. July 6, 2006) (same); *Perfect 10, Inc. v.*
3 *Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1125 (C.D. Cal. 2001) (same); *Xerox*
4 *Corp. v. Apple Computer, Inc.*, 734 F. Supp. 1542, 1551 (N.D. Cal. 1990) (same);
5 *Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1239 (C.D.
6 Cal. 1987) (plaintiff's UCL and FAL claims preempted by plaintiff's copyright
7 infringement claim). Thus, they provide no support for preemption here.

8 Plaintiffs further assert claims sounding in contract for money had and
9 received and for rescission (based on the failure of consideration). SAC ¶¶ 177-181.
10 It is well-settled that the Copyright Act does not preempt the enforcement of
11 contractual rights. *Altera*, 424 F.3d at 1089 (reviewing cases on unauthorized use
12 from the Seventh Circuit, Eighth Circuit and Federal Circuit); *accord JZK, Inc. v.*
13 *Weaver*, No. C06-5477 (FDB), 2006 U.S. Dist. LEXIS 75523, at *9 (W.D. Wash.
14 Oct. 17, 2006) ("The Ninth Circuit, as have most courts, has held that the Copyright
15 Act does not preempt the enforcement of contractual rights."); *Nat'l Car Rental*
16 *Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 433 (8th Cir.), *cert. denied*,
17 510 U.S. 861 (1993) (quoting H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 132,
18 *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748) ("In elaborating the meaning of the
19 term 'equivalent rights' the House committee report to the Copyright Act suggests
20 that breaches of contract were not generally preempted: 'nothing in the bill
21 derogates from the rights of parties to contract with each other and to sue for
22 breaches of contract.'). As the Ninth Circuit has recognized, the "bilateral
23 expectation of compensation" distinguishes contractual rights from the rights
24 protected under the Copyright Act. *See Grosso v. Miramax Film Corp.*, 383 F.3d
25 965, 968 (9th Cir. 2004). Thus, as one court explained:

26 A right that is qualitatively different from copyright includes a
27 right to payment, a right to royalties, or any other independent
28 covenant. These qualitatively different rights constitute the

1 requisite extra element. These breach of contract actions are *not*
2 ***preempted by federal copyright law.***

3 *Kabehie v. Zoland*, 102 Cal. App. 4th 513, 528, 125 Cal. Rptr. 2d 721 (2002)
4 (emphasis added); *see also Chesler/Perlmutter Prods., Inc. v. Fireworks Entm't,*
5 *Inc.*, 177 F. Supp. 2d 1050, 1058-59 (C.D. Cal. 2001) (breach of promise to pay
6 specific amounts for copyrighted work not preempted).

7 Plaintiffs' money had and received and rescission claims possess elements
8 that are qualitatively different from any right protected under the Copyright Act.
9 SAC ¶¶ 177-181. Both claims assert Plaintiffs' right to receive something of
10 consideration in exchange for their payments of synchronization and mechanical
11 licensing fees. *See* SAC ¶¶ 114, 115, 121-123, 126. As Plaintiffs allege, the right to
12 receive valid consideration was breached because "Defendants' purported licenses
13 were worthless." SAC ¶ 180. Accordingly, Plaintiffs' claims sounding in contract
14 are not preempted by the Copyright Act. *See Grosso*, 383 F.3d at 968.

15 Defendants' four contract preemption cases are easily distinguishable. In
16 each of those cases, unlike here, the plaintiffs were copyright owners who possessed
17 rights under the Copyright Act. In *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d
18 1053, 1054 (C.D. Cal. 2000), the plaintiff's breach of contract claim was preempted
19 by his claim that the defendant infringed his copyright. *See also Jacobsen v. Katzer*,
20 609 F. Supp. 2d 925, 933 (N.D. Cal. 2009) (preemption where plaintiff's contract
21 claim was predicated upon defendant's alleged use of copyrighted work without
22 abiding by the "Artistic License," in derogation of plaintiff's rights under Section
23 106); *Kabehie*, 102 Cal. App. 4th at 529 (breach of contract claims preempted where
24 no allegation of "extra element" made them qualitatively different from copyright
25 infringement action); *Santa-Rosa v. Combo Records*, 471 F.3d 224, 227 (1st Cir.
26 2006) (preemption found where plaintiff sought to rescind his recording contract;
27 after rescission, any further distribution by defendant record company would
28 infringe copyright). Here, Plaintiffs own no copyrights to the Song (and neither do

1 Defendants), and they assert no claim for infringement of any of the exclusive rights
2 granted by Section 106 of the Copyright Act, 17 U.S.C. § 106. Plaintiffs’ contract
3 claims thus are not preempted and must be allowed to stand.

4 **C. Plaintiffs’ State Law Claims Are Well Pled**

5 **1. Plaintiffs’ FAL and UCL Claims Do Not Rely on Allegations**
6 **of Fraud**

7 Defendants summarily argue that Plaintiffs’ FAL and UCL claims are
8 “grounded in fraud” and, therefore, must be pled with specificity. Defs. Mem. at
9 14:18-21. There is no claim for fraud in the SAC, leaving Defendants to cherry-pick
10 a handful of allegations from the Complaint, conclude that the claims are “grounded
11 in fraud,” and argue that the FAL and UCL claims must be dismissed because
12 “fraud” has not been alleged with particularity. Defendants are mistaken.

13 The claims would be “grounded in fraud” only if Plaintiffs “allege a unified
14 course of fraudulent conduct and rely *entirely* on that course of conduct as the basis
15 of that claim.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)
16 (emphasis added). Where, as here, averments of fraud are made in a claim in which
17 fraud is merely a part, but not an essential element of a claim, “an inadequate
18 averment of fraud does not mean that no claim has been stated.” *Vess v. Ciba-Geigy*
19 *Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). In such a case, “[t]he proper route
20 is to disregard averments of fraud not meeting Rule 9(b)’s standard and then ask
21 whether a claim has been stated.” *Id.* (“district court should ‘disregard’ those
22 averments, or ‘strip’ them from the claim” and “then examine the allegations that
23 remain to determine whether they state a claim”). Plaintiffs’ UCL and FAL claims
24 do not rely entirely on averments of fraud and are, even stripped of all allegations of
25 fraud, sufficiently pled.

26 Fraud requires: (i) a false representation; (ii) knowledge of its falsity; (iii)
27 intent to defraud; (iv) justifiable reliance; and (v) damages. *Vess*, 317 F.3d at 1105.
28 In sharp contrast, an FAL claim does *not* require knowledge of the falsity of an
advertisement or a specific intent to defraud. It is sufficient to allege negligent

1 dissemination of misleading advertising. *Khan v. Medical Board*, 12 Cal. App. 4th
2 1834, 1846 (1993) (“section[] 17500 . . . can be violated through negligence”);
3 *People v. Forest E. Olson, Inc.*, 137 Cal. App. 3d 137, 139 (1982). Therefore,
4 Plaintiffs’ allegations that Defendants “knew, or in the exercise of reasonable care
5 should have known” their advertising was untrue and misleading are both sufficient
6 to state a claim under § 17500 **and** not subject to Rule 9(b) of the Federal Rules of
7 Civil Procedure. SAC ¶¶ 198-201; *see Vess*, 317 F.3d at 1105 (allegations of
8 negligent misrepresentation are not subject to Rule 9(b)); *see also* SAC ¶¶ 110-115,
9 120-124, 130, 141-147, 168 (allegations of false advertisement).

10 The UCL claim survives for the same reason. One of the wrongs proscribed
11 by the UCL is “[a]ny act prohibited by . . . Section 17500.” Cal. Bus. & Prof. Code
12 § 17200. “‘Any violation of the false advertising law . . . necessarily violates’ the
13 UCL.” *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) (quoting *Comm. on*
14 *Children’s Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 210 (1983)). “Thus,
15 to state a claim under either the UCL or the false advertising law, based on false
16 advertising or promotional practices, it is necessary only to show that members of
17 the public are likely to be deceived.” *Id.* at 951. (quotation marks and citations
18 omitted). Plaintiffs easily meet this rather low pleading standard for a claim under
19 the FAL and, by extension, under the UCL as well.

20 The UCL claim also survives because the UCL more broadly covers “unfair”
21 acts, including those alleged by Plaintiffs, not just fraudulent or misleading ones.
22 “The UCL covers a wide range of conduct. It embraces anything that can properly
23 be called a business practice and that at the same time is forbidden by law.” *CRST*
24 *Van Expedited, Inc. v. Werner Enters.*, 479 F.3d 1099, 1107 (9th Cir. 2007) (quoting
25 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003)). In
26 other words, a successful claim under the UCL does not require fraud or even
27 misleading conduct. For example, ***it is a violation of the UCL to assert a***
28 ***contractual right that is not conferred*** in the contract or to include an unlawful

1 provision in a contract. *See People v. McKale*, 25 Cal. 3d 626, 635 (1979).

2 Plaintiffs’ UCL claim in this case is functionally the same as the claim in
3 *McKale*. Here, Plaintiffs allege that Defendants have asserted rights – namely
4 copyrights – that they do not possess. SAC ¶¶ 4, 6-8, 13-123, 127-130, 163-174.
5 As a practical matter, it makes no difference that those purported rights arise under
6 the Copyright Act rather than under a contract. The wrong and the harm are the
7 same in both cases.

8 The UCL also “‘borrows’ violations from other laws by making them
9 independently actionable as unfair competitive practices[,]” including common law
10 claims. *CRST Van Expedited*, 479 F.3d at 1107 (quoting *Korea Supply Co.*, 29 Cal.
11 4th at 1143). Plaintiffs’ common law claim for money had and received and their
12 claim for rescission under California Civil Code §§ 1688 *et seq.*, are, therefore,
13 sufficient to make a UCL claim. SAC ¶¶ 177-81.

14 Finally, UCL claims broadly encompass unfair business practices that are
15 “unfair” even though they are not “unlawful.” *Cel-Tech Commc’ns, Inc. v. L.A.*
16 *Cellular Tele. Co.*, 20 Cal. 4th 163, 180, 182-84 (1999). *See also Motors, Inc. v.*
17 *Times Mirror Co.*, 102 Cal. App. 3d 735, 739-740 (1980) (Legislature intended
18 broad, inclusive standard to encompass “creative nature of the scheming mind”)
19 (quoting *Barquis v. Merch. Collection Ass’n*, 7 Cal. 3d 94, 112 (1972)).
20 Defendants’ demand for money based upon a copyright they do not own, whether
21 technically “unlawful” or not, is unfair on its face.

22 Defendants also argue that Plaintiffs have failed to allege where and how they
23 communicated their purported ownership of the Song. Defs. Mem. at 15. That
24 argument completely overlooks paragraph 6 of the SAC, which plainly alleges that
25 at the time of filing of the initial complaint, Warner publicly asserted it owns the
26 Song “in the first two sentences on the ‘About Us’ page of its website.” SAC ¶ 6.
27 The SAC even identifies the website’s URL:
28 http://www.warnerchappell.com/about.jsp?currenttab=about_us last visited June

1 2013. *Id.* The SAC also alleges that Warner claimed to own the Song when it
2 demanded license fees from Plaintiffs GMTY (SAC ¶¶ 117, 119) and Siegel (SAC
3 ¶¶ 127-28). In addition, to all that, Warner Music Group Corp., the parent company
4 of defendant Warner, has advertised in each of its Annual Reports since at least
5 2008 that it owns *Happy Birthday*. See Decl. of Betsy C. Manifold in Support of
6 Pls.’ Opp’n to Defs.’ Mot. to Dismiss SAC (“Manifold Decl.”), at Exhibits 1-5; see
7 also Pls.’ Req. Judicial Not. In Support Of Opp’n To Defs.’ Mot. Dismiss SAC filed
8 concurrently herewith.

9 Thus, Plaintiffs’ allegations are more than sufficient to state a claim under the
10 FAL and the UCL on various bases that do *not* rely upon any allegations of fraud.

11 2. Rescission is a Claim, Not a Remedy

12 Defendants cite a decades-old California appeals court decision and one
13 decision from this Court to support their hyper-technical argument that rescission is
14 a remedy, not a claim. Defs. Mem. at 18 (*citing Nakash v. Sup. Ct.*, 196 Cal. App.
15 3d 59, 70 (1987) and *Taguinod v. World Savings Bank*, 755 F. Supp. 2d 1064,
16 1072). The weight of the case law, however, is to the contrary. For example, a very
17 recent opinion of this Court, *Van Dyke v. Lions Gate Entm’t, Inc.*, No. SA CV 13-
18 454-JST (ANx) 2013 U.S. Dist. LEXIS 105288, at *15-16 (C.D. Cal. July 24,
19 2013), denied a motion to dismiss a state law claim for rescission in a copyright and
20 contract dispute. The court recognized that California’s statutory right of rescission,
21 set forth in California Civil Code § 1689, was the proper basis for a claim. *Id.*, at
22 *14-15; see also *Abels v. Bank of Am., N.A.*, No. C 11-0208-YGR, 2012 U.S. Dist.
23 LEXIS 28125, at *16-17 (N.D. Cal. Mar. 2, 2012) (denying motion to dismiss claim
24 for rescission).

25 The 1987 California court of appeal case cited by Defendants is also
26 contradicted by a more recent court of appeal decision, *Tippett v. Terich*, 37 Cal.
27 App. 4th 1517, 1536 (1995) (“as a matter of pleading, the trial court erred because a
28 cause of action for rescission was available to plaintiff”) (*overruled on other*

1 grounds in *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000));
2 see also *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 130 (1966)
3 (“pleading . . . states a *cause of action for rescission*”) (emphasis added).

4 *Tippett* and *Van Dyke* are much more applicable to the present case than is
5 *Nakash*, but all three cases support Plaintiffs’ position. The issue in *Nakash* was
6 whether a party had waived its right to rescind a contract by settling and dismissing
7 a prior lawsuit that also sought rescission of the contract. *Nakash*, 196 Cal. App. 3d
8 at 69-70 (denying summary judgment; permitting plaintiff to seek rescission). The
9 court of appeal held that there are many bases for obtaining rescission, and upheld
10 the trial court’s decision not to grant summary judgment in favor of the defendant.
11 *Id.* at 70. Procedurally, therefore, *Nakash* supports Plaintiffs’ position that the Court
12 should deny Defendants’ motion to dismiss the claim for rescission.⁹

13 The facts of *Tippett* also support Plaintiffs’ claim for rescission. *Tippett*
14 sought to rescind his employment contract on the basis that it was not for the
15 prevailing wage and was, therefore, unlawful. *Tippett*, 37 Cal. App. 4th at 1535.
16 The trial court dismissed the plaintiffs’ claims. The court of appeal held that the
17 trial court should not have dismissed *Tippet*’s cause of action for rescission,
18 recognizing the validity of the cause of action, but affirmed the decision on the
19 merits. *Id.* at 1535-36. In *Van Dyke*, the plaintiff sought to rescind an agreement to
20 share his copyrights as the author of a screenplay, alleging that he was coerced into
21 signing the agreement. *Van Dyke*, 2013 U.S. Dist. LEXIS 105288, at *14. The
22 district court denied a motion to dismiss *Van Dyke*’s claim for rescission of the
23 agreement. *Id.*, at *15.

24 The statutory scheme that forms the basis for rescission also supports the
25 conclusion that rescission is a claim. The law distinguishes between the claim,

26
27 ⁹ The other case cited by Defendants, *Taguinod*, dismissed the plaintiff’s claim for
28 rescission on the basis that it is a “remedy, not a cause of action,” in a single
sentence without any substantive analysis. *Taguinod*, 755 F. Supp. 2d at 1072.

1 rescission, and the remedy, restitution. In particular, California Civil Code § 1692
2 speaks of an action for rescission, including asserting rescission as a cross-
3 complaint:

4 When a contract has been rescinded in whole or in part, any party
5 to the contract may seek relief based upon such rescission by (a)
6 bringing an action to recover any money or thing owing to him by
7 any other party to the contract as a consequence of such rescission
8 or for any other relief to which he may be entitled under the
9 circumstances or (b) asserting such rescission by way of defense
10 or cross-complaint.

11 *See also* Cal. Civ. Code § 1693 (discussing “relief based upon rescission . . . claimed
12 in an action”). It would be incongruous to allow rescission as a cross-complaint
13 without allowing it as a complaint (or, in federal court, as a claim).

14 **D. All of Plaintiffs’ Claims Are Timely**

15 **1. Plaintiffs’ Federal Claims and Their UCL and Breach**
16 **of Contract Claims Are Subject to Four-Year Statutes**
17 **of Limitations**

18 The central premise of Defendants’ two remaining arguments is that
19 Plaintiffs’ federal claims under the Declaratory Judgment Act are subject to the
20 Copyright Act’s three-year statute of limitations.¹⁰ Defs. Mem. at 18. The
21 Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, itself contains no statute of
22 limitations, and it is not certain – indeed, it is unlikely – that Plaintiffs’ federal
23 claims would be subject to the Copyright Act’s three-year statute of limitations. The
24 Copyright Act does not provide for any civil enforcement action except for

26
27 ¹⁰ A civil action for infringement under Section 501(b) of the Copyright Act, 17
28 U.S.C. § 501(b), is subject to a three-year statute of limitation. 17 U.S.C. § 507(b)
(civil action must be “commenced within three years after the claim accrues”).

1 infringement. *See* 17 U.S.C. §§ 501-505.¹¹ Nothing in the Copyright Act addresses
2 unfair practices, fraud, or similar wrongdoing. Plaintiffs do not assert any claim of
3 infringement, since *there is no copyright to be infringed*, and Plaintiffs do not
4 allege otherwise. Statutes of limitation apply to causes of action, not to the
5 underlying legal principles applied to determine the case. By its express terms, the
6 Copyright Act’s limitation period does not apply to any of Plaintiffs’ claims.

7 When a federal statute fails to provide any limitations period for the causes of
8 action it creates, federal courts “borrow a period, generally from *state law*, to limit
9 these claims.” *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 32, 115 S. Ct. 1927 (1995)
10 (emphasis added). The Supreme Court described the practice of borrowing the
11 limitations period from state law, rather than federal law, as both “longstanding” and
12 “settled.” *Id.* at 34. Consequently, federal courts turn to a federal source, as the
13 “secondary lender,” only “when the state limitations periods with any claim of
14 relevance would ‘frustrate or interfere with the implementation of national policies’
15 . . . or be ‘at odds with the purpose or operation of federal substantive law.’” *Id.*
16 (*quoting DelCostello v. Teamsters*, 462 U.S. 151, 161, 103 S. Ct. 2281 (1985)).

17 The most analogous state law is California’s remedial UCL, which prohibits
18 “anything that can properly be called a business practice and that at the same time is
19 forbidden by law.” *CRST Van Expedited*, 479 F.3d at 1107. Undeniably,
20 Defendants’ assertion of a copyright to extract license payments from Plaintiffs and
21 others who seek to use the Song for commercial purposes is a “business practice”
22 within the scope of the UCL. The fact that Defendants falsely assert a copyright for
23 the Song when they have no such right is unlawful – even though not proscribed by
24 the Copyright Act itself. Thus, there can be little doubt that Defendants’ conduct
25 falls within the scope of the UCL. Under the longstanding and settled practice, the

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27 ¹¹ Section 1203 of the Copyright Act, 17 U.S.C. § 1203, also permits an action
28 by anyone harmed by the circumvention of technological measures that protect his
copyrighted material.

1 UCL is the “lender of first resort,” and the Court should apply the UCL’s four-year
2 statute of limitations to Plaintiffs’ Declaratory Judgment Act claims. Cal. Bus. &
3 Prof. Code § 17208; Cal. Civ. Proc. Code § 337.¹²

4 Moreover, the Ninth Circuit has held that “if a claim for declaratory relief
5 could have been resolved through another form of action which has a specific
6 limitations period, the specific period of time will govern.” *Levald, Inc. v. City of*
7 *Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (internal quotations omitted). As
8 noted above, Defendants concede that Plaintiffs’ UCL and breach of contract claims
9 each have a four-year statute of limitations period and as previously discussed, the
10 delayed discovery rule can be applied to those claims

11 Applying the four-year statute of limitations to Plaintiffs’ Declaratory
12 Judgment Act claims would not frustrate or interfere with the purpose or policies of
13 the Copyright Act in any way. *N. Star Steel*, 515 U.S. at 34. The fundamental
14 purpose of the Copyright Act is “to stimulate artistic creativity for the general
15 public good.” *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992)
16 (*quoting Sony Corp. v. Universal City Studios*, 464 U.S. 417, 432, 104 S. Ct. 774
17 (1984)). Indeed, allowing Plaintiffs – each of whom sought to use the Song in their
18 own artistic work – an extra year to challenge Defendants’ wrongful claim of
19 copyright would *promote* the purpose of the Copyright Act rather than hinder it in
20 any way.

21 On the other hand, applying the shorter three-year limitation period that
22 Defendants seek – borrowing from the Copyright Act as the “secondary lender” –
23 would not advance any policy favored by the Copyright Act. The shorter three-year
24 limitation period in the Copyright Act is simply consistent with the policy that
25 requires copyright owners to be vigilant in enforcing their copyrights. *Bell v.*

27 ¹² Defendants concede that Plaintiffs’ UCL and breach of contract claims each
28 have four-year limitations periods. *See* Defs. Mem. at 20-21.

1 *Combined Registry Co.*, 397 F. Supp. 1241, 1248 (N.D. Ill. 1975), *superseded by*
2 *statue*, Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2578, *as recognized in*
3 *Caufield v. Ponchatoula Times*, 759 F.2d 493 (5th Cir. 1985) (copyright owner
4 “must be vigilant in policing distributions of the work”). That policy simply is not
5 implicated by the facts in this case.

6 **2. Plaintiffs’ Remaining State Claims Are Timely Under**
7 **the Discovery Rule**

8 Plaintiffs’ FAL claim and their claim for money had and received are subject
9 to three-year statutes of limitations.¹³ However, Plaintiffs are *not* strictly limited to
10 the three-year limitations periods on those state law claims. Those limitations
11 periods are subject to equitable tolling under the discovery rule. The Court has
12 broad discretion to defer the highly fact-specific statute of limitations analysis until
13 after appropriate discovery has been conducted. *Broberg v. Guardian Life Ins. Co.*
14 *of Am.*, 171 Cal. App. 4th 912, 921 (2009) (application of delayed discovery rule is
15 question of fact, and whether reliance on a misrepresentation was reasonable is a
16 question of fact for the jury).

17 In *Weatherly v. Universal Music Publ’g Gr.*, 125 Cal. App. 4th 913 (2004), a
18 songwriter brought a breach of contract action against his publisher claiming that he
19 was misled by royalty payment statements from the defendant. The Court of
20 Appeal held that the songwriter’s claim was not time-barred under the discovery
21 rule, even though he failed to conduct an audit within one year after receiving a
22 royalty statement. *Id.* at 918-919 (citations omitted). The Court of Appeal
23 explained further that “where, under the circumstances, a prudent man would not be
24 put on inquiry, the mere fact that means of knowledge are open and not availed of
25 does not operate to give constructive notice of the facts.” *Id.* at 919 (internal

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27 ¹³ Cal. Civ. Proc. Code §§ 338(a) and (d); *Yumul v. Smart Balance, Inc.*, 733 F.
28 Supp. 2d 1117, 1130-1134 (C.D. Cal. 2010) (FAL claim); *Creditors Collection Serv.*
v. Castaldi, 38 Cal. App. 4th 1039, 1043-44 (1995) (money had and received claim).

1 citations omitted). Thus, “a defendant cannot hinder the plaintiff’s discovery
2 through misrepresentations and then fault the plaintiff for failing to investigate.” *Id.*
3 (citing *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1039 (9th Cir. 2003)).¹⁴

4 The discovery rule not only applies to Plaintiffs’ state law claims, but should
5 also apply to Plaintiffs’ Declaratory Judgment Act claims as well. In *Welles v.*
6 *Turner Entm’t Co.*, 503 F.3d 728 (9th Cir. 2007), a case cited by Defendants, the
7 daughter of Orson Welles sought a declaratory judgment that she owned the
8 copyright and home video rights to *Citizen Kane*. The Ninth Circuit reversed the
9 district court’s decision that her claim was time-barred by the Copyright Act’s three-
10 year statute of limitations, holding that under the discovery rule, the period did not
11 begin to run until the defendants notified her that they repudiated her copyright
12 ownership. *Id.* at 734.

13 This Court has also acknowledged the applicability of the delayed discovery
14 rule when the complaint is grounded in allegations of public misrepresentations.
15 See *Henderson v. J.M. Smucker Co.*, Case No. CV 10-4524-GHK (VBKx), 2011
16 U.S. Dist. LEXIS 27953, at *2 (C.D. Cal. Mar. 17, 2011) (applying delayed
17 discovery rule in consumer class action and denying defendant’s statute of
18 limitations challenges to plaintiff’s UCL and FAL claims). See also *Broberg*, 171
19 Cal. App. 4th at 920-921 (discovery rule applied to unfair competition claim; “time
20 to file a section 17200 cause of action starts to run only when a reasonable person
21 would have discovered the factual basis for the claim”).

22 The delayed discovery rule undoubtedly applies in this case. Plaintiffs were
23 not only unaware that Defendants did not own a copyright to the Song, they were
24 misled by Defendants’ affirmative misrepresentations that they did. SAC ¶¶ 10-13,

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26 ¹⁴ “The recipient of a fraudulent misrepresentation of fact is justified in relying
27 upon its truth, although he might have ascertained the falsity of the representation
28 had he undertaken an investigation.” *El Pollo Loco*, 316 F.3d at 1040 (internal
quotations omitted).

1 113-134, 149-156, 184, 188, 194, 199, 200. Plaintiff’s lack of knowledge was
2 reasonable under the circumstances, given the complex history surrounding these
3 claims, as demonstrated by the highly particularized facts alleged in the SAC. SAC
4 ¶¶4, 6, 175, 178-181, 183-184, 188, 191, 199-200. Defendants’ false assertion of
5 copyright ownership and the Song’s byzantine history easily excuse the fact that
6 Plaintiffs did not know the truth about the lack of any copyright, and should
7 therefore preclude a strict application of any three-year statute of limitations. To
8 this day, no one who has not spent hundreds of hours researching arcane documents
9 would know there is no copyright to the Song (unless he read the SAC). Moreover,
10 Defendants’ undeniably superior knowledge and financial and bargaining position
11 also weigh heavily in favor of tolling any three-year statute of limitations on
12 Plaintiffs’ claims. *See El Pollo Loco*, 316 F.3d at 1039 (defendant has been in a far
13 superior position to comprehend the act and the injury) (citations omitted).

14 **3. Plaintiffs’ Class Allegations Should Not Be Stricken or** 15 **Limited**

16 For all the reasons discussed above, Defendants’ motion to strike or limit
17 Plaintiffs’ class allegations under Rule 12(f) (Fed. R. Civ. P. 12(f) – *i.e.*, to shorten
18 Plaintiffs’ proposed Class Period from four years to three years – is without merit.
19 The motion is also premature. As this Court has noted, “[t]he permissible scope of
20 the class, if any, is a question best addressed through a motion for class
21 certification.” *Henderson*, 2011 U.S. Dist. LEXIS 27953, at *2 (denying motion to
22 dismiss and/or strike concerning class allegations). Cases cited by Defendants
23 concur with the Court’s holding in *Henderson*. *See Shabaz v. Polo Ralph Lauren*
24 *Corp.*, 586 F. Supp. 2d 1205, 1209, 1211 (C.D. Cal. 2008) (denying motion to strike
25 since class allegations “would be better dealt with at a fully briefed class
26 certification hearing”); *Campbell v. PricewaterhouseCoopers*, No. CIV. S-06-2376
27 LKK/GGH, 2008 U.S. Dist. LEXIS 75756, at *14 (E.D. Cal. Aug. 14, 2008)
28 (denying motion to strike, “leaving an assessment of the sufficiency of the

1 allegations for adjudication on the merits”).

2 For this additional reason, the Court should deny Defendants’ motion to strike
3 or limit Plaintiffs’ class allegations.

4 **E. Plaintiffs Should be Given Leave to Amend**

5 The Court should deny Defendants’ motion to dismiss or strike in its entirety.
6 However, if the Court finds any deficiency in the SAC that warrants dismissal,
7 Plaintiffs respectfully request leave to amend to cure such deficiencies. To facilitate
8 decisions on the merits rather than on pleading technicalities, leave to amend is to be
9 freely given unless the complaint cannot possibly be cured by the amendment.
10 *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987).

11 **IV. CONCLUSION**

12 Based on the foregoing, Plaintiffs respectfully request that the Court deny
13 Defendants’ Motion to Dismiss and allow this important action to proceed on the
14 merits.

15 Dated: September 9, 2013

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP

17 By: /s/Betsy C. Manifold

18 BETSY C. MANIFOLD

19 FRANCIS M. GREGOREK

20 gregorek@whafh.com

21 BETSY C. MANIFOLD

22 manifold@whafh.com

23 RACHELE R. RICKERT

rickert@whafh.com

24 MARISA C. LIVESAY

livesay@whafh.com

25 750 B Street, Suite 2770

26 San Diego, CA 92101

Telephone: 619/239-4599

27 Facsimile: 619/234-4599

28 WOLF HALDENSTEIN ADLER

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FREEMAN & HERZ LLP
MARK C. RIFKIN
rifkin@whafh.com
JANINE POLLACK
pollack@whafh.com
BETH A. LANDES
landes@whafh.com
GITI BAGHBAN (284037)
baghban@whafh.com
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212-545-4753

Interim Lead Class Counsel for Plaintiffs and
the Proposed Class

RANDALL S. NEWMAN PC
RANDALL S. NEWMAN (190547)
rsn@randallnewman.net
37 Wall Street, Penthouse D
New York, NY 10005
Telephone: 212/797-3737
Facsimile: 212/797-3172

HUNT ORTMANN PALFFY NIEVES
DARLING & MAH, INC.
KATHERINE J. ODENBREIT (184619)
odenbreit@huntortmann.com
TINA B. NIEVES (134384)
tina@nieves-law.com
301 North Lake Avenue, 7th Floor
Pasadena, CA 91101
Telephone 626/440-5200
Facsimile 626/796-0107

DONAHUE GALLAGHER WOODS LLP
DANIEL J. SCHACHT
WILLIAM R. HILL (114954)

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27
28

rock@donahue.com
ANDREW S. MACKAY (197074)
andrew@donahue.com
DANIEL J. SCHACHT (259717)
daniel@donahue.com
1999 Harrison Street, 25th Floor
Oakland, CA 94612-3520
Telephone: 510/451-0544
Facsimile: 510/832-1486

GLANCY BINKOW & GOLDBERG, LLP
LIONEL Z. GLANCY
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/201-9150
Facsimile: 310/201-9160
info@glancylaw.com
Attorneys for Plaintiffs

WARNER/CHAPPELL:20202