

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMANDA LEWIS,

Plaintiff,

v.

ACTIVISION BLIZZARD, INC., et
al.,

Defendants.

No. C 12-1096 CW

ORDER ON MOTION TO
DISMISS SECOND AND
THIRD CLAIMS FOR
RELIEF

Plaintiff Amanda Lewis filed this action against Defendants Activision Blizzard, Inc. and Blizzard Entertainment, Inc. (collectively, Blizzard) alleging claims under federal copyright law and state law. Blizzard filed the instant motion to dismiss Lewis's state law claims for commercial misappropriation of voice pursuant to section 3344 of the California Civil Code and for quantum meruit. Lewis opposes the motion, which is submitted on the papers.

BACKGROUND

Lewis worked for Blizzard as a "Game Master" for World of Warcraft (WoW), a multiplayer online role-playing game developed and owned by Blizzard. Compl. ¶¶ 2, 13, 16. Lewis was employed in a customer-service position responsible for in-game issues such as abusive language or players becoming unable to move in the game. Compl. ¶ 16.

While Lewis was employed by Blizzard, she responded to an email requesting voices for game creatures. Compl. ¶ 17. Blizzard recorded Lewis's voice and an original song that she

1 allegedly developed, and applied her vocal work to WoW creatures
2 called baby murlocs, which are virtual pets. Compl. ¶ 17, 21.
3 Lewis alleges that, since at least November 2005, baby murloc pets
4 employing her voice and derivatives thereof have been awarded to
5 attendees of BlizzCon and other WoW-related events such as arena
6 tournaments. Compl. ¶ 20. Blizzard also sells plush versions of
7 baby murlocs through its online store. Compl. ¶ 20.

8 Lewis has filed applications for copyright registration for
9 her work in baby murloc expressions and the baby murloc song,
10 which she alleges have been incorporated into WoW without her
11 permission. Compl. ¶ 21; Defs' RJN Exs. 1, 2.¹ Lewis alleges
12 that she was not employed by Blizzard to produce creative content,
13 did not receive additional compensation for her creative work, and
14 did not assign any rights in copyright to Blizzard. Compl. ¶ 21.

15 Lewis filed this action against Blizzard on March 5, 2012,
16 alleging the following claims for relief: copyright infringement
17 pursuant to 17 U.S.C. § 501, unauthorized use of voice in
18 violation of California Civil Code section 3344, and quantum
19 meruit. On April 26, 2012, Blizzard filed the instant motion to
20 dismiss pursuant to Rule 12(b)(6), seeking dismissal of the claims
21 under state law. The matter is fully briefed and submitted.

22 LEGAL STANDARD

23 A complaint must contain a "short and plain statement of the
24 claim showing that the pleader is entitled to relief." Fed. R.

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26 ¹ Pursuant to Federal Rule of Evidence 201, the Court takes
27 judicial notice of Lewis's applications for copyright registration
28 which are matters of public record and the subject of allegations
in the complaint. See Compl. ¶ 21.

1 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
2 state a claim, dismissal is appropriate only when the complaint
3 does not give the defendant fair notice of a legally cognizable
4 claim and the grounds on which it rests. Bell Atl. Corp. v.
5 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
6 complaint is sufficient to state a claim, the court will take all
7 material allegations as true and construe them in the light most
8 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
9 896, 898 (9th Cir. 1986). However, this principle is inapplicable
10 to legal conclusions; "threadbare recitals of the elements of a
11 cause of action, supported by mere conclusory statements," are not
12 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
13 (citing Twombly, 550 U.S. at 555).

14 When granting a motion to dismiss, the court is generally
15 required to grant the plaintiff leave to amend, even if no request
16 to amend the pleading was made, unless amendment would be futile.
17 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
18 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
19 amendment would be futile, the court examines whether the
20 complaint could be amended to cure the defect requiring dismissal
21 "without contradicting any of the allegations of [the] original
22 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
23 Cir. 1990).

24 Although the court is generally confined to consideration of
25 the allegations in the pleadings, when the complaint is
26 accompanied by attached documents, such documents are deemed part
27 of the complaint and may be considered in evaluating the merits of
28

1 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
2 1265, 1267 (9th Cir. 1987).

3 DISCUSSION

4 I. Preemption

5 Blizzard contends that Lewis's claims for commercial misuse
6 of her voice (or right to publicity) and quantum meruit are
7 preempted by the Copyright Act, 17 U.S.C. § 301. Two conditions
8 must be satisfied to apply the preemption provision of the
9 Copyright Act to state law claims: (1) "the content of the
10 protected right must fall within the subject matter of copyright
11 as described in 17 U.S.C. §§ 102 and 103" and (2) "the right
12 asserted under state law must be equivalent to the exclusive
13 rights contained in section 106 of the Copyright Act.'" Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1150 (9th
14 Cir. 2008) (quoting Downing & Abercrombie & Fitch, 265 F.3d 994,
15 1003 (9th Cir. 2001)).

17 Lewis does not dispute that the recordings at issue fall
18 within the subject matter of copyright and satisfy the first prong
19 of the preemption test. Opp. at 5. As to the second prong of the
20 preemption test, Lewis's claims, as currently plead, assert rights
21 equivalent to those protected within the general scope of
22 copyright and are therefore preempted.

23 The "equivalent rights" prong of the test requires a court to
24 consider whether the state claim asserts rights within the general
25 scope of copyright as specified by section 106 of the Copyright
26 Act.

27 Section 106 provides a copyright owner with the
28 exclusive rights of reproduction, preparation of
derivative works, distribution, and display. To

1 survive preemption, the state cause of action must
2 protect rights which are qualitatively different
3 from the copyright rights. The state claim must
4 have an extra element which changes the nature of
5 the action.

6 Laws, 448 F.3d 1134, 1143 (9th Cir. 2006) (quoting Del Madera
7 Props. v. Rhodes & Gardner, 820 F.2d 973 (9th Cir. 1987)).

8 In Laws, the court held that the Copyright Act preempted a
9 claim under the commercial misappropriation statute, Cal. Civil
10 Code § 3344, based on an allegedly unauthorized publication of a
11 musical recording. There, the plaintiff, Debra Laws, recorded the
12 1981 song "Very Special," which was sampled in a song, "All I
13 Have," performed by Jennifer Lopez in 2002 and produced by Sony
14 Music Entertainment, Inc. Laws brought claims for invasion of
15 privacy and for misappropriation under section 3344 against Sony,
16 which argued that the claims were preempted by the Copyright Act.
17 The court noted that the Copyright Act extends protection to
18 "original works or authorship fixed in any tangible medium of
19 expression from which they can be reproduced," and that a work is
20 "fixed" in a tangible medium "when its embodiment in a copy or
21 phono record, by or under the authority of the author, is
22 sufficiently permanent or stable to permit it to be perceived,
23 reproduced, or otherwise communicated for a period of more than
24 transitory duration." Laws, 448 F.3d at 1139 (quoting 17 U.S.C.
25 § 101).

26 Distinguishing Ninth Circuit decisions holding that claims
27 concerning imitation of a voice were not preempted, the court in
28 Laws noted that Sony did not imitate the plaintiff's voice or
singing style but used the recording of her vocal performance.
Id. at 1140-41. In Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1100

1 (9th Cir. 1992), by contrast, the court held that the right of
2 publicity claim was not preempted because the defendants imitated
3 the artist's voice rather than using a "copyrightable subject such
4 as a sound recording or musical composition." Similarly, in
5 Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988), the
6 court held that copyright law did not preempt Bette Midler's
7 misappropriation claim for imitating her voice for advertising
8 purposes because a "voice is not copyrightable." Unlike the
9 claims for voice misappropriation in Waits and Midler, the
10 plaintiff in Laws asserted a misappropriation claim based on
11 Sony's unauthorized use of a sound recording of her vocal
12 performance, which was therefore preempted by copyright law.
13 Laws, 448 F.3d at 1140-41. The court in Laws rejected the
14 plaintiff's argument that her right to publicity claim was not
15 preempted because she alleged unauthorized duplication of her
16 vocal performance, and held that copyright law preempted a voice
17 misappropriation claim "when the entirety of the allegedly
18 misappropriated vocal performance is contained within a
19 copyrighted medium." Id. at 1141. The court in Laws reasoned,
20 "Sony did not use Laws's image, name, or the voice recording in
21 any promotional materials. Her state tort action challenges
22 control of the artistic work itself and could hardly be more
23 closely related to the subject matter of the Copyright Act." Id.
24 at 1142.

25 Like Laws's, Lewis's claim for commercial misuse of her
26 voice, pursuant to Civil Code section 3344, is based entirely on
27 the alleged use of recordings of her voice or vocal performance.
28 Section 3344 protects the right of publicity against "[a]ny person

1 who knowingly uses another's name, voice, signature, photograph,
2 or likeness . . . on or in products, merchandise, or goods, or for
3 purposes of advertising or selling, . . . without such person's
4 prior consent." Cal. Civ. Code § 3344. Here, Lewis does not
5 allege that Blizzard used or imitated any aspect of her voice that
6 was not contained in the recordings. See Compl. ¶ 21 ("Blizzard
7 has and continues to use, leverage and profit from Ms. Lewis'
8 Copyrighted Works without permission."). As the court held in
9 Laws, "[a]lthough California law recognizes an assertable interest
10 in the publicity associated with one's voice, we think it is clear
11 that federal copyright law preempts a claim alleging
12 misappropriation of one's voice when the entirety of the allegedly
13 misappropriated vocal performance is contained within a
14 copyrighted medium." 448 F.3d at 1141. See also Jules Jordan
15 Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146, 1153 (9th Cir.
16 2010) (concluding that right of publicity claim was preempted and
17 remanding for entry of judgment for the plaintiff on copyright
18 claim, which was affirmed on subsequent appeal, 468 Fed. Appx. 676
19 (9th Cir.), cert. denied, 81 U.S.L.W. 3030 (Oct. 1, 2012)); No
20 Doubt v. Activision Publishing, Inc., 702 F. Supp. 2d 1139, 1145
21 (C.D. Cal. 2010) (holding that name, physical likeness and persona
22 are not copyrightable, but noting that "if Plaintiff were suing on
23 the basis of Defendant's misuse of Plaintiff's songs or videotaped
24 musical performance, its claims would be preempted by the
25 Copyright Act."). Because Lewis alleges unauthorized use of her
26 voice recordings, federal copyright law preempts her claim for
27 commercial misappropriation.
28

1 Similarly, Lewis's claim for quantum meruit recovery is based
2 entirely on seeking compensation for Blizzard's alleged use of her
3 voice recordings. See Compl. ¶ 41 ("While Ms. Lewis permitted
4 defendants to record her voice, she did not give authorization to
5 use her voice and creative content and variations thereof for
6 World of Warcraft or for the promotion of World of Warcraft.").
7 Under California law, "[q]uantum meruit refers to the well-
8 established principle that 'the law implies a promise to pay for
9 services performed under circumstances disclosing that they were
10 not gratuitously rendered.'" Huskinson & Brown, LLP v. Wolf, 32
11 Cal. 4th 453, 458 (2004) (quoting Long v. Rumsey, 12 Cal.2d 334,
12 342 (1938)). Lewis alleges that she has applied for copyright
13 registration of her baby murloc vocal expressions and baby murloc
14 song, recorded when she was employed by Blizzard. Compl. ¶ 21.
15 Thus, her quantum meruit claim seeking "compensation for the use
16 and benefit defendants have obtained from the uncompensated use of
17 her voice and creative content" contained in these recordings
18 asserts rights that are equivalent to Lewis's rights under
19 copyright law, and is also preempted.

20 In her opposition, Lewis does not address the key question
21 whether her claims are limited to her rights in works fixed in a
22 tangible medium of expression, i.e., the recordings, but argues
23 that her state law claims should proceed in the alternative in the
24 event that Blizzard prevails against her copyright claim. Opp. at
25 6. Under section 301, however, all state law causes of action
26 falling within the scope of the federal Copyright Act are subject
27 to preemption. Laws, 448 F.3d at 1137. Thus, a state law claim
28 that is preempted by copyright law may not be plead under the

1 guise of an alternative or inconsistent theory of recovery.

2 "Whether a claim is preempted under Section 301 does not turn on
3 what rights the alleged infringer possesses, but on whether the
4 rights asserted by the plaintiff are equivalent to any of the
5 exclusive rights within the general scope of the copyright."

6 Jules Jordan Video, 617 F.3d at 1154-55.

7 As currently plead, Lewis's claims for commercial misuse of
8 voice and quantum meruit are based wholly on Blizzard's use of her
9 voice recordings and are therefore dismissed as preempted by
10 federal copyright law. Because amendment does not appear to be
11 futile, Lewis is granted leave to amend her state law claims only
12 to the extent that she can allege, subject to Rule 11, commercial
13 misuse of her "name, voice, signature, photograph, or likeness"
14 that is not fixed in a recording.

15 II. Statute of Limitations

16 Blizzard also seeks dismissal of Lewis's claims as time-
17 barred under the governing two-year statute of limitations. Mot.
18 at 10-11. Lewis does not dispute that the applicable limitations
19 period in California for commercial misappropriation under section
20 3344 and quantum meruit is two years. Opp. at 7. See Cusano v.
21 Klein, 264 F.3d 936, 950 (9th Cir. 2001) (citing Cal. Code Civ.
22 Proc. § 339(1)). Lewis further agrees that her claims under
23 California law are subject to the single-publication rule as
24 codified by Civil Code section 3425.3.² Opp. at 7. See Christoff
25 v. Nestle USA, Inc., 47 Cal. 4th 468, 476 (2009).

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27 _____
28 ² Section 3425.3 provides,

1 “The single-publication rule limits tort claims premised on
2 mass communications to a single cause of action that accrues upon
3 the first publication of the communication, thereby sparing the
4 courts from litigation of stale claims when an offending book or
5 magazine is resold years later.” Yeager v. Bowlin, 693 F.3d
6 1076, 1081 (9th Cir. 2012) (quoting Roberts v. McAfee, Inc., 660
7 F.3d 1156, 1166-67 (9th Cir. 2011)), petition for reh’g and reh’g
8 en banc filed Oct. 1, 2012. “In print and on the internet,
9 statements are generally considered ‘published’ when they are
10 first made available to the public.” Id. at 1081-82. “Under the
11 single-publication rule, the statute of limitations is reset when
12 a statement is republished. A statement in a printed publication
13 is republished when it is reprinted in something that is not part
14 of the same ‘single integrated publication.’” Id. at 1082
15 (quoting Christoff, 47 Cal. 4th at 477).

16 Plaintiff contends that WoW is not a single game or
17 publication, but a franchise of four separate, independently
18 playable games: the classic World of Warcraft, released November
19 2004; World of Warcraft: The Burning Crusade, released January
20 2007; World of Warcraft: Wrath of the Lich King, released November
21 2008; and World of Warcraft: Cataclysm, released December 2010.

22
23 No person shall have more than one cause of action
24 for damages for libel or slander or invasion of
25 privacy or any other tort founded upon any single
26 publication or exhibition or utterance, such as any
27 one issue of a newspaper or book or magazine or any
28 one presentation to an audience or any one broadcast
over radio or television or any one exhibition of a
motion picture. Recovery in any action shall include
all damages for any such tort suffered by the
plaintiff in all jurisdictions.

1 Opp. at 8. Blizzard responds that the subsequently released
2 expansion packs are part of a single WoW video game product,
3 subject to the single publication rule. Reply at 6. Plaintiff
4 does not include any allegations about the subsequent versions of
5 WoW or expansion packs in the complaint, which alleges only that
6 Blizzard has commercially used Lewis's voice recordings since at
7 least November 2005. Compl. ¶ 20. Furthermore, the complaint
8 does not allege that Lewis's voice was used in the later versions
9 of WoW. As currently plead, Lewis's state law claims for
10 commercial misappropriation are time-barred, as well as preempted
11 by copyright law.

12 Lewis contends that she is entitled to discovery to determine
13 whether Blizzard misappropriated her voice in later versions or
14 editions of the WoW game, in order to prevent application of the
15 single publication rule from barring her claims. Opp. at 8-9.
16 Lewis cites Christoff, where the state supreme court remanded the
17 plaintiff's claim for unauthorized commercial use of his likeness
18 on coffee jar labels to develop evidence on the question whether
19 the labels produced over a period of years constituted a single
20 integrated publication. 47 Cal. 4th at 482. The court in
21 Christoff held that the applicability of the single publication
22 rule could not be determined "without the benefit of a sufficient
23 factual record that reveals the manner in which the labels were
24 produced and distributed, including when production of the labels
25 began and ceased." 47 Cal. 4th at 482.

26 The question whether the expansion packs constitute separate
27 publications, rather than a single publication, cannot be
28 determined on the current state of the pleadings and it appears to

1 present factual issues that are not appropriate for review under
2 Rule 12(b)(6). Furthermore, the parties do not cite authority
3 applying the single publication rule to software and expansion
4 packs or new versions of software. The Court notes, however, that
5 in the context of internet publications, the Ninth Circuit has
6 recently articulated that, under California law, a statement on a
7 website is not republished unless the statement itself is
8 substantively altered or added to, or the website is directed to a
9 new audience. Yeager, 693 F.3d at 1082. The Court also notes
10 that the fact that the classic WoW and the expansion packs were
11 released over a period of six years suggests that the different
12 software releases should be deemed separate publications. See
13 Tiwari v. NBC Universal, Inc., 2011 WL 5079505, *13 (citing
14 Christoff, 47 Cal. 4th at 486 (Werdegar, J., concurring)
15 (expressing doubt that a "five-year course of printing and
16 distributing labels may be deemed a single publication simply
17 because the labels were not substantially altered during that
18 time")), order clarified, 2011 WL 5903859 (N.D. Cal.).

19 Lewis also argues that the statute of limitations is tolled
20 by Blizzard's fraudulent concealment in misleading her about the
21 existence of an agreement assigning her rights in the recordings.
22 Opp. at 9. Under California law, however, the single publication
23 rule triggers the limitations period immediately upon the
24 publication's initial distribution to the public. See Cole v.
25 Patricia A. Meyer & Associates, APC, 206 Cal. App. 4th 1095, 1121
26 n.8 (citation omitted), reh'g denied (June 26, 2012), review
27 denied (Aug. 29, 2012). The single publication rule applies
28 "regardless of when the plaintiff secured a copy or became aware

1 of the publication," and is not, therefore, tolled by the
2 discovery rule. Shively v. Bozanich, 31 Cal. 4th 1230, 1245-46
3 (2003). Lewis cites no authority under California law applying
4 the doctrine of fraudulent concealment to commercial
5 misappropriation claims. Moreover, the complaint does not allege
6 fraudulent concealment by Defendants before the statute of
7 limitations ran. The Court therefore declines to apply that
8 equitable tolling doctrine here.

9 Under the guidance of Yeager and Christoff, the Court
10 dismisses the state law claims as time-barred and grants Lewis
11 leave to amend the complaint to allege facts that would support a
12 claim of commercial misappropriation in later releases of WoW
13 which republished the game and triggered a new limitations period.
14 To avoid futility of amendment, leave to amend on the issue of
15 timeliness is granted only if the state law claims are amended to
16 assert rights that are not equivalent to rights protected by
17 copyright law, as discussed in section I, above.

18 CONCLUSION

19 For the foregoing reasons, Blizzard's Motion to Dismiss the
20 Second and Third Claims for Relief is GRANTED WITH LEAVE TO AMEND.
21 (Docket No. 14.) Plaintiff may file an amended complaint within
22 twenty-one days of the date of this order. Blizzard must file an
23 answer or otherwise respond to the amended complaint twenty-one
24 days thereafter.

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1 The initial case management conference will be held on
2 December 19, 2012. The parties must file a revised joint case
3 management statement by December 12, 2012.

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5 IT IS SO ORDERED.

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7 Dated: 10/22/2012


8 CLAUDIA WILKEN
9 United States District Judge
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