

APPENDIX A

20-3113

Genius Media Group Inc. v. Google LLC

**UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of March, two thousand twenty-two.

Present:

2a

DEBRA ANN LIVINGSTON,
Chief Judge,
REENA RAGGI,
Circuit Judge,
ERIC VITALIANO,
*District Judge.**

ML GENIUS HOLDINGS LLC, **

Plaintiff-Appellant,

v.

20-3113

GOOGLE LLC, LYRICFIND,

Defendants-Appellees.

For Plaintiff-Appellant: Marion R. Harris (Ilene S.
Farkas, *on the brief*),
PRYOR CASHMAN LLP,
New York, NY.

For Defendants-Appellees: Brian M. Willen (Jason
Mollick, *on the brief*),
WILSON SONSINI GOODRICH

* Judge Vitaliano, of the United States District Court for the
Eastern District of New York, sitting by designation.

** The Clerk of the Court is directed to amend the caption as
set forth above.

3a

& ROSATI, P.C., New York,
NY *for* Google LLC.

Kenneth D. Freundlich
(Michael J. Kaiser, *on the*
brief) FREUNDLICH LAW,
Encino, CA *for* LyricFind,
Inc.

Appeal from a judgment of the United States
District Court for the Eastern District of New York
(Margo Brodie, *C.J.*).

**UPON DUE CONSIDERATION, IT IS
HEREBY ORDERED, ADJUDGED, AND
DECREED** that the judgment of the district court is
AFFIRMED.

Plaintiff-Appellant ML Genius Holdings LLC
("Genius") appeals from an August 13, 2020 district
court judgment dismissing its complaint against
Defendants-Appellees Google LLC ("Google") and
LyricFind, Inc. ("LyricFind," and together with
Google, "Defendants") as preempted by the Copyright
Act, 17 U.S.C. § 301. *See Genius Media Grp. Inc. v.*
Google LLC, No. 19-CV-7279 (MKB), 2020 WL
5553639 (E.D.N.Y. Aug. 10, 2020). On appeal, Genius
argues that the district court erred by concluding that

its breach of contract and unfair competition claims are statutorily preempted.¹ We disagree, so we affirm.

Genius is an internet platform on which music fans transcribe song lyrics. Genius allegedly discovered that LyricFind was copying its transcriptions and licensing them to Google, which displayed the copied transcriptions in response to user searches, thereby depriving Genius of web traffic. Genius therefore sued Defendants in New York state court. Defendants removed the case to federal court, and Genius moved to remand. Concluding that Genius's claims are preempted by the Copyright Act, the district court denied remand and dismissed the case for failure to state a claim. *See id.* at *17. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we reference only as necessary to explain our decision.

* * *

“[O]nce a district court determines that a state law claim has been completely preempted [by the Copyright Act] and thereby assumes jurisdiction over it, the court must then dismiss the claim for failing to state a cause of action.” *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 309 (2d Cir.

¹ The district court also dismissed Genius's unjust enrichment and indemnification claims. Genius has abandoned those claims on appeal.

2004).² “We review *de novo* the grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *IWA Forest Indus. Pension Plan v. Textron Inc.*, 14 F.4th 141, 145 (2d Cir. 2021); *see also Seng-Tiong Ho v. Taflove*, 648 F.3d 489, 500 (7th Cir. 2011) (“We review *de novo* whether the Copyright Act preempts any of the plaintiffs’ state law claims.”).

Section 301 of the Copyright Act states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a). We have referred to preemption under § 301 as “statutory preemption.” *See Jackson v.*

² Unless otherwise indicated, we omit all internal citations, quotation marks, alterations, emphases, and footnotes from citations.

Roberts (In re Jackson), 972 F.3d 25, 42 (2d Cir. 2020). “Our court has interpreted the statute as directing a two-part analysis for determining whether a state law claim is preempted under § 301.” *Id.* We evaluate each prong in turn.

I. Subject Matter Prong

A. Applicable Law

The first prong of the statutory preemption inquiry, which we have called the “subject matter” requirement, “looks at the work that would be affected by the plaintiff’s exercise of a state-created right, and requires (as an essential element of preemption) that the work ‘come within the subject matter of copyright as specified by sections 102 and 103.’” *Id.* at 42 (quoting 17 U.S.C. § 301(a)). “[I]f the work against which the plaintiff claims rights is a ‘literary work,’ a ‘musical work,’ a ‘sound recording,’ or any other category of ‘work of authorship’ within the ‘subject matter of copyright’ (even if the subject of the claim is for some reason ineligible for copyright protection) the plaintiff’s claim is subject to the possibility of statutory preemption.” *Id.* at 42–43 (quoting 17 U.S.C. § 102(a)). In analyzing this prong, we focus on “the gravamen of the claim and the allegations supporting it.” *Id.* at 47.

“The scope of copyright for preemption purposes ... extends beyond the scope of available copyright protection.” *Forest Park v. Universal TV Network, Inc.*, 683 F.3d 424, 429–30 (2d Cir. 2012). “The reason for our broad interpretation of the scope of copyright preemption is that Congress, in enacting section 301,

created a regime in which some types of works are copyrightable and others fall into the public domain.” *Id.* at 430. “Section 301’s preemption scheme functions properly only if the ‘subject matter of copyright’ includes all works of a *type* covered by sections 102 and 103, even if federal law does not afford protection to them.” *Id.*

B. Application

Genius’s claims satisfy the subject matter requirement. The subject matter of Genius’s claims is its lyrics transcriptions. And “[s]ong lyrics enjoy independent copyright protection as ‘literary works.’” *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996); *see also* 17 U.S.C. § 102(a)(2) (“[M]usical works, including any accompanying words” are copyrightable.); 1 *Nimmer on Copyright* § 2.05[C] (2021) (“[T]he copyright in a ‘musical work’ protects against unauthorized use of the music alone or of the words alone, or of a combination of music and words.”).

Genius argues that its claims do not satisfy the subject matter requirement because its “transcriptions are ... not copyrightable.” Appellant’s Br. 26. According to Genius, its transcriptions “lack the requisite originality necessary to constitute ‘works of authorship’ that qualify for copyright protection.” *Id.*

Whatever the merits of this argument, it does not defeat preemption. We have squarely held that section 301 “prevents the States from protecting [a work] even if it fails to achieve Federal statutory

copyright because it is too minimal or lacking in originality to qualify.” *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 919 n.15 (2d Cir. 1980); *see also Jackson*, 972 F.3d at 42; *Fin. Info., Inc. v. Moody’s Invs. Serv., Inc.*, 808 F.2d 204, 209 (2d Cir. 1986); *Mourabit v. Klein*, 816 F. App’x 574, 578 (2d Cir. 2020) (“As has often been observed, ‘the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.’” (quoting 1 *Nimmer on Copyright* § 1.16[A] (2019))).

Genius also contends that what it “seeks to protect by way of this action is its investment in time, labor, systems and resources that go into the process of making lyrics transcriptions available to the public, the fruits of which have been misappropriated by Defendants in bad faith.” Appellant’s Br. 24. But the allegations in Genius’s complaint belie that argument. In its complaint, Genius repeatedly alleges that Defendants “misappropriat[ed] *content* from Genius’s website,” App’x 15, 37, 47, 53-55, 57, 59-61, not a “process” or “system.” Thus, the subject matter of Genius’s claims is the content that appears on Genius’s website—the lyrics transcriptions—because those are “the work[s] against which [it] claims rights.” *Jackson*, 972 F.3d at 42.

II. General Scope Requirement

A. Applicable Law

“The second prong” of the statutory preemption test, which we have called the “equivalence” or “general scope” requirement, “looks at the right being asserted (over a work that comes within the ‘subject

matter of copyright’) and requires (for preemption to apply) that the right be ‘equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.’” *Id.* at 43 (quoting 17 U.S.C. § 301(a)). Section 106 of the Copyright Act “defines the ‘exclusive rights’ granted by the federal copyright law, which consist of the rights ‘to do and to authorize’ the reproduction, distribution, performance, and display of a work, and the creation of derivative works based on a work.” *Id.* (quoting 17 U.S.C. § 106). “The general scope requirement is satisfied only when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law.” *Briarpatch*, 373 F.3d at 305. For preemption to apply, “the state law claim must involve acts of reproduction, adaptation, performance, distribution or display.” *Id.*

Even if a claim otherwise satisfies the general scope requirement, a claim is not preempted if it “include[s] any extra elements that make it qualitatively different from a copyright infringement claim.” *Id.* at 305. But “not all ‘extra elements’ are sufficient to remove the claim from the ‘general scope’ of copyright.” *Jackson*, 972 F.3d at 43. “The critical inquiry is whether such extra elements of the state law claim beyond what is required for copyright infringement change the nature of the action so that it is *qualitatively* different from a copyright infringement claim.” *Id.* at 43–44. “To determine whether a claim is qualitatively different, we look at what the plaintiff seeks to protect, the theories in which the matter is thought to be protected and the

rights sought to be enforced.” *Briarpatch*, 373 F.3d at 306. The “extra element” inquiry is not “mechanical.” *Jackson*, 972 F.3d at 44 n.17. “While we have inquired into the existence of extra elements in determining whether preemption applies,” this inquiry “requires a holistic evaluation of the nature of the rights sought to be enforced, and a determination whether the state law action is qualitatively different from a copyright infringement claim.” *Id.*

“[W]e take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim.” *Briarpatch*, 373 F.3d at 306. “[E]lements such as awareness or intent” do not save a claim from preemption because they “alter the action’s scope but not its nature.” *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992). And “[i]f unauthorized publication is the gravamen of [the plaintiffs’] claim, then it is clear that the right they seek to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev’d on other grounds*, 471 U.S. 539 (1985).

B. Application

1. Breach of contract claims

Genius’s breach of contract claims satisfy the general scope requirement. Genius’s complaint alleges that Defendants “breache[d] Genius’s Terms of Service regarding the copying and reproduction of

Genius [c]ontent.” App’x 49, 52; *see also id.* at 49, 51 (alleging that Defendants breached a provision of Genius’s Terms of Service because they “accessed the Genius website to copy, modify, sell and/or distribute content appearing on Genius’s website”). These allegations show that the right Genius “seek[s] to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material.” *Harper & Row*, 723 F.2d at 201.³

Genius argues that its breach of contract claims escape preemption because those claims require it to plead “mutual assent and valid consideration” and “assert[] rights only against the contractual counterparty, not the public at large.” Appellant’s Br. 39 (citing *Forest Park*, 683 F.3d at 431). We disagree. Though Genius relies on our decision in *Forest Park*, we expressly declined to address there whether these elements sufficed to preclude preemption. 683 F.3d at 432. And they are not sufficient here to avoid preemption. *See 5 Nimmer on Copyright* § 19D.03[C][2][b] (suggesting that a contract that “does not purport to give the plaintiff any protection beyond that provided by copyright law itself” would be preempted) (quoted in *Universal Instruments Corp. v. Micro Sys. Eng’g, Inc.*, 924 F.3d 32, 49 (2d Cir. 2019), and *Forest Park*, 683 F.3d at 432); *see also Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446, 457–58 (6th Cir. 2001) (“If the promise

³ Indeed, Genius itself reproduces the lyrics only pursuant to a license obtained “from music publishers permitting the display and distribution of” the copyrighted lyrics. App’x 17.

[in a contract] amounts only to a promise to refrain from reproducing, performing, distributing or displaying the work, then the contract claim is preempted. The contrary result would clearly violate the rule that state law rights are preempted when they would be abridged by an act which in and of itself would infringe one of the exclusive rights of § 106.”).

Genius argues, in effect, for a *per se* rule that all breach of contract claims are exempt from preemption. But such a rule would be in tension with our precedent holding that the general scope inquiry is “holistic.” *Jackson*, 972 F.3d at 44 n.17; *see also Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp. 2d 419, 444 (S.D.N.Y. 2011) (opining that a “categorical rule that the extra element that saves a contract claim from preemption is the promise itself provides mere lip service” to our precedent holding that “preemption turns on ‘what the plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced’” (quoting *Altai*, 982 F.2d at 716)). Moreover, such a rule would be difficult to square with our precedent teaching that we should “take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim.” *Canal+*, 773 F. Supp. 2d at 444 (quoting *Briarpatch*, 373 F.3d at 306). To be sure, we do not hold that breach of contract claims concerning copyrighted material are *never* preempted. We hold only that, given the specific facts Genius pleaded in its complaint, its breach of contract claim is not

qualitatively different from a copyright claim and is therefore preempted.

2. Unfair Competition Claims

Nor has Genius alleged an extra element to qualitatively differentiate its unfair competition claims from a federal copyright claim. “The essence of an unfair competition claim under New York law is that the defendant has misappropriated the labors and expenditures of another with some element of bad faith.” *Universal Instruments*, 924 F.3d at 50–51; *see also Telecom Int’l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001) (“The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff’s labors and expenditures by obtaining access to plaintiff’s business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship.”). “[U]nfair competition and misappropriation claims grounded solely in the copying of a plaintiff’s protected expression are preempted by section 301.” *Altai*, 982 F.2d at 717; *see also Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 909 (2d Cir. 2011) (Raggi, J., concurring) (“[U]nfair competition, misappropriation, or unjust enrichment claims are preempted when based on alleged acts such as distribution or reproduction, despite required elements of intent, enrichment, or commercial immorality.”).

Genius’s unfair competition claim is preempted because it is based solely on the allegation that Defendants wrongfully copied and reproduced lyrics

from its website. Genius alleges that LyricFind “misappropriates [its] content” via “copying activities” and that it is Google’s “display” of lyrics and use of “content misappropriated from Genius’s website” that affords it “unfair economic and competitive advantages.” App’x 53–58. As with its breach of contract claims, “un-authorized publication is the gravamen” of Genius’s unfair competition claims, so that the “right [it] seek[s] to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material.” *Harper & Row*, 723 F.2d at 201.

Genius contends that its allegation of “bad faith” is an extra element that rescues its claim from statutory preemption. Genius principally relies on the Tenth Circuit’s decision in *SCO Group, Inc. v. International Business Machines Corp.*, which held that unfair competition claims are not preempted because such claims require a plaintiff to plead “bad faith.” 879 F.3d 1062, 1081 (10th Cir. 2018).

We are not persuaded. Our precedent forecloses any suggestion that unfair competition claims under New York law are categorically exempt from statutory preemption. *See, e.g., Altai*, 982 F.2d at 717. And a rule that the “bad faith” element of an unfair competition claim is itself sufficient to exempt all such claims from statutory preemption does not square with our “holistic” approach to statutory preemption. *Jackson*, 972 F.3d at 44 n.17. Indeed, “New York’s law of unfair competition is a broad and flexible doctrine.” *Telecom Int’l*, 280 F.3d at 197. As

with any other claim, whether an unfair competition claim is preempted depends on “what the plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced.” *Briarpatch*, 373 F.3d at 306. Thus, “unfair competition claims based upon breaches of confidential relationship, breach of fiduciary duty and trade secrets” are not preempted. *Altai*, 982 F.2d at 716. But when the alleged “bad faith” consists of “elements such as awareness or intent,” preemption applies. *Id.* at 716–17.

Genius also contends that its allegations that Defendants engaged in “fraud” and “deception” constitute an extra element. We disagree because Genius has not alleged that Defendants “misappropriated the fruit of [its] labors and expenditures ... *through* fraud or deception.” *Telecom Int’l*, 280 F.3d at 197 (emphasis added). Instead, Genius alleges that LyricFind accessed its lyrics transcriptions through Genius’s public website. Genius argues that it has alleged that Defendants “intentionally tried to conceal their misappropriation” after the fact. Appellant’s Br. 38. But that argument only underscores that Genius has not alleged that Defendants accomplished the alleged misappropriation “*through* fraud or deception.” *Telecom Int’l*, 280 F.3d at 197. Genius alleges that Defendants misappropriated its content *and then* engaged in deceptive behavior. That is inadequate to save its claim from preemption. At bottom, the “gravamen” of Genius’s claim is Defendants’ “unauthorized publication” of its lyrics transcriptions,

so Genius's unfair competition claims are preempted. *Harper & Row*, 723 F.2d at 201.

III. Hot News Exception

Finally, Genius's claims do not fall within the "hot news" exception to copyright preemption. See *International News Service v. Associated Press*, 248 U.S. 215 (1918) (establishing this exception). Hot news claims are

limited to cases where: (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

NBA v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997). We have "repeatedly emphasized the 'narrowness' of the 'hot news' tort exception from preemption." *Barclays*, 650 F.3d at 896 (majority opinion).

Genius's claims do not qualify for the hot news exception because it has not shown that its transcriptions constitute time-sensitive information. See *Fin. Info., Inc.*, 808 F.2d at 209 ("[I]mmediacy of distribution [is] necessary to sustain a 'hot' news

claim.”). We have held the hot news doctrine inapplicable when allegedly copied information was republished “at least ten days” after its original publication. *Id.* Genius alleges that Defendants copied their transcriptions eleven days after its original publication. *See* App’x 44–45. Genius argues that “[t]imeliness is a key feature of Genius’s business model.” Appellant’s Br. 33. But the issue is not whether Genius’s business model depends on timeliness; it is whether the allegedly misappropriated *information* is time-sensitive in nature. *See NBA*, 105 F.3d at 845. Because lyrics transcriptions are not, Genius’s claims do not fall within the hot news exception.

* * *

We have considered Genius’s remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O’Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O’Hagan Wolfe, Clerk
United States Court of Appeals,
Second Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GENIUS MEDIA GROUP INC.,

Plaintiff, **MEMORANDUM & ORDER**
 19-CV-7279 (MKB)

v.

GOOGLE LLC and LYRICFIND,

Defendants.

MARGO K. BRODIE, United States District Judge:

Plaintiff Genius Media Group Inc. commenced the above-captioned action on December 3, 2019 in the New York Supreme Court, Kings County, against Defendants Google LLC (“Google”) and LyricFind, Inc. (“LyricFind”). (Notice of Removal ¶ 1, Docket Entry No. 1.) On December 30, 2019, Defendants removed the action to the Eastern District of New York. (*Id.*) Plaintiff alleges that Defendants misappropriated lyric transcriptions from its website and then used that content for Defendants’ “own financial benefit and to [Plaintiff’s] financial detriment,” and asserts state law claims for breach of contract, indemnification, unfair competition under both New York common law and California statutory

law, and unjust enrichment. (Compl. ¶¶ 1-2, 111-209, annexed to Notice of Removal as Ex. A, Docket Entry No. 1.)

Plaintiff moves to remand the action to state court. (Pl. Mot. to Remand (“Pl. Mot.”), Docket Entry No. 15; Pl. Mem. in Supp. of Pl. Mot. (“Pl. Mem.”), Docket Entry No. 15-1.) Defendants oppose the motion. (Defs. Opp’n to Pl. Mot. (“Defs. Opp’n”), Docket Entry No. 16.) For the reasons set forth below, the Court denies Plaintiff’s motion and dismisses the Complaint for failure to state a claim.

I. Background

According to the allegations in the Complaint, Plaintiff is a “digital media company,” one of whose “primary services is the development and maintenance of...annotated music lyrics.” (Compl. ¶ 1.) LyricFind is a Canadian company that maintains a database of music lyrics. (*Id.* ¶¶ 8-9.) Both Plaintiff and LyricFind “license lyrics for display [and distribution] from music publishers.” (*Id.* ¶¶ 18-19.) Google “owns and operates...the internet’s dominant search platform.” (*Id.* ¶ 14.) Pursuant to an agreement between Defendants, “LyricFind provides lyrics to Google for use in...Google’s search results.” (*Id.* ¶ 12.)

a. Plaintiff’s services and business model

While music publishers “usually own the copyright in the lyrics for a given song,” companies like Plaintiff and LyricFind “do not typically receive any actual lyrics transcriptions in connection with

their licensing agreements,” (*id.* ¶ 18), and must otherwise generate or obtain the lyrics they have licensed for display, (*see id.* ¶ 19). Plaintiff “provides a platform” for an online community of “music enthusiasts who transcribe music lyrics.” (*Id.* ¶ 19.) The transcription process is “arduous,” and Plaintiff has “invested ten years and millions of dollars to build the technology and community that support[] collaborative lyrics transcription.” (*Id.* ¶ 20.) In addition to this collaborative transcription process, Plaintiff also “obtains lyrics...directly” from artists. (*Id.* ¶ 19.) Plaintiff “earns revenue in several ways,” including by “licens[ing] its database of high-quality lyrics” to “major companies, such as Apple,” and by “generat[ing] ad revenue through web traffic on its website and apps.” (*Id.* ¶ 22.)

All visitors to Plaintiff’s website are bound by terms and conditions (the “Terms of Service”), “which are accessible to users from all pages of [Plaintiff’s] website.” (*Id.* ¶ 24.) The Terms of Service prohibit, *inter alia*, the unauthorized “licens[ing],...copy[ing], modif[ication], s[ale],...[or] transm[ission] for any commercial purpose, [of] any portion of [Plaintiff’s] Service, or access to [Plaintiff’s] Service.”¹ (*Id.* ¶¶ 112,

¹ The Terms of Service provision regarding commercial use provides that:

Unless otherwise expressly authorized herein or by [Plaintiff’s] express written consent, you agree not to display, distribute, license, perform, publish, reproduce, duplicate, copy, create derivative works from, modify, sell, resell, exploit, transfer or transmit for any commercial purpose, any portion of the Service, or access to

115.) The Terms of Service also prohibit, *inter alia*, the unauthorized “modif[ication], copy[ing],...s[ale], [or] distribution” of Plaintiff’s content, other than a user’s own content that a user has “legally upload[ed]” to Plaintiff’s website.² (*Id.* ¶ 119.)

b. Google’s lyrics information boxes and Plaintiff’s suspicions of misconduct

Many visitors arrive at Plaintiff’s website via a search engine, “most typically Google’s,” and Plaintiff “is often the top-ranked organic search result on Google for lyrics search queries.” (*Id.* ¶¶ 23, 25.) However, even if Plaintiff is the top-ranked organic result for a user’s lyrics search, a Google search feature known as an “Information Box” may still appear “above all other organic search results,” displaying “the complete lyrics for the requested song.” (*Id.* ¶¶ 28-29.) Such lyrics Information Boxes

the Service. The Service is for your personal use and may not be used for direct commercial endeavors without the express written consent of [Plaintiff].

(Compl. ¶ 115.)

² The Terms of Service provides that:

Except as expressly authorized by [Plaintiff] in writing, you agree not to modify, copy, frame, scrape, rent, lease, loan, sell, distribute or create derivative works based on the Service of the [Plaintiff] Content, in whole or in part, except that the foregoing does not apply to your own User Content that you legally upload to the Service.

(Compl. ¶ 119.)

are often “displayed in such a manner that the user cannot see any other search results without first scrolling down,” (*id.* ¶ 30), and significantly reduce the “click-through rate” to Plaintiff’s website, (*id.* ¶¶ 101-02).

When Google introduced the Information Box feature into its lyrics search results, Plaintiff “observed that the lyrics in those Information Boxes were sometimes identical, on a character-for-character basis,” to lyrics on Plaintiff’s website. (*Id.* ¶¶ 46-47.) Because such a match “is highly unlikely” given the particular nature of the lyrics transcription process, Plaintiff came to suspect that its “lyrics...were being misappropriated.” (*Id.* ¶¶ 48-49.)

c. Plaintiff investigates suspected misconduct and puts Defendants on notice of its findings

In August of 2016, in an effort to further investigate this suspected misappropriation, Plaintiff created a “digital watermark to embed in certain lyrics appearing on its site” (“Watermark #1”). (*Id.* ¶ 59.) Watermark #1 consisted of a “distinctive pattern of curly...and straight apostrophes,” which, when converted into “dots” and “dashes,” “spells out ‘REDHANDED’ in Morse code.” (*Id.* ¶ 60.) In May of 2017, Plaintiff notified Google via email that it had found Watermark #1 in Google’s lyrics Information Boxes, “prov[ing] that Google was displaying lyrics copied from [Plaintiff’s] website.” (*Id.* ¶ 62.) In response to that initial email and subsequent follow-

up communications by Plaintiff, Google informed Plaintiff that it was “looking into the issue.” (*Id.* ¶¶ 62-63.)

In October of 2018, Plaintiff “designed [and implemented] an experiment to more systematically assess the incidence of lyrics misappropriated from [Plaintiff’s] website in Google’s lyrics Information Boxes,” based on which Plaintiff “concluded that the incidence of lyrics irrefutably copied from [Plaintiff’s] website in Google’s lyrics Information Boxes was widespread and that the copying was systematic.” (*Id.* ¶¶ 64, 67.)

In April of 2019, Plaintiff “again notified Google, in writing, that it was displaying content misappropriated from [Plaintiff’s] website,” in response to which Google eventually “identified LyricFind as the source of the lyrics [in] the examples that [Plaintiff] provided to Google.” (*Id.* ¶¶ 68, 70.) Plaintiff then “wrote to LyricFind to request that it cease and desist from the misappropriation and commercialization of content appearing on [Plaintiff’s] website.” (*Id.* ¶ 71.) Despite having been “placed on actual notice of their behavior,” Defendants failed to take “any steps to cease such conduct.” (*Id.* ¶ 72.)

On June 16, 2019, the *Wall Street Journal* published an article detailing Plaintiff’s allegations that Defendants had copied lyrics from Plaintiff’s website. (*Id.* ¶ 74.) On June 18, 2019, Google stated in a blog post that it had asked LyricFind “to investigate the issue to ensure [it is] following industry best

practices in [its] approach,” and affirmed Google’s commitment to “uphold high standards of conduct for [itself] and from the partners [it] work[s] with.” (*Id.* ¶ 77.)

Soon after the article’s publication, Google began adding source attributions to its lyrics Information Boxes, including attributions to LyricFind for lyrics that Plaintiff had previously notified Google appeared to be taken from Plaintiff’s website. (*Id.* ¶ 81.) Around the same time, Plaintiff “discovered that Watermark #1 had disappeared from Google’s lyrics Information Boxes.” (*Id.* ¶ 82.) Suspecting “a deliberate effort...to conceal [continued] misappropriation of lyrics from [Plaintiff’s] website,” Plaintiff created a second watermark, this time designed to spell out the word “GENIUS” in Morse code (“Watermark #2”). (*Id.* ¶¶ 83-84.) Plaintiff then watermarked one set of lyrics on its website with Watermark #1, a second group of lyrics with Watermark #2, and a third set of lyrics with both Watermark #1 and Watermark #2. (*Id.* ¶ 85.) In monitoring the three sets of lyrics, Plaintiff observed Watermark #2 on lyrics in both the second and third groups, but did not observe Watermark #1 on any lyrics in either the first or third group. (*Id.* ¶ 86.) In a number of instances involving lyrics in which Plaintiff had embedded both Watermark #1 and Watermark #2, Plaintiff observed that Watermark #2, “the details of which had not previously been made public,” was present, while Watermark #1 was not. (*Id.* ¶ 88.)

On November 6, 2019, Plaintiff informed Google of these findings, and “demanded that Google stop displaying lyrics misappropriated from [Plaintiff’s] website and address the issue.” (*Id.* ¶ 90.) In response, Google asserted it had not done anything wrong, and stated that it had “obtained additional assurances’ that their data partners ‘do not, and would not, obtain lyrics from [Plaintiff’s] website.” (*Id.* ¶ 91.)

d. State court action and removal to this Court

On December 3, 2019, Plaintiff commenced this action in the New York Supreme Court, Kings County, asserting claims for (1) breach of contract, based on Defendants’ alleged violation of Plaintiff’s Terms of Service, (*id.* ¶¶ 111-23, 128-40); (2) indemnification for “damages and incurred expenses...including...attorneys’ fees and lost advertising and licensing revenue,” pursuant to Plaintiff’s Terms of Service, (*id.* ¶¶ 124-27, 141-44); (3) unfair competition under both New York common law and California Business and Professional Code § 17200 *et seq.*, (*id.* ¶¶ 145-99); and (4) unjust enrichment, (*id.* ¶¶ 200-09). Plaintiff seeks money damages and injunctive relief. (*Id.* at 49.)

On December 30, 2019, Defendants removed the action to this Court. (Notice of Removal.) Defendants assert that the state law claims alleged in the Complaint all arise from “(i) the alleged copying of digital transcriptions of copyrighted musical lyrics from [Plaintiff’s] website by LyricFind, and (ii) the display of these copyrighted lyrics on Google’s

website,” and that “[t]hese are in essence claims for copyright infringement disguised as various state law causes of action.” (*Id.* ¶ 4.) Defendants further assert that “this Court has original jurisdiction [over the action] under 28 U.S.C. §§ 1331 and 1338,” and that the action “may be removed to this Court [by Defendants], pursuant to 28 U.S.C. § 1441 *et seq.*, because it is a civil action containing purported state law claims which are preempted by Section 301(a) of the Copyright Act, 17 U.S.C. § 301(a) and thus within the exclusive jurisdiction of this Court.” (*Id.* ¶ 8.)

On March 11, 2020, Plaintiff moved to remand the action to state court, arguing that Defendants have not established that the Court has jurisdiction over this action because Plaintiff’s claims are not preempted by the Copyright Act. (*See* Pl. Mot; Pl. Mem.)

II. Discussion

a. Standard of review

A notice of removal must allege a proper basis for removal under 28 U.S.C. §§ 1441-1445. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007) (“In determining whether jurisdiction is proper, we look only to the jurisdictional facts alleged in the Notices of Removal.”); *Bankhead v. New York*, No. 13-CV-3377, 2013 WL 6145776, at *1 (E.D.N.Y. Nov. 21, 2013) (“An effective petition for the removal of a state action to federal court must allege a proper basis for the removal under sections 1441 through 1445 of Title 28.” (quoting *Negron v. New York*,

No. 02-CV-1688, 2002 WL 1268001, at *1 (E.D.N.Y. Apr. 1, 2002))). The party seeking removal bears the burden of proving that the jurisdictional and procedural requirements have been met. *Cal. Pub. Emps.' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 100 (2d Cir. 2004) (“Where, as here, jurisdiction is asserted by a defendant in a removal petition, it follows that the defendant has the burden of establishing that removal is proper.”).

b. Plaintiff's claims are preempted by the Copyright Act

Defendants argue that “Plaintiff's claims are wholly premised on Defendants' alleged use of musical lyrics, which are expressly identified as falling among the ‘works of authorship’ protected by the Copyright Act.” (Defs. Opp'n 7-8.) Defendants also argue that of the two-part test to determine whether Plaintiff's claims are preempted by the Copyright Act — the subject-matter and the general scope requirements — “Genius concedes, as it must, that the subject matter requirement is satisfied here.” (*Id.* at 7.)

Plaintiff argues that “the creation, curation, and provision of timely and accurate music lyrics transcriptions...is not protected by the Copyright Act.” (Pl. Reply 2, Docket Entry No. 17.)

“The Copyright Act exclusively governs a claim when (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable

rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106.” *Universal Instruments Corp. v. Micro Sys. Eng’g, Inc.*, 924 F.3d 32, 48 (2d Cir. 2019) (citing *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004)). “The first prong of this test is called the ‘subject matter requirement,’ and the second prong is called the ‘general scope requirement.’” *Briarpatch Ltd., L.P.*, 373 F.3d at 305 (quoting *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir. 1997)).

“The subject matter requirement is satisfied if the claim applies to a work of authorship fixed in a tangible medium of expression and falling within the ambit of one of the categories of copyrightable works.” *Id.* (citing *Nat’l Basketball Ass’n*, 105 F.3d at 848-49). “A work need not consist entirely of copyrightable material in order to meet the subject matter requirement, but instead need only fit into one of the copyrightable categories in a broad sense.” *Id.* (citing *Nat’l Basketball Ass’n*, 105 F.3d at 848-50). “These categories encompass literary works and motion pictures, including those based on preexisting works.” *Id.* (citations omitted).

“The general scope requirement is satisfied only when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law.”³ *Briarpatch*

³ Section 106 of the Copyright Act establishes the exclusive rights held by a copyright right owner in copyrighted

Ltd., L.P., 373 F.3d at 305 (quoting *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992)); *Universal Instruments Corp.*, 924 F.3d at 48 (“A state law right is equivalent to one of the exclusive rights of copyright if it may be abridged by an act which, in and of itself, would infringe one of the exclusive rights.” (internal quotation marks omitted) (quoting *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 430 (2d Cir. 2012))). “In other words, the state law claim must involve acts of reproduction, adaptation, performance, distribution

works. *See* 17 U.S.C. § 106. Section 106 provides, in relevant part:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

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

Id.

or display.” *Briarpatch Ltd., L.P.*, 373 F.3d at 305 (first citing 17 U.S.C. § 106; and then citing *Comput. Assocs. Int’l Inc.*, 982 F.2d at 716). “But if an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action,’ there is no preemption.” *Universal Instruments Corp.*, 924 F.3d at 48 (quoting *Forest Park Pictures*, 683 F.3d at 430 (internal quotation marks omitted)). “Preemption, therefore, turns on ‘what [the] plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced.’” *Id.* (alteration in original) (quoting *Comput. Assocs. Int’l, Inc.*, 982 F.2d at 716); *Briarpatch Ltd., L.P.*, 373 F.3d at 306 (“To determine whether a claim is qualitatively different, [courts in this Circuit] look at what the plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced.” (alterations, quotations, and citation omitted)). The Second Circuit has directed courts to “take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright claim.” *Briarpatch Ltd., L.P.*, 373 F.3d at 306.

i. Plaintiff’s claims satisfy the subject matter prong

The transcribed song lyrics that are the subject matter of Plaintiff’s claims fall within the type of works protected by the Copyright Act and therefore satisfy the subject matter prong.

To satisfy the “subject matter” prong, “a claim must involve a work ‘within the subject matter of copyright.’” *Forest Park Pictures*, 683 F.3d at 429 (quoting 17 U.S.C. § 301(a)); *see also Briarpatch Ltd., L.P.*, 373 F.3d at 305 (“The subject matter requirement is satisfied if the claim applies to a work of authorship fixed in a tangible medium of expression and falling within the ambit of one of the categories of copyrightable works.”). “Copyright protection exists for ‘original works of authorship fixed in any tangible medium of expression,’ but does not extend to an ‘idea,...regardless of the form in which it is described, explained, illustrated, or embodied.” *Forest Park Pictures*, 683 F.3d at 429 (quoting 17 U.S.C. § 102(a)-(b)). The Second Circuit has held, “however, that works may fall within the subject matter of copyright, and thus be subject to preemption, even if they contain material that is uncopyrightable under section 102.” *Id.* “The scope of copyright for preemption purposes, then, extends beyond the scope of available copyright protection.” *Id.* at 429–30.

“Under the Copyright Act, ‘[a] work is “fixed” in a tangible medium of expression when its embodiment in a copy..., by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Mourabit v. Klein*, No. 19-2142-CV, 2020 WL 3042131, at *3 (2d Cir. June 8, 2020) (quoting 17 U.S.C. § 101). “The Act defines ‘[c]opies,’ in turn, as ‘material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from

which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* “The work is a form of intangible property that can be physically embodied in (*i.e.*, fixed in) any number of different material objects (*i.e.*, tangible mediums of expression).” *Id.* (quoting *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 693, 699 n.9).

Plaintiff alleges in the Complaint that lyrics are copyrightable and that “music publishers and/or songwriters usually own the copyright in the lyrics for a given song...” (See Compl. ¶ 18; Pl. Opp’n 12 & n.4.) Because the subject of Plaintiff’s claims is the transcribed song lyrics, and Plaintiff concedes that the lyrics themselves fall under federal copyright law, the subject matter prong of the preemption test is met. See *Saint-Amour v. Richmond Org., Inc.*, 388 F. Supp. 3d 277, 290 (S.D.N.Y. 2019) (concluding that “[t]he subject matter of the [p]laintiffs’ claims [was a] [s]ong” and “[t]he [s]ong [was] a musical composition and as such a paradigmatic work protected by the Copyright Act” and finding the subject matter requirement met because the plaintiffs “challeng[ed] the validity of the copyrights in a song, which fits into the copyrightable category of musical works” (citing 17 U.S.C. § 102(a)(2))); *Affiliated Records Inc. v. Taylor*, No. 09-CV-9938, 2012 WL 1675589, at *5 (S.D.N.Y. May 14, 2012) (“[T]here is no question that the lyrics in the [s]ongs constitute copyrightable subject matter under [s]ection 102 of the Act.” (citing 17 U.S.C. § 102(a)(2))).

Moreover, the fact that the lyric transcriptions are fixed in writing further supports a finding that Plaintiff's claims are within the subject matter of copyright. *See Forest Park Pictures*, 683 F.3d at 30 (“[B]ecause the ideas that are the subject of the claim were fixed in writing — whether or not the writing itself is at issue — the claim is within the subject matter of copyright.”).

Accordingly, the Court finds that the subject matter prong is met.

ii. Plaintiff's claims satisfy the general scope requirement

Because the Court finds that the subject matter prong is met, the Court next considers each of Plaintiff's state law claims to determine whether they include an “extra element” in addition to acts of reproduction, adaptation, performance, distribution or display that would preclude preemption.

1. Breach of contract claims

In addressing its breach of contract claims, Plaintiff argues that “Defendants are bound by [Plaintiff's] Terms of Service, which impose on Defendants an obligation not to copy or scrape [Plaintiff's] Service for ‘commercial purposes,’” and that “[u]nder the law of the Second Circuit, this independent, contractual obligation constitutes an ‘extra element’” which renders Plaintiff's claims asserted pursuant to its Terms of Service “qualitatively different from a Copyright Act claim.” (Pl. Mem. 15.) In support, Plaintiff argues that “in

order to prove its contract claims, [Plaintiff] not only needs to prove that Defendants scraped content from its website, but also that Defendants used it for ‘commercial endeavors,’” which Plaintiff asserts is an “‘extra element’ [that] makes [Plaintiff’s] breach of contract claims qualitatively different from its copyright claim.” (*Id.* at 17.)

Defendants argue that the restrictions in Plaintiff’s Terms of Service “do no more than protect against the unauthorized use, reproduction, adaptation, and distribution of the work in question, which plainly falls within the general scope requirement of 17 U.S.C. § 106.” (Defs. Opp’n 15.) In response to Plaintiff’s assertion that its breach of contract claims are different from a copyright claim because Plaintiff must demonstrate both that Defendants scraped content from its website and that they used the content for commercial endeavors, Defendants argue that these assertions fail for separate reasons. As to the first provision of the Terms of Service Plaintiff alleges Defendants breached, which “broadly states that a user may not ‘modify, copy, frame, scrape, rent, lease, loan, sell distribute or create derivative works,’” this argument fails because the “provision is nothing more than a recitation of exclusive rights reserved for true copyright owners under [s]ection 106.” (*Id.* at 16 (quoting Compl. ¶¶ 119-20).) As to the second provision, “which states that users may not use copyright content ‘for any commercial purpose,’” the argument fails because “[Plaintiff] does not cite a single case that suggests that the presence of ‘commercial use’ in a provision in a contract renders a

breach claim qualitatively different from a claim for copyright infringement.” (*Id.* (quoting Compl. ¶¶ 115-16, 132-33).) In support, Defendants argue that each case cited by Plaintiff in which the court found no preemption also involved a contractual provision that “had nothing to do with the unauthorized use of copyrighted material,” and assert that “that plainly is not the situation here.” (*Id.* at 16 n.3.) Defendants further argue that the fact “that one provision of [Plaintiff’s] [Terms of Service] agreement requires ‘commercial use’ may limit the scope of Plaintiff’s claim, but it does not change its fundamental nature — what Plaintiff’s own Complaint describes as ‘conduct breach[ing] [Plaintiff’s] Terms of Service regarding the copying and reproduction of [Plaintiff’s] Content.’” (*Id.* at 17 (quoting Compl. ¶¶ 122, 139 (second alteration in original))).

In response, Plaintiff argues that “Defendants cite to a number of cases where a party who owns or controls copyright rights in the work at issue asserts contract claims — either in addition [to] or in lieu of Copyright Act claims,” (Pl. Reply 6), and asserts that none of the other cases cited by Defendants are “at all instructive here, as it is undisputed that the parties to this action are not copyright holders and do not seek to possess or exercise the rights of a copyright holder,” (*id.* at 7).⁴ Plaintiff argues that the fact “[t]hat parties like Google have paid to license music

⁴ Plaintiff also makes this same argument regarding the cases cited by Defendants as to Plaintiff’s state law claims for unjust enrichment and unfair competition. (See Pl. Reply 8 n.8, 9 n.9.)

lyrics transcriptions from companies like LyricFind demonstrates the value of licensing the music lyrics transcriptions *separate and apart* from the value of the necessary predicate license from the copyright owners” and that “companies...pay to license transcriptions from [Plaintiff], often the very lyrics transcriptions Defendants are misappropriating.” (*Id.* at 2.)

The Second Circuit has noted that “preemption cannot be avoided simply by labeling a claim ‘breach of contract,’” but rather, “[a] plaintiff must actually allege the elements of an enforceable contract (whether express or implied-in-fact), including offer, acceptance, and consideration, in addition to adequately alleging the defendant’s breach of the contract.” *Forest Park Pictures*, 683 F.3d at 432. In *Forest Park Pictures v. Universal Television Network, Inc.*, the Second Circuit considered whether the Copyright Act preempted the plaintiff’s implied-in-fact breach of contract claim and “held the contract at issue not to be preempted because it included an ‘extra element’ of a promise to pay, and plaintiff sought contract damages when defendant used plaintiff’s copyrighted work without paying for the privilege.” *Universal Instruments Corp.*, 924 F.3d at 49 (quoting *Forest Park Pictures*, 683 F.3d at 429). Although in reaching its decision, the Second Circuit explicitly declined to “address whether preemption is precluded whenever there is a contract claim, or only when the contract claim includes a promise to pay,” *Forest Park Pictures*, 683 F.3d at 432, district courts in this Circuit have decided the issue and are divided on the question of “whether the promise inherent in

every contract is sufficient to establish an “extra element.”” *Shepard v. Eur. Pressphoto Agency*, 291 F. Supp. 3d 465, 472 (S.D.N.Y. 2017) (quoting *BroadVision Inc. v. Gen. Elec. Co.*, No. 08-CV-1478, 2008 WL 4684114, at *4 (S.D.N.Y. Oct. 15, 2008)). Some district courts “follow the holding in *Architectronics, Inc. v. Control Systems, Inc.*, 935 F. Supp. 425 (S.D.N.Y. 1996), which held that ‘[p]rotection from breach of contract, however, is not equivalent to copyright protection because a contract claim requires an ‘extra element,’ that renders the claim qualitatively different from a claim for copyright infringement: a promise by the defendant.” *Id.* at 472–73 (quoting *Architectronics, Inc.*, 935 F. Supp. at 438); *see also id.* (collecting cases). Other district courts “follow the holding in *American Movie Classics Co. v. Turner Entertainment Co.*, 922 F. Supp. 926 (S.D.N.Y. 1996), which held that ‘a breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display).” *Id.* (quoting *Am. Movie Classics Co.*, 922 F. Supp. at 931); *see id.* (collecting cases).

In recent years, the majority of district courts in this Circuit have followed the approach taken in *American Movie Classics Co.* and have engaged in an analysis of the contractual promises alleged in order to determine whether the Copyright Act preempts a breach of contract claim. *See, e.g., Betty, Inc. v. PepsiCo, Inc.*, 283 F. Supp. 3d 154, 166 (S.D.N.Y. 2017) (noting “as a general matter, a breach of

contract action is not preempted by the Copyright Act” and considering whether the alleged implied-in-fact contract “required [the defendant] to pay for any use of [the plaintiff’s] presented storylines and ideas” before finding that the plaintiff failed to state a claim for breach of contract (quoting *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 617 (S.D.N.Y. 2010)); *Shepard*, 291 F. Supp. 3d at 474 (“*American Movie Classics* held that a breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff However, if the breach of contract claim is based on allegations that the parties’ contract creates a right not existing under copyright law — a right based upon a party’s contractual promise — and the plaintiff is suing to protect that contractual right, then the claim is not preempted.” (citing *Nat’l Car Rental Sys., Inc. v. Comput. Assocs. Int’l, Inc.*, 991 F.2d 426, 431–33 (8th Cir. 1993), *cert. denied*, 510 U.S. 861 (1993))); *Simmons v. Stanberry*, No. 10-CV-5815, 2014 WL 3611639, at *2 (E.D.N.Y. July 22, 2014) (finding the “[p]laintiff’s breach of contract claim consist[ed] of no extra element, such as a promise to pay, that would make the claim qualitatively different from a federal copyright claim”), *aff’d*, 810 F.3d 114 (2d Cir. 2016).

Plaintiff’s breach of contract claims are nothing more than claims seeking to enforce the copyright owners’ exclusive rights to protection from unauthorized reproduction of the lyrics and are therefore preempted. The parties agree that Plaintiff is not the owner of the copyrights to any of the lyrics it transcribes, and Plaintiff concedes that it licenses

lyrics from the copyright owners. (See Compl. ¶ 19 (“[Plaintiff] provides a platform for music enthusiasts who transcribe music lyrics, and also obtains lyrics through partnerships with artists who provide their lyrics directly to [Plaintiff]. [Plaintiff], in turn, obtains licenses from music publishers permitting the display and distribution of these lyrics.”).) Although Plaintiff describes the rights it seeks to enforce as “broader and different than the exclusive right existing under the Copyright Act,” based on “the substantial investment of time and labor by [Plaintiff] in a competitive market,” (Pl. Mem. 15), and asserts breach of contract claims based on alleged violations of Plaintiff’s Terms of Service, Plaintiff’s own ability to transcribe and display the lyrics on its website arises from the licensing rights Plaintiff has in the lyrics, *see Shepard*, 291 F. Supp. 3d at 473 (finding that the copyright-owner plaintiff’s claims for breach of contract based on a licensing agreement arose out of an “exclusive right [that] flowed from the Copyright Act, not from the [parties’] [a]greement...[and] [t]hus the claim that [the] [d]efendants usurped the exclusive right of [the plaintiff] to adapt the [f]ilm is nothing more than a claim that [the] defendants have violated a right of [the plaintiff] under the Copyright Act”).

Plaintiff asserts that its contract rights for use of the lyrics transcriptions are “separate and apart” from the copyright owners’ exclusive rights in the lyrics. (Pl. Reply 2.) Although Plaintiff does not refer to the lyrics as derivative works, Plaintiff’s argument parallels how derivative works are defined by the Copyright Act. *See Stewart v. Abend*, 495 U.S. 207,

220 (1990) (“An author holds a bundle of exclusive rights in the copyrighted work, among them the right to copy and the right to incorporate the work into derivative works.”); *Keeling v. Hars*, 809 F.3d 43, 49 (2d Cir. 2015) (“Under the Copyright Act, a derivative work involves a transformation to the work’s ‘form.’” (quoting 17 U.S.C. § 101)); *TufAmerica, Inc. v.Codigo Music LLC*, 162 F. Supp. 3d 295, 303 (S.D.N.Y. 2016) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” (quoting 17 U.S.C. § 101)).

Plaintiff’s argument is, in essence, that it has created a derivative work of the original lyrics in applying its own labor and resources to transcribe the lyrics, and thus, retains some ownership over and has rights in the transcriptions distinct from the exclusive rights of the copyright owners. (See Pl. Reply 2.) This argument is consistent with the treatment of derivative works under federal copyright law. See *Stewart*, 495 U.S. at 223 (“The aspects of a derivative work added by the derivative author are that author’s property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work.”); *TufAmerica, Inc.*, 162 F. Supp. 3d at 314 n.20 (“When a derivative work is created with consent of the owner of the pre-existing work,

‘[t]he aspects of a derivative work added by the derivative author are that author’s property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work.’” (quoting *Stewart*, 495 U.S. at 223)).

Plaintiff likely makes this argument without explicitly referring to the lyrics transcriptions as derivative works because the case law is clear that only the original copyright owner has exclusive rights to authorize derivative works. *See, e.g., TufAmerica, Inc.*, 162 F. Supp. 3d at 314 (“Since the original copyright owner has the exclusive right to creative derivative works, someone ‘who reproduces a derivative work without the authorization of the preexisting work’s registered owner violates...the exclusive rights of the copyright owner...[and] is an infringer of the copyright.’” (quoting *Mattel, Inc. v. Robarb’s, Inc.*, 139 F. Supp. 2d 487, 497 (S.D.N.Y. 2001))).

Even accepting the argument that Plaintiff has added a separate and distinct value to the lyrics by transcribing them such that the lyrics are essentially derivative works, because Plaintiff does not allege that it received an assignment of the copyright owners’ rights in the lyrics displayed on its website, Plaintiff’s claim is preempted by the Copyright Act because, at its core, it is a claim that Defendants created an unauthorized reproduction of Plaintiff’s derivative work, which is itself conduct that violates an exclusive right of the copyright owner under federal copyright law. *Stewart*, 495 U.S. at 223 (“So long as the pre-existing work remains out of the

public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the pre-existing work.... It is irrelevant whether the pre-existing work is inseparably intertwined with the derivative work.” (citation omitted)).

In addition, Plaintiff’s allegations as to how Defendants breached the contract also support a finding that Plaintiff’s breach of contract claims are preempted. Plaintiff’s breach of contract claims are based on the theory that Defendants breached their obligation under the Terms of Service by using Plaintiff’s lyrics — LyricFind by selling those lyric transcriptions to Google and Google by employing and displaying those lyric transcriptions in its search engine. (*See* Compl. ¶ 120 (“Upon information and belief, notwithstanding the foregoing, since at least 2016, LyricFind has accessed [Plaintiff’s] website to copy, modify, sell and/or distribute content appearing on [Plaintiff’s] website that LyricFind did not upload.”); *see also id.* ¶ 137 (“Upon information and belief, notwithstanding the foregoing, since at least 2016, Google has accessed [Plaintiff’s] website to copy, modify, sell and/or distribute content appearing on [Plaintiff’s] website that Google did not upload.”).) Plaintiff’s allegations that Defendants “scraped” and used their lyrics for profit amount to allegations that Defendants made unauthorized reproductions of Plaintiff’s lyric transcriptions and profited off of those unauthorized reproductions, which is behavior that falls under federal copyright law. *See Shepard*, 291 F. Supp. 3d at 475 (“Here, the [plaintiffs] claim that [the defendant] displayed, reproduced, published,

distributed, and otherwise made use of the [plaintiffs'] artworks beyond the expiration of the one[-]day term in the license agreement. That is conduct that the Copyright Act prohibits and for which it grants remedies. [The defendant's] promise not to infringe the [plaintiffs'] copyright is the same as its duty to comply with the copyright law, and is therefore preempted by it." (citation omitted)).

Moreover, Plaintiff has not cited any authority to support its argument that the "commercial use" language in the Terms of Service is sufficient to render the breach of contract claims qualitatively different from claims arising under the Copyright Act. Nor does Plaintiff allege that Defendants made the kind of "promise to pay" that courts in this Circuit have sometimes found to constitute an additional element of a breach of contract claim sufficient to avoid preemption. *Cf. Simmons*, 2014 WL 3611639, at *2 ("[The] [p]laintiff's breach of contract claim[] does no more than allege [the] [p]laintiff's right to protect against the unauthorized use, reproduction, adaptation, and distribution of the work in question, which plainly falls within the general scope requirement of 17 U.S.C. § 106. The [p]laintiff's breach of contract claim consists of no extra element, such as a promise to pay, that would make the claim qualitatively different from a federal copyright claim."), *aff'd*, 810 F.3d 114 (2d Cir. 2016); *Bill Diodato Photography LLC v. Avon Prod., Inc.*, No. 12-CV-847, 2012 WL 4335164, at *7 (S.D.N.Y. Sept. 21, 2012) ("[The] [p]laintiff has plead[ed] a valid breach of contract claim on the theory that [the] [d]efendant breached its obligation under the agreements by

using [the] [p]laintiff's images beyond the one-year licensing term without negotiating a fee to be paid to [the] [p]laintiff.... [The] [p]laintiff bears the burden of proving not just that [the] [p]laintiff used the images beyond the one-year licensing agreement, but also that [the] [d]efendant failed to negotiate a fee."). Because Plaintiff's breach of contract claims are based on alleged behavior by Defendants that would, itself, fall under federal copyright law and Plaintiff has not alleged a contractual promise to pay or any contractual promise not based on rights arising from federal copyright law, Plaintiff fails to allege breach of contract claims that are qualitatively different from federal copyright claims.

Accordingly, the Court find that the Copyright Act preempts Plaintiff's breach of contract claims.⁵

⁵ Plaintiff asserts separate indemnification claims in addition to its claims for breach of contract; however, based on the Terms of Service agreement, Plaintiff cannot assert such claims. "[U]nder New York law, absent 'unmistakably clear' language in an indemnification provision that demonstrates that the parties intended the clause to cover first-party claims, an agreement between two parties 'to indemnify' each other does not mean that one party's failure to perform gives rise to a claim for indemnification." *Lehman XS Tr., Series 2006-GP2 by U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 916 F.3d 116, 125–26 (2d Cir. 2019) (quoting *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 21 (2d Cir. 1996)). Because the Terms of Service do not include language of a clear agreement between the parties to indemnify each other for losses not related to liability to a third party arising from a breach of contract, the Court finds the indemnification claims redundant of the breach of contract

2. Unjust enrichment claims

Plaintiff asserts state law claims for unjust enrichment based on Defendants’ alleged “misappropriation of content from [Plaintiff’s] website,” which Plaintiff alleges has benefited Defendants at Plaintiff’s expense, causing Plaintiff to “suffer[] (and continue[] to suffer) decreased web traffic and associated revenue,” and “plac[ing] [Plaintiff] at an unfair competitive advantage in its efforts to license its lyrics to content partners.” (Compl. ¶¶ 201-02, 207-08.) Plaintiff argues that its unjust enrichment claims are “qualitatively different than a copyright infringement claim,” because it has alleged that Defendants engaged in “deceptive and wrongful conduct in unjustly enriching themselves through their improper exploitation of the fruits of [Plaintiff’s] substantial labor and investment...and subsequent concealment.” (Pl. Mem. 18.)

In response, Defendants argue that courts in this Circuit have routinely found that unjust enrichment claims are preempted by the Copyright Act, and that Plaintiff “fails to mention any of these authorities.” (Defs. Opp’n 23–24.) Defendants also argue that “merely pleading deception is not enough to escape

claims and addresses only the breach of contract claims. *See id.* at 126 (finding that “[w]here parties agree to ‘indemnify’ each other for losses incurred by a breach of contract, where those losses do not relate to liability to a third party, the characterization of ‘indemnification’ is no more than an epithet for recovery for breach of contract.” (alterations in original) (quoting *Xerox State & Local Sols., Inc. v. Xchanging Sols. (USA), Inc.*, 216 F. Supp. 3d 355, 364 (S.D.N.Y. 2016))).

preemption,” and that Plaintiff “does not and cannot claim that Defendants exploited some kind of fiduciary, confidential, or other trusting relationship with it.” (*Id.* at 24.)

“The basic elements of an unjust enrichment claim in New York require proof that (1) defendant was enriched, (2) at plaintiff’s expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.” *Briarpatch Ltd., L.P.*, 373 F.3d at 306. “The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *GFRE, Inc. v. U.S. Bank, N.A.*, 13 N.Y.S.3d 452, 454 (App. Div. 2015) (quoting *Paramount Film Distrib. Corp. v. New York*, 30 N.Y.2d 415, 421 (1972)).

The Second Circuit has held that “[w]hile enrichment is not required for copyright infringement,” it does “not...go[] far enough to make the unjust enrichment claim qualitatively different from a copyright infringement claim.” *Briarpatch Ltd., L.P.*, 373 F.3d at 306; *see also Forest Park Pictures*, 683 F.3d at 432 (“Under these quasi-contractual theories, [such as unjust enrichment,] the plaintiff need only prove that the defendant was unjustly enriched through the use of her idea or work. Such a claim is not materially different from a claim for copyright infringement that requires a plaintiff to prove that the defendant used, reproduced, copied, or displayed a copyrighted work.”); *Stadt v. Fox News Network LLC*, 719 F. Supp.

2d 312, 321-22 (S.D.N.Y. 2010) (“[T]he Second Circuit and courts in this district have consistently held that this enrichment element does not suffice to shield an unjust enrichment claim from preemption when the claim arises from unauthorized use of a copyrighted work.”). “Like the elements of awareness or intent, the enrichment element...limits the scope of the claim but leaves its fundamental nature unaltered.” *Briarpatch Ltd., L.P.*, 373 F.3d at 306. “Where the gravamen of an unjust enrichment claim is that defendants ‘unjustly benefitted from unauthorized use’ of a work within the scope of the Copyright Act...the claim is preempted.” *Stanacard, LLC v. Rubard, LLC*, No. 12-CV-5176, 2016 WL 462508, at *22 (S.D.N.Y. Feb. 3, 2016) (quoting *Einiger v. Citigroup, Inc.*, No. 14-CV-4570, 2014 WL 4494139, at *6 (S.D.N.Y. Sept. 12, 2014)); *see also Panizza v. Mattel, Inc.*, No. 02-CV-7722, 2003 WL 22251317, at *4 (S.D.N.Y. Sept. 30, 2003) (“The overwhelming majority of courts in this [C]ircuit have held that an unjust enrichment claim based upon the copying of subject matter within the scope of the Copyright Act is preempted.” (quoting *Boyle v. Stephens Inc.*, No. 97-CV-1351, 1998 WL 690816, at *5-6 (S.D.N.Y. 1998))).

Plaintiff’s unjust enrichment claims are preempted because they fall within the scope of the Copyright Act. Plaintiff alleges that LyricFind copied content from Plaintiff’s website and then “benefitted by...entering into licensing agreements with content partners whereby LyricFind received compensation for distributing content misappropriated from [Plaintiff’s] website,” and that those “benefits...came

at [Plaintiff's] expense.” (Compl. ¶¶ 206-07.) Plaintiff similarly alleges that Google benefitted from its “misappropriation of content from [Plaintiff's] website,” by “retaining users in and among Google-owned properties further concentrating its market power,” and that these “benefits...came at [Plaintiff's] expense.” (*Id.* ¶¶ 201-02.) Because the “gravamen” of Plaintiff's unjust enrichment claims is that Defendants were unjustly enriched by their use of Plaintiff's lyric transcriptions — work that, as discussed above, is within the scope of the Copyright Act — these claims are preempted. *See Stanacard, LLC*, 2016 WL 462508, at *22; *see also, e.g., BroadVision Inc.*, 2008 WL 4684114, at *5 (finding unjust enrichment claim preempted and “qualitatively the same as a copyright infringement claim” where the plaintiff “allege[d] that [the defendant] was unjustly enriched by copying and using the [plaintiff's] software in excess of the licensed usage rights”); *Logicom Inclusive, Inc. v. W.P. Stewart & Co.*, No. 04-CV-0604, 2004 WL 1781009, at *18 (S.D.N.Y. Aug. 10, 2004) (finding unjust enrichment claim preempted where the “plaintiffs allege[d] that [the] defendants [had] misappropriated [the plaintiffs'] software and used the programs to make derivative works for their own benefit”); *Panizza*, 2003 WL 22251317, at *4 (finding unjust enrichment claim preempted where claim “solely concern[ed] the benefit [the] defendant allegedly received by using [the] plaintiff's ideas and related materials without her permission or authorization to do so”).

In support of its argument that its unjust enrichment claims are not preempted because it has alleged that Defendants engaged in “deceptive and wrongful conduct,” Plaintiff relies on one district court case, *CVD Equipment Corp. v. PrecisionFlow Technologies, Inc.*, No. 02-CV-651, 2007 WL 951567 (N.D.N.Y. Mar. 27, 2007), in which the court held that the plaintiff’s unjust enrichment claim was not preempted. (Pl. Mem. 18; Pl. Reply 7.) In *CVD Equipment Corp.*, the plaintiff alleged that the defendant-competitor’s shareholders and employees, as well as the individual defendants, were former employees and officers of the plaintiff’s predecessor-in-interest and had “had access to [its] intellectual property,” which they then gave to the defendant-competitor for use and which had also been purchased by the plaintiff. 2007 WL 951567, at *1. The plaintiff alleged that the “defendants [had] been unjustly enriched by their misappropriation of products embodying [the plaintiff’s] intellectual property and/or proprietary and confidential information.” *Id.* In finding that the unjust enrichment claim was not preempted by the Copyright Act, the court stated that “[t]he extra element of inequity through fraud, deception, or abuse of fiduciary relationships is sufficient to change the nature of the unjust enrichment claim so that it is qualitatively different from a copyright infringement claim.” *Id.* at *2 (first citing *Kregos v. Assoc. Press*, 3 F.3d 656, 666 (2d Cir. 1993); and then citing *Comput. Assocs. Int’l, Inc.*, 982 F.2d at 716).

While the court in *CVD Equipment Corp.* listed deception as an extra element sufficient to avoid

preemption, the Court finds, based both on the facts in that case and the Second Circuit decisions cited in support, that the decision in *CVD Equipment Corp.* was based on the defendant's alleged abuse of a fiduciary relationship, which is not present in this case. The factual allegations in *CVD Equipment Corp.*, described above, clearly supported a claim that the defendants had unjustly enriched themselves by abusing a fiduciary relationship. *See id.* at *1. Moreover, the two Second Circuit cases the district court relied on in making its ruling further support the conclusion that the basis for the court's holding was not that the plaintiffs had alleged "deception," but rather, that they had alleged the abuse of fiduciary relationships. In *Kregos*, cited by the court in *CVD Equipment Corp.*, in finding that the plaintiffs' unfair competition claim was preempted, the Second Circuit stated that "unfair-competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets have been held to satisfy the extra-element test and avoid § 301 preclusion." *Kregos*, 3 F.3d at 666. Similarly, in *Computer Associates International, Inc.*, also cited by the court in *CVD Equipment Corp.*, the Second Circuit noted that the "state law rights that...satisfy the extra element test, and thus are not preempted by section 301...include unfair competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets." *Comput. Assocs. Int'l, Inc.*, 982 F.2d at 717. In contrast, in this case, Plaintiff has not alleged that Defendants abused a confidential or fiduciary relationship.

In addition, as discussed further below, other district courts in this Circuit have found, in the context of unfair competition claims, that deception does not constitute an extra element sufficient to avoid preemption. *See Woolcott v. Baratta*, No. 13-CV-2964, 2014 WL 1814130, at *10 (E.D.N.Y. May 7, 2014); *Atrium Grp. de Ediciones y Publicaciones, S.L. v. Harry N. Abrams, Inc.*, 565 F. Supp. 2d 505, 509–10 (S.D.N.Y. 2008).

Accordingly, the Court finds that Plaintiff's claims for unjust enrichment are preempted by the Copyright Act.⁶ *See Schleifer v. Berns*, No. 17-CV-1649, 2017 WL 3084406, at *5 n.2 (E.D.N.Y. July 19, 2017) (“[I]t is well-settled that a

⁶ Plaintiff cites no authority in support of its argument that because Defendants allegedly engaged in “wrongful conduct,” its unjust enrichment claims are not preempted. (Pl. Mem. 18.) Moreover, as discussed further below, the Second Circuit has made clear that allegations that defendants have engaged in immoral or unfair behavior are not sufficient to distinguish state law claims and avoid preemption. *See Barclays Cap. Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 896 (2d Cir. 2011) (“[U]nfairness alone is immaterial to a determination whether a cause of action has been preempted by the Copyright Act.”); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 851 (2d Cir. 1997) (“[A]morphous concepts such as ‘commercial immorality’...are virtually synonymous [with] wrongful copying and are in no meaningful fashion distinguishable from infringement of a copyright.”); *see also Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992) (“An action will not be saved from preemption by elements such as awareness or intent, which alter ‘the action’s scope but not its nature....’” (quoting *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (alteration in original))).

claim for unjust enrichment is preempted by the Copyright Act.”).

3. Unfair competition claims

Plaintiff asserts state law claims for unfair competition under both New York and California law, based on Defendants’ alleged misappropriation of content from Plaintiff’s website. (Compl. ¶¶ 145-99.) In support, Plaintiff argues that its unfair competition claims are “qualitatively different from a copyright claim” because they “include an ‘extra element’ of ‘bad faith’ and ‘unfairness,’” and therefore are not preempted. (Pl. Mem. 19.) Plaintiff also argues that the “allegations in the Complaint demonstrate how Defendants’ deceptive, unethical and immoral conduct is substantively different than a copyright claim,” (*id.* at 21), and that “[b]ecause [Plaintiff’s] unfair competition claims focus on Defendants’ deceptive and unscrupulous conduct, they are not preempted by federal law,” (*id.* at 22).

In response, Defendants argue that Plaintiff’s unfair competition claims “are entirely premised on the misappropriation of copyrighted lyrics,” and thus “are preempted because courts in New York and California have consistently held that claims for unfair competition based on misappropriation of copyrighted material are preempted.” (Defs. Opp’n 17–18.) Defendants also argue that Plaintiff’s theory that bad faith and unfairness are extra elements under copyright preemption law is “directly contrary to established law.” (*Id.* at 20.) Finally, Defendants argue that Plaintiff’s attempt to

differentiate the rights it seeks to enforce from those protected under the Copyright Act based on allegations that Defendants misappropriated Plaintiff's time and labor must fail, because "if that were true, no misappropriation claim would ever be preempted." (*Id.* at 21.)

"Under New York law, unfair competition includes 'taking the skill, expenditures and labors of a competitor,' as well as 'misappropriat[ing] for the commercial advantage of one person...a benefit or property right belonging to another.'" *Broker Genius Inc. v. Gainor*, --- F. App'x ---, ---, No. 19-2686-CV, 2020 WL 1908341, at *1 (2d Cir. Apr. 20, 2020) (alteration in original) (quoting *Roy Exp. Co. Establishment of Vaduz v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982)); *see also Jacino v. Ill. Tool Works Inc.*, No. 16-CV-1704, 2017 WL 4480752, at *5 (E.D.N.Y. Oct. 6, 2017) ("The essence of unfair competition under New York common law is the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origins of the goods." (quoting *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 34 (2d Cir. 1995))). "A claim of unfair competition" under New York common law "requires evidence of [the] defendant's bad faith." *Stadt*, 719 F. Supp. 2d at 320. Under California law, "unfair competition...include[s] any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "'Unfair' simply means any practice whose harm to the victim outweighs its benefits." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (quoting *Saunders v.*

Super. Ct., 27 Cal. App. 4th 832, 839 (Cal. Ct. App. 1994)).

“Following [the] ‘extra element’ test, [the Second Circuit has] held that unfair competition and misappropriation claims grounded solely in the copying of a plaintiff’s protected expression are preempted by section 301.” *Comput. Assocs. Int’l, Inc.*, 982 F.2d at 717; *see also Buttner v. RD Palmer Enters., Inc.*, No. 13-CV-0342, 2013 WL 6196560, at *3 (N.D.N.Y. Nov. 27, 2013) (“An unfair competition claim under New York law is preempted by § 301 of the Copyright Act if it is based solely on copying expression protected by the Act.”); *Integrative Nutrition, Inc. v. Acad. of Healing Nutrition*, 476 F. Supp. 2d 291, 297 (S.D.N.Y. 2007) (“The Copyright Act preempts unfair competition and misappropriation claims ‘grounded solely in the copying of a plaintiff’s protected expression.’” (quoting *Kregos*, 3 F.3d at 666)). In contrast, “unfair competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets” do “satisfy the extra element test, and thus are not preempted by section 301.” *Comput. Assocs. Int’l, Inc.*, 982 F.2d at 717; *see also Wnet v. Aereo, Inc.*, 871 F. Supp. 2d 281, 291 (S.D.N.Y. 2012) (“[A] state law claim is qualitatively different if it requires such elements as breach of fiduciary duty, or possession and control of chattels.” (quoting *Briarpatch Ltd., L.P.*, 373 F.3d at 305)); *Integrative Nutrition, Inc.*, 476 F. Supp. 2d at 297 (“[U]nfair competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets have been held to satisfy the

extra element test and avoid § 301 preclusion.” (quoting *Kregos*, 3 F.3d at 666)).

Where unfair competition claims are “predicated on a theory of ‘passing off,’ ‘the essence of which is false representation of origin,’” courts distinguish between claims for “passing off” and “reverse passing off.” *Integrative Nutrition, Inc.*, 476 F. Supp. 2d at 297 (first quoting *Am. Movie Classics Co.*, 922 F. Supp. at 934; and then citing *Colour & Design v. U.S. Vinyl Mfg. Corp.*, No. 04-CV-8332, 2005 WL 1337864, at *6 (S.D.N.Y. June 3, 2005)). “In a ‘passing off’ case, the tortfeasor misleads customers into believing that the product he produces emanates from another source.” *Am. Movie Classics Co.*, 922 F. Supp. at 934; *see also Integrative Nutrition, Inc.*, 476 F. Supp. 2d at 297 (“In a passing off case, the alleged infringer sells *its* products as the plaintiff’s.”). A “claim of ‘reverse passing off,’” in contrast, involves “a claim that the defendant misrepresented the plaintiff’s work as its own.” *Stadt*, 719 F. Supp. 2d 312, 322; *see also Shepard*, 291 F. Supp. 3d at 476 (“[The plaintiffs] allege that the defendants misrepresented the [plaintiffs’] goods as their own. That is known as ‘reverse passing of[f].’”); *Am. Movie Classics Co.*, 922 F. Supp. at 934 (“[I]f any unfair competition claim is asserted [in this case], it is of the ‘reverse passing off’ variety — *i.e.*, that [the defendant] took goods of another and passed them off as [its] own.”).

Plaintiff’s unfair competition claims are preempted by the Copyright Act. Plaintiff alleges that Defendants “misappropriated content from [Plaintiff’s] website,” (Compl. ¶ 147; *see also id.*

¶¶ 169, 171, 179), in “an unjustifiable attempt to profit from [Plaintiff’s] expenditure of time, labor and talent in maintaining its service,” (*id.* ¶¶ 154, 182). Plaintiff has not alleged that Defendants breached any fiduciary duty or confidential relationship, or that Defendants misappropriated Plaintiff’s trade secrets. Instead, Plaintiff’s claims are precisely the type of misappropriation claims that courts have consistently held are preempted by the Copyright Act. *See, e.g., Shepard*, 291 F. Supp. 3d at 475-76 (“[T]he Copyright Act...preempts claims ‘asserted under the misappropriation branch of New York’s unfair competition claim, which generally ‘protects against a defendant’s competing use of a valuable product or idea created by the plaintiff through investment of time, effort, money and expertise.’” (quoting *Am. Movie Classics*, 922 F. Supp. at 933)); *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (“In this case, the alleged misappropriation of [the plaintiff’s] time, talent and effort is by the reproduction of the product of her time, talent and effort,” and that is “precisely the type of misconduct the copyright laws are designed to guard against.”).

Plaintiff’s claims are essentially “reverse passing off” claims, as Plaintiff alleges that Defendants copied Plaintiff’s work product — song lyrics displayed on its website — and attempted to pass them off as either, in LyricFind’s case, its own work product or, in Google’s case, either its own work product or work product it was licensed to display. *See Integrative Nutrition, Inc.*, 476 F. Supp. 2d at 297 (finding that the “plaintiff’s unfair competition claim [was]

predicated on a theory of reverse passing off” and was preempted by the Copyright Act where the “primary allegation in the claim [was] that the defendants [had] ‘plagiarized’ the plaintiff’s website”). Unfair competition claims involving allegations of reverse passing off are preempted by the Copyright Act. *See Shepard*, 291 F. Supp. 3d at 476 (“It is well-settled that a claim for reverse passing off predicated on the theory that defendant’s product replicates plaintiff’s expressions contains no extra element and is therefore preempted.” (quoting *Silverstein v. Penguin Putnam, Inc.*, 522 F. Supp. 2d 579, 608 (S.D.N.Y. 2007))); *Stadt*, 719 F. Supp. 2d 312, 322 (“[R]everse passing off does not constitute an extra element for preemption purposes because it is essentially a claim for unauthorized use of copyrightable material.”); *see also Integrative Nutrition, Inc.*, 476 F. Supp. 2d at 297; *Colour & Design*, 2005 WL 1337864, at *6; *Am. Movie Classics Co.*, 922 F. Supp at 934.

Furthermore, as discussed below, Plaintiff’s unfair competition claims are not saved from preemption by its allegations of bad faith, unfairness, and deceptive, unethical, and immoral conduct.

A. “Bad faith” under New York law

In support of its argument that “bad faith” is an extra element that saves its New York unfair competition claims from preemption, Plaintiff relies almost exclusively on *SCO Group, Inc. v. International Business Machines Corp.*, 879 F.3d 1062, 1080-81 (10th Cir. 2018), (Pl. Mem. 20), in

which the Tenth Circuit found that “a misappropriation claim under New York law has an ‘extra element’ beyond the elements of a federal copyright infringement claim,” *SCO Grp., Inc.*, 879 F.3d at 1080. The court found that the “bad faith” element of New York misappropriation claims was “not simply a scienter requirement, which would be insufficient to provide the requisite extra element to avoid preemption by the Copyright Act,” and that instead, “in the context of an independent New York unfair competition claim[,] [bad faith] ‘typically results from fraud, deception, or an abuse of fiduciary or confidential relationship.’” *Id.* at 1080-81 (first citing *Comput. Assocs. Int’l, Inc.*, 982 F. 2d at 717; and then quoting Robert L. Haig, *Business and Commercial Litigation in Federal Courts*, 105:20 (3d Ed. 2011)). The Tenth Circuit concluded that “[b]ecause misappropriation under New York law is an independent claim with a separate element of bad faith business dealings, [the plaintiff’s] claim [was] not ‘equivalent’ to a federal copyright infringement claim,” and therefore was not preempted. *Id.* at 1081.

The Tenth Circuit’s decision in *SCO Group, Inc.* is directly contradicted by caselaw in this Circuit, discussed above, finding that New York unfair competition claims alleging misappropriation of copyrightable works are preempted by the Copyright Act. Regardless of how the Tenth Circuit interpreted the “bad faith” element of New York unfair competition claims, in this Circuit, “bad faith” on its own is not sufficient to avoid preemption — if it were, unfair competition claims under New York law would never be preempted. *See Stadt*, 719 F. Supp. 2d at 320

(“A claim of unfair competition...requires evidence of [the] defendant’s bad faith.”); *see also Eyal R.D. Corp. v. Jewalex N.Y. Ltd.*, 784 F. Supp. 2d 441, 447 (S.D.N.Y. 2011) (“[T]o avoid preemption, that which is claimed to be unfair competition must be something different from copying, or the fruits of copying, or the intent or bad faith that can be inferred from the act of copying....”). Instead, courts have regularly noted that “bad faith” is essential to unfair competition claims under New York law, and nevertheless have found those claims preempted. *See Jacino*, 2017 WL 4480752, at *5–6; *Stadt*, 719 F. Supp. 2d at 319–20, 322.

Accordingly, the Court finds that the bad faith element of Plaintiff’s unfair competition claims under New York law is not an extra element that defeats preemption.

B. Unfairness under California law

Plaintiff argues that its claims for unfair competition under California law are not preempted because “[s]ection 17200...requires an extra element of unfairness.” (Pl. Mem. 21.) Because unfairness, without more, is immaterial to the preemption determination, the Court rejects Plaintiff’s argument.

The Second Circuit has held that “[n]o matter how ‘unfair’” a defendant’s alleged conduct is, “such unfairness alone is immaterial to a determination whether a cause of action has been preempted by the Copyright Act.” *Barclays Cap. Inc. v.*

Theflyonthewall.com, Inc., 650 F.3d 876, 896 (2d Cir. 2011).

Accordingly, the fact that Plaintiff's unfair competition claims under California law require that Plaintiff demonstrate that Defendants' conduct was unfair does not preclude a finding that Plaintiff's unfair competition claims are preempted.⁷

C. Deceptive, unethical, and immoral conduct

Plaintiff argues that because its "unfair competition claims are based on [Defendants'] misappropriation of content from [Plaintiff] through...deceptive, immoral and dishonest practices...they are not preempted by federal law." (Pl. Mem. 22.)

"[A]n action will not be saved from preemption by elements such as awareness or intent, which alter the action's scope but not its nature." *Am. Movie Classics Co.*, 922 F. Supp. at 931 (quoting *Comput. Assocs. Int'l, Inc.*, 982 F.2d at 717) (internal quotation marks

⁷ Plaintiff cites no authority to support its argument that an unfair competition claim pursuant to section 17200 contains an extra element precluding preemption by the Copyright Act. (See Pl. Mem. 21; Pl. Reply 8–10.) However, California courts have found unfair competition claims under section 17200 to be preempted by the Copyright Act where they are "based solely on rights equivalent to those protected by the federal copyright laws." *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 1052, 1074 (quoting *Koladex v. MTV Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1988)).

omitted); *Wnet*, 871 F. Supp. 2d at 291 (“Awareness or intent...are not extra elements that make a state law claim qualitatively different.” (quoting *Briarpatch Ltd., L.P.*, 373 F.3d at 305)). Moreover, as noted above, “unfairness alone is immaterial to a determination whether a cause of action has been preempted by the Copyright Act.” *Barclays Cap. Inc.*, 650 F.3d at 896.

Courts in this Circuit have found that deception is not an extra element that saves an unfair competition claim from preemption. In *Atrium Group de Ediciones y Publicaciones, S.L.*, the court rejected the plaintiffs’ argument that their misappropriation claim was not preempted because the defendants’ “alleged deception” constituted an extra element, finding that “‘deception’ is not the sort of element that would cause claims for...misappropriation to be ‘qualitatively different’ from the Federal Copyright Act.” 565 F. Supp. 2d at 509-10. The court reasoned that deception alters only the scope and not the nature of the claim. *Id.* at 510; *see also Woolcott*, 2014 WL 1814130, at *10 (finding that the plaintiff’s unfair competition claim “lack[ed] any extra qualitative element” where the plaintiff alleged “intentional, unlawful, and deceptive conduct”); *cf. Katz Dochtermann & Epstein, Inc. v. Home Box Office*, No. 97-CV-7763, 1999 WL 179603, at *4 (S.D.N.Y. Mar. 31, 1999) (finding that the plaintiff’s “allegation of fraudulent intent simply alters the scope of the state [unfair competition claim] but not

the equivalency of its nature to a copyright infringement claim”).⁸

⁸ Plaintiff cites a single case in which a district court found that the plaintiff’s unfair competition claims were not preempted based in part on the “extra element of misrepresentation or deception,” *Silverstein v. Penguin Putnam, Inc. (Silverstein I)*, No. 01-CV-309, 2003 WL 1797848, at *8 (S.D.N.Y. Apr. 4, 2003), but, as Defendants note, Plaintiff failed to address in its opening brief the case’s subsequent history, (Pl. Mem. 21; Defs. Opp’n 22). On appeal, the Second Circuit vacated the judgment on other grounds and remanded the case for further proceedings. *Silverstein v. Penguin Putnam, Inc. (Silverstein II)*, 368 F.3d 77, 78, 86 (2d Cir. 2004). On remand, and following a bench trial, the district court held that the plaintiff’s unfair competition claims *were* preempted, finding that the “allegation that [the defendant] also misrepresented [the work] as its own does not transform the claim into one qualitatively different from a copyright claim,” and that “the allegation that the reproduction was immoral does not differentiate the claim from one of copyright infringement.” *Silverstein v. Penguin Putnam, Inc. (Silverstein III)*, 522 F. Supp. 2d 579, 608-09 (S.D.N.Y. 2007).

Plaintiff nevertheless argues that the district court’s “post-trial decision” in *Silverstein III* “did not address whether ‘deception’ satisfied the ‘extra element’ test whatsoever and thus that aspect of [*Silverstein I*] still stands.” (Pl. Reply 5 n.4.) In *Silverstein I*, the plaintiff’s unfair competition claim was based on the “defendant’s copying of [the] plaintiff’s work,” as well as allegations that the “defendant committed a false designation of origin or confusion as to source.” *Silverstein I*, 2003 WL 1797848, at *8. The court found that “[c]laims based on false designation or confusion as to source are not preempted because the claims require a showing of actual confusion, an element not required of a copyright infringement claim.” *Id.* In addition, the court in *Silverstein I* noted the plaintiff’s argument that “its unfair competition claims covering reverse passing off are not preempted because those claims involved the extra element of misrepresentation or deception,” before concluding that “based

Finally, the Second Circuit has explicitly rejected any “exception to the general rule of preemption in the misappropriation area...for claims involving ‘any form of commercial immorality,’” *Nat’l Basketball Ass’n*, 105 F.3d at 851 (quoting *Fin. Info., Inc. v. Moody’s Inv’rs Serv., Inc.*, 808 F.2d 204, 208 (2d Cir. 1986)), and has found that “amorphous concepts such as ‘commercial immorality’...are virtually synonymous [with] wrongful copying and are in no meaningful fashion distinguishable from infringement of a copyright,” *id.* at 851.

Accordingly, the Court finds that Plaintiff’s allegations that Defendants engaged in deceptive, unethical, or immoral conduct do not save Plaintiff’s unfair competition claims from preemption. Because the Court finds that all of Plaintiff’s claims are preempted by the Copyright Act, the Court denies the motion to remand the action to state court.

on the required presence of these elements...[the] plaintiff’s unfair competition claims are not preempted.” *Id.*

In essence, the court in *Silverstein I* found that unfair competition claims for reverse passing off were not preempted by the Copyright Act — a finding that is against the weight of authority in this Circuit, discussed above, holding that such claims are preempted. Indeed, in *Silverstein III*, in finding that the plaintiff’s unfair competition claims were preempted, the court noted that it was “well-settled that a claim for reverse passing off predicated on the theory that defendant’s product replicates plaintiff’s expressions contains no extra element and is therefore preempted.” *Silverstein III*, 522 F. Supp. 2d at 608. Accordingly, the Court finds that *Silverstein I* does not support a finding that Plaintiff’s unfair competition claims are preempted based on Defendants’ alleged deceptive conduct.

c. The Court dismisses the Complaint for failure to state a claim

The Second Circuit has held that the “complete preemption doctrine” extends to the Copyright Act, because it is a “federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action,” and “therefore...the district courts have jurisdiction over state law claims preempted by the Copyright Act.” *Briarpatch Ltd., L.P.*, 373 F.3d at 305. “[O]nce a district court determines that a state law claim has been completely preempted and thereby assumes jurisdiction over it, the court must then dismiss the claim for failing to state a cause of action.” *Id.* at 309.

Given that the Court finds that all of Plaintiff’s state law claims are preempted by the Copyright Act, and Plaintiff has not asserted any federal law claims, the Court dismisses the Complaint for failure to state a claim. *See Kennedy v. LaCasse*, No. 17-CV-2970, 2017 WL 3098107, at *5 (S.D.N.Y. July 20, 2017) (dismissing state law claims preempted by the Copyright Act for failure to state a claim).

III. Conclusion

For the reasons set forth above, the Court denies the motion to remand the action to state court and dismisses the Complaint for failure to state a claim. The Clerk of Court is directed to close this case.

Dated: August 10, 2020
Brooklyn, New York

65a

SO ORDERED:

/s/ MKB

MARGO K. BRODIE
United States District
Judge

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

| | |
|------------------------------|-------------------------|
| GENIUS MEDIA GROUP INC., | Index No. |
| <i>Plaintiff,</i> | <u>VERIFIED</u> |
| -against- | <u>COMPLAINT</u> |
| GOOGLE LLC and LYRICFIND, | |
| <i>Defendants.</i> | |

Plaintiff Genius Media Group, Inc. (“Genius”), as and for its Complaint against defendants Google LLC (“Google”) and LyricFind (each a “Defendant” and collectively, “Defendants”) alleges as follows:

NATURE OF THE ACTION

1. Genius is a digital media company connecting music fans across the internet. One of Genius’s primary services is the development and maintenance of a vast repository of annotated music lyrics, some of which are artist-supplied and many of which are transcribed and refined by a community of over two million Genius contributors.

2. Defendants Google LLC and LyricFind have been caught red-handed misappropriating content from Genius’s website, which they have exploited—and continue to exploit—for their own financial benefit and to Genius’s financial detriment.

3. When repeatedly confronted by Genius with incontrovertible evidence regarding their conduct, Defendants assigned blame elsewhere but otherwise continued their unlawful behavior.

4. Only after Defendants’ conduct became public in a *Wall Street Journal* article did Defendants purport to address their misappropriation of content from Genius’s website.

5. Defendants’ responses, however—largely platitudes of “high standards” and “best practices”—ring hollow, and Defendants continue to exploit content misappropriated from Genius’s website while apparently attempting to conceal that misappropriation.

6. This action seeks to halt Defendants’ unethical and unfair anticompetitive practices, as well as to recover damages for violations of Genius’s Terms of Service as a result of defendants’ misappropriation.

THE PARTIES

7. Plaintiff Genius Media Group, Inc. is a Delaware corporation with its principal place of business at 92 Third Street, Brooklyn, New York 11231.

8. Upon information and belief, Defendant LyricFind is a Canadian company with its principal place of business in Toronto, Ontario.

9. LyricFind describes itself as the “world’s leader in legal lyric solutions.” It purports to maintain a “quality-controlled, vetted database of...lyrics available for licensing and service to over 200 countries.”

10. While not registered to do business in New York State, LyricFind nonetheless, upon information and belief, maintains an office and has employees within the state, including, for example, its Vice President of International Publishing. Upon information and belief, LyricFind also has employees in California.

11. Moreover, upon information and belief, LyricFind regularly contracts and conducts business—including licensing of lyrics or the provision of its lyrics-related services—with counterparties located in the States of New York and California.

12. Upon information and belief, in or about June 2016, LyricFind entered into an agreement with Google whereby LyricFind provides lyrics to Google for use in (at least) Google’s search results.

13. Google LLC is a Delaware limited liability company with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043.

14. Google LLC owns and operates, among other products, Google Search (a/k/a Google Web Search), the internet's dominant search platform.

15. Google LLC is registered to do business in the State of New York and maintains offices at 111 Eighth Avenue, New York, New York 10011.

FACTUAL BACKGROUND

I. Genius and the Market for Accurate Music Lyrics

16. Founded in 2009 as "Rap Exegesis," Genius has become a preeminent source of lyrics for music and is a preferred destination for major publications when reporting on or analyzing lyrics.

17. It is commonly assumed that music lyrics are provided by music publishers and/or record labels in connection with the release of new music. In the age of digital distribution, however, that is rarely the case.

18. Rather, while the music publishers and/or songwriters usually own the copyright in the lyrics for a given song, they do not generally maintain a catalog of lyrics transcriptions. Companies that license lyrics for display from music publishers (like Genius and LyricFind) do not typically receive any actual lyrics transcriptions in connection with their licensing agreements.

19. Genius provides a platform for music enthusiasts who transcribe music lyrics, and also

obtains lyrics through partnerships with artists who provide their lyrics directly to Genius. Genius, in turn, obtains licenses from music publishers permitting the display and distribution of these lyrics.

20. Members of the Genius community are music enthusiasts. Lyrics transcription is an arduous task that often requires genre experts to repeatedly listen to songs in order to produce accurate transcriptions.¹ Lyrics transcription on Genius is also a collaborative activity—multiple members of the Genius community are able to work on a single lyrics transcription simultaneously. Genius has invested ten years and tens of millions of dollars to build the technology and community that supports collaborative lyrics transcription. The high quality and ready availability of lyrics on Genius are a direct result of this technology and Genius’s engaged community of users.

21. Genius moderates the quality of content on its website, including music lyrics, through the use of an “IQ” system, through which registered Genius users earn IQ points based on quality contributions,

¹ Chief Justice Roberts of the Supreme Court of the United States acknowledged as much when he quoted a lyric from the liner notes of Bob Dylan’s song “Like a Rolling Stone” in a 2008 decision. The liner notes read “When you got nothing, you got nothing to lose”, while the song as performed adds an extra word “ain’t”: “When you **ain’t** got nothing, you got nothing to lose.” The lyrics that appear on the Genius website include the word “ain’t”, as performed in the actual recording. See <https://www.nytimes.com/2016/02/23/us/politics/how-does-it-feel-chief-justice-roberts-to-hone-a-dylan-quote.html>

as determined by other Genius users. A higher number of IQ points for a registered Genius user translates into greater ability to add, edit and/or annotate lyrics on the Genius website.

22. Genius earns revenue in several ways. Significantly, Genius partners with major companies, such as Apple, to license its database of high-quality lyrics. Genius also generates ad revenue through web traffic on its website and apps, sales of pre-roll video commercials on YouTube, and production of custom content and events for major brands.

23. Many Genius users arrive at its website after using a search engine—most typically, Google’s search engine—to find lyrics for a given song. Genius is often the top-ranked organic search result on Google for lyrics search queries (*e.g., selenagomez lose you to love me lyrics.*)²

24. All users that visit Genius’s website, regardless of whether a user registers for an account with Genius, are bound by its Terms of Service, which are accessible to users from all pages of the Genius website.

² “Organic search results” are defined by Google “[a] free listing in Google Search that appears because it’s relevant to someone’s search terms.” The term is used *infra* to distinguish between free listings in Google Search and Google’s Information Box results.

II. Google's Lyrics Information Box

25. Google operates the internet's dominant search engine. In a given month, a majority of visitors to Genius's website arrive via Google search.

26. In Google's 2004 initial public offering materials, co-founder Larry Page claimed: "We want you to come to Google and quickly find what you want. Then we're happy to send you to the other sites.... We want to get you out of Google and to the right place as fast as possible."

27. Notwithstanding this public statement, upon information and belief, Google has since altered its search product in a manner designed to keep users on Google-owned properties, such as YouTube, rather than send them to third-party sites. Indeed, according to a study published in 2019, more than half of Google searches do not result in a click to visit another website. Moreover, approximately 14% of searches that do result in a click to another website are in fact clicks to visit other Google-owned properties.

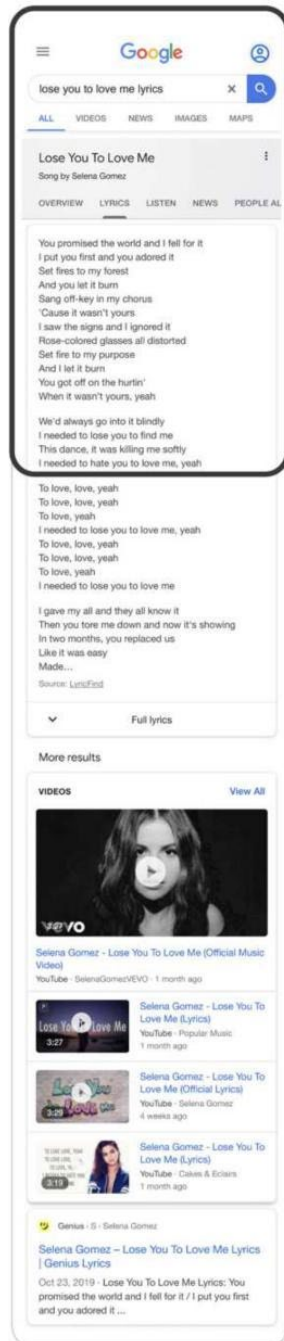
28. Upon information and belief, in 2009, Google added a feature to its search products in some categories that it calls an "Information Box," which is displayed above, alongside or interwoven with organic search results on select search engine results pages, depending on a given search query. For example, if a Google user queries the name of a celebrity, the search engine results page will often display an Information Box that provides select information regarding that celebrity, along with a link to another website (*e.g.* Wikipedia) to view more information. A

user desiring more information would then either click the link or click through to one of the organic search results linked on the page.

29. Upon information and belief, Google expanded its Information Box product to lyrics search results in or about December 2014. Currently, when a Google user queries the name of a song together with “lyrics,” (*e.g., lose you to love me lyrics*) the search engine results page may display an Information Box above all other organic search results showing the complete lyrics for the requested song. Unlike the preceding celebrity search example, lyrics Information Boxes display the full lyrics to songs and do not provide click-through links that provide additional content.

30. When virtually all mobile users and many desktop users search for song lyrics, and Google returns an Information Box containing the requested song lyrics, the Information Box is displayed in such a manner that the user cannot see any other search results without first scrolling down, as shown below.

74a



Portion of lyrics search
results visible on an
Apple iPhone 11 Pro
before scrolling

*Screenshot from: November 26, 2019

31. Moreover, Google's lyrics Information Boxes frequently appear in search results as a part of larger search features that include links to Google-owned revenue-generating products, such as YouTube and Google Play, as shown below. Specifically, many lyrics Information Boxes prompt users to play the music video on YouTube or stream the song on Google Play.

76a



32. In other words, in the competition for users on the internet, Google has designed its lyrics Information Box in a way that discourages users from seeking another result, and, in many cases, directs them toward other revenue-generating Google products.

III. Google's Search Quality Evaluator Guidelines ("SQEG")

33. Since its founding in 1998, Google has faced numerous inquiries from competition authorities worldwide concerning actual or potential unfair competition by Google regarding the manner in which it displays and ranks search results.³

34. Given Google's dominance in the internet search market—comprising more than 85% of the internet search engine market in the United States in 2018—a website's placement on Google's search engine results pages is a material consideration to both its web traffic and revenue.

35. The precise algorithm by which websites are ranked on Google's search engine results page is a closely-guarded company secret. Part of that algorithm, however, relies on the work of thousands of "Search Quality Evaluators," with whom Google contracts to assess the quality of the results provided by the Google search engine. The assessments from these evaluators, in turn, inform adjustments to Google's search results ranking algorithm.

36. To assist Search Quality Evaluators in assessing the results of Google's search engine, Google has published a 167-page "Search Quality

³ Indeed, Google is currently under antitrust investigation in the United States by 50 attorneys general and is also facing antitrust probes from the U.S. House of Representatives and the U.S. Department of Justice.

Evaluator Guidelines” (SQEG), which it last updated in September 2019. See Google Search Quality Evaluator Guidelines, dated Sept. 5, 2019 (attached hereto as **Exhibit A**).

37. With respect to lyrics websites, like Genius, that appear organically on Google’s search engine results pages, the SQEG instructs evaluators to score those website results as “Moderately Meeting” a lyric-searching user’s intent, noting that “many pages [on lyrics websites] are not 100% accurate.”

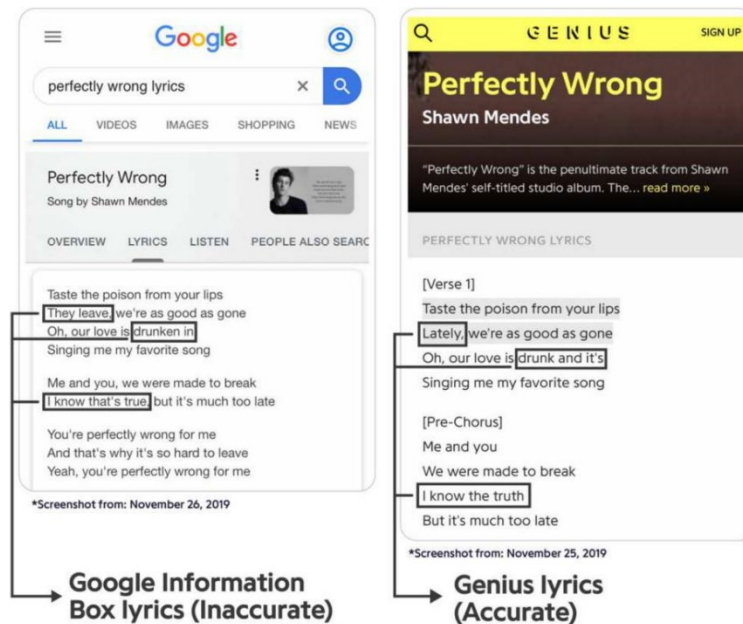
38. For the lyrics appearing in Google’s own Information Boxes, however, evaluators are instructed to score the results as “Fully Meeting” a lyric-searching user’s intent—the highest possible score an evaluator may assign.

39. The disconnect in the SQEG’s rating guidance for Google’s own lyrics Information Box versus websites like Genius appears to rely on the assumption that Google’s lyrics Information Box content is more accurate.

40. That assumption, however, does not bear out, as the lyrics featured in Google’s Information Boxes are often inaccurate and, upon information and belief, Google takes no steps to either verify the accuracy of the data from its lyrics Information Box or establish the inaccuracy of lyrics appearing on competing websites such as Genius.

41. For example, as shown below, Google’s Information Box results display inaccurate lyrics for

the song “Perfectly Wrong” performed by Shawn Mendes. Genius’s website, on the other hand, displays the accurate lyrics.



42. Moreover, many of the lyrics sites that Google deems of suspect accuracy license lyrics data from the same vendors Google contracts with to supply lyrics to its own lyrics Information Boxes. Notably, the lyrics site azlyrics.com, which is used in the SQEG example described in paragraph 37 above, is powered by lyrics data vendor Musixmatch. Musixmatch is, upon information and belief, a lyrics data vendor used by Google to provide lyrics for its lyrics Information Boxes.

43. Elsewhere in its SQEG, Google makes clear that it places little to no value on copied content:

The Lowest rating is appropriate if all or almost all of the [Main Content] on the page is copied with little or no time, effort, expertise, manual curation, or added value for users. Such pages should be rated Lowest, even if the page assigns credit for the content to another source.

44. Accordingly, based on Google's own guidance to search evaluators, a reasonable person would expect that Google's search engine would disfavor copied content obtained without permission and consequently rank it lower on search engine results pages.

45. In reality, however, upon information and belief, Google's Information Box lyrics results are displayed above all other search results without regard to their accuracy and without any evaluation of whether they are copied from another source, such as Genius's website.

IV. Genius Suspects Misappropriation

46. In 2014, when Google initially rolled out its Information Box feature in lyrics search results, Genius observed that the lyrics results were often inaccurate.

47. When Genius observed lyrics Information Boxes that were accurate, Genius also observed that the lyrics in those Information Boxes were sometimes identical, on a character-for-character basis, with those displayed on Genius's website.

48. As previously discussed, given the fact that most lyrics are transcribed after listening to the sound recording, it is highly unlikely that another source of lyrics would be a character-for-character match—including punctuation, contractions, and line breaks—with lyrics appearing on Genius’s website, without having been copied from Genius’s website. This is especially true for certain music genres such as hip-hop, which often features songs with especially intricate lyrics.

49. The lyrics Information Box on Google for the Desiigner song “Panda” was one of the first Information Boxes to cause Genius to suspect lyrics from its website were being misappropriated.

50. Specifically, the lyrics to “Panda” displayed in the Information Box on Google and observed by Genius on June 8, 2016 matched exactly, on a character-for-character basis, the lyrics to “Panda” featured on Genius’s website as of May 16, 2016 (the “May 2016 Genius Panda Lyrics”).

51. This observation suggested to Genius that Google’s lyrics Information Box for “Panda” on June 8, 2016 featured lyrics misappropriated from Genius’s website.⁴

⁴ It is possible that Google started displaying the lyrics in question before June 8, 2016; however June 8, 2016 was the day Genius first recorded those lyrics in Google’s lyrics Information Box.

52. Having observed an exact copy of lyrics from its website in Google's lyrics Information Box, Genius sought to determine who might be responsible for the apparent misappropriation.

53. As of June 8, 2016, Genius was aware of two companies engaged in the business of licensing lyrics for display on the web: LyricFind and Musixmatch.

54. As of June 8, 2016, Genius was not aware of any lyrics data licensing arrangement between Google and LyricFind or Google and Musixmatch. Given, however, their prominence in the lyrics data licensing business, Genius sought to determine if LyricFind or Musixmatch was responsible for the misappropriation of the lyrics to "Panda" from Genius's website for display in Google's lyrics Information Box.

55. On or about June 8, 2016, upon information and belief, the lyrics to "Panda" featured on the website metrolyrics.com were licensed for display from LyricFind, and the lyrics to "Panda" featured on the website azlyrics.com were licensed lyrics for display from Musixmatch.

56. By observing the lyrics to "Panda" featured on metrolyrics.com and azlyrics.com on or about June 8, 2016, Genius could attempt to determine if LyricFind or Musixmatch had provided the May 2016 Genius Panda Lyrics to Google. If the lyrics to "Panda" from metrolyrics.com on or about June 8, 2016 matched the May 2016 Genius Panda Lyrics, that would suggest that LyricFind had

misappropriated the lyrics to “Panda” from Genius’s website and was providing them to Google. If the lyrics to “Panda” from azlyrics.com on or about June 8, 2016 matched the May 2016 Genius Panda Lyrics, that would suggest that Musixmatch had misappropriated the lyrics to “Panda” from Genius’s website and was providing them to Google.

57. On or about June 8, 2016, upon information and belief, neither the lyrics to “Panda” featured on metrolyrics.com, nor the lyrics to “Panda” featured on azlyrics.com matched the May 2016 Genius Panda Lyrics.

58. Indeed, on or about June 8, 2016, upon information and belief, the only place on the internet that Genius could find an exact copy of the May 2016 Genius Panda Lyrics, was in Google’s lyrics Information Box. This fact suggested to Genius that Google was directly responsible for misappropriating lyrics from Genius’s website.⁵

⁵ Google has subsequently populated the lyrics Information Box for “Panda” with lyrics attributed to LyricFind. These lyrics contain a notable inaccuracy: Desiigner raps “Man I’m the **macho** like Randy,” a reference to the late WWE superstar Randy “Macho Man” Savage. As of December 2, 2019, Google’s lyrics Information Box for “Panda” renders this lyric incorrectly as “Man I’m the **mocho** like Randy.” As of June 8, 2016, when Google’s lyrics Information Box for “Panda” matched the May 2016 Genius Panda Lyrics, the lyrics Information Box included the correct line “Man I’m the **macho** like Randy.”

V. Google and LyricFind Are Caught “Red-Handed”

59. Based on the observations of Google’s lyrics Information Boxes described above, in August 2016, Genius devised a digital watermark to embed in certain lyrics appearing on its site.

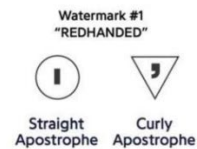
60. This watermark (“Watermark #1”) involved replacing the apostrophes in a selection of newly released songs with a distinctive pattern of curly (') and straight apostrophes (').⁶ Genius set the 2nd, 5th, 13th, 14th, 16th and 20th apostrophes of each watermarked song as curly apostrophes, and all the other apostrophes straight. If the straight apostrophes are interpreted as dots and the curly apostrophes are interpreted as dashes, the pattern spells out “REDHANDED” in Morse code, as shown below. Genius designed Watermark #1 to be woven into the text of the lyrics of the watermarked songs so that, if the apostrophe pattern were to be found outside of Genius’s website, there would be no explanation other than that the lyrics were copied from Genius’s website, *e.g.*, by using the copy/paste functionality or a computer program.

⁶ The Unicode character code for the curly apostrophe is U+2019 and the Unicode character code for the straight apostrophe is U+0027.

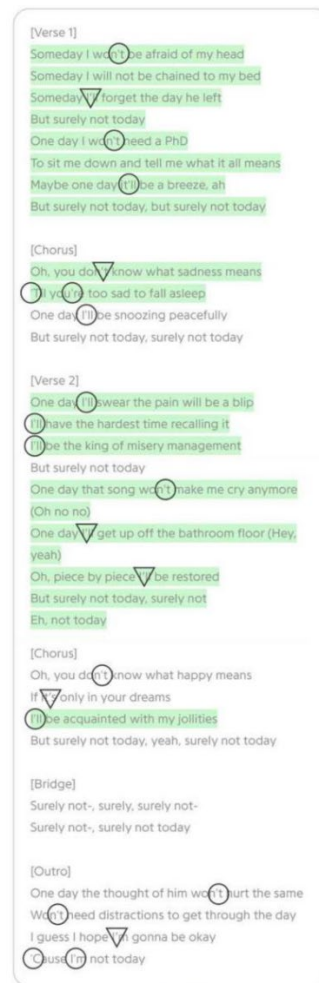
85a

Lyrics on Genius.com
Watermark #1

Song: "Not Today"
by Alessia Cara



| Apostrophe Number | Apostrophe Type | Morse Code | English |
|-------------------|-----------------|------------|----------|
| 1 | ○ Straight | Dot | R |
| 2 | ▽ Curly | Dash | |
| 3 | ○ Straight | Dot | |
| 4 | ○ Straight | Dot | E |
| 5 | ▽ Curly | Dash | |
| 6 | ○ Straight | Dot | D |
| 7 | ○ Straight | Dot | |
| 8 | ○ Straight | Dot | H |
| 9 | ○ Straight | Dot | |
| 10 | ○ Straight | Dot | |
| 11 | ○ Straight | Dot | A |
| 12 | ○ Straight | Dot | |
| 13 | ▽ Curly | Dash | N |
| 14 | ▽ Curly | Dash | |
| 15 | ○ Straight | Dot | D |
| 16 | ▽ Curly | Dash | |
| 17 | ○ Straight | Dot | E |
| 18 | ○ Straight | Dot | |
| 19 | ○ Straight | Dot | D |
| 20 | ▽ Curly | Dash | |
| 21 | ○ Straight | Dot | |
| 22 | ○ Straight | Dot | |



*Screenshot from: November 25, 2019

61. Over the next several months, Genius informally monitored Google's lyrics Information Boxes and sometimes encountered lyrics on Google that featured Watermark #1.

62. In or about May 2017, Genius first put Google on notice about the appearance of

Watermark #1 in its lyrics Information Boxes. In an email, Genius provided Google with an example of a song (Kendrick Lamar's "PRIDE.") that featured Watermark #1, explaining that the presence of the watermark irrefutably proved that Google was displaying lyrics copied from Genius's website in its lyrics Information Boxes. Genius received a response saying "Give me a week on this to figure out what is going on our side."

63. Genius followed up with multiple executives at Google and, while they would repeatedly indicate to Genius that they were looking into the issue, no explanation was ever given for the appearance of content in Google's lyrics Information Boxes that unquestionably originated from Genius's website.

64. In or about October 2018, Genius designed an experiment to more systematically assess the incidence of lyrics misappropriated from Genius's website in Google's lyrics Information Boxes. Specifically, Genius embedded Watermark #1 in the lyrics for a random sample of new songs that appeared on Genius. In order to be included in the sample a song had to (1) have lyrics in English or Spanish, (2) feature a sufficient number of apostrophes to support Watermark #1, and (3) meet a popularity threshold. Genius randomly applied Watermark #1 to a percentage of new songs meeting the criteria for inclusion in the sample.

65. Once a song became part of the watermarked sample set, Genius searched for its

lyrics every day on Google, and recorded whether the lyrics Information Box was present. If the lyrics Information Box was present, Genius recorded whether the lyrics displayed by Google therein featured Watermark #1.

66. From October 2018 through December 2018, a total of 301 songs were included in Genius's Watermark #1 sample set. Of those 301 songs, Google provided lyrics Information Boxes for 271 (90%) of them. Of those 271 Information Boxes, 116 (43%) showed clear evidence of matching Watermark #1—the distinctive pattern of curly and straight apostrophes described above. An example of a lyrics Information Box featuring Watermark #1 observed by Genius during this period is shown below.

88a

Lyrics in Google's Information Box Watermark #1

Song: "Not Today" by Alessia Cara

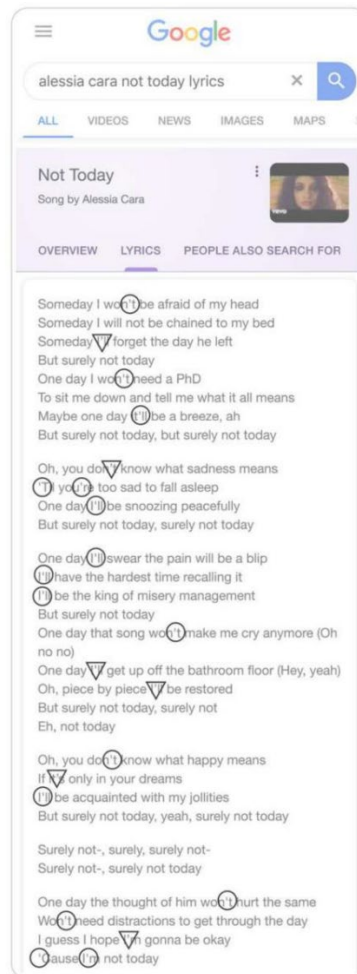
Watermark #1
"REDHANDED"



Straight
Apostrophe



Curly
Apostrophe



*Screenshot from: June 6, 2019

67. Based on the above evidence, Genius concluded that the incidence of lyrics irrefutably copied from Genius's website in Google's lyrics Information Boxes was widespread and that the copying was systematic.

68. On April 22, 2019, Genius again notified Google, in writing, that it was displaying content misappropriated from Genius's website. In that letter, Genius provided an example of the lyrics displayed in an Information Box that contained Watermark #1, noted that there were additional examples reflecting the same concern, and demanded that Google cease and desist from displaying lyrics misappropriated from Genius's website.

69. In response to Genius's April 22 letter, Google wrote to "reassure [Genius] that the lyrics in our lyric [Information Boxes] are obtained through several licensors not through scraping." Google requested 20 or more examples of the misappropriated content so that Google "can better address your concerns," which Genius provided.

70. Google subsequently identified LyricFind as the source of the lyrics from the examples that Genius provided to Google.⁷

71. As a result, on April 30, 2019, Genius wrote to LyricFind to request that it cease and desist from the misappropriation and commercialization of content appearing on Genius's website, which violates Genius's Terms of Service as well as New York and California law.

⁷ Genius had long suspected that LyricFind was misappropriating lyrics from Genius's website. In fact, in August 2016 a Genius executive mentioned these concerns to LyricFind's CEO.

72. Notwithstanding that both Google and LyricFind made use of lyrics that unquestionably originated from Genius’s website—obtained in violation of its Terms of Service⁸—and were placed on actual notice of their behavior, upon information and belief, neither Google nor LyricFind took any steps to cease such conduct.

VI. Defendants’ Inconsistent and Insufficient Response

73. In the weeks following Genius’s letters to both Google and LyricFind, the defendants continued business as usual with respect to the display of lyrics in Google’s Information Boxes, including those bearing Watermark #1.

74. On June 16, 2019, the *Wall Street Journal* published an article titled “Lyrics Site Accuses Google of Lifting Its Content,” outlining Google and LyricFind’s misappropriation of lyrics from Genius’s website. *See Lyrics Site Accuses Google of Lifting Its Content*, The Wall Street Journal, June 16, 2019 (attached hereto as **Exhibit B**).

75. In connection with reporting on the article, both Google and LyricFind were contacted by reporters from the *Wall Street Journal* and other press outlets for comment. LyricFind’s Chief Executive Officer maintained “we do not source lyrics

⁸ Notably, Genius has been able to identify user accounts on Genius registered with email addresses associated with the corporate domains of both Google and LyricFind.

from Genius.” Google asserted, “[w]e take data quality and creator rights very seriously and hold our licensing partners accountable to the terms of our agreement” and soon after issued a second statement saying: “We’re investigating this issue with our data partners and if we find that partners are not upholding good practices we will end our agreements.”

76. The *Wall Street Journal* article attracted significant discussion in the technology and music communities and, within days, both Google and LyricFind issued statements in response.

77. In a June 18, 2019 blog post, Google wrote, in relevant part:

News reports this week suggested that one of our lyrics content providers is in a dispute with a lyrics site about where their written lyrics come from. We’ve asked our lyrics partner to investigate the issue to ensure they’re following industry best practices in their approach. We always strive to uphold high standards of conduct for ourselves and from the partners we work with.

78. Google recited its commitments to “upholding high standards” and policing its content partners to “ensure they’re following industry best practices in their approach,” despite knowing, from numerous emails, meetings, and conversations with Genius dating back to 2017, that lyrics which appear in Google’s Information Boxes were watermarked

and, accordingly, irrefutably misappropriated from Genius's website.

79. No "high standard" or "industry best practice" includes the wholesale misappropriation of content from another company's website.

80. Indeed, Google's own SQEG provide that copied content receives the lowest rating. These "high standards" apparently do not apply to Google or its own money-making products, including Google Search.⁹

81. Shortly after the publication of the *Wall Street Journal* article, and seemingly in an effort to divert attention away from Google's knowing exploitation of misappropriated content, Google revised its lyrics Information Box search results to display the name of the data licensing partner from whom Google sources its displayed lyrics. Significantly, however, all but one of the twenty-one lyrics Information Box examples that Genius provided to Google in April 2019—which all contain lyrics that were irrefutably misappropriated from

⁹ Moreover, the SQEG provide that lyrics websites like Genius should be given a middling quality rating, but that Google's lyrics Information Boxes should be given the highest possible rating. This leads to the preposterous and hypocritical conclusion that in the act of misappropriating lyrics from Genius's website, those lyrics also inexplicably increased in quality such that they now merit the highest possible search quality rating.

Genius’s website—are now attributed to LyricFind, not Genius.¹⁰

VII. Defendants’ Knowing and Continued Misappropriation of Content From Genius’s Website and the Apparent Attempt to Conceal that Misappropriation

82. Shortly after the publication of the *Wall Street Journal* article, Genius discovered that Watermark #1 had disappeared from Google’s lyrics Information Boxes.

83. The wholesale removal of Watermark #1 following the publicity of the *Wall Street Journal* article suggested to Genius that a deliberate effort was being made to conceal the misappropriation of lyrics from Genius’s website, and Genius suspected that it was likely such misappropriation was continuing unabated.

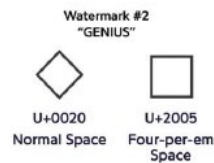
84. In order to test this suspicion, in August 2019, Genius devised a second watermark (“Watermark #2”). This watermark involves replacing the 15th, 16th, 19th, and 25th spaces of each song’s lyrics with a special whitespace character called a “four-per-em space.” This character (U+2005) looks identical to the normal “space” character (U+0020), but can be differentiated via Unicode character codes readable by a computer. If one ignores the first 14

¹⁰ For one of those 21 examples—“Redlight” by A\$AP Ferg and NGHTMRE—Google no longer displays a lyrics Information Box as of December 2, 2019.

spaces of a song's lyrics, then interprets the four-per-em spaces as dashes, and regular spaces as dots, the sequence spells out the word "GENIUS" in Morse code, as shown below.

Lyrics on Genius.com
Watermark #2

Song: "Lose You To Love Me"
by Selena Gomez



| Whitespace Number | Whitespace Character (Unicode) | Morse Code | English |
|-------------------|--------------------------------|------------|----------|
| 15 | □ U+2005 | Dash | G |
| 16 | □ U+2005 | Dash | |
| 17 | ◇ U+0020 | Dot | |
| 18 | ◇ U+0020 | Dot | E |
| 19 | □ U+2005 | Dash | |
| 20 | ◇ U+0020 | Dot | N |
| 21 | ◇ U+0020 | Dot | |
| 22 | ◇ U+0020 | Dot | I |
| 23 | ◇ U+0020 | Dot | |
| 24 | ◇ U+0020 | Dot | U |
| 25 | □ U+2005 | Dash | |
| 26 | ◇ U+0020 | Dot | S |
| 27 | ◇ U+0020 | Dot | |
| 28 | ◇ U+0020 | Dot | |

[Verse 1]

You promised the world and I fell for it
 I put you first and you adored

Set fire to my forest
 And you burn
 Sang off-key chorus
 'Cause it wasn't yours

I saw the signs and I ignored it
 Rose-colored glasses all distorted
 Set fire to my purpose
 And I let it burn
 You got off on the hurtin'
 When it wasn't yours, yeah

[Pre-Chorus]

We'd always go into it blindly
 I needed to lose you to find me
 This dancing was killing me softly
 I needed to hate you to love me, yeah

*Screenshot from: November 25, 2019

85. Next, a sample of lyrics on Genius's website was watermarked with the original watermark, Watermark #1 ("Group A"). Another

sample of lyrics was watermarked with Watermark #2 (“Group B”). A final sample of lyrics was watermarked with both Watermark #1 and Watermark #2 (“Group C”).


86. Genius regularly monitored the Google lyrics Information Boxes for songs in all three of the above groups. Genius did not observe Watermark #1 on any content in Google’s lyrics Information Boxes. Genius did, however, observe Watermark #2 on content in Group B and Group C.

87. The frequency with which Watermark #2 appeared in Google’s lyrics Information Boxes made clear that the misappropriation of lyrics from Genius’s website was continuing unabated. Based on an analysis of the incidence of Watermark #2 in Information Boxes for songs in Groups B and C, Genius estimates that approximately 40% of lyrics for new music displayed in the Information Boxes feature lyrics that are being unlawfully misappropriated from Genius’s website. An example of a lyrics Information Box featuring Watermark #2 observed by Genius is shown below.


Lyrics on Genius.com
Watermark #2

Song: "Lose You To Love Me"
by Selena Gomez

Watermark #2
"GENIUS"



U+0020
Normal Space



U+2005
Four-per-em Space

| Whitespace Number | Whitespace Character (Unicode) | Morse Code | English |
|-------------------|--------------------------------|------------|----------|
| 15 | □ U+2005 | Dash | G |
| 16 | □ U+2005 | Dash | |
| 17 | ◇ U+0020 | Dot | |
| 18 | ◇ U+0020 | Dot | E |
| 19 | □ U+2005 | Dash | N |
| 20 | ◇ U+0020 | Dot | |
| 21 | ◇ U+0020 | Dot | |
| 22 | ◇ U+0020 | Dot | I |
| 23 | ◇ U+0020 | Dot | U |
| 24 | ◇ U+0020 | Dot | |
| 25 | □ U+2005 | Dash | |
| 26 | ◇ U+0020 | Dot | S |
| 27 | ◇ U+0020 | Dot | |
| 28 | ◇ U+0020 | Dot | |

[Verse 1]

You promised the world and I fell for it
 I put you first and you adored
 Set fire to my forest
 And you let it burn
 Sang off-key to my chorus
 'Cause it wasn't yours
 I saw the signs and I ignored it
 Rose-colored glasses all distorted
 Set fire to my purpose
 And I let it burn
 You got off on the hurtin'
 When it wasn't yours, yeah

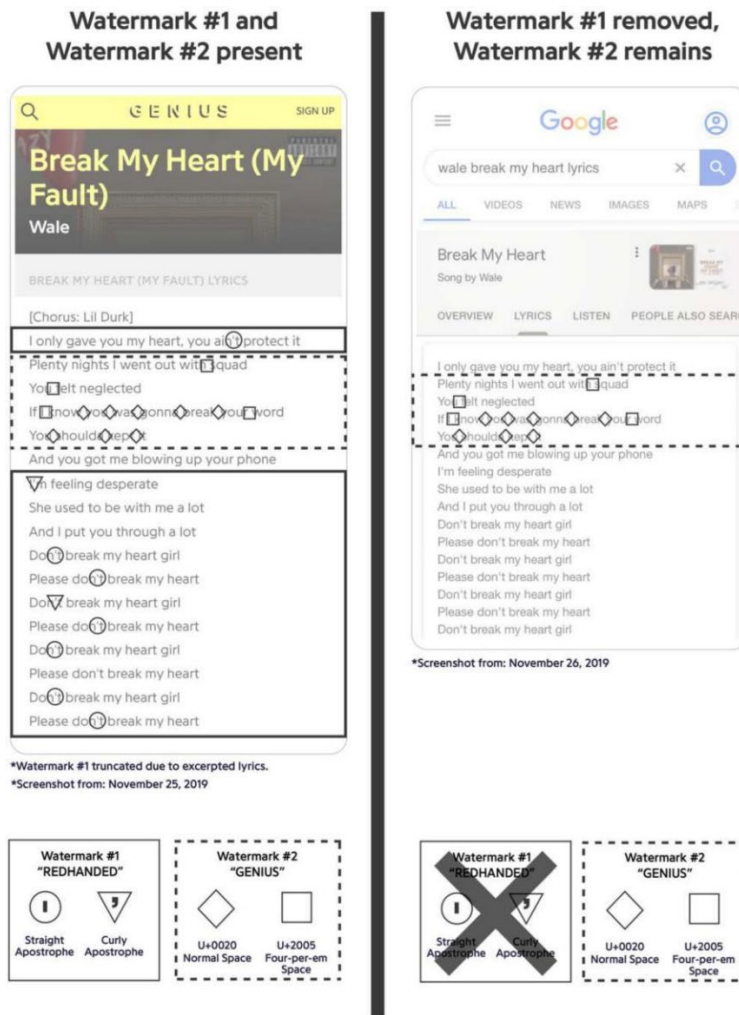
[Pre-Chorus]

We'd always go into it blindly
 I needed to lose you to find me
 This dancing was killing me softly
 I needed to hate you to love me, yeah

*Screenshot from: November 25, 2019

88. Even more egregious, with regard to lyrics in Group C (lyrics featuring both Watermark #1 and Watermark #2), Genius identified numerous instances in which Watermark #1 was not present in Google's lyrics Information Box, yet the same lyrics featured Watermark #2, the details of which had not

previously been made public. An example is shown below.



89. In other words, Genius has identified a number of Google's Information Boxes that feature lyrics misappropriated from Genius's website that originally had two watermarks embedded in them

(Watermarks #1 and #2), and now—when displayed in Google’s Information Boxes—no longer feature the publicly-known watermark (Watermark #1) while retaining the second, previously non-public watermark (Watermark #2). This pattern suggested to Genius that a deliberate effort was being made to conceal the misappropriation of lyrics from Genius’s website.

90. On November 6, 2019, Genius notified Google that: (a) it had devised another watermark and performed another experiment which demonstrated that lyrics for new music displayed in the Information Boxes were still being misappropriated from Genius’s website; and (b) for numerous songs, the publicly-known Watermark #1 appeared to have been systematically removed from Google’s lyrics Information Boxes while the non-public Watermark #2 remained. Accordingly, Genius demanded that Google stop displaying lyrics misappropriated from Genius’s website and address the issue.

91. On December 2, 2019, Google’s attorneys responded to Genius, stating that “Google has done nothing wrong” and continuing to assign all responsibility to their data licensing partners. Google made no mention of their purported “investigation,” other than to assert that they “obtained additional assurances” that their data partners “do not, and would not, obtain lyrics from Genius’s website.”

VIII. Selena Gomez’s “Lose You To Love Me”— A Case Study in Misappropriated Lyrics

92. On October 23, 2019 at 12am EDT, Selena Gomez released a new single, “Lose You To Love Me.” The song would go on to reach the #1 position on the Billboard Hot 100 for the week of November 9, 2019.

93. By October 23, 2019 at 10:34am EDT, a Genius staff member had marked the lyrics to “Lose You To Love Me” as complete and accurate.

94. On October 23, 2019, the lyrics to “Lose You To Love Me” received more than 600,000 views on Genius.

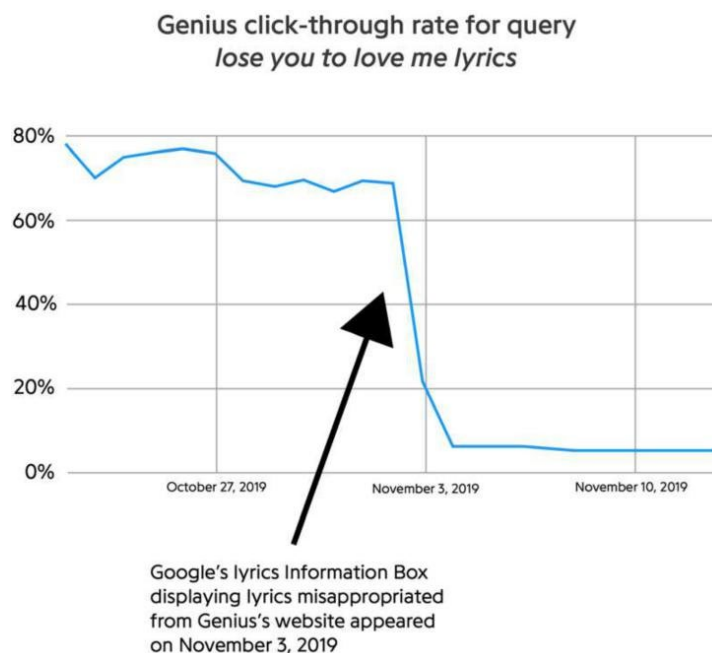
95. Upon information and belief, for the period between October 23, 2019 and November 2, 2019, Genius’s lyrics page for “Lose You To Love Me” was the first organic search result on Google for the search query *lose you to love me lyrics*.

96. Due to Genius’s placement in Google’s search results, approximately 75% of users who searched Google for *lose you to love me lyrics* between October 23 and November 2, 2019, clicked through to Genius. This traffic made “Lose You To Love Me” the #1 song on Genius’s website for the month of October 2019.

97. On November 3, 2019, upon information and belief, Google began displaying a lyrics Information Box above all organic search results for the query *lose you to love me lyrics*.

98. The lyrics in Google’s Information Box for “Lose You To Love Me” contained Genius’s Watermark #2 (based on the special four-per-em whitespace character), irrefutably demonstrating that these lyrics were misappropriated from Genius’s website.

99. On November 4, 2019, after the Information Box for “Lose You To Love Me” appeared, the click-through rate to Genius for the search query *lose you to love me lyrics* dropped from 75% to 5%, as shown below.



IX. Defendants’ Actions Harm Genius

100. Google web searches are a primary driver of traffic to Genius’s website.

101. When Genius is the first organic result for a lyrics search query on Google, and Google does not display an Information Box above the organic search results, the click-through rate to Genius's website is between 60% and 80%.

102. However, when Genius is the first organic result for a lyrics query, but a lyrics Information Box is displayed above the organic search results, the click-through rate to Genius's website plummets to between 5% and 20%.

103. Genius sells advertising on its website and traffic to Genius's website is a key driver of revenue for the company.

104. The economic impact on Genius is all the more galling because, as described above, in many cases Google's lyrics Information Boxes display content misappropriated from Genius's website for which Genius receives no compensation and, indeed, suffers a monetary loss.

105. Moreover, Genius is placed at an unfair competitive disadvantage in the market for the licensing and display of lyrics because Defendants, who have misappropriated content from Genius's website, use it to gain unfair advantages.

106. For example, LyricFind is able to expand and improve upon its database of lyrics— which it licenses to other companies, including Google— without the investment of time, effort and resources necessary to actually transcribe lyrics. Instead, LyricFind improperly freerides on the efforts of

Genius, a competitor, in violation of Genius's Terms of Service.

107. Google, meanwhile, is able to entrench its dominance by capturing users in its ecosystem who previously would have used Google Search to be directed to a third-party website, such as Genius's. By displaying a lyrics Information Box in response to a user's search, users stay within Google's ecosystem, where Google can monetize those users. For example, Google might lead the user to watch the song's music video on YouTube, where Google is able to sell ads and further monetize the user's search query.

108. The design and placement of Google's Information Box search results underscore Google's ongoing displacement of third-party websites. Google prominently displays the Information Box results at a size sufficient, in many instances, to squeeze out organic search results from the search engine results page unless a user scrolls down.

109. Upon information and belief, Google is well aware of the deleterious effect to web publishers of their placing organic search results further down on results pages, which is to materially decrease web traffic to those publishers and associated advertising revenue.¹¹

¹¹ In fact, due to Google's dominant market position in digital advertising technology, Google may be able to measure the impact of search placement and Information Boxes on Genius's revenue via the data in Google Ad Manager and Google Ad Exchange.

110. Accordingly, Google's knowing placement of lyrics Information Boxes containing content misappropriated from Genius's website despite Google's own professed disfavoring of copied content is deceptive and anticompetitive.

AS AND FOR A FIRST CAUSE OF ACTION
(Breach of Contract, as against LyricFind)

111. Plaintiff repeats and realleges paragraphs 1 through 110 as if set forth fully herein.

112. Access to and use of Genius's website, including the content appearing on its website, is subject to the Genius Terms of Service, which were last updated on March 13, 2014. Genius's Terms of Service are accessible from every page of its website by a link in the footer reading "Terms of Use."

113. Per the Genius Terms of Service, "[b]y accessing or using the Service, you signify that you have read, understand and agree to be bound by the terms of service and conditions set forth below.... Registration may not be required to view content on the Service, but unregistered Users are bound by these Terms."

114. Upon information and belief, since at least 2016, LyricFind and those working at LyricFind's direction accessed Genius's website and are bound by its Terms of Service.

115. In relevant part, the Terms of Service provide:

Commercial Use: Unless otherwise expressly authorized herein or by Genius' express written consent, you agree not to display, distribute, license, perform, publish, reproduce, duplicate, copy, create derivative works from, modify, sell, resell, exploit, transfer or transmit for any commercial purpose, any portion of the Service, or access to the Service. The Service is for your personal use and may not be used for direct commercial endeavors without the express written consent of Genius.

116. Notwithstanding the foregoing, since at least 2016, LyricFind has accessed the Genius website to copy, modify, sell and/or transmit content appearing on Genius's website for commercial purposes, including, but not limited to, licensing such content for display in Google's lyrics Information Box search results.

117. At no point has Genius provided its express written consent to LyricFind to engage in any of these (or any other) actions.

118. Accordingly, LyricFind's conduct breaches Genius's Terms of Service regarding commercial use.

119. In relevant part, the Terms of Service further provide:

Except as expressly authorized by Genius in writing, you agree not to modify, copy, frame, scrape, rent, lease, loan, sell, distribute or

create derivative works based on the Service of the Genius Content, in whole or in part, except that the foregoing does not apply to your own User Content that you legally upload to the Service.

120. Upon information and belief, notwithstanding the foregoing, since at least 2016, LyricFind has accessed the Genius website to copy, modify, sell and/or distribute content appearing on Genius's website that LyricFind did not upload.

121. At no point has Genius provided authorization in writing to LyricFind to engage in any of these (or any other) actions.

122. Accordingly, LyricFind's conduct breaches Genius's Terms of Service regarding the copying and reproduction of Genius Content.

123. As a result of these breaches of the Terms of Service by LyricFind, Genius has suffered damages in an amount to be proven at trial in this matter, but in no event less than \$50 million, including, but not limited to, lost licensing and advertising revenue.

AS AND FOR A SECOND CAUSE OF ACTION
(Indemnification, as against LyricFind)

124. Plaintiff repeats and realleges paragraphs 1 through 123 as if set forth fully herein.

125. In relevant part, the Genius Terms of Service provide:

You agree to defend, indemnify and hold harmless Genius and its subsidiaries, agents, licensors, managers, and other affiliated companies, and their employees, contractors, agents, officers and directors, from and against any and all claims, damages, obligations, losses, liabilities, injury (including death), costs or debt, and expenses (including but not limited to attorney's fees) arising from or relating to: (i) your use of and access to the Service, including any data or content transmitted or received by you; (ii) your violation of any term or condition of these Terms, including without limitation your breach of any of the representations and warranties above; (iii) your violation of any third-party right, including without limitation any right of privacy or Intellectual Property Rights; (iv) your violation of any applicable law, rule or regulation; (v) your User Content or any that is submitted via your account; or (vi) any other party's access and use of the Service with your unique username, password or other appropriate security code. For the avoidance of doubt, your indemnity obligations include, without limitation, claims against Genius that any of your User Content infringes a third party's Intellectual Property Rights.

126. As a result of LyricFind's breaches of the Terms of Service, Genius has suffered damages and incurred expenses for which it is entitled to indemnity under the Terms of Service, including, but not limited

to, its attorneys' fees and lost advertising and licensing revenue.

127. Accordingly, Genius is entitled to judgment against LyricFind in an amount to be proven at trial for these damages and expenses, but in no event less than \$50 million.

AS AND FOR A THIRD CAUSE OF ACTION
(Breach of Contract, as against Google)

128. Plaintiff repeats and realleges paragraphs 1 through 127 as if set forth fully herein.

129. Access to and use of Genius's website, including the content appearing on its website, is subject to Genius's Terms of Service, which were last updated on March 13, 2014. Genius's Terms of Service are accessible from every page of its website by a link in the footer reading "Terms of Use."

130. Per the Genius Terms of Service, "[b]y accessing or using the Service, you signify that you have read, understand and agree to be bound by the terms of service and conditions set forth below.... Registration may not be required to view content on the Service, but unregistered Users are bound by these Terms."

131. Upon information and belief, since at least 2016, Google and those working at Google's direction accessed Genius's website and are bound by its Terms of Service.

132. In relevant part, the Terms of Service provide:

Commercial Use: Unless otherwise expressly authorized herein or by Genius' express written consent, you agree not to display, distribute, license, perform, publish, reproduce, duplicate, copy, create derivative works from, modify, sell, resell, exploit, transfer or transmit for any commercial purpose, any portion of the Service, or access to the Service. The Service is for your personal use and may not be used for direct commercial endeavors without the express written consent of Genius.

133. Notwithstanding the foregoing, upon information and belief, since at least 2016, Google has accessed the Genius website to copy, modify, sell and/or transmit content appearing on Genius's website for commercial purposes, including, but not limited to, displaying such content in Google's lyrics Information Box search results.

134. At no point has Genius provided its express written content to Google to engage in any of these (or any other) actions.

135. Accordingly, Google's conduct breaches Genius's Terms of Service regarding commercial use.

136. In relevant part, the Terms of Service further provide:

Except as expressly authorized by Genius in writing, you agree not to modify, copy, frame, scrape, rent, lease, loan, sell, distribute or create derivative works based on the Service of the Genius Content, in whole or in part, except that the foregoing does not apply to your own User Content that you legally upload to the Service.

137. Upon information and belief, notwithstanding the foregoing, since at least 2016, Google has accessed the Genius website to copy, modify, sell and/or distribute content appearing on Genius's website that Google did not upload.

138. At no point has Genius provided authorization in writing to Google to engage in any of these (or any other) actions.

139. Accordingly, Google's conduct breaches Genius's Terms of Service regarding the copying and reproduction of Genius Content.

140. As a result of these breaches of the Terms of Service by Google, Genius has suffered damages in an amount to be proven at trial in this matter, but in no event less than \$50 million, including, but not limited to, lost licensing and advertising revenue.

AS AND FOR A FOURTH CAUSE OF ACTION
(Indemnification, as against Google)

141. Plaintiff repeats and realleges paragraphs 1 through 140 as if set forth fully herein.

142. In relevant part, the Genius Terms of Service provide:

You agree to defend, indemnify and hold harmless Genius and its subsidiaries, agents, licensors, managers, and other affiliated companies, and their employees, contractors, agents, officers and directors, from and against any and all claims, damages, obligations, losses, liabilities, injury (including death), costs or debt, and expenses (including but not limited to attorney's fees) arising from or relating to: (i) your use of and access to the Service, including any data or content transmitted or received by you; (ii) your violation of any term or condition of these Terms, including without limitation your breach of any of the representations and warranties above; (iii) your violation of any third-party right, including without limitation any right of privacy or Intellectual Property Rights; (iv) your violation of any applicable law, rule or regulation; (v) your User Content or any that is submitted via your account; or (vi) any other party's access and use of the Service with your unique username, password or other appropriate security code. For the avoidance of doubt, your indemnity obligations include, without limitation, claims against Genius that any of your User Content infringes a third party's Intellectual Property Rights.

143. As a result of Google's breaches of the Terms of Service, Genius has suffered damages and incurred expenses for which it is entitled to indemnity under the Terms of Service, including, but not limited to, its attorneys' fees and lost advertising and licensing revenue.

144. Accordingly, Genius is entitled to judgment against Google in an amount to be proven at trial for these damages and expenses, but in no event less than \$50 million.

AS AND FOR A FIFTH CAUSE OF ACTION
(New York Common Law Unfair Competition,
as against LyricFind)

145. Plaintiff realleges paragraphs 1 through 144 as if set forth fully herein.

146. Despite publicly touting itself as a purveyor of quality lyrics that are transcribed, compiled and/or edited by a "global content team," LyricFind in fact misappropriates content from other sources, including Genius's website.

147. In fact, watermarking performed by Genius on a sample of songs over a fixed period of time revealed that LyricFind misappropriated content from Genius's website to such an extent that Genius estimates that approximately 40% of lyrics for new music displayed in Google's Information Boxes that are attributed to LyricFind feature lyrics misappropriated from Genius's website.

148. Upon information and belief, LyricFind's copying activities are widespread and belie any notion of accidental or unintentional copying.

149. Even after Genius notified LyricFind about the watermarked lyrics and the ongoing misappropriation of content from Genius's website, LyricFind, in bad faith, knowingly continued to license lyrics to Google that unquestionably originated from Genius's website.

150. Furthermore, the disappearance of Watermark #1 from content irrefutably misappropriated from Genius's website following the publicity of the *Wall Street Journal* article, seemingly in order to conceal the misappropriation of content from Genius's website, further evidences LyricFind's bad faith conduct.

151. Moreover, LyricFind's misappropriation of content from Genius's website and its subsequent commercialization of that content is in direct violation of Genius's Terms of Service.

152. LyricFind markets its database of "high-quality" lyrics to companies, such as Google, who contract with LyricFind to display those lyrics in products such as Google's Information Box search results.

153. LyricFind receives substantial compensation from its partners for displaying lyrics, including those it misappropriated from Genius's website.

154. Such activities constitute an unjustifiable attempt to profit from Genius's expenditure of time, labor and talent in maintaining its service and, accordingly, constitute unfair competition in the State of New York.

155. Accordingly, Genius is entitled to a permanent injunction against LyricFind prohibiting the continued misappropriation of content from Genius's website, including the licensing of such content to third parties, such as Google, as well as a money judgment against LyricFind in an amount to be proven at trial in this action, but in no event less than \$50 million.

AS AND FOR A SIXTH CAUSE OF ACTION
(California Unfair Competition, Cal. Bus. & Prof. Code § 17200 et seq., as against LyricFind)

156. Plaintiff realleges paragraphs 1 through 155 as if set forth fully herein.

157. Despite publicly touting itself as a purveyor of quality lyrics that are transcribed, compiled and/or edited by a "global content team," LyricFind in fact misappropriates content from other sources, including Genius's website.

158. In fact, watermarking performed by Genius on a sample of songs over a fixed period of time revealed that LyricFind misappropriated content from Genius's website to such an extent that Genius estimates that more than 40% of lyrics for new music displayed in Google's Information Boxes that are

attributed to LyricFind feature lyrics misappropriated from Genius's website.

159. Upon information and belief, LyricFind's copying activities are widespread and belie any notion of accidental or unintentional copying.

160. Even after Genius notified LyricFind about the watermarked lyrics and the ongoing misappropriation of content from Genius's website, LyricFind, in bad faith, knowingly continued to license lyrics to Google that unquestionably originated from Genius's website.

161. Furthermore, the disappearance of Watermark #1 from content irrefutably misappropriated from Genius's website following the publicity of the *Wall Street Journal* article, seemingly in order to conceal the misappropriation of content from Genius's website, further evidences LyricFind's bad faith conduct.

162. Moreover, LyricFind's copying of content from Genius's website and its subsequent commercialization is in direct violation of Genius's Terms of Service.

163. LyricFind markets its database of "high-quality" lyrics to companies, such as Google, who contract with LyricFind to display those lyrics in products such as Google's Information Box search results.

164. LyricFind receives substantial compensation from its partners for displaying lyrics,

including those it misappropriated from Genius's website.

165. Such activities constitute an unjustifiable attempt to profit from Genius's expenditure of time, labor and talent in maintaining its service and, accordingly, constitute unfair competition in the State of California.

166. Accordingly, Genius is entitled to a permanent injunction against LyricFind prohibiting the continued misappropriation of content from Genius's website, including the licensing of such content to third parties, such as Google.

AS AND FOR A SEVENTH CAUSE OF ACTION
***(New York Common Law Unfair Competition,
as against Google)***

167. Plaintiff repeats and realleges paragraphs 1 through 166 as if fully set forth herein.

168. Google's display of the Information Box in response to lyrics-related queries significantly harms competition in the market for the licensing and display of music lyrics.

169. Google has designed its Information Box in a way that keeps users within the Google ecosystem on the back of content misappropriated from Genius's website.

170. In response to lyrics-related queries, Google presents users with an Information Box that discourages users from clicking through to third-

party websites linked on the search engine results page, such as Genius.

171. Genius is placed at an unfair competitive disadvantage in the market for the licensing and display of lyrics because Google uses content misappropriated from Genius's website to gain unfair economic and competitive advantages.

172. Following Google's institution of the lyrics Information Box, Genius has lost significant revenue as a result of the significantly decreased click-through rate to Genius's website.

173. Meanwhile, Google has further entrenched its dominance by capturing users in its ecosystem who previously would have used Google Search to be directed to a third-party website, such as Genius's. By displaying Information Box lyrics in response to a user's search, users stay on Google properties, where Google can monetize those users.

174. In its SQEG, Google makes clear that it places little to no value on copied content.

175. Accordingly, a reasonable person would expect that Google's search engine would disfavor copied content obtained without permission and consequently rank it lower on search engine results pages.

176. In reality, however, Google's Information Box results display inaccurate lyrics, as well as lyrics that were unquestionably copied from Genius's website.

177. The source, accuracy and overall quality of Google's Information Box results shown in response to lyrics-related queries are deceptive to users.

178. Google's conduct constituting violations of its own guidelines is deceptive, unethical, oppressive, and unscrupulous.

179. Genius receives no compensation for Google's display of content misappropriated from Genius's website in Google's lyrics Information Boxes. In fact, Genius suffers a monetary loss as a result of Google's lyrics Information Boxes.

180. Google's aforementioned conduct was undertaken in furtherance of its business activities and practices. Moreover, Google's actions were done knowingly and in bad faith, as demonstrated by Google's continued display of lyrics copied from Genius's website, even after Genius notified Google about its ongoing display of watermarked lyrics.

181. Furthermore, the disappearance of Watermark #1 from content irrefutably misappropriated from Genius's website following the publicity of the *Wall Street Journal* article, seemingly in order to conceal the misappropriation of content from Genius's website, further evidences Google's bad faith conduct.

182. Such activities constitute an unjustifiable attempt to profit from Genius's expenditure of time, labor and talent in maintaining its service and, accordingly, constitute unfair competition in the State of New York.

183. Genius seeks injunctive relief against Google to prohibit these unfair practices from occurring in the future, as well as an award of damages in an amount to be proven at trial in this action, but in no event less than \$50 million.

AS AND FOR AN EIGHTH CAUSE OF ACTION
(California Unfair Competition, Cal. Bus. & Prof. Code § 17200 et seq., as against Google)

184. Plaintiff repeats and realleges paragraphs 1 through 183 as if fully set forth herein.

185. Google's display of the Information Box in response to lyrics-related queries significantly harms competition in the market for the licensing and display of lyrics.

186. Google has designed its Information Box in a way that keeps users within the Google ecosystem on the back of content misappropriated from Genius's website.

187. In response to lyrics-related queries, Google presents users with an Information Box that discourages users from clicking through to third-party websites linked on the search engine results page, such as Genius.

188. Genius is placed at an unfair competitive disadvantage in the market for the licensing and display of lyrics because Google uses content misappropriated from Genius's website to gain unfair economic and competitive advantages.

189. Following Google's institution of the lyrics Information Box, Genius has lost significant revenue as a result of the significantly decreased click-through rate to Genius's website.

190. Meanwhile, Google has further entrenched its dominance by capturing users in its ecosystem who previously would have used Google Search to be directed to a third-party website, such as Genius's. By displaying Information Box lyrics in response to a user's search, users stay within Google's ecosystem, where Google can monetize those users.

191. In its SQEG, Google makes clear that it places little to no value on copied content.

192. Accordingly, a reasonable person would expect that Google's search engine would disfavor copied content obtained without permission and consequently rank it lower on search engine results pages.

193. In reality, however, Google's Information Box results display inaccurate lyrics, as well as lyrics that were unquestionably copied from Genius's website.

194. The source, accuracy and overall quality of Google's Information Box results shown in response to lyrics-related queries are deceptive to users.

195. Google's conduct constituting violations of its own guidelines is deceptive, unethical, oppressive, and unscrupulous.

196. Genius receives no compensation for Google's display of content misappropriated from Genius's website in Google's lyrics Information Boxes. In fact, Genius suffers a monetary loss as a result of Google's lyrics Information Boxes.

197. Google's aforementioned conduct was undertaken in furtherance of its business activities and practices. Moreover, Google's actions were done knowingly and in bad faith, as demonstrated by Google's continued display of lyrics misappropriated from Genius's website, even after Genius notified Google about its ongoing display of watermarked lyrics.

198. Furthermore, the disappearance of Watermark #1 from content irrefutably misappropriated from Genius's website following the publicity of the *Wall Street Journal* article, seemingly in order to conceal the misappropriation of content from Genius's website, further evidences Google's bad faith conduct.

199. Genius seeks a permanent injunction against Google to prohibit these unfair practices from occurring in the future.

AS AND FOR A NINTH CAUSE OF ACTION
(Unjust Enrichment, as against Google)

200. Plaintiff repeats and realleges paragraphs 1 through 199 as if fully set forth herein.

201. Through Google's misappropriation of content from Genius's website, Google benefitted by,

among other things, retaining users in and among Google-owned properties further concentrating its market power.

202. The benefits to Google as a result of its misappropriation of content from Genius's website came at Genius's expense. Namely, because of Google's misappropriation, Genius has suffered (and continues to suffer) decreased web traffic and associated revenue.

203. Equity and good conscience require recompense in favor of Genius for Google's misappropriation of content from Genius's website. It contravenes equity and the public policy of New York to permit a party to misappropriate the labors and investments of another.

204. Accordingly, Genius is entitled to a money judgment against Google in an amount to be proven at trial in this action, but in no event less than \$50 million.

AS AND FOR A TENTH CAUSE OF ACTION
(Unjust Enrichment, as against LyricFind)

205. Plaintiff repeats and realleges paragraphs 1 through 204 as if fully set forth herein.

206. Through LyricFind's misappropriation of content from Genius's website, LyricFind benefitted by, among other things, entering into licensing agreements with content partners whereby LyricFind received compensation for distributing content misappropriated from Genius's website.

207. The benefits to LyricFind as a result of its misappropriation of content from Genius's website came at Genius's expense. Namely, because of LyricFind's misappropriation, Genius has suffered (and continues to suffer) decreased web traffic and associated revenue; moreover, Genius has been placed at an unfair competitive disadvantage in its efforts to license its lyrics to content partners.

208. Equity and good conscience require recompense in favor of Genius for LyricFind's misappropriation of content from Genius's website. It contravenes equity and the public policy of New York to permit a party to misappropriate the labors and investments of another.

209. Accordingly, Genius is entitled to a money judgment against LyricFind in an amount to be proven at trial in this action, but in no event less than \$50 million.

WHEREFORE, Plaintiff requests that a judgment be issued and entered against Defendants as follows:

A. On the first cause of action, a money judgment against LyricFind and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

B. On the second cause of action, a money judgment against LyricFind and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

C. On the third cause of action, a money judgment against Google and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

D. On the fourth cause of action, a money judgment against Google and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

E. On the fifth cause of action, a permanent injunction against LyricFind prohibiting the continued misappropriation of content from Genius's website, as well as a money judgment against LyricFind and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

F. On the sixth cause of action, a permanent injunction against LyricFind prohibiting the continued misappropriation of content from Genius's website;

G. On the seventh cause of action, a permanent injunction against Google prohibiting the continued misappropriation of content from Genius's website, as well as a money judgment against Google and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

H. On the eighth cause of action, a permanent injunction against Google prohibiting the continued misappropriation of content from Genius's website;

I. On the ninth cause of action, a money judgment against Google and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest;

J. On the tenth cause of action, a money judgment against LyricFind and in favor of Genius in an amount to be determined at trial, but in no event less than \$50 million, plus costs and interest; and

K. Such other and further relief as this Court deems just and proper.

Dated: New York, New York
December 3, 2019

PRYOR CASHMAN LLP

By: /s/

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/s/
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APPENDIX D

EXHIBIT A

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Genius
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Brooklyn NY 11231

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SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. ACCORDINGLY, SOME OF THE LIMITATIONS SET FORTH ABOVE MAY NOT APPLY TO YOU. IF YOU ARE DISSATISFIED WITH ANY PORTION OF THE SERVICE OR WITH THESE TERMS OF SERVICE, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USE OF THE SERVICE.

The Service is controlled and operated from facilities in the United States. Genius makes no representations that the Service is appropriate or available for use in other locations. Those who access or use the Service from other jurisdictions do so at their own volition and are entirely responsible for compliance with all applicable United States and local laws and regulations, including but not limited to export and import regulations. You may not use the Service if you are a resident of a country embargoed by the United States, or are a foreign person or entity

blocked or denied by the United States government. Unless otherwise explicitly stated, all materials found on the Service are solely directed to individuals, companies, or other entities located in the United States.

Governing Law, Arbitration, and Class Action/Jury Trial Waiver.

Governing Law: You agree that: (i) the Service shall be deemed solely based in New York; and (ii) the Service shall be deemed a passive one that does not give rise to personal jurisdiction over us, either specific or general, in jurisdictions other than New York. These Terms will be governed by the internal substantive laws of the State of New York, without respect to its conflict of laws principles. The parties acknowledge that these Terms evidence a transaction involving interstate commerce. Notwithstanding the preceding sentences with respect to the substantive law, any arbitration conducted pursuant to these Terms shall be governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16). The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. You agree to submit to the personal jurisdiction of the federal and state courts located in New York, New York for any actions for which Genius retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of its copyrights, trademarks, trade secrets, patents, or other intellectual property or proprietary rights, as set forth in the Arbitration provision below,

including any provisional relief required to prevent irreparable harm. You agree that New York, New York is the proper forum for any appeals of an arbitration award or for trial court proceedings in the event that the arbitration provision below is found to be unenforceable.

Arbitration: READ THIS SECTION CAREFULLY BECAUSE IT REQUIRES THE PARTIES TO ARBITRATE THEIR DISPUTES AND LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF FROM GENIUS. For any dispute with Genius, you agree to first contact us at terms@genius.com and attempt to resolve the dispute with us informally. In the unlikely event that Genius has not been able to resolve a dispute it has with you after sixty (60) days, we each agree to resolve any claim, dispute, or controversy (excluding any claims for injunctive or other equitable relief as provided below) arising out of or in connection with or relating to these Terms, or the breach or alleged breach thereof (collectively, “Claims”), by binding arbitration by JAMS, Inc. (“JAMS”), under the Optional Expedited Arbitration Procedures then in effect for JAMS, except as provided herein. JAMS may be contacted at www.jamsadr.com. The arbitration will be conducted in New York, New York, unless you and Genius agree otherwise. If you are using the Service for commercial purposes, each party will be responsible for paying any JAMS filing, administrative and arbitrator fees in accordance with JAMS rules, and the award rendered by the arbitrator shall include costs of arbitration, reasonable attorneys’ fees and reasonable costs for expert and other witnesses. If you are using

the Service for non-commercial purposes: (i) JAMS may require you to pay a fee for the initiation of your case, unless you apply for and successfully obtain a fee waiver from JAMS; (ii) the award rendered by the arbitrator may include your costs of arbitration, your reasonable attorney's fees and your reasonable costs for expert and other witnesses; and (iii) you may sue in a small claims court of competent jurisdiction without first engaging in arbitration, but this does not absolve you of your commitment to engage in the informal dispute resolution process. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. Nothing in this Section shall be deemed as preventing Genius from seeking injunctive or other equitable relief from the courts as necessary to protect any of Genius's proprietary interests.

Class Action/Jury Trial Waiver: WITH RESPECT TO ALL PERSONS AND ENTITIES, REGARDLESS OF WHETHER THEY HAVE OBTAINED OR USED THE SERVICE FOR PERSONAL, COMMERCIAL OR OTHER PURPOSES, ALL CLAIMS MUST BE BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS ACTION, COLLECTIVE ACTION, PRIVATE ATTORNEY GENERAL ACTION OR OTHER REPRESENTATIVE PROCEEDING. THIS WAIVER APPLIES TO CLASS ARBITRATION, AND, UNLESS WE AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE MORE THAN ONE PERSON'S CLAIMS. YOU AGREE THAT, BY ENTERING INTO THIS AGREEMENT,

YOU AND GENIUS ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION, COLLECTIVE ACTION, PRIVATE ATTORNEY GENERAL ACTION, OR OTHER REPRESENTATIVE PROCEEDING OF ANY KIND.

Termination

In addition to the termination rights set forth elsewhere herein, you agree that Genius, in its sole discretion, may suspend or terminate your account (or any part thereof) or use of the Service and remove and discard any content (including without limitation your User Content) within the Service, for any reason, including, without limitation, for lack of use or if Genius believes that you have violated or acted inconsistently with the letter or spirit of these Terms. Any suspected fraudulent, abusive or illegal activity that may be grounds for termination of your use of Service may be referred to appropriate law enforcement authorities. Genius may also in its sole discretion and at any time discontinue providing the Service, or any part thereof, with or without notice. You agree that any termination of your access to the Service under any provision of these Terms may be effected without prior notice, and acknowledge and agree that Genius may immediately deactivate or delete your account and all related information and files in your account and/or bar any further access to such files or the Service. Further, you agree that Genius shall not be liable to you or any third-party for any termination of your access to the Service.

User Disputes

You agree that you are solely responsible for your interactions with any other User in connection with the Service and Genius will have no liability or responsibility with respect thereto. Genius reserves the right, but has no obligation, to become involved in any way with disputes between you and any other User of the Service or to elect to display only certain of the User content submitted in connection with a particular Genius subdomain.

Assignment

These Terms, and any rights and licenses granted hereunder, may not be transferred or assigned by you, but may be assigned by Genius without restriction. Any attempted transfer or assignment in violation hereof shall be null and void.

General

These Terms constitute the entire agreement between you and Genius and govern your use of the Service, superseding any prior agreements between you and Genius with respect to the Service. You also may be subject to additional terms and conditions that may apply when you use certain features of the Service, affiliate or third-party services, third-party content or third-party software. The failure of Genius to exercise or enforce any right or provision of these Terms shall not constitute a waiver of such right or provision. If any provision of these Terms is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to

give effect to the parties' intentions as reflected in the provision, and the other provisions of these Terms remain in full force and effect. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service or these Terms must be filed within one (1) year after such claim or cause of action arose or be forever barred, unless required otherwise by applicable law. A printed version of these Terms and of any notice given in electronic form shall be admissible in judicial or administrative proceedings based upon or relating to this agreement to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form. The section titles in these Terms are for convenience only and have no legal or contractual effect. Notices to you may be made via either email or regular mail. The Service may also provide notices to you of changes to these Terms or other matters by displaying notices or links to notices generally on the Service.

Notice for California Users

Under California Civil Code Section 1789.3, Users of the Service from California are entitled to the following specific consumer rights notice:

1. The provider of the Service and associated services is Genius Media Group, Inc, located at 92 Third Street, Brooklyn, NY 11231.
2. As of the date of these terms, no direct charges are imposed upon the consumer by the Service.

3. If you have a complaint with the services provided on the Service or wish to request further information, please contact us at the physical address above with a description of your request. We cannot guarantee a response in any particular time period. If you remain unsatisfied, contact The Complaint Assistance Unit of the Division of Consumer Services of the California Department of Consumer Affairs may be contacted in writing at 1625 North Market Blvd., Suite N 112, Sacramento, CA 95834, or by telephone at (916) 445-1254 or (800) 952-5210.

Contact

Please contact us terms@genius.com with any questions regarding these Terms.