658 F.Supp.3d 901
United States District Court, D. Nevada.

LEVY PRODUCTION GROUP, LLC, Plaintiff

v.

R&R PARTNERS, INC. and Farra Foxdog Productions, LLC, Defendants

Case No. 2:22-cv-01261-JAD-DJA
|
Signed February 28, 2023

Synopsis

Background: Video production company brought action in state court against advertising agency and video producer, asserting state-law claims for conversion, misappropriation, unjust enrichment, and breach of contract, arising from agency's and producer's alleged copying of its entertainment-magazine style video series recapping highlights of events in Las Vegas. After agency and producer removed action to federal court, production company filed motion to remand.

Holdings: The District Court, Jennifer A. Dorsey, J., held that:

[1] as a matter of first impression, complete-preemption doctrine applies to the Copyright Act, and thus, state-law claims that fall under its ambit are considered to arise under federal law for subject-matter jurisdiction purposes;

[2] production company's written treatment for its video series fell within subject matter of copyright;

[3] complete preemption under the Copyright Act conferred federal jurisdiction for removal purposes; and

[4] district court had supplemental jurisdiction over misappropriation, unjust enrichment, and breach of contract claims.

Motion denied.

West Headnotes (22)

[1] **Federal Courts** Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Federal courts are courts of limited jurisdiction.

[2] **Removal of Cases** Cases arising under Constitution of United States

Removal of Cases Cases Arising Under Laws of United States

Removal of Cases Diversity of Citizenship of Coplaintiffs and Codefendants

A defendant may remove an action to federal court based on federal-question jurisdiction or diversity jurisdiction.

[3] **Removal of Cases** Evidence

There is a strong presumption against removal jurisdiction, and federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.

[4] **Removal of Cases** Evidence

Defendant seeking to remove an action to federal court always has the burden of establishing that removal is proper.

[5] **Federal Courts** Cases "Arising Under" Federal Law; Federal-Question Jurisdiction

Federal-question jurisdiction generally arises only if the complaint affirmatively alleges a federal claim.

[6] **Removal of Cases** Allegations in Pleadings

Under the well-pleaded-complaint rule, which requires federal question jurisdiction to appear in the complaint, a case may not be removed to

federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

[7] **Removal of Cases** Allegations in Pleadings

The complete preemption doctrine creates an exception to the well-pleaded complaint rule requiring a defendant to remove the matter based upon a federal question that appears in the plaintiff's complaint.

[8] **Removal of Cases** Allegations in Pleadings

Under the "artful pleading" doctrine, a well-pleaded state-law claim presents a federal question, as required for removal of the action, when a federal statute has completely preempted that particular area of law.

[9] **Federal Courts** Complete preemption

Federal Preemption Complete preemption

Complete preemption applies when Congress (1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action.

[10] **Removal of Cases** Allegations in Pleadings

Defensive preemption is ordinarily a federal defense to a plaintiff's suit, which does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.

[11] **Federal Courts** Complete preemption

Federal Preemption Complete preemption

Complete preemption is a jurisdictional doctrine that allows the court to consider a preempted state-law claim as a federal one arising under federal law.

[12] **Copyrights and Intellectual Property** Relation between state and federal law; preemption

Federal Courts Copyrights

Federal Preemption Copyrights

Complete-preemption doctrine applies to the Copyright Act, and thus state-law claims that fall under its ambit are considered to arise under federal law for subject-matter jurisdiction purposes. 17 U.S.C.A. § 301.

[13] **Copyrights and Intellectual Property** Relation between state and federal law; preemption

Federal Preemption Copyrights

Copyright preemption is both explicit and broad: the Copyright Act prohibits state-law protection for any right equivalent to those in the Act. 17 U.S.C.A. § 301(a).

[14] **Copyrights and Intellectual Property** Relation between state and federal law; preemption

Federal Preemption Copyrights

Courts apply two-part test to determine whether the Copyright Act exclusively governs a claim, finding preemption if: (1) subject matter of the state-law claim falls within the subject matter of copyright and (2) rights asserted under state law are equivalent to the rights contained in provision of the Act which articulates the exclusive rights of copyright holders. 17 U.S.C.A. §§ 106, 301(a).

[15] **Copyrights and Intellectual Property** Relation between state and federal law; preemption

Copyrights and Intellectual Property Embodiment of work; fixation in tangible medium

Copyrights and Intellectual Property Ideas and concepts

Federal Preemption Copyrights

For Copyright Act preemption purposes, ideas and concepts that are fixed in a tangible medium fall within the scope of copyright despite the exclusion of fixed ideas from the scope of actual federal copyright protection. 17 U.S.C.A. § 301(a).

[16] **Conversion and Civil Theft** Preemption

Federal Preemption Copyrights

Removal of Cases Allegations in Pleadings

Video production company's written treatment for entertainment-magazine style, weekly video series recapping highlights of events in Las Vegas for tourism and promotional purposes fell within subject matter of copyright, as required for the Copyright Act to exclusively govern the claim and complete preemption doctrine to confer removal jurisdiction of its state-law conversion claim against advertising agency; while idea for video series may have been unprotectable under the Copyright Act, as soon as production company fixed that idea in a tangible medium, it became protectable by copyright. 17 U.S.C.A. §§ 106, 301(a).

[17] **Copyrights and Intellectual Property** Relation between state and federal law; preemption

Federal Preemption Copyrights

To survive preemption by the Copyright Act, a state cause of action must protect rights that are qualitatively different from the copyright rights and must have an extra element that changes the nature of the action. 17 U.S.C.A. §§ 106, 301(a).

[18] **Copyrights and Intellectual Property** Relation between state and federal law; preemption

Federal Preemption Copyrights

Mere presence of an additional element is not enough to qualitatively distinguish state-law claim from a claim in copyright for purposes of complete preemption under the Copyright Act; the additional element must transform the nature of the action. 17 U.S.C.A. §§ 106, 301(a).

[19] **Conversion and Civil Theft** Property Subject of Conversion or Theft

Conversion and Civil Theft Assertion of ownership or control in general

In Nevada, "conversion" is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with, his title or rights therein or in derogation, exclusion, or defiance of such title or rights.

[20] **Conversion and Civil Theft** Preemption

Federal Preemption Copyrights

Dispositive inquiry in a Copyright Act preemption analysis of state-law conversion claims is whether the property at issue is tangible or intangible. 17 U.S.C.A. §§ 106, 301(a).

[21] **Conversion and Civil Theft** Preemption

Federal Preemption Copyrights

Removal of Cases Allegations in Pleadings

Heart of video production company's state law conversion claim against advertising agency and video producer, related to agency's and producer's alleged copying of production company's intellectual property in entertainment-magazine style, weekly video series recapping highlights of events in Las Vegas for tourism and promotional purposes, mirrored exclusive rights protected by the Copyright Act, and thus, Copyright Act exclusively governed the claim and complete preemption doctrine conferred removal jurisdiction over production company's state law action; allegations that defendants' series was substantially a copy and virtually identical to content of production company's own series demonstrated that production company sought to vindicate rights equivalent to Copyright Act's

protection against unauthorized reproduction. 17 U.S.C.A. §§ 106, 301(a).

[22] **Federal Courts** Particular Claims or Causes of Action

Federal Courts Contract claims

Video production company's state-law misappropriation, unjust enrichment, and breach of contract claims against advertising agency and video producer were closely related to and part of same case or controversy as underlying conversion claim, which was completely preempted by the Copyright Act so as to confer removal jurisdiction, and thus, district court had supplemental jurisdiction over those claims, where the claims stemmed from same alleged misconduct as that underlying the conversion claim, namely, defendants' copying of production company's entertainment-magazine style, weekly video series recapping highlights of events in Las Vegas for tourism and promotional purposes. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 1367.

Attorneys and Law Firms

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Order Denying Motion to Remand

[ECF No. 15]

Jennifer A. Dorsey, United States District Judge

Plaintiff Levy Production Group, LLC sues R&R Partners, Inc. and Farra Foxdog Productions, LLC under various tort and contract theories for the alleged copying of Levy's "What's Up Vegas" video series. Levy filed this case in state court, but the defendants removed it based on federal-question jurisdiction.[1] Pointing out that all of its claims are state-law ones, Levy moves to remand this case for want of subject-matter jurisdiction.[2] The defendants respond that the Copyright Act of 1976 preempts at least two of Levy's claims, conferring federal jurisdiction under the complete-preemption doctrine.

1 ECF No. 1 (removal petition).

2 ECF No. 15 at 5.

I join with the majority of circuits that have considered this issue and find that the complete-preemption doctrine applies to the Copyright Act, and I conclude that Levy's conversion claim is completely preempted by the act such that it is deemed to arise under federal law. And with subject-matter jurisdiction over the conversion claim, this court may exercise supplemental jurisdiction over the remaining ***905** causes of action. So I deny the motion to remand.

Background

Levy Production Group alleges that it created and began development on "What's Up Vegas," an "entertainment[-]magazine style, weekly video series" that "would recap highlights of what had happened and was happening in Las Vegas" for tourism and promotional purposes.[3] It then met with advertising agency R&R Partners to pitch this idea.[4] As part of its presentations, Levy prepared "tangible, full-color, multi-page, graphic depictions called 'treatments' that contained both images and text" detailing the content of the series.[5] After a couple years of discussions, R&R Partners announced that it was no longer considering Levy's project.[6] But, a little over a year later, R&R Partners, in collaboration with production company Farra Foxdog, partnered with the Las Vegas Convention and Visitors Authority to launch "Vegas On," a video series that "showcase[s] all of the amazing events in Las Vegas."[7]

3 ECF No. 1 at 13.

4 *Id.*

5 *Id.* at 14.

6 *Id.* at 15.

7 *Id.* at 16.

Levy sued R&R Partners and Farra Foxdog in Nevada state court for misappropriation of trade secrets, conversion of intellectual property, unjust enrichment, and breach of contract.[8] The defendants removed the case here based on federal-question jurisdiction, arguing that Levy's conversion and unjust-enrichment claims are completely preempted by § 301 of the Copyright Act.[9] Levy moves to remand this case back to state court, contending that this court lacks subject-matter jurisdiction because Levy asserted no copyright claims in its complaint, removal on the basis of copyright preemption is improper, and none of its state-law claims are preempted by the Copyright Act.[10]

8 ECF No. 1.

9 *Id.* at 4–7.

10 ECF No. 1 at 1, 8–13.

Discussion

[1] **[2]** **[3]** **[4]** Federal courts are courts of limited jurisdiction.[11] "A defendant may remove an action to federal court based on federal[-]question jurisdiction or diversity jurisdiction."[12] But there is a strong presumption against removal jurisdiction, and "federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance."[13] The defendant always has the burden of establishing that removal is proper.[14]

11 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

12 *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009). No party argues that diversity jurisdiction exists, and the complaint states that plaintiff Levy and defendant Farra Foxdog are Nevada limited-liability companies and defendant R&R is a Nevada corporation. ECF No. 1 at 12.

13 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

14 *Id.*

[5] **[6]** Federal-question jurisdiction generally arises only if the complaint "affirmatively allege[s] a federal claim."[15] This so-called "well-pleaded[-]complaint rule means that 'a case may not be removed to federal court on the basis of a federal defense, including the defense of ***906** pre[ ]emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.' "[16]

15 *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014) (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003)).

16 *Id.* (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)).

[7] **[8]** **[9]** The complete-preemption doctrine is an exception to the well-pleaded-complaint rule.[17] It comes into play when "a federal statute's preemptive force is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim" so that "any claim purportedly based on that pre[ ]empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[18] And under the "artful pleading" doctrine, a well-pleaded state-law claim presents a federal question when a federal statute has completely preempted that particular area of law.[19] Complete preemption applies when Congress "(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action."[20]

17 *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 747 (9th Cir. 2022).

18 *Id.* at 748 (cleaned up) (quoting *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425).

19 *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683 (9th Cir. 2007) (citing *Balcorta v. Twentieth Century–Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000)).

20 *Cnty. of San Mateo*, 32 F.4th at 748 (quoting *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020)).

I. The Copyright Act has complete preemptive force.

[10] **[11]** Though the "relationship between complete preemption and defensive preemption is not entirely clear, ... the complete-preemption doctrine must be distinguished from [defensive] preemption."[21] Defensive preemption "is ordinarily a federal defense to a plaintiff's suit[,]" which "does

not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court."[22] But complete preemption is a jurisdictional doctrine that allows the court to consider a preempted state-law claim as a federal one arising under federal law.[23] So removal based on complete preemption confers subject-matter jurisdiction on the federal court.

21 *Retail Prop. Tr.*, 768 F.3d at 948 (quoting *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 (2d Cir. 2005)).

22 *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

23 *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

Levy argues that the complete-preemption doctrine doesn't apply to the Copyright Act because "Congress has not legislated in any way that suggests that" state-law "claims are necessarily federalized when creative personal or intellectual property is at issue."[24] It cites the Ninth Circuit case of *City of Oakland v. BP PLC*[25] for the proposition that "the Copyright Act has never been found to completely preempt state[-]law claims"[26] and argues that the "many cases ... that discuss preemption by the Copyright Act ... make it abundantly clear" that the complete-preemption doctrine does not apply to it.[27]

24 ECF No. 15 at 9–10.

25 *City of Oakland*, 969 F.3d at 895.

26 ECF No. 15 at 9.

27 Though the defendants discuss complete preemption in their removal petition, they apply express, field, and conflict-preemption standards in their opposition brief, arguing that the Copyright Act expressly preempts Levy's state-law claims. ECF No. 16 at 8. But these are forms of defensive preemption, which cannot confer jurisdiction and are thus inapplicable to the issue of whether removal was proper.

***907** But the *City of Oakland* case that Levy relies on makes no mention of the Copyright Act; it notes only that the Supreme Court has applied the complete-preemption doctrine to just three statutes thus far.[28] And the cases that Levy refers to analyze whether state-law claims fall under § 301 of the Copyright Act[29] don't discuss the separate issue of complete preemption: whether the Copyright Act can confer subject-matter jurisdiction over preempted claims pled solely as state-law claims.

28 *City of Oakland*, 969 F.3d at 905.

29 *Id.* The "many cases" that Levy refers to appear to be located at ECF No. 15 at 5–7. *See, e.g., Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1190 (C.D. Cal. 2001); *Berkla v. Corel Corp.*, 66 F. Supp. 2d 1129, 1149–50 (E.D. Cal. 1999); *Lennon v. Seaman*, 63 F. Supp. 2d 428, 437 (S.D.N.Y. 1999); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001).

Although neither the Supreme Court nor the Ninth Circuit has addressed the issue, the Second, Fourth, Fifth, and Sixth Circuits have all held that the complete-preemption doctrine applies to the Copyright Act.[30] Only the Third Circuit has held otherwise in an unpublished opinion,[31] and no other circuits have answered this question directly. Numerous district courts in this circuit have also determined that the Copyright Act completely preempts state-law claims that fall into the guidelines established under § 301.[32]

30 *See Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004), *cert. denied,* 544 U.S. 949, 125 S.Ct. 1704, 161 L.Ed.2d 525 (2005) ("[W]e conclude that [the Supreme Court] means to extend the complete preemption doctrine to any federal statute that both preempts state law and substitutes a federal remedy for the law, thereby creating an exclusive federal cause of action. The Copyright Act does just that."); *Rosciszewski v. Arete Assocs.,* 1 F.3d 225, 232–33 (4th Cir. 1993) (holding that "the preemptive force of § 301(a) of the Copyright Act transforms a state-law complaint asserting claims that are preempted by § 301(a) into a complaint stating a federal claim for purposes of the well-pleaded complaint rule."); *GlobeRanger Corp. v. Software AG*, 691 F.3d 702, 706 (5th Cir. 2012) ("We hold that Section 301(a) of the Copyright Act completely preempts the substantive field."); *Ritchie v. Williams*, 395 F.3d 283, 286 (6th Cir. 2005) (agreeing with the Second and Fourth Circuits that the complete-preemption doctrine applies to the Copyright Act).

31 *Bd. of Chosen Freeholders of Cnty. of Burlington v. Tombs*, 215 F. App'x 80 (3rd Cir. 2006).

32 *See Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1092 (C.D. Cal. 2005) (holding that the "Copyright Act has complete preemptive force"); *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1123 (N.D. Cal. 2001) ("[T]his Court concludes that the Copyright Act

completely preempts state-law claims within the scope of section 301."); *Chesler/Perlmutter Prods., Inc. v. Fireworks Ent., Inc.*, 177 F. Supp. 2d 1050, 1057 (C.D. Cal. 2001) (noting that the Copyright Act "has complete preemptive force if the rights asserted in the state[-]law claims are rights that could have been asserted under the Copyright Act"); *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 821 (C.D. Cal. 1997) ("[The] grant of exclusive jurisdiction combined with the broad Congressional grant of copyright preemption under 17 U.S.C. § 301 favors complete preemption and removal of equivalent state copyright claims."); *Dielsi v. Falk*, 916 F. Supp. 985, 993 (C.D. Cal. 1996) ("[C]opyright law 'completely' preempts equivalent state claims."); *Metrano v. Fox Broad., Co., Inc.*, 2000 WL 979664, at *3 (C.D. Cal. April 24, 2000) ("Accordingly, state claims that are equivalent to federal copyright claims are completely preempted by the Copyright Act.").

Particularly persuasive here is the Fourth Circuit's decision in *Rosciszewski v. Arete Associates*. In *Rosciszewski*, the court found removal of the plaintiff's state-law claim proper because that claim was ***908** completely preempted by the Copyright Act, conferring subject-matter jurisdiction on the federal court.[33] Following the analysis in the Supreme Court's decision in *Metropolitan Life Insurance Co. v. Taylor*,[34] which held that the complete-preemption doctrine applies to the Employee Retirement Income Security Act (ERISA), the *Rosciszewski* court focused its inquiry on congressional intent, finding complete preemption applicable to the Copyright Act for two reasons.[35] First, the court considered the language of § 301, which states that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright ... in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright ... are governed exclusively by this title."[36] The court then looked to a congressional report accompanying the Copyright Act to elucidate the statutory language: "The declaration ... in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively."[37] The *Rosciszewski* court thus held that Congress "clearly indicated" via § 301's "broad[,] mandatory preemption provision for causes of action equivalent to copyright claims" that such claims "should be litigated only as federal copyright claims."[38]

33 *Rosciszewski*, 1 F.3d at 234.

34 *Metro. Life Ins. Co.*, 481 U.S. at 63, 107 S.Ct. 1542 (holding that the complete-preemption doctrine applies to the Employee Retirement Income Security Act).

35 *Rosciszewski*, 1 F.3d at 231.

36 *Id.* at 229 (quoting 17 U.S.C. § 301(a)).

37 *Id.* at 232 (quoting H.R.Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746).

38 *Id.*

The court next turned to 28 U.S.C. § 1338(a), which gives federal district courts "original jurisdiction of any civil action arising under any Act of Congress relating to ... copyrights," and clarifies that "[s]uch jurisdiction shall be exclusive of the courts of the states in ... copyright cases."[39] The court viewed this "grant of exclusive jurisdiction over copyright claims to the district courts as strong evidence that Congress intended copyright litigation to take place in federal courts."[40] It bolstered this conclusion by noting that Congress provided only concurrent jurisdiction in state and federal courts over claims arising under ERISA and the Labor Management Relations Act—both of which the Supreme Court found to completely preempt relevant state-law claims.[41]

39 28 U.S.C. § 1338.

40 *Rosciszewski*, 1 F.3d at 232.

41 *Id.*

[12] So § 1338's jurisdictional grant, combined with the "preemptive force" of the Copyright Act, compelled the *Rosciszewski* court to find that "state-law actions preempted by § 301(a) ... arise under federal law."[42] Given the weight of persuasive authority from other courts, and because I find the *Rosciszewski* court's reasoning persuasive, I hold that the complete-preemption doctrine applies to the Copyright Act, and thus state-law claims that fall under its ambit are considered to arise under federal law for subject-matter jurisdiction purposes.[43]

42 *Id.*

43 Levy also argues that there is no embedded federal question that can confer subject-matter jurisdiction, so the defendants cannot overcome the strong presumption against removal and preemption. ECF No. 15 at 10–11, 13. Because this court has jurisdiction because the

Copyright Act completely preempts a state-law claim here, I do not reach the merits of Levy's embedded-question argument.

***909 II. The Copyright Act preempts Levy's conversion claim.**

[13] **[14]** Having concluded that the complete-preemption doctrine can confer federal jurisdiction over claims preempted by the Copyright Act, I next consider whether the act preempts any of Levy's claims. "Copyright preemption is both explicit and broad: 17 U.S.C. § 301(a) prohibits state-law protection for any right equivalent to those in the Copyright Act."[44] The Ninth Circuit has adopted a two-part test to determine whether the Copyright Act exclusively governs a claim, finding preemption if: (1) the subject matter "of the state[-]law claim falls within the subject matter of copyright" and (2) "the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders."[45]

44 *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992).

45 *Laws v. Sony Music*, 448 F.3d 1134, 1138–39 (9th Cir. 2006) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001)).

A. Levy's video-series treatments fall within the subject matter of copyright.

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression" including literary, pictorial, and graphic works.[46] The defendants contend that Levy's "tangible, full-color, multi-page, graphic" treatments containing "both images and text" clearly fall into the literary, pictorial, and graphic categories outlined in the act.[47] Levy argues that the subject matter of its claims is not its physical treatments, but rather the ideas embodied within them.[48] The Copyright Act makes clear that its protections do not "extend to any idea ... regardless of the form in which it is described, explained, illustrated, or embodied."[49] Levy thus contends that its treatments contain only non-protectable ideas that fall outside the subject matter of copyright and that courts must "carefully exclude non-protectable material from copyright consideration."[50]

46 17 U.S.C. § 102(a).

47 ECF No. 16 at 10 (quoting ECF No. 1 at 14).

48 ECF No. 15 at 4.

49 17 U.S.C. § 102(b).

50 ECF No. 15 at 4 (citing *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002)). The *Cavalier* case is inapposite here. That decision involved excising non-protectable material for a substantial-similarity analysis in a copyright-infringement action. But a copyright-infringement analysis examines subject-matter to determine what is protectable, *see Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971), whereas the Ninth Circuit's § 301 preemption test examines subject matter to determine if a state-law claim falls under the broader scope of federal copyright, regardless of its protection under the Copyright Act.

[15] **[16]** But the Ninth Circuit in *Montz v. Pilgrim Films & Television* recognized that "the scope of the subject matter of copyright law is broader than the protections it affords."[51] So, "for preemption purposes, ideas and concepts that are fixed in a tangible medium fall within the scope of copyright ... despite the exclusion of fixed ideas from the scope of actual federal copyright protection."[52] In *Montz*, plaintiffs ***910** who had conceived of an idea for a paranormal-investigation television show sued a production studio for creating a similar series allegedly based on the plaintiffs' materials. Though the plaintiffs' idea for a ghost-hunting show was unprotectable, the court found that it was still within the scope of copyright because the ideas were fixed in a tangible medium.[53] Similarly, Levy's idea for "an entertainment[-]magazine style, weekly video series" promoting "what was upcoming in Las Vegas" may be unprotectable, but as soon as Levy fixed that idea into written treatments, it came under the subject matter of the Copyright Act. So Levy's claims satisfy the subject-matter requirement of the copyright-preemption test.

51 *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011) (citing 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 19D.03 (rev. ed. 2010)).

52 *Id.*; *see also Firoozye*, 153 F. Supp. 2d at 1124 (holding that a work "does not necessarily have to be actually protected by a specific copyright or even itself be copyrightable; it just has to be 'within the subject matter' of the Act").

53 *Montz*, 649 F.3d at 979.

B. Levy's conversion claim is completely preempted because it seeks to protect rights equivalent to those covered by the Copyright Act.

[17] **[18]** The second part of the copyright-preemption test requires that rights asserted under a plaintiff's state-law claims "be equivalent to rights within the general scope of copyright as specified by section 106 ...."[54] Section 106 of the Copyright Act gives the owner of a copyright the exclusive rights of reproduction, preparation of derivative works, distribution, public performance, and display.[55] So, "to survive preemption, the state cause of action must protect rights [that] are qualitatively different from the copyright rights" and "must have an extra element [that] changes the nature of the action."[56] But "the mere presence of an additional element ... is not enough to qualitatively distinguish [the claim] from a claim in copyright ... [; it] must transform the nature of the action."[57]

54 *Laws*, 448 F.3d at 1143.

55 17 U.S.C. § 106.

56 *Laws*, 448 F.3d at 1143.

57 *Id.* at 1144.

[19] In Nevada, conversion is "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with[,] his title or rights therein or in derogation, exclusion, or defiance of such title or rights."[58] Levy contends that its conversion claim presents an extra element because, unlike the Copyright Act, it "allows money damages for the taking of another's property, wholly apart from whether the thief reproduces the property, makes derivative works of the property, or makes any commercial use of the property."[59] The defendants concede that a claim based on that theory would not be preempted, but they argue that Levy's conversion claim is based on intangible, rather than tangible, intellectual property and thus seeks to protect rights that are equivalent to those protected by the Copyright Act.[60]

58 *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043, 1048 (2000) (quoting *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413, 414 (1958)).

59 ECF No. 15 at 13.

60 ECF No. 16 at 11.

[20] Indeed, Ninth Circuit decisions suggest that there may be a difference between conversion of tangible and intangible property for copyright-preemption purposes. In *Oddo v. Ries*, an author sued his publisher for, among other things, conversion of his paper manuscript.[61] The court held that "[c]onversion of tangible property involves actions different from ***911** those proscribed by the copyright laws, and thus is not preempted."[62] But recently, in *Bokenfohr v. Gladen*, the Ninth Circuit held that a plaintiff's claim for conversion of intangible, electronic data sought to enforce rights "equivalent to the exclusive rights within the scope of copyright," so it was preempted.[63] The dispositive inquiry in a copyright-preemption analysis of conversion claims thus appears to be whether the property at issue is tangible or intangible.

61 *Oddo v. Ries*, 743 F.2d 630, 632 (9th Cir. 1984).

62 *Id.* at 635.

63 *Bokenfohr v. Gladen*, 826 F. App'x 485, 486 (9th Cir. 2020).

Decisions from other circuits[64] and multiple district courts in this circuit[65] have also drawn this distinction. For instance, in *Worth v. Universal Pictures, Inc.*, script writers sued a movie studio for the unauthorized use of their screenplay, asserting various claims including conversion.[66] The district court found that the conversion claim was brought not "for retrieval of [the screenplay], but rather for the profits from the movie's reproduction and distribution."[67] And because "copyright law encompasses reproduction and distribution of copyrighted works[,]" their claim was preempted.[68] The Fourth and Fifth Circuits have adopted this same rule, finding that the Copyright Act preempts conversion claims for intangible property.[69]

64 *See U.S. ex rel. Berge v. Bd. of Trs. of the Univ. of Alabama*, 104 F.3d 1453 (4th Cir. 1997); *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586 (5th Cir. 2015).

65 *See Firoozye*, 153 F.Supp.2d at 1130 ("[W]hile a claim for conversion typically involves tangible property and thus may be immune from preemption, [if] a plaintiff is only seeking damages from a defendant's reproduction of a work—and not the actual return of a physical piece of property—the claim is preempted."); *Dielsi*, 916 F. Supp. at 992 (holding that the plaintiff's conversion claim based on copying and distributing literary intangible property

was "clearly equivalent to a copyright claim" and thus preempted).

66 *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 819 (C.D. Cal. 1997).

67 *Id.* at 822.

68 *Id.*

69 *See U.S. ex rel. Berge*, 104 F.3d at 1464 ("[W]here the core of the state[-]law theory of recovery, as in conversion, goes to wrongful copying ... it is preempted."); *Spear Mktg.*, 791 F.3d at 597–98 (holding that "claims for conversion of intangible property are preempted") (collecting cases).

[21] Like the screenwriters in *Worth*, Levy brings its conversion claim not for retrieval of its written treatments but rather for the "actual economic loss" sustained due to the defendants' alleged reproduction and distribution of its series.[70] And, as the defendants argue,[71] Levy's allegations that the defendants' series was "substantially a copy" and "virtually identical to the content of" its own series demonstrate that Levy seeks to vindicate rights equivalent to the Copyright Act's protection against unauthorized reproduction.[72] Because the heart of Levy's conversion claim mirrors exclusive rights protected by the Copyright Act, it satisfies the equivalent-rights prong and is thus preempted.[73]

70 ECF No. 1 at 17–18.

71 ECF No. 16 at 11.

72 ECF No. 1 at 16.

73 The defendants also argue that Levy's unjust-enrichment claim is preempted under the Copyright Act. ECF No. 16 at 10–11. But because this court has subject-matter jurisdiction over Levy's conversion claim and supplemental jurisdiction over its other claims, I need not and do not reach the merits of the parties' arguments for preemption of Levy's unjust-enrichment claim.

***912 III. This court has supplemental jurisdiction over Levy's other claims.**

Levy devotes a significant part of its motion to arguing that its misappropriation and breach-of-contract claims contain the extra elements necessary to save them from copyright preemption.[74] But the defendants, by their own admission, "do not claim otherwise."[75] Rather, they ask the court to exercise supplemental jurisdiction over these claims because it has original jurisdiction over Levy's preempted conversion and unjust-enrichment claims.[76]

74 ECF No. 15 at 12–13.

75 ECF No. 16 at 12.

76 *Id.* at 12–13.

[22] Federal courts "have supplemental jurisdiction over all other claims that are so related to claims" brought in the same action "that they form part of the same case or controversy under Article III of the United States Constitution."[77] As Levy's conversion claim is completely preempted by the Copyright Act, this court has original jurisdiction over that claim. And, because Levy's misappropriation, unjust-enrichment, and breach-of-contract claims stem from the same alleged misconduct as that underlying its conversion claim—the defendants copying of its series—those claims are closely related and part of the same case or controversy. So I find that this court can exercise supplemental jurisdiction over Levy's state-law claims.[78]

77 28 U.S.C. § 1367.

78 Levy also asks for "attorney's fees resulting from [the defendants'] unwarranted petition for removal." ECF No. 15 at 14. Because I hold that removal was proper, I deny this request.

Conclusion

Because Levy's conversion claim is completely preempted by the Copyright Act and thus poses a federal question that confers subject-matter jurisdiction on this federal court, and because this court may exercise supplemental jurisdiction over Levy's remaining claims, IT IS ORDERED that Levy's motion to remand **[ECF No. 15] is DENIED**.

All Citations

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