

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

	)	
LEOPONA, INC. (d/b/a AUDIOCKET),	)	CASE NO. C16-0658RSM
a Delaware corporation; SARAH	)	
SCHACHNER, a California resident; and	)	
BRAD COUTURE, a New Hampshire	)	ORDER DENYING DEFENDANTS'
resident,	)	MOTION TO DISMISS
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CRUZ FOR PRESIDENT, a Texas nonprofit	)	
corporation; and MADISON MCQUEEN, a	)	
California limited liability company,	)	
	)	
Defendants.	)	

**I. INTRODUCTION**

This matter comes before the Court on Defendants' Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6), 12(c) and/or 12(f). Dkt. #4. Defendants argue that Plaintiffs' claims fail as a matter of law because: 1) Plaintiffs do not allege their copyrights are valid, and offer no information about their filings with the U.S. Copyright Office; 2) Plaintiffs cannot support their claim for liquidated damages; 3) Plaintiffs' contract claims are preempted by the Copyright Act; and 4) Plaintiffs' request for an injunction is moot. *Id.* Plaintiffs oppose the motion, arguing that they have met the liberal pleading standards under Rule 12(b)(6) and related case law, and no alternative Rule permits dismissal of the Complaint at this stage of the

ORDER

1 proceedings. Dkt. #7. For the reasons set forth below, the Court agrees with Plaintiffs and  
2 DENIES Defendants' motion to dismiss.

## 3 II. BACKGROUND

4 This copyright infringement/breach of contract matter arises from the use of certain  
5 musical compositions used in ads run by the Presidential campaign for Ted Cruz. Dkt. #1. For  
6 purposes of this motion, Defendants have accepted the following allegations by Plaintiffs as  
7 true. Dkt. #4 at 3.

8  
9 On September 17, 2015, an employee of the advertising company Madison McQueen,  
10 Robert Perkins, downloaded an Audiosocket-licensed music track called "Lens," which was  
11 created by Sarah Schachner. Ms. Schachner has filed a US copyright application for the "Lens"  
12 music composition and sound recording. Dkt. #1 at ¶ 20. On December 23, 2015, Defendant  
13 Madison McQueen entered into Audiosocket's standard Small Business License Agreement.  
14 Under the License Agreement, Madison McQueen agreed to use "Lens" for the limited permitted  
15 purposes outlined in that Agreement. *Id.* at ¶ 21. The License Agreement contained permitted  
16 uses and restrictions on use of the "Lens" composition and sound recording. *Id.* at ¶ 22. The  
17 Agreement expressly prohibited Madison McQueen from using "Lens":  
18  
19

20 1. In any broadcast, cable, web television, video games, mobile  
21 applications, or radio;

22 . . .

23 3. For political purposes (including, but not limited to, supporting or  
24 opposing any government policy, government official, political action, or  
25 candidate for political office).

26 *Id.* at ¶ 23. Madison McQueen also agreed to pay liquidated damages of \$25,000 for any  
27 breach of the Agreement. *Id.* at ¶ 24.  
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1 Prior to filing the instant lawsuit, Audiosocket confirmed that three days after entering  
2 into the License Agreement, and despite the agreement not to use ‘Lens’ for any political  
3 purposes, Defendants Cruz for President (‘Cruz’) and Madison McQueen began broadcasting  
4 ‘Victories,’ an acclaimed political ad promoting and supporting U.S. Presidential candidate Ted  
5 Cruz, on YouTube. The political ad used ‘Lens’ as its soundtrack throughout the entirety of the  
6 video. Dkt. #1 at ¶ 25. Audiosocket also confirmed that ‘Victories’ used Audiosocket’s unique  
7 watermarked version of ‘Lens,’ which reveals that it was the licensed version downloaded by Mr.  
8 Perkins. The ‘Victories’ video has been viewed over 78,000 times on YouTube. *Id.* at ¶ 26.

10 On February 24, 2016, nearly two months after Madison McQueen and Cruz first went  
11 live with their unauthorized political use of ‘Lens,’ but before they broadcast ‘Lens’ on cable  
12 television, Madison McQueen admitted it had no right to use ‘Lens’ on cable television.  
13 Although Audiosocket advised Madison McQueen that political use of ‘Lens’ was not approved,  
14 Madison McQueen ignored the restriction and proceeded to cause ‘Lens’ to be broadcast on  
15 cable channel Fox Business News no fewer than 86 times. *Id.* at ¶ 27.

17 On September 17, 2015, Mr. Perkins downloaded an Audiosocket-licensed song called  
18 ‘Fear of Complacency,’ which was created by Brad Couture. Mr. Couture has filed a U.S.  
19 copyright application for the ‘Fear of Complacency’ sound recording and music composition. *Id.*  
20 at ¶ 28. On January 25, 2016, Defendant Madison McQueen, entered into another Small  
21 Business Licensing Agreement with Audiosocket. Under that Licensing Agreement, Madison  
22 McQueen agreed to use ‘Fear of Complacency’ for the limited permitted purposes outlined in the  
23 Agreement. Dkt. #1 at ¶ 29. That License Agreement contained the same permitted uses and  
24 restrictions as the ‘Lens’ License Agreement, including that Madison McQueen was expressly  
25 prohibited from publishing or performing ‘Fear of Complacency’ for political purposes,  
26  
27  
28

ORDER

1 including, but not limited to, supporting or opposing any government policy, government  
2 official, political action, or candidate for political office. Dkt. #1 at ¶ 30. Madison McQueen  
3 also agreed to pay liquidated damages of \$25,000 for any breach of the “Fear of Complacency”  
4 License Agreement. *Id.* at ¶ 31.

5 Prior to filing the instant lawsuit, Audiosocket confirmed that on January 24, 2016,  
6 Defendants Cruz and Madison McQueen began broadcasting on YouTube a political  
7 commercial for candidate Cruz entitled “Best to Come,” which used “Fear of Complacency” as its  
8 soundtrack. Audiosocket also confirmed that “Best to Come” used Audiosocket’s unique  
9 watermarked version of “Fear of Complacency,” which reveals that it was the licensed version  
10 downloaded by Mr. Perkins. The “Best to Come” video has been viewed over 12,000 times on  
11 YouTube. *Id.* at ¶ 32.

12 The instant law suit followed, and Defendants have now moved to dismiss it.

### 13 14 15 **III. DISCUSSION**

#### 16 **A. Federal Rule of Civil Procedure 12(c)**

17 Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but early  
18 enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P.  
19 12(c). As an initial matter, the Court DENIES Defendants’ motion to the extent that it was  
20 brought under this Rule. As Defendants should be aware, such a motion is premature given  
21 that no Answer has been filed in this matter. *Doe v. United States*, 419 F.3d 1058, 1061 (9th  
22 Cir. 2005) (holding that Rule 12(c) motion is premature if no answer has been filed). Thus the  
23 Court turns to Defendants’ motion under 12(b)(6).  
24  
25  
26

#### 27 **B. Federal Rule of Civil Procedure 12(b)(6)**

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ORDER

1 On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure  
2 12(b)(6), all allegations of material fact must be accepted as true and construed in the light  
3 most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38  
4 (9th Cir. 1996). However, the Court is not required to accept as true a “legal conclusion  
5 couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
6 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Complaint “must contain sufficient factual  
7 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This  
8 requirement is met when the Plaintiff “pleads factual content that allows the court to draw the  
9 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Absent facial  
10 plausibility, Plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.  
11  
12

13 Though the Court limits its Rule 12(b)(6) review to allegations of material fact set forth  
14 in the Complaint, the Court may properly take judicial notice of facts not subject to reasonable  
15 dispute. *See* FRE 201(b). Here, the Court takes judicial notice of the fact that Ted Cruz  
16 suspended his Presidential campaign on or about May 4, 2016. Dkt. #4 at 7 fn. 20.  
17

18 *1. Plaintiffs Schachner’s and Couture’s Copyright Claims*

19 Defendants first argue that Plaintiffs Schachner and Couture have failed to allege facts  
20 sufficient to support their copyright infringement claims. Dkt. #4 at 9-11. Specifically,  
21 Defendants argue that Plaintiffs Schachner and Couture fail to allege sufficient facts to prove  
22 ownership of a valid copyright. Dkt. #4 at 10. The Ninth Circuit Court of Appeals has  
23 expressly held that “receipt by the Copyright Office of a complete application satisfies the  
24 registration requirement of § 411(a).” *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d  
25 612, 621 (9th Cir. 2010). Defendants have accepted for purposes of this motion that Ms.  
26 Schachner and Mr. Couture filed U.S. Copyright applications; however, they complain that  
27  
28

ORDER

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