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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12	LUCAS WIMER,)	CV 17-1917-RSWL-ASx
13	Plaintiff,)	
14	v.)	ORDER re: Defendant
15)	Reach Out WorldWide,
16	REACH OUT WORLDWIDE, INC.;)	Inc.'s Motion to Dismiss
17	REPRESENT HOLDINGS, LLC;)	Pursuant to Federal
18	and DOES 1-10,)	Rules of Civil Procedure
19	Defendants.)	12(b)(1) and 12(b)(6)
20)	[7]

21 Currently before the Court is Defendant Reach Out
 22 Worldwide, Inc.'s ("ROWW") Motion to Dismiss ("Motion"
 23 or "Motion to Dismiss") Plaintiff Lucas Wimer's
 24 ("Plaintiff") Complaint pursuant to Federal Rules of
 25 Civil Procedure 12(b)(1) and 12(b)(6). Having reviewed
 26 all papers submitted pertaining to this Motion, the
 27 Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES**
 28 **AS MOOT** ROWW's Motion [7] and **REMANDS** this Action for

1 lack of subject matter jurisdiction to the Los Angeles
2 County Superior Court, Case No. BC648794.

3 **I. BACKGROUND**

4 **A. Factual Background**

5 Plaintiff is purportedly a lifelong friend of Paul
6 Walker ("Walker"), a well-known actor who passed away
7 in 2013. Compl. ¶¶ 6, 7, ECF No. 1. In 2010, Walker
8 founded ROWW, a section 501(c)(3) charitable California
9 corporation, to provide humanitarian aid to victims of
10 natural disasters. Id. at ¶ 6. Plaintiff accompanied
11 Walker on numerous humanitarian trips, where he took
12 photographs and video recordings of Walker (the
13 "Works").¹ Id. at ¶ 7. Plaintiff and Walker apparently
14 discussed Plaintiff's future compensation for his work
15 with ROWW. Id. at ¶ 8.

16 Plaintiff avers that the Works were removed from
17 various storage devices without his authorization or
18 consent. Id. at ¶ 15. ROWW then sold Plaintiff's
19 Works via its website and incorporated the Works onto
20 clothing and other merchandise. Id. at ¶¶ 9, 11.

21 Defendant Represent Holdings, LLC ("Represent") is a
22 Delaware limited liability company that creates custom
23 merchandise and purportedly helped ROWW design and sell
24
25

26
27 ¹ In one photograph from 2010, Walker is at an airport in
28 the Dominican Republic, praying and wearing a bandana. Id. at ¶
10. Other recordings include video footage from 2010-2011 trips
to Haiti, Indonesia, Chile, and Alabama. Id.

1 the merchandise at issue.² Id. at ¶¶ 13, 14.

2 **B. Procedural Background**

3 Plaintiff filed his Complaint in Los Angeles
4 Superior Court on January 31, 2017 [1]. The Complaint
5 included causes of action for (1) conversion; (2)
6 unjust enrichment; (3) unlawful, unfair, and fraudulent
7 business acts and practices in violation of California
8 Business and Professions Code § 17200 ("Section
9 17200"); and (4) receiving and/or concealing stolen
10 property in violation of California Penal Code § 496
11 ("Section 496"). On March 9, 2017, the Action was
12 removed to federal court on the basis of federal
13 question jurisdiction, on the grounds that the
14 Copyright Act preempts the state law claims in the
15 Complaint.

16 ROWW filed a Motion to Dismiss the Complaint on
17 March 16, 2017 [7] pursuant to Federal Rule of Civil
18 Procedure 12(b)(1) for lack of subject matter
19 jurisdiction and 12(b)(6) for failure to state a claim
20 on which relief can be granted. Plaintiff filed his
21 Opposition on May 9, 2017 [10].³ ROWW filed a Reply on
22

23 ² It appears that Represent is not represented by counsel
24 and that only ROWW brought the instant Motion; Represent did not
25 join in the Motion. Collectively, the Court refers to ROWW and
Represent as "Defendants."

26 ³ The Opposition was untimely filed fourteen days before the
27 May 23, 2017 hearing, rather than the requisite twenty-one days
28 as required by Local Rule 7-9. Pursuant to Local Rule 7-12,
"[t]he Court may decline to consider any memorandum or other
document not filed within the deadline set by order or local
rule." Plaintiff is forewarned that the Court may exercise its

1 May 16, 2017 [11].

2 **II. DISCUSSION**

3 **A. Legal Standard**

4 1. Subject Matter Jurisdiction

5 Removal to federal court is governed by 28 U.S.C. §
6 1441, which in relevant part states that "any civil
7 action brought in a State court of which the district
8 courts of the United States have original jurisdiction,
9 may be removed by the defendant or defendants."

10 Original jurisdiction may be based on diversity or the
11 existence of a federal question, as set forth in 28
12 U.S.C. §§ 1331 and 1332. District courts have
13 diversity jurisdiction over all civil actions between
14 citizens of different states where the amount in
15 controversy exceeds \$75,000, exclusive of interest and
16 costs. 28 U.S.C. § 1332.

17 The Court has an independent obligation to
18 determine whether it has subject matter jurisdiction
19 over this Action. Arbaugh v. Y&H Corp., 546 U.S. 500,
20 514 (2006)(stating that because subject matter
21 jurisdiction "'can never be forfeited or waived,'"
22 courts "have an independent obligation to determine
23 whether subject-matter jurisdiction exists, even in the
24 absence of a challenge from any party"); 28 U.S.C. §
25 1447(c) ("[i]f at any time before final judgment it
26 appears that the district court lacks subject matter

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discretion to ignore future untimely motions or pleadings.

1 jurisdiction, the case shall be remanded.").

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3 ///

4 **B. Discussion**

5 1. The Court Does Not Have Subject Matter
6 Jurisdiction

7 Before considering the Motion to Dismiss, the Court
8 must confirm that it has subject matter jurisdiction
9 over the Action. If not, the Court must remand the
10 case. 28 U.S.C. § 1447(c).

11 The Court has reservations as to whether it has
12 subject matter jurisdiction over the exclusively state
13 law claims involving the alleged theft and
14 misappropriation of the Works. Diversity jurisdiction
15 is lacking, as Plaintiff is a California resident, ROWW
16 is a California corporation, Represent is a California
17 LLC, and the Complaint—initially filed in state
18 court—lacks allegations as to an amount-in-controversy
19 exceeding \$75,000. Compl. ¶¶ 1-3.

20 The only other option is federal question
21 jurisdiction. Federal question jurisdiction could be
22 conferred through a copyright infringement or other
23 claim asserted under the Copyright Act. 28 U.S.C. §
24 1338(a)("[t]he district courts shall have original
25 jurisdiction of any civil action arising under any Act
26 of Congress relating to . . . copyrights.") But even
27 if Plaintiff did have a viable copyright infringement
28 claim to confer federal question jurisdiction and the

1 Court could potentially assert supplemental
2 jurisdiction over the remaining state law claims, 28
3 U.S.C. § 1367(a), Plaintiff has not alleged or advised
4 the Court that he has registered any potential
5 copyright with the Copyright Office. Pursuant to 17
6 U.S.C. § 411(a), "no civil action for infringement of
7 the copyright in any United States Work shall be
8 instituted until preregistration or registration of the
9 copyright claim." Because neither the Complaint nor
10 the current record show that Plaintiff has
11 preregistered or registered a copyright claim, it is
12 doubtful at best that Plaintiff could even raise a
13 copyright infringement claim to confer federal question
14 jurisdiction. Dielsi v. Falk, 916 F. Supp. 985, 994
15 (C.D. Cal. 1996)("[p]laintiff's failure to plead that
16 he has applied for a copyright registration deprives
17 this court of subject matter jurisdiction over his
18 copyright claim."). Thus, without even reaching the
19 issue of whether the Copyright Act preempts the state
20 law claims, the Court could conclude it lacks diversity
21 jurisdiction or federal question jurisdiction and
22 remand on these grounds alone.

23 Nevertheless, ROWW contends that removal was
24 appropriate and the Court has subject matter
25 jurisdiction because the Copyright Act "completely
26 preempts" all of Plaintiff's state law claims.
27 See Ntc. of Removal ¶ 17, ECF No. 1. Typically,
28 federal preemption as a defense to a state law claim

1 does not confer federal question jurisdiction to permit
2 removal. Firoozye v. Earthlink Network, 153 F. Supp.
3 2d 1115, 1120 (N.D. Cal. 2001). However, the complete-
4 preemption doctrine "confers exclusive federal
5 jurisdiction in certain instances where Congress
6 intended the scope of a federal law to be so broad as
7 to entirely replace any state-law claim." Dennis v.
8 Hart, 724 F.3d 1249, 1254 (9th Cir. 2013). Courts in
9 this district have concluded that the Copyright Act
10 *completely* preempts equivalent state law claims and
11 those claims can be removed to federal court. See,
12 e.g., Firoozye, 153 F. Supp. 2d at 1119 (emphasis
13 added).

14 To further verify if it has subject matter
15 jurisdiction, the Court now turns to whether the
16 Copyright Act preempts the four state law claims in the
17 Complaint.

18 a. *Plaintiff's State Law Claims are not*
19 *Preempted by the Copyright Act*

20 A state law claim is preempted by the Copyright Act
21 if (1) the work at issue comes within the subject
22 matter of copyright, as defined by Sections 102 and 103
23 of the Copyright Act; and (2) the state law rights are
24 equivalent to rights within the general scope of
25 copyright, as specified in Section 106 of the Copyright
26 Act. Del Madera Props. v. Rhodes & Gardner, Inc., 820
27 F.2d 973, 976 (9th Cir. 1987), overruled on other
28 grounds by, Montz v. Pilgrim Films & Television, Inc.,

1 649 F.3d 975 (9th Cir. 2011); 17 U.S.C. § 301. "To
2 survive preemption, the state cause of action must
3 protect rights that are qualitatively different from
4 the rights protected by copyright: the complaint must
5 allege an 'extra element' that changes the nature of
6 the action." Grosso v. Miramax Film Corp., 383 F.3d
7 965, 968 (9th Cir. 2004)(emphasis added).

8 As to the first prong, Plaintiff's Works are
9 feasibly within the subject matter of copyright because
10 they are explicitly listed in the Copyright Act. In
11 the Complaint, Plaintiff describes the Works as
12 photographs and video recordings. Compl. ¶ 9. Section
13 102 of the Copyright Act protects "pictorial, graphic,
14 and sculptural works" and "motion pictures and other
15 audiovisual works." This includes both photographs and
16 videos. 17 U.S.C. § 101. And to the extent that the
17 Works are electronically stored, at least one court has
18 recognized that electronically stored photographs and
19 videos enjoy copyright protection. See Shade v.
20 Gorman, No. C 08-3471 SI, 2009 WL 196400, at *2 (N.D.
21 Jan. 28, 2009)(assessing copyright infringement claim
22 for computer files containing still photographs and
23 video footage).

24 The next issue is whether the rights afforded by
25 Plaintiff's state law claims are equivalent to rights
26 outlined by Section 106 of the Copyright Act. The
27 Court discusses each claim.

28 i. *Conversion*

1 To state a claim for conversion, the plaintiff must
2 show: (1) ownership or right to possession of certain
3 property; (2) defendant's conversion via a wrongful
4 act; and (3) damages. Ryoo Dental, Inc. v. Han, No.
5 SACV 15-308-JLS (RNBx), 2015 WL 4208580, at *2 (C.D.
6 Cal. July 9, 2015).

7 A conversion claim is preempted by the Copyright
8 Act when it accuses a defendant of wrongfully using and
9 distributing or reproducing a work. See Dielsi, 916 F.
10 Supp. at 992. By contrast, to the extent the plaintiff
11 alleges conversion of tangible property and seeks
12 retrieval of the tangible property, the conversion
13 claim "adds an 'extra element' beyond those elements
14 required to state a claim for copyright infringement."
15 Oddo v. Ries, 743 F.2d 630, 635 (9th Cir.

16 1984)(conversion claim not preempted where plaintiff
17 alleged conversion of the physical papers for his book
18 manuscript); 220 Labs., Inc. v. Babaii, No. CV 08-6125
19 PSG (Ssx), 2008 WL 5158863, at *7 (C.D. Cal. Dec. 8,
20 2008)(conversion claim not preempted where defendant
21 used plaintiff's video and photograph footage to
22 promote its products because of extra element that
23 defendants wrongfully obtained possession over
24 property). A conversion claim is preempted, however,
25 "where a plaintiff is only seeking damages from a
26 defendant's reproduction of a work-and not the actual
27 return of a physical piece of property." Firoozye, 153
28 F. Supp. 2d at 1130.

1 First, the conversion claim is not preempted
2 because Plaintiff aptly alleges conversion of tangible
3 property. Here, Plaintiff alleges that Defendants
4 removed the Works from "various storage devices without
5 his authorization or consent." Compl. ¶ 15. See
6 Lattie v. Murdach, No. C-96-2524 MHP, 1997 WL 33803, at
7 *1, *5 (N.D. Cal. Jan. 9, 1997)(remanding non-preempted
8 conversion claim where plaintiff alleged interference
9 with his physical dominion over price lists,
10 photographs, and drawings alleged); but see Firoozye,
11 153 F. Supp. 2d at 1130(concluding conversion claim was
12 preempted because defendant could not wrongfully
13 possess property that plaintiff authorized them to
14 use). Here, unlike Firoozye, Plaintiff apparently did
15 not willingly turn over the Works to Defendants;
16 rather, he alleges that Defendants took storage devices
17 containing the Works without his permission. The
18 overall gist of Plaintiff's conversion claim is not
19 that Defendants used and distributed Plaintiff's work
20 of authorship—and even that would be a stretch, as it
21 is speculative whether Plaintiff even has a copyright
22 for the Works—but rather Plaintiff alleges the "extra
23 element" that Defendants unlawfully retained the
24 tangible object embodying the Works when they pilfered
25 the Works from Plaintiff's storage devices without his
26 permission.

27 Second, the conversion claim is not preempted as
28 Plaintiff seeks return of the physical property, not

1 copyright-like damages. Plaintiff seeks "an order that
2 Defendants return to Plaintiff all Plaintiff's images
3 that may be in Defendants' possession, custody or
4 control," compl. ¶ G, not damages associated with
5 Defendants' use of the Works or damages based on
6 Defendants' profits from allegedly merchandising the
7 Works. Because the conversion claim asserts rights
8 "qualitatively distinguishable" from rights flowing
9 from the Copyright Act, it is not preempted.

10 ii. *Unjust Enrichment*

11 Unjust enrichment claims are preempted to the
12 extent that they arise from a defendant's unauthorized
13 use of a copyrighted work. Zito v. Steeplechase Films,
14 Inc., 267 F. Supp. 2d 1022 (N.D. Cal. 2003). For
15 instance, "an implied promise not to use or copy
16 materials within the subject matter of copyright" is
17 preempted, as it "is equivalent to the protection
18 provided by section 106 of the Copyright Act." Del
19 Madera, 820 F.2d at 977.

20 ROWW argues that the unjust enrichment claim is
21 preempted to the extent that Plaintiff seeks damages
22 for Defendants' profits from reproducing, distributing,
23 and selling merchandise containing the Works. Mot.
24 7:23-28. But a closer reading of Plaintiff's unjust
25 enrichment claim shows that Plaintiff is not claiming
26 violation of an implied promise not to use or copy the
27 Works; rather, Plaintiff alleges Defendants benefitted
28 from the Works without compensating him. Compl. ¶ 21.

1 In other parts of the Complaint, Plaintiff alleges that
2 Walker indicated that he would be compensated for his
3 role in ROWW and would work "formally and informally"
4 with the charitable corporation. Id. at ¶ 8. Coupling
5 these allegations together, it is plausible that the
6 unjust enrichment claim seeks to recover the value of
7 creative services that Plaintiff provided Defendants
8 through his Works and other efforts. This "extra
9 element"—of an implied promise to compensate
10 Plaintiff—"transforms the action from one arising under
11 the ambit of the federal statute to one sounding in
12 contract." Grosso, 383 F.3d at 968; see also NW Home
13 Designing Inc. v. Sound Built Homes Inc., 776 F. Supp.
14 2d 1210, 1216-17 (W.D. Wash. 2011)(concluding that the
15 unjust enrichment claim was not preempted because
16 plaintiff alleged the implied promise that he would be
17 compensated with royalty payments for use of his home
18 designs); Cadkin v. Loose, SACV 08-1580 JVS (Shx), 2008
19 WL 11336390, at *3 (C.D. Cal. Apr. 24, 2008)(unjust
20 enrichment claim not preempted because it was based on
21 violation of the parties' contract and alleged an
22 "extra element" of the parties' "expectation of
23 compensation," rather than relied on defendant's
24 unauthorized use of copyright-protected materials).

25 It is true that the Complaint also alleges that
26 Defendants were unjustly enriched by profiting from the
27 Works without Plaintiff's consent and without legal
28 rights to the works. Id. At first, this allegation

1 seems equivalent to the Copyright Act's exclusive right
2 to reproduce the work or distribute copies, 17 U.S. §
3 106(1),(2). Were the Court to subscribe to this
4 reasoning—particularly in a case like this where it is
5 unclear whether the plaintiff even has a valid
6 copyright registered—any time a party mentioned that
7 the other party “benefitted” from a potentially
8 copyrightable work, preemption would be the only result
9 and would invariably swallow up viable state law
10 claims. Thus, the Court concludes that the Copyright
11 Act does not preempt the unjust enrichment claim.

12 iii. *Section 17200 Claim*

13 “California unfair competition law, [California
14 Business & Professions Code § 17200 *et seq.*,] prohibits
15 any ‘unlawful, unfair or fraudulent business
16 practice.’” Kodadek v. MTV Networks, Inc., 152 F.3d
17 1209, 1212 (9th Cir. 1998). Where the unfair
18 competition claim rests on rights guaranteed by the
19 Copyright Act, the unfair competition claim is
20 preempted. Id. at 1212.

21 Plaintiff alleges that Defendants’ “conversion,
22 constructive fraud, and other violations of law”
23 constitute unlawful, unfair, and fraudulent business
24 practices. Compl. ¶¶ 25-29. Plaintiff further adds
25 that he “would not have created the Works or performed
26 the services he provided (or would have taken steps to
27 . . . prevent . . . their conversion)” absent
28 Defendants’ unlawful practices. Id. at ¶ 31. In

1 Kodadek, the overlap between the alleged unfair
2 business practices and rights guaranteed by the
3 Copyright Act was clear: plaintiff alleged that
4 defendants were "publishing and placing on the market
5 for sale products bearing the images subject to the
6 copyright ownership of the plaintiff."⁴ 152 F.3d at
7 1212-13. The unfair business practices were
8 effectively interchangeable with the unauthorized
9 publishing and sale of products bearing the copyright
10 image; in that case, a cartoon. Unlike the claim in
11 Kodadek, the unfair competition claim here does not
12 clearly rest on rights the Copyright Act guarantees.
13 Here, the allegations regarding unfair competition are
14 based on conversion and fraud, not use of copyrighted
15 material or violations of the Copyright Act. See
16 Valente-Kritzer Video v. Pinckney, 881 F.2d 772, 776
17 (9th Cir. 1989)(fraud claim was not substantially
18 equivalent to copyright infringement claim because it
19 alleged additional element of misrepresentation); Oddo,
20 743 F.2d at 635 (conversion claim not preempted by

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22 ⁴ The Court notes that in many of the cases concluding that
23 the Copyright Act preempts the unfair competition claim, the
24 plaintiff already has a copyright infringement claim in the
25 action and the unfair competition claim merely incorporates the
26 allegations for the copyright infringement claim. See, e.g.,
27 Media.net Advertising FZ-LLC v. NetSeer, Inc., 156 F. Supp. 3d
28 1052, 1075 (N.D. Cal. 2016)(unfair competition law violation
lacked "additional allegations or facts" that were "not asserted
in its copyright infringement" claims); Kodadek, 152 F.3d at 1212
("the unfair competition claim incorporates by reference
paragraphs from the copyright infringement claim."). But
Plaintiff does not have a copyright infringement claim here.

1 Copyright Act because of "retaining physical property"
2 element). Considering the Complaint as a whole, it is
3 feasible that the unfair competition claim strikes more
4 at Defendants' alleged conversion of the storage
5 devices and ROWW's alleged fraud in promising
6 Plaintiff—through Walker—compensation and a role in
7 ROWW. Compl. ¶¶ 8, 15. The Section 17200 claim—and
8 its incorporated allegations—do not clearly show that
9 "unfair business practices" is subtext for "violations
10 of the Copyright Act's exclusive rights." Accordingly,
11 the Section 17200 claim is not preempted.

12 *iv. Section 496 Claim*

13 The elements of a receipt of stolen property claim,
14 California Penal Code § 496, are: (1) the property must
15 be stolen property; (2) defendant must receive,
16 conceal, or withhold it or aid in receiving, concealing
17 or withholding it from its owner; and (3) defendant
18 must have knowledge that property is stolen property.
19 People v. Stuart, 272 Cal. App. 2d 653, 656 (Ct. App.
20 1969). ROWW argues that the alleged conversion
21 underpinning the Section 496 claim is akin to the
22 wrongful appropriation of the Works; that is, a
23 copyright claim. Mot. 8:8-11. Plaintiff counters that
24 "specific allegations of physical thefts" render the
25 section 496 claim qualitatively distinguishable from
26 the copyright claims. Opp'n 9:13-15.

27 For largely the same reasons in the conversion
28 claim, the Section 496 claim is also not preempted by

1 the Copyright Act. First, the claim contains the
2 "extra element" of receiving and concealing stolen
3 property. ROWW stretches the application of copyright
4 preemption to its breaking point by insisting that the
5 Section 496 claim is more properly framed as a
6 copyright issue. From the Complaint, it is apparent
7 that the Section 496 claim—like the conversion
8 claim—flows from the allegation that Defendants stole
9 storage devices containing Plaintiff's Works.

10 ROWW appears to believe that Plaintiff should have
11 raised a copyright infringement claim. But because
12 Plaintiff has not yet alleged whether he has registered
13 any copyright, ROWW can conveniently argue that even
14 the copyright claim would fail or, that any of the
15 accompanying state law claims would be preempted. At
16 this juncture, the Court does not speculate as to
17 Plaintiff's strategy or the most appropriate claims he
18 could have raised. The Court similarly will not
19 facilitate ROWW's preemption analysis by reading a
20 nonexistent copyright infringement claim into the
21 Complaint. Plaintiff's purely state law claims are
22 plausible on their own given the allegations that
23 Defendants pilfered Plaintiff's storage devices and
24 that Plaintiff and ROWW may have had preliminary
25 discussions about his compensation with ROWW or
26 possibly agreed to provide the Works. In light of
27 this, the Court will not mechanically apply the rules
28 surrounding Copyright Act preemption of state law

1 claims. Because the state law claims are independently
2 supportable and not preempted by the Copyright Act, the
3 Court lacks subject matter jurisdiction over the Action
4 and thus remands the claims to the state court which
5 can more appropriately resolve them.

6 **III. CONCLUSION**

7 Because the Court lacks both diversity jurisdiction
8 and federal question jurisdiction and the Copyright Act
9 does not preempt the entirely state law claims, the
10 Court **DENIES AS MOOT** ROWW's Motion to Dismiss [7] and
11 **REMANDS** this Action to the Los Angeles Superior Court,
12 Case No. BC648794 for lack of subject matter
13 jurisdiction.

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15 **IT IS SO ORDERED.**

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17 DATED: July 13, 2017

s/ RONALD S.W. LEW

18 **HONORABLE RONALD S.W. LEW**
19 Senior U.S. District Judge
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