

1 D. GILL SPERLEIN (172887)
2 THE LAW OFFICE OF D. GILL SPERLEIN
3 584 Castro Street, Suite 879
4 San Francisco, California 94114
5 Telephone: (415) 404-6615
6 Facsimile: (415) 404-6616
7 gill@sperleinlaw.com

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 DOUGLAS L. BRIDGES (*pro hac vice pending*)
9 HENINGER GARRISON DAVIS LLC
10 1 Glenlake Parkway, Suite 700
11 Atlanta, Georgia 30328
12 Telephone: (678) 638-6309
13 Facsimile: (678) 638-6142
14 dbridges@hgdllawfirm.com

15 BRIAN D. HANCOCK (*pro hac vice pending*)
16 HENINGER GARRISON DAVIS LLC
17 2224 1st Avenue North
18 Birmingham, AL 35203
19 Telephone: (205) 326-3336
20 Facsimile: (205) 326-3332
21 bdhancock@hgdllawfirm.com

22 Attorneys for Plaintiff,
23 DANIEL M. MILLER

24 **UNITED STATES DISTRICT COURT**
25 **NORTHERN DISTRICT OF CALIFORNIA**
26 **SAN FRANCISCO DIVISION**

27 DANIEL M. MILLER,)
28) **CASE NO.: CV-10-264 (WHA)**
29)
30) **PLAINTIFF DANIEL MILLER'S**
31) **OPPOSITION TO DEFENDANT**
32) **FACEBOOK, INC.'S MOTION TO DISMISS**
33) **COMPLAINT**
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Plaintiff,

vs.

FACEBOOK, INC. and YAO WEI YEO,

Defendants.

1 COMES NOW Plaintiff Daniel M. Miller (“Plaintiff”) and moves this Court to deny
2 Defendant Facebook, Inc.’s (“Defendant”) Motion to Dismiss Complaint pursuant to Rules 8(a),
3 12(b)(6), and 12(b)(1), Fed. R. Civ. P., filed on February 2, 2010 (“Defendant’s Motion”), and in
4 support thereof, the Plaintiff would state the following:
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6 **I. INTRODUCTION**

7 In its Motion, the Defendant contends that (1) the Court does not have subject matter
8 jurisdiction of Plaintiff’s copyright infringement claim, under Rule 12(b)(1), Fed. R. Civ. P.,
9 because the Plaintiff applied for registration of his copyright claim prior to filing the Complaint
10 but without first obtaining registration; (2) that the Plaintiff has failed to state a claim upon which
11 relief can be granted under Rule 12(b)(6), Fed. R. Civ. P., because his averments and allegations
12 of copyright infringement and violations of §43(a) of the Lanham Act, 15 U.S.C. §1125(a), fail to
13 meet the pleading standards set forth by the United States Supreme Court in *Bell Atl. Corp. v.*
14 *Twombly*, 550 U.S. 544 (2007) (“*Twombly*”) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)
15 (“*Iqbal*”); and (3) the Plaintiff’s claim under the Georgia Deceptive Trade Practices Act is barred
16 by the Communications Decency Act and preempted by the Copyright Act. The Defendant’s
17 Motion has no merit.¹ This Court has subject matter jurisdiction over the Plaintiff’s copyright
18 infringement claim and there is ample authority, including prior decisions in this District as well
19 as persuasive authority from foreign jurisdictions, including the Eleventh Circuit where Plaintiff
20 originally filed his Complaint (i.e. the Northern District of Georgia), that the filing of an
21 application for registration of a copyright confers both standing on the Plaintiff to file an
22 infringement claim and jurisdiction of such an action on the Court in front of which the claim is
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27 ¹ Plaintiff voluntarily agrees to dismissal without prejudice of Counts Two and Three of
28 his Complaint.

1 pending. As to the Defendant's contentions regarding the insufficiency of the Plaintiff's
2 allegations of copyright infringement, the Defendant is requesting dismissal when it is essentially
3 alleging insufficient notice. The averments and allegations in the Plaintiff's Complaint give fair
4 notice to the Defendant as to its alleged copyright infringement. The actions on the part of the
5 Defendant as alleged in the complaint create a plausible cause of action which is sufficient to
6 overcome the Defendant's Motion.

8 II. ARGUMENT

9 1. This Court has Subject Matter Jurisdiction over Plaintiff's Copyright 10 Infringement Claim.

11 In Paragraph 13 of his Complaint, the Plaintiff alleges that he "has filed a registration for a
12 copyright in *Boomshine* with the United States Copyright Office." The Defendant contends that
13 this alone is not enough to confer this Court with jurisdiction over the Plaintiff's claim of
14 copyright infringement while in the same breath acknowledging that courts of the Northern and
15 Central District of California have held otherwise. See n.3of Defendant's Motion (Doc. 25), p. 8.
16 In addition to the cases cited by the Defendant in its footnote, in *Penpower Tech. Ltd. v. S.P.C.*
17 *Tech.*, 627 F.Supp.2d 1083, 1090-1091 (N.D.Cal. 2008) ("*Penpower*"), the court, when
18 considering whether or not the plaintiffs had properly alleged ownership of a copyright in
19 connection with the court's analysis of the propriety of entering default judgment against certain
20 defendants, held that the plaintiffs' allegation that it had "filed [an] application for registration
21 with the United States Copyright Office" constituted a sufficiently pled claim of copyright
22 infringement. In so holding, the *Penpower* court concluded that "the plain language of §411 [of
23 the Copyright Act] permits a plaintiff to initiate a copyright infringement claim before the actual
24 issuance of a registration certificate" and that the plaintiffs' allegation that it had filed an
25 application for registration was equivalent to "preregistration" as set forth in §411(a). *Penpower*,

1 627 F.Supp.2d at 1091. Furthermore, in *Identity Arts v. Best Buy Enter. Serv. Inc.*, 2007 WL
2 1149155 (N.D. Cal. April 18, 2007) at *6, the court stated that it would be within its authority to
3 allow a copyright infringement action to be initiated prior to actual issuance of a registration
4 certificate but *after* the filing of an application for registration. This is in keeping with the
5 reasoning of the leading treatise on copyright law, *Nimmer on Copyright*. “Given the fact that a
6 subsequently issued registration is deemed effective on the day the Copyright Office received the
7 application, fee and deposit, Nimmer opines that ‘it makes sense...to refer to *application for*
8 *registration* as a condition to filing an infringement action, whereas *issuance of a registration*
9 *certificate* is a condition to statutory damages, *prima facie* registration, constructive notice,
10 and...other consequences....” *Breakdown Serv., Ltd. v. My Entertainment World, Inc.*, 2009 WL
11 3045807 (C.D.Cal. Sep. 18, 2009) at *2 (*citing* 2 Melville B. Nimmer and David Nimmer,
12 NIMMER ON COPYRIGHT, § 7.16[B][1][a] at p. 7-155 (2005)).

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15 It must also be remembered that the Plaintiff is a resident of Marietta, Georgia, and
16 originally filed this action in the Northern District of Georgia. See Plaintiff’s Complaint (Doc. 1),
17 ¶ 1. The Eleventh Circuit has stated that “the case law is clear that only those copyright holders
18 *that at least apply to register their copyrights* may invoke the subject matter jurisdiction of the
19 federal courts in an infringement suit.” *Stuart Weitzman, LLC v. Microcomputer Resources, Inc.*,
20 542 F.3d 859, 863 (11th Cir. 2008) (*citing La Resolana Architects, PA v. Clay Realtors Angel Fire*,
21 416 F.3d 1195, 1199 (10th Cir. 2005)).
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24 Accordingly, the Defendant’s Motion is due to be denied.

25 **2. The Plaintiff’s Allegations of Copyright Infringement Satisfy Rule 8(a), Fed. R.**
26 **Civ. P., and the Pleading Standards Set Forth by the United States Supreme**
27 **Court.**
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1 When addressing the propriety of a motion to dismiss for failure to state a claim pursuant
2 to Rule 12(b)(6), Fed. R. Civ. P., the complaint is construed in the light most favorable to the non-
3 moving party and all material allegations in the complaint are taken to be true. *Sanders v.*
4 *Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). Motions to dismiss pursuant to Rule 12(b)(6) are
5 typically disfavored; complaints are construed liberally to set forth some basis for relief, as long as
6 they provide basic notice to the defendants of the charges against them. *In re Rigel Pharm., Inc.*
7 *Securities Litigation*, 2009 WL 5125344 (N.D. Cal. Dec. 21, 2009) at *5. The notice pleading
8 standard of Rule 8(a)(2) requires a plaintiff to give a short and plain statement “plausibly
9 suggesting ...that the pleader is entitled to relief.” *Twombly*, 550 U.S. at 557. Under this standard,
10 a claim is facially plausible where “the pleaded factual content allows the court to draw a
11 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at
12 1940. “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of
13 what the ... claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93
14 (2007).

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18 The elements of a *prima facie* claim of copyright infringement are (1) ownership of a valid
19 copyright; and (2) defendant’s copying of constituent elements of the original work. *See, e.g.,*
20 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The existence of the
21 first element is satisfied, for purposes of responding to Defendant’s Motion, in Section II.1 of this
22 brief which clearly sets forth the averment in Plaintiff’s Complaint (e.g. Paragraph 13) sufficient
23 to meet the requirements of Rule 8(a), Fed.R. Civ. P., and the pleading standards set forth above.
24 In its Motion, however, the Defendant encourages the Court to disregard the allegations made by
25 the Plaintiff in Paragraph 13 of his Complaint, and as grounds therefore, argues that the cease and
26 desist letters attached to the Complaint as Exhibits A and B assert that the Plaintiff’s company,
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1 K2xl, LLC, is the “owner of the [sic] all right, title and interest in copyrights...including certain
2 flash video games known as Boomshine...” See Defendant’s Motion (Doc. 25), p. 4. In response
3 to this, the Plaintiff need only remind the Defendant that when deciding a motion to dismiss
4 pursuant to Rule 12(b)(6), Fed. R. Civ. P., all material allegations in the complaint are taken to be
5 true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The fact that a cease and desist letter
6 was sent to the Defendants asserting that the Plaintiff’s company, K2xL, LLC, is the owner of any
7 right, title, or interest in copyrights concerning the *Boomshine* game is not sufficient grounds for
8 the total disregard of the properly pled averment in Paragraph 13 of the Plaintiff’s Complaint , as
9 urged by the Defendant, nor should it render a well-established principle of the 12(b)(6) analysis
10 inapplicable and of no consequence.

13 As to the second element, the averments of the Plaintiff’s Complaint clearly and
14 unequivocally allege that Defendant Yao Wei Yeo does business on the Defendant’s web site and
15 published the infringing game, *ChainRxn*, on a website hosted by the Defendant. See Plaintiff’s
16 Complaint (Doc. 1), ¶¶ 14, 15. It is also alleged that *ChainRxn* copies the look and feel of
17 *Boomshine* “by incorporating almost every visual element of the game”, that the Defendant
18 advertises on its webpage which contains *ChainRxn*, that the Defendant was notified of its
19 infringing activity consisting of the unauthorized copying, reproduction and distribution of
20 *ChainRxn*, that this activity is unlawful pursuant to 17 U.S.C. §501, and that the Defendant did
21 nothing in response to this notification. See Plaintiff’s Complaint (Doc. 1), ¶¶ 17, 19, 20, 25, 27,
22 31. It begs the question what further notice does the Defendant require as to the Plaintiff’s claim
23 of copyright infringement and the grounds upon which it rests. In accordance with Rule 8(a)(2),
24 the Plaintiff has given a short and plain statement plausibly suggesting that he is entitled to relief.
25 Thus, the Defendant’s Motion is due to be denied.
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1 However, should the Court conclude that the Defendant's arguments have merit and that
2 its Motion is due to be granted, the Plaintiff would move this Court, as an alternative to dismissal
3 and pursuant to Rules 15(a)(1)(B) and/or (a)(2), Fed. R. Civ. P., for leave to amend its complaint
4 so as to satisfy whatever pleading deficiencies the Court identifies.
5

6
7 Dated 2/24/10

Respectfully submitted,

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11 D. GILL SPERLEIN
12 THE LAW OFFICE OF D. GILL SPERLEIN
13 584 Castro Street, Suite 879
14 San Francisco, CA 94114
15 Telephone: (415) 404-6615
16 Facsimile: (415) 404-6616
17 E-mail: gill@sperleinlaw.com

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CERTIFICATION OF INTERESTED PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons (i)
have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii)
have a non-financial interest in that subject matter or in a party that could be substantially affected
by the outcome of this proceeding:

DANIEL M. MILLER

Dated: 2/24/10

Respectfully submitted,



D. GILL SPERLEIN
THE LAW OFFICE OF D. GILL SPERLEIN

Attorney for Plaintiff
DANIEL M. MILLER

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PROOF OF SERVICE BY MAIL

Gill Sperlein Certifies that:

I am an active member of the State Bar of California and am not a party to this action. My business address is 584 Castro Street, Suite 879, San Francisco, California, 94114. Today, I deposited in the United States mail at San Francisco, California a copy of the attached:


- **PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS**
- **APPLICATION FOR ADMISSION OF DOUGLAS L. BRIDGES, *PRO HAC VICE***
- **APPLICATION FOR ADMISSION OF DOUGLAS L. BRIDGES, *PRO HAC VICE***
- **PROPOSED ORDERS RE *PRO HAC VICE* APPLICATIONS**

In a sealed envelope, with postage fully prepaid, addressed to:

I. Neel Chatterjee, Esq. (nchatterjee@orrick.com)
Thomas J. Gray, Esq. (tgray@orrick.com)
Julio C. Avalos, Esq. (javalos@orrick.com)
Orrick, Herrington & Sutcliffe, LLP
1000 Marsh Road
Menlo Park, CA 94205

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Date: February 24, 2010


D. Gill Sperlein