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9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN FRANCISCO DIVISION

13 DANIEL M. MILLER,  
 14 Plaintiff,  
 15 v.  
 16 FACEBOOK, INC. and YAO WEI YEO,  
 17 Defendants.

Case No. 5:10-CV-00264 (WA)

**MOTION TO DISMISS SECOND  
 AMENDED COMPLAINT**

Date: August 5, 2010  
 Time: 8:00 A.M.  
 Court: Courtroom 9, 19th Floor  
 Judge: Honorable William Alsup

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1 **I. INTRODUCTION**

2 The Court granted Plaintiff one last opportunity to amend his complaint and specifically  
3 instructed him to add factual allegations explaining “how and why” Defendant Yeo’s allegedly  
4 infringing game is an unlawful copy of Plaintiff’s copyright. Plaintiff has failed to comply with  
5 the Court’s Order and did not add the requested “clarifying” facts to his Second Amended  
6 Complaint (“SAC”). Rather, Plaintiff added one paragraph of implausible and conclusory  
7 statements regarding Defendant Yeo’s purported access to and copying of Plaintiff’s code.  
8 Plaintiff’s newly-added allegations not only fail to satisfy the Court’s orders, they actually make  
9 it more difficult to determine the factual basis for his claims.

10 Specifically, Miller alleges for the first time that Yeo copied the Boomshine source code,  
11 rather than just the “look and feel” of the game. But the SAC is devoid of any factual basis for  
12 this new theory, a theory that in any event is belied by Plaintiff’s counsel’s statements at the  
13 May 27 hearing, a mere week before Plaintiff filed the SAC, that Plaintiff did not know how  
14 Defendant Yeo accessed and copied the Boomshine game. And consistent with this newly-added  
15 theory, at that same hearing, Plaintiff conceded that his copyright only covers the Boomshine  
16 source code. Consequently, because Plaintiff’s copyright registration does not extend to  
17 Boomshine’s unregistered visual elements, Miller lacks standing to maintain an infringement  
18 action based on Boomshine’s “look and feel.”

19 The SAC demonstrates that Plaintiff is really just guessing as to what Defendant Yeo  
20 allegedly did. But the Federal Rules of Civil Procedure require more than mere speculation and  
21 unsupported conclusions. This is especially true here, where the speculative and conclusory  
22 allegations added to the SAC are inconsistent with representations made by Plaintiff’s counsel  
23 only one week before. Though the Court has previously found that Plaintiff has sufficiently  
24 stated a claim for direct infringement against Defendant Yeo, Facebook respectfully submits that  
25 Plaintiff’s new allegations—in addition to failing to meet the Court’s express orders—in fact  
26 undercut Plaintiff’s direct infringement theory and demonstrate that no such claim has been pled.  
27 Facebook respectfully requests that the SAC be dismissed with prejudice.

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1 **II. BACKGROUND**

2 As the Court is well aware, Plaintiff has been given a number of opportunities to try to  
3 properly allege his direct copyright infringement claim against Defendant Yeo and his  
4 contributory infringement claim against Facebook. In an effort to sustain the matter, Plaintiff  
5 filed a Motion for Leave to Amend Complaint, the hearing for which was held on May 27, 2010.  
6 Remarkably, despite knowing about Yeo’s alleged infringing activity for over a year and  
7 litigating this case for over eight months, Plaintiff’s counsel conceded, “I don’t know for certain  
8 how he accessed the code or how he did that.” Declaration of Julio C. Avalos in Support of  
9 Motion to Dismiss Second Amended Complaint, Ex. A at 10:16-18. Thereafter, on June 3, the  
10 Court issued its Order granting Plaintiff leave to amend but ordering him to allege, among other  
11 things, “how and why the ChainRxn video game is an unlawful ‘copy’ of plaintiff’s copyright in  
12 Boomshine.” See Docket No. 56 at 13:16-17. The very next day, a mere seven days after  
13 Plaintiff’s concession at the hearing that he did not know how Yeo accessed and copied Plaintiff’s  
14 source code, Plaintiff added the following paragraph to his previous draft of the SAC:

15 Defendant Yeo unlawfully copied Boomshine by (1) improperly  
16 accessing and decompiling the Boomshine source code with a  
17 decompiling program, **or** by viewing the Boomshine application via  
18 the K2xl.com web site, and (2) then reproducing the Boomshine  
19 source code from the original decompiled source code, **or** by  
20 authoring, from the “look and feel” of the Boomshine application  
21 available on the K2xl.com web site, a source code designed and  
22 intended to result in the ChainRxn application that is substantially  
23 similar to Boomshine in its structure, sequence, organization, and/or  
24 user interface.

25 SAC ¶ 20 (emphasis added). On their face, these allegations reveal that Plaintiff still has no idea  
26 how or even whether Defendant Yeo accessed and copied the code. Plaintiff has merely added  
27 conclusory statements in an attempt to overcome the Court’s concern about Plaintiff’s failure to  
28 properly allege access and copying of the Boomshine source code. Miller’s newly added  
allegations do not satisfy the Court’s Order and do not satisfy basic federal pleading  
requirements.

1 **III. ARGUMENT**

2 **A. Legal Standard**

3 A party may move to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) if,  
4 from the face of the complaint, the plaintiff fails to state a claim upon which relief can be granted.  
5 Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) requires the Court to take all allegations in Plaintiff's  
6 complaint as true, and construe all inferences from them in the light most favorable to it. *Cahill v.*  
7 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). While a plaintiff does not need  
8 detailed factual allegations, he must nonetheless "provide the grounds of his 'entitle[ment] to  
9 relief' . . . [which] requires more than labels and conclusions, and a formulaic recitation of a  
10 cause of action will not do . . . Factual allegations must be enough to raise a right to relief above  
11 the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations  
12 omitted).

13 The Court need not credit conclusory allegations, unwarranted deductions of fact, or  
14 unreasonable inferences. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *Sprewell v. Golden*  
15 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Rule 12(b)(6) must be read in conjunction  
16 with the pleading requirements of Rule 8(a)(2). *Sprewell*, 266 F.3d at 988. Rule 8(a)(2) requires  
17 "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R.  
18 Civ. P. 8(a)(2). Rule 8(a)(2) requires a "showing, rather than a blanket assertion, of entitlement to  
19 relief . . . [w]ithout some factual allegation in the complaint, it is hard to see how a claimant could  
20 satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also  
21 'grounds' on which the claim rests." *Twombly*, 550 U.S. at 556 n.3. Though, a pleading must  
22 contain "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570, if the  
23 "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their  
24 complaint must be dismissed." *Id.*

25 **B. Miller Has Not Alleged Direct Copyright Infringement**

26 "To establish infringement, two elements must be proven: (1) ownership of a valid  
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1 copyright, and (2) copying of constituent elements of the work that are original.”<sup>1</sup> *Feist Publ’n,*  
2 *Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) citing *Harper & Row*  
3 *Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985). In order to establish that a work  
4 has been “copied,” Miller must show “access (by the alleged infringer) and substantial similarity  
5 (between the works at issue).” *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941-942  
6 (8th Cir. 1992) citing 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13.01[B] (1992).

7 Though not entirely clear, it appears that in paragraph 20, Miller is attempting to allege  
8 two disparate theories of how Defendant Yeo directly infringed Plaintiff’s copyright in the  
9 Boomshine source code. Defendant Yeo is alleged to have infringed the source code copyright:

- 10 • By improperly accessing and decompiling the *Boomshine* source code with a  
11 decompiling program and then reproducing the *Boomshine* source code from the  
12 original decompiled source code; **OR**
- 13 • By viewing the *Boomshine* application (the game) via the K2xl.com web site and  
14 authoring, from the “look and feel” of the *Boomshine* application available on the  
15 K2xl.com web site, a source code designed and intended to result in the ChainRxn  
16 application that is substantially similar to *Boomshine* in its structure, sequence,  
17 organization, and/or user interface.

18 As pled, these theories neither comply with the Court’s order nor save Plaintiff’s case.  
19 Instead, Miller offers pure conjecture and speculation rather than real factual allegations as to  
20 how Yeo supposedly accessed and copied the code. Moreover, the plausibility of these new  
21 theories is significantly undermined by Plaintiff’s counsel’s representation at the May 27 hearing  
22 that he does not “know for certain how [Yeo] accessed the code.” Avalos Decl. Ex. A at 10:16-  
23 17. Despite this concession, made after Miller had known about Yeo’s allegedly infringing game  
24 for more than a year and after eight months of litigation, a mere seven days later Plaintiff added  
25 his conclusory statements in an attempt to breathe life into his case. The Court should not  
26 condone this improper tactic and should find that Plaintiff has not adequately alleged direct

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27  
28 <sup>1</sup> Facebook does not, for purposes of this motion, dispute that Miller obtained a certificate of registration for a “computer file” that he refers to as Boomshine.

1 copyright infringement.

2 **1. Plaintiff Has Failed To Provide Any Facts Describing How Yeo**  
3 **Accessed And Copied the Source Code.**

4 Miller’s conclusion, without any factual support, that Yeo “improperly access[ed] ... the  
5 Boomshine source code” (SAC ¶ 20) demonstrates the “conclusory allegations and unwarranted  
6 deductions of fact” that the Court must reject.<sup>2</sup> *Iqbal*, 129 S.Ct. at 1949-50. This is especially  
7 true in light of Miller’s counsel’s representation at the May 27 hearing that he does not “know for  
8 certain how [Yeo] accessed the code.” Avalos Decl. Ex. A at 10:16-17. If Miller is unaware of  
9 how Yeo accessed the code, he cannot plausibly allege access in this manner. This is precisely  
10 the type of “defendant-unlawfully-harmed-me accusation” rejected by the Supreme Court and,  
11 thus, should be rejected. *Iqbal* at 1949, citing *Twombly*, 550 U.S. at 555.

12 The plausibility of this new theory also is belied by the absence of any such allegation in  
13 the first two iterations of the complaint. *Cf. Bradley v. Chiron Corp.*, 136 F.3d 1317, 1324 (9th  
14 Cir. 1998) (dismissing new allegations in favor of former pleading because original pleading  
15 “represented a fresher recollection . . . and clearly constituted a comprehensive statement of  
16 Plaintiff’s allegations and claims”). The only infringement allegation Miller previously (twice)  
17 offered was that ChainRxn copies the “look and feel” of Boomshine. At the May hearing,  
18 however, Miller’s counsel represented that Miller holds a copyright in the code. If he had a basis  
19 for asserting that Yeo copied the code, as he now asserts, Miller presumably would have alleged,  
20 in his first two complaints, the most basic form of copying to support his claim. He did not. And  
21 though he asserts now that Yeo copied the code, Miller offers no factual support for this theory.  
22 Importantly, Miller also proffers no facts that would, if proven, establish that Yeo, from a distant  
23 location, was able to access Plaintiff’s source code.

24 **2. Miller Cannot Maintain An Action Based On Boomshine’s “Look and**  
25 **Feel”.**

26 Miller also alleges, without specificity, that perhaps Yeo “view[ed] the *Boomshine*

27 <sup>2</sup> Miller does not explain why Yeo’s alleged access was improper or what relevance the propriety  
28 of his access has to his infringement claim. If the source code were as easily or readily  
accessible, as Miller now alleges, Yeo’s access could not have been improper, in any event.

1 application via the K2xl.com web site” and then “author[ed], from the ‘look and feel’ of the  
2 *Boomshine* application . . . a source code designed and intended to result in the *ChainRxn*  
3 application that is substantially similar to *Boomshine* in its structure, sequence, organization,  
4 and/or user interface.” SAC ¶ 20. As a threshold matter, the SAC is devoid of any factual  
5 allegations that Plaintiff actually registered the visual expression of the computer code (the “look  
6 and feel”) for *Boomshine*. Thus, Plaintiff has not alleged that the look and feel is a protectible  
7 element of his copyright in the computer code. *See Miller v. Facebook, Inc.*, No. C 10-00264  
8 WHA, 2010 WL 2198204, \*5 (N.D. Cal. May 28, 2010) (“this order emphasizes that plaintiff’s  
9 copyright appears to be limited to the source code rather than the audiovisual aspects of  
10 *Boomshine*”). Indeed, the record to date establishes that Plaintiff only “has a copyright on the  
11 code.” Avalos Decl. Ex. A at 10:1-3; *see also* Declaration of Theresa A. Sutton in Support of  
12 Opposition to Motion for Leave to Amend Complaint (Dkt. No. 47), Ex. A. Consequently,  
13 because he did not register the visual elements, Miller lacks standing to assert that Yeo copied the  
14 “look and feel” of the *Boomshine* game. *See Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209,  
15 1211 (9th Cir. 1998) (finding that failure to satisfy registration requirements prevents  
16 maintenance of infringement action); *see also* 37 CFR 202.3(c)(2) (requiring deposit of “materials  
17 required under 17 U.S.C. 408 and §202.20”); 37 CFR 202.20(c)(2)(vii)(C) (“Where the  
18 application to claim copyright in a computer program includes a specific claim in related  
19 computer screen displays, the deposit . . . shall consist of: (1) Visual reproductions of the  
20 copyrightable expression in the form of printouts, photographs, or drawings”).

21 Furthermore, absent access to and copying of the source code, Miller is merely  
22 complaining that Yeo copied the idea for *Boomshine*. But copyright law does not protect the idea  
23 for a game. *Frybarger v. Int’l Bus. Machines Corp.*, 812 F.2d 525 (9th Cir. 1987). According to  
24 the SAC, *Boomshine* comprises floating circles that expand when clicked and cause a chain  
25 reaction of further expanding circles. SAC ¶ 10. Consequently, any similarities between  
26 *Boomshine* and *ChainRxn* are likely a result of Yeo implementing this basic idea for the game.

27 In addition, the Court need not credit the unsupported conclusion that Yeo “view[ed] the  
28 *Boomshine* application.” SAC ¶ 20. The internet is a big place, and the fact that *Boomshine* is out

1 there does not necessarily mean Yeo found it. Plaintiff does not satisfy his pleading requirements  
2 by asserting “a bare possibility . . . inferred through speculation or conjecture” that Yeo viewed  
3 the Boomshine game. *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1089 (C.D. Cal. 2005) citing  
4 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.02[A].

5 Finally, the Court should reject Plaintiff’s implausible conclusion that merely by looking  
6 at the game, Yeo was somehow able to write code that is “substantially similar” to the Boomshine  
7 code. SAC ¶ 20. Plaintiff fails to provide any factual explanation for how Defendant Yeo, sitting  
8 in his dorm room at Cornell, somehow was able to write source code that was nearly identical to  
9 Plaintiff’s source code just from looking at the display. This is akin to claiming that by merely  
10 looking at a book cover, an alleged infringer was able to write the same novel. Such a contention  
11 defies logic and fails to “nudge [Plaintiff’s] claims across the line from conceivable to plausible.”  
12 *Twombly*, 550 U.S. at 570. Accordingly, this theory cannot save Plaintiff’s case.

13 **IV. CONCLUSION**

14 The Court has previously stated that it would not allow any further amendments to the  
15 complaint. Despite this warning, Plaintiff has failed to abide by the Court’s previous Order and  
16 has not adequately alleged direct copyright infringement by Defendant Yeo. Without direct  
17 infringement, there can be no contributory infringement by Facebook. Accordingly, Facebook  
18 respectfully requests that the Court dismiss the Second Amended Complaint with prejudice.

19 Dated: June 21, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

21 /s/ Thomas J. Gray

22 Thomas J. Gray  
23 Attorneys for Defendant  
24 FACEBOOK, INC.