

E-Filed 5/11/2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

FACEBOOK, INC.,

Plaintiff,

v.

POWER VENTURES, INC.; STEVEN
VACHANI; DOE 1, d/b/a POWER.COM; and
DOES 2-25,

Defendants.

Case Number C 08-5780 JF (RS)

ORDER¹ (1) DENYING MOTION TO
DISMISS AND (2) GRANTING IN PART
AND DENYING IN PART MOTION
FOR MORE DEFINITE STATEMENT

[re: doc. no. 17]

Plaintiff Facebook, Inc. ("Facebook") alleges that Defendants Power Ventures, Inc. and Power.com (collectively "Power.com") and Steve Vachini ("Vachini") operate an Internet service that collects user information from Facebook's website in violation of the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act, 15 U.S.C. § 7701, *et seq.*; the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et seq.*; and California Penal Code § 502. Facebook also alleges that Defendants committed direct and indirect copyright infringement when they made copies of Facebook's website during the process of extracting user

¹ This disposition is not designated for publication in the official reports.

1 information. In addition, Facebook alleges that the means by which Power.com accessed the
2 Facebook website constituted a violation of the Digital Millennium Copyright Act (“DMCA”),
3 17 U.S.C. § 1201, *et seq.* Facebook also asserts claims for relief based on state and federal
4 trademark law, as well as a claim for relief under California’s Unfair Competition Law (“UCL”),
5 Cal. Bus. & Prof. Code § 17200, *et seq.*

6 Defendants initially moved to dismiss the First Amended Complaint (“FAC”) in its
7 entirety pursuant to Fed. R. Civ. P. 12(b)(6) or in the alternative pursuant to Fed. R. Civ. P.
8 12(e), but that motion was withdrawn with respect to the CAN-SPAM, CFAA, and § 502 claims
9 in light of Facebook’s opposition. Defendants now seek dismissal of Facebook’s remaining
10 claims for relief (counts 4 through 8 in the FAC). For the reasons set forth below, the motion to
11 dismiss for failure to state a claim will be denied, and the motion for a more definite statement
12 will be granted in part and denied in part.

13 I. BACKGROUND

14 Facebook developed and operates what is now one of the most popular social networking
15 websites. *See* FAC ¶ 2. The Facebook website allows users to create user profiles, join networks
16 and “friend” other users, which creates online communities with shared interests and
17 connections. *See id.* Every Facebook user must register before using the website, and
18 registration requires the user to assent to Facebook’s Terms of Use, which essentially is a user
19 agreement that sets forth the acceptable terms of use. *See id.* Ex. A. Users who agree to the
20 Terms of Use have a limited license to access and use Facebook’s website and services. *See id.* ¶
21 31 and Ex. A at 3 (“Any use of the Site or the Site Content other than as specifically authorized
22 herein, without the prior written permission of Company, is strictly prohibited and will terminate
23 the license granted herein.”). Registered users create and customize their own user profiles by
24 adding content such as personal information, content related to their interests, and photographs,
25 which can then be shared with other Facebook users with whom the user has a Facebook
26 connection. *Id.* ¶ 22. Facebook users may be contacted only by Facebook or other registered
27 Facebook users. *Id.* ¶ 23. Any unauthorized use of Facebook’s website will result in the
28 termination of a user’s license. *See id.* ¶ 31.

1 Facebook also grants third parties a limited license to create applications that interact
2 with Facebook's proprietary network, provided that these applications adhere to a standardized
3 set of protocols and procedures and that the third-party developers agree to Facebook's
4 Developer Terms of Service, the Terms of Use, and any other applicable policies. FAC ¶ 27. In
5 addition, Facebook permits integration with third-party websites, and even permits exchange of
6 proprietary data with third-party websites, provided that these third party websites use the
7 "Facebook Connect" service, which enables users to "connect" their Facebook identity, friends
8 and privacy to those third-party websites. *Id.* ¶ 27. Facebook does not permit third-party access
9 to Facebook user profile data unless such access is through Facebook Connect. *Id.* ¶ 28.

10 The corporate Defendants are alleged to be California entities and/or organizations that
11 do business in California. FAC ¶¶ 9-10. Defendant Vachini allegedly is the CEO of Defendant
12 Power.com, which is a website designed to integrate various social networking or email accounts
13 into a single portal *Id.* ¶¶ 5, 11, 45. A user has discretion with respect to whether to use
14 Defendants' services, and the user determines which accounts will be aggregated. *See id.* ¶ 50.
15 After a user provides his or her user names and passwords to Defendants, the Power.com service
16 takes this access information to "scrape" user data from those accounts. *Id.* ¶¶ 50-52.
17 Subsequently, the user can log on to Power.com to view the data culled from Facebook and any
18 other social networking sites or email accounts. *See id.* at ¶ 52.

19 Prior to the filing of the FAC, the parties attempted to negotiate an arrangement whereby
20 Power.com could continue to access Facebook's website provided that it did so through the
21 Facebook Connect application. FAC ¶¶ 58-61. Those discussions proved fruitless, however, and
22 in late December 2008 Defendants informed Facebook that Power.com would continue to
23 operate without using Facebook Connect. *Id.* ¶ 62. Defendants allegedly continue to scrape
24 Facebook's website, despite technological security measures to block such access. *Id.* ¶¶ 63-64.
25 Defendants also have solicited Facebook users to join Power.com through promotional emails.
26 *Id.* ¶¶ 65-66, 70.

II. LEGAL STANDARD

When considering a motion to dismiss, the plaintiff's allegations are taken as true and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). For a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), "[d]ismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted).

"If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P. 12(e). "Whether to grant a Rule 12(e) motion is within the discretion of the trial court." *Babb v. Bridgestone/Firestone*, 861 F. Supp. 50, 52 (M. D. Tenn., 1993). However, "[s]uch motion [is] not favored by the courts since pleadings in federal courts are only required to fairly notify the opposing party of the nature of the claim." *Resolution Trust Corp. V. Dean*, 854 F. Supp. 626, 629 (D. Ariz. 1994) (citing *A.G. Edwards & Sons, Inc. V. Smith*, 736 F. Supp. 1030, 1032 (D. Ariz. 1989)). "[The motion] should not be granted unless the defendant cannot frame a responsive pleading." *Falamore, Inc. V. Edison Bros. Stores, Inc.*, 525 F. Supp. 940 (E.D. Cal. 1981).

III. DISCUSSION

A. Copyright Infringement

To state a claim for copyright infringement, a plaintiff need only allege (1) ownership of a valid copyright and (2) copying of original elements of the work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The FAC alleges that Defendants accessed the Facebook website and made unauthorized copies of the website or created derivative works

1 derived from the Facebook website. *See* FAC ¶¶ 124-27.

2 Defendants contend that Facebook’s copyright allegations are deficient because it is
3 unclear which portions of the Facebook website are alleged to have been copied. Defendants
4 also argue that there are significant portions of the website that are not protected by copyright
5 because Facebook does not hold any rights to content posted by users. In response, Facebook
6 argues that Defendants make a “cache” copy of the website on each occasion of unauthorized
7 access. Facebook also argues that it need not define the exact contours of the protected material
8 because copyright claims do not require particularized allegations.

9 The facts as pled in the instant case may be analogized to those in *Ticketmaster L.L.C. v.*
10 *RMG Techs, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007), where in the context of a motion for a
11 preliminary injunction the district court found that the defendant made a copy of Ticketmaster’s
12 website each time its automated program accessed the website. *See id.* at 1106. (“copies of
13 webpages stored automatically in a computer’s cache or random access memory (“RAM”) upon a
14 viewing of the webpage fall within the Copyright Act’s definition”). *See also MAI Sys. Corp. v.*
15 *Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir.1993) (“since we find that the copy created in
16 the RAM can be ‘perceived, reproduced, or otherwise communicated,’ we hold that the loading
17 of software into the RAM creates a copy under the Copyright Act.”). In addition, any users that
18 accessed the Ticketmaster website were bound its terms of use, which prohibited the use of
19 automated programs to access content. *Id.* at 1107-10. Under those circumstances, the court
20 found that Ticketmaster had met its burden of showing a likelihood of success on the merits with
21 respect to its direct copyright infringement claim. *Id.* at 1110.

22 Facebook’s user agreement prohibits, *inter alia*, the “harvest[ing] or collect[ion] [of]
23 email addresses or other contact information of other users from the Service or the Site by
24 electronic or other means for the purpose of sending unsolicited emails or other unsolicited
25 communications.” FAC Ex. A at 4. In addition, the user agreement broadly prohibits the
26 downloading, scraping, or distributing of any content on the website, with the exception being
27 that a user may download his or her own user content. *Id.* at 3. However, not even this
28 exception allows a user to employ “data mining, robots, scraping, or similar data gathering or

1 extraction methods.” *Id.* Such actions are explicitly deemed to constitute “unauthorized use.”
2 *See id.* Accordingly, the allegations as set forth in the FAC sufficiently allege unauthorized
3 access. Access for purposes that explicitly are prohibited by the terms of use is clearly
4 unauthorized. *See Ticketmaster*, 507 F. Supp. 2d at 1108-1110.

5 In addition, Facebook need not allege the exact content that Defendants are suspected of
6 copying at this stage of the proceedings. There is no requirement that copyright claims must be
7 pled with particularity. *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114,
8 1120 (C.D. Cal. 2001) (“Copyright claims need not be pled with particularity...complaints
9 simply alleging present ownership by plaintiff, registration in compliance with the applicable
10 statute and infringement by defendant have been held sufficient under the rules.”). Defendants’
11 argument that Facebook’s website is “huge” is irrelevant. According to the FAC, Facebook owns
12 the copyright to any page within its system, including the material located on those pages besides
13 user content, such as graphics, video and sound files. *See* FAC ¶ 135 and Ex. A at 3. Defendants
14 need only access and copy one page to commit copyright infringement.

15 Defendants correctly assert that Facebook does not have a copyright on user content,
16 which ultimately is the information that Defendants’ software seeks to extract. However, if
17 Defendants first have to make a copy of a user’s entire Facebook profile page in order to collect
18 that user content, such action may violate Facebook’s proprietary rights.² Accordingly, the
19 motion to dismiss the claim for direct copyright infringement will be denied.

20 The FAC also sufficiently states a claim for indirect copyright infringement. “One
21 infringes contributorily by intentionally inducing or encouraging direct infringement, and
22 infringes vicariously by profiting from direct infringement while declining to exercise a right to
23 stop or limit it.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)
24 (citations omitted). Viewing the allegations in the FAC as true, the utilization of Power.com by

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26 ² A collection of non-copyrighted material arranged in an original way is subject to
27 copyright protection. *See* 17 U.S.C. § 101; *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d
28 197, 204 (9th Cir. 1989). For example, in *Ticketmaster* the factual information about concerts
and tickets was not by itself copyrightable, but Ticketmaster’s arrangement of that information
on its website presumably was. *See id.*

1 Facebook users exceeds their access rights pursuant to the Terms of Use. *See* FAC Ex. A at 3-4.
2 Moreover, when a Facebook user directs Power.com to access the Facebook website, an
3 unauthorized copy of the user's profile page is created. *See id.* ¶ 125. The creation of that
4 unauthorized copy through the use of Defendants' software may constitute copyright
5 infringement. *See Ticketmaster*, 507 F. Supp. 2d at 1110-11 ("Designing and marketing a device
6 whose purpose is to allow unauthorized access to, and thus to infringe on, a copyrighted website
7 is sufficient to trigger contributory liability for infringement committed by the device's
8 immediate users."). The motion to dismiss the claim for indirect copyright infringement also will
9 be denied.

10 B. Violation of the DMCA

11 The elements necessary to state a claim under the DMCA are (1) ownership of a valid
12 copyright; (2) circumvention of a technological measure designed to protect the copyrighted
13 material; (3) unauthorized access by third parties; (4) infringement because of the circumvention;
14 and (5) the circumvention was achieved through software that the defendant either (i) designed or
15 produced primarily for circumvention; (ii) made available despite only limited commercial
16 significance other than circumvention; or (iii) marketed for use in circumvention of the
17 controlling technological measure. *See Chamberlain Group, Inc. v. Skylink Techs, Inc.*, 381 F.3d
18 1178, 1203 (Fed. Cir. 2004). *See also Ticketmaster*, 507 F. Supp. 2d at 1112. As with a
19 copyright infringement claim, there is no heightened pleading requirement that mandates detailed
20 allegations. *Perfect 10*, 167 F. Supp. 2d at 1120.

21 Defendants argue that Facebook's DMCA claim also is insufficient for essentially the
22 same reasons discussed previously, except that they also argue that the unauthorized use
23 requirement is not met because it is users who are controlling access (via Power.com) to their
24 own content on the Facebook website. However, this argument relies on an assumption that
25 Facebook users are authorized to use Power.com or similar services to access their user accounts.
26 The Terms of Use negate this argument. Any user is barred from using automated programs to
27 access the Facebook website. *See* FAC Ex. A at 3-4. Users may have the right to access their
28 own content, but conditions have been placed on that access. *See id.* The FAC further alleges

1 that Facebook implemented specific technical measures to block access by Power.com after
2 Defendants informed Facebook that they intended to continue their service without using
3 Facebook Connect, and that Defendants then attempted to circumvent those technological
4 measures. FAC ¶¶ 63, 64. Accordingly, the motion to dismiss the DMCA claim will be denied.

5 C. Trademark Infringement

6 The Lanham Act imposes liability upon any person who (1) uses an infringing mark in
7 interstate commerce, (2) in connection with the sale or advertising of goods or services, and (3)
8 such use is likely to cause confusion or mislead consumers. 15 U.S.C. § 1114(1)(a). The
9 FAC states that Facebook has been the registered owner of the FACEBOOK mark since 2004.
10 FAC ¶¶ 38-39, 146. The FAC further alleges that Defendants use the mark in connection with
11 their business. *See id.* ¶ 70. At no time has Facebook authorized or consented to Defendants’
12 use of the mark. *Id.* ¶ 79.

13 _____ Defendants again argue that the FAC does not provide sufficient detail and that Facebook
14 is required to provide concise information with respect to the trademark infringement allegations,
15 including information about “each instance of such use.” However, particularized pleading is not
16 required for a trademark infringement claim. *See Perfect 10*, 167 F. Supp. 2d at 1122. The FAC
17 incorporates a screenshot of an email sent by Defendants to Facebook users that not only
18 incorporates the protected mark but also appears to have been originated from or been endorsed
19 by Facebook. *See* FAC ¶ 70. The FAC also states that Defendants’ unauthorized use of the
20 Facebook mark was likely to “confuse recipients and lead to the false impression that Facebook
21 is affiliated with, endorses, or sponsors” Defendants’ services and the Power.com website. *Id.* ¶¶
22 73, 76, 78. These allegations are sufficient to state a claim for trademark infringement. *See*
23 *Perfect 10*, 167 F. Supp. 2d at 1122 (“Perfect 10’s allegations concerning the scope of the alleged
24 violations and Cybernet’s alleged role, Cybernet is put on notice of the claims’ nature and has
25 enough information to draft its pleadings.”).

26 “To state a claim of trademark infringement under California common law, a plaintiff
27 need allege only 1) their prior use of the trademark and 2) the likelihood of the infringing mark
28 being confused with their mark.” *Wood v. Apodaca*, 375 F. Supp. 2d 942, 947-48 (N.D. Cal.

2005). For the same reasons set forth above, the motion to dismiss the common law trademark claim will be denied.

D. UCL Claim

The Ninth Circuit “has consistently held that state common law claims of unfair competition and actions pursuant to California Business and Professions Code § 17200 are ‘substantially congruent’ to claims made under the Lanham Act.” *Cleary v. News Corp.*, 30 F.3d 1255, 1263-64 (9th Cir. 1995). *See also Jackson v. Sturkie*, 255 F. Supp. 2d 1096, 1107 (N.D. Cal. 2003) (adequately pled Lanham Act claim meant that UCL claim also was pled sufficiently). Facebook’s UCL claim does not reference the alleged trademark violations specifically, but it does incorporate all the prior allegations in the pleading by reference. *See* FAC ¶ 157. Otherwise, the UCL count merely alleges that Defendants have engaged in “unlawful, unfair, and/or fraudulent business acts or practices” in violation of the UCL. Accordingly, from the face of the FAC it is unclear whether Facebook’s UCL claim is based on its trade dress allegations alone or whether other portions of the FAC, such as the CFAA or CAN-SPAM claims, are intended to form separate and independent bases for the UCL claim. Accordingly, the Court will grant Defendants’ motion for a more definite statement pursuant to Rule 12(e) with respect to the UCL claim. *See Anderson v. Dist. Bd. of Trustees of Cent. Fl. Comm. Coll.*, 77 F.3d 364, 367(11th Cir. 1996) (“Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court’s docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice.”). Within thirty (30) days of the date of this order, Facebook shall file a short statement clarifying the ground(s) underlying its UCL claim.

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED that the motion to dismiss is DENIED and the motion for a more definite statement is GRANTED IN PART and DENIED IN PART. Defendants shall file an answer to the FAC within thirty (30) days of the date that Facebook files its supplemental statement.

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2 IT IS SO ORDERED.
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5 DATED: May 11, 2009
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JEREMY FOGEL
United States District Judge

1 This Order was served on the following persons:

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