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**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

THE HERSHEY COMPANY,  
  
Plaintiff/Counterclaim Defendant,  
  
v.  
  
HOTTRIX LLC,  
  
Defendant/Counterclaim Plaintiff.

No. 1:10-cv-1178-JEJ  
  
JUDGE JOHN E. JONES III

**BRIEF OF PLAINTIFF / COUNTERCLAIM DEFENDANT THE  
HERSHEY COMPANY IN SUPPORT OF MOTION TO DISMISS  
COUNTERCLAIMS AND FOR JUDGMENT ON THE PLEADINGS**

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The Hershey Company (“Hershey”) submits this brief in support of its motion to dismiss the counterclaims of Hottrix LLC (“Hottrix”) pursuant to Rule 12(b)(6), and for judgment on the pleadings pursuant to Rule 12(c) with respect to Hershey’s claim for declaratory judgment of non-infringement.

### **INTRODUCTION**

Hershey commenced this action for a declaratory judgment that its HERSHEY’S Syrup application for iPhone (the “HERSHEY’S Syrup App”) does not infringe any copyright in Hottrix’s iMilk application for iPhone (the “iMilk App”). Hottrix purports to assert counterclaims for copyright infringement, unfair competition, trade dress infringement and tortious interference with prospective economic advantage, all arising out of Hershey’s alleged copying of the iMilk App.

The counterclaims should be dismissed, and judgment on the pleadings should be entered for Hershey, for several reasons.

First, Hottrix’s copyright claim (Counterclaim I) fails because Hottrix does not identify any similarities in *expression* between the two applications but merely identifies the non-protectable *idea* of an interactive video of a glass of milk, and because a review of the two interactive videos at issue confirms that no substantial similarity exists between the protectable expression of each, as required for copyright infringement.

Second, Counterclaims II and III for unfair competition and trade dress fail for several separate and independent reasons:

- they are preempted by the Copyright Act, 17 U.S.C. § 301;
- they are barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and are an impermissible attempt to assert copyright under the guise of unfair competition and trademark law; and
- Hottrix identifies no protectable elements of its claimed trade dress.

Third, Hottrix’s tortious interference claim is preempted by 17 U.S.C. § 301, and Hottrix fails to allege essential elements of the claim.

## **STATEMENT OF FACTS**

### **A. The Hottrix iMilk App.**

Hottrix’s counterclaims arise from two iPhone applications, iMilk 1.0 and 2.0, which Hottrix alleges collectively as the iMilk App. Countercls. ¶¶ 36-40. According to Hottrix, the iMilk App embodies video and sound of “a glass of milk being ‘filled’ and then ‘drank.’” *Id.* ¶ 37. As Hottrix alleges:

The iMilk App is an interactive application that simulates milk magically rising into a glass (the size of an iPhone). The iMilk App then uses the iPhone features and user interaction to simulate a beverage (seemingly milk) being consumed. In essence, the iPhone Device user “drinks” the milk.

*Id.* ¶ 41.

Haje Decl. Ex. A-1<sup>1</sup> discloses the specific elements of expression embodied in the iMilk App, including:

- a. “milk” rises in the iPhone screen from an unseen source, as if filled from below, filling more than two-thirds of the screen;
- b. the milk (in various colors) is against a black background;
- c. the top layer of milk consists of a distinct band of small bubbles, and the width of that band does not vary significantly;
- d. streaks of milk appear on the “glass” and drip down the iPhone screen;
- e. shaking the iPhone vigorously causes the “milk” to turn into virtual whipped cream, and additional shaking turns it into cheese; touching the iPhone screen causes the whipped cream or cheese to change back into milk;
- f. the milk is then “drunk” by the user by tipping the iPhone sideways as if it were glass, leaving swirl-shaped tracings of milk on the glass;
- g. once the milk is gone, the sequence ends with a loud belch.

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<sup>1</sup> Videos of the Hershey application and the iMilk App currently available on the Apple App Store are attached as Haje Decl. Exs. A-1, A-2. On this motion, the Court may consider the complaint, documents incorporated therein by reference and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (court may consider document attached as exhibit to a motion to dismiss if plaintiff’s claims are based on the document).



See Haje Decl. Ex. A-1.

**B. The HERSHEY’S Syrup App.**

Hottrix alleges that Hershey “copied, created, and offered for copying and downloading, a copy and derivative work of the iMilk App, which constitutes a software application with functionality and a ‘look and feel’ substantially similar to the iMilk App.” Countercls. ¶ 46. Hottrix describes no specific expression in Hershey’s application that purportedly infringes the iMilk App. Rather, Hottrix alleges summarily that Hershey’s application “allows a user to pour and drink a digital glass of (chocolate) milk using a video application of a milk drink rising that is substantially similar to that of the iMilk App.” *Id.* ¶ 47. Hottrix further alleges that Hershey’s application includes a chocolate milk bottle and straw. *Id.* According to Hottrix, Hershey’s application is “strikingly similar . . . to Hottrix’ iMilk App, exuding the same ‘look and feel’ as Hottrix’ copyrighted material.” *Id.* ¶ 62.

A review of the HERSHEY’S Syrup App (Haje Decl. Ex. A-2) discloses that its actual expression includes, *inter alia*, the following:

- a. the video opens with an image of a predominantly brown HERSHEY’S Chocolate Syrup bottle with a blue background, and the text “add milk?” on a virtual button;

- b. when the user presses the “add milk?” button, the screen switches to a plain blue background with the HERSHEY’S logo in white in the center;
- c. milk is then poured in a vertical column from the top of the screen to fill up approximately three fifths of the screen, with large bubbles appearing while the milk is poured in; medium-sized bubbles appear and disappear into the milk after the pouring is completed;
- d. a brown button with the words “add syrup?” appears at the bottom of the screen;
- e. tilting the iPhone causes the milk to tilt about but does not cause the milk to be poured out or drunk;
- f. when the user presses the “add syrup?” button, the screen switches to an image of the HERSHEY’S Syrup bottle, with the bottle lid flipped open and chocolate syrup coming out of the bottle, on a blue background;
- g. when the user touches the HERSHEY’S Syrup bottle, the bottle is indented, the syrup flow is interrupted by small drops of syrup, and a sputtering sound is heard;
- h. once the user inverts the iPhone (as if adding chocolate syrup to a glass of milk) and then returns it to the upright position, the milk reappears on a blue background, with a darker pool of chocolate syrup near the lower portion of milk, the HERSHEY’S logo again visible, and a spoon sitting in the milk;

i. when the user touches the screen, the spoon stirs the chocolate syrup in the milk with the sound of liquid stirring and the spoon clinking on the glass, making chocolate milk;

j. a red and white straw (an element that also is featured on the label of the HERSHEY'S Chocolate Syrup bottle) then appears in the chocolate milk;

k. if the user blows into the iPhone's mouthpiece at this point, a bubbling sound is heard and the milk generates large bubbles (as if one were blowing through a straw into a glass of milk);

l. when the user again touches the screen, the level of milk begins to decrease, and the sound of liquid being drunk through a straw is heard;

m. at the end of the drinking, the sound of the straw sucking an empty glass is heard, followed by the person saying "ahh!" (a sounds that can be changed in the application's settings to that of a mooing cow, or "Mmm. Delicious!");

n. the video then ends with a closing shot of the HERSHEY'S Syrup container, on a brown background, with a button labeled "more?" (which, when pressed, starts the application from the beginning).

Haje Decl. Ex. A-2.

**C. Publication of Parties' iPhone Applications.**

Hershey does not dispute that it had access to the iMilk App because, as Hottrix alleges, both parties' applications have been made available to the public on Apple, Inc.'s online "App Store." Countercls. ¶¶ 48-50.

**ARGUMENT**

**I. MOTION TO DISMISS STANDARD.**

On a Rule 12(b)(6) motion, although the Court must accept well-pleaded factual allegations as true, "factual allegations that constitute nothing more than 'legal conclusions' or 'naked assertions'" are not entitled to such treatment and are "disregarded." *Boland v. Select Comfort Corp.*, 2010 WL 3083021, \*2 (M.D. Pa. Aug. 6, 2010) (Jones, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). In *Twombly*, the Supreme Court held that:

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 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's element will not do.

550 U.S. at 555 (citations and internal quotation marks omitted). In *Ashcroft v. Iqbal*, the Court held that to survive Rule 12(b)(6), a claim must have "facial plausibility," which only exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. 1937, 1949 (2009). The same standard applies to

a Rule 12(c) motion. *See Bangura v. City of Philadelphia*, 338 F. App'x. 261, 264 (3d Cir. 2009).

Hottrix's counterclaims consist of conclusory allegations – in *Twombly's* words, “formulaic recitations” – that the applications are “substantially similar,” which are belied by the applications themselves, and are entitled to no legal deference. Where, as a viewing of the applications makes clear, plaintiff “ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed.” *Twombly*, 550 U.S. at 570.

## **II. HOTTRIX'S COPYRIGHT CLAIM FAILS AS A MATTER OF LAW.**

To prove copyright infringement, Hottrix must establish ownership of a copyright and copying by Hershey of “protectable expression” in the work. *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 496 (E.D. Pa. 2006), *aff'd*, 242 F. App'x. 833 (3d Cir. 2007). Absent evidence of direct copying, Hottrix must show that Hershey had access to Hottrix's work and the two works are substantially similar. *Dam Things From Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 561-62 (3d Cir. 2002). This standard applies regardless of whether Hershey's application is alleged to be a “copy” or a “derivative work.” *Id.* at 563 n.22.

Hershey does not dispute access. (And, because Hershey concedes on this motion that it was aware of and had access to the iMilk App in the online App Store, Hottrix's allegation that Hershey sought to license the iMilk App is

irrelevant on this motion.) There is no allegation by Hottrix that Hershey actually copied the iMilk App's computer code. Rather, Hottrix's claim is that Hershey allegedly copied the appearance or "look and feel" of the iMilk App for its own application. *See, e.g.*, Countercls. ¶¶ 46, 62. Accordingly, the issue for this motion is whether, as a matter of law, the appearance of the Hershey application is substantially similar to the protectable expression of the iMilk App.

The Third Circuit applies a two-pronged test to determine whether works are substantially similar. The first prong of the test is sometimes referred to as the "extrinsic" or "actual copying" test, while the second prong is referred to as the "intrinsic" or "actionable copying" test. *Dam Things*, 290 F.3d at 562. Both prongs must be established to show substantial similarity.

First, there must be "sufficient similarity between the works so as to conclude that the alleged infringer 'copied' the work." *Id.* Considering the two works "in their entirety," plaintiff must establish a "sufficient nexus of 'substantial similarity' between the two works." *McCormick v. Fugerson*, 1995 WL 580339, \*2 (E.D. Pa. Sept. 28, 1995), *aff'd*, 82 F.3d 405 (3d Cir. 1996).

Second, plaintiff must still prove that the copying is actionable. Viewing the works from the eyes of a lay observer, there must be "'substantial' similarity between the alleged infringing work and *protectible elements* of the original work." *Dam Things*, 290 F.3d at 562 (emphasis in original).

It is settled that, on a motion to dismiss, the Court may compare the two works and determine, as a matter of law, that they are not substantially similar. *See Curtin v. Star Editorial Inc.*, 2 F. Supp. 2d 670, 673 (E.D. Pa. 1998); *Douglas v. Kimberly-Clark Corp.*, 1993 WL 9033, \*2 (E.D. Pa. Jan. 11, 1993).<sup>2</sup>

**A. The Elements that Hottrix Claims Have Been Misappropriated Are Not Protectable By Copyright Law.**

**1. Hottrix Has No Copyright Interest in the Underlying Ideas in Its iMilk App, and the General Ideas It Claims Must Be Stripped Out in the Copyright Analysis.**

As a threshold matter, Hottrix cannot claim infringement for the alleged copying of the *idea* of a virtual glass of milk that the user can drink. Copyright protects only “the particular expression of an idea” and not the idea itself. *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 64 (3d Cir. 1978); *see* 17 U.S.C. § 102(b). In *Franklin Mint*, for example, two paintings each “depict[ed] two cardinals in profile, a male and a female perched one above the other on apple tree branches in blossom.” 575 F.2d at 66. Nonetheless, the Third Circuit noted differences in “color, body attitude, position of the birds and linear

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<sup>2</sup> Courts in other Circuits similarly refer to the works at issue on motions to dismiss to find no substantial similarity as a matter of law. *E.g.*, *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63-64 (2d Cir. 2010); *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143-44 (8th Cir. 1989); *Tessler v. NBC Universal, Inc.*, 2009 WL 866834, \*5 (E.D. Va. Mar. 31, 2009), *aff’d*, 364 F. App’x 5 (4th Cir. 2010); *Capcom Co. v. MKR Group, Inc.*, 2008 WL 4661479, \*4-5 (N.D. Cal. Oct. 20, 2008).

effect” and held that “while the ideas are similar, the expressions are not.” *Id.* at 66-67.

Moreover, any expression that necessarily follows from an idea is *not* protectable. A “copyright is not infringed by an expression of the idea which is substantially similar where such similarity is necessary because the idea or system being described is the same.” *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975). This concept of “*scenes a faire*” is routinely applied to find that works are not substantially similar.<sup>3</sup>

Courts have repeatedly applied this “idea/expression” dichotomy, and the *scenes a faire* rule, in the context of computer videos and games, and rejected claims where the works share only ideas, or share similarities inherent in those shared ideas. In *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981), for example, both video games had the player control a “spaceship” at the center of the screen and rotate the spaceship to fire at incoming rocks. While the

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<sup>3</sup> See, e.g., *Pino v. Viacom, Inc.*, 2008 WL 704386, \*5 (D.N.J. Mar. 4, 2008) (elements common to two sports-themed reality shows, such as “trash-talking exchanges,” were unprotectable *scenes a faire*); *Daley v. Granada U.S. Prods.*, 2003 WL 21294986, \*1, \*4 (E.D. Pa. Jan. 29, 2003) (plot themes common to two TV productions based on Robin Hood legend were *scenes a faire*); see also *Roginski v. Time Warner Interactive, Inc.*, 967 F. Supp. 821, 831-32 & n.20 (M.D. Pa. 1997); *Segal v. Paramount Pictures*, 841 F. Supp. 146, 149 (E.D. Pa. 1993), *aff’d*, 37 F.3d 1488 (3d Cir. 1994); *Computer Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 715 (2d Cir. 1992) (elements that “follow naturally from the work’s theme rather than from the author’s creativity” are unprotectable).



games contained many similarities, there was no infringement because “certain forms of expression” were “inevitable” in such a game. *Id.* at 229. “Defendants used plaintiff’s idea and those portions of plaintiff’s expression that were inextricably linked to that idea.” *Id.* at 230. *See also, e.g., Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1014-15 (7th Cir. 2005); *Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208-09 (9th Cir. 1988); *Atari v. Williams*, 217 U.S.P.Q. 746, 748 (E.D. Cal. 1981).

Hottrix identifies no copied protectable expression. It merely alleges that Hershey has made an application that fills the iPhone screen with virtual milk and allows the user to drink the milk (*see, e.g., Countercls.* ¶ 47) and, in conclusory fashion, that the application is “substantially similar” to Hottrix’s application, “exuding the same ‘look and feel,’” *id.* ¶ 62 – allegations that do not even satisfy *Iqbal* and *Twombly*. *See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 67-69 (2d Cir. 2010) (*Iqbal* not satisfied where allegedly infringed matter ““consisted only of generalized ideas and concepts” and not ““protected expression””).

**B. Hershey’s Application is Not Substantially Similar to any Protectable Expression in the iMilk App.**

Even if Hottrix’s conclusory allegations sufficed under *Iqbal* and *Twombly*, a review of the actual expression of each application shows that the works are neither extrinsically nor intrinsically similar. Considering the two works “in their

entirety,” Hottrix cannot establish a “sufficient nexus of ‘substantial similarity’ between the two works” to satisfy the extrinsic similarity test. *McCormick*, 1995 WL 580339, at \*2. Nor can Hottrix establish that there is a “‘substantial’ similarity between the alleged infringing work and *protectible elements* of the original work” so as to meet the intrinsic similarity test. *Dam Things*, 290 F.3d at 562 (emphasis in original). This is particularly true given the requirement that substantial similarity be measured by comparison of the “concrete elements” of each work. *McCormick*, 1995 WL 580339, at \*2-3 (no substantial similarity, despite “basic similarity” on a “high level of generality”).

Here, any objective analysis – taking into account the works’ actual visual depictions, sequence of events and interactivity, sounds and other attributes – confirms that Hershey’s application is not substantially similar to Hottrix’s:

**1. There are numerous differences in visual appearance.**

The iMilk App has none of the expressive elements of the HERSHEY’S Syrup App that are set forth on pp. 5-7, *supra* (subsections (a)-(n)). It features milk rising more than two-thirds of the way up the iPhone screen from an unseen source (not poured from above), a black background, and significantly different looking bubbles – for example, there are no large bubbles as the milk fills up, and the top of the iMilk App’s milk is a distinct band of small bubbles, the width of which does not vary significantly. Unlike in the Hershey application, streaks of

milk (but not large bubbles) appear on the iMilk App “glass” and drip down the iPhone screen when the newly-filled glass is shaken. Also unlike Hershey’s application, the iMilk App contains depictions of the milk turned to whipped cream and cheese. There is no chocolate syrup bottle, and no depiction of adding chocolate syrup or of milk with chocolate syrup amassed at the bottom of the glass, or of syrup being mixed into the milk. There is no spoon or straw. And, when the milk is drunk from the iMilk App, it drains out the top of the tipped iPhone “glass,” rather than dropping its level as if being drunk from a straw.<sup>4</sup> The only commonality is that both applications show milk on the screen, an idea no more protectable than the idea of painting a field of grain or a bird in a tree.

**2. There are numerous differences in events and sequence.**

The two applications also do not contain the same events or sequences of events, or the interactivity of the user and the application, as set forth on pp. 3-7. In the Hershey application, the user presses buttons to add milk and to add syrup, shakes the iPhone to stir the syrup, presses the iPhone to drink from a straw, and blows into the iPhone to make bubbles. In contrast, upon launch, the iMilk App immediately fills with milk (from the bottom) on its own; the user can then shake

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<sup>4</sup> In addition, there are no similarities in the introduction screens of the respective applications, and iMilk does not contain text instructions as the Hershey application does, as evidenced in Haje Decl. Exs. A-1 & A-2.

the iPhone to turn the milk whipped cream, and into cheese; touching the iPhone screen causes the whipped cream or cheese to become milk again; and the user can tip the iPhone as if it were a glass to drink the milk.

### **3. The Applications Use Different Sounds.**

There are also numerous differences in the audio portions of the respective applications, including the sounds the applications make when milk is added, agitated and drunk. In addition, Hershey's application contains sounds of a squeezed syrup bottle, a spoon mixing, a straw sucking and gurgling, and bubbles blown with a straw. The iMilk App ends with a belch, Hershey's application with "Ahh." And, the iMilk App begins and ends with machine-like sounds unlike anything in Hershey's application.

## **III. HOTTRIX'S TRADE DRESS AND UNFAIR COMPETITION CLAIMS FAIL AS A MATTER OF LAW.**

### **A. The Unfair Competition and Trade Dress Counterclaims Are Preempted by the Copyright Act.**

17 U.S.C. § 301 expressly preempts a state law claim that (1) "falls within the subject matter of copyright law" if (2) the asserted right is "'equivalent' to any of the exclusive rights specified" in Section 106 of the Copyright Act. *Daley v. Firetree, Ltd.*, 2006 WL 148879, \*2 (M.D. Pa. Jan. 19, 2006). Hottrix's own allegations confirm that the iPhone applications here are within the subject matter of copyright law. As for the second requirement, a claim is preempted unless it is contains an extra element "'beyond mere copying'" and is therefore "qualitatively

different from” a copyright infringement claim. *Daley*, 2006 WL 148879, at \*2-3 . “Not every extra element is sufficient” and “courts have taken a ‘restrictive view’” as to which extra elements create a genuine qualitative difference. *Id.* at \*2.

Courts have repeatedly held that unfair competition claims and trade dress claims that, as here, allege “reverse passing off,” are preempted by Section 301. Thus, the plaintiff in *Daley* claimed that defendants’ copying of its work constituted unfair competition. The claim was preempted “because it is grounded solely in the copying and distributing of plaintiff’s protected expression,” even though the plaintiff “does allege that defendant’s actions are ‘likely to cause mistake, confusion or deceive the general public.’” *Id.* at \*4. *See also Scranton Times, L.P. v. Wilkes-Barre Publ’g Co.*, 2009 WL 585502, \*5 (M.D. Pa. Mar. 6, 2009) (unfair competition claim preempted).

As in *Daley*, Hottrix’s unfair competition and trade dress claims are that Hershey copied and distributed the iMilk App. Counterclaim II alleges that “by their unauthorized appropriation and use of Hottrix’ copyrighted works,” Hershey is “engaged in acts of unfair competition.” Countercls. ¶ 71. Counterclaim III, for trade dress, alleges that Hershey has copied Hottrix’s iMilk App. *Id.* ¶¶ 79-80. As in *Daley*, the alleged wrongful act is the same as in a copyright claim – namely, the copying of a copyrighted work. While Hottrix alleges consumer confusion (*see id.* ¶¶ 72, 81), those allegations are “not enough to pass the extra element test,”

because any alleged confusion is the “*result* of the alleged unlawful copying and distributing, and does not make the unfair competition claim qualitatively different from the copyright claim.” *Daley*, 2006 WL 148879, at \*5.

**B. The Unfair Competition and Trade Dress Counterclaims Are Barred by *Dastar* and Cannot be Used to Circumvent the Copyright Laws.**

*Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), held that a plaintiff cannot assert a claim for unfair competition under the federal Lanham Act based on the copying of a work ordinarily subject to copyright protection. *See also, e.g., Maule v. Phila. Media Holdings, LLC*, 2008 WL 5251308, \*5-6 (E.D. Pa. Dec. 17, 2008). Although *Dastar* addressed a federal claim and Hottrix’s Counterclaims II and III are under state law, Pennsylvania unfair competition and trade dress law applies the same standards as the Lanham Act. *See, e.g., First Keystone Fed. Sav. Bank v. First Keystone Mortg., Inc.*, 923 F. Supp. 693, 700 n.1, 707 n.2 (E.D. Pa. 1996). Indeed, courts long have rejected trademark and unfair competition claims for copyright-protected works. *See, e.g., Attia v. Society of N.Y. Hosp.*, 201 F.3d 50, 58-60 (2d Cir. 1999) (plaintiff who failed to show substantial similarity under copyright law could not protect same materials under trademark law).<sup>5</sup>

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<sup>5</sup> *See also EMI Catalogue P’ship v. Hill, Holliday, Connors, Cosmopulos, Inc.*, 228 F.3d 56, 64 (2d Cir. 2000) (“once an original work has been produced, trademark (continued...)”)

**C. Hottrix Fails to Assert Any Protectable Rights in its iMilk App Under Unfair Competition or Trade Dress Law.**

The courts have consistently rejected trade dress protection for vaguely defined configurations, or for generic elements that are a function of the idea being communicated. *See, e.g., Liko AB v. Rise Lifts, Inc.*, 2008 WL 2977869, \*6-7 (E.D. Pa. July 31, 2008) (trade dress description was “incomplete,” “vague” and failed to provide definitions of some design elements); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 114-18 (2d Cir. 2001) (failure to identify specific elements of trade dress in jewelry line required dismissal); *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381-82 (2d Cir. 1997) (description of trade dress in furniture designs was too abstract); *In re Ingle Co.*, 1997 WL 8495, \*5-7 (9th Cir. Jan. 7, 1997) (no trade dress in television show featuring interactions with zoo animals and their keepers because claimed features were a function of premise of show); *Score, Inc v. Cap Cities/ABC, Inc.*, 724 F. Supp. 194, 199-201 (S.D.N.Y. 1989) (claimed features of show, including catchphrases, crowd scenes, prerecorded cheers, triangular banners, bunting and sports logos in block letter and neon, were common, non-protectable elements of sports-related shows).

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law is not the proper means of protecting the rights in this originality”); *RDF Media, Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 562-64 (C.D. Cal. 2005) (television program cannot serve as its own trademark); *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 13 (D.D.C. 2004) (“the scope of [trademark law] does not extend to the corpus of a book, play, film, song, television show, or comic book”).

It is critical to require such specificity because:

just as copyright law does not protect ideas but only their concrete expression, neither does trade dress law protect an idea, a concept, or a generalized type of appearance. . . . Drawing the line between ‘ideas’ or ‘concepts’ on the one hand and ‘concrete expressions’ on the other may sometimes present close questions.

*Jeffrey Milstein, Inc. v. Gregor, Lawlor, Roth, Inc.*, 58 F.3d 27, 32-34 (2d Cir. 1995) (affirming denial of preliminary injunction with respect to trade dress in greeting cards described as “straight-on color photographs of animals, plants, people or objects, die-cut to the shape of the image of the photograph, with the inside of the card being a blank white color”).

Hottrix vaguely claims “the shape and design of the App; the shape and design of the beverage as it is ‘poured’ into the iPhone ‘glass’; the shape and design of the beverage as the iPhone user ‘drinks’ the beverage; the shape, design, and placement of the iMilk video; and the overall configuration and appearance of these features combined on the App.” Countercls. ¶ 77. Particularly in light of *Iqbal* and *Twombly*, such vague allegations do not begin to approach the requisite specificity to allege rights in a trade dress.<sup>6</sup>

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<sup>6</sup> Hottrix also cannot show a likelihood of confusion between the iMilk App and the HERSHEY’S Syrup App, given the lack of substantial similarity. See *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984); *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 246 (2d Cir. 1983).



#### **IV. HOTTRIX'S TORTIOUS INTERFERENCE COUNTERCLAIM FAILS TO STATE A CLAIM FOR RELIEF.**

##### **A. The Tortious Interference Count is Preempted.**

Tortious interference claims predicated on alleged unlawful copying are routinely dismissed as preempted by the Copyright Act. *E.g.*, *Scranton Times*, 2009 WL 585502, at \*7; *Daley*, 2006 WL 148879, at \*6; *MCS Servs., Inc. v. Johnsen*, 2002 WL 32348500, \*7 (E.D. Pa. Aug. 13, 2002).

Hottrix merely realleges the same operative facts as in its copyright claim (Countercls. ¶ 83) and alleges that these facts also “constitute tortious interference.” *Id.* ¶ 84. The remaining allegations (*id.* ¶¶ 85-89) in its tortious interference claim are merely a failed (see below) attempt to recite the elements of tortious interference. Far from being “qualitatively different,” this is *exactly the same* as Hottrix’s copyright infringement claim, and, therefore, is preempted by 17 U.S.C. § 301.

##### **B. Hottrix Has Failed to Adequately Plead the Elements of a Tortious Interference Claim.**

Hottrix also fails to adequately plead the elements of tortious interference. Under Pennsylvania law, a plaintiff asserting tortious interference with prospective economic advantage “must allege that a *particular* contract or express offer was being contemplated by a plaintiff and/or third party which was improperly impeded by the defendant’s action.” *Monroeville Chrysler, LLC v. DaimlerChrysler Motors Co.*, 2007 WL 4150344, \*7 (W.D. Pa. Nov. 19, 2007) (emphasis added).

Hottrix identifies no specific prospective relationship, nor that Hershey took purposeful action against any such specific relationship. *See id.* (dismissing tortious interference claim where plaintiff offered only “speculation to support its claim” and failed to adequately plead “any prospective agreement between itself and a third party”); *Meissner Chevrolet Geo-Oldsmobile, Inc. v. Rothrock Chevrolet, Inc.*, 2007 WL 3103114, \*2-3 (E.D. Pa. Oct. 23, 2007) (dismissing tortious interference claim where allegation of the existence of prospective contracts “constituted nothing more than a mere hope of future dealings.”).

Finally, the failure of Hottrix’s copyright claim means that there is no wrongful conduct to support a tortious interference claim. *See Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 214-17 (3d Cir. 2009) (no tortious interference “as a matter of law” where conduct was not “independently actionable”; privilege to “sell similar products to prospective purchasers”).

## CONCLUSION

For the foregoing reasons, Hottrix's counterclaims should be dismissed, and judgment on the pleadings should be entered on Hershey's claim for declaratory judgment.

Dated: September 27, 2010

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**CERTIFICATION PURSUANT TO LOCAL RULE 7.8(b)(2)**

Undersigned counsel hereby certifies pursuant to Local Rule 7.8(b)(2) that the foregoing document contains 4,503 words (exclusive of the caption, the table of contents, the table of authorities, and the certifications herein) according to the word count feature of undersigned counsel's computer.

/s/ Harvey Freedenberg  
Harvey Freedenberg

Of Counsel for Plaintiff/Counterclaim  
Defendant, The Hershey Company

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of Court using CM/ECF and that the document is being served electronically upon counsel of record through the Court's electronic transmission facilities.

/s/ Harvey Freedenberg  
Harvey Freedenberg

Of Counsel for Plaintiff/Counterclaim  
Defendant The Hershey Company

Dated: September 27, 2010