

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

THE HERSHEY COMPANY,
Plaintiff/Counterclaim Defendant,

v.

HOTTRIX LLC,
Defendant/Counterclaim Plaintiff.

v.

VERSATILE SYSTEMS, INC.
Counterclaim Defendant,

No. 1:10-cv-1178-JEJ

JUDGE JOHN E. JONES III

FILED ELECTRONICALLY

**BRIEF OF HOTTRIX, LLC, IN OPPOSITION TO THE
HERSHEY COMPANY'S MOTION TO DISMISS AMENDED
COUNTERCLAIMS AND FOR JUDGMENT ON THE
PLEADINGS**

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I. INTRODUCTION

This action traces its roots back to August 12, 2008, when Scott Crowell, the Technology Director for The Hershey Company (“Hershey”) unsuccessfully sought to license Hottrix’ iMilk App as a branding and marketing tool for its Hershey’s Chocolate Syrup product. After failing to license the iMilk App, Hershey elected to intentionally copy and create derivative works from Hottrix’ copyrighted elements in the iMilk App. This case also arises from Hershey’s deliberate imitation of the overall look and feel of Hottrix’ unique and well-known iPhone Apps, specifically the iMilk App, in an effort to confuse consumers as to its association with Hottrix and to profit from Hottrix’ goodwill in the iPhone App industry.

Hershey’s Motion to Dismiss seeks to minimize its actions by prematurely arguing its own conclusory factual allegation that the two iPhone applications are not substantially similar. Moreover, Hershey improperly applies the preemption doctrine to attempt to eliminate a properly plead claim for trade dress infringement. As set forth in more detail below, Hershey’s Motion to Dismiss is devoid of merit and must be rejected as a matter of law.

II. COUNTER STATEMENT OF FACTS

In its Statement of Facts, Hershey takes the liberty of undertaking its own review of the Apps and selecting and defining the “specific elements of expression

embodied in the iMilk App.” (Hershey Brief in Support of Motion to Dismiss, (“Hershey Brief”), Dkt. No. 27, p. 3).¹ In doing so, Hershey completely ignores, and indeed even denies, that Hottrix has alleged that Hershey copied not only the copyrighted elements, but also potentially the computer code of the iMilk App. (Hershey Brief, p. 9). Such an allegation expressly ignores the plain language of Hottrix’ Counterclaims. Hottrix has specifically plead that Hershey copied and/or created a derivative work of the iMilk App, which is a software program (not a video). (Hottrix’ Answer and Amended Counterclaims (“Amended Counterclaims”), Dkt. No. 33, ¶ 62). Thus, at issue is the software of the two Apps, as well as the functionality and user experience of the two Apps.

¹ Hershey seeks to improperly utilize a video of the Infringing App and the iMilk App in support of its Motion to Dismiss. While courts may consider documents attached as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the document, this is not the case in the matter at hand. Hottrix does seek remedy for the deliberate imitation of the look and feel of its trade dress, which can visibly be seen. However, Hershey completely ignores that Hottrix has alleged that Hershey has copied the iMilk App, which is a software program that is a duly registered copyright. (Hershey Brief, p. 9). Software is comprised of computer coding, which is not subject to examination by watching a mere demonstration of one use of the computer coding. As such, to the extent Hershey seeks to utilize Exhibit A-1 and Exhibit A-2 in support of its Motion to Dismiss, they may not be considered for Hottrix’ counterclaim for copying, among other things, the software of the iMilk App. (Amended Counterclaim, ¶ 46) (“Hershey copied, and/or created, and offered for copying and downloading, a copy and/or derivative work of the iMilk App”).

A. Creation of the iMILK App

Apple and third-party developers, such as Hottrix, create software programs for the iPhone known as “applications” or “apps.” In re Apple & AT&TM Antitrust Litig., 596 F. Supp. 2d 1288, 1295 (N.D. Cal. 2008) (explaining app development); see also, Amended Counterclaim, ¶ 31. Successful iPhone Apps are a careful combination of computer coding, software development, and artistic creation. Some Apps, such as the Apps in the case at hand, utilize a combination of software coding to create interactive Apps.

iPhone App development is a dynamic and rapidly growing industry, with 3 billion apps sold world-wide in the last eighteen months.² As such, many organizations look to well-known App developers, such as Hottrix, to create iPhone Apps to market their business. Hottrix has emerged in the industry as a well-known and highly respected developer of simulated “drinking” Apps, such as iBeer, iSoda, and iMilk.

The iMilk App traces its development back to a video authored by Steve Sheraton on or about August 1, 2007.³ This iMilk Video was developed by Mr.

² Press Release, Apple, Apple’s App Store Downloads Top Three Billion, Jan. 5, 2010, <http://www.apple.com/pr/library/2010/01/05appstore.html>

³ Steve Sheraton (“Sheraton” or “Original Author”) has used the name “Hottrix” since approximately May 1, 1998, and until July 18, 2008, had done business as “Hottrix.” On or about July 18, 2008, Sheraton granted all his intellectual property rights in the copyrighted works mentioned herein, which he created prior thereto, to Hottrix (Amended Counterclaim, ¶ 30).

Sheraton by creating visual and audio material, which imitates a glass of milk being filled and subsequently drunk. The iMilk Video was the foundation for iMilk 1.0, which was available for download for \$2.99 per copy at Mr. Sheraton's website (www.hottrixdownload.com). On or about May 9, 2008, Mr. Sheraton registered the iMilk Video with the Register of Copyrights.

As the iPhone began to increase in popularity, Mr. Sheraton decided to utilize iMilk 1.0 as a basis to create an App for the iPhone. On July 6, 2008, Mr. Sheraton first published iMilk 2.0, which consisted of software coding that mimicked the "drinking" of milk of iMilk 1.0. iMilk 2.0 was registered under the title "iMilk Software" with the Register of Copyrights on or about April 8, 2009.⁴ Together, iMilk 1.0 and iMilk 2.0 provided the foundation for the iMilk iPhone App. The iMilk App is available for sale in the iTunes App Store for \$2.99 retail (although there are periodic lower "sale" prices) and has reached the top-100 Apps downloaded in many international markets.

⁴ To the extent Hershey categorizes the copyrighted materials of Hottrix as a "video," this is not only misleading, but patently false. (Hershey Brief, p. 1). To clarify the confusion regarding the distinction between a video and a software application, a brief explanation of the iMilk App development process is the creation of visual and audio artwork, followed by creation of computer based code that allows for the visual and audio artwork to be manipulated in such a way as to create the illusion of milk being poured and than drunk.

B. Licensing Negotiations

Due to the overwhelming popularity of Hottrix' iPhone Apps, companies often seek to license Hottrix' copyrighted works and distinctive trade dress to create their own Apps. Indeed, this action follows on the heels of a failed attempt by Hershey to obtain a license from Hottrix for the lawful use of the iMilk App. Specifically, on or about August 12, 2008, Scott Crowell (scrowell@hersheys.com), the Director of Technology for The Hershey Company, sent an email to Hottrix stating, *inter alia*:

Hi guys, I like your iMilk app. I am a Technology Director for The Hershey Company. I am curious to see if you would be interest in taking that code and modifying it to incorporate Hershey's Syrup and have it make chocolate milk, replacing the burp with a "moo."

(Amended Counterclaim, ¶ 45, Exhibit C (emphasis added)). This e-mail clearly evidences Hershey's intent to develop a derivative of the iMilk App.

Hottrix and Hershey entered into negotiations for the development of such an App; however, an agreement could not be reached. In light of these failed negotiations, Hershey sought out Counterclaim Defendant Versatile Systems, Inc., to do what Hottrix had been unwilling to permit – create a derivative work and/or copy of the iMilk App.

III. PRELIMINARY STATEMENT AND LEGAL STANDARD

In a motion that resounds more of a motion for summary judgment than a motion to dismiss, Hershey ignores the factual elements plead in Hottrix' Amended Answer and Counterclaims and implores this Court to not only do the same, but also to accept Hershey's own conclusory statements of law and fact. Indeed, Hershey's Motion to Dismiss is premised on the erroneous contention that a plaintiff is required, in the initial pleading and even prior to any responsive pleading, to establish and prove every possible aspect of their copyright infringement claim that may arise.⁵ This simply is contradictory to the notice-pleading requirements of the Federal Rules of Civil Procedure.

The Court's task on a Rule 12(c) motion is to determine not "whether a Plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." Bell Atlantic v. Twombly, 550 U.S. 544, 562 n.8, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).⁶ At this preliminary stage of

⁵ See e.g., "[P]laintiff must still prove that the copying is actionable." (Hershey's Brief, p. 9); "To prove copyright infringement, Hottrix must establish ownership of a copyright and copying by Hershey of 'protectable expression' in the work." Id. at 8 (emphasis supplied).

⁶ The Twombly decision "repeatedly indicated that the Court was not adopting or applying a 'heightened pleading standard.'" Phillips, 515 F.3d 224, 234 (citing Twombly, 127 S. Ct. at 1974) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

litigation, the allegations of the Complaint are to be accepted as true and all reasonable inferences drawn in favor of the plaintiff. Sharpe v. County of Dauphin, CV- 00989, 2010 U.S. Dist. LEXIS 92799 * 4 (M.D. Pa. Sept. 7, 2010) (Jones, J.) (quoting Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)).

To require a plaintiff to demonstrate every aspect of its claim in the complaint would undermine the intent behind Rule 8(a)(2), which only requires a “short plain statement of the claim.” Twombly, 550 U.S. at 555. Indeed, a defendant’s “attempts to scrutinize the [Complaint] for an absence of details stands in direct opposition to these standards [and] demands an unduly stringent degree of specificity” and any such attempts must be denied. Sony BMG Music Entm’t v. Cloud, 2008 U.S. Dist. LEXIS 64373, *7 (E.D. Pa. Aug. 21, 2008).

As such, under Rule 12(c), judgment “will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” Rosenau v. Unifund Corp., 539 F.3d 218, 221 (3d Cir. 2008). As set forth below, the notice-pleading requirements of the Federal Rules have clearly been met.⁷ Moreover, as evidenced by the

⁷ To the extent that the Court finds any of the claims insufficiently supported by the allegations of the complaint, the appropriate remedy would be to require Hottrix to amend the complaint to restate the claim. Hale v. Pa. Dep’t of Corr., 2010 U.S. Dist. LEXIS 97101, 4-5 (M.D. Pa. Sept. 16, 2010) (“Under this liberal pleading standard, courts should generally grant plaintiffs leave to

pleadings themselves, significant disputes exist as to material facts that preclude the granting of a motion to dismiss as a matter of law.

IV. ARGUMENT

A. Hottrix has Adequately Plead a Copyright Claim and Identified Protectable Elements of Expression in its iMilk App.

Contrary to Hershey's conclusory statements, Hottrix has not only sufficiently plead a copyright claim, but also has identified specific expressions of a copyrightable work upon which Hershey has infringed. To establish a claim of copyright infringement, a plaintiff must establish: "(1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff's work." Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 206 (3d Cir. 2002). Where a plaintiff has alleged ownership of a copyright and unlawful use of the copyright, a motion to dismiss must be denied. Universal Steel Bldgs. Corp. v. Shore Corp. One, 2010 U.S. Dist. LEXIS 27817, *10-11 (W.D. Pa. March 24, 2010); see also, Key Consol. 2000, Inc., v. Troost, 432 F. Supp. 2d 484, 488 (M.D. Pa. 2006) (Caputo, J.) ("Therefore, in order to withstand a motion to dismiss, a complaint based on copyright infringement must allege: (1) which specific original works are the subject of the copyright claim; (2) ownership

amend their claims before dismissing a complaint that is merely deficient.") (citing Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116-17 (3d Cir. 2000)).

of the copyrights in those works; (3) registration of the works in question with the Copyright Office in accordance with 17 U.S.C. §§ 101, et seq.; and (4) by what acts the defendant infringed the copyright.”) (citations omitted); Kelly v. LL Cool J., 145 F.R.D. 32, 36 (S.D.N.Y. 1992) (listing same four pleading requirements). To the extent Hershey contends that an examination of the substantial similarity between the two works during the initial pleading phase is warranted, this is unsupported by case law.⁸

For example, in Key Consol., viewing the complaint in the light most favorable to plaintiff, this Court found that each element of a claim for copyright infringement had been sufficiently alleged and denied the defendants’ motion to dismiss. 432 F. Supp. 2d at 488. In that case, the plaintiff alleged that it authored a text for home inspection reports that “contain[ed] material wholly original with plaintiff that is copyrightable subject matter.” Id. Second, the complaint further alleged that plaintiff “has been the sole proprietor of all rights and interests in the copyrights in the texts in question.” Id. Third, the plaintiff alleged “it received certificates of registration for three versions of the text in question.” Fourth, the Court noted that the plaintiff alleged that defendants had access to plaintiff’s text. Id. Lastly, the complaint alleged that “[d]efendants used, copied and distributed

⁸ Where a reasonable jury could conclude that “the two works are sufficiently similar,” a plaintiff’s claims for copyright infringement will withstand a motion to dismiss. Maule v. Phila. Media Holdings, LLC, 2009 U.S. Dist. LEXIS 6795, 11-13 (E.D. Pa. 2009).

the text without [p]laintiff's permission.” Id. Concluding the plaintiff satisfied the pleading requirements, the court found that the plaintiff was “entitled to offer evidence in support of its claims of copyright infringement.” Id. Noticeably absent from the Court’s opinion was any discussion relating to the “substantial similarity” between the two works.

Here, Hottrix has plead each of the requisite elements for a copyright claim, including, to the extent necessary, the identification of protectable expressions and elements of its iMilk App. In seeking a motion to dismiss and judgment on the pleadings, Hershey essentially claims that these factual elements plead by Hottrix must be taken as false. Clearly, this is in direct violation of the legal standard for evaluating a motion to dismiss. As evidenced below, Hottrix has sufficiently plead a copyright claim.

1. The Complaint Specifies the Two Original Works that are the Subject of Plaintiffs’ Claim.

First, Hottrix has clearly identified the specific works that are the subject of the copyright claim – Hottrix’ iMilk Video and iMilk Software, both of which are integral to its iMilk iPhone App. (Counterclaim, ¶¶ 36-40). Each of these copyrighted works is a protectable expression under copyright law. Copyright law protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102. “It is settled law that software can be copyrighted and the copyright can be infringed.” AMC Tech. L.L.C. v. SAP AG, 2005 U.S.

Dist. LEXIS 27095, *15 (E.D. Pa. 2005).⁹ Indeed, the copyright registrations for the two works are annexed to the Complaint, which further identify and sets forth the identification and nature of Hottrix' works. (Amended Counterclaim ¶¶ 39, 40)

Contrary to Hershey's assertions, Hottrix does not purport to copyright the "idea" of a milk-drinking App for the iPhone, but rather, to the extent required under the notice-pleading requirements, has asserted protectable copyrighted elements in the expression upon which Hershey has infringed. Audio components and concrete details of the visual presentation of software, such as the choice of shapes, sizes, colors, sequences, arrangements, and sounds of a video game, constitute copyrightable expressions of the work's basic idea. Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 214 U.S.P.Q. (BNA) 33 (7th Cir. 1982), *superseded by statute on unrelated grounds as stated in* Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. Ill. 1985); see also, Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 480 (D. Neb. 1981) ("The plaintiff's copyrights cover the plaintiff's audiovisual expression of various game ideas. This expression includes the distinctive color and design of the space ships and other players, as well as the sounds accompanying the playing of the games.

⁹ See also, Williams Electronics, Inc. v. Artic Intern., Inc., 685 F.2d 870 (3d Cir. 1982) (holding that the object code of a video game's computer program was subject to copyright protection).

Such expressions of game ideas are an appropriate subject of copyright protection.”) Copying these protected elements constitutes copyright infringement.

For example, in Atari, Inc. v. Armenia, Ltd., the court held that the defendant’s video game, called “War of the Bugs,” infringed on the plaintiff’s copyright for its video game “Centipede,” where both games were substantially similar and accordingly granted a preliminary injunction. 1981 U.S. Dist. LEXIS 16561, *6 (N.D. Ill. Nov. 3, 1981). Specifically, the court found that the “[t]he worms travel in the same manner. The shots were fired in the same manner. The whole arrangement was very similar.” Id.

There are numerous ways to express the *idea* of “drinking” from an iPhone; however, Hottrix has expressed this idea in a certain sequence and utilizing certain elements of sound and visual presentation. Specifically, Hottrix’ expressions include: (1) white, brown, pink, and green colored “milk” like substance rising from the bottom to the top into a “glass” the size of the iPhone, which simulates the “pouring” of the beverage; (2) the solid colored background behind the “glass” upon the milk visualizations; (3) using the input from the user of the iPhone to decrease the quantity of the beverage and the creation of bubbles; (4) the “drinking” until the beverage is finished; (5) a sound immediately following the finishing of the drink; (6) the color of the chocolate “milk;” (7) the color, shape and movement of the “bubbles” in the “milk” as it is poured into and emptied from

the “glass;” (8) the movement of both the bubbles and the liquid as the App waits for user input/interaction; (9) the sound of the bubbles and liquid as it is poured into and emptied from the class.

Moreover, Hottrix has specifically alleged that Hershey has copied these protected elements of expression. (Amended Counterclaim ¶¶62.) For example, Hershey has elected to incorporate the “pouring” of the beverage into a glass, as opposed to a mug or other container, and to have the liquid rise from the bottom to the top. Hershey has also adopted the “finishing sound effect” at the conclusion of “drinking” the milk. Having a sound effect at the end of a “drink” is clearly not related to the “idea” of drinking from an iPhone, but rather a fanciful and protectable expression under copyright law.

2. Hottrix has Plead Ownership and Copyrights for the Works in Question.

Satisfying the next two prongs, Hottrix has plead ownership of the copyrights in those works and attached the registration of these works to its Counterclaim. (Amended Counterclaim ¶¶ 30, 39, 40) Hershey has not contested ownership and registration of the iMilk App.

3. The Complaint Sets Forth Hershey’s Infringing Acts.

Finally, Hottrix has plead the infringing acts of Hershey – (1) unlawful copying all or part of the iMilk App, which is a copyrighted software program (Amended Counterclaim ¶¶ 40, 62) ; and/or (2) creation of a derivative work of the

iMilk App, which is a copyrighted software program (Amended Counterclaim ¶¶40, 65).¹⁰ A plaintiff can show copying by proving that defendant made literal copies of the program. Dam Things From Denmark v. Russ Berrie & Co., 290 F.3d 548, 561-62 (3d. Cir. 2002).¹¹ Alternatively, a plaintiff can show copying by proving that defendant had access to the program and that defendant's work is substantially similar to plaintiff's work in ideas and the expression of those ideas. Id. Indeed, a court may also find substantial similarity absent access, where the two works are nearly identical. Midway, 543 F. Supp. 466, 480. Here, Hottrix has

¹⁰ Contrary to Hershey's assertions, the standard of substantial similarity between a work and a derivative work is not the same. (Hershey Brief, p. 8). "A new work that utilizes expression from a previously existing work is considered to be derivative of that work." Dam Things from Den. v. Russ Berrie & Co., 290 F.3d 548, 563 (3d Cir. 2002). The Copyright Act defines a derivative work as "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101. An author's right to protection of the derivative work only extends to the elements that he has added to the work; he cannot receive protection for the underlying work. Dam Things, 290 F.3d at 563. "To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." Id. (citations omitted). Here, the originality and minimal degree of creativity of the Infringing App, in so far as it is considered a derivative work, are disputed.

¹¹ Discovery has not yet been conducted, so Hottrix is unaware as to the extent Hershey has directly copied portions of its software code of the iMilk App. As Hottrix has plead direct copying of the iMilk App, examination of access and substantial similarity is not warranted. Dam Things, 290 F.3d 548, 561-62.

alleged not only access, but substantial similarity between the two Apps. (Amended Counterclaim, ¶¶46-48, 63).

Accordingly, for the reasons set forth above, the Court need look no further than the face of Hottrix' Counterclaim to deny Hershey's Motion. Simply put, Hottrix has adequately pled its claims under the Copyright Act and has identified its protectable elements of expression.

B. Examination of the Substantial Similarities Between the Apps Before Initial Pleadings are Closed is Unwarranted and in Violation of Pleading Requirements.

In a misapplication of a Rule 12(c) motion, Hershey essentially demands that Hottrix meet the requirements of a summary judgment motion in its Complaint, prior to the filing of a responsive answer from Hershey, prior to the start of discovery, prior to examination of expert testimony, and prior to a further factual development of the record. Examination of the substantial similarities is not warranted at a motion to dismiss where, as is the case at hand, the factual record has yet to be developed, expert testimony has not been conducted, and the issue is a complex one of fact. At this stage in litigation, Hottrix has plead, and the Court must accept as true for purposes of this Motion to Dismiss, that the Infringing App is not only substantially similar to, but nearly identical ("strikingly similar") to, the iMilk App and as such, the Motion to Dismiss must be denied. (Amended Counterclaim ¶63).

To the extent Hershey attempts to decide issues of material fact, including the substantial similarities between the two Apps, such determinations are inappropriate on a motion to dismiss. Hershey cites only two non-binding cases in support of its broad assertion that it is “settled” a court may compare the two works and determine, as a matter of law, that they are not substantially similar. (Hershey Brief, p. 10) (citing Curtin v. Star Editorial, Inc., 2 F.Supp.2d 670, 673 (E.D. Pa. 1998); Douglas v. Kimberly-Clark Corp., 1993 U.S. Dist. LEXIS 243 (E.D. Pa. Jan. 8, 1993)). Not only are these cases readily distinguishable,¹² but additional case law indicates that the issue of substantial similarity, if at all determined by the

¹² Importantly, in Curtin, the copyright claim was dismissed as a matter of law because the plaintiff did not own a copyright interest in the seven pictures at issue, but rather asserted a copyrightable interest in a compilation of the pictures found in his book. Id. at 673. The plaintiff alleged copyright compilation infringement of the defendant’s two page pictorial spread that photographs of Elvis Presley. Id. The Court noted that of the ten photographs contained in the two-page pictorial, seven pictures contained the same famous personalities found in the Plaintiff’s copyrighted book. Id. Because the pictures were not the same as those found in the book, the court found that there was no substantial similarity between the compilation. Id. Thus, “[e]ven assuming plaintiff’s well pleaded facts are true, no reasonable fact finder could find “substantial similarity” in selection, coordination, and arrangement [of the photographs] needed for copyright infringement.” Id.

In Douglas, the plaintiff’s complaint was dismissed because the plaintiff’s factual allegations in his second amended complaint did not depict the copyrighted design. The court held that the discrepancy between the exhibit and the description made it impossible for plaintiff to prove infringement because the two drawings were sufficiently different that no reasonable juror could find them to be substantially similar. Douglas v. Kimberly-Clark Corp., 1993 U.S. Dist. LEXIS 243, *7 (E.D. Pa. Jan. 8, 1993).

Court, is most appropriately addressed on a motion for summary judgment. See e.g., Nourison Indus. v. Virtual Studios, Inc., 2010 U.S. Dist. LEXIS 55545 (D.N.J. June 3, 2010) (denying motion to dismiss copyright claim without examining substantial similarity); Roginski v. Time Warner Interactive, 967 F. Supp. 821, 825 (M.D. Pa. 1997) (Vanaskie, J.) (determining issue of substantial similarity on motion for summary judgment); Segal v. Paramount Pictures, 841 F. Supp. 146, 149 (E.D. Pa. 1993) (same).

Because substantial similarity is customarily an extremely close question of fact, however, even “summary judgment has traditionally been frowned upon in copyright litigation.” Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980) (citing Arnstein v. Porter, 154 F.2d 464, 468, 474 (2d Cir. 1946)); accord, The Yankee Candle Company, Inc v. the Bridgewater Candle Company, LLC, 259 F.3d 25, 37 (1st Cir. 2001) (same);

Courts have only determined substantial similarity as a matter of law in the appropriate case where the evidence demonstrates that “no reasonable jury could find substantial similarity of ideas and expression.” Funky Films, Inc. v. Time Warner Entm’t. Co., L.P., 462 F.3d 1072, 1076-77 (9th Cir. 2006) (deciding issue on Motion for Summary Judgment) (emphasis supplied). Indeed, where a reasonable jury could conclude that “the two works are sufficiently similar,” a plaintiff’s claims for copyright infringement will withstand a motion to dismiss.

Maule v. Phila. Media Holdings, LLC, 2009 U.S. Dist. LEXIS 6795, 11-13 (E.D. Pa. 2009); Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127 (2d. Cir. 2005) (remanding summary judgment motion to district court for a factual finding that defendant's rug was substantially similar to protected aspects of plaintiff's copyrighted rug).

Here, although examination of the substantial similarities of the Apps is not warranted at this time, a reasonable jury could easily find substantial similarity between the iMilk App and the Infringing App.¹³ Accordingly, even assuming such an examination was proper at this stage of the proceedings, Hershey's Motion still fails as a matter of law.

C. Assuming Arguendo, Examination is Proper, the Infringing App is Substantially Similar to the iMilk App.

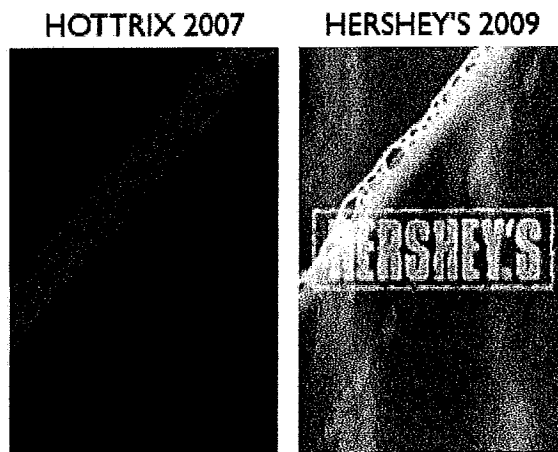
Assuming examination of the substantial similarity of the Apps is appropriate, which is specifically denied, the Infringing App is substantially similar to, if not identical to, the iMilk App. Substantial similarity is broken down into two considerations: "(1) whether the defendant copied from the plaintiff's work and (2) whether the copying, if proven, went so far as to constitute an improper appropriation." Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 209

¹³ At minimum, expert testimony is warranted in considering if the two works are substantially similar. Dam Things, 290 F.3d 548, 562. ("[T]he opinions of experts may be called upon in determining whether there is sufficient similarity between the works so as to conclude that the alleged infringer 'copied' the work.")

(3d Cir. 2005). Specifically, in a computer program cases, the fact-finder must decide whether there is sufficient similarity between the two works in question to conclude that the alleged infringer used the copyrighted work in making his own. Id.

“When analyzing two works to determine whether they are substantially similar, courts should be careful not to lose sight of the forest for the trees.” Atari, Inc. v. North Am. Philips Cons. Elecs. Corp., 672 F.2d at 618. Indeed, “because [courts] are concerned with the overall similarities between the [computer] programs, [the court] must ask whether the most significant steps of the programs are similar.” Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1246 (3d Cir. 1986) (citations omitted). Here, comparing the overall appearances of these Apps, one could only conclude that the Infringing App not only copies Hottrix’ ideas, but captures Hottrix’ unique expression. Below are true and correct screenshots of the iMilk App and the Infringing App, which Hottrix intends to enter into the record (but has not done so as of yet due to the premature request by Counterclaim Defendant Hershey to analyze substantial similarity):¹⁴

¹⁴ J. Fisher Declaration, attached hereto as Exhibit “A”. Hottrix disputes that examination of the two Apps is warranted at this stage in the litigation; however, insofar as Hershey’s Brief wrongfully presents one video portrayal of the Apps, Hottrix has been forced to present its own screenshots of the App.



For example, in Atari, the Seventh Circuit Court of Appeals examined the idea/expression dichotomy in the context of video games to determine which elements of the Pac-Man video game were expression, subject to protection, rather than ideas which are in the public domain. Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 617 (7th Cir. Ill. 1982). In so doing, the Court stated that dissection of the subject matter into copyrighted and unprotected elements is generally rejected in favor of examining the “total concept and feel” of the copyrighted work. Id. at 614. The Court cautioned that while such dissection was not appropriate, the substantial similarity inquiry must “take into account that the copyright laws preclude appropriation of only those elements of the work that are protected by the copyright.” Id.

In conducting its examination, the Court found that while the overall idea of the Pac-Man game was not copyrightable, the “particular form in which it is expressed (shapes, sizes, colors, sequences, arrangements, and sounds) provides

something ‘new or additional over the idea’, which is entitled to protection.” Id. at 617. In the abstract, “PAC-MAN is a maze-chase game in which the player scores points by guiding a central figure through various passageways of a maze and at the same time avoiding collision with certain opponents or pursuit figures which move independently about the maze.” Id. Importantly, the audio component and the concrete details of the visual presentation constituted the copyrightable expression of that game “idea.” Id. These protectable elements included, but were not limited to, the choice of characters utilized in the game and the characters’ shapes, sizes, colors, pace, and actions. Id.

The court found substantial similarity in the shape of the characters utilized in the two games. Id. at 618. Specifically, the characters of the alleged infringing game had “several blatantly similar features, including the relative size and shape of the “body,” the V-shaped “mouth,” its distinctive gobbling action (with appropriate sounds), and especially the way in which it disappears upon being captured.” Id. The Court went on to find “significant visual similarities [i]n size, shape, and manner of movement” in other aspects of the games. Id. Despite the existence of some differences between the games, the court found that these “slight differences between a protected work and an accused work will not preclude a finding of infringement” where the works are substantially similar in other respects. Id.

Similarly, a court may also find substantial similarity, where as the case is in the matter at hand, the two works are nearly identical. Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 480 (D. Neb. 1981). The plaintiff in Midway sought the issuance of a preliminary injunction to prohibit the further distribution and sale of a video that it claimed violated its copyright. Id. at 472. In examining the plaintiff's copyright claim, the court found the defendants' games and the plaintiff's games to be "virtually identical." Id. at 482. Specifically, the court found the following similarities:

The plaintiff's Galaxian game has a convoy of aliens approaching the player's defense ship. These aliens are unique in their shape and movement. In formation, the aliens fly with their gently flapping wings toward the defense ship. When the aliens break away from the convoy to swoop down on the defense ship, their wings are extended upward in a stationary position. Although the defendants' Galactic Invaders game offered in evidence is not in color, the shape and movement of its aliens are identical to the plaintiff's game.

Id. at 482-83.

Here, as in Atari and Midway, there are numerous similarities that render the iMilk App and the Infringing App not only substantially similar, but also virtually identical. In Atari, the unprotected idea was a maze-chase game – the artistic expressions, such as the characters and overall layout of the game, were the protected elements of expression. Here, the unprotected idea is an iPhone App involving a virtual beverage. The artistic and copyrightable expressions are how

this idea is manifested in color, shape, layout, sequence, and sound. As with the characters of the infringing game in Atari, which mimicked the color, shape, sequence of movement, and sound of the copyrighted expressions, the Infringing App in this case mirrors the copyrightable expressions of the iMilk App.

For example, the shape of the expressions in the Apps is the same – a clear glass the size of an iPhone; the bubbles (in both size and shape) in the milk; the liquid as it is “poured” and “drunk” in and out of the container. The movement of the expressions in the Apps is the same – the bubbles forming as the milk is “poured,” the bubbles moving as the milk is “drunk” from the “glass;” the liquid as it is “poured” into the “glass;” the liquid as it is “drunk” from the glass. The colors of the expressions in the Apps are the same – a solid colored background; clear glass; chocolate and/or white milk; a clear empty glass. The audio expressions of the Apps are the same – the sound of the bubbles and liquid as the user fills the glass; the sound of the bubbles and liquid as the user empties the glass; and the sound of the liquid and bubbles as the App waits for user interaction. The sequence of movement of the expression are the most similar – a button commences the interactive App; the beverage is poured into a glass; the glass is filled; the beverage is “drunk” by the interactive user; a sound follows at the conclusion. All these similarities are not inherent to the “idea” of an iPhone filling up with a beverage and then being emptied, but rather unique and creative

expressions, which are entitled to copyright protection. As clearly demonstrated, the substantial similarities between the iMilk App and the Infringing App is clearly evident.

D. Hottrix' Lanham Act Claim is not Preempted by the Copyright Act.

Contrary to Hershey's misrepresentations, Hottrix' unfair competition claim does not rely on the copying of a copyrighted work for the basis of its claim.¹⁵ Rather, the claim is for copying of Hottrix' trade dress, which is a separate and distinct wrong for which Hottrix is entitled to recover separate and apart from infringement of the copyrighted elements of the iMilk App. As asserted in Hottrix' Amended Counterclaims, Hershey has committed two separate and distinct wrongs.

First, as discussed above, Hershey has copied and/or created a derivative work from the copyrighted protected elements of the iMilk App. This unlawful copying of the protected elements is copyright infringement under the Copyright Act. Second, Hershey has deliberately mimicked the "look and feel" of Hottrix'

¹⁵ Hershey misquotes Hottrix' Amended Answer and Counterclaims. For example, Hershey purports Counterclaim II to allege that "by their unauthorized appropriation and use of Hottrix' copyrighted works,' Hershey is 'engaged in acts of unfair competition.'" (Motion at 16) (citing Am. Countercls. ¶71). This is false. Paragraph 71 contains no reference to any copyrighted works, but rather states "Defendants, by their unauthorized appropriation and use of the 'look and feel' of Hottrix' iMilk App, have in the past and are currently engaging in acts of unfair competition." (Am. Countercls. ¶ 71) (emphasis supplied).

iMilk App to confuse or deceive consumers as to whether the iMilk App and the Infringing App come from the same source or are otherwise associated, affiliated, or connected. (Am. Counterclaims. ¶¶ 71-72). Unlike the Copyright Act claim, this claim does not rely on the copying of the protected elements of the iMilk App, but rather the overall “look and feel” of the App. Simply put, this is a competitive business claim based on Hershey’s attempts to capitalize on Hottrix’ goodwill and reputation by mimicking its trade dress. Insofar as Hershey expressly sought out Hottrix’ services for the development of its Infringing App, it cannot be denied that Hottrix’ trade dress, in particular the overall high quality and “look and feel” of its products, is well-known in the iPhone App development industry.

Although the Copyright Act does not expressly preempt remedies under other federal statutes, “courts have long limited application of the Lanham Act so as not to encroach on copyright interests.” Blue Nile v. Ice.com, 478 F.Supp.2d 1240, 1243 (W.D. Wash. 2007) (citations omitted). Importantly, “[p]arallel claims under the Copyright Act and the Lanham Act, however, are not *per se* impermissible.” Id. at 1244 (citing Nintendo of Am., Inc. v. Dragon Pac. Int’l, 40 F.3d 1007, 1011 (9th Cir. 1994)).

Adapting to ever-changing technology, courts have now found Lanham Act claims based on the copying of the “look and feel” of expressions of code, such as websites, to be separate and distinct from copyright claims. See e.g., Id. (denying

motion to dismiss on plaintiff's Lanham Act claim for copying "look and feel" of website); Conference Archives, Inc. v. Sound Images, Inc., 2010 U.S. Dist. LEXIS 46955 (finding plaintiff could assert Lanham Act claim for unprotected elements of website "look and feel"); Sleep Sci. Partners v. Lieberman, 2010 U.S. Dist. LEXIS 45385, *12 (N.D. Cal. May 10, 2010) ("Courts have concluded that a website's "look and feel" could constitute protectable trade dress that would not interfere with copyright interests."). The reasoning behind this is clear – "considering a website through the lens of copyright law allows the court to ignore certain intangible elements. Focusing on the look and feel of a website through the prism of trade dress suits allows courts to protect these attributes." Conference Archives, 2010 U.S. Dist. LEXIS 46955 (W.D. Pa. March 31, 2010), *44.

The case of Conference Archives is particularly illustrative of this principle. In that case, the District Court for the Western District of Pennsylvania determined that in the context of a website "a 'look and feel' analysis is suited to protect not only static elements such as 'photos, colors, borders, or frames'" but also "interactive elements and the overall mood, style, or impression of the site." 2010 U.S. Dist. LEXIS 46955, *44. Specifically, the Court determined that the "look" encompasses aspects such as "colors, shapes, layouts, typecases, and shapes." Id. at *45. On the other hand, the "feel" of an interactive coding source, such as a website, is comprised of "certain dynamic navigation elements, including buttons,

boxes, menus and hyperlinks.” Id. at *46. The court went on to note that the “feel can also consist of the ‘information design of a website, including . . . the location of common elements.’” Id.

The “hallmark of a protectable ‘look and feel’ trade dress is a graphical user interface that promotes the intuitive use of the website.” Id. at *48. Importantly, intuitive use arises from the consistent look and feel of the user interface, which encourages users to rely on the predictability of the design when they need to utilize the interface. Id. at *47. Focusing on this consistent look and feel enables the court with greater flexibility to “fashion the scope of protection needed to shield a Plaintiff from a ‘careful’ infringer who has wrongfully imitated the ‘essence’ of a Web site without copying its specific traditionally protectable elements.” Id. at *49.

Similarly, in Blue Nile, Blue Nile, an online diamond retailer, sued Ice.com, alleging that Ice.com copied elements of the Blue Nile web site that were protected by the Copyright Act. 478 F.Supp.2d at 1242. Blue Nile further alleged that Ice.com copied the “look and feel” of its website, in violation of Blue Nile’s trade dress under § 1125(a) of Lanham Act. Id. at 1243. Deeming the claim a “novel theory,” the court declined to grant the defendant’s motion to dismiss. Id. Specifically, the court noted that in so far as non-copyrightable elements

comprised Blue Nile's trade dress, the Copyright Act did not provide an adequate remedy for the alleged injury and therefore would not preempt the claim. Id.

Similar to a website, which utilizes a distinct "look and feel" to foster consumer familiarity and goodwill, iPhone Apps are often developed utilizing certain non-functional elements (*i.e.*, a trade dress) to promote developer recognition. As with websites, iPhone Apps utilize graphic placement, color schemes, navigational functions, and other visual and sound enhancements to promote consumer familiarity with the product. Hottrix has developed a distinct trade dress in its iPhone drinking app products. All of its products are recognizable by its high quality graphic display, color schemes, navigational functions, graphic placement, and sound enhancements.

Specifically, all Hottrix drinking Apps, including the iMilk App, use the same color schemes, glassware, sounds, navigational functions, and operational steps. The Apps all begin with a beverage being poured, followed by the "drinking" of the beverage, and all end with a sound effect upon complete. Moreover, Apps are all easily recognized due to the high quality of the graphic display of the user interface. Quite simply, no other developer utilizes these same elements to identify its products. All Hottrix Apps have been marketed based on these trade dress elements and consumers have come to recognize Hottrix for them.

Indeed, a user would recognize the source of an App as Hottrix by the unique audiovisual design.

At minimum, Hershey's demand for dismissal of the unfair competition claim under the Lanham Act due to pre-emption is premature. Where the factual record remains undeveloped and no discovery has been conducted, such as the case here, dismissal is improper. FedEx Ground Package Sys. v. Applications Int'l Corp., CV-03-1512, 2005 U.S. Dist. LEXIS 26651, *7-8 (W.D. Pa. Nov. 4, 2005) ("Because the factual record remains undeveloped, the Court lacks a sufficient basis upon which to decide the preemption question. Accordingly, the Court cannot conclude at this juncture that no facts exist that would allow the non-moving party to recover.") ; see also, Blue Nile, 478 F.Supp.2d at 1246 ("[T]he Court denies defendant's motion to dismiss the trade dress claim in light of the presumption that Fed. R. Civ. P. 12(b)(6) motions should be rarely granted, especially when the claim involves a novel legal theory.")

E. Hottrix' State Claims are not Preempted and are Adequately Plead.

Contrary to the implication of Hershey's motion, the Copyright Act does not *sua sponte* preempt all state law claims brought in addition to a copyright claim. In so far as a state law claim is based upon behavior other than the wrongful copying of copyrighted works, the Copyright Act does not preempt it. See e.g., Axxiom Manufacturing, Inc. v. McCoy Investments, Inc., 2010 U.S. Dist. LEXIS

61206, *24 (S.D. Tex. June 21, 2010) (denying motion to dismiss state law claim where plaintiff alleged other behavior outside copyright copying constituted alleged wrong). Hottrix specifically does not rely on the alleged copying behavior as the basis of its tortious interference claim. (Amended Counterclaims ¶ 89). Rather, the alleged wrongful conduct arises out of the copying of the “look and feel” of the iMilk App. (Amended Counterclaim¶ 91).

Moreover, Hottrix has adequately plead the elements of tortious interference. A claim of tortious interference with prospective economic advantage must allege “(1) a prospective contractual relationship, (2) defendant’s intent to harm plaintiff by preventing the relationship from occurring, (3) the absence of privilege or justification on the part of the defendant, and (4) the occurrence of actual damages.” Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 184 (3d Cir. 1997). A prospective contractual relation is, “by definition, not as susceptible of precise, exacting identification as is an existing contract.” Id. Indeed, “[a]nything that is prospective in nature is necessarily uncertain.” Glenn v. Point Park College, 272 A.2d 895, 898 (Pa. 1971).

Here, Hottrix has alleged more than a “mere hope” of a contractual relationship – it has alleged that but for the offering of the Infringing App for free by Hershey, the prospective purchasers would have bought the Hottrix iMilk App or sought licensing agreements. Indeed, Hershey itself even attempted to get into a

contractual relationship with Hottrix (Counterclaim at ¶45). Furthermore, had Hershey refrained from mimicking the look and feel of its iMilk App, there is a strong likelihood that the consumers would have purchased the iMilk App rather than the Infringing App.

V. CONCLUSION

For the reasons set forth above, Defendant/Counterclaim Plaintiff Hottrix, LLC respectfully requests that The Hershey Company's Motion to Dismiss be DENIED. In the alternative, should the Court find a deficiency in the pleadings, Plaintiff respectfully requests leave to amend the Complaint.

Respectfully submitted,
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CERTIFICATION PURSUANT TO LOCAL RULE 7.8(b)(2)

Pursuant to Local Rule 7.8(b)(2) and this Court's November 1, 2010 Order [Dk. Doc. No. 41], undersigned counsel hereby certifies that the foregoing document contains 7,649 words (exclusive of the caption, Table of Contents, the Table of Authorities, and the certifications herein) according to the word count feature of the word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010 in accordance with the Rules of the United States District Court for the Middle District of Pennsylvania, a true and correct copy of the foregoing document was electronically filed and served via the Court's ECF system on the following:

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