

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Ilyon Dynamics Ltd. d/b/a Ilyon Games v. Kings Fortune Pte. Ltd.

No. 24-cv-04581-NC (N.D. Cal. Feb. 25, 2025) · No. 24-cv-04581-NC · Decided February 25, 2025

SUMMARY

The United States District Court for the Northern District of California denied Kings Fortune Pte. Ltd.’s motion to dismiss copyright, trademark infringement, and false designation of origin and unfair competition claims brought by Ilyon Dynamics Ltd. and BoomBox Games Ltd. The court held that BoomBox plausibly alleged ownership of a valid copyright and copying of protectable audiovisual elements in its mobile game, Triple Match 3D. The court also found that Ilyon adequately pleaded a likelihood of consumer confusion based on the alleged use of its trademarks in Kings Fortune’s competing game.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                 |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Northern District of California                                                                                                                                                                                                                            |
| WRITING FOR THE COURT | Nathanael M. Cousins                                                                                                                                                                                                                                                                            |
| JURISDICTION          | United States District Court for the Northern District of California                                                                                                                                                                                                                            |
| DECIDED               | February 25, 2025                                                                                                                                                                                                                                                                               |
| DOCKET                | 24-cv-04581-NC                                                                                                                                                                                                                                                                                  |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                           |
| PROCEDURAL POSTURE    | Defendant moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss three federal claims for failure to state a claim and also sought dismissal or striking of the plaintiffs' damages and punitive-damages requests. The court denied the motion.                                        |
| STANDARD OF REVIEW    | On a Rule 12(b)(6) motion, the court accepts well-pleaded factual allegations as true, draws reasonable inferences in favor of the nonmoving party, disregards conclusory allegations and unreasonable inferences, and asks whether the complaint states a facially plausible claim for relief. |
| PRECEDENTIAL VALUE    | unpublished and nonprecedential district-court order                                                                                                                                                                                                                                            |
| PARTIES               | Ilyon Dynamics Ltd. d/b/a Ilyon Games, BoomBox Games Ltd. v. Kings Fortune Pte. Ltd.                                                                                                                                                                                                            |

## TOPICS

copyright infringement

trademark infringement

motions to dismiss

pleadings

civil procedure

## PRACTICE AREAS

intellectual property

copyright

trademark

civil procedure

commercial litigation

## QUESTIONS PRESENTED

1. Whether BoomBox plausibly alleged ownership of a valid copyright despite an alleged discrepancy between the copyright registration certificate and the complaint regarding the work's completion date.
2. Whether BoomBox plausibly alleged copying of protectable expression, including access and substantial similarity, sufficient to state a copyright-infringement claim.
3. Whether Ilyon plausibly alleged a likelihood of consumer confusion sufficient to state claims for trademark infringement and false designation of origin and unfair competition under the Lanham Act.
4. Whether Defendant's motion adequately supported dismissal or striking of Plaintiffs' requests for damages and punitive damages.

## HOLDINGS

1. An alleged inaccurate completion date on a copyright registration certificate, without allegations establishing that the inaccurate information was knowingly included in the application and would have caused the Register of Copyrights to refuse registration, did not defeat BoomBox's plausible allegation of copyright ownership at the pleading stage.
2. BoomBox plausibly alleged copyright copying by alleging access to Triple Match 3D and substantial similarity in protectable visual and audiovisual expression, including graphic assets, color schemes, and interfaces; the claim could not be dismissed at the pleading stage merely because game mechanics and procedures themselves are unprotectable.
3. Ilyon plausibly alleged trademark infringement under 15 U.S.C. § 1114 and false designation of origin and unfair competition under 15 U.S.C. § 1125(a) by alleging unauthorized use of identical marks on a substantially similar competing game distributed through the same channels and likely to cause consumer confusion.
4. Defendant's requests to dismiss or strike Plaintiffs' damages and punitive-damages prayer were denied because the motion did not adequately present or apply the governing Rule 12(f) standard, and arguments raised for the first time in reply were disregarded.

## KEY QUOTATIONS

*“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”* (Order at 2)

*“Copyright protection extends only to expression, “not the idea underlying that expression.””* (Order at 8)

*“Substantial similarity is usually an extremely close issue of fact.”* (Order at 10)

*“Likelihood of confusion is typically a question of fact.”* (Order at 12)

## FACTUAL BACKGROUND

Ilyon owns two federally registered trademarks, and its subsidiary BoomBox owns a copyright in the mobile game Triple Match 3D. Plaintiffs alleged that Kings Fortune published Happy Match Café, a mobile three-dimensional object-matching game containing objects, graphics, interfaces, color schemes, and other visual features similar to those in Triple Match 3D, including a mug displaying Ilyon's logo. Plaintiffs alleged that both games were distributed through the Google Play and Apple App Stores and that Defendant's use of the marks was likely to cause consumers to believe that its game was affiliated with, sponsored, or authorized by Ilyon.

## PROCEDURAL HISTORY

Plaintiffs filed a complaint alleging copyright infringement, trademark infringement, and false designation of origin and unfair competition arising from alleged copying of elements of the mobile game Triple Match 3D in Defendant's game Happy Match Café. Defendant moved to dismiss. After briefing, and with the parties' consent to magistrate-judge jurisdiction under 28 U.S.C. § 636(c), the court denied the motion and ordered Defendant to answer by March 11, 2025.

## DISPOSITION

other

## CASES CITED

- Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)
- Ashcroft v. Iqbal, 556 U.S. 662 (2009)
- Retail Property Trust v. United Board of Carpenters & Joiners of America, 768 F.3d 938, 945 (9th Cir. 2014)
- In re Gilead Sciences Securities Litigation, 536 F.3d 1049, 1055 (9th Cir. 2008)
- Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)
- Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 984-85 (9th Cir. 2017)
- S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1086 (9th Cir. 1989)
- Yellowcake, Inc. v. Morena Music, Inc., 522 F. Supp. 3d 747, 779 (E.D. Cal. 2021)
- Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178, 185, 187-88 (2022)
- Skidmore as Trustee for Randy Craig Wolfe Trust v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020)
- Hanagami v. Epic Games, Inc., 85 F.4th 931, 935, 941, 945 (9th Cir. 2023)
- Oracle America, Inc. v. Google Inc., 750 F.3d 1339, 1355-57 (Fed. Cir. 2014)
- DaVinci Editrice S.R.L. v. ZiKo Games, LLC, 183 F. Supp. 3d 820, 830 (S.D. Tex. 2016)
- Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 404-05 (D.N.J. 2012)
- Petrie v. Electronic Game Card, Inc., 761 F.3d 959, 964 n.6 (9th Cir. 2014)
- Padilla v. State of California, 509 F. Supp. 3d 1167, 1180 (N.D. Cal. 2020)
- Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638 F.3d 1137, 1144-46 (9th Cir. 2011)

- Freecycle Network, Inc. v. Oey, 505 F.3d 898, 902 (9th Cir. 2007)
- Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046 (9th Cir. 1999)
- Punchbowl, Inc. v. AJ Press, LLC, 90 F.4th 1022, 1027 (9th Cir. 2024)
- AMF Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979)
- Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792, 810 n.19 (9th Cir. 2003)
- Yelp, Inc. v. ReviewVio, Inc., No. 23-cv-06508-WHA, 2024 WL 2883668, at \*6 (N.D. Cal. June 6, 2024)
- Automated Pet Care Products, LLC v. PurLife Brands, Inc., 670 F. Supp. 3d 946, 950-52 (N.D. Cal. 2023)
- LegalForce Rapc Worldwide P.C. v. MH Sub I, LLC, No. 24-cv-00669-WHA, 2024 WL 3238124, at \*2, \*4 (N.D. Cal. June 27, 2024)
- Adobe Systems Inc. v. Blue Source Group, Inc., 125 F. Supp. 3d 945, 966-67 (N.D. Cal. 2015)

## OPINION

ILYON DYNAMICS LTD. d/b/a ILYON GAMES v. KINGS FORTUNE PTE. LTD.

PER CURIAM.

1 2 3 4 5 6

7 UNITED STATES DISTRICT COURT

8 NORTHERN DISTRICT OF CALIFORNIA

9 10 ILYON DYNAMICS LTD., et al., Case No. 24-cv-04581-NC 11 Plaintiffs,

ORDER DENYING DEFENDANT’S

12 v. MOTION TO DISMISS

13 KINGS FORTUNE PTE. LTD., Re: ECF 14, 15, 16, 19, 20, 25, 26

14 Defendant. 15

16 Plaintiffs Ilyon Dynamics Ltd. and BoomBox Games Ltd. bring three federal 17 copyright and trademark claims against Defendant Kings Fortune Pte. Ltd. Plaintiffs 18 allege Defendant copied protected visuals and trademarks from their mobile video game 19 Triple Match 3D for use in Defendant’s own mobile game Happy Match Café. Defendant 20 moves to dismiss for failure to state a claim, arguing BoomBox’s copyright is invalid, the 21 allegedly infringed game elements are not copyrightable, and Ilyon’s trademark claims fail 22 to allege a likelihood of confusion among consumers. For the reasons below, the Court 23 finds Plaintiffs adequately allege each claim and DENIES Defendant’s motion to dismiss.

## 24 I. BACKGROUND

25 The Court takes the following facts as true for the purposes of this motion. Ilyon is 26 a mobile games developer. ECF 1 (Compl.) ¶ 11. Ilyon owns valid U.S. trademarks, Nos. 27 5580711 and 5804788, in two marks registered in 2018 and 2019, respectively, that 1 BoomBox is a subsidiary of Ilyon and, in or around 2021, created the casual mobile 2 video game Triple Match 3D. Compl. ¶¶ 10, 12–13. BoomBox owns a valid U.S. 3 Copyright, No. PA 2-421-883, that has been effective since July 26, 2023, for Triple

4 Match 3D. Compl. ¶¶ 13–14, Ex. A. Ilyon permits BoomBox to use its trademarks, and

5 therefore its logo. Compl. ¶ 19. Since February 2022, Plaintiffs have “published, 6 distributed, and advertised” the copyrighted work “by making [it] available for download 7 on the Android and iOS platforms via the Google Play and App Stores.” Compl. ¶¶ 13, 15. 8 In the copyrighted work, players match three identical objects, “such as a mug of hot 9 chocolate, an Easter egg, a cup of coffee, and a mug bearing Plaintiff Ilyon’s ILYON 10 Logo” to clear the board. Compl. ¶¶ 16–17. 11 On or around January 2023, Defendant “published, distributed, and advertised, or 12 caused to be published, distributed, and advertised” via the Google Play and App Stores a 13 “three-dimensional object matching game” called Happy Match Café. Compl. ¶ 22. The 14 objects to be matched in Defendant’s work include a mug of hot chocolate, an Easter egg, 15 a cup of coffee, and a mug with Ilyon’s logo. Compl. ¶ 24. Defendant’s game also 16 includes “similar tutorials, similar items and color schemes on the same levels, similar 17 ‘Lives Bank’ design, similar leaderboard design, similar ‘Teams’ user interface, [and] 18 similar ‘Star Challenge’ pop-up” as BoomBox’s game. Compl. ¶¶ 18, 26, Ex. B. 19 Plaintiffs filed a complaint, Compl., which Defendant moves to dismiss, ECF 14, 15 20 (Mot.). Plaintiffs filed an opposition, ECF 19 (Opp’n), and Defendant replied, ECF 25 21 (Reply). All parties have consented to the jurisdiction of a magistrate judge under 28 22 U.S.C. § 636(c). ECF 8, 30.

## 23 II. LEGAL STANDARD

24 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal 25 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “To 26 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as 27 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 1 reviewing a 12(b)(6) motion, a court “must accept as true all factual allegations in the 2 complaint and draw all reasonable inferences in favor of the non-moving party.” *Retail 3 Prop. Trust v. United Bd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 4 2014). A court, however, need not accept as true “allegations that are merely conclusory, 5 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Secs. 6 Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). A claim is facially plausible when it “allows 7 the court to draw the reasonable inference that the defendant is liable for the misconduct 8 alleged.” *Id.* If a court grants a motion to dismiss, leave to amend should be granted 9 unless the pleading could not possibly be cured by the allegation of other facts. *Lopez v. 10 Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

## 11 III. DISCUSSION

12 Defendant moves to dismiss each of Plaintiffs’ three claims under the Lanham Act 13 for copyright infringement, trademark infringement, and for false designation of origin and 14 unfair competition. Mot. The parties also dispute whether Defendant effectively moves to 15 dismiss or strike Plaintiffs’ prayer for damages and/or punitive damages. See Mot. 4–5; 16 Opp’n 20; Reply 10–11. 17 A. Copyright Infringement (Claim One) 18 Plaintiff BoomBox brings a claim for copyright infringement. Compl. ¶¶ 34–39. 19 “To prove copyright infringement, a plaintiff must demonstrate (1) ownership of the 20 allegedly infringed work and (2) copying of the protected

elements of the work by the 21 defendant.” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) 22 (citation omitted). The parties dispute whether BoomBox plausibly alleges both elements. 23 Specifically, Defendant argues BoomBox cannot establish ownership of the copyrighted 24 work due to an inaccuracy on the copyright’s certificate of registration, and that the 25 allegedly infringed aspects of BoomBox’s work are not copyrightable. The Court 26 disagrees. 27 1. Ownership 1 U.S.C. § 411(a); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086 (9th Cir. 1989). “[T]he 2 certificate of a registration made before or within five years after first publication of the 3 work shall constitute prima facie evidence of the validity of the copyright and of the facts 4 stated in the certificate.” 17 U.S.C. § 410(c). However, a certificate of registration that 5 contains inaccurate information cannot support a suit for infringement if “(A) the 6 inaccurate information was included on the application for copyright registration with 7 knowledge that it was inaccurate; and (B) the inaccuracy of the information, if known, 8 would have caused the Register of Copyrights to refuse registration.” 17 U.S.C. 9 § 411(b)(1). 10 Defendant argues BoomBox fails to establish ownership of the copyrighted work 11 because the certificate of registration states the work was completed in 2015, but the 12 complaint alleges the work was created “[i]n or around 2021.” Compl. ¶ 13, Ex. A. Under 13 17 U.S.C. § 411(b)(1), this inaccuracy, alone, is insufficient to undermine the validity of 14 the copyright. First, Defendant focuses on the inaccurate date on the certificate of 15 registration, but it is unclear if the inaccurate date appeared on BoomBox’s application for 16 the copyright. See 17 U.S.C. § 411(b)(1)(A); *Yellowcake, Inc. v. Morena Music, Inc.*, 522 F. Supp. 3d 747, 779 (E.D. Cal. 2021) (ordering party to explain “what information was 18 presented as part of its registration application” (emphasis added)). Second, it is not clear 19 that BoomBox knew of any inaccuracy on the application. See *Unicolors, Inc. v. H&M 20 Hennes & Mauritz, L.P.*, 595 U.S. 178, 185, 187–88 (2022) (holding that “in this context, 21 the word ‘knowledge’ means actual, subjective awareness of both the facts and the law”). 22 The validity of BoomBox’s copyright registration is therefore an issue more 23 appropriate for determination at summary judgment when evidence may “lead a court to 24 find that an applicant was actually aware of, or willfully blind to, legally inaccurate 25 information” on a copyright application. See *H&M*, 595 U.S. at 187–88; *S.O.S.*, 886 F.2d 26 at 1086 (“The presumptive validity of the certificate may be rebutted and defeated on 27 summary judgment.”); *Yellowcake*, 522 F. Supp. 3d at 779 (“[I]t seems unlikely that the 1 judgment motion or a trial.”). The Court rejects Defendant’s invitation to “request the 2 Register of Copyrights to advise the court whether the inaccurate information, if known, 3 would have caused the Register of Copyrights to refuse registration” until facts concerning 4 BoomBox’s application and knowledge are before the Court. See Mot. at 7; 17 U.S.C. 5 § 411(b)(2). 6 The Court therefore declines to find BoomBox’s copyright invalid. The certificate 7 of registration is sufficient to allege BoomBox’s ownership of the copyright. 8 2. Copying 9 Where, as here, the complaint offers no allegations of “direct evidence of copying, a 10 plaintiff may prove this element through circumstantial evidence that (1) the defendant had 11 access to the copyrighted work prior to the creation of defendant’s work and

(2) there is 12 substantial similarity of the general ideas and expression between the copyrighted work 13 and the defendant’s work.” *Urban Outfitters*, 853 F.3d at 984–85; see *Skidmore as Trustee* 14 for *Randy Craig Wolfe Trust v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (noting 15 the access and substantial similarity prongs at this step are also referred to as “copying” 16 and “unlawful appropriation,” respectively). BoomBox adequately alleges access and 17 substantial similarity, and thus copying. 18 a. Access 19 A plaintiff can establish access to the copyrighted work using circumstantial 20 evidence that “the plaintiff’s work has been widely disseminated.” *Urban Outfitters*, 853 21 F.3d at 985 (citation omitted). The infringing and copyrighted works must also show 22 “similarities probative of copying” rather than of “coincidence, independent creation, or 23 prior common source.” *Skidmore*, 952 F.3d at 1064 (citations omitted). These similarities 24 “may be based on the overlap of unprotectable as well as protectable elements.” *Id.* 25 Defendant argues BoomBox does not sufficiently allege that Defendant copied 26 BoomBox’s work, but does not argue that it lacked access to the copyrighted work. See

27 Mot. 3–4. At most, Defendant seems to merely express dissatisfaction with the standards 1 for establishing access using circumstantial evidence. See Mot. 3–4.1 2 Regardless, BoomBox adequately alleges access under controlling law. The 3 complaint alleges Defendant “intentionally copied” the copyrighted work. Compl. ¶ 23. 4 BoomBox also alleges Defendant had access to the copyrighted work “as a result of [its] 5 widespread dissemination,” and that “striking similarities” exist between the two works’ 6 gameplay, user interfaces, and graphics. Compl. ¶¶ 23– 24. Defendants do not challenge 7 the widespread availability of the work or the similarities between the two works, 8 seemingly acknowledging the “convergence of product features” between the two games. 9 See Mot. 4. As a result, BoomBox sufficiently alleges access. 10 b. Substantial Similarity 11 The Ninth Circuit uses a two-part test to determine whether the allegedly infringing 12 work is substantially similar to the copyrighted work: the extrinsic test and the intrinsic 13 test. *Skidmore*, 952 F.3d at 1064. At the pleading stage, courts apply only the extrinsic 14 test. *Hanagami v. Epic Games, Inc.*, 85 F.4th 931, 941 (9th Cir. 2023). The extrinsic test 15 “assesses the objective similarities of the two works, focusing only on the protectable 16 elements of the plaintiff’s expression.” *Id.* (citation omitted). “Substantial similarity is 17 usually an extremely close issue of fact.” *Urban Outfitters*, 853 F.3d at 985 (citation 18 omitted); see also *Hanagami*, 85 F.4th at 945 (“[I]t is generally disfavored for copyright 19 claims to be dismissed for lack of substantial similarity at the pleading stage.”). 20 Defendant’s main argument is not that BoomBox’s allegations fail to pass the 21 extrinsic test, but that the aspects of the copyrighted work that Defendant allegedly 22 infringed are neither protected by BoomBox’s copyright nor copyrightable. Mot. 2–4. 23 “Crucially, because only substantial similarity in protectable expression may 24 constitute actionable copying that results in infringement liability, ‘it is essential to 25 distinguish between the protected and unprotected material in a plaintiff’s work.’” 26 27 1 The Court notes that Defendant’s argument and use of the term “copying” may be 1 *Skidmore*, 952 F.3d at 1064 (citation omitted). Copyright protection extends only to 2 expression,

“not the idea underlying that expression.” Hanagami, 85 F.4th at 941. As such, copyright protections do not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery” embodied in an original expressive work. 17 U.S.C. § 102(b). Defendant’s argument is unpersuasive because it relies on a misreading of the allegations in Plaintiffs’ complaint. Specifically, Defendant contends that BoomBox’s copyright infringement claim fails because BoomBox only alleges infringement of “gameplay mechanics or design concepts,” which are not subject to copyright protections, and does not allege infringement of any code from the copyrighted work. Mot. 3–4; Reply 11. But, drawing all reasonable inferences in favor of Plaintiffs, the complaint alleges that Defendant copied the visuals in the copyrighted work—namely, assets (graphic visuals of objects), color schemes, and the appearance of certain interfaces. See Compl. ¶¶ 26, 28–31 (discussing similarities in “the overall look and feel” of the games), 31 (alleging copying of “the audiovisual work” and “texts embodied” in the game), Ex. B; see Opp’n 15. BoomBox therefore does not, as Defendant argues, allege infringement because Defendant’s game is also “triple-match-themed” or involves “common elements in many puzzle games,” but rather because Defendant’s implementation of the same game procedures looks the same as in the copyrighted work. Mot. 3, Reply 7. Defendant’s arguments and cited case authority do not support the idea that the allegedly infringed visuals are not copyrightable. In *Oracle America, Inc. v. Google Inc.*, the Federal Circuit, applying Ninth Circuit precedent, observed, “It is well established that copyright protection can extend to both literal and non-literal elements of a computer program. [citation omitted]. The literal elements of a computer program are the source code and object code. . . . The non-literal components of a computer program include, among other things, the program’s sequence, structure, and organization, as well as the program’s user interface.” 750 F.3d 1339, 1355–56 (Fed. Cir. 2014) (emphasis added). Whether copyright protection depends on whether, on the particular facts of each case, the component in question qualifies as an expression of an idea, or an idea itself.” *Id.* at 1356. Defendant offers no explanation for why the allegedly infringed visuals constitute ideas themselves, rather than expressions of ideas, which in any case is likely a question of fact. Instead, Defendant argues that Oracle held only the non-literal elements of code are protected under copyright because neither “literal nor non-literal elements are separable from the underlying coding of the computer program.” Reply 5. Defendant offers no authority for this interpretation or to justify confining Oracle to the facts of that case. In fact, Defendant cites to caselaw recognizing that audiovisual and “expressive elements” of games are “copyrightable, including game labels, design of game boards, playing cards and graphical works,” even though game mechanics and rules are not. See

12 Reply 7; *DaVinci Editrice S.R.L. v. ZiKo Games, LLC*, 183 F. Supp. 3d 820, 830 (S.D.

13 Tex. 2016) (quoting *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 404

14 (D.N.J. 2012)). In *Tetris Holding*, the court rejected arguments similar to those raised by Defendant that “any and all expression related to a game rule or game function is



unprotectible.” See 863 F. Supp. 2d at 404–05 (emphasis in original). Defendant also 17 appears to concede as much by recognizing BoomBox’s copyright “protects audiovisual 18 works” and “texts embodied in the video game.” Mot. 2–4; see also Reply 5 (“Instead, 19 Plaintiffs relied on allegations that the audiovisuals in the two games are similar to make a 20 copyright infringement claim.”). 21 Defendant raises for the first time in its reply brief that the Court should use the 22 abstraction-filtration-comparison test to determine whether the allegedly infringed non- 23 literal elements of BoomBox’s game are copyrightable. See Reply 6 (citing Oracle, 750 24 F.3d at 1357 (explaining the test as endorsed by the Ninth Circuit)). Defendant does not 25 offer its own analysis using this test. See Reply 6–7. The Court therefore declines to 26 conduct the abstraction-filtration-comparison test now, particularly given that doing so 27 would require additional facts that are not yet before the Court at the motion to dismiss

1 Supp. 3d 1167, 1180 (N.D. Cal. 2020) (“As a general rule, courts do not consider  
2 arguments raised for the first time on reply.”). 3 Because BoomBox alleges infringement of protectable aspects of the copyrighted 4 work, the Court must next assess whether BoomBox “plausibly allege[s] substantial 5 similarity between the original work and the allegedly infringing work” under the extrinsic 6 test. See Hanagami, 85 F.4th at 935, 945. Defendant does not argue that its allegedly 7 infringing visuals are not substantially similar to the copyrighted work. Even so, the Court 8 concludes BoomBox sufficiently alleges substantial similarity through side-by-side visual 9 comparisons of graphics and interfaces across the two works. Compl. ¶¶ 17, 24, Ex. B; see 10 Petrie v. Elec. Game Card, Inc., 761 F.3d 959, 964 n.6 (“We generally consider exhibits 11 attached to a complaint and incorporated by reference to be part of the complaint.”). 12 BoomBox points to “specific, objective” details of both works, including, for example, 13 similar graphics of a small red mug with brown liquid and one orange and one pink 14 marshmallow. Compl. ¶ 24; see Kev & Cooper, LLC v. Furnish My Place, LLC, 20-cv- 15 01509-MCS-KES, 2021 WL 6618745, at \*3 (C.D. Cal. Nov. 28, 2021) (citation omitted). 16 The Court finds it unnecessary to consider each allegedly infringed element in 17 isolation, particularly given that Defendant does not do so. Although Defendant does 18 argue that any infringement of the graphic of a mug bearing the Ilyon logo, specifically, is 19 de minis and therefore not actionable, it raises this argument for the first time in its reply 20 brief, so the Court disregards it. See Padilla, 509 F. Supp. 3d at 1180. 21 Because BoomBox plausibly alleges ownership of a valid copyright and both 22 elements of copying, it plausibly alleges a claim for copyright infringement. 23 B. Trademark Infringement (Claim Two) and False Designation of Origin and Unfair Competition (Claim Three)  
24 25 Plaintiff Ilyon alleges Defendant used two of Ilyon’s protected trademarks in 26 commerce and without authorization by showing Ilyon’s logo on a graphic of a coffee mug 27 in Defendant’s game. Compl. ¶¶ 40–59. As a result, Ilyon brings claims for trademark 1 To state a claim for trademark infringement under § 1114 of the Lanham Act, a 2 plaintiff must establish “(1) that it has a protectible ownership interest in the mark; and (2) 3 that the defendant’s use of the mark is likely to cause consumer confusion.” Network 4 Automation, Inc. v. Advanced Sys. Concepts,

Inc., 638 F.3d 1137, 1144 (9th Cir. 2011) 5 (citation omitted); 15 U.S.C. § 1114. To state a claim for false designation of origin and 6 unfair competition under § 1125(a) of the Lanham Act, a plaintiff must allege the 7 defendant “(1) use[d] in commerce (2) any word, false designation of origin, false or 8 misleading description, or representation of fact, which (3) is likely to cause confusion or 9 misrepresents the characteristics of his or another person’s goods or services.” Freecycle 10 Network, Inc. v. Oey, 505 F.3d 898, 902 (9th Cir. 2007); Brookfield Commc’ns, Inc. v. W. 11 Coast Entm’t Corp., 174 F.3d 1036, 1046 (9th Cir. 1999); 15 U.S.C. § 1125(a). 12 For both claims, Defendant challenges only whether Ilyon adequately alleges 13 likelihood of confusion. Mot. 7–9. To determine the likelihood of confusion when 14 evaluating a claim under the Lanham Act, courts ask “whether a ‘reasonably prudent 15 consumer’ in the marketplace is likely to be confused as to the origin of the good or 16 service bearing one of the marks.” Punchbowl, Inc. v. AJ Press, LLC, 90 F.4th 1022, 1027 17 (9th Cir. 2024). In doing so, courts consider the eight Sleekcraft factors: “(1) strength of 18 the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual 19 confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to 20 be exercised by the purchaser; (7) defendant’s intent in selecting the mark; and (8) 21 likelihood of expansion of the product lines.” Id. (quoting AMF Inc. v. Sleekcraft Boats, 22 599 F.2d 341 (9th Cir. 1979), abrogated on other grounds by Mattel, Inc. v. Walking 23 Mountain Prods., 353 F.3d 792, 810 n.19 (9th Cir. 2003)). These factors are illustrative, 24 flexible, non-exhaustive, and case specific. Network Automation, 638 F.3d at 1145–46. 25 Nonetheless, the Ninth Circuit has emphasized the importance of considering the similarity 26 of the marks, the proximity or relatedness of the goods, and the marketing channels used, 27 including whether the two companies are direct competitors. See id. at 1146; Brookfield, 1 Applying the most important Sleekcraft factors here, the Court finds Ilyon 2 adequately pleads a likelihood of confusion from Defendant’s alleged use of Ilyon’s 3 trademarks. First, as to the similarity of the marks on the mugs in the two games, Ilyon 4 alleges the marks are not just similar, but identical—that Defendant uses Ilyon’s 5 trademarks. Compl. ¶¶ 43, 52, 54–55 ; see Opp’n 19; Yelp, Inc. v. ReviewVio, Inc., No. 6 23-cv-06508 WHA, 2024 WL 2883668, at \*6 (N.D. Cal. June 6, 2024). Second, as to the 7 relatedness of the goods, Ilyon alleges both games are “three-dimensional object matching 8 game[s]” and “substantially similar,” sharing both gameplay features and visuals. Compl. 9 ¶¶ 16, 22, 24, 26. Defendant acknowledges both games are among “several similar triple- 10 match-themed games on the market.” Reply 7. 11 Third, as to shared marketing channels, Ilyon alleges that “[l]ike the Copyrighted 12 Work, the Infringing Work has been published, distributed, and advertised in the United 13 States by making the Infringing Work available for download on the Android and iOS 14 platforms via the Google Play and App Stores.” Compl. ¶ 22. Ilyon also alleges that 15 revenue for its game decreased “by an amount approximately commensurate with the 16 revenue generated by” Defendant’s game once it launched. Compl. ¶ 29. Where goods are 17 direct competitors, as Ilyon effectively alleges here, courts have often required fewer 18 Sleekcraft factors and lower degrees of similarity between the

marks and products at the 19 pleading stage. See *Automated Pet Care Prods., LLC v. PurLife Brands, Inc.*, 670 F. Supp. 3d 946, 951–52 (N.D. Cal. 2023); *LegalForce Rapc Worldwide P.C. v. MH Sub I, LLC*,

21 No. 24-cv-00669 WHA, 2024 WL 3238124, at \*2 (N.D. Cal. June 27, 2024). Defendant’s 22 argument that “the fact that basically all games are available for download on platforms 23 like the Apple Store or Google Play does not help establish the existence of confusion” is 24 well-taken, especially given that Plaintiff does not provide allegations about the 25 advertising and marketing of each game as directed to consumers, as opposed to their 26 channels of distribution and download. Reply 10; see *LegalForce*, 2024 WL 3238124, at 27 \*4. “Still,” accepting the allegations as true, “that both use the same marketing channel 1 3238124, at \*4. Moreover, the Court cannot consider Defendant’s remaining arguments 2 that the games’ icons within the app stores look different, which precludes any confusion 3 between the games at the time of download, or that any use of Ilyon’s trademarks in 4 Defendant’s game is “inconspicuous.” See Reply 9–10. Both would require the Court to 5 improperly consider information outside of the complaint and involve questions of fact. 6 Finally, Ilyon alleges that Defendant’s use of its trademarks “is likely to cause 7 confusion, or to cause mistake, or to deceive consumers” into believing Defendant’s game 8 is “sold, authorized, endorsed, [] sponsored” or “in some way affiliated with” Ilyon. 9 Compl. ¶¶ 45, 54, 56; see *Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 10 966–67 (N.D. Cal. 2015) (finding similar allegations, standing alone, sufficient to plead 11 likelihood of confusion). Taken together, Ilyon’s allegations adequately plead likelihood 12 of confusion at the motion to dismiss stage, especially considering “[l]ikelihood of 13 confusion is typically a question of fact.” *Automated Pet Care*, 670 F. Supp. 3d at 950. 14 C. Prayer for Damages 15 Defendant’s motion only briefly addresses Plaintiffs’ prayer for damages. First, 16 Defendant concludes its argument that the allegedly infringed elements of Plaintiffs’ work 17 are not copyrightable by stating “the pleadings regarding damages are equally incomplete 18 and perplexing.” Mot. 4. Second, Defendant argues “[t]he alleged similarity of minor 19 game elements is too remote to serve as a valid basis for the claimed damages, which 20 should be deemed unfounded and insufficient, thereby also constituting the Plaintiff’s [sic] 21 failure to state a claim.” Mot. 5. 22 In response, Plaintiffs argue that Defendant’s motion is not the proper vehicle to 23 dismiss or strike damages. Opp’n 20. Defendant, in its reply brief, provides the standard 24 for a Court to strike matter from a pleading under Rule 12(f) and argues the Court could 25 alternatively consider “Defendant’s request to strike the claim of punitive damages” under 26 Rule 12(b)(6). Reply 10–11.

27 The Court does not consider Defendant’s two remarks concerning damages in its 1 || uses the word “strike” or references punitive damages, specifically. Nor does the motion 2 || provide any argument applying Rule 12(f)’s standard to Plaintiffs’ prayer. See Fed. R. 3 || Civ. P. 12(f). Again, the Court will not consider arguments raised for the first time in a 4 || reply brief. See *Padilla*, 509 F. Supp. 3d at 1180. Defendant’s motion to strike or dismiss 5 || Plaintiffs’ prayer for damages or

punitive damages, to the extent Defendant so moved, is 6 || DENIED.

7 || IV. CONCLUSION

8 The Court DENIES Defendant's motion to dismiss Plaintiffs' complaint. The Court 9 || also  
DENIES without prejudice both parties' requests for judicial notice, ECF 20 and ECF 10 || 24, and  
evidentiary objections, Opp'n 12 n.1 and ECF 26, because the Court did not 11 || consider those  
materials when reviewing the parties' briefs and writing this Order. 12 Defendant must file an  
answer to Plaintiffs' complaint by March 11, 2025. 13 IT IS SO ORDERED. 15 || Dated: February  
25, 2025 h-\_\_\_\_\_-

NATHANAEL M. COUSINS

Q 16 United States Magistrate Judge 17 1g 19 20 21 22 23 24 25 26 27 28