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OPINION OF THE ELEVENTH CIRCUIT
(JULY 12, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THOMAS S. ROSS,

Plaintiff-Appellant,

v.

APPLE, INC., a California Corporation,

Defendant-Appellee.

No. 17-13712

Non-Argument Calendar

D.C. Docket No. 0:16-cv-61471-KMW

Appeal from the United States District Court
for the Southern District of Florida

Before: MARTIN, JILL PRYOR and FAY,
Circuit Judges.

PER CURIAM

Thomas S. Ross, proceeding pro se, appeals following the district court's dismissal after denying leave to amend his complaint alleging copyright infringement against Apple, Inc. ("Apple"). We affirm.

I. BACKGROUND

In 2016, Ross filed a complaint against Apple alleging misappropriation of intellectual property and copyright infringement. He stated that he had invented an electronic reading device (“the Device”) and applied for a patent on it in 1992. He asserted that he had envisioned a range of uses for the Device, including reading books and news, viewing photographs and videos, making phone calls, and keeping notes. He said that he had created three technical drawings of the Device, which he contended became his intellectual property upon creation in 1992. He then stated the patent application was declared abandoned in 1995 for failure to pay the application fee. He said that he had registered his copyrights on the drawings of the Device in 2015.

Ross contended that Apple had systematically searched for abandoned and discarded ideas to patent and exploit. He stated that, in 2007, Apple began using images of products, including iPhones, iPods, and iPads, that were substantially similar to his drawings of the Device and embodied its “non-functional aesthetic look and feel.” Accordingly, Ross alleged numerous counts of copyright infringement based on the visual similarities between his drawings and Apple’s products.¹

Apple moved to dismiss the complaint, arguing that Ross had failed to state a copyright claim. It stated that, while he might hold a copyright on the expressive elements of his patent application, he could not

¹ Ross also alleged misappropriation and unjust enrichment; however, he did not include those claims in his proposed amended complaint and has not challenged their dismissal on appeal.

hold a copyright on the idea for the Device and he had not identified how Apple had copied any expressive, non-utilitarian elements. It also argued that Ross had not identified any specific infringing work but instead referred generally to various models of Apple products. Apple contended that Ross had failed to allege any evidence of direct copying and only speculated that it was possible that Apple had accessed his patent applications. He also had not identified any non-functional elements of his Device that were similar to Apple's products; the only similarities between its products and the drawings of the Device were being rectangular, handheld electronic devices with screens, hardly unique expressive elements.

In December 2016, the district court granted Apple's motion to dismiss. The court found that Ross had not alleged any facts to show when or how Apple copied elements of his original works. It stated that the presence of the patent application in the public record coupled with generalized statements about Apple's culture of stealing others' ideas was insufficient to show that the company copied or had access to the patent application. The court also found that Ross had not sufficiently alleged substantial or striking similarity because he merely asserted that the "overall look and feel" of Apple's products was the same as the Device.

In January 2017, Ross moved for leave to file an amended complaint. With his motion he submitted a proposed amended complaint and asserted that nothing like the Device existed when he designed it in 1992 and that Apple and other tech companies began releasing handheld digital notepads and tablets in 1993, but their designs were bulky and none matched the "elegant

look and feel” of the Device. Ross asserted one claim for copyright infringement, pursuant to 17 U.S.C. § 106, and stated that he had exclusive rights to the drawing of the Device and that Apple had violated those rights by making copies and derivatives of the drawing without his consent.

The district court denied Ross’s motion for leave to amend in July 2017 and dismissed the case without prejudice. First, the court stated that the idea for the Device depicted in Ross’s drawing could not be the basis for a claim that Apple infringed on his rights to the drawing. The court found that the proposed amended complaint, like the original complaint, failed to distinguish between the drawing and the Device that it depicted. Second, the court found that, even if the proposed amended complaint alleged infringement of expressive elements, Ross had failed to allege facts showing Apple copied or had a reasonable opportunity to access the drawing.

Ross appealed and designated the court’s July 2017 Order for review. On appeal, he argues that his 1992 drawing of the Device depicted artistic, ornamental elements and he showed that Apple’s line of electronics infringed on his copyright to those elements because they were strikingly similar.

II. DISCUSSION

A district court’s denial of leave to amend the complaint is reviewed for abuse of discretion. *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1239 (11th Cir. 2011). A legal determination that a proposed amendment to the complaint would be futile is reviewed de novo. *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1336 (11th Cir. 2010).

Pro se filings are held to a less stringent standard than those drafted by attorneys and are liberally construed. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). However, where a pro se litigant fails to raise a legal claim on appeal, he abandons that claim, and we will not review it. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Where an appellant makes only passing reference to an issue or raises it in a perfunctory manner, without providing supporting arguments or authority, that claim is considered abandoned and need not be addressed on appeal. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014).

Generally, a district court must sua sponte provide a pro se plaintiff at least one opportunity to amend his complaint, even where the plaintiff did not request leave to amend. *See Silva v. Bieluch*, 351 F.3d 1045, 1048-49 (11th Cir. 2003). However, a district court need not allow even a pro se plaintiff leave to amend where an amendment would be futile. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007). “Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant.” *Id.*

Two elements must be proven to establish copyright infringement: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994). As to the first prong, an “author has a valid copyright in an original work at the moment it is created—or, more specifically, fixed in any tangible medium of expression.” *See Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*,

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684 F.2d 821, 823 n.1 (11th Cir. 1982) (citing 17 U.S.C. § 102(a)). Copyright law never protects an idea itself, but only protects the expression of that idea. *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1248 (11th Cir. 1999).

The design of a useful article is “considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” 17 U.S.C. § 101. Elements of a design for a useful item may be protected under copyright law if those elements are “ornamental” or “superfluous.” *Norris Indus. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 923-24 (11th Cir. 1983). However, “functional components of useful articles, no matter how artistically designed, [are] generally . . . denied copyright protection unless they are physically separable from the useful article.” *Id.* at 924. The Supreme Court recently held that

the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two-or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work . . . if it were imagined separately from the useful article into which it is incorporated.

Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017).

To establish copying, the second prong of a copyright infringement claim, the plaintiff may show that the defendant (1) had access to the copyrighted work,

and (2) the two works are so “substantially similar” that “an average lay observer would recognize the alleged copy as having been appropriated from the original work.” *Calhoun v. Lillenas Publ’g*, 298 F.3d 1228, 1232 (11th Cir. 2002) (quotation omitted). To establish access to the copyrighted work, the plaintiff must show that the defendant had a reasonable possibility of viewing it—speculation, conjecture or “bare possibility” are not sufficient. *Herzog*, 193 F.3d at 1250.

If the plaintiff cannot show access, he may still prevail by demonstrating that the works are “strikingly similar.” *Calhoun*, 298 F.3d at 1232 n.6. Striking similarity exists where the items are so similar in appearance that the possibility of independent creation, coincidence, and prior common source are, as a practical matter, precluded. *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007).

Here, the district court did not abuse its discretion in denying Ross leave to amend his complaint. *See Covenant Christian Ministries*, 654 F.3d at 1239. As to the first prong of his infringement claim, he did not establish in his proposed amended complaint that he had a valid copyright on any element of the drawing that Apple allegedly copied. *See Beal*, 20 F.3d at 459. The idea for the Device was not subject to copyright protection; each element of the drawing that he identified was purely functional and inseparable from the idea of a handheld electronic reading device. *See Norris Indus.*, 696 F.2d at 924. None of those elements can be conceived as a work of art separate from the Device itself but are necessary parts of it. *See Star Athletica*, 137 S. Ct. at 1007.

As to the second prong, even if Ross had identified elements of his drawing that were entitled to copyright protection, his claim would still fail because he did not plead facts to establish that Apple copied those elements. *See Beal*, 20 F.3d at 459. We need not review whether Ross alleged direct evidence of copying or plausibly pled that Apple had access to his drawing because he does not offer any argument in support of those issues on appeal. *See Timson*, 518 F.3d at 874. He also did not make a showing in his proposed amended complaint of striking similarity because no Apple product was so similar in appearance to the Device or any of its elements so as to preclude independent creation, coincidence, and prior common source. *See Corwin*, 475 F.3d at 1253. There is nothing unique or expressive about a handheld electronic device being rectangular with a screen.

Accordingly, we affirm the denial of Ross's motion for leave to amend and subsequent dismissal of his case.

AFFIRMED.

ORDER OF THE DISTRICT COURT
OF SOUTHERN DISTRICT OF FLORIDA
(JULY 19, 2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS S. ROSS,

Plaintiff,

v.

APPLE, INC.,

Defendant.

Case No. 16-61471-Civ-Williams

Before: Kathleen M. WILLIAMS,
United States District Judge.

THIS MATTER is before the Court on *pro se* Plaintiff Thomas S. Ross's motion for leave to file amended complaint. (DE 36). Defendant Apple, Inc. ("Apple") has filed a response in opposition (DE 37) and Ross has filed a reply in support of the motion (DE 39). For the reasons below, Ross's motion for leave to file (DE 36) is DENIED and this case is DISMISSED WITHOUT PREJUDICE.

I. Background

This case is about Ross's claim that virtually all the products Apple has released since 2007 infringe

his rights to the Electronic Reading Device (“ERD”), which he conceived of in 1992. Ross filed his original Complaint (DE 1) on June 27, 2016. The Court granted Apple’s motion to dismiss on December 30, 2016 because Ross’s Complaint, which was a shotgun pleading, lacked facts supporting its 15 copyright infringement claims and two common law claims. (DE 35). Specifically, the Court found that the Complaint alleged no facts to support Ross’s claim that Apple directly copied or had access to his drawings and writings describing the ERD; was contrary to the “established principle that copyright protects specific expressions of ideas, not ideas themselves” (DE 35 at 10); and failed to “identify the particular expression to which [Ross] objects and explain in detail how that expression infringes on his rights.” (DE 35 at 10). Accordingly, the Court instructed that “[i]f Ross wishes to amend his complaint in a manner consistent with this Order, he must seek leave to do so.” (DE 35 at 13).

Ross has now filed a motion for leave to file an amended complaint. (DE 36). He attaches a 31-page proposed amended complaint (“PAC”) (DE 36 at 20-50) along with 31 pages of proposed exhibits (DE 36 at 51-81). The PAC alleges virtually the same facts alleged in the Complaint while expanding on descriptions of the similarities between the ERD and Apple’s products. (Compare DE 1 and DE 36 at 20-50). Specifically, the PAC alleges that in 1992, Ross “created a set of drawings and documents that preserved, on paper, what the ERD was, what it did and what it looked like.” (DE 36 at 20). One of those documents, the “491 drawing,” was the basis for a copyright registration Ross obtained with respect to that drawing, VAu 1-186-491 (the “491 copyright”). (DE 36 at 21).

The PAC mentions that Ross applied for but was unable to obtain a patent for the ERD, and as a result unsuccessfully sued the United States Patent and Trademark Office (“USPTO”). (DE 36 at 22; *see also* *Ross v. United States of America*, Case No. 07-cv-61723-JIC). As part of the patent application process, Ross submitted the 491 drawing that was the basis for the 491 copyright. Ross alleges that the 491 drawing represented a revolutionary advance in hand-held device technology and that Apple and others had tried and failed to market handheld devices that were not as distinctive. (DE 36 at 25-26). Further, the PAC alleges that “[d]uring the period of 1998 to 2007, Apple was eager to change its mission . . . to a company that created revolutionary products” and that “[a] close examination of the development of the smartphone, the tablet, and the digital music player, reveals that every single key component [of the ERD] that was ultimately used by Apple in its iPhone and other derivative products . . . reflect Ross’s 491 drawing.” (DE 36 at 27).

Additionally, the PAC claims that Apple discovered the 491 drawing in 1999, when Ross submitted documents containing the drawing as part of his failed patent application. It suggests that Apple obtained the 491 drawing because Ross’s patent application was searchable and that “in the late 1990s and early 2000s, powerful data collection and mining tools became available that made it possible for Apple to search fast and in a wide universe of data.” (DE 36 at 28). “Judging from the striking similarity of Apple’s products to the 491 drawing,” the PAC concludes that Apple copied the 491 drawing for the “first iPhone® released in 2007” and “kept on copying it on every new iPhone®,

iPod touch®, and iPad® Model ever since, right up to the last 2016 releases.” (DE 36 at 28). Ross also offers written and pictorial comparisons between the 491 drawing and various Apple products. (DE 36 at 29-40).

On these facts, the PAC brings a single cause of action under the Lanham Act, alleging that Apple “infringed [Ross’s] exclusive copyright, where Apple 1) copied Ross’s original design . . . 2) prepared derivative works based upon Ross’s copyrighted work, 3) distributed copies of Ross’s copyright protected work to the public by sale or other transfer of ownership, or by rental, lease or lending, and 4) Apple caused images of Ross’s copyrighted work to be displayed publicly, without Ross’s permission and in violation of Ross’s exclusive rights.” (DE 36 at 22).

II. Legal Standard

Although Rule 15(a) of the Federal Rules of Civil Procedure provides that courts “should freely give leave when justice so requires,” the Eleventh Circuit has recognized that courts may properly deny leave to amend a complaint where amendment would be futile. *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010) (“A proposed amendment may be denied for futility when the complaint as amended would still be properly dismissed.”) (quotation marks and citation omitted).

To avoid dismissal, a plaintiff must plead sufficient facts to state a claim that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court’s consideration is limited to the allegations in the complaint. *See GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). All factual

allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *See Speaker v. U.S. Dep't. of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010); *see also Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). Although a plaintiff need not provide "detailed factual allegations," a plaintiff's complaint must provide "more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* Rule 12(b)(6) does not allow dismissal of a complaint because the court anticipates "actual proof of those facts is improbable" but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 545).

III. Discussion

Apple contends that amendment would be futile here because Ross's PAC suffers from the same central defect as his original Complaint: it mistakenly seeks to protect, through copyright law, "non-copyrightable ideas and utilitarian designs." (DE 37 at 3). Accordingly, and because the PAC also fails to allege Apple's access to the 491 drawing or the striking similarity of the allegedly infringing products to expressive elements of the 491 drawing, Apple argues that Ross should not receive leave to amend and that this case should be dismissed. The Court agrees with Apple.

A plaintiff alleging copyright infringement must establish two elements: (1) ownership of a valid copyright and (2) copying of constituent elements of the

work that are original. *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1247-48 (11th Cir. 1999) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). Like the Complaint, the PAC successfully alleges Ross's ownership of a copyright in the 491 drawing, but fails to allege that Apple engaged in the requisite copying.

The primary reason the PAC does not allege copying is an issue the Court previously identified with respect to the Complaint: "The generalized nature of Ross's allegations is . . . in significant tension with the established principle that copyright protects specific expressions of ideas, not ideas themselves." (DE 35 at 10). In other words, Ross's idea for the ERD that the 491 drawing depicts cannot be the basis for his claim that Apple infringed his rights to the 491 drawing. (DE 35 at 10); *see also Herzog*, 193 F.3d at 1248 ("It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself."); *Baby Buddies, Inc. v. Toys R Us, Inc.*, 611 F.3d 1308, 1315 (11th Cir. 2010) (holding that "copyright protection does not extend to utilitarian aspects of a work") (citing *Mazer v. Stein*, 347 U.S. 201, 218 (1954)).

This is not a new legal principle. As the Supreme Court explained over 130 years ago in holding the defendant's use of a book-keeping method did not infringe the plaintiff's copyrighted treatise describing that method:

There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a

book. Such a book may be explanatory either of old systems, or of an entirely new system; and, considered as a book, as the work of an author, conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The mere statement of the proposition is so evident, that it requires hardly any argument to support it.

...

The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.

Baker v. Selden, 101 U.S. 99, 102 (1879). Pursuant to *Baker's* division of patent and trademark law, other courts have held, for example, that a defendant selling lamps it copied from a photograph in the plaintiff's catalogue did "not make the lamps themselves an infringement because plaintiff's product which its catalogue portrayed was neither copyrighted nor patented." *Kashins v. Lightmakers, Inc.*, 155 F. Supp. 202, 202 (S.D.N.Y. 1956); see also *Jack Adelman, Inc. v. Sonners & Gordon*, 112 F. Supp. 187, 188 (S.D.N.Y. 1934) ("It has long been recognized that the copyright owner secures no exclusive right in the article illustrated.").

The PAC, like the Complaint, fails to distinguish between the 491 drawing—the expressive elements of which are what the 491 copyright protects—and the ERD depicted in the drawing, for which the PAC does not allege that Ross holds any protectable rights. Nevertheless, the PAC continues to advance Ross’s misguided notion that the 491 copyright somehow reduced his idea for the ERD to protectable form. For instance, the PAC describes the 491 drawing as “cloth[ing] the idea [for the ERD] in form by means of a picture” and as a “birth certificate” for the ERD. (DE 36 at 22). It also states that Ross is the “sole and exclusive owner and copyright holder of original work of authorship [the 491 drawing], the expression of which is . . . the ERD.” (DE 36 at 20). In his reply in support of his motion for leave to amend, Ross reiterates his position: “It is a fact that the idea of [the] ERD was expressed in the 491 drawing, and what is also a fact, is that the 491 drawing is a copyright protected expression of the ERD.” (DE 39 at 7).

The PAC does state in conclusory fashion that the 491 drawing, “when viewed without the functional parts, has a unique look and feel . . . all of which is ornamental and non-functional.” (DE 36 at 24-25). But the specific “ornamental elements” it identifies are functional aspects of the ERD, not expressive elements of the 491 drawing: “[a] rectangular structure with four evenly rounded corners; [a] flat surface covering the front of the structure; [a] display screen placed on the front surface with a border that surrounds it; [a] proportionally spaced border area on top and bottom with a narrower border at the sides; [s]lides that accommodate positioning of functional elements so as not to detract from the overall aesthetic balance

of the design; [d]imensions within a range that were consistent with the ability to be hand-held or small enough to be portable.” (DE 36 at 26-27). The PAC goes on to explain how a litany of distinct Apple products released since 2013 all independently copy some or all of these functional elements, but never abandons the fatal premise that the 491 copyright somehow protects Ross’s rights to the ERD product depicted in the 491 drawing. (DE 36 at 29-40). The PAC’s blanket allegations of infringement do not even attempt to identify the expressive elements of the 491 drawing that Apple infringed, let alone which works infringed the 491 drawing, giving Apple no basis on which to draft a meaningful responsive pleading. (DE 35 at 10); *Mahnke v. Munchin Prod. Inc.*, No. 99CIV.4684 (LTS) (THK), 2001 WL 637378, at *6 (S.D.N.Y. June 7, 2001) (dismissing copyright infringement claims for failure to identify with particularity a specific infringing work and the time period in which the infringement occurred).

Even if the PAC successfully alleged that Apple infringed expressive elements of the 491 drawing rather than functional aspects of the ERD, it still fails to allege that Apple ever directly copied or had a reasonable opportunity to access the 491 drawing. (See DE 35 at 8-9). As the Eleventh Circuit held in *Herzog*, the plaintiff must offer more than “mere speculation or conjecture” that the defendant had access to the work it allegedly infringed. *Herzog*, 193 F.3d at 1250. The PAC alleges that Apple had an “opportunity” to discover the 491 drawing in 1999 through Ross’s submissions to the USPTO and that “powerful data collection and mining tools became available that made it possible” for a “persistent researcher”

like Apple to discover the publicly available drawing. (DE 36 at 28). But Apple's opportunity to discover the 491 drawing "the way astronomers search the universe for new things" and the alleged "similarity of Apple's products to the 491 drawing" are nothing more than speculation and conjecture and do not support Ross's claim that Apple actually copied or had a reasonable opportunity to access to the 491 drawing. *See Herzog*, 193 F.3d at 1250.

Without alleging direct copying or access, the only way the PAC can state a claim for copyright infringement is if it successfully alleges "that the original and infringing works are 'strikingly similar.'" *See Herzog*, 193 F.3d at 1248 (citing *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978)). "Striking similarity exists where the proof of similarity in appearance is so striking that the possibilities of independent creation, coincidence, and prior common source are . . . precluded." (DE 35 at 9) (quoting *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007)). The PAC fails to allege facts showing striking similarity and instead simply concludes that "Apple products are, each, strikingly similar to the 491 drawing in that each consists of" the ERD's functional design elements, such as a rectangular shape with rounded corners, a flat surface covering the front of the structure, and a display screen placed on the front surface. (DE 36 at 34). These comparisons between Apple's products and the non-copyrightable functional aspects of the ERD product do not support a finding of striking similarity. *See Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994) (affirming district court's finding that book and allegedly infringing motion picture were not even

substantially similar, let alone strikingly similar, where “some of the similarities” listed “consist[ed] of non-copyrightable elements.”). Further, a mere list of similarities is normally not sufficient to show striking similarity in any context. *See Singleton v. Dean*, 611 F. App’x 671, 672 (11th Cir. 2015) (“Lists of similarities between two works are inherently subjective and unreliable, particularly where the list contains random similarities, as many such similarities can be found in very dissimilar works.”) (citing *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994)). Thus, the PAC does not establish striking similarity, cannot establish the second element of infringement, and fails to state a claim.

IV. Conclusion

The Court dismissed Ross’s original Complaint because it failed to state a claim. As the foregoing demonstrates, Ross’s PAC suffers from the same deficiencies the Court identified in dismissing his original Complaint. Accordingly, amendment would be futile and Ross’s motion for leave to amend (DE 36) is DENIED. This case is dismissed without prejudice. All pending motions are DENIED AS MOOT. All hearings, trial settings, and deadlines are CANCELED. The Clerk is instructed to CLOSE this case.

DONE AND ORDERED in chambers in Miami, Florida,
this 18th day of July, 2017.

/s/ Kathleen M. Williams
United States District Judge

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cc:

Thomas S. Ross
PO Box 279381
Miramar, FL 33027

ORDER OF THE DISTRICT COURT
OF SOUTHERN DISTRICT OF FLORIDA
(DECEMBER 30, 2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS S. ROSS,

Plaintiff,

v.

APPLE, INC.,

Defendant.

Case No. 16-61471-Civ-Williams

Before: Kathleen M. WILLIAMS,
United States District Judge.

THIS MATTER is before the Court on Defendant Apple, Inc.'s ("Apple") corrected motion to dismiss. (DE 19). *Pro Se* Plaintiff Thomas S. Ross has filed a response to the motion (DE 23) and Apple has filed a reply (DE 27). For the reasons below, the motion (DE 19) is GRANTED and the Complaint (DE 1) is DISMISSED.

I. Background

Ross brings this 40-page Complaint—which attaches 67 pages of exhibits—against Apple for “misappropriation of intellectual property and copyright infringements.” (DE 1 at 1). The Complaint states that in

1992, Ross conceived of an Electronic Reading Device (“ERD”) (DE 1 ¶¶ 1-4, 14-16), a “reading and writing device, with a back-lit screen that contained all manner of reading material, as well as other media, stored in the device or obtained from an external storage device or other remote sources . . . all of which could be used in spite of the absence of ambient light.” (DE 1 ¶ 14). Ross contemplated a device that would “allow one to read stories, novels, news articles, as well as look at pictures, watch video presentations, or even movies, on a flat touch-screen that was back-lit.” (DE 1 ¶ 15). Ross also imagined that the ERD “could include communications functions” and that the device “would have batteries and even be equipped with solar panels.” (DE 1 ¶ 15). “The ERD Ross envisioned had various configurations ranging in size, features and functions, to accommodate various settings and uses.” (DE 1 ¶ 16).

Between May 23, 1992 and September 10, 1992, Ross “designed three technical drawings, one flow chart, and one narrative of his invention” (collectively, the “ERD Written Materials”) (DE 1 ¶ 17). On September 10, 1992, Ross applied for a patent in relation to the ERD, to which the United States Patent and Trademark Office (“USPTO”) assigned the application number #07/974,428 on November 12, 1998 and the application number #07/999,524 on December 30, 1992.¹ (DE 1 ¶ 22). However, the “USPTO, due to failure to pay the application fee,” declared Ross’s application abandoned in 1995. (DE 1 ¶ 23). Ross attempt-

¹ Ross states, without additional explanation, that the issuance of the application number #07/974,428 was “in error, as it was a duplicate.” (DE 1 ¶ 22 n.1).

ted “revival and/or substitution of his original invention, on or about 1999, but it was also declared abandoned in 2000, by the USPTO, this time, for reasons other than failure to pay fees.” (DE 1 ¶ 24). Seven years later on July 11, 2007, Ross filed a lawsuit against USPTO before another court of this District, alleging “unconstitutional depr[iv]ation of patent rights in the 1992 patent applications, and detrimental reliance on USPTO procedures and instructions, for the 1999 failed effort to revive his original patent application.” (DE 1 ¶ 25; *see also Ross v. United States of America*, Case No. 07-cv-61723-JIC). The district court dismissed Ross’s 2007 action as time-barred and the Federal Circuit Court of Appeals later affirmed this dismissal. (DE 1 ¶ 26; *see also* DE 54, *Ross v. United States of America*, Case No. 07-cv-61723-JIC). Almost seven years later, on May 14, 2015,² Ross “secured a Copyright Registration with the United States Copyright Office” for each of the ERD Written Materials that he produced in 1992: VAu 1-186-491 (the “491 Copyright”), VAu 1-186-859 (the “859 Copyright”), VAu 1-186-860 (the “860 Copyright”), VAu 1-186-862 (the “862 Copyright”), and TXu 1-919-460 (the “460 Copyright”). (DE 1 ¶ 27; DE 1 at 46-63, 65-70). He claims that these 2015 registrations “copyright protected” the ERD Written Materials “as of their respective date of creation, in 1992.” (DE 1 ¶ 21; DE 1 at 43).

Ross next alleges that Apple’s current and former executives bragged publicly about the company’s culture

² The copyright registrations which Ross attaches as exhibits are all dated May 4, 2014—a full year earlier than the date Ross alleges that he obtained registrations in the body of his Complaint. (DE 1 at 46-63).

of stealing (DE 1 ¶ 28) and that Apple therefore must have “engaged in systematic searching for other people’s ideas by rummaging through all sorts of resources, private and governmental, for ‘abandoned’ and ‘discarded’ prior art, and ideas, and, when it found something promising, ‘made it its own.” (DE 1 ¶ 29). He concludes that because of this culture of theft, Apple found and used the ERD Written Materials (DE 1 ¶ 31) and “generated infringing two-dimensional copies of [the drawing that is the subject of the 491 Copyright] in packaging, advertising, broadcast media, print media and . . . three-dimensional devices copied therefrom.” (DE 1 ¶ 35). He lists 25 products Apple released from 2007 to 2010 and 39 more products Apple released from 2011 to 2016 that allegedly misappropriate or infringe his intellectual property rights. (DE 1 ¶¶ 35-36). He also claims that Apple further infringed his rights in seeking and obtaining 17 patents and 3 trade dress registrations from the USPTO, including a patent for a “two screen device” that resembles drawing that is the subject of the 859 Copyright and two patents for devices that “provid[e] remote media content to users of iTunes® and iBook Store®” which used or copied elements of the drawing that is the subject of the 862 Copyright and the writing that is the subject of the 460 Copyright. Ross does not identify what language or features from the ERD Written Materials that Apple used copied, and does not identify in detail what Apple’s remaining patents and registrations were for or how they infringe his rights. (DE 1 ¶¶ 37-41).³ On March 10, 2015, Ross sent a

³ Ross identifies Apple’s infringing patents as US8638549B2, US7774708B2, US9084089B2, D627,790, D602,016, D618,677, D690,300, D681,632, D750,065, D750,062, D748,622, D755,784,

cease and desist letter to Apple. Apple replied on June 10, 2015 denying any infringement. (DE 1 ¶¶ 42-43; DE 1 at 72-77).

Ross's Complaint brings seventeen causes of action against Apple:

- Count 1 for “misappropriation of intellectual property as chattel”;
- Count 2 for “unjust enrichment resulting from misappropriation of intellectual property as chattel”;
- Counts 3, 4, 5, 6, and 7 for “direct infringement of copyright” in relation to the 491 Copyright, the 859 Copyright, the 860 Copyright, the 862 Copyright, and the 460 Copyright, respectively;
- Counts 8, 9, 10, 11, and 12 for “wil[l]ful[] infring[e]ment of copyrights” in relation to the 491 Copyright, the 859 Copyright, the 860 Copyright, the 862 Copyright, and the 460 Copyright, respectively;
- Counts 13, 14, 15, 16, and 17 for “unjust enrichment resulting from infringement of copyrights” in relation to the 491 Copyright, the 859 Copyright, the 860 Copyright, the 862 Copyright, and the 460 Copyright, respectively.

He demands several injunctions and over \$10 billion in damages and restitution. (DE 1 at 33-37). Apple

D752,577, D752,037, D724,078, D712,405, and utility patent 7,479,949. (DE 1 ¶ 38-40). He identifies Apple's infringing trade dress registrations “awarded to Apple for the design and configuration of the iPhone” as U.S. Registration Nos. 3,470,983, 3,457,218, and 3,475,327. (DE 1 ¶ 41).

moves to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts to state a claim that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court’s consideration is limited to the allegations in the complaint. *See GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). All factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff’s favor. *See Speaker v. U.S. Dep’t. of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010); *see also Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). Although a plaintiff need not provide “detailed factual allegations,” a plaintiff’s complaint must provide “more than labels and conclusions.” *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). “[A] formulaic recitation of the elements of a cause of action will not do.” *Id.* Rule 12(b)(6) does not allow dismissal of a complaint because the court anticipates “actual proof of those facts is improbable” but the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 545). Although *pro se* pleadings are held to a less stringent standard and construed liberally, *see Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006), they still must satisfy the basic pleading requirements of applicable law and the Federal Rules

of Civil Procedure. *See Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

III. Discussion

Apple argues that the Complaint does not allege sufficient facts to support Ross's Copyright Act infringement claims, Counts 3 through 17. It also contends that Ross's remaining claims—Counts 1 and 2—are similarly deficient or are, in the alternative, preempted by his copyright claims. The Court agrees with these arguments and dismisses the Complaint.

Ross brings Counts 3 through 17 pursuant to the Copyright Act, 17 U.S.C. § 101, *et seq.*, alleging for each of the five ERD Written Materials a separate count for “direct infringement,” “willful infringement,” and “unjust enrichment.” Construing these claims liberally as causes of actions for copyright infringement as to each of the ERD Written Materials, the Complaint fails to state a claim.⁴ “To state a claim for copyright infringement, ‘two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’”

⁴ Ross's Complaint is “the proverbial shotgun pleading.” *See Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006) (“Shotgun pleadings are those that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense.”). For instance, Ross arbitrarily separates his copyright infringement causes of action into “direct infringement,” “willful infringement,” and “unjust enrichment” counts, and then indiscriminately incorporates every antecedent allegation into each subsequent claim for relief. Courts disfavor such pleadings because they “wreak havoc on the judicial system” and “divert already stretched judicial resources into disputes that are not structurally prepared to use those resources efficiently.” *Wagner*, 464 F.3d at 1279 (citations omitted).

Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1247-48 (11th Cir. 1999) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)); see also *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994); *BellSouth Advertising & Publishing Corp. v. Donnelley Info. Publishing, Inc.*, 999 F.2d 1436, 1440 (11th Cir. 1993) (en banc). Ross's Complaint satisfies the first element of an infringement claim by alleging that he holds five copyright registrations in relation to each ERD Written Material. It does not, however, allege any facts showing when and how Apple copied constituent elements of Ross's original works.

As alleged, the Complaint relies almost exclusively on public statements by current and former Apple executives: in 1996, former CEO Steve Jobs said that Apple engaged in "shameless stealing"; "Sr. VP of Worldwide Marketing" Phil Schiller was "once quoted" as saying that Apple had a culture of taking others' ideas and "making them their own"; and "Vice President of Apple" Bud Tribble was "quoted as saying" that idea theft was "part of Apple's DNA." (DE 1 ¶ 28). From these statements, the Complaint posits two allegations that do not necessarily follow: that Apple actively "engaged in systematic searching for other people's ideas by rummaging through all sorts of resources" and that "Apple chose to adopt a culture of dumpster diving as an R&D strategy." (DE 1 ¶¶ 29-30). These factually unsupported conclusions are the basis, without any additional facts, for the assumption that Apple actually came into possession of Ross's ERD Written Materials. (DE 1 ¶ 31). And from this inference, the Complaint reaches the blanket conclusion that 64 Apple products released since 2007, and all the

accompanying marketing materials, copied constituent elements of Ross's original works. The Complaint also concludes that Apple copied the ERD Written Materials in applying for and obtaining 17 patents and 3 trade dress registrations, but provides insufficient details about the subject matter of these patents or registrations and how precisely they infringed on Ross's rights.⁵

Critically, Ross's Complaint alleges no facts permitting this broad swath of deductions. Contrary to Ross's argument (DE 23 at 13-14), the presence of the ERD Written Materials in the public record and Apple executives' generalized statements in no way show that Apple directly copied or even had access to the ERD Written Materials. Ross responds with a citation to the Sixth Circuit case *Jones v. Blige*, 558 F.3d 485 (6th Cir. 2009). However, the discussion in *Jones* actually illustrates the central flaw with Ross's copyright infringement claims: "access may not be inferred through mere speculation or conjecture. A mere assertion of access, unsupported by probative evidence is inadequate. Nor is the bare possibility of access sufficient." *Jones*, 558 F.3d at 491 (quotation marks and citations omitted). The Eleventh Circuit has similarly held that "mere speculation or conjecture" is not enough and that the defendant must have had a "reasonable opportunity" to establish access. *Herzog*, 193 F.3d at 1250. In *Herzog*, the plaintiff alleged that a defendant infringed her rights to a film screenplay, arguing that the defendant had "access" because he

⁵ Because Ross provides no details about which aspects of Apple's patent or registration applications infringed his rights, the Court declines to address Apple's arguments that the *Noerr-Pennington* doctrine immunizes its conduct from suit.

visited Miami while a physical copy of the screenplay was in the city. *Id.* In rejecting this argument, the Eleventh Circuit found, “notwithstanding the bare physical possibility” that the defendant had viewed the screenplay during his Miami visit, that “[r]easonable opportunity does not encompass any bare possibility in the sense that anything is possible.” *Id.* (citing Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.02[A] at 13-19). Ross’s assertion of “access” also falls short because he does not allege that Apple or its agents had a reasonable opportunity to access the ERD Written Materials. Accordingly, the Court cannot reasonably infer that Apple directly copied or had access to the ERD Written Materials.

Even without alleging direct copying or access, Ross may “still prevail on his copyright infringement claim by demonstrating that the original and infringing works are ‘strikingly similar.’” *See Herzog*, 193 F.3d at 1248 (citing *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978)). “Striking similarity exists where the proof of similarity in appearance is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.” *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007) (quotation marks and citation omitted). But the Complaint does not present with particularity a description of any infringing work on which to base a “striking similarity” analysis. Instead, it presents a single side-by-side pictorial comparison of the drawing that is the subject of the 491 Copyright and an “Apple . . . 2007” device (DE 1 ¶¶ 48), accompanied by the conclusory allegation that “[a] casual observer with ordinary perception will conclude that the iPhone® has the same

overall concept and feel as Ross's ERD design of 1992." (DE 1 ¶ 49). To the extent the Complaint presents any specific factual allegations about "striking similarity," it is that Apple once represented in an unrelated litigation that the "iPhone . . . has a distinctive shape and appearance—a flat rectangular shape with rounded corners" (DE 1 ¶ 49). But it remains unclear how this allegation relates to any specific work that Apple produced which infringes any work for which Ross has a valid copyright. As Ross appears to confirm in his briefing, he relies on the overbroad claim that 64 different Apple products⁶ and the accompanying "packaging, advertising, broadcast media, print media," all infringed his rights because they have the same overall look and feel as the ERD. (DE 23 at 14).

This lack of specificity leaves the Complaint bereft of detail sufficient to afford Apple the opportunity to draft a meaningful responsive pleading. *See Mahnke v. Munchkin Prod., Inc.*, No. 99CIV.4684(LTS)(THK), 2001 WL 637378, at *6 (S.D.N.Y. June 7, 2001) (dismissing copyright infringement claims for failure to identify with particularity a specific infringing work and the time period in which the infringement occurred). The generalized nature of Ross's allegations

⁶ Ross's list of 64 Apple products includes products released as recently as 2016. Apple argues that Ross's claims are nevertheless time-barred pursuant to the Copyright Act's three-year statute of limitations. 17 U.S.C. § 507(b). However, because of the deficiency of Ross's conclusory allegations, the Court is unable to determine whether Ross has alleged continuing infringement sufficient to overcome the Copyright Act's statute of limitations. Accordingly, the Court declines to reach the statute of limitations argument as this juncture.

is also in significant tension with the established principle that copyright protects specific expressions of ideas, not ideas themselves. “It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself.” *Herzog*, 193 F.3d at 1248 (quoting *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976)); *see also* 17 U.S.C. § 102(b); *Baker v. Selden*, 101 U.S. 99 (1880). In order to state a copyright infringement claim, Ross must identify the particular expression to which he objects and explain in detail how that expression infringes on his rights. Counts 3 through 17 fail to do so and the Court dismisses these claims.

Ross’s misappropriation and unjust enrichment claims, Counts 1 and 2, also do not survive Apple’s motion to dismiss. Although Ross—a Florida plaintiff filing suit in Florida—does not explicitly characterize either as such, the Court interprets both Counts 1 and 2 as common law causes of action brought pursuant to Florida law.⁷ Additionally, while Ross brings a claim for “misappropriation of intellectual property as chat[t]el,” the factual allegations supporting his claim most accurately reflect a claim for the misappropriation of the ERD idea. (DE 1 ¶ 45). “To establish a claim for misappropriation of an idea, a plaintiff must show that: (1) the idea was novel; (2) disclo-

⁷ Since *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), federal courts have applied state substantive law and moved away from general federal common law. In his response to Apple’s motion to dismiss, Ross denies that his misappropriation claim had any basis in Florida statute. (DE 23 at 19). Eventually though, he argues that his Complaint satisfied the elements of a Florida common law cause of action. (DE 23 at 19-20).

sure of the idea was made in confidence; and (3) the idea was adopted and used by the defendant.” *Dyer v. Wal-Mart Stores, Inc.*, 535 F. App’x 839, 842 (11th Cir. 2013) (citation omitted). Even assuming that the ERD was a novel idea—a tenuous proposition given the dearth of supporting facts in the Complaint—Ross does not claim that he disclosed the ERD idea to Apple in confidence. Accordingly, Ross’s misappropriation claim, Count 1, fails.

To state a claim for “unjust enrichment . . . under Florida law,” a plaintiff “must allege (1) the plaintiff conferred a benefit on the defendant, (2) the defendant had knowledge of the benefit, (3) the defendant accepted or retained the benefit conferred, and (4) the circumstances indicate that it would be inequitable for the defendant to retain the benefit without paying fair value for it.” *Merle Wood & Assocs. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1237 (11th Cir. 2013). As discussed above, the Complaint contains no facts connecting Apple to the ERD or to the ERD Written Materials in a manner that would support any of these elements. Consequently, the Court dismisses the unjust enrichment claim as well.

Independently, the Copyright Act preempts Ross’s common law causes of action. “Section 301 of the Act preempts all state causes of action based on a right found in the Act or an equivalent to such a right.” *Foley v. Luster*, 249 F.3d 1281, 1285 (11th Cir. 2001). However, “[t]he Act ‘preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.’” *Id.* (quoting *Computer Assoc. Intl, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir.1992)). Thus, a state law claim can survive

preemption by adding an “extra element” which changes the nature of the claim, making it “qualitatively different from a copyright infringement claim.” *Id.* (emphasis in original).

The Copyright Act preempts Ross’s unjust enrichment claim, Count 2, because it is identical to his copyright infringement claims. *See, e.g., Levine v. Landy*, 832 F. Supp. 2d 176, 187 (N.D.N.Y. 2011) (quoting *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 462 (S.D.N.Y. 1999)); *Microstrategy, Inc. v. Netsolve, Inc.*, 368 F. Supp. 2d 533 (E.D. Va. 2005); *see also* William F. Patry, Patry on Copyright § 18:51 (“The mere phrasing of this claim reveals its preemptive nature: typical unjust enrichment claims are preempted because they are mere attempts to state a claim for damages for unauthorized copying or other activity encompassed by Section 106.”). The Copyright Act also preempts Ross’s misappropriation claim, even though Florida courts recognize that in some circumstances misappropriation claims may be exempt from such preemption. *See, e.g., Garrido v. Burger King Corp.*, 558 So.2d 79, 83 (Fla. 3d Dist. Ct. App. 1990). For example, in *Garrido*, the court found that the Copyright Act did not preempt a misappropriation claim premised on the plaintiff’s confidential disclosure of a novel idea to the defendant with the expectation of payment. *Id.* But, as discussed, Ross does not allege confidential disclosure or some other element that would distinguish his misappropriation claim from a standard copyright infringement claim. Ross objects that his misappropriation claim relates to the “taking of his personal property” and to “rights other than those protected under the Copyright laws,” (DE 23 at 18), but this objection lacks substance: as alleged, Ross’s misappro-

priation and copyright claims rely on the exact same allegations and theories of harm and are “qualitatively identical.” Consequently, the Copyright Act preempts Ross’s misappropriation claim as well. *Foley*, 249 F.3d at 1285.

IV. Conclusion

For the foregoing reasons, Apple’s corrected motion to dismiss (DE 19) is GRANTED and the Complaint (DE 1) is DISMISSED. If Ross wishes to amend his complaint in a manner consistent with this Order, he must seek leave to do so by January 21, 2017. Ross’s motion for leave to file proposed case management plan and order (DE 28) is DENIED with leave to renew after responses to any amended pleading. Apple’s motion to stay discovery (DE 30) is DENIED AS MOOT.

DONE AND ORDERED in chambers in Miami, Florida, this 30th day of December, 2016.

/s/ Kathleen M. Williams
United States District Judge

cc:

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SUPREME COURT
PRESS