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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

5 BUNGIE, INC.,

6 Plaintiff,

7 v.

8 AIMJUNKIES.COM; PHOENIX  
9 DIGITAL GROUP LLC; DAVID  
10 SCHAEFER; JORDAN GREEN;  
11 JEFFREY CONWAY; and JAMES  
MAY,

Defendants.

C21-0811 TSZ

MINUTE ORDER

12 The following Minute Order is made by direction of the Court, the Honorable  
13 Thomas S. Zilly, United States District Judge:

14 (1) The motion for summary judgment, docket no. 156, brought by plaintiff  
Bungie, Inc. (“Bungie”) is DENIED in part and DEFERRED in part, as follows:

15 (a) The motion is DENIED as it relates to Bungie’s copyright  
16 infringement claim against defendants Aimjunkies.com (“Aimjunkies”), Phoenix  
17 Digital Group LLC (“Phoenix Digital”), David Schaefer, Jordan Green, Jeffrey  
18 Conway, and James May (collectively, the “Defendants”). To prevail on a direct  
19 copyright infringement claim, Bungie must (i) “show ownership of the allegedly  
20 infringed material,” and (ii) “demonstrate that the alleged infringers violate at least  
21 one exclusive right granted to copyright holders under 17 U.S.C. § 106.” *Disney  
22 Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). As an initial  
23 matter, the parties do not dispute that Bungie owns multiple copyrights in the  
computer software code and audiovisual material for its Destiny 2 videogame.  
*See Exs. 2–5 to Rava Decl.* (docket no. 160). With respect to the second element  
of its claim, Bungie alleges that Defendants infringed its copyrights in Destiny 2  
by copying certain portions of the videogame’s software code to create the cheat  
software at issue in this action. *See Am. Compl.* at ¶ 105 (docket no. 34). A  
Bungie Engineering Lead, Edward Kaiser, Ph.D., contends that the Aimjunkies  
cheat software could not function unless Defendants copied certain portions of

1 Destiny 2’s copyrighted software code. *See, e.g.*, Kaiser Decl. at ¶¶ 15, 18, 21  
2 (docket no. 158). Dr. Kaiser’s opinion is based on his extensive knowledge of  
3 Destiny 2’s software code. *See id.* at ¶ 7. Dr. Kaiser concedes, however, that  
4 Bungie has never examined the software code for the Aimjunkies cheat software.  
5 *See, e.g.*, Kaiser Dep. (Oct. 4, 2022) at 111:20–24, Ex. A to Mann Decl. (docket  
6 no. 179) (Q: “Has anyone at Bungie seen any such code in the cheat software that  
7 is identical to any such code in the Destiny 2 game?” A: “No one has looked at  
8 the cheat software code, as far as I know.”); *see also id.* at 112:24–113:2  
9 (Q: You’ve already told me nobody at Bungie has actually looked at the cheat  
10 software, correct? A: Nobody has looked at the source code, that’s correct.”).  
11 Notably, Dr. Kaiser is not certain that Defendants copied portions of Destiny 2’s  
12 copyrighted software code to create the Aimjunkies cheat software, and he  
13 explained during his deposition that, based on the available evidence, his opinion  
14 is merely “the most likely conclusion.” *See* Kaiser Dep. (Oct. 5, 2022) at 259:22–  
15 260:9, Ex. B to Mann Decl. (docket no. 179-1); *see also* Kaiser Dep. at 112:3–4  
16 (docket no. 179) (“Based on the evidence we have, it is extremely likely this is  
17 how [the Aimjunkies cheat software] works.”). Defendants deny that they copied  
18 any portions of Destiny 2’s software code, and contend that a non-party developer  
19 created the Aimjunkies cheat software. *See, e.g.*, Schaefer Dep. (Oct. 28, 2022) at  
20 119:11–13, Ex. 10 to Rava Decl. (docket no. 164). The Court concludes that  
21 factual disputes preclude summary judgment on Bungie’s direct copyright  
22 infringement claim.<sup>1</sup>

23 (b) The motion is DENIED as it relates to Bungie’s trademark  
infringement claim against Aimjunkies, Phoenix Digital, Schaefer, Green, and  
Conway (collectively, the “Phoenix Digital Defendants”). To prevail on a claim  
for trademark infringement, the plaintiff must show (i) “that it has a protectible  
ownership interest in the mark,” and (ii) “that [a] defendant’s use of the mark is  
likely to cause consumer confusion.” *Air Aromatics, LLC v. Victoria’s Secret  
Stores Brand Mgmt., Inc.*, 744 F.3d 595, 599 (9th Cir. 2014) (citation omitted);  
*see also Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129  
(9th Cir. 1998) (explaining that the “test for likelihood of confusion is whether a  
‘reasonably prudent consumer’ in the marketplace is likely to be confused as to the  
origin of the good or service bearing one of the marks”). Whether a defendant’s  
use of a mark results in a likelihood of confusion “is inherently factual.” *Daimler  
AG v. A-Z Wheels LLC*, 334 F. Supp. 3d 1087, 1096 (S.D. Cal. 2018) (citing  
*Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d  
1025, 1039 (9th Cir. 2010)). In this case, the parties do not dispute that Bungie  
registered the DESTINY mark with the United States Patent and Trademark  
Office, *see* Ex. 1 to Rava Decl. (docket no. 160), or that the Phoenix Digital

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<sup>1</sup> The same factual disputes preclude summary judgment as to Bungie’s copyright infringement  
claims premised on contributory and vicarious theories of liability. *See* Am. Compl. at ¶¶ 108,  
110 (docket no. 34).

1 Defendants displayed the DESTINY mark on the Aimjunkies website in  
2 connection with their sale of the subject cheat software, *see* Ex. 20 to Rava Decl.  
3 (docket no. 160). With respect to the second element of its trademark  
4 infringement claim, Bungie argues that no genuine issue of material fact exists  
5 regarding likelihood of confusion because the mark the Phoenix Digital  
6 Defendants used is allegedly “counterfeit.” *See Coach, Inc. v. Pegasus Theater*  
7 *Shops*, No. C12-1631, 2013 WL 5406220, at \*3 (W.D. Wash. Sep. 25, 2013)  
8 (“Numerous courts, including those in the Ninth Circuit, have held if an allegedly  
9 infringing mark qualifies as a ‘counterfeit’ mark, then no genuine issue of fact  
10 exists regarding likelihood of confusion and, assuming all other elements are  
11 satisfied, the plaintiff is entitled to summary judgment on the defendant’s liability  
12 for trademark infringement.”). Whether a mark is counterfeit is a question of fact,  
13 *id.*, and requires proof that the infringing mark is “(1) a non-genuine mark  
14 identical to the registered, genuine mark of another, where (2) the genuine mark  
15 was registered for use on the same goods to which the infringer applied the mark,”  
16 *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 946 (9th Cir.  
17 2011). Although the parties do not dispute that the Phoenix Digital Defendants  
18 used the DESTINY mark in connection with their sale of unauthorized cheat  
19 software for the Destiny 2 videogame, factual issues regarding the likelihood of  
20 confusion preclude summary judgment on Bungie’s trademark infringement claim.  
21 Notably, all Destiny 2 players must accept Bungie’s Limited Software License  
22 Agreement (“LSLA”) before playing the videogame. *See* Am. Compl. at ¶ 47. By  
23 accepting the LSLA, all players agree not to “use any unauthorized software  
programs to gain advantage in any online or multiplayer game modes.” Ex. 6 to  
Am. Compl. (docket no. 34-1 at 20). Unlike the case Bungie cites, involving a  
handbag, coin purse, and wallet bearing counterfeit reproductions of an accessory  
designer’s registered marks, *see Coach*, 2013 WL 5406220, at \*4, in this matter,  
the mark at issue was used on a product that was different in kind from the one  
associated with the genuine mark and that Bungie’s online and multiplayer  
customers had contractually agreed not to use.

(c) The motion is DEFERRED as it relates to Bungie’s request for  
dismissal of Phoenix Digital’s and May’s counterclaims.

(2) The Clerk is directed to send a copy of this Minute Order to all counsel of  
record.

Dated this 7th day of September, 2023.

Ravi Subramanian  
Clerk

s/Laurie Cuaresma  
Deputy Clerk