

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEIJING MEISHE NETWORK
TECHNOLOGY CO., LTD.,

Plaintiff,

v.

TIKTOK INC., et al.,

Defendants.

Case No. [23-cv-06012-SI](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
RENEWED MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED
COMPLAINT WITH LEAVE TO
AMEND**

Re: Dkt. No. 409

Before the Court is defendants’ renewed motion to dismiss plaintiff’s third amended complaint. Dkt. No. 409. Plaintiff opposes. Dkt. No. 414. The Court heard oral argument on this motion on April 5, 2024. For the reasons set forth below, the Court GRANTS IN PART defendants’ motion to dismiss with leave to amend and DENIES IN PART defendants’ motion. Plaintiff shall file its fourth amended complaint no later than **May 14, 2024**.

BACKGROUND¹

Plaintiff Beijing Meishe Network Technology Co., Ltd. (“Meishe”) filed its third amended complaint on April 20, 2023 in the Western District of Texas. Dkt. No. 235 (“TAC”). The complaint alleges seven causes of action against defendants TikTok Inc., TikTok Pte. Ltd., ByteDance Ltd., and ByteDance Inc. (collectively, “defendants”). Four causes of action remain: copyright infringement, misappropriation of trade secrets under the Defend Trade Secrets Act (“DTSA”), misappropriation of trade secrets under the Texas Uniform Trade Secrets Act

¹ For purposes of this motion to dismiss, the Court treats as true the factual allegations as stated in plaintiff’s complaint and draws all reasonable inferences in plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

United States District Court
Northern District of California

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1 (“TUTSA”), and Lanham Act false advertising.²

2 Meishe is a private company established in 2014 under the laws of the People’s Republic of
3 China with a principal place of business in Beijing. *Id.* ¶¶ 3, 10. It is the owner of a copyright in
4 Meishe software (the “Meishe app”), “a computer program that enables users to complete
5 professional-level video and audio editing processing on the mobile side through simple operations,
6 making high quality video and audio clips.” *Id.* ¶ 53. Meishe “developed the Meishe app and further
7 developed the Meishe SDK and other software that provide users with video and audio editing
8 functions.” *Id.* ¶ 54.

9 TikTok Inc. is a California corporation with a “regular and established place of business in
10 Austin, Texas.” *Id.* ¶ 11. TikTok Pte. Ltd. is a Singapore corporation with its principal place of
11 business in Singapore. *Id.* ¶ 12. ByteDance Ltd. is a Cayman Islands corporation with offices in
12 the United States and elsewhere. *Id.* ¶¶ 13, 16. ByteDance Inc. is a Delaware corporation. *Id.* ¶14.
13 ByteDance Ltd. is the parent and owner of TikTok Inc., TikTok Pte. Ltd., and ByteDance Inc. *Id.*
14 ¶ 15. ByteDance Ltd. developed the TikTok app around May 2017 and operates and controls the
15 app in the United States through its subsidiaries and affiliates, including the other defendants in this
16 case. *Id.* ¶¶ 17, 55.³ The TikTok app “allows users to create short videos, which often feature music
17 in the background and can be sped up, slowed down, or edited with a filter.” *Id.* ¶ 55. Defendants
18 operate ByteDance Ltd.’s TikTok business in the United States as a joint enterprise. *Id.* ¶ 21.

19 Meishe brings this action for copyright infringement of its registered and unregistered
20 software, all of which is “subject to copyright protection.” *Id.* ¶ 1. Meishe registered portions of its
21 software with the Copyright Protection Centre of China (“CPCC”), with Copyright Registration
22 Nos. 2015SR227927, 2018SR037747, 2018SR037751, 2018SR038324, 2018SR218096,

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25 ² On February 26, 2024, the Court granted the parties’ joint stipulation dismissing the three
26 state law tort claims, unfair competition by misappropriation under Texas law, unjust enrichment
27 under Texas law, and aiding and abetting a breach of fiduciary duty under Texas law (Counts IV,
28 VI and VII), with prejudice. Dkt. No. 405.

27 ³ The TikTok app is the international version of a Chinese application called Douyin. *Id.*
28 ¶ 5.

1 2018SR218287, 2019SR0899912, and 2020SR0291426.⁴ *Id.* ¶¶ 1, 54. Meishe lists completion
 2 dates for the CPCC-registered copyrighted software. *See id.* ¶ 71. Meishe is also the “owner of
 3 copyrights in its source code and software, which have been fixed in tangible mediums before the
 4 filing date of this lawsuit regardless of registration, including but not limited to [a long list of
 5 software].” *Id.* ¶¶ 1, 54. Meishe “has the exclusive rights to reproduce, display, and distribute the
 6 copyrighted software,” including the registered copyrights listed above, “as well as its copyrighted
 7 source code and software regardless of registration.” *Id.* ¶ 72. Prior to filing the TAC, Meishe
 8 provided defendants with copies of the China copyright registrations and associated material and
 9 copies of other copyrighted works, and defendants’ experts “have spent several days reviewing that
 10 code.” *Id.* ¶ 1.

11 In March 2021, Meishe discovered that a “series of apps belonging to ByteDance, Ltd. had
 12 infringed Meishe’s copyright since at least 2018.” *Id.* ¶ 56. “Meishe personnel conducted an
 13 analysis between code of Meishe app and that of TikTok app [which] shows that the code used to
 14 implement video and audio editing functions in the two apps is highly similar, proving that
 15 Defendants copied Meishe’s copyright work.” *Id.*⁵

16 Defendants allegedly had access to Meishe’s source code through Meishe’s former
 17 employee, Mr. Jing Xie, who is currently working for defendants. *Id.* ¶ 58. Mr. Xie began his
 18 employment with a Meishe affiliate in 2007 and began his employment with Meishe in March 2015.
 19 *Id.* ¶ 60. As a C++ R&D engineer, Mr. Xie “directly participated in the development of Meishe’s
 20 software and the subsequent upgrades of various versions until his resignation on or around June 8,
 21 2015.” *Id.* Mr. Xie also “had access to and control over Meishe’s trade secrets, proprietary software
 22 code, and/or other confidential information” during his employment with Meishe and its affiliate.
 23 *Id.* ¶ 59. When Mr. Xie resigned on June 8, 2015, he “knowingly took copyrighted and trade secret
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25 ⁴ Meishe’s TAC lists eighteen copyright registrations that defendants allegedly copied. *See*
 26 TAC ¶¶ 54, 71. In a September 29, 2023 letter to defendants, Meishe withdrew the following ten
 27 registered copyrights from the case: 2019SR0899799, 2019SR0899814, 2019SR0901166,
 2019SR0901175, 2019SR0901188, 2019SR0901198, 2019SR0901209, 2020SR0572704,
 2020SR0572713, 2020SR0575533. Dkt. No. 409 at 2 n.2; Dkt. No. 414 at 7 n.4.

28 ⁵ Meishe conducted a comparison between “TikTok v8.5.0” object code, obtained from
 public channels, and “Meishe v2.5.4” object code. *Id.* ¶¶ 56-57.

1 Meishe code that was incorporated into subsequent software including software controlled and
2 distributed by ByteDance and its subsidiaries.” *Id.* ¶ 97, *see also* ¶ 63. Mr. Xie began his
3 employment at ByteDance as “multimedia audio and video director” around October 2017. *Id.*
4 ¶¶ 65, 98.

5 Around March 2021, Meishe audited Mr. Xie’s activities and “discovered that on or around
6 June 3, 2015, he downloaded [and copied] Meishe’s source code and/or other confidential
7 information.” *Id.* ¶¶ 94, 101. Each time Mr. Xie modified Meishe software in the “SVN system,”
8 he first had to check “the corresponding subtree of the repository to get a so-called ‘working copy.’”
9 *Id.* ¶ 61. The “SVN system recorded all relevant information in its logs,” and “[t]hese logs prove
10 that Mr. Jing Xie accessed Meishe’s source code and downloaded the source code.” *Id.* Around
11 May 14, 2021, Meishe “notarized the SVN log and checked the committed log of Jing Xie on SVN.”
12 *Id.* ¶ 101.

13 In addition to the allegations already detailed, Meishe alleges the following with respect to
14 its copyright infringement claim. “On information and belief, the TikTok app consists of Plaintiff’s
15 proprietary information, trade secrets, and/or reproduced software code” registered with the CPCC,
16 “as well as its copyrighted source code and software regardless of registration.” *Id.* ¶ 73. More
17 specifically, defendants’ software, including TikTok, “includes portions of code that are copyrighted
18 and owned by TikTok” and subjected to copyright registrations and portions of plaintiff’s software
19 code that were never made public. *Id.* ¶ 74. Defendants infringed on plaintiff’s copyright in its
20 software by reproducing Meishe’s copyrighted works, preparing derivative works based on
21 Meishe’s copyrighted works, and distributing the copyrighted works. *Id.* ¶ 75. Defendants also
22 profited by inducing users to download and use the TikTok app. *Id.* Additionally, “[u]pon
23 information and belief, on or around April 2020, Defendants took steps to obfuscate its software
24 code in order to conceal its infringement.” *Id.* ¶ 76.

25 Defendants were aware of the incorporation of Meishe’s copyrighted source code into at
26 least the TikTok app and were aware of the use of Meishe’s copyrighted source code by users of at
27 least the TikTok app. *Id.* ¶ 77. Defendants also knowingly provided false copyright management
28 information and/or distributed or imported false copyright information for distribution, and/or

1 “intentionally removed or altered Meishe’s copyright management information from the software []
2 copied and distributed for importation.” *Id.* ¶¶ 77, 160. Meishe previously filed lawsuits against
3 ByteDance and other defendants in China, including an April 30, 2021 lawsuit, where, according to
4 a National Law Review article, Meishe alleged that “version 3.0 and later of Douyin released on
5 November 1, 2018, copied video and audio editing and processing software code from Meishe
6 Technology’s copyrighted beauty photo software. Further, six other apps by Bytedance have traces
7 of code plagiarism, many of which have the same function names and even misspelled code copied
8 from Meishe source code.” *Id.* ¶ 79.

9 Plaintiff further alleges the following with respect to its misappropriation of trade secrets
10 claims under the DTSA and TUTSA. “Plaintiff is the owner of trade secrets that include, but are
11 not limited to proprietary, independently-developed software code that allows for video and audio
12 editing, video and audio processing, video and audio release, personalized audio and video
13 recommendations, webcasting, and other confidential business information.” *Id.* ¶¶ 87, 119.
14 “Plaintiff’s trade secrets are not generally known or readily ascertainable nor could they be properly
15 acquired or duplicated by others,” and plaintiff’s copyrighted source code has never been made
16 publicly available. *Id.* ¶¶ 88-89, 120-121. Meishe “has taken reasonable and extensive efforts to
17 maintain the secrecy of its source code through the use of employment agreements and other
18 measures. All of Plaintiff’s trade secrets are stored on secure servers and are password-protected.”
19 *Id.* ¶¶ 89, 121. Defendants wrongfully acquired Meishe’s proprietary software code from Mr. Xie
20 and knew or had reason to know that the software code was improperly acquired. *Id.* ¶¶ 102, 131.
21 Defendants also obtained other trade secret information from Mr. Xie, including “information about
22 which portions of Meishe’s software were most likely to be popular if incorporated into video
23 editing features in smart phone applications.” *Id.* ¶ 103. Defendants induce users to download and
24 use its products and services that include Meishe’s software code. *Id.* ¶¶ 105, 133.

25 Meishe further alleges the following with respect to the Lanham Act claim. TikTok “informs
26 users that it owns and has proper rights to the code it uses in its applications.” *Id.* ¶¶ 158-159.
27 Meishe provides examples of this in the TAC. *See id.* Through the described conduct, defendants
28 misrepresented to their consumers “the nature, characteristics of their product and commercial

1 activities.” *Id.* ¶ 161. Defendants “have willfully continued to represent the software as their own,
2 not credited Meishe with being the owners or author of portions of Defendants’ products or code,
3 and not stopped distributing the infringing and misappropriated code.” *Id.* Defendants’
4 misrepresentations were intended to, and did influence purchasing decisions by its consumers. *Id.*
5 ¶¶ 163-164.

7 LEGAL STANDARD

8 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if
9 it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
10 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”
11 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires
12 the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted
13 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require “heightened
14 fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the
15 speculative level.” *Twombly*, 550 U.S. at 555, 570.

16 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
17 court must assume that the plaintiff’s allegations are true and must draw all reasonable inferences
18 in the plaintiff’s favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However,
19 the court is not required to accept as true “allegations that are merely conclusory, unwarranted
20 deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055
21 (9th Cir. 2008). A pleading must contain allegations that have “factual content that allows the court
22 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556
23 U.S. at 678. Dismissal under Rule 12(b)(6) is proper when the complaint “lacks a cognizable legal
24 theory” or “fails to allege sufficient facts to support a cognizable legal theory.” *Somers v. Apple,*
25 *Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

26 If the Court dismisses the complaint, it must then decide whether to grant leave to amend.
27 The Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no
28 request to amend the pleading was made, unless it determines that the pleading could not possibly

1 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
 2 (citations and internal quotation marks omitted).

3 4 DISCUSSION

5 I. Copyright Infringement Claim (Count I)

6 The Copyright Act grants copyright owners the exclusive rights, among others, to copy,
 7 prepare derivative works based on, and distribute copyrighted works. *See* 17 U.S.C. § 106(1)-(3).
 8 To establish copyright infringement, a plaintiff must prove “(1) ownership of a valid copyright, and
 9 (2) copying of constituent elements of the work that are original.” *Feist Publ'ns, Inc. v. Rural Tel.*
 10 *Serv. Co.*, 499 U.S. 340, 361 (1991). Where there is no direct evidence of copying, “copying may
 11 be established by showing that the infringer had access to plaintiff’s copyrighted work and that the
 12 works at issue are substantially similar in their protected elements.” *Cavalier v. Random House,*
 13 *Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). Copying may also be established by pleading facts plausibly
 14 showing “that the two works in question are strikingly similar.” *Malibu Textiles, Inc. v. Label Lane*
 15 *International, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019). “Where two works are strikingly similar,
 16 access may be inferred.” *Id.* (citing *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 987-88
 17 (9th Cir. 2017)).

18 19 A. Whether Meishe’s Unregistered Copyright Infringement Allegations Are 20 Sufficiently Specific

21 Defendants first argue that Meishe’s copyright infringement claim for “copyrighted code
 22 and software regardless of registration” should be dismissed because Meishe’s allegations are
 23 “conclusory and vague and provide no notice to Defendants on what Meishe has allegedly
 24 infringed.” Dkt. No. 409 at 4. Meishe contends that it has identified its copyrighted works with
 25 sufficient particularity. Dkt. No. 414 at 3.

26 In the complaint, Meishe includes a long list of included but not limited to “source code and
 27 software, which have been fixed in tangible mediums before the filing date of this regardless of
 28 registration.” TAC ¶ 1. Plaintiff explains how the infringement allegedly occurred: defendants

1 incorporated portions of Meishe’s copyrighted source code into their software, specifically the
 2 TikTok app. However, the TAC fails to allege sufficient facts that show copying of the unregistered
 3 works because it is not clear what source code or software listed in the first paragraph of the
 4 complaint was allegedly infringed. *See Media.net Adver. FZ-LLC v. Netseer, Inc.*, 156 F. Supp. 3d
 5 1052, 1068 (N.D. Cal. 2016) (dismissing a copyright infringement claim with leave to amend where
 6 the plaintiff failed to identify which sections of HTML code the defendant allegedly copied). The
 7 Court thus dismisses Meishe’s copyright infringement claims as to the unregistered works with leave
 8 to amend to add more specificity about what source code or software was allegedly copied.⁶ Meishe
 9 need not specify each and every instance of infringement; alleging representative acts of
 10 infringement is sufficient. *See Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co. Ltd.*, 149 F.
 11 Supp. 3d 1167, 1175 (N.D. Cal. 2016).

12 The Court directs Meishe to be specific with its language. The terms “source code” and
 13 “software” are used interchangeably in the TAC. However, Meishe’s counsel clarified at the April
 14 5, 2024 hearing that “software” refers to products that are the result of compiling “source code,”
 15 such as an app or SDK (software developer kit). Hence the two terms refer to different things and
 16 should not be used interchangeably.

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18 **B. Whether Meishe Has Adequately Pled Access**

19 Defendants next argue that Meishe has not properly pled access to both the unregistered
 20 copyrighted source code as well as material registered in 2017 – 2019. Dkt. No. 409 at 5.
 21 Defendants argue that Meishe has failed to assert, and factually cannot assert, defendants’ “access”
 22 to these works. *Id.*

23 A plaintiff must separately plead access only when alleging substantial similarity, not when
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25 ⁶ Defendants contend that Meishe should not be granted leave to amend because it has
 26 already amended its complaint three times and despite “over a year of discovery, including multiple
 27 chances to review Defendants’ source code, Meishe has not cured the deficiencies in the Second
 28 Amended Complaint.” Dkt. No. 409 at 15. However, the court in Texas never issued an order on
 defendants’ motion to dismiss. Furthermore, the Court does not believe “that the pleading could not
 possibly be cured by the allegation of other facts,” which means leave to amend should be granted
 under Ninth Circuit law. *See Lopez*, 203 F.3d at 1130.

1 alleging striking similarity. *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423-24, n.2 (9th Cir. 1987);
 2 *Astor-White v. Strong*, 733 Fed. Appx 407, 407 (9th Cir. 2018). This is because access may be
 3 inferred when two works are strikingly similar. *Malibu Textiles*, 922 F.3d at 952. Here, Meishe
 4 alleges that its “personnel conducted an analysis between code of Meishe app and that of TikTok
 5 app [which] shows that the code used to implement video and audio editing functions in the two
 6 apps is highly similar.” TAC ¶ 56. The Court does not find this allegation alone sufficient to allege
 7 striking similarity.⁷

8 “Access is proven when the plaintiff shows that the defendant had an opportunity to view or
 9 to copy the plaintiff’s work.” *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*,
 10 562 F.2d 1157, 1172 (9th Cir. 1977). “This is often described as providing a ‘reasonable
 11 opportunity’ or ‘reasonable possibility’ of viewing the plaintiff’s work.” *Three Boys Music Corp.*
 12 *v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (citing 4 Melville B. Nimmer & David Nimmer,
 13 *Nimmer on Copyright*, § 13.02[A], at 13–19 (1999)). Reasonable access is “more than a bare
 14 possibility.” *Three Boys Music Corp.*, 212 F.3d at 482 (citations and internal quotation marks
 15 omitted).

16 Meishe alleges that Mr. Xie had access to its proprietary software code and explains how it
 17 learned that Mr. Xie downloaded and copied the source code. *See* TAC ¶¶ 59, 61, 94, 101. Given
 18 these allegations, coupled with the allegation about the similarity of the code in Meishe and
 19 defendants’ products, it is reasonable to infer that defendants had access to Meishe’s source code

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 22 ⁷ Plaintiff asserts that the complaint “alleges striking similarity, including even at least one
 23 copied typographical error.” Dkt. No. 414 at 6. However, the allegation about the typographical
 24 error is not specific to this case. Meishe alleges that it has “previously filed multiple lawsuits against
 25 ByteDance alleging that ByteDance incorporated Meishe’s protected code in its products. These
 26 cases include, for example, a lawsuit filed on or about April 30, 2021 by Meishe against ByteDance
 27 and other Defendants. As noted in the *National Law Review* on May 1, 2021, for example, ‘Meishe
 28 alleges that version 3.0 and later of Douyin released on November 1, 2018, copied video and audio
 editing and processing software code from Meishe Technology’s copyrighted beauty photo
 software. Further, six other apps by Bytedance have traces of code plagiarism, many of which have
 the same function names and even misspelled code copied from Meishe source code.’” TAC ¶ 79.
 If Meishe had alleged that there are copied typographical errors involving the source code at issue
 in this case, the Court may be able to reasonably infer striking similarity. However, the Court cannot
 attribute this pleading quoted in an online article from a separate case to this case.

United States District Court
Northern District of California

1 that was created before Mr. Xie departed Meishe through Mr. Xie.⁸

2 Regarding the seven works registered with the CPCC post-June 8, 2015 when Mr. Xie left
3 Meishe, defendants contend that “it is impossible for Meishe to demonstrate access” because its
4 “only allegation of ‘access to Meishe’s source code’ is through” Mr. Xie. Dkt. No. 409 at 6; *see*
5 TAC ¶ 71 for registration completion dates. Consequently, according to defendants, any copyright
6 registrations for works created after June 8, 2015 “cannot support a copyright claim, because Mr.
7 Xie could not have had access to those works.” *Id.* Meishe responds that this is a defense that
8 assumes the works registered in 2017-2019 did not exist until after Mr. Xie departed Meishe. Dkt.
9 No. 414 at 6. Meishe contends that it did not plead that Mr. Xie was only able to access Meishe’s
10 copyright protected materials after they were registered; rather, it alleged that Mr. Xie “had access
11 to and control over Meishe’s trade secrets, proprietary software code, and/or confidential
12 information” from 2007 until his departure on June 8, 2015. *Id.* (quoting TAC ¶ 93).

13 In their reply, defendants contend that a “bare assertion that these software versions existed
14 in their entirety two to four years before Meishe represented to the copyright office in China that
15 they were ‘completed’ is not plausible without further facts.” Dkt. No. 416 at 3. The Court agrees
16 with defendants that Meishe has pled insufficient facts to plausibly allege access to copyrighted
17 works completed after Mr. Xie’s departure from Meishe. The motion to dismiss as to the copyright
18 infringement claims is thus granted as to the copyrighted works created after Mr. Xie’s departure
19 from Meishe, with leave to amend to plead additional facts regarding access.

20
21 **C. Whether Meishe Has Adequately Pled Substantial Similarity**

22 Defendants next argue that Meishe’s substantial similarity allegations do not provide fair
23 notice of how defendants’ works are substantially similar to Meishe’s copyrighted works. Dkt. No.
24 404 at 9. Defendants contend that Meishe’s “conclusory statements” do not identify what

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27 ⁸ Defendants argue that the TAC is silent on whether Mr. Xie had access to the “copyrighted
28 code and software regardless of registration.” Dkt. No. 409 at 6. While the complaint could be
more specific about what Mr. Xie had access to, the Court interprets the allegation that Mr. Xie had
access to Meishe’s proprietary software code to encompass the software and code listed in ¶ 1 of
the complaint. *See* TAC ¶¶ 1, 59.

1 copyrighted works are substantially similar to what parts of the TikTok app. *Id.* Regarding
 2 Meishe’s allegation about its comparison of source code, defendants assert that Meishe does not
 3 plead that the code in Meishe v2.5.4 is part of its copyright infringement claim, and that there is no
 4 identification of what parts of the Meishe code is similar to the TikTok v8.5 code. *Id.* at 10.⁹
 5 Defendants further contend that Meishe has failed to show the two works are “highly similar,” even
 6 though Meishe has conducted “an extensive review of Defendants’ source code.” *Id.* Defendants
 7 also contend that Meishe never identifies “what protectable aspect(s) of its asserted copyrights
 8 Defendants have allegedly copied” and that Meishe has “only alleged that its code and the TikTok
 9 app are similar in the functional sense.” *Id.* Lastly, defendants contend that Meishe’s “descriptions
 10 of its code reflect nothing more than processes, concepts and ideas—not a detailed showing of an
 11 original work.” *Id.* Meishe responds that its allegations of similarity are sufficient under the notice
 12 pleading standard of Rule 8. *See* Dkt. No. 414 at 11-12.

13 Meishe alleges that defendants’ software, “including but not limited to TikTok includes
 14 portions of [Meishe’s] code that are copyrighted and owned by plaintiff and never made public.”
 15 TAC ¶ 74. Meishe alleges that it has exclusive rights to its copyrighted software listed in the first
 16 paragraph of the TAC. *See id.* ¶ 72. Meishe further alleges:

17 In March 2021, Meishe discovered that a series of apps belonging to ByteDance, Ltd.
 18 had infringed Meishe’s copyright since at least 2018. These apps include, but are
 19 not limited to, TikTok, Douyin, Jianying, and CapCut. Meishe personnel conducted
 20 an analysis between code of Meishe app and that of TikTok app [that] shows that the
 code used to implement video and audio editing functions in the two apps is highly
 similar, proving that Defendants copied Meishe’s copyright work.

21 Though Meishe cannot obtain the source code of TikTok app, Meishe was able to
 22 conduct a comparison between “TikTok v8.5.0” object code and “Meishe v2.5.4”
 23 object code. On the Android platform, object code of an app is in the form of Android
 application package (“APK”) file. The release version refers to the APK file.
 24 “TikTok v8.5.0” APK file can be obtained from public channels. In March 2021,
 Meishe downloaded “TikTok v8.5.0” APK file from a third-party android app store.

25 *Id.* ¶¶ 56-57. Meishe also alleges that on or around April 2020 defendants “took steps to obfuscate
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27
 28 ⁹ Meishe v.2.5.4 is listed in ¶ 1 of the TAC. However, as discussed in subsection A, it is
 unclear if Meishe alleges that all of the source code and software listed in ¶ 1 of the TAC was
 allegedly infringed.

United States District Court
Northern District of California

1 its software code in order to conceal its infringement.” *Id.* ¶ 76.

2 “Substantial similarity in the literal elements of a computer program can be demonstrated
3 either by showing verbatim (or near verbatim) copying of the source code or that the ‘fundamental
4 essence’ of the code was duplicated.” *Lilith Games (Shanghai) Co. v. uCool, Inc.*, No. 15-CV-
5 01267-SC, 2015 U.S. Dist. LEXIS 128619, at *6 (N.D. Cal. Sep. 23, 2015) (citing 4-13 Nimmer on
6 Copyright § 13.03). “Similarly, copying will be found where source code is translated from one
7 programming language to another or where insignificant changes are made, such as replacing certain
8 terms, reordering lines of code, or adding or removing comments.” *Id.*

9 As discussed in part A, it is unclear what software or source code was allegedly infringed.
10 However, once the complaint is amended to address this deficiency, the Court finds plaintiff’s
11 allegations of substantial similarity sufficient at this pleadings stage.

12
13 **D. Whether Meishe Has Adequately Pled a Violation of 17 U.S.C. § 1202**

14 Defendants contend that Meishe alleges a violation of 17 U.S.C. § 1202, the Digital
15 Millennium Copyright Act (“DMCA”), “through conclusory allegations that Defendants provided
16 copyright management information (‘CMI’) that is ‘false’ or ‘removed or altered Meishe’s’ CMI.”
17 Dkt. No. 404 (quoting TAC ¶ 77). Defendants contend that Meishe provides no identification of
18 the CMI allegedly “removed or altered” and that its “bare and conclusory allegations” are
19 insufficient. *Id.* Meishe responds that its allegations in ¶ 77 of the TAC are sufficient to allege a
20 violation of the DMCA. Dkt. No. 414 at 7-8.

21 Section 1202(a) of the DMCA provides that: “No person shall knowingly and with the intent
22 to induce, enable, facilitate, or conceal infringement--(1) provide copyright management
23 information that is false, or (2) distribute or import for distribution copyright management
24 information that is false.” 17 U.S.C. § 1202(a). Section 1202(b) provides that:

25 No person shall, without the authority of the copyright owner or the law—(1)
26 intentionally remove or alter any copyright management information; (2) distribute
27 or import for distribution any copyright management information knowing that the
28 copyright management information has been removed or altered without authority of
the copyright owner or the law, or (3) distribute, import for distribution, or publicly
perform works, copies of works, or phonorecords, knowing that copyright

United States District Court
Northern District of California

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management information has been removed or altered without authority of the copyright owner or the law.

17 U.S.C. § 1202(b). Additionally, the defendant must do so “knowing or having reasonable grounds to know that [the removal or alteration of CMI] will induce, enable, facilitate, or conceal an infringement.” *Id.*¹⁰

Meishe alleges the following with respect to CMI:

On information and belief, Defendants knowingly with the intent to induce, enable facilitate, or conceal infringement, provided copyright management information that is false and/or distributed or imported for distribution copyright information that is false, and/or intentionally removed or altered Meishe’s copyright management information from the software it copied and distributed for importation copyright management information knowing that the copyright management information was removed or altered without Meishe’s consent or having reasonable grounds to know that its actions would induce, enable facilitate, or conceal infringement.

TAC ¶¶ 77, 160. These allegations simply reiterate the legal standard and are insufficient. *See Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). Without alleging some facts identifying what source code or software had CMI removed or to describe what the removed or altered CMI was, without identifying what CMI was distributed and how it was distributed, and without pleading facts in support of the required mental state, Meishe has failed to state a claim under the DMCA. *See Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1175 (N.D. Cal. 2019). The motion to dismiss is thus granted as to the DMCA claim. Meishe is granted leave to amend to allege additional facts because the Court concludes that amendment would not necessarily be futile. *See Lopez*, 203 F.3d at 1127.¹¹

¹⁰ CMI is defined, in relevant part, as: “[A]ny of the following information conveyed in connection with copies . . . of a work . . . or displays of a work, including in digital form . . . : (1) The title and other information identifying the work, including the information set forth on a notice of copyright. (2) The name of, and other identifying information about, the author of a work. (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright. . .” 17 U.S.C. § 1202(c).

¹¹ Defendants argue for the first time in their reply that Meishe’s allegations under § 1202(b) have additional defects, namely that actionable conduct under subsections (b)(1) and (b)(2) requires that CMI be removed or altered from an original work, not a copy of that work, and that subsection (b)(3) prohibits removing or altering CMI from a copy of an original work only if the copy and the original works are identical. Dkt. No. 416 at 5. The Court does not reach these arguments at this time because they were raised for the first time in the reply brief. *See, e.g., Nathanson v. Polycom*,

United States District Court
Northern District of California

1 **E. Whether Meishe Sufficiently Pled Contributory and Induced Infringement**

2 Defendants similarly contend that Meishe’s allegations of contributory and induced
3 copyright infringement are “bare legal conclusions without any facts sufficient to identify the
4 necessary acts by Defendants or the allegedly infringing conduct of TikTok app users.” Dkt. No.
5 409 at 7.

6 To state a claim for contributory copyright infringement, a plaintiff must allege that a
7 defendant “(1) has knowledge of a third party's infringing activity, and (2) induces, causes, or
8 materially contributes to the infringing conduct.” *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d
9 788, 795 (9th Cir.2007) (citations and internal quotation marks omitted). The first prong “requires
10 more than a generalized knowledge by the [defendants] of the possibility of infringement.”
11 *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013).

12 With respect to contributory copyright infringement, Meishe alleges:

13 In violation of 17 U.S.C. § 501, Defendants have and will continue to violate and
14 both directly and indirectly infringe Plaintiff’s copyright in the software registered
15 by reproducing, displaying, and profiting from inducing users to download and use
16 the TikTok app. Defendants were aware of the incorporation of Meishe’s copyrighted
17 source code into, at least, the TikTok app. Defendants were further aware of the use
18 of Meishe’s copyrighted source code by the users of, at least, the TikTok app.
19 Defendants were aware of the infringing activity and induced, caused, or materially
20 contributed to the infringing conduct.

21 TAC ¶ 77. Meishe further alleges that “the TikTok app began infringing Plaintiff’s copyright in the
22 software by reproducing, displaying, and profiting from inducing users to download and use the
23 TikTok app.” *Id.* ¶ 75. Meishe also alleges that defendants “actively and continuously induce users
24 to download and use the TikTok app and provide instructions online for downloading and using the
25 TikTok app.” *Id.* ¶ 28.

26 The Court finds these allegations sufficient at the pleading stage. Meishe identifies the
27 alleged third-party infringers – TikTop app users. Meishe also alleges that defendants induce users
28 to download the TikTok app and provide instructions online for doing so. Taking as true the

Inc., 2015 WL 12964727, *1 (N.D. Cal. Apr. 16, 2015) (noting that numerous courts, including the Ninth Circuit, have concluded that it is inappropriate to consider arguments raised for the first time in a reply brief).

United States District Court
Northern District of California

1 allegations in Meishe’s complaint, it is reasonable to infer that defendants had knowledge of the
2 alleged acts of infringement of third-party TikTok app users. The motion to dismiss the contributory
3 and induced copyright infringement claim is therefore denied.

4
5 **F. Whether Meishe Sufficiently Pled that its Copyrighted Works Are Exempt from**
6 **the Registration Requirement**

7 Meishe alleges that all its registered and unregistered copyrighted works are “foreign works
8 as defined by the [U.S.] Copyright Act and copyright registration is not necessary to bring a claim
9 of copyright infringement under 17 U.S.C. § 101 and 17 U.S.C. § 104(b)(2).” TAC ¶¶ 2, 70.¹²
10 Defendants contend that it is undisputed that Meishe’s copyright claims all rely on foreign works,
11 but the TAC “does not provide or otherwise allege facts sufficient to show its asserted Chinese
12 copyrights do not need to be registered in the U.S. Copyright Office before it can bring suit.” Dkt.
13 No. 404 at 8. Meishe responds that it has plausibly alleged its ownership of the foreign works and
14 that the works are exempt from the registration requirements, and more is not required. Dkt. No.
15 414 at 10. Specifically, Meishe asserts that it is not required to plead that the copyrighted works
16 were first published solely in China because plaintiffs need not anticipate and attempt to plead
17 around potential defenses. *Id.*

18 The international implications of copyright law are principally governed by the Berne
19 Convention. *See Unicolors*, 52 F.4th at 1078–79. As a party to the Convention, the United States
20 agrees to extend the same protections to foreign copyright holders as to domestic copyright holders.
21 *Id.* at 1078. Foreign works are exempt from registering with the U.S. Copyright Office under 17
22 U.S.C. § 411(a), which is otherwise a prerequisite for standing. *See Fourth Est. Pub. Benefit Corp.*
23 *v. Wall-Street.com, LLC*, 139 S. Ct. 881, 885 (2019) (“Congress removed foreign works from
24 § 411(a)’s dominion in order to comply with the Berne Convention[’s] . . . bar on copyright

25
26
27 ¹² 17 U.S.C. § 104(b)(2) specifies that published works are subject to protection under this
28 title if “the work is first published in the United States or in a foreign nation that, on the date of first
publication, is a treaty party.”

United States District Court
Northern District of California

1 formalities for such works.”). Whether a work is a United States or foreign work is “inextricably
2 intertwined with publication” because the registration requirement only applies to “United States
3 work[s].” *teamLab Inc. v. Museum of Dream Space, LLC*, 650 F. Supp. 3d 934, 945 (C.D. Cal.
4 2023); 17 U.S.C. § 411; *see also* 17 U.S.C. § 104.

5 The Copyright Act defines a “United States work” differently depending on whether the
6 alleged work is a published work or an unpublished work. *See* 17 U.S.C. § 101. A published
7 “United States work” is defined as a work that is first published –

- 8 (A) in the United States;
- 9 (B) simultaneously in the United States and another treaty party . . .
- 10 (C) simultaneously in the United States and a foreign nation that is not a treaty party; or
- 11 (D) in a foreign nation that is not a treaty party, and all of the authors of the work are

12 nationals, domiciliaries, or habitual residents of, or in the case of audiovisual work legal entities
13 with headquarters in, the United States.” *Id.* An unpublished “United States work” is defined as a
14 work in which “all the authors of the work are nationals, domiciliaries, or habitual residents of the
15 United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities
16 with headquarters in the United States.” *Id.* A plaintiff must “adequately allege that its works are
17 not United States works in order to be exempt” from the registration requirement. *UAB “Planner*
18 *5D” v. Facebook, Inc.*, No. 19-cv-03132-WHO, 2019 WL 6219223, at *6 (N.D. Cal. Nov. 21, 2019).
19 The “omission of allegations indicating that the work is a United States work” is insufficient. *Id.*
20 (quoting *DigitAlb, Sh.a v. Setplex, LLC*, 284 F. Supp. 3d 547, 555 (S.D.N.Y. 2018) (emphasis in
21 original)).

22 Here, neither party disputes that Meishe’s copyrighted works are “foreign works.” The
23 statute does not define “foreign works.” Defendants contend that Meishe has not adequately alleged
24 that its copyrighted works are not “United States works” subject to the § 411 publication
25 requirement. The Court agrees. Accordingly, the copyright infringement claims are also dismissed
26 with leave to amend to allege facts indicating that the works are not “United States works” within
27 the meaning of 17 U.S.C. § 101.

28

United States District Court
Northern District of California

1 **II. Misappropriation of Trade Secret Claims (Counts II and III)**

2 Defendants argue that Meishe’s DTSA and TUTSA trade secret claims should be dismissed
3 because Meishe has failed to give sufficient notice to defendants of what its trade secrets are. Dkt.
4 No. 409 at 12. Defendants also contend that Meishe’s DTSA claim should be dismissed because
5 the DTSA does not apply extraterritorially, and all the alleged improper acts pled occurred in China.
6 *Id.*

7
8 **A. Whether Meishe Provided Sufficient Notice of Its Alleged Trade Secrets**

9 “To succeed on a claim for misappropriation of trade secrets under the DTSA, a plaintiff
10 must prove: (1) that the plaintiff possessed a trade secret, (2) that the defendant misappropriated the
11 trade secret; and (3) that the misappropriation caused or threatened damage to the plaintiff.”
12 *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657-58 (9th Cir. 2020). Plaintiffs
13 “must identify the trade secrets and carry the burden of showing they exist.” *MAI Sys. Corp. v. Peak*
14 *Computer, Inc.*, 991 F.2d 511, 522 (9th Cir. 1993). To allege the existence of a trade secret, the
15 plaintiff must demonstrate that (1) the information is not “readily ascertainable through proper
16 means,” (2) it “derives independent economic value,” and (3) the plaintiff took “reasonable
17 measures to keep such information secret.” *See* 18 U.S.C. § 1839(3). “A plaintiff need not spell out
18 the details of the trade secret.” *Autodesk, Inc. v. ZWCAD Software Co.*, 2015 WL 2265479, *5
19 (N.D. Cal. May 13, 2015). However, “[t]he plaintiff should describe the subject matter of the trade
20 secret with sufficient particularity to separate it from matters of general knowledge in the trade or
21 of special knowledge of those persons . . . skilled in the trade.” *Imax Corp. v. Cinema Techs., Inc.*,
22 152 F.3d 1161, 1164 (9th Cir. 1998) (internal quotation marks and citations and emphasis omitted).

23 Meishe alleges that it is the “owner of trade secrets that include, but are not limited to
24 proprietary, independently-developed software code that allows for video and audio editing, video
25 and audio processing, video and audio release, personalized audio and video recommendations,
26 webcasting, and other confidential business information.” TAC ¶¶ 87, 119. Meishe further alleges
27 that defendants “obtained other trade secret information from Meishe” provided by Mr. Xie
28 “including but not limited [to] information about which portions of Meishe’s software were most

United States District Court
Northern District of California

1 likely to be popular if incorporated into video editing features in smart phone applications.” *Id.*
 2 ¶ 103. Meishe alleges that its source code is valuable and that defendants wrongfully acquired
 3 plaintiff’s “commercial trade secrets in the form of software code.” *See id.* ¶¶ 122-23, 131. Meishe
 4 alleges that its “copyrighted source code has never been made publicly available” and that its
 5 “copyrighted software was only published, distributed, sold, or offer[ed] for sale as compiled object
 6 code.” *Id.* ¶ 89. Meishe further alleges that it has taken “reasonable and extensive efforts to maintain
 7 the secrecy of its source code through the use of employment agreements” and that its “trade secrets
 8 are stored on secure servers and are password-protected.” *Id.* Defendants contend that Meishe has
 9 failed to allege its trade secrets with sufficient particularity, arguing that Meishe’s allegations are
 10 “devoid of specificity” and provide no clarify “as to what the alleged secret information is and how
 11 it differs from information that is publicly known.” Dkt. No. 409 at 12-13.

12 To the extent the trade secrets are software code (which the Court understands to be the same
 13 thing as source code) designed for the specified purposes, the Court finds these allegations
 14 sufficiently particular. *See Cisco Sys., Inc. v. Chung*, 462 F. Supp. 3d 1024, 1050, 1052 (N.D. Cal.
 15 2020) (finding that the plaintiff described the trade secret information with sufficient particularity
 16 where the plaintiff alleged categories of misappropriated information, including source code, and
 17 referenced the categories’ subject matter); *cf Creative Writer Software, LLC v. Schechter*, No. 23-
 18 cv-2471-MWF, 2023 WL 6786796, *3 (C.D. Cal. Sept. 5, 2023) (concluding the plaintiff failed to
 19 identify the purported trade secret with sufficient particularity because it was unclear whether the
 20 plaintiff’s “proprietary information” referred to the “underlying source code, the functionality of the
 21 code, the design of the platform, the exact combination of various features . . . all of the above, or
 22 something else entirely”). However, the Court finds it unclear whether the trade secrets include
 23 anything other than the software (ie. source) code designed for the specified purposes, specifically
 24 what “other confidential business information” refers to and what “other trade secret information”
 25 Mr. Xie allegedly provided to defendants. *See TAC* ¶¶ 87, 103. Thus, the Court dismisses the
 26 trademark infringement claims in part with leave to amend to clarify whether the alleged trade
 27 secrets include anything other than “proprietary, independently-developed software code that allows
 28 for video and audio editing, video and audio processing, video and audio release, personalized audio

United States District Court
Northern District of California

1 and video recommendations, webcasting” and “information about which portions of Meishe’s
2 software were most likely to be popular if incorporated into video editing features in smart phone
3 applications.” *See id.*

4
5 **B. Whether the DTSA Claim Should Be Dismissed Because of the Location of the**
6 **Actionable Conduct**

7 Defendants next argue that “the federal trade secret DTSA claim should also be dismissed
8 because the TAC does not allege that any actionable facts occurred in the United States.” Dkt. No.
9 409 at 14. Meishe responds that it “did not allege that the DTSA offenses—improper acquisition,
10 unauthorized disclosure, and unauthorized use of the trade secrets . . .—occurred outside of the
11 United States” and that defendants’ argument is an affirmative defense. Dkt. No. 414 at 16.

12 The DTSA “applies to conduct occurring outside the United States if —(1) the offender is a
13 natural person who is a citizen or permanent resident alien of the United States, or an organization
14 organized under the laws of the United States or a State or political subdivision thereof; or (2) an
15 act in furtherance of the offense was committed in the United States.” 18 U.S.C. § 1837.

16 Meishe pled that defendant TikTok Inc. is a California corporation and that defendant
17 ByteDance Inc. is a Delaware corporation. TAC ¶¶ 11, 14. However, with respect to the defendants
18 who are not “organized under the laws of the United States,” Meishe does not include allegations
19 indicating that “acts in furtherance of the offense” were committed in the United States. Meishe
20 only alleges with respect to jurisdiction that “Defendants have committed, aided, induced, and/or
21 participated in the commission of the tortious act of copyright infringement and other acts alleged
22 in other claims in this Complaint that led to foreseeable harm to Meishe in [the Western District of
23 Texas].” *Id.* ¶ 44. The DTSA claim as to the non-US incorporated defendants is thus dismissed
24 with leave to amend to indicate what “acts in furtherance of the offense” were committed in the
25 United States.

26
27 **III. Lanham Act Claim (Count V)**

28 “Section 43(a) of the Lanham Act . . . forbids the use of false designations of origin and false

1 descriptions or representations in the advertising and sale of goods and services.” *Smith v. Montoro*,
 2 648 F.2d 602, 603 (9th Cir. 1981). To establish a false designation of origin claim under
 3 § 43(a)(1)(A), the plaintiff must show that the defendant “(1) use[s] in commerce (2) any word, false
 4 designation of origin, false or misleading description, or representation of fact, which (3) is likely
 5 to cause confusion or misrepresents the characteristics of his or another person's goods or services.”
 6 *See Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 902 (9th Cir. 2007). A claim for false advertising
 7 under § 43(a)(1)(B) requires a plaintiff to show that “(1) a statement made in a commercial
 8 advertisement or promotion is false or misleading; (2) that it actually deceives or has the tendency
 9 to deceive a substantial segment of its audience; (3) that it’s likely to influence purchasing decisions
 10 and (4) that the plaintiff has been or is likely to be injured by the false advertisement.” *See*
 11 *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 828 (9th Cir. 2011).¹³ Meishe alleges Lanham
 12 Act violations under both subsections of the statute.

13 Defendants contend that Meishe does not allege that defendants rebranded Meishe’s
 14 software as their own, but rather that they misrepresented the intellectual property of the TikTok
 15 app as their own. Dkt. No. 404 at 10. Defendants argue that Meishe’s “false advertising” allegation
 16 “simply states that by copying the code, Defendants have *ipso facto* claimed ownership over the

17
 18 ¹³ Section (a)(1) of the statute, at issue here, specifically provides that:

19 Any person who, on or in connection with any goods or services . . . uses in
 20 commerce . . . any false designation of origin, false or misleading description of fact,
 or false or misleading representation of fact, which—

21 (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,
 22 connection, or association of such person with another person, or as to the origin,
 sponsorship, or approval of his or her goods, services, or commercial activities by
 23 another person, or

24 (B) in commercial advertising or promotion, misrepresents the nature,
 25 characteristics, qualities, or geographic origin of his or her or another person’s goods,
 services, or commercial activities,

26 shall be liable in a civil action by any person who believes that he or she is or is likely to be
 27 damaged by such act.

28 15 U.S.C. 1125(a)(1).

1 code,” and that mere allegations of misrepresentation cannot support a Lanham Act claim as a matter
2 of law. Dkt. No. 409 at 10-11.

3 Meishe alleges that defendants “made false and misleading descriptions and representations
4 of fact, which were intended, likely, and did in fact mislead, cause confusion, cause mistake, and
5 deceive as to their ownership of the software of its application to its consumers.” TAC ¶ 157.
6 Meishe alleges that “TikTok informs users that it owns and has proper rights to the code it uses in
7 its applications” and provides examples of statements made by defendants. *Id.* ¶¶ 158-59.
8 According to Meishe, defendants “have represented that they value intellectual property and would
9 not infringe others’ intellectual property, but have done so as described in this Complaint” and
10 defendants “willfully continued to represent the software as their own, not credited Meishe with
11 being the owners or author of portions of Defendants’ products or code, and not stopped distributing
12 infringing and misappropriated code.” *Id.* ¶ 161. Meishe further alleges that defendants knowingly
13 provided and/or distributed false CMI and/or removed or altered Meishe’s CMI from the software
14 it copied and distributed. *Id.* ¶ 160.

15 Defendants assert that the “Lanham Act does not address the uncredited *copying* of a work,
16 and cannot be used as a surrogate to a copyright infringement claim.” Dkt. No. 404 at 11. They
17 cite *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) in support. *Dastar*
18 addressed the question of whether § 43(a) of the Lanham Act “prevents the unaccredited copying of
19 a work.” *Id.* at 25. The “gravamen of respondents’ claim” was that in marketing and selling a video
20 set entitled World War II Campaigns as its own product “without acknowledging its nearly
21 wholesale reliance on the Crusade television series,” the defendant made a “false designation of
22 origin, false or misleading description of fact, or false or misleading representation of fact, which .
23 . . . is likely to cause confusion . . . as to the origin . . . of his or her goods.” *Id.* at 31 (citing Lanham
24 Act § 43(a)). The Court reasoned that this claim “would undoubtedly be sustained” if the defendant
25 had bought some of the plaintiff’s videotapes and “merely repackaged them as its own.” *Id.*
26 However, the defendant’s alleged wrongdoing was “vastly different: It took a creative work in the
27 public domain—the Crusade television series—copied it, made modifications (arguably minor), and
28 produced its very own series of videotapes.” *Id.*

United States District Court
Northern District of California

1 The Court then went on to decide what section (a)(1)(A) of the Lanham Act means by the
2 “origin” of goods, specifically whether it is appropriate to adopt a special definition or “origin”
3 under the Lanham Act for communicative products and whether § 43(a) of the Lanham Act could
4 be read as creating a cause of action “for the use of otherwise unprotected works and inventions
5 without attribution.” *Id.* at 31, 33, 36. The Court concluded that: “reading the phrase ‘origin of
6 goods’ in the Lanham Act in accordance with the Act’s common-law foundations (which were not
7 designed to protect originality or creativity), and in light of the copyright and patent laws (which
8 were), we conclude that the phrase refers to the producer of the tangible goods that are offered for
9 sale, and not to the author of any idea, concept, or communication embodied in those goods.” *Id.* at
10 37. Because the plaintiff was the “origin” of the products it sold as its own, the defendants could
11 not prevail on their Lanham Act claim. *Id.* at 38. The Court was concerned that recognizing in
12 § 43(a) “a cause of action for misrepresentation of authorship of noncopyrighted works” would
13 cause the Lanham Act to conflict with copyright law and that reading “origin” in § 43(a) “to require
14 attribution of uncopyrighted materials would pose serious practical problems.” *Id.* at 33-35.
15 “Assuming for the sake of argument that Dastar’s representation of itself as the ‘Producer’ of its
16 videos amounted to a representation that it originated the creative work conveyed by the videos,
17 allowing a cause of action under § 43(a) for that representation would create a species of mutant
18 copyright law that limits the public’s ‘federal right to copy and to use’ expired copyrights.” *Id.* at
19 34 (citation omitted).

20 Plaintiff contended at oral argument that *Dastar* focused on claims under subsection (A) of
21 § 43(a)(1), but that plaintiff also alleges Lanham Act false advertising violations under subsection
22 (B). The Court agrees that *Dastar* focused on the “confusion . . . as to origin” provision of
23 § 43(a)(1)(A). “If . . . the producer of a video that substantially copied the Crusade series were, in
24 advertising or promotion, to give purchasers the impression that the video was quite different from
25 that series, then one or more of the respondents might have a cause of action—not for reverse passing
26 off under the ‘confusion . . . as to the origin’ provision of § 43(a)(1)(A), but for misrepresentation
27 under the ‘misrepresents the nature, characteristics [or] qualities’ provision of § 43(a)(1)(B). For
28 merely saying it is the producer of the video, however, no Lanham Act liability attaches to *Dastar*.”

1 *Id.* at 38.

2 The Ninth Circuit recently interpreted *Dastar* in *OTR Wheel Engineering, Inc. v. W.*
3 *Worldwide Servs., Inc.*, 897 F.3d 1008 (9th Cir. 2018). There, the primary issue before the court
4 was “whether [the defendant] can be found liable for reverse passing off under the Lanham Act.”
5 *Id.* at 1012. The court held that pursuant to *Dastar*, “a claim for reverse passing off cannot be
6 brought to prevent the copying of intellectual property” because “[c]opying is dealt with through
7 the copyright and patent laws, not through trademark law.” *Id.* at 1012, 1015. “Reverse passing off”
8 occurs when the “producer misrepresents someone else’s goods or services as his own.” *Dastar*,
9 539 U.S. at 27 n.1. Because the defendant did not simply copy the plaintiff’s intellectual property,
10 but rather passed off genuine products of the plaintiff as his own, the court found the defendant could
11 be liable for reverse passing off under the Lanham Act. *Id.* at 1012-13. The court assessed whether
12 the defendant’s conduct amounted to mere copying and concluded that instead of simply copying
13 the plaintiff’s design, the defendant used tires from an anticipated order of plaintiff’s tires and passed
14 those tires off as his own. *Id.* at 1014-15. The court further indicated that it did not need to determine
15 “whether use of the OTR mold would create a mere copy or a genuine OTR product” because
16 “[t]here was evidence that [the defendant] did pass off actual OTR tires.” *Id.* at 1017.

17 Defendants also point to *Media.net Adver. FZ-LLC*, 198 F. Supp. 3d at 1087. This case did
18 not involve a Lanham Act claim. However, in holding that the California Unfair Competition Law
19 (“UCL”) claim was preempted by the U.S. Copyright Act, the court compared the UCL claim to
20 reverse passing-off claims. *See id.* at 1087-88. The court reasoned that “a reverse passing-off claim
21 is, in essence, a misrepresentation claim which is, in effect, what Plaintiff is also alleging in the
22 instant case—i.e., that Defendant failed to disclose to potential customers that it had used Plaintiff’s
23 code in its own product, marketing the product as its own.” *Id.* at 1087. The court went on to say
24 that “[a] number of courts have held that a reverse passing-off claim is not qualitatively different
25 from a copyright claim and is preempted because [c]laims alleging misrepresentations of the
26 ownership or origin of an idea do not differ from the ‘inherent misrepresentations that accompany
27 unauthorized copying and reproduction of another’s copyrighted work.” *Id.* at 1087 (internal
28 quotation marks and citations omitted). The court concluded that “even if some inference could be

1 made that there was a misrepresentation *not* based on reverse passing-off, Plaintiff has failed to
2 include sufficiently specific allegations to make it plausible that Defendant made any such broader
3 misrepresentation.” *Id.* at 1088.

4 *Luxul Technology Inc. v. Nectarlux, LLC*, 78 F. Supp. 3d 1156 (N.D. Cal. 2015) and
5 *Talavera v. Global Payments, Inc.*, 670 F. Supp. 3d 1074 (S.D. Cal. 2023), raised for the first time
6 at the April 5, 2024 hearing, provide further guidance. *Luxul Technology* found the defendants’
7 reliance on *Dastar* misplaced with respect to a false designation of origin claim. *Id.* at 1172. Unlike
8 in *Dastar*, “where the defendant independently created a tangible good to sell and was therefore the
9 ‘origin’ of the ‘good’ being sold,” here the “gravamen” of the plaintiff’s claim was that the
10 defendants’ marketing materials falsely designated the defendants as the source of LED tube lamps
11 by replacing “Luxul” with “Nectar.” *Id.* at 1172. The good at issue was an LED tube lamp pictured
12 in marketing materials, not the marketing materials themselves, and the defendants did not and could
13 not contend they were the “origin” of the LED tube lamps. *Id.* The court noted that “in this circuit,
14 a reverse passing off claim requires the alteration of a product and a subsequent sale.” *Id.* at 1171.
15 With respect to plaintiff’s false advertising claim, the court noted that in the FAC the plaintiff
16 alleged that the defendant falsely claimed that the “Nectar product is UL certified with the intent to
17 induce prospective customers of Luxul to purchase Defendant's product in lieu of Luxul's product”
18 but the remainder of the plaintiff’s allegations were “bare recitations of the elements of a false
19 advertising claim.” *Id.* at 1172.

20 *Talavera* involved a false designation of origin claim at the summary judgment stage. The
21 court found the defendants’ actions analogous to those of *Dastar* because the evidence demonstrated
22 that the defendants “copied Plaintiffs’ SunShop software code into a new file, removed ‘the portions
23 of [Plaintiffs’] code that deal with license key checks and sections of the code that reference call
24 home functionality,’ and then offered that product to potential clients.” *Id.* at 1106. The court found
25 that these actions amounted to copying and that their reverse passing of claim must fail because the
26 plaintiffs failed to present any evidence that the defendants passed off the plaintiffs’ tangible goods
27 as defendants’ own. *Id.* at 1107.

28 Based on this authority, the Court concludes that Meishe’s false designation of origin claim

1 is not cognizable under § 43(a)(1)(A) of the Lanham Act because Meishe alleges a reverse passing
 2 off claim—that defendants incorporated its source code into their TikTok app (ie. copied the source
 3 code) and passed the TikTok app off as developed from their own source code. The Court also finds
 4 that Meishe has insufficiently alleged a false advertising claim under § 43(a)(1)(B). Meishe points
 5 to statements defendants made in their copyright notice at tiktok.com, in the ByteDance Code of
 6 Conduct, in TikTok’s Intellectual Property Policy, and in TikTok’s terms of service. *See* TAC
 7 ¶¶ 158-59. However, it is not clear that any of these statements were made on the context of
 8 “commercial advertising or promotion.” *See* 15 U.S.C. 1125(a)(1)(B). Plaintiff has also not alleged
 9 how these statements are likely to influence purchasing decisions by consumers. *See*
 10 *TrafficSchool.com*, 653 F.3d at 828. However, it is possible that Meishe could amend its complaint
 11 to add sufficient factual allegations, so the Court grants plaintiff leave to amend its § 43(a)(1)(B)
 12 false advertising claim.¹⁴

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 14 ¹⁴ In their reply, defendants also point to *Slep-Tone Entm’t Corp. v. Wired for Sound Karaoke*
 15 *& DJ Servs., LLC*, 845 F.3d 1246 (9th Cir. 2017). This case involved the §43(a)(1)(A) requirement
 16 that a plaintiff establish a likelihood of consumer confusion. There, the plaintiff, a producer of
 17 karaoke tracks, claimed that the defendants, who operated a karaoke business, violated the Lanham
 18 Act by “media-shifting” plaintiff’s soundtracks from physical CDs to digital files and performing
 19 them without authorization. *Id.* at 1248. The plaintiff’s theory was that because the media-shifted
 20 files displayed the plaintiff’s trademarks and trade dress when performed, consumers would believe
 21 that the tracks originated with the plaintiff, rather than with the defendants. *Id.* at 1249. The plaintiff
 22 framed the dispute as concerning a new tangible good—the new digital files that the defendants
 23 allegedly created from the plaintiff’s CDs. *Id.* at 1250. The court disagreed, reasoning that the
 24 plaintiff’s theory did not involve consumer confusion about the source of an appropriate “good”
 25 under the Lanham Act but rather over the source of content. *Id.* at 1249. Although the defendants
 26 may, in some sense, have created a new good by copying plaintiff’s CDs to hard drives, it was not
 27 a relevant good under the Lanham Act because “the good whose origin is material for purposes of
 28 a trademark infringement claim is the tangible product sold in the marketplace rather than the
 creative content of that product.” *Id.* at 1250 (internal quotation marks and citations omitted). If
 there was any confusion, it did not concern the source of the goods because consumers “never see
 the digital files and Defendants neither sell them nor make representations about their source
 medium.” *Id.* Instead, the defendants made allegedly unauthorized use of the content of the
 plaintiff’s karaoke tracks, which the court held was precluded under *Dastar*. *Id.* Defendants
 analogize *Slep-Tone* to the present case contending that here, the relevant good is the TikTok app
 and consumers cannot view the source good, so there can be no consumer confusion about its origin.
 Dkt. No. 416 at 9. The Court finds this argument relevant to the § 43(a)(1)(A) false designation of
 origin claim only, which the Court has already determined is not cognizable under *Dastar*. The
 Court thus need not reach the issue of whether *Slep-Tone* requires dismissal of the § 43(a)(1)(A)
 claim as a matter of law.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART defendants’ motion to dismiss the copyright infringement claim, misappropriation of trade secrets claims, and Lanham Act claim, with leave to amend except as to the § 43(a)(1)(A) Lanham Act claim.

The copyright infringement claim is dismissed with leave to amend on the following grounds. The complaint lacks sufficient information about what *unregistered* copyrighted works were allegedly infringed. The complaint fails to plead access to copyrighted works completed after Mr. Xie left Meishe, but the access allegations as to the works completed while Mr. Xie was with Meishe are sufficient. Lastly, for all copyrighted works, the complaint fails to adequately allege that the works are not “United States works” within the meaning of 17 U.S.C. § 101.

The violation of 17 U.S.C. § 1202 claim is dismissed with leave to amend because it is conclusory.

The motion to dismiss is denied as to the contributory and induced infringement claim.

The misappropriation of trade secret claims are dismissed with leave to amend to the extent they allege trade secrets beyond “proprietary, independently-developed software code that allows for video and audio editing, video and audio processing, video and audio release, personalized audio and video recommendations, webcasting” and “information about which portions of Meishe’s software were most likely to be popular if incorporated into video editing features in smart phone applications.” Additionally, the DTSA claim is dismissed with leave to amend as to the non-United States incorporated defendants because Meishe has inadequately alleged “acts in furtherance of the offense” committed in the United States.

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United States District Court
Northern District of California

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1 The Lanham Act § 43(a)(1)(A) claim is dismissed without leave to amend because the Court
2 finds it not cognizable under the above-referenced case law. The Lanham Act § 43(a)(1)(B) claim
3 is dismissed with leave to amend.

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5 **IT IS SO ORDERED.**

6 Dated: April 23, 2024

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9 SUSAN ILLSTON
10 United States District Judge

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United States District Court
Northern District of California