

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ATARI INTERACTIVE, INC.,

Plaintiff,

v.

TARGET CORPORATION,

Defendant.

Case No. 19-cv-3111

COMPLAINT

(Jury Trial Demanded)

Plaintiff Atari Interactive, Inc. (“Atari”), as and for its complaint against defendant Target Corporation (“Target”), hereby alleges as follows:

PARTIES

1. Atari is a Delaware corporation with its principal place of business in New York, New York. Through contractual agreements and extensive and continuing use, Atari owns the rights to the intellectual property library of the well-known Atari video game brand.

2. Atari is informed and believes, and thereon alleges, that Target is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. sections 1331 and 1338 because the action arises under the federal Lanham Act. See 15 U.S.C. §§1051, *et seq.* This Court also has supplemental jurisdiction pursuant to 28 U.S.C. sections 1367 and 1338(b).

4. This Court has personal jurisdiction over Target because Target continuously and systematically conducts business in this district, is registered with the New York Department of State’s Division of Corporations, and has corporate offices in this district. In addition, Atari is informed and believes and thereon alleges that Target has approximately 75 retail locations in this

state and that it engaged in at least some of the infringing conduct described herein in one or more of these locations, and that it intentionally aimed its tortious conduct at this state with knowledge that its effects would be felt here.

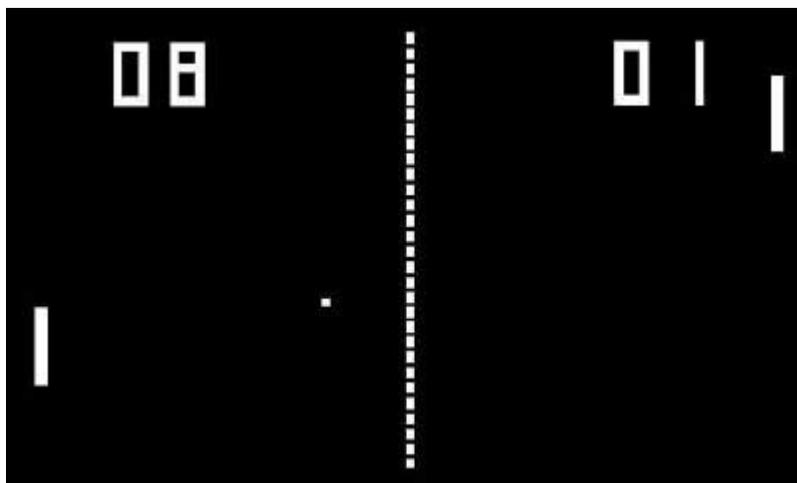
5. Venue in this district is proper under 28 U.S.C. section 1391 because Target is subject to personal jurisdiction here and Atari has suffered injury here.

GENERAL ALLEGATIONS

A. Pong Is an Iconic Atari Video Game.

6. Atari is one of the most famous video game brands in history. Founded in the early 1970s in California, Atari became *the* pioneer in the video game industry during the 1970s and continuing into the 1980s, developing and releasing (a) home video game consoles – e.g., the Atari 2600 – that set new standards in design and function, and (b) a series of hit games – e.g., *Breakout*, *Asteroids*, and as most relevant here, *Pong*.

7. *Pong* is generally considered to be the first commercially successful video game in history. Indeed, industry experts have gone so far as to say that *Pong* launched the now multi-billion dollar modern day video game industry. Although visually and functionally simple by today's gaming standards, the look and feel of *Pong* is immediately recognizable. Below is a screenshot from the game.



8. In light of its historical significance and fame, *Pong* has been featured extensively and in myriad ways throughout its now nearly 50-year existence.

9. Atari created, distributed, licensed, and/or sold various sequel or derivative games based on the original *Pong*.

10. *Pong* is part of permanent collections at the Smithsonian Institute and the World Video Game Hall of Fame, the latter of which selected *Pong* as one of six games inducted in its inaugural class.

11. *Pong* has been featured on popular television shows and commercials.

12. Atari recently licensed the *Pong* imagery for use in a television commercial for a well-known alcoholic beverage brand.

13. Atari currently licenses, markets, and/or sells a variety of products bearing the *Pong* trademark and imagery.

14. Below are examples of officially licensed Atari *Pong* apparel products being sold nationwide.



15. Below is a picture of Atari's official *Pong* table game that is currently being sold nationwide.



16. To help protect the valuable *Pong* brand from infringement, Atari duly registered the PONG trademark with the United States Patent and Trademark Office in several categories, including for computer game programs (Reg. No. 2,611,782 dated August 27, 2002).

17. Through extensive and continuous nationwide promotion and sales, unsolicited press, and word-of-mouth for nearly 50 years, Atari owns common law rights in the names and graphics associated with *Pong* and the game's overall look and feel.

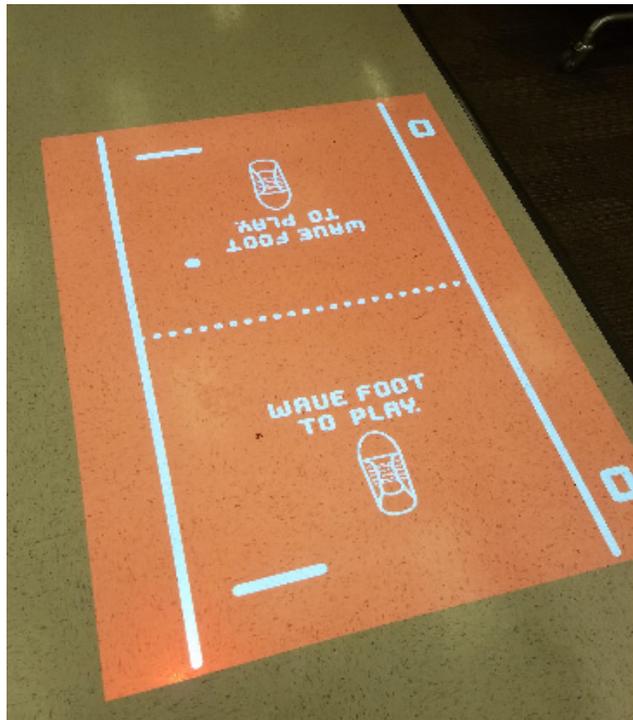
B. Target Has Knowingly Infringed Upon Atari's Intellectual Property Rights by Featuring a Game Promoted as "Foot Pong" in Dozens of Target Stores.

18. Target is one of the largest and most frequented retailers in the United States.

19. On information and belief, Target created or authorized the creation of a video game that imitates *Pong*. The game – which Target itself dubbed and promoted as "*Foot Pong*" – was installed in and promoted by Target in dozens of its stores.

20. *Foot Pong* is an obvious, deliberate copy of Atari's original *Pong* game. Practically, the only difference between *Foot Pong* and *Pong* is that in the former, players use their

feet rather than hands and the game is projected onto the floor rather than through a television or mobile device screen. Below is a screen shot of Target's *Foot Pong* game.

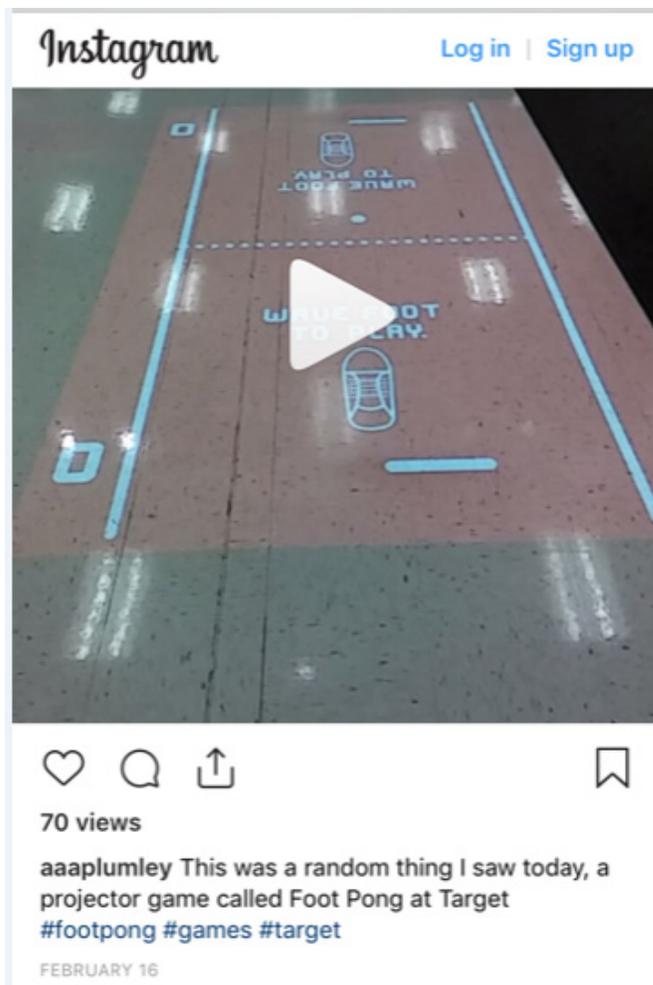


21. The extent of Target's copying of *Pong* in connection with *Foot Pong* extends far beyond the mere ideas underlying *Pong* and reaches those ideas' creative expression. Rather than being a generic "ping pong" style competition, for example, *Foot Pong* imitates such design elements as *Pong*'s board layout and proportions, font style, and minimalistic graphic design. Indeed, the similarities between the two games' representations are so striking as to remove any reasonable doubt as to Target's access to and intent regarding *Pong*.

22. Moreover, on information and belief, representatives of Target have referred to the game in promotional interviews as "Pong" or "Foot Pong," and have encouraged the public to use such terms as well. For example, an article in the Minneapolis/St. Paul Business Journal concerning the game ran under the headline "Target testing 'Foot Pong' game in select stores, including NE Minneapolis location (video)," with the quotation marks around "Foot Pong"

implying that the Target representatives quoted in the article referred to the game through use of the PONG trademark.

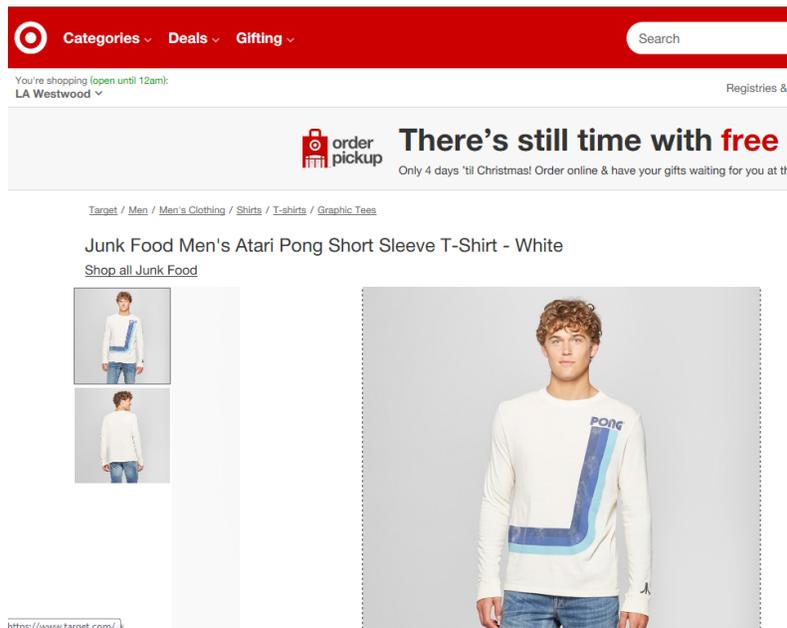
23. In addition, consumers regularly refer to the game as “Pong” or “Foot Pong,” indicating that Target itself actively promoted the game using Atari’s Pong trademark. An example of one of the references to Target’s “Foot Pong” game on social media is depicted below.



24. On information and belief, in addition to its unauthorized commercial use of the PONG trademark in promotional press interviews, Target has been making *Foot Pong* available to its customers for promotional, commercial purposes intended to encourage customers to spend more time (and ultimately money) in its stores. On information and belief, Target also uses *Foot*

Pong to benefit its reputation and goodwill with consumers. That this is true is evidenced by the fact that Target's marketing department was closely involved with *Foot Pong*'s roll out.

25. Target's infringement of Atari's intellectual property rights is willful. Target knew that Atari owned the intellectual property rights associated with *Pong*. Indeed, Target has been selling authentic, officially licensed Atari shirts, including shirts bearing the PONG trademark. Below is an example of Target offering for sale an officially licensed *Pong*-related product.



26. Nevertheless, when it came to the *Foot Pong* game, Target neither sought nor obtained Atari's permission.

27. In December 2018, a lawyer for Atari wrote to Target demanding that it cease and desist using *Foot Pong* in its stores or otherwise. A lawyer representing Target responded to explain that Target would not cease and desist, expressly stating that Target would continue its planned use through March 2019. Target's lawyer went on to state that Target "trust[s] you will agree to treat the matter as closed."

28. Atari does not consider Target's willful infringement as a matter that is "closed."

29. Target has profited from *Foot Pong* by attracting customers to Target stores, keeping customers in Target stores where they spend additional money, and generating positive word-of-mouth and goodwill for Target.

30. Target's infringement has harmed Atari, including by diluting the PONG intellectual property and causing Atari to lose potential license fees from both Target and third parties.

FIRST CLAIM FOR RELIEF

(Trademark Infringement and Counterfeiting)

31. Atari re-alleges and incorporates herein by reference each and every allegation set forth above.

32. Atari is the owner of the registered PONG trademark for the category of goods on which Target is using the trademark.

33. The PONG trademark is a valid, protectable mark.

34. Target has marketed, created, displayed, distributed, and/or profited from materials promoted via unauthorized uses of the PONG trademark or nearly identical variations thereof.

35. Target's use of the PONG trademark is likely to cause confusion among ordinary customers as to the source or affiliation of the *Foot Pong* game.

36. Atari has not consented to Target's use of the PONG trademark.

37. Target infringed upon the PONG trademark and engaged in trademark counterfeiting willfully.

38. As a proximate result of the unfair advantage accruing to Target from its unauthorized use of the PONG trademark and deceptive use of Atari's goodwill in the *Pong* name, (i) Target has made substantial sales and profits in amounts to be established according to proof;

and (ii) Atari has been damaged and deprived of substantial sales and profits, as well as of the value of its trademarks as commercial assets in amounts to be established according to proof.

39. Unless restrained by the Court, Target will continue to infringe Atari's trademarks. Pecuniary compensation alone will not afford Atari adequate relief for the damage to its trademarks and brand. In the absence of injunctive relief, consumers are likely to continue to be mistaken or deceived as to the true source, origin, sponsorship, and affiliation of *Foot Pong*.

40. Target's acts have been committed, and continue to be committed, with actual notice of Atari's exclusive rights and with the intent to cause confusion, to cause mistake, and/or to deceive, and to cause injury to the reputation and goodwill associated with Atari and its products. Pursuant to 15 U.S.C. section 1117, Atari is, therefore, entitled to recover three times its actual damages or three times Target's profits, whichever is greater, together with its attorneys' fees. Atari is entitled to statutory damages of \$2 million per registered mark. In addition, pursuant to 15 U.S.C. section 1118, Atari is entitled to an order requiring destruction of all infringing materials in Target's possession.

SECOND CLAIM FOR RELIEF

(False Designation of Origin)

41. Atari re-alleges and incorporates herein by reference each and every allegation set forth above.

42. The PONG trademark and the overall look and feel of the *Pong* game (the "Pong Trade Dress"), are inherently distinctive and have also acquired secondary meaning through extensive promotion, sales, unsolicited press, and word of mouth for over four decades.

43. The Pong Trade Dress consists of the following elements: (a) a rectangular playing field or court; (b) two vertical lines, located on the far side of each side of the court, that create "paddles" that can move only up and down; (c) a dotted line in the center of the court; (d) a small

ball that can be volleyed back and forth by the paddles, but that disappears if missed by either paddle; and (e) a scoreboard at the top of the court that consists of a single number in a simple font on each side of the dotted line. The Pong Trade Dress is the overall look and feel of the combination of the aforementioned elements, as seen in the *Pong* video game.

44. Target has advertised, marketed, created, displayed, distributed, and profited from products utilizing the PONG trademark and the Pong Trade Dress or nearly identical variations thereof without Atari's authorization.

45. Target's use of the PONG trademark and the Pong Trade Dress is likely to cause confusion among ordinary consumers as to the source or affiliation of Foot Pong.

46. Atari has never consented to Target's use of its trademarks or trade dress in the manner described herein.

47. Target infringed upon Atari's trademarks and trade dress willfully.

48. As a proximate result of the unfair advantage accruing to Target from using similar or quasi-similar marks and trade dress and deceptively trading on Atari's goodwill, (i) Target has made substantial sales and profits in amounts to be established according to proof, and (ii) Atari has been damaged and deprived of substantial sales and has been deprived of the value of its trademarks as commercial assets in amounts to be established according to proof.

49. Unless restrained by the Court, Target will continue to infringe Atari's trademarks and trade dress. Pecuniary compensation alone will not afford Atari adequate relief for the damage to its trademarks, trade dress, and brand. In the absence of injunctive relief, consumers are likely to continue to be mistaken or deceived as to the true source, origin, sponsorship, and affiliation of the infringing game.

50. Target's acts were committed, and continue to be committed, with actual notice of Atari's exclusive rights and with the intent to cause confusion, to cause mistake, and/or to deceive, and to cause injury to the reputation and goodwill associated with Atari and its products. Pursuant to 15 U.S.C. § 1117, Atari is therefore entitled to recover three times its actual damages or three times Target's profits, whichever is greater, together with its attorneys' fees. Atari is also entitled to statutory damages of \$2 million per registered mark. In addition, pursuant to 15 U.S.C. § 1118, Atari is entitled to an order requiring destruction of all infringing materials in Target's possession.

THIRD CLAIM FOR RELIEF

(Trademark and Trade Dress Dilution)

51. Atari re-alleges and incorporates herein by reference each and every allegation set forth above.

52. The PONG trademark and the Pong Trade Dress are widely recognized by the general consuming public of the United States.

53. Target's unauthorized use of the PONG trademark and the Pong Trade Dress has the effect of tarnishing and blurring the PONG trademark and the Pong Trade Dress.

54. Atari is entitled to recover damages and/or Target's profits in an amount to be determined at trial.

55. Atari is entitled to an order preliminarily and permanently enjoining Target from using its trademarks and trade dress in the future.

56. Because Target has willfully intended to cause dilution of the PONG trademark and the Pong Trade Dress, Atari is further entitled to recover its costs of suit and reasonable attorney's fees pursuant to 15 U.S.C. §§ 1117 and 1125(c)(2).

FOURTH CLAIM FOR RELIEF

(Common Law Unfair Competition)

57. Atari re-alleges and incorporates herein by reference each and every allegation set forth above.

58. Target's unauthorized use of Atari's trademark and trade dress is likely to cause consumer confusion as to the source, origin, sponsorship, and association of Target's products.

59. Atari has been, and will continue to be, damaged and irreparably harmed by the actions of Target unless it is enjoined by this Court.

60. Target committed the foregoing acts with the intention of depriving Atari of its legal rights, with oppression, fraud, and/or malice, and in conscious disregard of Atari's rights. Atari is therefore entitled to an award of exemplary and punitive damages, according to proof.

FIFTH CLAIM FOR RELIEF

(Violation of New York General Business Law Article 22-A §349)

61. Atari re-alleges and incorporates herein by reference each and every allegation set forth above.

62. Target's unauthorized use of Atari's trademark and trade dress is likely to cause consumer confusion as to the source, origin, sponsorship, and association of Target's products.

63. Atari has been, and will continue to be, damaged and irreparably harmed by the actions of Target unless it is enjoined by this Court.

64. Target committed the foregoing acts with the intention of depriving Atari of its legal rights, with oppression, fraud, and/or malice, and in conscious disregard of Atari's rights. Atari is therefore entitled to an award of exemplary and punitive damages, according to proof.

SIXTH CLAIM FOR RELIEF

(Violation of New York General Business Law Article 24 §360-L)

65. Atari re-alleges and incorporates herein by reference each and every allegation set forth above.

66. Target's unauthorized use of Atari's trademark and trade dress is likely to cause consumer confusion as to the source, origin, sponsorship, and association of Target's products.

67. Atari has been, and will continue to be, damaged and irreparably harmed by the actions of Target unless it is enjoined by this Court.

68. Target committed the foregoing acts with the intention of depriving Atari of its legal rights, with oppression, fraud, and/or malice, and in conscious disregard of Atari's rights. Atari is therefore entitled to an award of exemplary and punitive damages, according to proof.

PRAYER FOR RELIEF

WHEREFORE, Atari prays for relief against Target as follows:

1. For preliminary and permanent injunctions enjoining and restraining Target, its agents, employees, representatives, partners, joint venturers, and/or anyone acting on behalf of, or in concert with it, from designing, manufacturing, importing, shipping, delivering, selling, marketing, displaying, advertising, or promoting any product that incorporates or is marketed in conjunction any Atari trademark or trade dress absent an express licensing agreement to the contrary.

2. For an order requiring the destruction of all of Target's infringing materials and all marketing, advertising, or promotional materials depicting or describing them;

3. For an accounting of all profits obtained by Target in connection with the infringing game and an order that Target hold all such profits in a constructive trust for the benefit of Atari;

4. For an award to Atari of all profits earned by Target from its infringing acts;

5. For compensatory damages according to proof;
6. For statutory damages of no less than \$2 million per registered trademark;
7. For punitive and/or enhanced damages;
8. For pre-judgment interest on all damages awarded by this Court;
9. For reasonable attorney's fees and costs of suit incurred herein; and
10. For such other and further relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Atari hereby demands trial by jury of all issues so triable pursuant to Rule 38(a) of the Federal Rules of Civil Procedure.

Dated: New York, New York
April 8, 2019

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