

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DISTRICT

DAVID ALLISON DBA CHEAT CODE
CENTRAL,

Plaintiff,

v.

JEREMY N. WISE and
WISE BUY NOW LLC,

Defendants.

Case No. 2:08-cv-00157

Judge Watson

Magistrate Judge Abel

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants Jeremy N. Wise and Wise Buy Now, LLC, by and through their counsel of record, file this Response in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Motion") (Docket #58).

I. INTRODUCTION

Plaintiff concedes that his work consists largely of facts in the public domain: lists of cheat codes to be used in playing video games. Plaintiff's claim that his works are copyrightable centers on his argument that he somehow provides creativity in the selection and arrangement of the cheats and codes on his website. Plaintiff's alleged contribution to the factual content is minimal at best, is obvious and not entitled to copyright protection. Despite his allegation that Defendants copied "significant portions" of his website, Plaintiff's infringement contentions consist solely of five examples.¹ These five examples represent approximately .05% of the total content of Plaintiff's alleged copyrighted work. Any similarity in Defendants' work to the protected

¹ Plaintiff indicated over six months ago that he would be relying on only twelve examples of alleged infringement, many of which were rebutted by Defendants. Plaintiff has abandoned all but one of his previously disclosed contentions and bases his Motion on four previously undisclosed examples of alleged infringement.

elements, if any, of Plaintiff's website is so minimal there can be no determination of copyright infringement.

II. STATEMENT OF MATERIAL FACTS

With his Motion, the Plaintiff purports to set forth a statement of undisputed facts. However, many of the "facts" contained therein represent mere allegations and, in fact, constitute material facts in dispute.

A. Undisputed Facts

The cheat codes contained on www.cheatcc.com are factual in nature and are not entitled to copyright protection. See Motion, p. 3; Allison Affidavit ¶ 4; Expert Report of Garry E. Kitchen ("Expert Report.") ¶¶ 14-15 and 32². Plaintiff is claiming copyright protection of only the selection and arrangement of the factual information on his site. Motion, p.10 ("Plaintiff's web pages contain facts arranged by the Plaintiff in an original matter that qualifies for copyright protection.") Plaintiff has obtained copyright registrations which purport to cover his website and the content of his book "The Ultimate Code Book." Motion, p. 3.

Defendants own and operate websites which cater to the same audience as Plaintiff and include www.cheatmasters.com and www.playstation2-cheats.co.uk. Motion, p. 3. Jeremy Wise manages and operates the affairs of Wise Buy Now, LLC. Motion, p. 7; Affidavit of Jeremy Wise ("Wise Aff.") ¶¶ 4, 5.³ Defendants' site, www.cheatmasters.com, was started in 1994 and was purchased by Defendants in 2001. Wise Aff. ¶¶ 6, 7. Plaintiff's site, www.cheatcc.com, was started in 1997, three years after Defendants' website. Motion, p. 3.

Plaintiff's Motion sets out five (5) discreet examples of allegedly infringed content consisting of cheats and codes concerning the following games: Star Wars: Jedi Outcast - Jedi

² Attached hereto as Exhibit A.

³ Attached hereto as Exhibit B.

Knight 2; Star Wars: Episode 1 - Jedi Power Battles; Star Wars: Episode 1 - Phantom Menace; Star Wars: Racer Revenge - Racer 2; and Sega Smash Pack.

Plaintiff's website provides cheats, codes, hints, tips and strategies to more than 10,000 video games. Motion, pp. 1-2.

Defendants' www.cheatmasters.com website covers over 13,000 software titles from the most popular gaming platforms as well as additional categories (such as Neopets) that are not covered on Plaintiff's site. Wise Aff. ¶ 8. Defendants' www.cheatmasters.com website alone contains more than 100,000 web pages not including its blog and forum. *Id.* ¶ 9.

Wise Buy Now, LLC also operates other gaming websites named in this suit that cover several other gaming systems that Plaintiff's site does not cover. *Id.* ¶ 10.

B. Material Facts in Dispute

In his Motion, Plaintiff claims he authored the arrangement of codes on his website covering several games.⁴ In fact discovery, Plaintiff had disclosed twelve (12) excerpts from his website which he alleged Defendants infringed. After Plaintiff represented that his copyright contentions solely relied on those twelve excerpts, Defendants and their legal counsel discovered third-party sources for much of the content Plaintiff alleged he authored and Defendants infringed. Defendants discovered the cheats and codes in the excerpts were likely copied by Plaintiff from a third-party site, www.gamewinners.com.⁵ That theme continues with the five examples of alleged infringement cited in Plaintiff's Motion for Partial Summary Judgment.⁶

As discussed below, each chart or grouping of codes for which Plaintiff alleges authorship of "protectable elements" fails to establish actionable copyright infringement for one or both of

⁴ For an overview of the history and technology of cheat codes in video games, see Expert Report. ¶ 19-27.

⁵ The Parties discussed these issues extensively in the briefing on Plaintiff's Motion for Sanctions that the Court denied.

the following reasons: (1) the content had been copied by Plaintiff from a third-party site, including the selection and arrangement of those cheats and codes; or (2) the content exhibits no original or non-obvious selection or arrangement which could be protected under copyright law. Consequently, there exists a factual dispute as to whether Plaintiff in fact authored the cheats and code charts contained within the four latest examples serving as his attempts to allege infringement (Star Wars: Jedi Outcast - Jedi Knight 2; Star Wars: Episode 1 - Jedi Power Battles; Star Wars: Episode 1 - Phantom Menace; Star Wars: Racer Revenge - Racer 2) and the previously disclosed Sega Smash Pack example. As delineated below, Plaintiff is not the originator of these arrangements and, even if he is the first to arrange the codes in the portrayed manner, they lack the creativity necessary to be protected under copyright law.

For the foregoing reason and other documentation obtained by Defendants and their counsel, it is disputed that Plaintiff holds any valid copyrights in his website or book, or that any copyright registrations covering them are valid.

III. SUMMARY JUDGMENT STANDARD AND APPLICABLE LAW

Summary judgment is appropriate only if no genuine issue of material fact exists on the record and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Amway Distributors Benefits Ass'n v. Northfield Ins. Co., 323 F.3d 386, 390 (6th Cir. 2003) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most

⁶ While the previously disclosed examples of allegedly infringed cheats consisted of narrative cheat descriptions, the newly disclosed examples contain charts listing alphanumeric codes.

favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Redding v. St. Edward, 241 F.3d 530, 532 (6th Cir. 2001).

A witness's recorded and sworn testimony can be used as summary judgment proof. Fed. R. Civ. P. 56(e)(1). The facts stated in the affidavit must be specific and must constitute admissible evidence. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990). Under Federal Rule of Civil Procedure 56(e), all affidavits filed in support or opposition of a summary judgment Motion must set forth facts that would be admissible at trial. Moore v. Holbrook, 2 F.3d 697, 699 (6th Cir. 1993); Jones v. Butler Metro. Hous. Auth., 40 Fed. Appx. 131, 134 (6th Cir. 2002) (unpublished). Bare allegations of fact, hearsay, conclusory facts, or legal conclusions are not sufficient summary judgment proof. Jones, 40 Fed. Appx. at 134; Marshall v. East Carrol Parish Hosp. Serv. Dist., 134 F.3d 319, 324 (5th Cir. 1998).

IV. ARGUMENT AND AUTHORITIES

The Plaintiff is unable to meet his burden to prove copyright infringement. To establish copyright infringement, a plaintiff must prove: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); see also Murray Hill Public'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 316 (6th Cir. 2004); Kohus v. Mariol, 328 F.3d 848, 853 (6th Cir. 2003). Although registration creates a presumption of validity, "[t]o rebut the presumption... a defendant sued for infringement must simply offer some evidence or proof to dispute or deny the plaintiff's *prima facie* case of infringement." Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1196 (10th Cir. 2005) (quotations omitted).

Plaintiff cannot meet the first element. As discussed in more detail below, contrary to Plaintiff's assertions, he does not own a valid copyright. The Defendants possess evidence demonstrating that much of Plaintiff's website is copied from third-parties and, in fact, most of the

alleged infringed examples cited in his Motion and previously produced in discovery were directly copied from third-party sites. Whether the evidence is substantial enough to show invalidity is a question for the finder of fact. Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98, 110 (2d Cir. 2002) (“Authorship is generally a question of fact for the jury.”). However, at the very least, enough evidence exists to rebut the presumption of validity afforded by a copyright registration and to raise a fact issue as to copyright validity.⁷

Although the absence of a valid copyright is enough to defeat an infringement claim, Plaintiff likewise cannot meet the second element. In determining whether two works share substantially similar protectable elements, the Sixth Circuit utilizes a two-step approach. “[T]he first step requires identifying which aspects of the artist’s work, if any are protectable by copyright; the second involves determining whether the allegedly infringing work is substantially similar to protectable elements of the artist’s work.” Kohus, 328 F.3d at 855 (quotations omitted); see also Lexmark Int’l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 534 (6th Cir. 2004). Whether elements copied are entitled to copyright protection is a matter of law. Lexmark Int’l, Inc., 387 F.3d at 534.

Plaintiff’s entire argument that there exist protectable elements embodied in his works relies entirely on his own conclusory affidavit in which he states, without elaboration or factual support, “I have my own unique method for organizing the cheat codes I post to my site.” Allison Aff. ¶ 6. He proceeds to describe his method as ordering cheat codes in descending order from most important or useful to least important or useful. Id. He provides no factual support for his conclusion that this represents a unique method. These portions of his affidavit should be ignored

⁷ Plaintiff argues that Defendants have not denied that Plaintiff owns rights in alleged protectable elements of his webpages. Motion, p. 7. However, this is untrue. Defendants have consistently maintained a defense of invalidity from the outset of this litigation. See Answer, Doc. #13 ¶ 58 “Plaintiff’s Copyrights, if any, are invalid.”; See, also, Defendant Wise Buy Now, LLC’s Answer, Doc. #38 at ¶¶ 48, 64, 65. Further, Defendants have maintained that Plaintiff’s claim is barred by the merger doctrine and scenes a faire. Id. ¶ 42.

as they are inadmissible as conclusory and not based on fact. Jones, 40 Fed. Appx. at 134; Marshall, 134 F.3d at 324. Notwithstanding their inadmissibility, Jeremy Wise disputes the alleged originality of this ordering. Wise Aff. ¶¶ 12-13. Further and contrary to Plaintiff's conclusory testimony, as described fully below, this "method" of organization is commonly used to organize code charts and many of the charts Plaintiff alleges to have authored likely originated at other sites. For these reasons, at a minimum, questions of fact exist which preclude summary judgment. Fed. R. Civ. P. 56(c); Amway Distributors Benefits Ass'n, 323 F.3d at 390.

A. Plaintiff Does Not Own a Valid Copyright.

Because Plaintiff copied through himself or his agents the content at issue, he cannot possess a valid copyright. For the copyright in a work to be valid, the work must be an original work of authorship. Feist Pub'ns, Inc., 499 U.S. at 361. The Supreme Court has instructed that "original . . . means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity," even if the work is not a "novel" one. Id. at 345-46 (originality requires both "independent creation plus a modicum of creativity"). This simple standard cannot be met – and the Defendants possess evidence demonstrating the lack of originality in the excerpts presented by Plaintiff.

1. Defendants previously documented copying by Plaintiff from www.gamewinners.com.

Toward the end of fact discovery, Defendants produced evidence indicating that Plaintiff did not independently create the content of his website.⁸ About a month earlier, during a June 22, 2009 teleconference, Plaintiff informed Defendants and the Court that he would rely on only twelve examples of alleged infringement. See December 12, 2009 Order (Doc. #57) ¶ 5. Days later, Defendant Wise found these twelve examples to be identical to those on a third-party site,

www.gamewinners.com. Further investigation uncovered (despite the lapse of nearly three or more years) the identities of several persons stating that they were the true authors of the game hints at issue - some of whom signed declarations to that effect. (See Authors' Declarations attached hereto as Exhibit C).

Defendants' investigation continued during briefing on the Plaintiff's unsuccessful Motion for Sanctions and found recent occurrences of game cheats being posted to www.gamewinners.com and their appearance, days later, identically on Plaintiff's site. See Supplemental Affidavit of Charles Lee Mudd, Jr. ("Suppl. Mudd Aff.") ¶¶ 9-13.⁹ By way of example, Defendants obtained captures from www.gamewinners.com and Plaintiff's site, www.cheatcc.com, including cheats for three games: Blazblue: Calamity Trigger; Dynasty Warriors 6: Empires; and Overlord 2. Suppl. Mudd Aff. Exhibit 1. Each example shows (1) a printout of cheat codes from www.gamewinners.com; (2) a printout of cheats from www.cheatcc.com of the same day, absent some cheats from www.gamewinners.com; and (3) a later printout of the same URL of www.cheatcc.com showing added content identical to the first printout of www.gamewinners.com. Suppl. Mudd Aff. Exhibit 1. With respect to the game Overlord 2, documents show a clear pattern of copying by Plaintiff from www.gamewinners.com. *Id.*, pp. 26-56. For example, on July 9, 2009, www.gamewinners.com exhibits a cheat entitled "Finding more people."; www.cheatcc.com does not. *Id.*, pp. 35-39. However, www.cheatcc.com does exhibit this same cheat on August 6, 2009. *Id.*, pp. 44-46. Moreover, Defendants have

⁸ As the Court knows, the Plaintiff filed a motion for sanctions seeking to exclude this evidence. The Court denied the motion.

⁹ Attached hereto as Exhibit D.

obtained testimony that one of the specific cheats found on both sites was authored by Matthew Clark, not Plaintiff. Affidavit of Matthew Clark ¶¶ 3-9.¹⁰

Similarly, with respect to the game BlazBlue, the cheats were captured from www.gamewinners.com on August 6, 2009. Suppl. Mudd Aff. Exhibit 1, pp. 6-8. That same day, the same cheats did not appear on www.cheatcc.com. *Id.* pp. 9-10. Specifically, the cheat titled “Japanese Audio Interview.” However, the next day, August 7, 2009, the BlazBlue cheat had been copied from www.gamewinners.com to Plaintiff’s site. *Id.* pp. 11-12. Further, contrary to Plaintiff’s testimony that he orders his cheats in a manner original to him (Doc. #58-9 ¶ 6), he has copied the cheats in the identical order as they appear on www.gamewinners.com. *Id.*

2. All of the latest examples were copied, either partially or entirely, from other sites.

As noted above, there exists a factual dispute as to whether Plaintiff in fact authored the tables of codes contained within the four latest examples of alleged infringed content (Star Wars: Jedi Outcast - Jedi Knight 2; Star Wars: Episode 1 - Jedi Power Battles; Star Wars: Episode 1 - Phantom Menace; Star Wars: Racer Revenge - Racer 2) and the previously disclosed Sega Smash Pack example. Each of these games is specifically discussed below.

Star Wars: Jedi Outcast—Jedi Knight 2

With respect to the game Star Wars: Jedi Outcast—Jedi Knight 2, Plaintiff claims to have authored and arranged the codes for the Game Shark¹¹ code chart utilizing, in part, codes which were emailed to him by third-parties. Doc. #58-9 ¶ 9. He then claims that Defendants copied these codes into their webpages. *Id.* ¶10. However, it is clear that Plaintiff at some point copied the cheats and Game Shark code charts from www.gamewinners.com. On the Game Shark chart

¹⁰ Exhibit C, Authors’ Declarations. Matthew Clark’s declaration was signed and produced during the briefing on Plaintiffs’ Motion for Sanctions. The others were disclosed before the close of discovery. Defendants have obtained additional declarations as the investigation has continued.

from Plaintiff's site, www.cheatcc.com, superscripted numbers appear at the end of some of the cheat descriptions such as "Destroy all AT-ST¹", "Kyle taunts²", and "Kyle does victory pose²". Motion Ex. 1-A. These numbers appear as superscripts in the chart for the same game at www.gamewinners.com. See Affidavit of Kevin Brett ("Brett Aff.") Ex. 1 pp. 2-3.¹² However, on www.gamewinners.com they correspond to footnotes at the bottom of the chart which give further information regarding the codes such as "1. This is useful in single-player mode if Jan refuses to land during the prisoner rescue mission until you finish off the AT-STs. There is a potential bug that makes one of them disappear" and "2. Cheat mode does not have to be enabled for this code to be used." See *id.* Although the www.gamewinners.com chart has since had more codes added, Plaintiff obviously copied an earlier version, omitting the footnotes but keeping the superscripts that correspond to them. Although third-parties may have contributed additional codes to Plaintiff via email, the original chart was not authored by Plaintiff, it was copied from www.gamewinners.com.

Plaintiff further alleges that Defendants copied hints which appear above his code chart for "Double-bladed lightsaber" and "Cheat Codes." Doc. #58-9 ¶11. The "Double-bladed lightsaber" hint appears nearly identical on www.gamewinners.com under the heading "Hint:Double-bladed lightsaber" and has been attributed to a user by the handle "spite". Brett Aff. Ex. 1 p. 9. The hint for unlocking cheat mode appears at the top of the www.gamewinners.com page and is nearly identical to the hint under Plaintiff's heading "Cheat Codes". *Id.* p.1; Doc. #59-2. Given the Plaintiff's predisposition to copying vast amounts of cheats from www.gamewinners.com, he likely also copied these cheats.

¹¹ For an overview of the history and technology of the Game Shark device, see Expert Report. ¶¶ 28-31.

¹² The Affidavit of Kevin Brett is attached hereto as Exhibit E.

Star Wars: Episode 1 - Jedi Power Battles

With respect to the game *Star Wars: Episode 1- Jedi Power Battles*, Plaintiff claims to have authored a chart of Game Shark codes. Motion, p. 5; Doc. #58-9 ¶12. Notably, Plaintiff does not mention any authorship of the cheats which appear above the Game Shark chart. Doc. #59-4. This is likely because he, through himself or his agents, cut and pasted them from www.gamewinners.com. The identical cheats appear on www.gamewinners.com and are attributed to specific users. Brett Ex. 2 pp. 3-13. Convenient for the Plaintiff, the Game Shark charts are no longer available on www.gameshark.com as this game is over ten years old and is no longer supported on the site.¹³ For this reason, Plaintiff likely chose to concentrate on this game out of the 10,000 for which he alleges authorship of cheat content on his website.

Star Wars: Episode 1 - Phantom Menace

Regarding *Star Wars: Episode 1-Phantom Menace*, the same situation exists. Plaintiff claims to have authored a chart of Game Shark codes. Motion, p. 5; Doc. #58-9 ¶13. Notably, Plaintiff does not mention any authorship of the cheats appearing above the Game Shark chart. Doc. #59-6. This is likely because they were “cut and pasted” from www.gamewinners.com. The identical cheats appear on www.gamewinners.com and, again, with attributions to specific users. Brett Aff. Ex. 3 p. 1. Conveniently, the Game Shark charts for the North American version are no longer available on www.gamesharks.com as this game is over ten years old and no longer supported on the site – which is likely why Plaintiff chose this game.¹⁴

Star Wars: Racer Revenge -- Racer 2

Regarding *Star Wars: Racer Revenge – Racer 2*, Plaintiff claims to have authored a Game

¹³ This game was outdated at the time the corresponding codes were placed on Defendants’ website. Expert Report. ¶¶ 36-37, and it was not being promoted by Plaintiff at that time. *Id.* ¶ 42. In fact, the game system had been discontinued. *Id.* ¶ 44.

¹⁴ See note 13, *supra*.

Shark code chart. Motion, pp. 5-6; Doc. #58-9 ¶ 14. In his affidavit, Plaintiff concedes that he does not author the codes as those are facts; he claims to have authored the arrangement of the charts, claiming his arrangements are unique to him. Doc. #58-9 ¶ 6. However, the arrangement of this chart is far from unique. Wise Aff. ¶¶ 12-13. Though the codes are different, they are arranged in the same order as those found on the Game Shark¹⁵ website; the only difference being that Plaintiff has moved the code for Young Anakin to the bottom. Brett Aff. Ex. 4 p. 2; Doc. #59-8. This arrangement is hardly unique and was likely authored by the manufacturer of the Game Shark rather than by Plaintiff.

Sega Smash Pack

As for Sega Smash Pack, Plaintiff does not claim any authorship of the cheats which appear on his site. He merely references an html glitch likely because he did not author any of the content.¹⁶ Motion, p. 6; Doc. #58-9 ¶ 17. It is nearly identical to the cheats which appear on www.gamewinners.com, though that website has since added more cheats. Brett Aff. Ex. 5; Doc. #59-10. Similar to cheats for previous games, the Sega Smash Pack cheats which appear on www.gamewinners.com have been attributed to specific users who likely authored them. Brett Aff. Ex. 5. Further, the Sega Smash Pack is grouped alphabetically according to game on both Plaintiff's website and on www.gamewinners.com. *Id.* Ex. 5; Doc. #59-10. Plaintiff admits that there is nothing original in grouping cheats and codes in this manner. #58-9 ¶ 6. So, Plaintiff likely did not author anything original in his Sega Smash Pack pages.

Given the plethora of evidence that Plaintiff copied from other sources – particularly with respect to the games at issue, it is likely that Plaintiff does not own a valid copyright. Feist Pub'ns, 499 U.S. at 345-46 (stating a work is not “original” for purposes of copyright protection if

¹⁵ The Game Shark device is currently marketed by a company called Mad Catz Interactive, Inc. of San Deigo, California. Expert Report ¶ 30.

it was copied from other sources). At the very least, Defendant has presented evidence to rebut the presumption of validity and create a fact issue as to authorship, an issue which should be submitted to the jury. Medforms Inc., 290 F.3d at 9110 (“Authorship is generally a question of fact for the jury.”).

B. Plaintiff’s Arrangement is Not Original or Protectable

As discussed above, the content at issue is not original to the Plaintiff. *Supra* IV.A. Though Plaintiff’s affidavit and statement of facts list five examples, his infringement argument concentrates on only four excerpts allegedly copied by Defendants.¹⁷ These selections contain no protectable elements.

Not all “copying” is prohibited under copyright law; it is constitutionally mandated that “a plaintiff bringing an infringement claim must prove ‘copying of the constituent elements of the work that are *original*.’” Kohus, 328 F.3d at 853. The first step in determining whether actionable copying has occurred is to identify the protectable elements in a work. *Id.* at 855. The Sixth Circuit has set forth three principles which guide the determination of what is protectable: First, it is a basic tenet of copyright law that ideas themselves embodied in a work are not protectable and those parts must be filtered out in determining the protectable elements. 17 U.S.C. §102(b) (“In no case does copyright protection for an original work of authorship extend to any idea...”); Kohus, 328 F.3d at 853 (citing Feist, 499 U.S. at 345).

Here, Plaintiff concedes that his work is a compilation of factual content. Under copyright law, protection exists for compilations which are defined as “work formed by the collection and assembling of preexisting materials . . . that are selected, coordinated or arranged in such a way

¹⁶ It is unclear whether he claims authorship to anything in the Sega Smash Pack example. Expert Report ¶ 34.

¹⁷ The Game Shark code charts for the games Star Wars: Jedi Outcast - Jedi Knight 2; Star Wars: Episode 1 - Jedi Power Battles; and Star Wars: Episode 1 - Phantom Menace; and the section of cheats for Sega Smash Pack. See Motion, pp. 11-13.

that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. Specifically, the selection and categorization of these facts are the protectable elements of the compilation. Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Group, 463 F.3d 478, 482 (6th Cir. 2006). However, where, as here, the categorization flows from the work's theme, (i.e. cheat codes for video games), there can be no copyright protection in the arrangement.¹⁸ See, e.g., Feist, 499 U.S. at 362 (categories in a directory such as "name, town, and telephone number" not entitled to protection: "Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original."); see also Kregos v. Associated Press, 937 F.2d 700, 702 (2d Cir. 1991) (no protectable copyright in categories of information concerning the baseball games for that day, including "the teams, starting pitchers, the game time, and the betting odds."); Mid Am. Title Co. v. Kirk, 59 F.3d 719, 722-723 (7th Cir. 1995) (where selection of facts to include in compilation is guided by strong external forces and not by the creativity of the author, no copyright protection exists).

For the second Kohus principle, "it is necessary to eliminate those elements dictated by efficiency." Kohus, 328 F.3d at 856. Essentially, under the merger doctrine "when there is essentially only one way to express an idea, the idea and its expression are inseparable [i.e., they merge,] and copyright is no bar to copying that expression." Kohus, 328 F.3d at 856 (quoting Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 606 (1st Cir. 1988)). Similarly, for the third Kohus principle, it is necessary to filter out *scenes a faire* - those elements which flow naturally from a work's theme rather than the author's creativity and that are external factors such as common business practices or elements which are outside the control of the author.

¹⁸ Plaintiff does not claim that his "selection" of cheat and codes is original or unique. Indeed, it seems that he posts them without first making a discriminatory "selection." He even posts codes for which the results are "unknown." See, e.g., Doc. #58-2 (code chart for Star Wars: Jedi Outcast --Jedi Knight 2); Wise Aff. ¶ 12.

Kohus, 328 F.3d at 856 (6th Cir. 2003) (citing 4 Nimmer § 13.03[F][3] and Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc., 220 F.3d 396, 401 (5th Cir. 2000)).

Here, the content at issue represents obvious arrangements dictated by external factors and commonly used when assembling cheat codes.¹⁹ For example, some codes are arranged with the most important and desirable attributes first (such as listing at the top “God mode,” which renders your character invisible, and “all weapons and maximum health and armor”) and having lesser important codes (such as ones for which the results are “unknown”) listed last. See, e.g., code chart for Star Wars: Jedi Outcast - Jedi Knight 2 at Doc. #58-2. Such an order is not ingenuity. Indeed, each game dictates the relative importance of the codes applicable to it. And, a ranking of importance has become a common way of arranging codes. Wise Aff. ¶¶ 12-13. In fact, the manufacturer of the Game Shark arranges the codes on its website in a similar manner.²⁰

Additionally, other codes have been arranged by character or by level title. For example, for Star Wars: Episode 1 - Jedi Power Battles, the codes are grouped first in order of importance, as described above, and then according to character. See code chart at Motion Exhibit 2-A. The codes specific for each character (such as Obi-Wan Kenobi) are all grouped together. Id. This type of grouping is common in the industry as exhibited by the website for the manufacturer of the Game Shark device who also groups its codes, in some instances, in this manner.²¹

¹⁹ With respect to the Sega Smash Pack codes, Plaintiff admits that listing codes in alphabetical order is not protectable. However, that is what he has done here. See Doc. #58-9 ¶ 6; and Doc. #59-10. Further, the appearance of the phrase “CCC Daily Poll” in the list is an artifact of an html glitch, not due to the creativity of the author and is, thus, not a protectable element. See, e.g., Ross, Brovins & Oehmke, 463 F.3d at 485 (elements which are out of the control of the author and dictated by an underlying authoring tool are not sufficiently creative to warrant copyright protection).

²⁰ Brett Aff. Ex. 6 at 5, 8, 11, 13, 16, 19, 28, 33, 35, 37, 40, 42 (grouping codes in descending order of importance and according to character).

²¹ See, e.g., Brett Aff. Ex. 6 at 5, 8, 11, 13, 16, 19, 28, 33, 35, 37, 40, 42 (grouping cheat codes in descending order of importance and according to character).

In this context, the unpublished and on point Sixth Circuit opinion, J. Thomas Distributions v. Greenline Distributions, No. 95-2100, 1996 U.S. App. LEXIS 29035 (6th Cir. Oct. 31, 1996) (unpublished), is instructive. There the plaintiff claimed that the defendant had copied an entire section of its catalog listing lawn mower replacement belts as well as a particular drawing. Id. at 4. The only unique feature added by the plaintiff was to add subheadings under each group of products and reorder the products in accordance with those subheadings. Id. The Court found that the arrangement lacked sufficient creativity to be protected under copyright law stating:

. . . This method of organization, although perhaps original, lacks the requisite creativity for copyright protection. [citations omitted].

The additional subheadings provided by the plaintiff are similar to the business headings one would find in the yellow pages. Such an arrangement is typical, if not inevitable. See BellSouth, 999 F.2d at 1442-43. It does not qualify for copyright protection. . . . Plaintiff did not select the data from an infinite number of available possibilities, nor is the information presented unique to plaintiff's catalog. Viewing these contributions together, one is inevitably drawn to the conclusion that plaintiff's replacement belt section is nothing more than a common and generic method of organization. The information provided can only be presented in a limited number of ways. **Plaintiff's arrangement constitutes a mechanical, routine, and garden-variety compilation.** See Feist, 499 U.S. at 362. **Such a compilation fails as a matter of law to meet the minimal level of creativity required for copyright protection.**

Id. at 4-5 (emphasis added). Similarly, where the only original aspects of a compilation work were the choice of headings and arrangement of categories, the Sixth Circuit has stated (though acknowledging the low threshold for originality):

. . . [These are] two minor differences that we have previously held to be insufficiently creative to justify copyright protection. In [J. Thomas Distributions], we held that a catalog that featured additional subheadings and a rearranged sequence of information was, while "organized in a manner unknown to the industry prior to its publication," and "perhaps original," nonetheless "typical, if not inevitable," and lacking in the "requisite creativity for copyright protection." . . . To be sure, ATC could have arranged the parts information in other ways that were potentially less clear or useful, but this fact alone is insufficient to demonstrate the creativity necessary for copyright protection. . . . ATC's catalog is not eligible for copyright protection as a compilation.

ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 712 (6th Cir. 2005) (citations and quotations omitted).

Similarly, outside forces dictate Plaintiff's arrangement - the codes are specific to each character as an artifact of their function with the Game Shark device, not as to Plaintiff's own creativity. Though, according to his own testimony, Plaintiff's arrangement of codes into categories by character and in descending order of importance may render them more useful (See Doc. #58-9 at ¶ 6), this does not make them eligible for copyright protection. ATC Distrib. Group, Inc., 402 F.3d at 712. The law could not be clearer.

C. Plaintiff Cannot Prove Substantial Copying

Once the Court has removed the unprotectable elements, it must determine whether the allegedly infringing work is substantially similar to the protectable elements of the alleged infringed work. In order to do this, the Court must look at the individual parts of the works and at the works as a whole, including those portions of the works which are not alike. Mihalek Corp. v. Michigan, 814 F.2d 290, 295 (6th Cir. 1987) (the more numerous the differences between two works the less likely copying has occurred). Here, such an analysis demonstrates the lack of any substantial copying.

"Because copyright law affords only 'thin' protection to factual compilations, a competitor may take the bulk of the factual material from a preexisting compilation without infringing the author's copyright." Schoolhouse, Inc. v. Anderson, 275 F.3d 726, 729 (8th Cir. 2002). A large amount of verbatim copying is needed to find infringement in a compilation. Id. at 729; Feist, 499 U.S. at 348-50. In this motion (and after nearly three years of litigation in Colorado and Ohio), Plaintiff relies on only five (5) examples of content allegedly obtained from his site. As Plaintiff admittedly lists content for over 10,000 games, the Plaintiff's examples constitute less than .05% of the entire content of his website. Motion, pp. 1-2. Further, a substantial amount of Defendants'

website existed prior to any alleged infringement.²² Because only a small percentage of the alleged infringing cheats and codes in the two websites overlap, the works cannot be substantially similar as a whole and there can be no finding of infringement. See, e.g., id. at 729 (holding that a website incorporating 56 out of 64 of the plaintiff's topics non-infringing); see e.g. Key Publications, Inc. v. Chinatown Today Pub. Enter., Inc., 945 F.2d 509 (2d Cir. 1991).

D. Plaintiff's Summary Judgment Evidence Should be Stricken

Though the Defendants have addressed the Plaintiff's exhibits in good faith, much of the Plaintiff's exhibits and evidence at issue in this Motion should be stricken. Under Rule 37(c)(1), a party who fails to provide information required by Rule 26(a) or (e) is prohibited from using that evidence to support a motion or at trial, unless that failure is found to be "substantially justified or harmless." See Fed. R. Civ. Proc. 37(c)(1). Moreover, under Rule 26(e), a party is required to timely supplement prior responses which are known to be incomplete.²³ Here, the Plaintiff failed to comply with the applicable discovery rules.

As this Court well knows, Defendants requested the Plaintiff disclose his infringement contentions in their entirety several times, but Plaintiff responded by stating that it would be unduly burdensome for him to do so.²⁴ Not until the June 22, 2009 phone conference did Plaintiff state that he would be limiting his infringement case to twelve examples which had been previously produced in discovery. See December 23, 2009, Order (Doc. #57) at 5. Despite this representation to the Court and to Defendants, for the first time during briefing on his Motion for Sanctions, Plaintiff contradicted this statement and revealed that he would conduct a substantial

²² Wise Aff. at ¶ 10.

²³ See Fed. R. Civ. Proc. 26(e); See Roberts v. Galen of Va., Inc., 325 F.3d 776, 782 (6th Cir. 2003) (Stating that Rule 37(c)(1) "mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified.")

²⁴ See, e.g., Plaintiff's Response to Defendants' Amended First Set of Interrogatories at No. 4, attached as Exhibit F; See also, Plaintiff's Response to Defendant's Amended First Request for Production of Documents at No. 5, attached as Exhibit G.

similarity analysis on the entire site.²⁵ At that time, Plaintiff had not disclosed any other infringement contentions other than the twelve examples. Further, Plaintiff had maintained that he was the sole author of all content on his website, focusing on discreet examples and accusing Defendant of verbatim copying. See Affidavit of Charles Mudd²⁶ (“Mudd Aff.”) ¶¶ 6-8; Suppl. Mudd Aff. ¶ 8. At no time did he characterize his work as a compilation of facts, nor did he disclose an infringement contention which would rely on the selection and arrangement of facts in the public domain. See Mudd Aff. ¶¶ 6-8; Suppl. Mudd Aff. ¶ 8.

Defendants have been subject to extreme prejudice by receiving the newly disclosed contentions in Plaintiff’s Motion so late in the case and nearly six months after the close of discovery. Plaintiff also submitted the emails of three previously undisclosed witnesses as summary judgment proof. See Doc. #59-1. Defendants have been unable to conduct a full investigation as to the four latest examples of allegedly infringed content and these new witnesses. Given the vast amounts of content at issue in the case, it is important for Defendants to be informed of the specific examples upon which Plaintiff intends to rely so that they may mount a defense against any infringement contentions. See December 23, 2009, Order (Doc. #57) at 5. There is absolutely no excuse for withholding these contentions until this late date; Plaintiff clearly had formed an intent to rely on other evidence as early as the filing of his reply.²⁷ Further, Defendants expressly informed Plaintiff that they were unaware of any selection and arrangement analysis and that if he was intending to rely on such an analysis it would be trial by ambush. See Defendants’ Surreply at 11.

²⁵ Plaintiff’s Reply to Defendants’ Response to Plaintiff’s Motion for Sanctions (Doc. #49) at 6-7. Plaintiff stated that producing thousands of pages of cheats and codes from each website constituted disclosure of infringement contentions. See Id. This hardly constitutes sufficient disclosure of contentions. See, e.g., See, e.g., General Universal Sys. v. Lee, 379 F.3d 131, 147 (5th Cir. 2004)(plaintiff produced only a copy of the alleged infringing source code and provided no comparison with the copyrighted work).

²⁶ Attached hereto as Exhibit H.

²⁷ Plaintiff’s Reply to Defendants’ Response to Plaintiff’s Motion for Sanctions (Doc. #49) at 6-7.

Late disclosed infringement contentions are frequently excluded under Rule 37(c) (1), and should be excluded in this case.²⁸ Defendant respectfully requests that the Court strike any evidence related to the four new infringement contentions and deny Plaintiff's Motion for Summary Judgment.

V. CONCLUSION

Based on the foregoing arguments, Defendants respectfully request that the Plaintiff's Motion for Partial Summary Judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 21, 2010, I electronically filed the foregoing with the Clerk of Courts using the Court's CM/ECF system, which will send notification of such filing to counsel for Plaintiff in this action.

s/ Sabrina Haurin

Sabrina Haurin (0079321)

²⁸ See *Roberts v. Galen of Va., Inc.*, 325 F.3d 776, 782 (6th Cir. 2003); *Cummins-Allison Corp. v. SBM Co., Ltd.*, 2009 U.S. Dist. LEXIS 22114 (E.D. Tex. Mar. 19, 2009) (citing *Roberts* and excluding invalidity contentions in a patent infringement case where contentions were not disclosed in accordance with the local patent rules); *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 825 (E.D. Tex. 2007) (citing *Roberts* and striking infringement contentions stating "Allowing such a scanty and inadequate infringement contention disclosure to stand would deter neither game-playing nor actual violation of the rules - to the contrary it would actually discourage the voluntary exchange of information.")