UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID ALLISON, doing business as CHEAT CODE CENTRAL, a sole proprietorship,	)	
Plaintiff,	)	Case No. 2:08-cv-00157-MHW-MRA
vs.	)	
JEREMY N. WISE, an individual, and **WISE BUY NOW, LLC**, an Ohio Corporation	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff David Allison, d/b/a Cheat Code Central, files this reply brief in support of his Motion for Partial Summary Judgment ("Motion").

INTRODUCTION

Defendants Jeremy N. Wise and Wise Buy Now, LLC filed an astonishing 451 pages with this Court in response to Plaintiff's Motion, nearly all of which are completely unrelated to the matter at hand. Included among the documentation were several affidavits, an expert report, and various printouts of web pages. Conspicuously absent from this prodigious production of paper was an affirmation that Defendants did not copy the material in question from Plaintiff. Also absent was any evidence creating a genuine issue of fact regarding Plaintiff's copyright infringement claim in the case at hand. Plaintiff hopes this Court will not be distracted by the mountain of irrelevant evidence submitted by Defendants. For each of the well-supported

reasons previously set forth in the Motion, and for the reasons set forth below, Plaintiff's Motion must be granted.

A. Plaintiff Has Demonstrated that the two Works are Protected by Copyright and Substantially Similar.

In the Sixth Circuit, the substantial similarity inquiry has been condensed into a two-part test, the first being the identification of those parts of the work that are original and thus protected by copyright, and the second being whether the infringing work is substantially similar to those delineated elements of the registered work. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 274 (6thCir. 2009). As the Sixth Circuit stated in *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 318 (6th Cir.2004), the standard for originality is quite low and the "vast majority of works make the grade quite easily" (quoting *Feist,* 499 U.S. at 361, 111 S.Ct. 1282).

"Registration by the Copyright Office is *prima facie* evidence of a copyright's validity. The burden is on the party challenging the copyright to rebut the presumption." *Decker Inc. v. G & N Equipment Co.*, 438 F.Supp.2d 734, 739 (E.D.Mich.,2006)(citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 533-534 (6th Cir. 2004) and *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC Inc.*, 58 F.3d 1093, 1095 (6th Cir. 1995)). *See also*, 17 U.S.C. §410(c). As stated in the Motion, Plaintiff registered his Copyrighted Web Pages with the U.S. Copyright Office on May 12, 2005, Registration number TX 6-162-180, more than a year before the acts of infringement occurred. In addition, some of the content appearing on the Copyrighted Web Pages was derived from Plaintiff's copyrighted book, "The Ultimate Code Book," which he registered on January 5, 2000, Registration number TX-5-116-527. These registrations make Plaintiff's copyrights of the Copyrighted Web Pages presumptively valid, thereby satisfying the first prong of the test for infringement.

The second test, i.e., the substantial similarity analysis between the Copyrighted Web Pages and the infringing work, was conducted in detail within the Motion. In their Response, Defendants provide no substantial similarity analysis whatsoever, let alone one that refutes Plaintiff's. In fact, in his affidavit Defendant Wise does not deny that he accessed and copied portions of Plaintiff's site.

In light of the fact that the works are identical on their face and copying has not been denied, Defendants' Response was limited to an attempt to (1) create an issue of fact; and (2) argue the non-enforceability of Plaintiff's copyright. Neither succeeds, as addressed more fully below.

B. Defendants have Failed to Create a Genuine Issue of Fact Regarding Plaintiff's Unique Arrangement of the Cheat Code Tables

1. Plaintiff's original cheat code tables substantively differ from the cheat code tables of third-party websites.

Defendants submitted a quantity of printouts from an unassociated cheat code website titled "www.gamewinners.com" ("gamewinners") pertaining to the games at issue in Plaintiff's Motion. Based on the submission of these dissimilar documents, Defendants argue that Plaintiff's copyrighted cheat code tables "likely" originated from third-party websites. A comparative analysis of the documents produced by Defendants and Plaintiff's own tables demonstrates, however, that Defendants' claims are flatly unsupported.

For example, with respect to the cheat code chart compiled for the game "Star Wars: Jedi Outcast – Jedi Knight 2" (Plaintiff's Exhibit 1-A to his Motion), a review of Plaintiff's chart [Document 58-1, pages 1-2] and the gamewinners chart submitted by Defendants [Document 60-5, pages 5-8] shows the facts in the two charts have been presented in completely different and

unique orders. The Court need only look to the first 10 facts to get a feel for how differently the two charts have been arranged:[1]

Column 1 - from Plaintiff's site	Column 1 from the gamewinners site
Result (Column 1 from Plaintiff's site)	**Effect**[2]
God Mode	God mode
All weapons and maximum health and armor	No clipping mode
All weapons	Disable enemy AI
Full ammunition	Suicide
Full health	All weapons, maximum health, and armor
Full armor	Full health
Full force bar	Full armor
Full inventory	Full ammunition
Full battery bar	All weapons
999 health	Spawn indicated weapon

Likewise, Plaintiff's copyrighted cheat code table presented as his Exhibit 2-A to his Motion [Document 58-3, pages 1-4] differs markedly from the gamewinners chart presented by Defendants [Document 60-5, page 74] for the "Star Wars: Episode 1 – Jedi Power Battles" game, both in the order of facts and in the descriptions used, as well as in the overall quantity of information presented. Attached as ***Exhibit A*** are the two charts, with the first six entries on the

[1] Defendants attempt to prove that Plaintiff copied this chart from the gamewinners website by pointing to some superscripted numbers that appear after a couple of the entries. It is important to note, however, that regardless of where Plaintiff obtained the facts incorporated into his table, it was his own creative organization of those facts—an organization that differs markedly from the one used by gamewinners—that merits protection under the Copyright Act and Supreme Court precedent.

[2] Even the table headings are different on the two sites. Plaintiff's site uses the headings "Result" and "Cheat Code," while gamewinners.com uses the headings "Effect" and "Code." In addition, while Plaintiff has selected just 51 entries for inclusion on his chart, the gamewinners' chart has 97 entries.

gamewinners chart marked as letters A through F, and the corresponding entries on Plaintiff's chart also marked A through F for ease of comparison. Although entry "F" is the sixth entry on the gamewinners chart, it does not even appear on Plaintiff's chart until half way through the third page.

Yet again, Plaintiff's chart presented as his Exhibit 3-A to his Motion [Document 58-5, pages 1-2] is not replicated in any way on the gamewinners pages for the same "Star Wars: Episode 1 – The Phantom Menace" game submitted by Defendants [Document 60-6, pages 54-55]. Defendants' respond by making the speculative argument that a similar chart may have previously appeared on some other website at some other point in time. Defendants' argument is pure conjecture, unsupported by any evidence. Only admissible evidence can serve to create a question of fact in motions for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Defendants submitted no gamewinners' counterpart to the chart Plaintiff presented from "Star Wars: Racer Revenge – Racer 2" in his Exhibit 4-A to his Motion [Document 58-7, p.1]. Instead, they submitted a printout from the Game Shark Code website. [Document 60-6, p. 96.] In this case, the codes themselves are completely different, and Plaintiff's page was last updated on May 31, 2002 [Document 59-8, p.1], whereas the information presented on the Game Shark Code site utilized by Defendants to support their argument was updated almost a year later, on March 19, 2003 [Document 60-6, p. 96]. In other words, the website that Plaintiff allegedly "used" to obtain the information for his web page was dated almost one year later than his own.

Finally, in his Motion Plaintiff referenced pages pertaining to "Sega Smash Pack" [Document 59-10, p. 1-9] not in order to allege copyright infringement of those pages (they were not registered in May 2005), but in order to demonstrate without question Defendants' direct and

knowing copying from Plaintiff's website, because this copying included portions of Plaintiff's website's foundation, *including but not limited to portions that were actually malfunctioning*. Through this example and that of the infringing registered works cited above, together with Defendants' silence on the issue of access and actual, willful infringement, the Court may very reasonably conclude that Defendants had access to and copied directly and willfully from the protected elements of Plaintiff's site.

2. Plaintiff's affidavit is admissible evidence proving that he has a unique system of ordering information.

Defendants ask the Court to ignore those portions of Plaintiff's affidavit in which he describes his method of organization for the charts and tables he creates because they allege that such portions are inadmissible as conclusory and not based on fact.

Defendants cite *Jones v. Butler Metropolitan Hous. Auth.*, 40 Fed. Appx. 131 (6th Cir. 2002), an unreported case with no precedential value, and *Marshall v. East Carroll Parish Hospital Serv. Dist.*, 134 F.3d 319 (5th Cir.1998), a Fifth Circuit case also with no precedential value in this Court. Even if the Court were bound to follow these cases, they do not support Defendants' argument.

In *Jones*, *supra*, the court affirmed the district court's decision to strike portions of affidavits that expressed the affiants' impressions of what other people in their organization were thinking. The court found that the affidavits merely expressed "beliefs based purely on innuendo, rumor and hearsay." *Jones*, 40 Fed. Appx. at 135. As such, the testimony would have been inadmissible at trial. In *Marshall*, *supra*, defendants sought to strike the affidavit of a hospital nurse who testified therein that during her tenure at the hospital, she had seen patients with symptoms similar to those of the plaintiff who all had been admitted for observation and further testing. In essence, she was giving expert testimony about the conditions of the various

patients in question. The court found she was not qualified to make such a judgment call and deemed her statements conclusory and unsupported, and therefore deemed them insufficient to defeat a motion for summary judgment. *Marshall*, 134 F.3d at 324.

In sharp contrast, Allison has testified to his ten-plus years of experience as a website creator and manager, and is fully competent to testify to his own actions related thereto. He does not opine on what he believes others do or don't do. Nor does he testify about facts outside his realm of expertise. Rather, he states factually that he organizes the cheat codes he uses in the charts and tables on his site by hand, according to his personal, subjective belief about the relative importance of each. Plaintiff's statements are neither hearsay nor conclusory; instead they clearly set forth the true facts regarding how Plaintiff generates the content for his site.

It is Defendant Wise whose testimony is completely conclusory and unsupported. In his affidavit he states, "I do not believe that Plaintiff organized his Game Shark charts in any original way. [Other websites] also list codes in descending order of importance and group them according to character and level title." *See*, Affidavit of Jeremy Wise ("Wise Affidavit"), [Document 60-2], ¶13. Defendant's testimony regarding what *he believes* constitutes "order of importance" is a *subjective*, not objective concept. If there were just one definitive way for this to play out, all the charts for the same games would be absolutely identical. Yet they are not, as is evident from the various exhibits produced by Defendants themselves, and discussed at length above. Not *one* of the gamewinners' examples employs anything resembling the "order of importance" used by Plaintiff in his charts.

Through his affidavit, Plaintiff has submitted admissible and competent evidence regarding the creative process he employs to generate his content. Defendants have failed to produce any admissible evidence to question Plaintiff's statements. If the movant meets the

initial burden of showing that there is no material fact issue, the burden shifts to the non-movant to produce evidence creating a genuine issue of fact for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Defendants have failed to create an issue of fact with respect to Plaintiff's original selection and arrangement of the cheat codes in his various charts and tables.

As noted in the Motion, the mere existence of a "scintilla of evidence" to support the nonmoving party's side will not be sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, there must be sufficient evidence upon which a jury could properly base a verdict, taking into account the parties' respective burdens of proof. *Id.* Because no such evidence has been presented, Plaintiff's Motion must be granted.

3. Plaintiff's choices in creating his tables were neither mechanical nor arbitrary, and demonstrate sufficient creativity to warrant copyright protection.

Contrary to the Defendants' contentions, the original arrangement of the charts on Plaintiff's site do not flow from the work's theme, or represent the only way to express the ideas in question. The arrangement of unprotectable factual elements into original format has been directly addressed in several circuits. *See, e.g., Metcalf v. Bochco,* 294 F.3d 1069, 1074 (9th Cir. 2002) ("[T]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element. Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection").

If the arrangement of Plaintiff's site was flowed directly from the field in which he practices, the gamewinners charts for the same games would have been ordered in precisely the same way. As noted above, they are not. Instead, Plaintiff applies his subjective opinion about the relative importance of the facts at issue in order to come up with the organization of his

charts. Because there is more than one way to express the ideas at issue, Plaintiff's unique expression is protectable. *Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003).

Defendants' citation to the two-page unpublished decision *J. Thomas Distribs. V. Greenlilne Distribs.*, 100 F.3d 956, 1996 WL 636138 (6th Cir. 1996) does not further their argument because the facts are distinguishable from the case at bar. That case involved the replacement belt section of a landscaping power equipment catalog. The only two potentially protectable elements in plaintiff's catalog were the subheadings added underneath each manufacturer heading, and the sequence of presenting the information. The court found the subheadings to be no different from business headings one would find in a telephone directory. As such, they did not contain the requisite element of creativity. It further found the rearrangement of information was "nothing more than mere column switching." *Id.* In other words, no subjective thought went into that change. *See, also, ATC Distrib. Corp. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F3d 700, 709 (6th Cir. 2005)(holding allocation of numbers to parts in transmission parts catalog to be "an essentially random process" not worthy of copyright protection). In contrast, Plaintiff's organization of his information is not something he did mechanically or randomly. Instead, he applied his subjective opinion to the facts at hand in order to generate the specific order he personally felt would be most useful to his viewers. Allison Affidavit, [Document 59], ¶6. There was nothing random about it, nor was the order dictated by outside forces or mechanical requirements. Again, had that been so, Plaintiff's charts would mirror the order and organization of the gamewinners charts. They do not.

As the Supreme Court has noted:

> The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently

> by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.

Feist Publ., Inc. v. Rural Tel. Service Co., Inc. 499 U.S. 340, 348-349 (1991). Because Plaintiff's choices involved at least a minimal degree of creativity in creating his tables, his work is protectable.

C. Plaintiff's Copyright, Duly Registered with the U.S. Copyright Office, is Presumed Valid. Defendants Have Failed to Create an Issue of Fact Sufficient to Rebut that Presumption.

Defendants continue their attempt to raise irrelevant issues of fact and law by producing several affidavits signed (but in several cases not notarized) by a handful of teenaged boys who assert that they were the original authors of several one- or two-paragraph cheat codes that appear on Plaintiff's over 12,000 page website (constituting less than .004 percent of Plaintiff's total content). Plaintiff is not claiming protection for those particular elements of his site, so any factual or legal evidence related thereto is completely irrelevant to this Motion.

Defendants have produced an expert report for the same reason. *See*, Expert Report of Garry E. Kitchen, [Document 60-1] and Exhibit A to Defendants' Response ("Kitchen Report"). The majority of the Kitchen Report focuses on a damages analysis, an analysis that is moot because Plaintiff elected to opt for statutory damages in this matter before the report was produced. The only portion of the Kitchen Report that remains relevant can be found in paragraph 33, where he gives his opinion as to whether Plaintiff authored the content on the web pages in question. Kitchen states, "...it is my understanding of the facts in this case that Plaintiff Allison is not claiming 'authorship' of any Game Shark code data, only the way in which it is presented and organized on the page. Therefore it is my opinion that Plaintiff Allison did not author the content on the five web pages in question..." Kitchen Report, ¶33.

Kitchen is correct when he states that Plaintiff is not claiming to have written the codes themselves, but rather that he claims his selection and arrangement of those codes is entitled to copyright protection. Kitchen's subsequent conclusion that Plaintiff did not "author" the content of those pages reflects Mr. Kitchen's lack of knowledge regarding copyright law. It is the very selection and arrangement that would be deemed "authorship" for purposes of copyright protection. See, e.g., *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* 499 U.S. 340, 338-349 (1991). As noted in the Motion, "even a directory that contains absolutely no protectable written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. ... **Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection.**" *Id.* (emphasis added). Kitchen readily admits he is no lawyer. Kitchen Report, ¶15. Any legal conclusion he drew with respect to legally protectable authorship must be disregarded.

Finally, Defendants have raised an issue regarding content appearing on Plaintiff's site ***in 2009*** that also allegedly appeared on a third-party site. Such an allegation would involve events occurring more than four years after the copyright relevant to this lawsuit was registered, long after the infringing activities occurred, and long after this lawsuit was filed. Plainly, this evidence is completely irrelevant to the case at hand. An infringer of content from an author's first novel cannot point to alleged problems with the validity of the author's copyright on his *third* novel as some sort of evidence that the first copyright was not valid. Moreover, the evidence presented here does not even relate to the type of material in which Plaintiff claims protection. Instead, it is limited to the narrative style cheat codes that are readily copied and posted from site to site. Kitchen Report, ¶14. Defendants' unsupported allegations of alleged

infringement from a third-party in 2009 cannot serve to rebut the presumption that Plaintiff's 2005 copyright is valid, as there is absolutely no connection between those two works.

D. Plaintiffs have Demonstrated Sufficient Evidence of Infringement to Show Substantial Similarity

In their Response, Defendants attempt to argue that they should not be held liable for infringement because Plaintiff hasn't presented enough examples of infringement to warrant protection of his copyright.[3] Their argument is without merit. Plaintiffs have produced four separate substantive cheat code tables, each of which was copied virtually verbatim by Defendant.

The Sixth Circuit makes a distinction between cases in which large quantities of purely factual information are copied versus cases in which discrete portions of work displaying the requisite modicum of creativity are copied in their entirety. *See, e.g., Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Group*, 463 F.3d 478 (6th Cir. 2006). In *Ross, Brovins*, the court discussed the quantitative analysis a court should do in order to find substantial similarity for compilations when the works in question involve nothing more than a collection of facts, blank forms, or works otherwise available in the public domain. The court contrasted this scenario with one in which a discrete portion of a work that involves creative expression is copied in its entirety. *Id.* When that is the case, substantial similarity can be demonstrated by virtue of defendant's replication of that unique aspect of plaintiff's work. *See also, Faessler v. United States Playing Card Co.*, Not reported in F.Supp.2d, 2007 WL 490171 (S.D.Ohio) (holding that verbatim reproduction of large portion of work not required when subject works are not mere lists of

[3] Plaintiff notes that the examples provided were intended as just that—*examples* to demonstrate that infringement occurred. At the damages phase of the trial Plaintiff will present additional evidence as to the scope of infringement.

factual information or blank forms). A copy of this opinion is attached as ***Exhibit B*** for the Court's convenience.

Plaintiff's tables presented in Exhibits 1 through 4 of the Motion [Document 58] are literally identical to the ones found on Defendants' websites and shown in those same exhibits. Not only have the facts themselves been reproduced, but the original order, selection and arrangement are replicated exactly. When this creative, subjective content is infringed, substantial similarity is obvious. There is no need to reproduce large amounts of factual content in order to demonstrate that a particular volume of data has been copied in order to prove infringement.

The cases cited by Defendants (none of which were from this circuit) all fall into the "purely factual" or "blank forms" category, which require large-scale copying in order to demonstrate substantial similarity. In *Schoolhouse, Inc. v. Anderson*, 275 F.3d 726 (8th Cir. 2002), for example, plaintiff published an annual magazine that included various tables of information on public and private schools in the Minneapolis and St. Paul metropolitan area. The tables organized information on the various schools by topic. The defendant published a website containing similar information and incorporating many of the same topics. In holding that the two works were not substantially similar for purposes of copyright protection, the Court noted that although both works contained many of the same topics, the topics themselves were ones that parents would obviously consider important in selecting a school and therefore did not reflect any genuine creativity or originality. More importantly, ***the court noted that the arrangement of the topics in the two works was not substantially similar***. *Id.*, at 730.[4]

[4] It is interesting to note that the defendant in *Schoolhouse* conceded that plaintiff had a valid copyright in its tables. He simply disagreed that his presentation of the information infringed that valid copyright because the two works were so different.

The *Schoolhouse* court (and Defendants) cite to another case that is similarly distinguishable from the present one. *Key Publ., Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2nd Cir. 1991) involved two telephone directory publishers who both targeted businesses that would be of interest to the Chinese-American community in New York. There was an overlap of approximately 1,500 listings between the two directories, and plaintiff sued on this basis, alleging that defendant had infringed its copyright. The court declined to find substantial similarity based solely upon the overlap of some of the businesses in the two directories. *Id.*, at 516.

Contrary to each of these cases, Plaintiff's copyrighted cheat code charts were created by him and not copied verbatim from another source, for which reason they fall outside the "purely factual/blank form" string of cases in which the courts require a significant volume of copying in order to demonstrate substantial similarity. Here, it is undeniable that the charts and tables created by Plaintiff and copied by Defendant are substantially similar. In fact, ***they are identical***.

E. Plaintiff's Summary Judgment Evidence Must Stand.

Plaintiff provided copies of his entire web site (the "Copyrighted Work") along with a copy of Defendants' primary website (the "Infringing Work") from the same timeframe to Defendants at the time that the case was originally filed.[5] The identical comparative evidence of infringement was produced yet again earlier this year in response to discovery requests by Defendant Wise Buy Now.

As the two CDs clearly demonstrate, Defendants copied large portions of the Copyrighted Work verbatim and placed them on the Infringing Work. Defendants conceded as much during 2007 when they temporarily removed the majority of their web site content. *See*, Affidavit of David Allison filed in conjunction with his Reply to Motion for Sanctions

[5] This case was originally filed in U.S. District Court in Colorado in January 2007.

[Document 49-7], ¶ 5. Plaintiff is not required or expected to delineate every specific instance of infringement for Defendants in order to maintain his right to damages.[6] To the contrary, the Sixth and other circuits have held that a comparative analysis of the works in their entirety is required, since "the final step [in a substantial similarity analysis] is to determine whether the allegedly infringing work is substantially similar *by comparing the two works*." *Stromback v. New Line Cinema*, 384 F.3d 283, 297 (6th Cir. 2004) (Emphasis added). The Court went on to state that substantial similarity exists where "the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value." *Id.* Here, a substantial similarity analysis arising from the evidence twice produced through discovery in this matter will demonstrate that numerous portions of the two works are virtually identical.

Ignoring the twice-produced CDs, Defendants cite *General Universal Systems v. Lee*, 379 F.3d 131 (5th Cir. 2004), a case from outside the Sixth Circuit which is completely inapposite to these facts. In *Lee*, the plaintiff did not provide copies of both works for comparison purposes, but rather only provided the court with a copy of a single work. *Id.* at p. 147 ("GUS, however, fails to provide the copy from LOPEZ COBOL's source code for comparison."). By so doing, the plaintiff failed to provide the foundational basis for conducting a substantial similarity analysis. As noted above, here Plaintiff intentionally and repeatedly produced copies of both the Copyright Work and the Infringing Work during this case.

Defendants' citation to *Roberts v. Galen of Va., Inc.*, 325 F.3d 776 (6th. Cir. 2003), is also off point. That case involved an allegedly untimely expert witness disclosure. The court refused

[6] Plaintiff disputes Defendants' assertion that Plaintiff agreed to limit his infringement contentions to 12 previously disclosed examples. Defendants cite the Court's Order of December 23, 2009 [Document 57] allegedly confirming their version of the facts; however, that portion of the Order merely restates Defendants' assertions. It does not reflect the Court's opinion or concurrence thereon.

to strike the report as a sanction for being untimely, holding that any disclosure errors were harmless or substantially justified. *Id.*

Defendants cite to no copyright infringement case in the Sixth Circuit or elsewhere requiring the Plaintiff to disclose each and every specific infringement contention. No such case exists. There are a small series of patent infringement cases along these lines, but only where the relevant district court's local patent rules require such specificity. *See, e.g., Integrated Circuit Systems, Inc. v. Realtek Semiconductor Co., Ltd.*, 308 F.Supp.2d 1101 (N.D.Cal. 2004). No comparable local rule exists for copyright infringement.

Also contrary to Defendants' contentions, Plaintiff has timely supplemented his discovery production and disclosures. For example, the three emails attached as Exhibit A to the Allison Affidavit [Document 59] were produced to Defendants on October 5, 2009 pursuant to Plaintiff's Supplemental Response to Defendant Jeremy N. Wise's Amended Requests for Production. Plaintiff timely supplemented his responses when these documents were located. The emails are documents that demonstrate some of the sources of information Allison used to create his charts. He has not listed the emails' authors as witnesses because Plaintiff does not intend to call these people. Nor must he do so in order to admit the emails as evidence. As the intended recipient, Plaintiff can authenticate the emails, and their contents speak for themselves. The documents would not be admitted for purposes of proving the underlying facts (i.e., that the cheat codes are accurate). Rather, they would be admitted merely to demonstrate the source from which Plaintiff obtained the information he then incorporated into his site.

Discovery in this matter remained open for four weeks beyond the Court's order of December 23, 2009 [Document 57], and by stipulation of the parties the right to take depositions of certain witnesses continues to be open. Defendants have not been prejudiced in any way by

Plaintiff's timely supplementation of his document production responses. The evidence provided in conjunction with the Motion is admissible.

CONCLUSION

Plaintiff sought the protection of the U.S. Copyright Office by registering the content of his website in 2005. Subsequent to that registration, Defendants copied protectable elements of Plaintiff's site for their own use and benefit, without authorization or permission. Plaintiff has met his burden of proof with respect to the issue of infringement and is entitled to the partial summary judgment he requests. Because Defendants have failed to raise any genuine issue of material fact, the Court must enter the relief he seeks.

Dated this 8th day of February, 2010.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2010, I electronically filed the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this matter.

/s/ Thomas P. Howard
Thomas P. Howard, admitted *pro hac vice* (CO reg. 36337)

GameWinners.com

CHANNELS
- ARCADE
- DS
- DVD
- GAME BOY ADV
- GAMECUBE
- PC
- PLAYSTATION2
- PLAYSTATION3
- PSP
- WII
- XBOX
- XBOX 360
- MORE...

THIS PAGE
- EMAIL THIS
- PRINTER VIEW
- SUBMIT CODE

THIS SYSTEM
- OTHER GAMES
- REVIEWS
- MESSAGES

GAMING
- NEWS
- REVIEWS
- BOOKS/GUIDES
- SALES
- SEARCH

amazon.com
and you're done.

World of Warcraft
Best $4.99
Privacy Information

STAR WARS: EPISODE 1 - JEDI POWER BATTLES (PLAYSTATION)

GameShark, Pro Action Replay, Xploder, and Xplorer Codes

Note:
A GameShark or Pro Action Replay cartridge is required to use the codes featured below.

North American (NTSC) version

(A) **Unlimited special for player 2:**
800B2116 000A
800B2436 000A

(B) **Max score for player 1:**
800B2408 05F5
800B240A E0FF

(C) **Press L1+R1 for All handmaidens/pilot:**
D00B22B4 000C
800B22B4 000A

(D) **All secret levels unlocked:**
800AD29C 000f

Unlimited health for Anakin:
800B247C 0064

(E) **Unlimited credits:**
800B2404 0000

(F) **Levels unlocked for Plo Koon:**
50000A01 0000
300B2675 0001

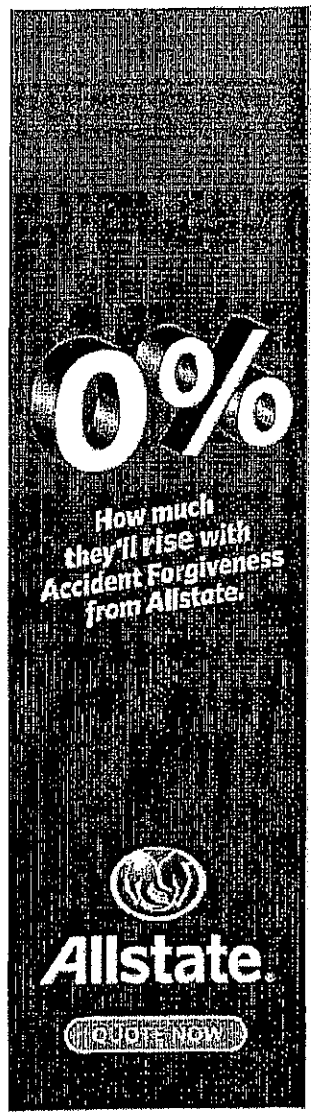

EXHIBIT A

•Game Shark Codes

Unlock All Levels	800AD29C 000F
Infinite Credits	800B2404 0000
Infinite Health P1	800B240C 0064
Infinite Force P1	800B2414 0064
Infinite Bombs P1	800B241A 0005
Infinite Special P1	800B228C 000A 800B241A 000A
Max Score P1	800B2408 05F5 800B240A B0FF
Infinite Health P2	800B2428 0064
Infinite Force P2	800B2430 0064
Infinite Bombs P2	800B2436 0005
Infinite Special P2	800B2116 000A 800B2436 000A
Have All Handmaidens	800B22B4 000A
Obi-Wan Kenobi Codes	
Have Max Skills Trade Federation Battleship	3008C9AF 0004
Have Trade Federation Battleship Completed	300B25F9 0001
Have Max Skills Swamps of Naboo	3008C9B0 0004
Have Swamps of Naboo Completed	300B25FA 0001
Have Max Skills City of Theed	3008C9B1 0004
Have City of Theed Completed	300B25FB 0001
Have Max Skills Theed Palace	3008C9B2 0004
Have Theed Palace Completed	300B25FC 0001
Have Max Skills Tatooine	3008C9B3 0004
Have Tatooine Completed	300B25FD 0001
Have Max Skills Coruscant	3008C9B4 0004
Have Coruscant Completed	300B25FE 0001
Have Max Skills Ruins	3008C9B5 0004
Have Ruins Completed	300B25FF 0001
Have Max Skills Streets of Theed	3008C9B6 0004
Have Streets of Theed Completed	300B2600 0001
Have Max Skills Palace Cliffs	3008C9B7 0004
Have Palace Cliffs Completed	300B2601 0001
Have Max Skills Final Battle	3008C9B8 0004
Have Final Battle Completed	300B2602 0001
Have All Levels Completed (GS 2.2 or Higher Needed)	50000A01 0000 300B25F9 0001
Have All Skills (GS 2.2 or Higher Needed)	50000A01 0000 3008C9AF 0004
All Levels Unlocked & Skill Maxed Out (GS 2.2 or Higher Needed)	300B25F9 0001 50000402 0000 800B25FA 0101 300B2602 0001 3008C9AF 0004 50000402 0000 3008C9B0 0404 3008C9B8 0004
Qui-Gon Jinn Codes	
Have Max Skills Trade Federation Battleship	3008C9C1 0004
Have Trade Federation Battleship Completed	300B2619 0001
Have Max Skills Swamps of Naboo	3008C9C2 0004
Have Swamps of Naboo Completed	300B261A 0001
Have Max Skills City of Theed	3008C9C3 0004
Have City of Theed Completed	300B261B 0001
Have Max Skills Theed Palace	3008C9C4 0004

Have Theed Palace Completed	300B261C 0001
Have Max Skills Tatooine	3008C9C5 0004
Have Tatooine Completed	300B261D 0001
Have Max Skills Coruscant	3008C9C6 0004
Have Coruscant Completed	300B261E 0001
Have Max Skills Ruins	3008C9C7 0004
Have Ruins Completed	300B261F 0001
Have Max Skills Streets of Theed	3008C9C8 0004
Have Streets of Theed Completed	300B2620 0001
Have Max Skills Palace Cliffs	3008C9C9 0004
Have Palace Cliffs Completed	300B2621 0001
Have Max Skills Final Battle	3008C9CA 0004
Have Final Battle Completed	300B2622 0001
Have All Levels Completed (GS 2.2 or Higher Needed)	50000A01 0000 300B2619 0001
Have All Skills (GS 2.2 or Higher Needed)	50000A01 0000 3008C9C1 0004
All Levels Unlocked & Skill Maxed Out (GS 2.2 or Higher Needed)	300B2619 0001 50000402 0000 800B261A 0101 300B2622 0001 3008C9C1 0004 50000402 0000 8008C9C2 0404 3008C9CA 0004
Mace Windu Codes	
Have Max Skills Trade Federation Battleship	3008C9D3 0004
Have Trade Federation Battleship Completed	300B2637 0001
Have Max Skills Swamps of Naboo	3008C9D4 0004
Have Swamps of Naboo Completed	300B2638 0001
Have Max Skills City of Theed	3008C9D5 0004
Have City of Theed Completed	300B2639 0001
Have Max Skills Theed Palace	3008C9D6 0004
Have Theed Palace Completed	300B263A 0001
Have Max Skills Tatooine	3008C9D7 0004
Have Tatooine Completed	300B263B 0001
Have Max Skills Coruscant	3008C9D8 0004
Have Coruscant Completed	300B263C 0001
Have Max Skills Ruins	3008C9D9 0004
Have Ruins Completed	300B263D 0001
Have Max Skills Streets of Theed	3008C9DA 0004
Have Streets of Theed Completed	300B263E 0001
Have Max Skills Palace Cliffs	3008C9DB 0004
Have Palace Cliffs Completed	300B263F 0001
Have Max Skills Final Battle	3008C9DC 0004
Have Final Battle Completed	300B2640 0001
Have All Levels Completed (GS 2.2 or Higher Needed)	50000A01 0000 300B2637 0001
Have All Skills (GS 2.2 or Higher Needed)	50000A01 0000 3008C9D3 0004
All Levels Unlocked & Skill Maxed Out (GS 2.2 or Higher Needed)	300B2637 0001 50000402 0000 800B2638 0101 300B2640 0001 3008C9D3 0004 50000402 0000 8008C9D4 0404 3008C9DB 0004
Plo Koon Codes	

Have Max Skills Trade Federation Battleship	3008C9F7 0004
Have Trade Federation Battleship Completed	300B2675 0001
Have Max Skills Swamps of Naboo	3008C9F8 0004
Have Swamps of Naboo Completed	300B2676 0001
Have Max Skills City of Theed	3008C9F9 0004
Have City of Theed Completed	300B2677 0001
Have Max Skills Theed Palace	3008C9FA 0004
Have Theed Palace Completed	300B2678 0001
Have Max Skills Tatooine	3008C9FB 0004
Have Tatooine Completed	300B2679 0001
Have Max Skills Coruscant	3008C9FC 0004
Have Coruscant Completed	300B267A 0001
Have Max Skills Ruins	3008C9FD 0004
Have Ruins Completed	300B267B 0001
Have Max Skills Streets of Theed	3008C9FE 0004
Have Streets of Theed Completed	300B267C 0001
Have Max Skills Palace Cliffs	3008C9FF 0004
Have Palace Cliffs Completed	300B267D 0001
Have Max Skills Final Battle	3008CA00 0004
Have Final Battle Completed	300B267E 0001
(F) Have All Levels Completed (GS 2.2 or Higher Needed)	50000A01 0000 300B2675 0001
Have All Skills (GS 2.2 or Higher Needed)	50000A01 0000 3008C9F7 0004
All Levels Unlocked & Skill Maxed Out (GS 2.2 or Higher Needed)	300B2675 0001 50000402 0000 800B2676 0101 300B267E 0001 3008C9F7 0004 50000402 0000 8008C9F8 0404 3008CA00 0004
Adi Gallia Codes	
Have Max Skills Trade Federation Battleship	3008C9E5 0004
Have Trade Federation Battleship Completed	300B2656 0001
Have Max Skills Swamps of Naboo	3008C9E6 0004
Have Swamps of Naboo Completed	300B2657 0001
Have Max Skills City of Theed	3008C9E7 0004
Have City of Theed Completed	300B2658 0001
Have Max Skills Theed Palace	3008C9E8 0004
Have Theed Palace Completed	300B2659 0001
Have Max Skills Tatooine	3008C9E9 0004
Have Tatooine Completed	300B265A 0001
Have Max Skills Coruscant	3008C9EA 0004
Have Coruscant Completed	300B265B 0001
Have Max Skills Ruins	3008C9EB 0004
Have Ruins Completed	300B265C 0001
Have Max Skills Streets of Theed	3008C9EC 0004
Have Streets of Theed Completed	300B265D 0001
Have Max Skills Palace Cliffs	3008C9ED 0004
Have Palace Cliffs Completed	300B265E 0001
Have Max Skills Final Battle	3008C9EE 0004
Have Final Battle Completed	300B265F 0001
Have All Levels Completed (GS 2.2 or Higher Needed)	50000502 0000 800B2656 0101
Have All Skills (GS 2.2 or Higher Needed)	50000A01 0000 3008C9E5 0004

All Levels Unlocked & Skill Maxed Out (GS 2.2 or Higher Needed)	3008C9E5 0004 50000402 0000 8008C9E6 0404 3008C9EE 0004 50000502 0000 800B2656 0101

Not Reported in F.Supp.2d, 2007 WL 490171 (S.D.Ohio)
(Cite as: 2007 WL 490171 (S.D.Ohio))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.
Michael E. FAESSLER, Plaintiff,
v.
The UNITED STATES PLAYING CARD CO., Defendant.
No. 1:05CV581.

Feb. 9, 2007.

David J. Dawsey, Michael James Gallagher, Gallagher & Dawsey Co LPA, Columbus, OH, for Plaintiff.

Lynda Eileen Roesch, Dinsmore & Shohl, Cincinnati, OH, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SUSAN J. DLOTT, United States District Judge.

*1 This matter is before the Court on Defendant's Amended Motion to Dismiss or for Summary Judgment and supporting memorandum (doc. 11),[FN1] Plaintiff's response in opposition (doc. 12), and Defendant's reply (doc. 13). For the reasons that follow, the Court treats Defendant's motion as one for summary judgment and **GRANTS IN PART** and **DENIES IN PART** Defendant's motion.

FN1. Defendant's original motion to dismiss or for summary judgment was filed as Docket 8, and Defendant's memorandum in support and exhibits thereto as Docket 9. Due to an electronic filing error, Defendant amended and refiled its motion as Docket 11.

I. BACKGROUND

Plaintiff Michael Faessler filed this action against Defendant United States Playing Card Company ("USPC") alleging copyright infringement and tortious interference with contract. USPC moved to dismiss Faessler's claims pursuant to Fed.R.Civ.P. 12(b)(6) or, in the alternative, for summary judgment on the claims pursuant to Fed.R.Civ.P. 56.

Faessler's claims arise out of his belief that USPC is producing playing cards that infringe upon Faessler's registered copyright for military insignia playing cards. Faessler claims that in 1980, while he was studying as a cadet in the U.S. Miliary Academy, he began designing a unique deck of playing cards modeled after the Military ranking system. Faessler claims that he introduced this idea to USPC in 1987 but declined the company's offer to publish his cards, as the price quote was not economically viable. Faessler found a different company to manufacture the cards (hereafter referred to as "Military Playing Cards") and began commercial sales of the cards in 1988.

In 1992, Faessler left active duty in order to pursue the opportunity to sell his Military Playing Cards to the Army and Air Force Exchange Services ("AAFES"), a distributor he was unable to solicit while he was on active duty because of the potential conflict of interest. In 1994, Faessler filed for and received four registered copyrights for his Miliary Playing Cards, with styles for the Air Force, Navy, Army, and Marines, listing himself as the author and copyright claimant. Each of the cards included a single rank insignia and an indication of the corresponding rank designation for each of the military branches beginning with the lowest rank on the "2" cards and proceeding up the ranks to the "Ace" cards. (Doc. 9 exs. D (Air Force), E (Navy), F (Army), and G (Marines)). In 1995, Faessler sold his Military Playing Cards to approximately 200 AAFES outlets. The following year, the AAFES entered into a contract with Faessler to distribute all

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EXHIBIT B

four styles of the Military Playing Cards. Faessler also sold his Military Playing Cards at other retail outlets including Navy Exchange, Ship Stores Afloat, Marine Corps Exchange, and Veterans Canteen Services.

In 1998, one of Faessler's sales representatives informed him that USPC representatives were removing Faessler's Military Playing Cards from their designated shelf space at AAFES outlets and replacing them with USPC's own brand of playing cards. USPC's Patriotic Playing Cards use the same rank insignias and theme as Faessler's cards (lowest rank corresponds to lowest card and highest rank corresponds to highest card) but arrange the insignias differently and use a different cover and different Joker card artwork. (Doc. 9 e's. H (Air Force), I (Navy), J (Army), and K (Marines)). USPC's Patriotic Playing Card line also includes a deck representing the Coast Guard. Faessler claims that in 1999 he sent USPC a "cease and desist letter" concerning the Patriotic Playing Cards but that USPC did not respond.

*2 Faessler continued to sell his playing cards until 2001, when he was placed back on active duty. In 2005, he attempted to re-enter the playing card market but realized that USPC was selling its Patriotic Playing Card line at military exchanges. Faessler filed this suit for copyright infringement and tortious interference with his contract with AAFES on September 6, 2005.

II. SUMMARY JUDGMENT STANDARD

USPC captioned its motion as a motion to dismiss or for summary judgment. Because both parties have presented matters outside the pleadings, the Court will treat the motion as arising under Fed.R.Civ.P. 56. *See* Fed.R.Civ.P. 12(b); *Granger v. Marek,* 583 F.2d 781, 785 (6th Cir.1978).[FN2]

> FN2. Pursuant to Fed.R.Civ.P. 12(b), "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Plaintiff in this case had reasonable opportunity to present material pertinent to USPC's motion and, in fact, did so when he attached to his responsive memorandum numerous exhibits and the supporting affidavit of Michael E. Faessler. (Doc. 12 ex. 1-12.) As such, the Court is required to proceed under Rule 56. *See, e.g., Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389, 392-93 (6th Cir.1975) (finding that if affidavits are filed with the district court, the court must proceed under Rule 56 unless the court decides to exclude the affidavits).

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). On a motion for summary judgment, the movant has the burden of showing that no genuine issues of material fact are in dispute, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 585-87 (1986). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly

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supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The nonmoving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The task of the Court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. A genuine issue for trial exists when the evidence is not "so one-sided that one party must prevail as a matter of law." *Id.* at 252.

Where the moving party bears the burden of proof on an issue, he must show more than the lack of a genuine issue for trial. Rather, "where the moving party has the burden-the plaintiff on a claim for relief or the defendant on an affirmative defense-his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. U .S.*, 799 F.2d 254, 258-59 (6th Cir.1986).

Although summary judgment is permissible in copyright infringement actions, the Sixth Circuit has found that a jury's determination of whether two works are substantially similar has "special significance":

> A jury deciding the issue of substantial similarity not only makes findings of historical fact, but usually also serves as a proxy for the works' intended audience. In this role as proxy, jurors decide not only what happened, but also can be properly influenced by whether their exposure to the alleged infringing work would diminish their appetite for the copyrighted work. *See Kohus*, 328 F.3d at 856-57. As the diminished market for copyrighted work is the harm that the copyright law seeks to avoid, this issue is crucial and contains an element of subjectivity not found in most other jury determinations. ***Therefore, courts have recognized that "granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly in copyright infringement cases."***
>
> *3 *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 321 (6th Cir.2004) (quoting *Wickam v. Knoxville Int'l Energy Exposition*, 739 F.2d 1094, 1097 (6th Cir.1984)) (emphasis added).

III. ANALYSIS

USPC sets forth several arguments in support of its motion. First, USPC argues that Faessler's copyright infringement and tortious interference with contract claims are barred in whole or in part by statutes of limitation. In a somewhat related argument, USPC contends that Faessler's copyright infringement claims are barred by the equitable doctrine of laches because Faessler delayed filing this action over seven years and USPC has suffered substantial prejudice. Next, addressing the merits of Faessler's copyright infringement claims, USPC argues that: (1) Faessler's cards failed to include the requisite copyright notice and thus entered the public domain; and (2) there is no infringement because USPC's cards are not substantially similar to Faessler's cards. Finally, USPC argues that Faessler's tortious interference with contract claim fails because Faessler cannot prove that USPC intentionally procured the breach of his contract. The Court will address each of these contentions in turn.

A. Statute of Limitations

1. Copyright Infringement

A plaintiff must bring a civil copyright infringement claim within three years after the claim accrues. 17 U.S.C. § 507(b). "A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge." *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir.1994). Because each act of infringement is a distinct harm, the statute of limitations bars infringement claims that accrued more than three years before suit was filed but does not preclude infringement claims that accrued within the statutory period. *Bridgeport Music, Inc. v. Dia-*

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mond Time, Ltd., 371 F.3d 883, 889 (6th Cir.2004); *see also Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir.1997). The copyright holder's recovery in such cases is limited to acts of infringement that accrued within the limitations period. *Roley*, 19 F.3d at 481.

Based on the three-year limitations period, USPC argues that to the extent Faessler prevails on his copyright infringement claims, he can only recover damages for sales of USPC decks after September 6, 2002, which is three years prior to the date he filed his Complaint. Faessler responds that the Court has the discretion to equitably toll the statute of limitations and that summary judgment on the issue is improper as the record is insufficiently developed on "the numerous issues which may affect [Faessler's] right to calculate damages across time." (Doc. 12 at 15.)

"Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run. If the defendant meets this requirement then the burden shifts to the plaintiff to establish an exception to the statute of limitations." *Campbell v. Grand Trunk Western R. Co.*, 238 F.3d 772, 775 (6th Cir.2001). USPC has demonstrated by pointing to Faessler's Complaint that Faessler knew of USPC's allegedly infringing playing cards in 1998. (Doc. 1 ¶¶ 18-19.) Faessler alleges that he sent USPC a cease and desist letter the following June. (*Id.* at ¶ 21.) Nonetheless, Faessler did not file his Complaint until September 6, 2005. Thus, USPC has meet its burden of showing that the statute of limitations bars Faessler from recovering damages for sales of USPC's playing cards after September 6, 2002. The burden thus shifts to Faessler to show that he is entitled to an exception to the statute.

*4 The Sixth Circuit Court of Appeals has identified five factors to consider when determining the appropriateness of equitably tolling a statute of limitations: (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. *Andrews v. Orr*, 851 F.2d 146 (6th Cir.1988). Absent congressional authority to the contrary, equitable tolling shall only be appropriate after a court has properly considered and balanced these factors. *Dunlap v. U.S.*, 250 F.3d 1001, 1008 (6th Cir.2001). Federal courts typically extend equitable relief only sparingly. *Grifin v. Rogers*, 399 F.3d 626, 635 (6th Cir.2005) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

In responding to USPC's motion, Faessler provided the Court with very little support to his claim of entitlement to an equitable tolling of the statute of limitations. The fourteen-paragraph affidavit he filed in support of his opposing memorandum dedicated but one paragraph to elucidating his asserted grounds for tolling the statute: "My delay in bringing this action was caused in part by my overseas military service and severe business difficulties." (Doc. 12 ex. 11 ¶ 11.) The overseas military service apparently consisted of active duty with service in the U.S. Embassy at Guatemala, where Faessler served from early 2001 to September 2002. (Doc. 1 ¶ 23.) From the Complaint, it appears that Faessler's severe business difficulties were at least in part "due to the shrinking margins from the unfair competition by Defendant." (*Id*. at ¶ 22.)

Faessler provides the Court with no evidence that he lacked notice or constructive knowledge of the requirement of filing his lawsuit within the mandatory limitations period. He does not explain why he was not diligent in filing his lawsuit between 1998 when he first learned of the allegedly infringing work and 2001 when he was called back to active duty or why he did not file his lawsuit when he returned to the United States in 2002. While the Court accepts that Faessler's delay was, in part, caused by his overseas service and business difficulties, this bare assertion, without more, is insufficient to satisfy Faessler's burden of establishing that

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he is entitled to an equitable tolling of the statute of limitations. Accordingly, the Court holds that Faessler's recoverable damages for his copyright infringement claim are limited to those that occurred within three years of his commencement of this action.

2. Tortious Interference with Contract

Faessler's state-law claim of tortious interference with contract is controlled by a four-year statute of limitations. Ohio Rev.Code § 2305.09(D). Ohio law dictates that the limitations period begins to run when the events giving rise to the claim occurred. *Koury v.. City of Canton*, No. 1:04-CV-02248, 2005 WL 2649883, * 14 (N.D.Ohio Oct. 17, 2005) (citing *Kabealo v. Huntington Nat. Bank*, No. 94APE09-1387, 1995 WL 141064, at *3 (Ohio Ct.App.1995)).

*5 USPC argues that any action it took that could be perceived as interfering with Faessler's contract with AAFES occurred five or six years ago, thus Faessler's state law claim is barred. Faessler responds that "there are serious issues, such as equitable considerations, on which almost no record has yet been adduced" and that it would therefore be premature for the Court to grant USPC's motion on statute of limitations grounds. (Doc. 12 at 19.)

The relevant time line is established by Faessler's Complaint. In 1998, Faessler learned that his salespeople and USPC's representatives "were in a subtle battle over shelf space in the AAFES outlets." (Doc. 1 ¶ 18.) Faessler sent USPC a cease and desist letter in June 1999. (*Id.* ¶ 21.) He did not file his Complaint until September 2005.

Once again, the Court notes that USPC has presented facts that demonstrate that the relevant statute bars the claim, and it is Faessler's burden to establish his entitlement to an exception to the statute. Faessler has failed to meet this burden, having presented no evidence in support of his position other than his sworn statement that business difficulties and overseas service delayed his filing of the action. Faessler cannot point to an undeveloped record as a basis for denying USPC's motion. USPC filed its motion as a motion to dismiss or, alternatively, for summary judgment. (Doc. 11.) Faessler responded to USPC's motion with various matters outside the pleadings, including his own affidavit. (Doc. 12 ex. 1-12.) As such, the Court was required to treat the motion as one for summary judgment. Faessler had the opportunity to present additional facts supporting his alleged entitlement to an equitable tolling of the statute, and he did not. Accordingly, USPC's argument that Faessler's tortious interference with contract claim is time barred is well taken.

B. Laches

USPC seeks to invoke the affirmative defense of laches to limit Faessler's potential damages to those incurred after the filing of the action. "Laches occurs when the plaintiff has delayed enforcing his rights for an unreasonable length of time and the defendant has been materially prejudiced by the delay." *High Tymes Prods., Inc. v. PRN Prods., Inc.*, No. 1:93-CV-298, 1994 WL 16460309 at * 2 (S.D.Ohio Nov. 18, 1994) (*citing Watkins v. Northwestern Ohio Tractor Pullers Assoc., Inc.*, 630 F.2d 1155, 1159 (6th Cir.1980)). Laches must be determined on a case-by-case basis. *Id.* (citing *Yellow Cab Transit Co. v. Louisville Taxicab & Transfer Co.*, 147 F.2d 407 (6th Cir.1945)). A successful defense of laches in this case would require that there be no material issues of fact as to whether Faessler's delay in bringing suit was unreasonable and whether USPC was prejudiced by the delay. *See Hoste v. Radio Corp. of America*, 654 F.2d 11, 11 (6th Cir.1981).

USPC attempts to place the burden on Faessler to demonstrate why laches should not bar the copyright claim. (Doc. 13 at 12.) However, as laches is an affirmative defense, the burden is USPC's, not Faessler's. And USPC has not met its burden. While it presents the Court with the affidavit of USPC's

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Associate General Counsel which states that USPC would suffer prejudice if the claim was to proceed (doc. 9 ex. Q), that alone is insufficient to convince the Court that USPC is entitled to summary judgment on the issue. For example, to assert the equitable defense of laches, a defendant must have clean hands; a defendant who engages in deliberate, calculated plagiarism or who acts in open and known hostility to a plaintiff's rights may not assert laches. *High Tymes Prods., Inc.*, 1994 WL 16460309 at *3. USPC has failed to adduce any evidence to affirmatively demonstrate its clean hands, an important fact issue particularly because Faessler alleges that he presented his prototype military playing cards to USPC in 1987 to solicit price quotes. Simply put, there remain too many issues of material fact for the Court to find that USPC is entitled to a laches defense.

C. Copyright Infringement

1. Requisite Notice

*6 Turning now to the merits of Faessler's claim, USPC argues that Faessler has no copyright infringement claim because his military playing cards failed to display copyright notice and thus entered the public domain. Under the Copyright Act of 1976, copyright notice on a work was a prerequisite to copyright protection. 17 U.S.C. § 401 (1976 version). However, Congress amended the Copyright Act in 1988 in accordance with the Berne Convention. Under the Revised Act, effective March 1, 1989, copyright notice is no longer a prerequisite to protection. 17 U.S.C. § 401.

To analyze USPC's argument, the Court must first determine the significance of the fact that Faessler first published and began selling a prototype of his Military Playing Cards between 1986 and 1988 (hereafter the "1986 Cards"). USPC argues that the 1986 Cards did not contain copyright notice and therefore entered the public domain pursuant to the Copyright Act of 1976. Faessler has a two-pronged response. First, he says that his claim against USPC is based on its alleged infringement of the copyright he holds on his Army, Navy, Air Force, and Marines playing cards which did not exist until 1994 (hereafter the "Subject Works"), thus the 1976 version of the Copyright Act does not apply to the action. The 1986 Cards, which only have an Army theme, are "markedly different" from the Subject Works, according to Faessler.[FN3] Second, Faessler asserts that even if the 1976 Copyright Act applied, the 1986 Cards contained appropriate copyright notice and were protected, thus they did not enter the public domain.

FN3. USPC disputes that the 1986 Cards are markedly different from the Subject Works. *See* comparison of the 1986 Cards, the Subject Works, and USPC's cards attached as Ex. 1 to doc. 13.

The issue of whether the 1986 Cards are in the public domain is an important first step to the resolution of this case, even assuming that the 1994 Subject Works are the basis of Faessler's infringement claim. When viewing allegedly infringing work, a court must ignore unprotectible or public domain portions of the plaintiff's work. *See, e.g., Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir.1995) ("[W]here we compare products that contain both protectible and unprotectible elements, our inspection must be 'more discerning'; we must attempt to extract the unprotectible elements from our consideration and ask whether the protectible elements, standing alone, are substantially similar.") Thus, if the 1986 Cards are in the public domain and unprotectible, the Court would have to extract all common elements from any comparison between Faessler's 1994 Subject Works and USPC's cards.

The Copyright Act of 1976 applies to the 1986 Cards as they were published prior to the effective date of the Berne Convention. The 1976 Act required that notice of copyright be placed on publicly distributed copies of the work. The notice was to consist of three elements: "(1) the symbol © ... or the word 'Copyright', or the abbreviation

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'Copr.'; and (2) the year of the first publication of the work ...; and (3) the name of the owner of the copyright in the work...." 17 U.S.C. § 401(b) (1976 Act). The Act required that the notice be affixed to the copies "in such manner and location as to give reasonable notice of the claim of copyright." *Id.* § 401(c).

*7 The 1986 Cards include notice consisting of the language "The Military Playing Card Co., © 1986, Ft. Myers, FL" near the bottom of each illustration on the Jokers and on the illustration of the Jokers on the card boxes. (Doc. 12 Ex. 2). The flap of the box bears the language, "We claim exclusive rights to all face designs, joker, back designs, case design, and other distinguishing characteristics of our brand of cards." (Doc. 12 Ex. 1.) USPC does not dispute that the form of the copyright notice complies with the statute's requirements. Rather, it contends that the placement of the notice on the Jokers alone did not reasonably notify the viewer of a claim in copyright over the entire compilation of playing cards. (Doc. 13 at 13.) [FN4]

> FN4. USPC also argues that under 17 U.S.C. § 403, Faessler's failure to include on his 1986 Cards a statement about the government's ownership of the rank and insignia places the work in the public domain. (Doc. 13 at 12-13.) This is an overstatement. The 1973 Act provided that "[w]henever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title." 17 U.S.C. § 403 (1976 Act).
>
> Courts interpreting § 403 as revised by the 1988 amendments have held that the sole consequence of failing to provide sufficient copyright notice on government work is that an alleged infringer may mitigate his actual or statutory damages by asserting the innocent infringement defense. *See, e.g., Matthew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 116 (2d Cir.2001). Thus, there is insufficient precedent for the Court to conclude that Faessler's omission of a statement of governmental ownership over certain elements used in his playing cards casts the entire work into the public domain.

"The purpose of a copyright notice is to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalties of infringers by making use of the copyrighted work." *Monogram Models, Inc. v. Industro Motive Corp .*, 492 F.2d 1281, 1284-85 (6th Cir.1974). The question, then, is whether the copyright notice included on the 1986 Cards' Joker illustration, which also was included on the box cover, gave reasonable notice of Faessler's claim of copyright over all the cards in the deck. The Court finds that it did.

The Sixth Circuit has held that when a "work" protected by copyright consists of component parts, it is not necessary to place the notice on each component part. *Monogram Models, Inc.*, 492 F .2d at 1285 (holding that copyright notices on model airplane boxes and instruction sheets gave adequate copyright notice to anyone who reasonably used the kits and that it was not necessary to place a notice on each of the plastic airplane parts themselves). The Fourth Circuit Court of Appeals, interpreting *Monogram Models* and similar cases, has referred to this concept as the "unit publication doctrine" and held that the doctrine applies to protect all elements of a publication when those elements form a single commercial unit. *Koontz v. Jaffarian*, 787 F.2d 906, 909 (4th Cir .1986). "Courts adhering to the unit publication doctrine hold that copyright notice affixed 'to one element of a publication containing various elements gives copyright protection to all elements of the publication.' " *Id.* (quoting *Koontz v. Jaffarian*, 617 F.Supp. 1108, 1112

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(E.D.Va.1985)).

In this case, Faessler placed copyright notice on the Jokers contained within the deck of cards, and the same Joker illustration with copyright notice was on the card box. A box of cards is a single commercial unit; one would not, and could not, purchase the Joker alone. Furthermore, the flap of the box containing the 1986 Cards unequivocally stated a claim of exclusive rights to all face designs, joker, back designs, case design. The application of the unit publication doctrine to the 1986 Cards is fair under the circumstances, and the Court concludes that the copyright notice displayed on the Joker and on the card box was sufficient to provide copyright protection to the entire compilation of 1986 Cards. Therefore, the Court cannot grant summary judgment to USPC on the basis that Faessler's work entered the public domain.

2. Substantial Similarity

*8 In order to establish a claim of copyright infringement, a plaintiff must show that he or she owns a copyrighted work and that the defendant copied it. *See Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir.2003). However, in most cases, there is no objective evidence of copying, so courts "are forced to rely on the inferences which may be drawn from two basic facts: access and similarity." *Murray Hill Publ'ns, Inc.*, 361 F.3d at 316 (quoting *Glanzman v. King*, 8 U.S.P.Q.2d 1594, 1595 (E.D.Mich.1988)). In other words, "copying is an essential element of infringement and substantial similarity between the plaintiff's and defendants' work is an essential element of copying." *Id.* (quoting *Wickam*, 739 F.2d at 1097).

The Sixth Circuit has adopted a two-step approach for substantial similarity. *Kohus*, 328 F.3d 848. The first step is to "filter out the unoriginal, unprotectible elements-elements that were not independently created by the inventor, and that possess no minimal degree of creativity." *Id.* at 855. Once the unprotectible elements have been filtered out, the second step is to determine whether the allegedly infringing work is substantially similar to the protectible elements of the original. *Id.* This requires the trier of fact to determine substantial similarity from the perspective of the work's target audience. *Id.* at 857. USPC makes numerous arguments designed to undercut Faessler's claim that USPC's Patriotic Playing Cards are substantially similar to his Military Playing Cards.

a. Idea Versus Expression and the Merger Doctrine

Two of USPC's arguments against Faessler are closely related, and the Court will consider them simultaneously. First, USPC argues that the "idea" of making playing cards containing rank insignia for different branches of the military is not protectible. Second, USPC argues that there is essentially only one way of assigning insignia to playing cards, and because the idea and the expression of the idea "merge," Faessler's expression of the idea is not protectible. Faessler, in response, asserts that he is not seeking protection of the "idea" of using military insignia as a card design but rather his particular "expression" of military-theme playing cards. He further asserts that there is no merger of idea and expression in the Subject Works because there are many military themes and, even assuming a military *insignia* theme, there are a number of possible arrangements of insignia to correspond to a card's value.

USPC is correct that Faessler's idea of making playing cards that use military rank insignia is not protectible. "Ideas ... as distinguished from the particular manner in which they are expressed or described in a writing," are not subject to copyright protection. 37 C.F.R. § 202.1(b). Furthermore, when an idea and its expression are inseparable, "copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner." *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir.1971)

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(holding that the defendant was not barred from copying the expression of plaintiff's copyrighted bee pin when the idea of the bee and its expression were indistinguishable). In cases that involve functional rather than creative objects, a court must eliminate those elements dictated by efficiency. *Kohus*, 328 F.3d at 856. "To this end, the merger doctrine establishes that '[w]hen 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.' " *Id.* (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir.1988)); *see also Tastefully Simple, Inc. v. Two Sisters Gourmet, L.L.C.*, 134 F. App'x 1, *5 (6th Cir.2005) (unpublished) (finding that a form listing the states, their tax department information, and their sales tax rates was not subject to copyright protection in part because of the merger doctrine, "for the only way to inform someone of the respective states' sales tax rates and their taxing department names and addresses is to actually list the information.").

*9 The Court does not find that the *idea* of military-themed playing cards and Faessler's *expression* of that idea in his Subject Works are inseparable. As Faessler points out in his opposition memorandum, there are a myriad of military themes that could be, and have been, applied to playing cards: different wars, devices of the military such as aircraft or armaments, military flags, war heroes, etcetera. Thus, Faessler's particular expression of military-themed playing cards-using military rank insignia in a particular arrangement, a labeling of those ranks, and camouflage card backs-required a choice among several alternatives. Unlike the form at issue in *Tastefully Simple*, the Subject Works are not mere lists of facts.

To take the argument a level further, even if the *idea* in this case is not military-themed playing cards in general but rather military insignia-themed playing cards, there is arguably at least a modicum of creativity and originality in Faessler's selection and arrangement of the insignia as well as his choice of image on the card backs and packages. Even factual compilations may possess a level of originality sufficient to entitle them to copyright protection:

> The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data....
>
> These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

USPC suggests that given the structure of playing cards from lowest to highest card and the nature of the ranking system from lowest to highest rank, there is only one way of assigning insignia to playing cards. In contradiction to this suggestion, however, USPC asserts that its military insignia playing cards differ from Faessler's: "[Faessler's] and USPC's use of ranks are not identical in that they sometimes skip different ranks and their face cards are generally designated differently." (*See* doc. 9 ex. P at 11-14 demonstrating the available military ranks and which of those ranks are associated with Faessler's and USPC's playing cards.) Thus, USPC concedes that the decision of which rank to assign to which card, while limited, is not foregone.

Beyond the choice of rank is the choice of insignia style or design. As Faessler points out, insignia come in several designs. There are at least four different renditions of U.S. military rank: they may be rendered in either cloth or pin-on style, and each of these styles may be rendered in either a regular (also called "brass") or subdued style. (Doc. 12 at 10.) Faessler, and USPC, selected cloth ranks for all enlisted rank cards and pin-ons for all officer rank cards.

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Assuming for the purpose of deciding USPC's motion that Faessler's "idea" is military rank insignia themed playing cards, the Court finds that there is more than one way to express the idea. Accordingly, the Subject Works are entitled to copyright protection, and the merger doctrine does not apply to give USPC the right to copy Faessler's expression of the idea.

b. Public Domain Elements

*10 USPC next argues that the majority of the elements found in Faessler's Subject Works are in the public domain and thus not protectible. For example, familiar symbols and designs are not protected by copyright. 37 C.F.R. § 202.1(a). Additionally, copyright protection is not available "for any work of the United States government," which USPC argues includes "military elements." 17 U.S.C. § 105 (2005). Faessler responds that he is not asserting ownership of the design of the military rank insignias but rather of his creative selection of the insignias. Further, argues Faessler, there is no bar to copyright for original works that incorporate public-domain or government-created elements. Indeed, "a work may be protected by copyright even though it is based on something already in the public domain if the author ... has contributed a distinguishable variation [to it]." *Tastefully Simple, Inc.*, 134 F. App'x at *6 (quoting *Ribbon & Trimming, Inc., v. Little*, 51 F.3d 45, 47 (5th Cir.1995)).

USPC's argument that public domain elements must be filtered out before comparing two works for potential infringement is well-taken. The playing card suit symbols (hearts, clubs, diamonds, and spades), numerals, rank insignia, and rank designations are in the public domain.[FN5] Accordingly, those elements are not subject to copyright protection, and the Court must filter them out prior to determining whether the allegedly infringing playing cards are substantially similar to Faessler's Subject Works. However, as discussed in the preceding section, there are several different military rank insignia and styles of insignia. The Court's finding that the Subject Works contain public domain elements that must be filtered does not necessitate a conclusion that Faessler's selection and arrangement of these elements is not protectible.

FN5. The Court does not agree with USPC that camouflage is a public domain element. Creation of a camouflage pattern involves the selection of colors and shapes to achieve a camouflage effect in a certain environment. As Faessler notes, "[t]here are hundreds of camouflage patterns in existence, and even a fairly large number of official military patterns." (Doc. 12 at 12.)

c. Scenes à faire

USPC asserts that military emblems and camouflage are scenes à faire, that is, elements that follow naturally from the work's theme, and accordingly must be filtered out prior to comparing USPC's playing cards to the Subject Works. Faessler responds that these elements are not subject to filtering because the possible motifs for military themed playing cards are great and insignia, camouflage, and emblems are inessential to a military themed card.[FN6]

FN6. In the documents filed with the Court, USPC characterizes the Subject Works as "military rank insignia" playing cards while Faessler refers to them as "military themed" playing cards. Obviously, a military rank insignia theme is narrower than a military theme. However, the Court is not compelled to decide which theme characterization is correct. Even assuming that the narrower theme applies, the Court concludes that the Subject Works are entitled to copyright protection for the reasons specified in the body of this Order.

"The principle of scenes à faire excludes copyright protection for 'incidents, characters or settings which are as a practical matter indispensable, or at

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least standard, in the treatment of a given topic.' " *Stromback v. New Line Cinema,* 384 F.3d 283, 296 (6th Cir.2004) (quoting *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir.1982)). Stated otherwise, "when external factors constrain the choice of expressive vehicle, the doctrine of 'scenes à faire'-'scenes,' in other words, 'that must be done'-precludes copyright protection." *Lexmark Intern., Inc. v. Static Control Components,* 387 F.3d 522, 535 (6th Cir.2004). The doctrine applies, for example, to deny copyright protection to literary works consisting of familiar themes that are staples of literature, such as "saving the world, the battle between good and evil, sibling rivalry or familial secrets and issues, and racial issues.... These elements are too general to qualify for copyright protection." *Stromback,* 384 F.3d at 297 (citations omitted).

*11 Faessler's Subject Works are military playing cards. Certainly the elements he has chosen to portray his theme are incidents to the military: insignia, camouflage, and emblems. However, the Court cannot conclude that these particular elements are so generally presumed to accompany military playing cards that they are susceptible to being screened as scenes à faire. Faessler directs the Court to numerous examples that aptly demonstrate the variety of ways in which a military themed playing card might be portrayed. (See doc. 12 ex. 3.) For example, military playing cards may employ flags, armaments, or illustrations of battleships or aircraft as a basis for the design of card backs and boxes. Unlike the case of *Winfield Collection, Ltd. v. Gemmy Ind., Corp.*, 147 F. App'x 547 (6th Cir.2005), in which the court found that elements such as a flowing cape, curled boots, black clothing, and a broom were scenes à faire for a witch, this case does not present a subject work that is as susceptible to distillation into requisite components. A witch is not a witch without a broom and flowing cape. However, a military playing card is certainly a military playing card absent camouflage and military emblems.

Even if one construes the theme of Faessler's cards as the narrower one of military insignia, a variety of possible elements remain to decorate card backs and boxes. Indeed, USPC's own Navy style Patriotic Playing Cards demonstrates the point: while Faessler's Navy cards have a camouflage back, USPC's have a water-inspired back. The Court thus will not apply the scenes à faire doctrine to filter out the camouflage and military emblems from Faessler's Subject Works.

d. Filtering

After a court has filtered out a work's unprotected elements, the trier of fact must determine whether the allegedly infringing work is substantially similar to the protectible elements of the original. *See Kohus,* 328 F.3d at 856. Where a lay audience purchases the product at issue, the test is whether the works are substantially similar based on the judgment of the ordinary reasonable person. *Id.* USPC argues that, after filtering out the unprotected elements of the Subject Works, its Patriotic Playing Cards are "substantially different" from Faessler's works.

The Court has found that neither the merger doctrine nor scenes à faire strip away the Subject Works' elements. Thus, all that must be filtered from the Subject Works are the public domain elements of numerals, symbols, and military insignias. Like facts, these elements cannot be copyrighted. However, even "[a] factual compilation is eligible for copyright protection if it features an original selection or arrangement of facts." *Feist Publ'ns, Inc.,* 499 U.S. at 350. In such cases, "the copyright is limited to the particular selection or arrangement." *Id.* at 350-51.

As applied to this case, Faessler has a valid copyright in his particular selection and arrangement of the public domain elements of numerals, symbols, and insignia, but not to those elements themselves. Indeed, USPC is entitled to use those same elements "so long as the competing work does not fea-

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ture the same selection and arrangement." *Id.* at 349. Faessler also has a valid copyright in his selection of camouflage and military emblems used on the card backs and boxes.

*12 USPC directs this Court to case law holding that where the selection and arrangement of facts is claimed, substantial similarity must amount to "a verbatim reproduction or very close paraphrasing." *The Pampered Chef, Ltd. v. Magic Kitchen, Inc.*, 12 F.Supp.2d 785, 792 (N.D.Ill.1998); see also *Ross, Brovins & Oehmke, P.C. v. Lexis/Nexis*, 348 F.Supp.2d 845, 860 (E.D.Mich.2004) (comparing compilations of automated legal forms); *Tastefully Simple, Inc.*, 134 F. App'x 1 at *5 (comparing spreadsheets and checklists); *Kregos v. Associated Press*, 3 F.3d 656, 663 (2d Cir.1993) (comparing compilations of baseball statistics). Unlike in those cases, the Subject Works are not lists of factual information or blank forms. Rather, they are playing cards which meld both functional and creative elements. Furthermore, the unprotectible elements at issue here-rank insignia and symbols-are capable of being rendered in varying styles, and there are enough ranks available that the insignia could be selected and arranged in more than one logical way. The law cited by USPC in which courts granted summary judgment to defendants on grounds that their compilations of factual material were not substantially similar to the copyrighted work are not sufficiently on point to warrant the same conclusion here. The Court is mindful of the fact that "[i]n copyright infringement cases, 'granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly.' " *Kohus*, 328 F.3d at 853. Particularly in the context of playing cards, where the lay audience is the intended consumer, the Court cannot conclude that a reasonable jury could not find that the two works are substantially similar.

D. Tortious Interference with Contract

As previously discussed, Faessler's tortious interference with contract claim is barred by Ohio Revised Code § 2305.09(D). The Court thus declines to consider the claim on its merits.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion for Summary Judgment. The Court **GRANTS** summary judgment in favor of Defendant on Plaintiff's Second Claim for Relief and **DENIES** it as to Plaintiff's First Claim for Relief. Consistent with this opinion, in the event Plaintiff is entitled to recovery, it shall be limited to any acts of infringement by Defendant that occurred after September 6, 2002.

IT IS SO ORDERED.

S.D.Ohio,2007.
Faessler v. U.S. Playing Card Co.
Not Reported in F.Supp.2d, 2007 WL 490171 (S.D.Ohio)

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