

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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(B) of the Federal Rules of Civil Procedure, Defendants Jeremy N. Wise and Wise Buy Now, LLC (“Defendants”) respectfully move the Court for summary judgment on all of Plaintiff David Allison d/b/a Cheat Code Central’s claims against Defendants. A memorandum in support of this motion is attached hereto and an Appendix will be submitted herewith.

Respectfully submitted,

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**DEFENDANTS' MEMORANDUM IN SUPPORT OF
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1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[I] (May 1996)21

Defendants Jeremy N. Wise and Wise Buy Now, LLC, by and through their counsel of record, file this Memorandum in Support of Defendants' Motion for Summary Judgment ("Motion"). In support of their Motion, Defendants also rely on their Statement of Material Facts ("SMF") and supporting documents, all of which are filed concurrently herewith.

I. INTRODUCTION

After nearly three years of litigation, the straightforward facts establish that the Plaintiff filed for copyrights by misrepresenting the scope of his "authorship"; used these invalid copyrights to file litigation against multiple competitors, including the Defendants, for alleged copyright infringement; misrepresented the scope of his "authorship" in such litigation and, in particular, to this Court; and, after Defendants exposed such misrepresentations, admitted having engaged in the very conduct about which he complains. In the end, as a final effort to avoid a determination that he filed a completely fraudulent complaint, the Plaintiff has reduced his allegations against the Defendants to four charts of factual codes for which he cannot demonstrate substantial similarity. Given all of the foregoing and for the reasons articulated below, this Court should, alternatively or collectively, find the Plaintiff's copyrights invalid and unenforceable; determine that the Plaintiff is estopped from changing his legal theories at this stage of the litigation; hold that the Plaintiff's claims are barred by the doctrines of copyright misuse and unclean hands; and, conclude that the Plaintiff cannot demonstrate substantial similarity with respect to the four minute charts upon which he now bases his entire litigation. Thereafter, as none of the claims in the Plaintiff's Amended Complaint can survive, the Court should grant summary judgment as to the Plaintiff's Amended Complaint in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND¹

The Plaintiff and Defendants (“Parties”) all have operated and owned websites that contain game hints, cheat codes, and other content related to electronic games (collectively, this content shall be referred to as “cheats” throughout this memorandum).² In short, the Parties are competitors. To be sure, there exist other competitors of the Parties that host cheat-related websites.

As the Plaintiff admits, cheats are, at their essence, factual content. These cheats help individuals play electronic games and/or enhance their playing experience. As the Plaintiff also now admits, operators of cheat websites will acquire cheats from other similar websites in the normal course of business. SMF ¶ 53; Doc. #62 at 11. Consequently, cheat websites acquire thousands and thousands of cheats which they publish on the Internet.

In this instance Plaintiff acquired cheats from, at the very minimum, another cheat website at www.gamewinners.com. SMF ¶¶ 15-22. Although many of the cheats acquired by the Plaintiff from www.gamewinners.com had been attributed to third party authors, the Plaintiff published these cheats without attributing authorship to the third parties. SMF ¶¶ 15-22; Affidavit of Jeremy Wise (“Wise Aff.”), attached as Appendix Exhibit H, ¶¶ 35-37. Being that cheats are factual content, this too may be a normal course of business among cheat websites.

Despite having acquired cheats authored by third parties and incorporated them into his website, the Plaintiff applied for and obtained two copyright registrations (one in 2005 and one in 2007) for all of his website content.³ SMF ¶¶ 18-22. In applying for such copyright

¹ The Defendants specifically incorporate the Statement of Material Facts provided in Appendix 1.

² During the course of this litigation, Defendant Wise Buy Now, LLC acquired any and all electronic game related domain names and content that Defendant Jeremy Wise owned at the time of the alleged infringement. Soon after this occurred, counsel for Defendants informed counsel for the Plaintiff.

³ Plaintiff obtained a third copyright registration for a book of cheats that actually predated the registrations for the websites. The copyright for the book is not at issue.

registrations, the Plaintiff misrepresented that he authored all of the content and failed to disclose that the works for which he sought registration contained substantial content authored by third parties. SMF ¶ 22. After obtaining the 2005 copyright registration, the Plaintiff sought to eliminate his competitors and dramatically alter the normal course of business among cheat websites. He did so by using his copyright registration as a basis to file suit against his competitors, including the Defendants, for copyright infringement. SMF ¶ 14; see Complaints at Appendix Exhibit G (“App. Ex. G”).

In 2001, Defendant Jeremy Wise purchased www.cheatmasters.com, which had operated as a cheat website since 1994 - predating the Plaintiff’s website. SMF ¶ 41; Wise Aff. ¶¶ 6, 7. As of early 2006, the Defendants websites contained thousands of webpages of cheats. SMF ¶ 41-45; Wise Aff. ¶¶ 9-10. Prior to late-2006, the Defendants never acquired any content from the Plaintiff’s website. Id. In late-2006, the Defendants admit, and have never denied, that they obtained some factual cheats from the Plaintiff’s website and incorporated these cheats into some of their websites in the normal course of operating cheat websites. SMF ¶ 32; Wise Aff. ¶ 15. By doing so, the Defendants engaged in conduct no different than that in which the Plaintiff engaged – and continues to engage in today. SMF ¶¶ 47-53.

In 2007, the Plaintiff filed suit against Defendant Jeremy Wise for copyright infringement in the District of Colorado. SMF ¶ 23. The Plaintiff alleged that Defendant Jeremy Wise copied cheats that the Plaintiff authored. Id. The complaint was dismissed for lack of personal jurisdiction. The Plaintiff thereafter filed the instant suit against Defendant Jeremy Wise, and later Defendant Wise Buy Now, LLC, alleging again that the Defendants infringed cheats authored by the Plaintiff. SMF ¶ 23.

Throughout discussions among counsel and in discovery, the Plaintiff alleged and maintained that he authored cheats the Defendants infringed. SMF ¶ 23; Affidavit of Charles Lee Mudd, Jr., (“Mudd Aff.”) ¶ 33-34, attached at Appendix Exhibit D. After isolating his allegations to twelve (12) pages of cheats, the Defendants found evidence that the Plaintiff did not author the cheats in question. SMF ¶¶ 24-25; Mudd Aff. ¶¶ 8, 33. In fact, the Defendants obtained affidavits and declarations from the putative authors of the cheats. Mudd Aff. ¶¶ 18-25; App. Ex. E; App. Ex. I. In the face of such evidence, the Plaintiff quickly filed a Motion for Sanctions seeking to exclude the evidence. See Doc. #43. The Plaintiff’s Motion was denied. See Doc. #57.

The Plaintiff then filed a Motion for Summary Judgment in which, after years of litigation and claims of mass infringement, he focused on four, minute charts of cheats. See Doc. #58. In briefing he admitted to obtaining cheats from third-party websites. See Doc. #62 at 11. Moreover, he abandoned authorship per se and claimed only infringement of arrangement and compilation. Id. The Defendants previously responded to the Plaintiff’s Motion for Summary Judgment. See Doc. #60.

The Defendants now file this Motion requesting that the Court enter Summary Judgment in Defendants’ favor as to the Plaintiff’s Amended Complaint in its entirety.

III. ARGUMENT AND AUTHORITIES

By this Motion, the Defendants shall demonstrate that the Plaintiff copied numerous amounts of text from third-party websites, incorporated the text into his website, and then consistently claimed to have authored such text in his filings with the United States Copyright Office, federal courts in which he alleged copyright infringement, and, in particular, court documents and discovery responses in this litigation. In no case did the Plaintiff disclose the

presence, within his website, of pre-existing material obtained from third-party websites. In fact, he only quietly conceded such misrepresentations after the Defendants presented him with evidence documenting authorship of such content by third parties and this Court denied his Motion for Sanctions seeking to exclude such evidence. Based on the foregoing, there exist no genuine issues of material fact with respect to the Plaintiff's copyrights being invalid; the Plaintiff having engaged in copyright misuse; the Plaintiff being barred from asserting opposing theories of law; and, the existence of any substantial similarity on protectable content owned by the Plaintiff. For these reasons, the Court should grant summary judgment as to the Plaintiff's Amended Complaint in its entirety.

A. Summary Judgment Standard

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 favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Redding v. St. Eward, 241 F.3d 530, 532 (6th Cir. 2001). However, the non-movant must present more than a "scintilla" of evidence to defeat a summary judgment motion, he must present contradictory evidence of a fact material to the claims at issue. Anderson, 477 U.S. at 251-52.

B. Plaintiff's Alleged Copyrights Are Invalid and Unenforceable.

This Court should determine Plaintiff's copyrights to be invalid and unenforceable. The underlying work for which Plaintiff obtain copyright registrations contains material authored by third-parties to which Plaintiff has no license or over which he has no control. In seeking his copyright registrations, the Plaintiff failed to inform the United States Copyright Office that the work for which he sought exclusive copyright contained such third-party content and, in fact, claimed authorship of the entire content.

Since the Plaintiff limited his infringement contentions to twelve pages of examples in the Summer of 2009, the Defendants have found over five hundred instances of Plaintiff copying narrative cheats from the third-party website www.gamewinners.com. SMF ¶ 15; Wise Aff. at ¶¶ 35-37. At the same time, the Defendants obtained affidavits and/or declarations from the true authors of over one hundred of these instances testifying to their original creations. SMF at ¶¶ 16-19; App. Ex. A, B, C, E, I, J; Wise Aff. ¶¶ 38-50; 52, 53, 56, 57. Plaintiff has submitted no evidence to dispute that he did not author these cheats. In fact, facing such evidence, Plaintiff now admits copying narrative style cheats from other sites. Doc. #62 at 11 (“[Defendants’ evidence] is limited to the narrative style cheat codes that are readily copied and posted from site to site.”). Indeed, he continues his pattern of copying cheats from www.gamewinners.com. SMF ¶ 21; Wise Aff. ¶¶ 24-34. Plaintiff has even illegally copied narrative style cheats originally authored by Defendant Wise onto his website. SMF ¶ 22; Wise Aff. ¶¶ 29 and 34.

Despite having actively copied volumes of narrative cheats from third-party sites, Plaintiff obtained his copyright registrations on the premise that he solely authored the entire text and compilation of his website. Although he claimed his book as pre-existing material and excluded third-party banner ads, he did not disclose that he had copied narrative cheats from

third-party sites. SMF ¶¶ 1, 2, 4 and 5; App. Ex. A-C. Despite this, he used his copyrights to claim authorship of such portions of his site when he filed this suit and subsequently throughout this litigation. SMF ¶ 6-9.⁴ Indeed, he did so in interrogatory responses and pleadings. See id. When submitting his infringement contentions to the Defendants, he limited his infringement claims to twelve examples of verbatim copying of narrative cheats. SMF ¶ 3. Ironically, it happened to be these twelve examples of alleged infringement that led Defendants to discover Plaintiff's misrepresentations. Through an investigation on the Internet, Defendant Wise found the identical cheats on www.gamewinners.com with authorship for such cheats attributed to third parties. SMF ¶¶ 24, 25. Using the information associated with these attributions, he located the true authors of many of the cheats for which Plaintiff claimed both authorship and infringement. Id. These true authors affirmed authorship and, in the case of many, executed affidavits and/or declarations attesting thereto. See id. The Defendants and their counsel continued the investigation and found numerous additional instances of Plaintiff having copied third-party content into his website – the very website and content he submitted for purposes of obtaining his May 2005 and January 2007 copyright registrations.⁵ See id.; see also SMF ¶¶ 18, 19. Plaintiff offers no contradictory testimony as to the authorship of these narrative cheats and, in fact, now admits copying. Doc. #62 at 11.

Plaintiff's inclusion of pre-existing materials in his works without the permission or authorization of the original authors invalidates any copyright in his work, despite any additional

⁴ Plaintiff also utilized these registrations to force settlements against third parties for the same conduct at issue here.

⁵ The twelve original infringement contentions were supported by Plaintiff's January 2007 copyright registration. However, Plaintiff has abandoned those contentions and now relies solely on the May 2005 registration. Doc. #62 at 11. Because of Plaintiff's earlier disclosures limiting his contentions to the January 2007 copyright, Defendants had concentrated their invalidity analysis on this work. Plaintiff waited until his Summary Judgment Reply to indirectly inform Defendants of his intention to abandon his case based on his January 2007 copyright. See Doc. #62 at 11. At the very least, Defendants should be granted summary judgment of invalidity and non-infringement as to the January 2007 copyright.

creativity or originality he may have contributed. 17 U.S.C. § 103(a) (“protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); see, e.g., Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1200 (10th Cir. 2005) (holding copyright in sound recordings invalid where Plaintiff had used the pre-existing underlying musical works without authorization). For the same reasons, the copyright registrations upon which Plaintiff bases his claims in this litigation are themselves invalid. Had Plaintiff disclosed that his work consisted of the unauthorized copies of pre-existing third-party materials, the Copyright Office would not have granted a registration covering the entire text in his website. Under copyright law, “the knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application constitute reason for holding the registration invalid and thus incapable of supporting an infringement action.” Cannon Group, Inc. v. Better Bags, Inc., 250 F. Supp. 2d 893, 898 (S.D. Ohio 2003) (quoting Russ Berrie & Co. v. Jerry Elsner Co., 482 F. Supp. 980, 988 (S.D.N.Y. 1980)); see also Eckes v. Card Update, 736 F.2d 859, 861-62 (2d Cir. 1984) (finding that the knowing failure to “advise the Copyright Office of facts which might have occasioned a rejection of the application” enough to preclude infringement action); see, e.g., R. Ready Prods., Inc. v. Cantrell, 85 F. Supp. 2d 672, 692 (S.D. Tex. 2000) (finding that a plaintiff committed fraud on the Copyright Office where the plaintiff failed to disclose preexisting work created by others); Garner v. Sawgrass Mills Ltd. P’ship, 35 U.S.P.Q.2d 1396, 1402-04 (D. Minn. 1994) (barring the plaintiff’s copyright infringement action where he failed to disclose to the Copyright Office that his copyrighted logo was based on the defendant’s logo).

Although the Sixth Circuit appears to require evidence of a knowing misstatement in an application to invalidate a copyright registration, Advisers, Inc. v. Wiesen-Hart, Inc., 238 F.2d

706 (6th Cir. 1956), this is not an issue here. For, the Sixth Circuit recognizes a “knowing misrepresentation” such as that made by Plaintiff, see supra, as an element of fraud and characterizes it as the knowing concealment of a material fact of which there is a duty to disclose. Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 456 (6th Cir. Ohio 2008). Clearly, Plaintiff’s omission constitutes a knowing misrepresentation. Based on the overwhelming evidence of knowing misrepresentations by Plaintiff, both of the Plaintiff’s copyright registrations are clearly invalid. See R. Ready Prods., 85 F. Supp. 2d at 692 (finding registration invalid due to a knowing omission where Plaintiff’s work contained pre-existing material owned by his previous employer). As no issues of material fact exist on this issue, Defendants are entitled to summary judgment as a matter of law.

Without a valid copyright registration, there can be no action for copyright infringement. Indeed, courts in the Second Circuit have found that registrations obtained in this manner are unable to support a copyright infringement matter. Eckes, 736 F.2d at 861-62 (finding that the knowing failure to “advise the Copyright Office of facts which might have occasioned a rejection of the application” enough to preclude infringement action); GB Mktg. USA Inc. v. Gerolsteiner Brunnen GmbH & Co., 782 F. Supp. 763, 776 (W.D.N.Y. 1991); Russ Berrie & Co., 482 F. Supp. at 988; Vogue Ring Creations, Inc. v. Hardman, 410 F. Supp. 609, 616 (D.R.I. 1976); Cannon Group, 250 F. Supp. 2d at 898. For this reason, this Court should grant summary judgment as to Count One for copyright infringement. See id.

C. Plaintiff’s Claims are Barred Due to Copyright Misuse and Unclean Hands.

For more than three years, Plaintiff has asserted copyrights for material that he does not own against Defendants and others. See supra II.B. Such an overextension of one’s copyright interest is prohibited and constitutes “copyright misuse,” a complete defense to copyright

infringement. Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 792 (5th Cir. 1999). Indeed, the “copyright misuse” doctrine bars a culpable plaintiff from prevailing on an action for the infringement of the misused copyright. Id. at 792. It forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which it is contrary to public policy to grant. Id. “When a copyright holder attempts to use legal proceedings to protect an improper extension of a copyright, the court may refuse to enforce the copyright.” QAD, Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1266 (N.D. Ill. 1991).

Although the Sixth Circuit has neither accepted nor rejected the copyright misuse defense, Microsoft Corp. v. Compusource Distribs., Inc., 115 F. Supp. 2d 800, 810 (E.D. Mich. 2000), several circuits have recognized the defense. See, e.g., Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1090 (9th Cir. Cal. 2005); Alcatel USA, Inc., 166 F.3d at 792; Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 647 (7th Cir. 2003); Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 976-79 (4th Cir. 1990); Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 206 (3d Cir. 2003); Lava Records LLC v. Amurao, 2009 U.S. App. LEXIS 25037, at *4 (2d Cir. Nov. 16, 2009) (unpublished opinion); Saxon v. Blann, 968 F.2d 676, 680 (8th Cir. 1992) (Recognizing “copyright abuse” as a subset of the defense of unclean hands). In circuits that recognize copyright misuse, it is a complete defense to copyright infringement. See Lasercomb Am., 911 F.2d at 977. To show copyright misuse, a defendant must prove “(1) that [the plaintiff] violated the antitrust laws, or (2) that [the plaintiff] illegally extended its monopoly beyond the scope of the copyright or violated the public policies underlying the copyright laws.” In re Independent Serv. Orgs. Antitrust Litig., 114 F. Supp. 2d 1070, 1113 (D. Kan. 2000) (citing Lasercomb Am., 911 F.2d at 978). Some courts label this defense as “copyright abuse” and require a more stringent analysis analogous to the doctrine of

“unclean hands” that requires a nexus between the wrongful actions of the plaintiff and the equitable relationship between the parties as they relate to the controversy. See, e.g., Saxon, 968 F.2d at 680 (“The defense [of copyright abuse] does not apply ‘where plaintiff’s misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful acts’ affect the equitable relations between the parties with respect to the controversy”).

Here, Plaintiff’s wrongful acts clearly affect the Parties’ equitable relations. Plaintiff applied for and received copyright registrations covering the entire text of his website, excluding only third-party banner ads. SMF ¶ 2; App. Ex. A. He then used the registrations to enforce his “purported” copyrights against others for purposes of forcing them settle. SMF ¶ 14. In many cases he succeeded. With respect to the Defendants, he continued to litigate claims against the Defendants clearly based upon the copyright registrations. SMF ¶¶ 23, 28. Remember, the Plaintiff alleged that he authored the entire website in a complaint filed in Colorado, the Complaint in this action, and then the Amended Complaint in this action. SMF ¶ 23. Additionally, in response to Defendants’ interrogatories, he represented himself to be the “sole author of his Copyrighted Webpages” and accused Defendants of copying narrative style cheats, including those which were “several paragraphs in length.” SMF ¶ 13.

Until the filing of Plaintiff’s Motion for Partial Summary Judgment, Defendants understood that the Plaintiff accused them of copying verbatim narrative style cheats from Plaintiff’s site. SMF ¶ 10. In addition to the complaints filed against the Defendants, the Plaintiff affirmed this understanding during early discussions⁶ with Defendants about what would constitute acceptable narrative differences between the inherently factual cheats on the Parties’ respective websites. The communications between counsel addressed the specific wording of narrative style cheats; despite having no information regarding specific infringement

⁶ These discussions began while the action was still pending in Colorado.

examples, Defendants attempted to re-word fact-based cheats to Plaintiff's approval. Plaintiff actively engaged in this process. SMF ¶ 11; Mudd Aff. ¶¶ 34, 35. Later during discovery in the instant action, Plaintiff continued this theory of infringement when he submitted the twelve examples representing the foundation of his infringement contentions. As discussed above, these twelve examples contained content authored by third parties – *not* the Plaintiff. See supra II.B.

Given the Plaintiff's use of material authored by third parties to assert copyrights against the Defendants, and given his success, in some efforts, and attempt in this action to use his copyrights to gain control over components for which he has no rights (i.e. those portions of his site which were copied from third-parties), the Plaintiff has clearly engaged in copyright misuse. See QAD, Inc., 770 F. Supp. at 1266. For, the Plaintiff's wrongful actions directly relate to the merits of the instant controversy and affect the equitable relations between the parties. See Saxon, 968 F.2d at 680.

Again, this case is analogous to QAD, Inc. in which the plaintiff instituted an infringement action and procured an injunction based on allegations that the defendants copied portions of a work which the plaintiff had in fact copied from a pre-existing work authored by a third-party. QAD, Inc., 770 F. Supp. at 1264-65. The QAD court dismissed the plaintiff's infringement case based upon the defense of copyright misuse stating, "No party can use the limited grant that a copyright confers to gain control of components over which it has no such right." Id. at 1266. Based on cases involving patent misuse, the court held: "When a copyright holder attempts to use legal proceedings to protect an improper extension of a copyright, the court may refuse to enforce the copyright." Id. at 1266. Like the Plaintiff in QAD, the Plaintiff has used federal litigation in at least two states to consistently extend his copyright monopoly

beyond its scope and, in doing so, violated the public policies underlying copyright law. See QAD, Inc, 770 F. Supp. at 1266; Lasercomb Am., 911 F.2d at 978.

For the foregoing reasons, this Court should bar Plaintiff from asserting his claims of copyright infringement. See QAD, Inc, 770 F. Supp. at 1266; Saxon, 968 F.2d at 680; Lasercomb Am., 911 F.2d at 978. Given the uncontroverted facts in this case, the Court should grant summary judgment in favor of Defendants on the defense of Copyright Misuse and Count One of Plaintiff's Complaint.

D. Plaintiff's "Mend the Hold" Strategy, Plaintiff is Estopped from Changing his Contentions to Avoid Invalidity.

For nearly three years, the Plaintiff asserted copyright infringement claims against Defendants for alleged verbatim copying of narrative cheats. SMF ¶ 23; Mudd Aff. ¶¶ 33, 34. After being prompted to submit examples of infringement from the 12,000 pages of content on Defendants' site, Plaintiff disclosed twelve examples of alleged infringement. SMF ¶ 24; Mudd Aff. ¶¶ 8, 33. Through researching these twelve examples, Defendants discovered and produced evidence demonstrating that portions of these twelve examples had been copied from a third-party site and authored by third parties. SMF ¶ 25; Mudd Aff. ¶¶ 18-25; App. Ex. E; App. Ex. Exhibit I. In addition to identifying the true authors of several of the narrative cheats, the Defendants obtained sworn statements from some of these authors. Mudd Aff. ¶¶ 18-25; App. Ex. E; App. Ex. Exhibit I. In the face of Defendants' evidence clearly supporting Plaintiff's misrepresentations and the invalidity of Plaintiff's copyrights, the Plaintiff sought to exclude such evidence through a Motion for Sanctions. See Doc. #43. The Plaintiff's Motion was denied. See Doc. #57.

When this Court denied the Plaintiff's Motion for Sanctions and allowed Defendants to introduce their evidence, the Plaintiff then adopted a legal position completely opposing the one

presented over the prior two and a half years. SMF ¶ 26; Doc. #62 at 11. The Plaintiff now disavows any claim of copyright protection for the narrative style cheats contained on his website – the very material once representing the cornerstone of his infringement case. See id. He has even gone so far as to completely abandon his infringement case with respect to his January 2007 copyright registration. See id. As should be obvious to this Court, the Plaintiff has retreated from his prior allegations and legal theory and implemented such an opposing strategy because he wants to *prevent his copyrights from being invalidated*. However, the law prohibits such tactics.

Indeed, existing law forbids a party, in this case the Plaintiff, to change horses mid-race and thereby ambush the Defendants with new infringement contentions. See Grand Trunk W. R. Co. v. H. W. Nelson Co., 116 F.2d 823, 840 (6th Cir. 1941). In other words, he is not permitted to “mend the hold” and take opposing positions when it suits him. See id. at 840. This represents a long-settled principle in the Sixth Circuit:

[W]here a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot change his ground and put his conduct on another and different consideration after litigation has begun. He is not permitted thus to mend his hold, but is estopped from doing it by settled principles of law.

Grand Trunk Western R. Co., 116 F.2d at 840.

In the analogous case of QAD, Inc., the Plaintiff tried a similar tactic. QAD, Inc., 770 F. Supp. 1261. After the plaintiff obtained a preliminary injunction against the defendant based on alleged copying of certain portions of its software program, the defendant came forward with evidence that the plaintiff’s work had been largely based on the pre-existing work of a third-party. Id. at 1264-65. The defendant pointed out that the plaintiff also had not disclosed this pre-existing work to the Copyright Office in its registration application. Id. at 1264. To avoid a

finding of invalidity, plaintiff submitted affidavits stating that the portions of its work that were common to the pre-existing work were merely factual, incident to the industry and, therefore, not invalidating. Id. at 1269. However, the plaintiff had previously adopted the opposing legal position by relying on the defendant's alleged copying of these elements for its infringement contentions. Id. at 1264-65. The court refused to allow the plaintiff to adopt an opposing theory stating:

It would be impermissibly inequitable for this Court to allow a plaintiff to assert certain facts to win an injunction and then assert the opposite of those "facts" to fend off an affirmative defense.

QAD, Inc., 770 F. Supp. at 1268.

Similarly, Plaintiff Allison cannot take an opposing position to his earlier assertions of copyright infringement (alleged copying of verbatim cheats to which he purportedly owned the copyright) in order to avoid a finding of invalidity. Grand Trunk W. R. Co., 116 F.2d at 840. Thus, this Court should find the Plaintiff estopped from adopting such an opposing position. Id. As such, no issues of material fact exist as to allegations in Count One, and the Court should grant Defendants summary judgment on these grounds as a matter of law.

E. Plaintiff is Unable to Show Substantial Similarity as a Matter of Law.

As noted above, Plaintiff's copyrights, as well as his registrations, are invalid. However, even if they were valid, there has been no copying of any protectable elements as a matter of law. Indeed, the Plaintiff has failed to submit any evidence as to the requisite substantial similarity between the works as viewed by an ordinary observer. Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1372 (2d Cir. 1993) ("the trier of fact must determine whether the similarities are sufficient to qualify as substantial"). As such, the Court should grant summary judgment as to Count One.

1. Summary Judgment and Substantial Similarity

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). With respect to a copyright infringement action, summary judgment is routinely granted when no reasonable trier of fact could find the works substantially similar in protectable expression. Wickham v. Knoxville Int’l Energy Expo., Inc., 739 F.2d 1094, 1097 (6th Cir. 1984); Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Group, 463 F.3d 478, 479-480 (6th Cir. Mich. 2006) (affirming summary judgment of non-infringement where no substantial similarity between protectable elements was found); Winfield Collection Ltd. v. Gemmy Indust. Corp., 311 F. Supp. 2d 611 (E.D. Mich. 2004) (court held no substantial similarity as a matter of law after comparing the two works and determining that no reasonable jury could find substantial similarity between protectable elements). Courts can make this determination by comparing the two works and are “fitted by training and experience to compare literary works and determine whether they evidence substantial similarity.” Murray Hill Public’ns, Inc., 361 F.3d at 316.

As noted above, the Plaintiff has abandoned any arguments that the Defendants infringed narrative cheats. Doc. #58; Doc. #62 at 11; SMF ¶ 26. He now claims copyright in and infringement of solely the charts of cheats located on his site. Doc. #58; Doc. #62 at 11; SMF ¶ 26. However, there are no protectable elements in Plaintiff’s charts. Even if Defendants had copied any protectable elements of Plaintiff’s work, the Plaintiff has absolutely no evidence upon which a jury could find the works substantially similar.

2. *Plaintiff's Arrangement Is Not Original or Protectable*

The Defendants deny copying any protectable or copyrightable elements of Plaintiff's site, including any protectable selection and arrangement of cheat codes. That being said, the Defendants have never denied using Plaintiff's site as a source for narrative cheats and cheat codes. SMF ¶ 32; Wise Aff. ¶ 15. For good reason: not all "copying" is prohibited under copyright law.

The first step in determining whether actionable copying has occurred is to identify the protectable elements in a work. Kohus, 328 F.3d at 855. 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).⁷ Further, 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.

Even in the rare case of a plaintiff with direct evidence that a defendant attempted to appropriate his original expression, there is no infringement unless the defendant succeeded to a meaningful degree. See Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 122-23 (2d Cir.1994). The court in Fisher-Price illustrated this point of law stating:

Parrotty does not always mean piracy, however. The plaintiff must also show illegality, and this requires a sharper focus: the court must find a substantial similarity between the protectible elements of the two works. That is, the plaintiff must show that the defendant appropriated the plaintiff's particular means of expressing an idea, not merely that he expressed the same idea.

⁷ The Sixth Circuit has set forth three principles that guide the determination of what is protectable. Kohus, 328 F.3d at 855. Defendants provided a thorough and exhaustive analysis of Plaintiff's infringement case under the Kohus factors in response to Plaintiff's Motion for Partial Summary Judgment. See Doc. #60 at 13-15. Rather than repeat the analysis here, Defendants hereby incorporate it by reference into the instant motion.

[citation]. The means of expression are the “artistic” aspects of a work; the “mechanical” or “utilitarian” features are not protectible.

Fisher-Price, Inc., 25 F.3d at 23 (citations omitted).

As discussed above, the Plaintiff cannot demonstrate originality as to his entire website. See supra II.B. In fact, the Defendants engaged in the same conduct in which the Plaintiff now admits doing for his own site: using third-party sites as sources for factual information. Doc. #62 at 12. Thus, as to the narrative cheat content, he cannot claim originality, and no longer does so. Moreover, with the exception of lists of cheat codes, Defendants did not copy the order of any narrative cheats when he placed them on his site. Rather, he reordered them alphabetically. SMF ¶ 32; Wise Aff. ¶ 15. A comparison of the two sites – which Defendants welcome – would demonstrate this fact and other substantial differences. Wise Aff. ¶¶ 16-23. Therefore, the Plaintiff’s “originality” argument must be limited to the arrangement of specific lists of cheat codes of which he has only produced four. SMF ¶¶ 33-34; see, generally, Doc. #58; see also Doc. #62 at 11; see Alleged Infringing Charts at App. Ex. L; see also Expert Report of Gary Kitchen (“Kitchen Rept.”) attached at Appendix Exhibit M at ¶¶ 32-33. As shown below, the arrangement of these lists does not constitute protectable expression and Plaintiff’s infringement case fails as a matter of law.

Plaintiff would have the Court believe that his limited original work in the four lists of codes is creative and not a “mere list of factual information.” See Doc. #62 at 12 citing Faessler v. U.S. Playing Card Co., 2007 U.S. Dist. LEXIS 12767, at *28 (S.D. Ohio Feb. 9, 2007) (stating “the Subject Works are not mere lists of fact” and holding that the plaintiff’s card game contained the modicum of creativity necessary for copyright protection) (unpublished). However, Plaintiff’s work is precisely that what he claims it is not - a mere list of factual information. For example, the Plaintiff seeks to protect the following list of codes:

Master Code (Must Be On)	0E3C7DF2 1853E59E EEAF17C6 BCDACE32
Unlock Clegg Holdfast	CE5D3F66 BCA99B84
Unlock Gasgano	CE5D3F76 BCA99B84
Unlock Mawhonic	CE5D3F7E BCA99B84
Unlock Knire Dark	CE5D3F2A BCA99B84
Unlock Kraid Nemmeso	CE5D3F36 BCA99B84
Unlock Wan Sandage	CE5D3F12 BCA99B84
Unlock Mars Guo	CE5D3F72 BCA99B84
Unlock Scorch Zanales	CE5D3F1E BCA99B84
Unlock Tzidik Wrantojo	CE5D3F32 BCA99B84
Unlock Sebulba	CE5D3F1A BCA99B84
Unlock Sebulba (Episode 1)	CE5D3F0A BCA99B84
Unlock Darth Maul	CE5D3F2E BCA99B84
Unlock Watto	CE5D3F3E BCA99B84
Unlock Darth Vader	CE5D3F3A BCA99B84
Unlock Anakin	CE5D3F26 BCA99B84
Unlock Occo	CE5D3F22 BCA99B84
Unlock Shrivel	CE5D3F02 BCA99B84
Unlock Aldar	CE5D3F7A BCA99B84
Unlock Ben	CE5D3F5A BCA99B84
Unlock Dud	CE5D3F62 BCA99B84
Unlock Ody	CE5D3F06 BCA99B84
Unlock Teemto	CE5D3F16 BCA99B84
Unlock Young Anakin	CE5D3F5E BCA99B84

See SMF ¶¶ 33-34; App. Ex. L.

The foregoing example represents merely a list of alpha-numeric codes and their corresponding effects on the video game for which they are used. *Id.* The Plaintiff makes no claim to the cheat codes; rather, the only element for which Plaintiff seeks protection is the order in which the cheat codes appear. SMF ¶¶ 33-34. However, this order is purely utilitarian. Although Defendants dispute that the order is anything other than common or random, Plaintiff testifies that he placed the codes in order of importance to make it most useful for users. SMF ¶ 35; Allison Aff. However, in much the same way, the order of facts in a phone book or a catalogue is meant to be useful or utilitarian. Indeed, Plaintiff's entire work is merely utilitarian. It essentially represents a directory of cheats and codes used by players to gain advantage in video games. SMF ¶ 36; Wise Aff. Wise Aff. ¶ 13; Kitchen Rept. ¶¶ 32-33. That the order is

different from other lists of codes or is allegedly based on Plaintiff's purported expertise does not make it sufficiently artistic or creative to be removed from the category of an utilitarian idea to the category of protected artistic expression. It is his expression of his idea of what is most important and useful; the idea cannot be expressed in any other way (it is merely a list) and the expression is therefore not copyrightable under the merger doctrine. Kohus, 328 F.3d at 856 (citing Concrete Machinery Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 607 (1st Cir. Mass. 1988)). A substantial similarity analysis in conjunction with the merger doctrine was set out by the First Circuit in Concrete Machinery Co.:

Some ideas admit of only a limited number of expressions. When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression. [citation omitted]. When the idea and its expression are not completely inseparable, there may still be only a limited number of ways of expressing the idea. In such a case, the burden of proof is heavy on the plaintiff who may have to show "near identity" between the works at issue. [citation omitted]. This showing is necessary because, as idea and expression merge, fewer and fewer aspects of a work embody a unique and creative expression of the idea; **a copyright holder must then prove substantial similarity to those few aspects of the work that are expression not required by the idea.**

See id. at 607 (emphasis added).

Clearly, the order of the codes is an aspect of Plaintiff's work required by his idea (i.e. their order of importance). Based on the foregoing, the order of the Plaintiff's lists of codes are thus purely functional - much like a list of ingredients in a recipe. Though a list of ingredients may have been created out of the subjective tastes of the recipe's creator, such a list is not original in a copyright context and, therefore, cannot be protected. See, e.g., Publications Int'l v. Meredith Corp., 88 F.3d 473, 481 (7th Cir. 1996) ("This conclusion [i.e., that recipes are copyrightable] seems doubtful because the content of recipes are clearly dictated by functional

considerations, and therefore may be said to lack the required element of originality, even though the combination of ingredients contained in the recipes may be original in a noncopyright sense.”) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[I], at 2-204.25-.26 (May 1996)). For this reason, the Plaintiff’s lists of code contain no protectable elements.

3. *Plaintiff Lacks Evidence of Substantial Similarity*

The Defendants contend that the Plaintiff’s lists of cheat codes contain no protectable elements. Should the Court disagree and conclude that protectable elements remain, it must then determine whether the allegedly infringing work is substantially similar to the protectable elements of the alleged infringed work. In this instance, the Plaintiff has produced no evidence of substantial similarity.

In determining substantial similarity, the Court must look at the individual parts of the works and at the works as a whole, including those portions of the works that are not alike. Mihalek Corp. v. Mich., 814 F.2d 290, 295 (6th Cir. 1987) (the more numerous the differences between two works the less likely copying has occurred). The two works must be compared in their entirety for this determination to be made; it is the final step in the copyright infringement analysis. Stromback v. New Line Cinema, 384 F.3d 283, 297 (6th Cir. 2004) (“[T]he Sixth and other circuits have held that a comparative analysis of the works in their entirety is required.”). Although acknowledging the necessity of comparing the two works in their entirety to determine infringement, Plaintiff failed to introduce the works in the record so that this determination could be made. See Doc. #58; see also Doc. #62 at 14-15.

Here, the Plaintiff refers solely to the four lists of cheat codes as a basis for determining substantial similarity. Id. Although the Plaintiff has pointed to alleged similarities between the

specific lists of codes, he has produced no evidence demonstrating that these similarities are substantial as required in a copyright infringement case. Twin Peaks Prods., 996 F.2d at 1372 (“the trier of fact must determine whether the similarities are sufficient to qualify as substantial”). Moreover, he fails to recognize that the four lists of cheat codes, protectable or not, within the monumental amount of webpages on each website is inconsequential. Indeed, the two websites contain tens of thousands of pages of content. SMF ¶¶ 40-46.

Rather than perform his own analysis of the two websites, the Plaintiff would have the Court undertake its own comparison of tens of thousands of pages to conduct a substantial similarity analysis. SMF ¶ 37; see Doc. #62 at 14-15. Although the Plaintiff imposes a daunting task on the Court, the Defendants can facilitate this effort by filtering out significant portions of the websites. For, Defendants, in compiling their websites, did not reproduce any selection and arrangement of narrative cheats. As noted above, the Defendants substantially reordered narrative style cheats and, as he testifies, added a significant amount of original content and organization not present on Plaintiff’s site. SMF ¶¶ 38, 45- 46; Wise Aff. ¶¶ 15-23. Moreover, as to arrangement, the Defendants rearranged all content but for the limited number of charts such as the four or five introduced by the Plaintiff. Id. Though Defendants are unaware of which charts may have been reproduced, it would only have been possible for Defendants to have reproduced a negligible amount of content.

Because such a minute portion of the protectable elements in the sites may overlap, they cannot be considered substantially similar in their entirety. “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 specific lists of codes 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. Doc. #58 at 1-2. Further, a substantial amount of Defendants' website existed prior to any alleged infringement.⁸

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 as a matter of law. *See, e.g., Schoolhouse, Inc.*, 275 F.3d 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).⁹ Summary Judgment must be granted in Defendants' favor as to Count One.

F. Summary Judgment Must Be Granted as to Count Two through Four.

Plaintiff alleges additional claims for Passing Off and Federal Unfair Competition (Claim 2), Common Law Unfair Competition (Claim 3) and Deceptive Trade Practices (Claim 4). These remaining claims are based on the identical set of facts as Plaintiff's copyright infringement claims. *See* Doc. #35 at ¶¶42-51. Plaintiff's remaining claims fail on the same grounds as his copyright infringement claim.

The same analysis should be used in reviewing all three of the remaining causes of action as they all stem from common law unfair competition. *See, e.g., MMK Group, LLC v. SheShells Co., LLC*, 591 F. Supp. 2d 944, 960-961 (N.D. Ohio 2008) ("[C]ourts are to apply essentially the

⁸ SMF ¶ 41-45; Wise Aff. ¶¶ 9-10.

⁹ Plaintiff attempts to distinguish these cases stating that his charts are not merely lists of factual content. Doc. #62 at 12-13. However, that is exactly what they are. *See* section III. E. 2. supra. It is a list of facts with a utilitarian function. *See id.* It is not an artistically creative song or a uniquely creative card game as in *Faessler*, 2007 U.S. Dist. LEXIS 12767 at *28.

same analysis as that applied in assessing unfair competition under the federal statutes.”) (quoting Cesare v. Work, 36 Ohio App.3d 26, 28, 520 N.E.2d 586, 590 (1987)); see also Champions Golf Club, Inc. v. Champions Golf Club, Inc., 78 F.3d 1111, 1122-23 (6th Cir. 1996); Yocono’s Restaurant v. Yocono, 100 Ohio App. 3d 11, 17 (Ohio Ct. App. 1994) (“Ohio Deceptive Trade Practices Act is a codification of the common law.”); Dawson v. Blockbuster, Inc., 2006 Ohio 1240 (Ohio Ct. App. 2006).

A claim of unfair competition arises where a person “on or in connection with any goods or services, . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, in a manner that is ‘likely to cause confusion.’” Bird v. Parsons, 289 F.3d 865, 877 (6th Cir. 2002) (quoting 15 U.S.C. § 1125(a)(1)(A)); MMK Group, LLC, 591 F. Supp. 2d at 960-961. The Sixth Circuit has explained that unfair competition arises where “one party fraudulently seeks to sell his goods as those of another.” Wisconsin Elec. Co. v. Dumore Co., 35 F.2d 555, 557 (6th Cir. 1929); MMK Group, LLC, 591 F. Supp.2d at 960-961.

Plaintiff can show no set of facts under which unfair competitions exists. Defendants have not sought to sell their goods as those of Plaintiff, or represented their website or its content as that of Plaintiff. Rather Defendants’ website is substantially different from Plaintiff’s website and contains numerous additional features. SMF ¶¶ 38, 45- 46; Wise Aff. ¶¶ 15-23. Plaintiff has himself taken large amounts of content from third-parties, represented it as his own, and based these claims on those false representations. SMF ¶¶ 15-22, 47-52. Therefore, Plaintiff can show no evidence of a likelihood of confusion and his claims fail as a matter of law. Bird, 289 F.3d at 877; MMK Group, LLC, 591 F. Supp. 2d at 960-961. Summary Judgment should be granted in Defendants’ favor as to Counts Two through Four.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court order summary judgment invalidating Plaintiff's copyrights and barring his infringement claims due to copyright misuse and unclean hands. Additionally, Defendants' request that the Court render summary judgment in favor of Defendants that Plaintiff will be unable to prove copyright infringement as no substantial similarity exists as a matter of law. Defendants reserve the right to file and pursue motion for sanctions including attorneys' fees and costs against the Plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 5, 2010, I electronically filed the foregoing Defendants' Motion for Summary Judgment 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)