

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

**STATEMENT OF MATERIAL FACTS PURSUANT TO RULE 56(C)(2)**

**The Copyrights**

1. Plaintiff applied for and received the following copyright registrations covering his website: TX 6-162-180 (May 12, 2005); and TX 6-516-407 (January 29, 2007).

Registrations, attached hereto as Appendix Exhibit A (“App. Ex. A”).

2. Plaintiff’s registrations purport to cover the entire text of his site excluding only third-party banner ads. *Id.*

3. 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.

4. Plaintiff submitted the materials found at Appendix Exhibit B (“App. Ex. B”) as his deposit materials when obtaining Registration No. TX 6-162-180 (May 12, 2005).

5. Plaintiff submitted the materials found at Appendix Exhibit C (“App. Ex. C”) as his deposit materials when obtaining Registration No. TX 6-516-407 (January 29, 2007).

**Plaintiff's Representations of Authorship**

6. Plaintiff purported to be the author of the entire text of his website several times in pleadings before this court, and the District of Colorado. See Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, Complaint and Jury Demand, (Doc. #2) ¶¶ 7-11; Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, Amended Complaint (Doc. #26) ¶¶ 9-13; Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, First Amended Complaint and Jury Demand (Doc. #35) ¶¶ 12-16; and Allison v. Wise et al., U.S. Dist. Colorado, Case No. 1:07-cv-00143-WYD, Complaint and Jury Demand ¶¶ 9-13.

7. For instance, Plaintiff alleged that he “wrote the text contained on each cheat code web page located at [www.cheatcc.com](http://www.cheatcc.com), and solely created the compilation and arrangement of the cheat code information on each of those pages.” Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, Amended Complaint (Doc. #26) ¶ 11.

8. Additionally, he claimed that he is the “sole author of all commentary regarding video game strategies, tips, hints, tricks, and cheat codes published on the [www.cheatcc.com](http://www.cheatcc.com) website.” Id. ¶ 13.

9. He later claims that he “created the Copyrighted Web Pages listed above and fixed them in a tangible medium, with the exception of any third party banner ads contained on the pages.” Id. ¶ 15.

10. Prior to the submission of his Motion for Partial Summary Judgment, Plaintiff maintained a position that Defendant copied verbatim codes without any mention of selection and arrangement of unprotected facts. Affidavit of Charles Lee Mudd, Jr., (“Mudd Aff.”) ¶ 32, attached as Appendix Exhibit D.

11. Based on Plaintiff's representations regarding its allegations of verbatim copying, early in the matter, Defendants attempted to re-word much of the cheats on their site to avoid further litigation. Mudd Aff. ¶¶ 34, 35.

12. Plaintiff has never come forth with evidence of wholesale copying Defendants' sites. Plaintiff originally accused Defendants of taking discreet sections of cheat codes. Mudd Aff. ¶ 8; see also, twelve examples of infringement, attached as Appendix Exhibit E ("App. Ex. E").

13. Plaintiff made knowing misrepresentations in discovery that he was the sole author of the content on his website calling himself the "sole author of his Copyrighted Webpages" and accusing Defendant of copying narrative style cheats, including those which were "several paragraphs in length." See Plaintiff's Objections and Responses to Defendant's First Set of Interrogatories [Redacted] at Nos. 7 and 13 (Attached as Appendix Exhibit F ("App. Ex. F")).

14. Plaintiff made these same assertions in pleadings in at least three other cases in which he has extracted settlements. See Complaints attached as Appendix Exhibit G ("App. Ex. G").

#### **Plaintiff's Copying from Third-Parties**

15. Defendants have uncovered over five hundred (500) instances of copying of narrative cheats by Plaintiff from third-party site [www.gamewinners.com](http://www.gamewinners.com) and have tracked this copying via affidavits from several of the true authors of that content. Affidavit of Jeremy Wise ("Wise Aff."), attached as Appendix Exhibit H ¶¶ 35-37.

16. Third parties actually authored Cheats from each of the twelve examples initially relied upon by Plaintiff for his infringement contentions. See Twelve Examples, App. Ex. E;

Affidavits of Brandon Mizera, Kevin Merrel, Shane Colton, James Stretch, Cameron Benoit, and Jason Watene (“First Set of Authors’ Affidavits”) attached hereto as Appendix Exhibit I (“App. Ex. I”).

17. Defendants found additional narrative cheats copied by Plaintiff into his website from [www.gamewinners.com](http://www.gamewinners.com) and obtained twenty-two (22) additional sworn statements from the true authors of those cheats. See Affidavits of Aaron Holmes, Anthony Barrett, Joakim Jern, Matthew Clark, Eric Bigras, Darryl Smith, Robert Anthony Hoots, Cody Murphy, Mark Johnson, Greg Farrell, Filip Stelling, Daniel Talarico, Tomas Benada, Michael C. Lemontagne, Mike Martinell, Ellery Johannessen, Roderick Barkley, Christopher Luke Jonavic, Darryl Johnson, Carl de Jong, Matt Little, and Tom Carroll (“Second Set of Authors’ Affidavits”) attached as Appendix Exhibit J (“App. Ex. J”).

18. All of the affiants authored cheats which appear in the deposit materials submitted by Plaintiff in applying for his Registration No. TX 6-516-407 (January 29, 2007). Wise Aff. ¶¶ 38-50; See also App. Ex. I, Ex. J, Ex. A, and Ex. C.

19. Aaron M. Holmes and Joakim Jern authored twenty-eight (28) cheats which appear in the deposit materials submitted by Plaintiff in applying for his Registration No. TX 6-162-180 (May 12, 2005). Wise Aff. ¶¶ 52, 53, 56, 57; see also App. Ex. I, Ex. J, Ex. A, and Ex. B.

20. Plaintiff knowingly omitted that his work contained portions of pre-existing works when he applied for his registrations. According to his testimony, he hand assembled the cheats and codes on his site. Affidavit of David Allison (“Allison Aff.”) ¶ 6, attached as Appendix Exhibit K.<sup>1</sup>

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<sup>1</sup> Originally submitted with Plaintiff’s Motion for Partial Summary Judgment. Doc. #59.

21. Plaintiff's copying from [www.gamewinners.com](http://www.gamewinners.com) continues to this day and includes the selection and arrangement of the cheats. Wise Aff. ¶¶ 24-34.

22. In fact, Plaintiff has even copied a cheat originally authored and posted by Defendant Wise. Id. ¶¶ 29, 34.

### **Plaintiff's Opposing Legal Positions**

23. Plaintiff asserted copyright claims against Defendants for over three years for alleged verbatim copying of narrative cheats. See Plaintiff's Objections and Responses to Defendant's First Set of Interrogatories [Redacted] at Nos. 7 and 13 (Attached as Appendix Exhibit F ("App. Ex. F")); see Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, Complaint and Jury Demand, (Doc. #2) ¶¶ 7-11; Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, Amended Complaint (Doc. #26) ¶¶ 9-13; Allison v. Wise, et al., Case No. 1:07-cv-00143-REB-PAC, First Amended Complaint and Jury Demand (Doc. #35) ¶¶ 12-16; and Allison v. Wise et al., U.S. Dist. Colorado, Case No. 1:07-cv-00143-WYD, Complaint and Jury Demand ¶¶ 9-13; Mudd Aff. ¶¶ 33, 34.

24. 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 by verbatim copying of narrative cheats. Mudd Aff. ¶¶ 8, 33.

25. Defendant then came forward with evidence that portions of these twelve examples had been copied from a third-party site and identified, and in some cases obtained sworn statements from, the true authors of several narrative cheats. Mudd Aff. ¶¶ 18-25; App. Ex. E; App. Ex. Exhibit I.

26. Plaintiff now takes an opposing legal position. He now asserts that he does not claim copyright protection for the narrative style cheats on his site, material which was once the

cornerstone of his infringement case. See Doc. #62 at 11.

27. Plaintiff has abandoned his infringement case as to his January 2007 registration.

Id.

28. However, as late as his initial motion for summary judgment, he relied on this registration. Doc. #58 at 3.

### **Plaintiff's New Contentions**

29. Plaintiff now solely relies on five (5) discreet examples of allegedly infringed content consisting of cheats and cheat codes concerning the following games: Star Wars: Jedi Outcast --Jedi Knight 2; Star Wars: Episode 1 - Jedi Power Battles; Star Wars: Episode 1 - Phantom Menace; and Star Wars: Racer Revenge -- Racer 2. See, generally, Doc. #58; see also Doc. #62 at 11.

30. Plaintiff asserts that the cheats and codes on his sites are factual and now only relies on the selection and arrangement of the cheats and codes on his site for his infringement contentions. Doc. #58 at 3 & 10.

31. Prior to Plaintiff's Motion for Partial Summary Judgment, Plaintiff never gave any indication that he would be relying on infringement contentions based on these lists of codes, but instead based its contentions on the alleged infringement of discreet narrative cheats. Mudd Aff. ¶ 32, 33.

32. 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. Wise Aff. ¶ 15.

33. The order of the cheat codes in Plaintiff's charts is the only allegedly protectable element he is claiming. See, generally, Doc. #58; see also Doc. #62 at 11; see also Expert Report

of Gary Kitchen (“Kitchen Rept.”) attached at Appendix Exhibit M at ¶¶ 32-33.

34. The allegedly infringed charts are attached hereto as Appendix Exhibit L (“App. Ex. L”).

35. Plaintiff testifies that he has placed the codes in order of importance to make it most useful for the users. Allison Aff. ¶ 6.

36. Indeed the entirety of Plaintiff’s work is merely utilitarian; it is essentially a directory of cheats and codes used by players to gain advantage in video games. Wise Aff. ¶ 13; Kitchen Rept. ¶¶ 32-33.

37. Rather than perform his own analysis, the Plaintiff would have the Court compare tens of thousands of pages to conduct a substantial similarity analysis. See Doc. #62 at 14-15.

38. Defendant Wise, in compiling his site, did not reproduce selection and arrangement in the narrative cheat sections of his sites; as to arrangement, he only reproduced the arrangements of charts such as the four or five at issue. Wise Aff. ¶ 15.

39. Arranging Game Shark codes in descending order of importance is frequently used in arranging these charts, as is arranging them by character and level. Wise Aff. ¶ 14; Affidavit of Kevin Brett at 5, 8, 11, 13, 16, 19, 28, 33, 35, 37, 40, 42 (grouping codes in descending order of importance and according to character); and 5, 8, 11, 13, 16, 19, 28, 33, 35, 37, 40, 42 (grouping cheat codes in descending order of importance and according to character) (Doc. #60-6).

40. Jeremy Wise manages and operates the affairs of Wise Buy Now, LLC. Wise Aff. ¶ 4.

41. Defendants’ site, [www.cheatmasters.com](http://www.cheatmasters.com), was started in 1994 and was purchased by Defendants in 2001. Wise Aff. ¶¶ 6, 7.

42. Plaintiff's site, [www.cheatcc.com](http://www.cheatcc.com) was started in 1997, three years after Defendants' site. Doc. #58 at 3.

43. Plaintiff's site provides cheat codes, hints, tips and strategies to more than 10,000 video games. Id.

44. Defendants' site [www.cheatmasters.com](http://www.cheatmasters.com) contains over 19,000 software titles it covers from the most popular gaming platforms and additional categories (such as Neopets) that are not covered on Plaintiff's site. Wise Aff. ¶ 8.

45. Defendants' site [www.cheatmasters.com](http://www.cheatmasters.com) alone has more than 100,000 web pages not including its blog and forum. Wise Aff. ¶ 9.

46. Wise Buy Now, LLC also operates other gaming websites named in this suit that cover several other gaming systems that are not covered by Plaintiff's site. Wise Aff. ¶ 11.

#### **Continued Copying from Third-Party Sites**

47. As noted during briefing on the Plaintiff's unsuccessful Motion for Sanctions, Defendants found recent occurrences of game cheats being posted to [www.gamewinners.com](http://www.gamewinners.com) and their appearance, days later, identically on Plaintiff's site. See Wise Aff. ¶¶ 24-28, 29-34.

48. By way of example, Defendants obtained captures from [www.gamewinners.com](http://www.gamewinners.com) and Plaintiff's site, [www.cheatcc.com](http://www.cheatcc.com), including cheats for three games: Blazblue: Calamity Trigger; Dynasty Warriors 6: Empires; and Overlord 2. Mudd Aff. Exhibit 1. Each example shows (1) a printout of cheat codes from [www.gamewinners.com](http://www.gamewinners.com); (2) a printout of cheats from [www.cheatcc.com](http://www.cheatcc.com) of the same day, absent some cheats from [www.gamewinners.com](http://www.gamewinners.com); and (3) a later printout of the same URL of [www.cheatcc.com](http://www.cheatcc.com) showing added content identical to the first printout of [www.gamewinners.com](http://www.gamewinners.com). Mudd Aff. Exhibit 1. With respect to the game Overlord 2, documents show a clear pattern of copying by Plaintiff from [www.gamewinners.com](http://www.gamewinners.com). Id., pp.



26-56. For example, on July 9, 2009, [www.gamewinners.com](http://www.gamewinners.com) exhibits a cheat entitled "Finding more people."; [www.cheatcc.com](http://www.cheatcc.com) does not. *Id.*, pp. 35-39. However, [www.cheatcc.com](http://www.cheatcc.com) does exhibit this same cheat on August 6, 2009. *Id.*, pp. 44-46. Moreover, Defendants have obtained testimony that Matthew Clark, not Plaintiff, authored one of the specific cheats found on both sites. Affidavit of Matthew Clark ¶¶ 3-9.<sup>2</sup>

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

50. Defendant Wise has since done an extended analysis showing substantial copying by Plaintiff from [www.gamewinners.com](http://www.gamewinners.com) regarding the games Assassin's Creed and Bioshock 2. Wise Aff. ¶¶ 29-34, 24-27.

51. Plaintiff even copied a cheat authored by Defendant Wise for the game Assassin's Creed. Wise Aff. ¶ 34.

52. Defendant Wise has found similar instances of copying by Plaintiff from [www.gamewinners.com](http://www.gamewinners.com) of cheats for several other games including: Marvel: Ultimate Alliance 2, Battle Tanks, Dirt 2, Heroes Over Europe, TV Show King, Shatter, Shadow Complex, Defense Grid The Awakening, Ashes Cricket 2009, Katsuragi Misato Houdou Keikaku, and Cabela's Big Game Hunter 2010. Wise Aff. ¶ 58.

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<sup>2</sup> App. Ex. J, Second Set of Authors' Affidavits.

53. Plaintiff now tries to excuse his actions by admitting that narrative style cheats are frequently and easily copied from site to site. Doc. #62 at 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 5, 2010, I electronically filed the foregoing Statement of Material Facts Pursuant to Rule 56(C)(2) using the Court's CM/ECF system, which will send notification of such filing to counsel for Plaintiff in this action.

/s/ Sabrina Haurin  
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