

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 RESPONSE TO DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT**

Plaintiff David Allison, d/b/a Cheat Code Central, through his counsel of record, hereby responds to Defendants’ Motion for Summary Judgment (“Motion”). In addition to the response that follows, Plaintiff expressly incorporates by reference his own Motion for Partial Summary Judgment and exhibits thereto (“Plaintiff’s Motion”) [Doc.#58 and exhibits 58-1 through 58-8], his Reply thereto (“Plaintiff’s Reply”) [Doc. #62], and the Affidavit of David Allison and supporting exhibits (“Original Affidavit”) [Doc.#59 and exhibits 59-1 through 59-11]. This Response is further supplemented by the current Affidavit of David Allison (“Current Affidavit”)

and the Affidavit of Thomas P. Howard (“Howard Affidavit”).

Respectfully submitted,
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**PLAINTIFF’S MEMORANDUM IN RESPONSE TO DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff David Allison has devoted more than a decade of his time to the development and management of a premier website that caters to videogame players. By providing cheat codes, hints, tips and strategies to more than 10,000 video games across a variety of gaming platforms, Plaintiff has developed a loyal following from a very attractive demographic group. The volume of his visitor traffic is directly correlated to the advertising revenues his site generates. As such, he takes the protection of his content very seriously. Plaintiff has registered the content of his website with the U.S. Copyright Office on two separate occasions, once in 2005 (“the 2005 Copyright”) and once in 2007 (“the 2007 Copyright”). In addition, Plaintiff registered the content of his book, “The Ultimate Code Book,” in 2000. Portions of this book were incorporated into his website.

In late 2006, Plaintiff discovered that Defendants had copied and pasted significant portions of his content onto several of their competing websites. These acts of infringement were done knowingly and intentionally. Indeed, Defendants have now admitted that they accessed and used Plaintiff’s website as a source of material, and they have admitted knowing that Plaintiff’s site was copyrighted. They have also admitted that they copied the content and organization of the web pages submitted by Plaintiff as examples of infringement that he filed in conjunction with his Motion for Partial Summary Judgment.

When the smoke and mirrors are lifted from Defendants’ Motion and its voluminous accompanying (largely irrelevant and/or inadmissible) exhibits, what remains is this: Plaintiff has a valid copyright over those aspects of his site that are original to him, and Defendants have infringed that copyright. Defendants are not entitled to the relief they seek because they have

failed to prove either that that they are entitled to summary judgment as a matter of law or that no genuine issue of fact exists. Their Motion must be denied.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

1. Plaintiff is the owner and sole proprietor of the website www.cheatcc.com. Affidavit of David Allison, [Doc. #59] (“Original Affidavit”), ¶3. He started this website in 1997. *Id.*
2. Plaintiff’s website is the largest independently owned website that caters to videogame players looking for cheat codes, hints and tips. Affidavit of David Allison, (“Current Affidavit”), ¶3.
3. Defendants own a series of websites that cater to the same demographic. Their websites include, but are not limited to, the following: www.cheatmasters.com, www.playstaion2-cheats.co.uk, www.Xbox-cheats-codes.com, www.cheatdemon.com, and www.Cheats2k.net. Defendant Wise’s Answer to First Amended Complaint (“Wise Answer”) [Doc. #37], ¶11; Defendant Wise Buy Now’s Answer to First Amended Complaint (“Wise Buy Now Answer”) [Doc. #38], ¶11.
4. In 2000, Plaintiff was issued a copyright from the U.S. Copyright Office for the content of his book, “The Ultimate Code Book,” (“the Book”), which he published in August of 1999. The copyright for the Book was issued on January 5, 2000, registration number TX 5-116-527. Current Affidavit, ¶8.
5. In addition to his copyright registration for the Book, Plaintiff has been issued two copyrights from the United States Copyright Office pertaining to the content published upon his website. Those copyrights are: TX 6-162-180, issued May 12, 2005 (“the 2005 Copyright”), and TX 6-516-4-7, issued January 29, 2007 (the “2007 Copyright”). Original Affidavit, ¶5. True

and correct copies of Plaintiff's copyright registration certificates are attached as *Exhibit A* to the original Complaint filed on February 19, 2008 [Docket # 2]. A copy of the 2005 Copyright is also attached as Exhibit 2 to the Current Affidavit.

6. On the registration materials for the 2005 Copyright, Plaintiff describes his "Nature of Authorship" (Section 2 of the form TX) as follows: "Revised text & compilation of website..." Current Affidavit, ¶8, and its Exhibit 2, Section 2. He also filled in Section 6 of the registration materials, which relates to compilation and derivative works. In that section he expressly stated that the website incorporates some material from his previously registered Book, and he again referred to the elements of his website that he was seeking to protect as "revised text & compilation of website." *Id.*, Section 6.

7. Plaintiff has managed the content of his website since its inception. Original Affidavit, ¶4. In fact, this has been his full-time job for more than 10 years. *Id.* While much of the content is fact-based, he adds value by writing, revising, organizing, compiling and/or designing the information before posting it on his site. *Id.*

8. In late 2006, Plaintiff became aware that vast quantities of his website content had been posted on Defendants' various websites without his license, authorization or permission. Original Affidavit, ¶8.

9. Defendant Jeremy Wise states that he used Plaintiff's site as a source for cheats for a period of time in 2006. Wise Affidavit, [Doc.#64-7], ¶15.

10. Plaintiff submitted four examples of Defendants' verbatim infringement of his website as exhibits to his Motion for Partial Summary Judgment. [Doc. #58, Exhibits 1A&B through 4A&B]. Defendants acknowledge that they copied the identical arrangement of

information in these four examples and posted them to their websites. Defendants' Statement of Material Facts ("SMF") [Doc #64-1, ¶38].

11. Defendants' inaccurately assert that Plaintiff's stated "infringement contentions" are limited to the four examples cited above. Plaintiff denies limiting its "infringement contentions" in such a manner, nor does its pleading suggest the same. In fact, the representative infringements attached to the Motion for Partial Summary Judgment were but examples, and were expressly designated as examples. Plaintiff has submitted an additional 18 examples of infringement arising from the Copyrighted Works designated in the Complaint. Current Affidavit, Exhibits 4-21. They arise from the 2005 copyrighted web pages and, in some cases, also appeared in the Book, copyrighted in 2000. In each case, Plaintiff's particular wording and choice of organization as they appear in his Book and/or on his website as of the 2005 Copyright are, yet again, replicated exactly on Defendants' websites. Current Affidavit, ¶¶ 12-30, and Exhibits 4-21.

12. Plaintiff has elected to proceed under a claim of statutory damages and has thereby limited his claims of infringement to the enforcement of the 2005 Copyright and the 2000 copyright for the Book, because those are the copyrights that were registered prior to the acts of infringement. Howard Affidavit, ¶5.

13. The affidavits of Anthony Hugh M. Barrett, Matthew Clark, Eric Bigras, Darryl D. Smith, Robert Anthony Hoots, Cody Murphy, Mark Johnson, Greg Farrell, Filip Stelling, Axelrod Talarico, Tomas Benada, Michael C. Lemontagne, Mike Martinell, Ellery Johannessen, Roderick Barkley, Christopher Luke Jonavic, Darryl Johnson, Carl de Jong, Matthew Little, Thomas Carroll, Kevin Merrel, Brandon Mizera, Shayne Colton, James Stretch, Cameron Benoit and Jason Watene all address cheat code hints or tips that the affiants allegedly wrote in 2006 or

after. Motion for Summary Judgment, Exhibits I and J [Docs. #64-8 and 64-9]. None of the content allegedly referred to in these affidavits appears on the materials submitted by Plaintiff in conjunction with registering his 2005 Copyright or the copyright for his Book. Motion, Exhibit B [Doc. #67].

14. Defendants supplemented their 26(a) Disclosures on July 29, 2009. Howard Affidavit, ¶6, and Exhibit A. Only four of the people whose affidavits were submitted as exhibits to Defendants' Motion were listed in their supplemental disclosures as potential witnesses.¹ *Id.*, and Motion, Exhibits I and J [Docs. #64-8 and 64-9]. Most of the affidavits submitted in Exhibits I and J were obtained in October 2009 and November 2009. Mudd Affidavit, ¶25 [Doc. #64-3]; Exhibits I and J to Motion for Summary Judgment [Docs. #64-8 and 64-9]. Although Defendants have had almost five months to do so, Defendants never filed any additional supplementation to their 26(a) disclosures, nor had they provided copies of any of the previously unfiled affidavits prior to filing this Motion. Howard Affidavit, ¶¶6-7.

15. The videogames Blazblue: Calamity Trigger; Dynasty Warriors 6: Empires; and Overlord 2 were released in June 2009 and therefore were not in existence in the year 2000 when Plaintiff registered his Book with the U.S. Copyright Office, or in the year 2005 when Plaintiff registered his 2005 Copyright with the U.S. Copyright Office. Current Affidavit, ¶42.

16. The videogame BioShock 2 was not released until February 2010, and was therefore not in existence in the year 2000 when Plaintiff registered his Book with the U.S. Copyright Office, or in the year 2005 when Plaintiff registered his 2005 Copyright with the U.S. Copyright Office. Current Affidavit, ¶43. The videogame Assassin's Creed 2 was not released until November 2009, and was therefore not in existence in the year 2000, when Plaintiff

¹ The four affiants listed in these supplemental disclosures are: Kevin Merrel, Brandon Mizera, Shayne Colton and Cameron Benoit. Although the disclosures also list someone named Thomas Carroll, this is not the same Thomas Carroll as the person who submitted an affidavit in Exhibit J.

registered his Book with the U.S. Copyright Office, or in the year 2005, when Plaintiff registered his 2005 Copyright with the U.S. Copyright Office. *Id.*

17. Defendant Jeremy Wise has primary responsibility for the control, management, operation and maintenance of Wise Buy Now, LLC's affairs. Wise's Answer, ¶9 [Doc. #37].

18. At all times relevant to this matter, Plaintiff's website has contained a copyright notice, and Wise was aware of this fact. Wise's Answer, ¶19 [Doc. #37]. Wise admits that he did not obtain any express authorization or license from Plaintiff to use his content. *Id.*, at ¶22. Wise Buy Now, LLC similarly admits that it did not obtain any express authorization or license from Plaintiff to use his content. Wise Buy Now's Answer, ¶22 [Doc. #38].

19. Plaintiff has enforced his copyrights in the past by suing various other infringers. Motion, Exhibit G [Doc. #64-6]; Current Affidavit, ¶44. None of these cases progressed to trial or any other form of judicial determination. *Id.*

MEMORANDUM OF POINTS AND AUTHORITIES

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where no genuine issue of material fact exists so that the movant is entitled to a judgment as a matter of law. *Hancock v. Dodson* 958 F.2d 1367, 1374 (6th Cir.1992). "If there are 'any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party,' then summary judgment may not be granted." *Id.*, (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). When making this determination, "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The evidence of the non-

movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, at 255.

B. DEFENDANTS' "EVIDENCE" ALLEGEDLY SUPPORTING ITS FILING COMPRISES IRRELEVANT AND INADMISSIBLE EVIDENCE

Defendant has filed a Motion for Summary Judgment supported solely by irrelevant or inadmissible evidence. Plaintiff has elected statutory damages in this matter. See, Howard Affidavit, ¶ 5. Pursuant to the same, Plaintiff is enforcing his rights under the Copyrighted Book, registered in 2000, and the 2005 Copyright, both of which he registered prior to the acts of infringement in this case.

Defendants, in an effort to support this motion, submitted 28 identical affidavits from individuals scattered outside this state and this country, claiming to be the authors of several paragraphs of text allegedly appearing in “nearly identical” fashion on Plaintiff’s website.² Of these affiants, only two allegedly wrote any material on or before Plaintiff’s 2005 Copyright registration. None allege to have written any information prior to the Copyrighted Book, registered in 2000. In short, 26 of the 28 affidavits submitted to support Defendants’ claims are legally irrelevant to the matter at hand.³

Further, of the 28 affidavits submitted, only four of these witnesses were disclosed by Defendants on their 26(a) Disclosures or any supplements thereto.⁴ See, Howard Affidavit, Exhibit A. This is true even though most of these affidavits contain signature dates of October and November 2009—more than four months ago. Seven of the affidavits contain no address or only a partial one, 13 are not notarized, 12 are from affiants who live in other countries and are

² Every single one of the affidavits uses this phrase; all appear to have been written based upon the same template.

³ For a more lengthy discussion of the irrelevance of evidence that post-dates the 2005 Copyright, see Plaintiff’s Reply for his Motion for Partial Summary Judgment, pp. 11-12 [Doc. #62].

⁴ The four witnesses are Kevin Merrel, Brandon Mizera, Shayne Colton and Cameron Benoit. Each of these affiants discuss cheat codes they drafted in 2006, which by definition relates to content that could not have been incorporated into the 2005 Copyright and is therefore irrelevant to this case.

therefore highly unlikely to be called to court as witnesses at trial, and one included numerous blanks. On their face, the affidavits comprising the foundation of Defendants' Motion are not only irrelevant to the issues at hand, they are wholly unreliable.⁵

As additional alleged "evidence" submitted to bolster their Motion, Defendants have without prior notice submitted irrelevant and inadmissible correspondence between Defendants' attorney Charles Mudd and Plaintiff's former counsel pertaining directly to settlement negotiations. See, Mudd Affidavit, Exhibit 2. [Doc. #64-3, pp. 60-67.] Such evidence is completely inadmissible under Fed. R. Evid. 408 and should be ignored by this Court. As that rule states,

Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

...

(2) conduct or statements made in compromise negotiations regarding the claim...

(b) Permitted uses.-- ... Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Rule 408 directly applies to evidence of conduct or statements made in compromise negotiations, "and this encompasses the whole of the settlement evidence." *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499, 537 (D.C.Mich. 1974). In the matter at hand, the correspondence between counsel that Defendants are attempting to restate out of context was directly related to the parties' attempts to come to a compromise in the context of impending litigation. It does not fall within the limited exceptions for permissible use. It is inadmissible.

⁵ For additional detail of the unreliability of these affidavits, see Section D below.

“[I]t is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.” *Smoot v. United Transp. Union*, 246 F.3d 633, 649 (6th Cir. 2001)(citing *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir.1994)).

In sum, Defendants have filed a Motion for Summary Judgment founded solely upon irrelevant and/or inadmissible evidence. For that reason alone, it should be denied.

C. SIGNIFICANT PORTIONS OF DEFENDANTS’ WEBSITES ARE SUBSTANTIALLY SIMILAR TO PLAINTIFF’S COPYRIGHT-PROTECTED WEB PAGES AND CONSTITUTE INFRINGEMENT.

On January 5, 2000, Plaintiff was issued a copyright from the U.S. Copyright Office for the content of his book, “The Ultimate Code Book,” (“the Book”), which he published in August of 1999. Current Affidavit, ¶8. In addition to his copyright registration for the Book, Plaintiff has been issued two further compilation copyrights from the United States Copyright Office pertaining to the content published upon his website: the 2005 Copyright issued on May 12, 2005, and the 2007 Copyright, issued on January 29, 2007. Original Affidavit, ¶5. True and correct copies of Plaintiff’s copyright registration certificates are attached as *Exhibit A* to the original Complaint filed on February 19, 2008 [Docket # 2]. A copy of the 2005 Copyright is also attached as Exhibit 2 to the Current Affidavit.

On the registration materials for the 2005 Copyright, Plaintiff describes his “Nature of Authorship” (Section 2 of the form TX) as follows: “Revised text & compilation of website...” Current Affidavit, ¶8, and its Exhibit 2, Section 2. He also filled in Section 6(a) and 6(b) of the registration materials, which relate to compilation and derivative works. In that section he expressly stated that the website incorporates some material from his previously registered Book, referenced the video games with regards to which he was compiling information, and referred to the elements of his website that he was seeking to protect as “revised text & compilation of website.” *Id.*, Section 6.

Plaintiff has continued developing and expanding the content of his website since its inception. Original Affidavit, ¶4. In fact, this has been his full-time job for more than 10 years. *Id.* While much of the content is fact-based, he adds value by writing, revising, organizing, compiling and/or designing the information before posting it on his site. *Id.*

Defendant Wise has admitted downloading content from Plaintiff's website, for which reason access is an admitted factor of the substantial similarity analysis in this lawsuit. The sole issue remaining to be determined by this Court for the purpose of determining substantial similarity is the similarity of the works themselves. Here, relevant portions of the Copyrighted Works and the Infringing Works at issue are *identical*.

Defendants try to skirt the substantial similarity between the two sets of works by arguing that the Court should ignore their acts of infringement because they only took a handful of charts. In so doing, they presume that Plaintiff's entire claim must be limited to the few examples submitted in his Motion for Partial Summary Judgment. See, Motion, p. 16 [Doc.#63]. It is not. Plaintiff at no time expressly or implicitly limited his claimed infringement solely to the cheat code charts submitted as exhibits to his Partial Summary Judgment Motion. To the contrary, the several charts and tables submitted with Plaintiff's Motion were expressly submitted *as examples* of infringement. In fact, Plaintiff expressly claimed copyright infringement in this lawsuit with regards to the protectable elements of the Book, as well as those portions of his web pages to which he has copyright protection because he has personally selected, revised, organized and presented the information in question. These include the charts and tables on his site, but they also include the particular way he has edited, added to, and organized other types of hints and tips as well.⁶

⁶ Again, while Plaintiff has two copyrights for his website, his recent decision to proceed under statutory damages makes the 2007 Copyright irrelevant.

Attached to the Current Affidavit are 18 additional *examples* of the protectable elements of Plaintiff’s website that Defendants directly infringed.⁷ In each case, the content was posted to Plaintiff’s site prior to submission to the Copyright Office in 2005, and then copied verbatim—both the precise wording used and the order in which the information appears—onto the corresponding game pages of Defendants’ various websites sometime on or before January 15, 2007. See, Current Affidavit, Exhibits 4-21. These examples include not only tables and charts of alpha-numeric codes, but also lists of hints and tips revised by Plaintiff and organized by Plaintiff according to his subjective opinion as to the relative importance of each.

Defendants attempt to argue that Plaintiff’s copyrighted works are devoid of protectable elements, and that they therefore had the “right” to copy his web pages at will without license or permission. In so doing, they ignore almost 20 years of Supreme Court precedent to the contrary.

As the Supreme Court has held:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. ... Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. *Id.*, § 1.08 [C] [1].

Feist Publ., Inc. v. Rural Tel. Service Co., Inc. 499 U.S. 340, 345-346 (1991). As the Court

⁷ Defendants repeatedly assert in their Motion that Plaintiff previously agreed to limit his “infringement contentions” to 12 examples of narrative-style cheats produced in discovery in this matter. Plaintiff has never agreed to so limit this case. See, Affidavit of Thomas P. Howard, ¶4. Nor is Plaintiff required to set forth every single instance of infringement. It is only in patent infringement matters that specific infringement contentions must be stated by the expert prior to the “Markman” hearing so that the Court can analyze the issues. This is a copyright infringement case. No similar requirement exists.

further stated, “[i]f the selection and arrangement are original, these elements of the work are eligible for copyright protection.” *Id.* at 348-349 (emphasis added). Throughout Plaintiff’s work, which has been created over the course of 10 years, the selection and arrangement are original. It is precisely those compiled elements that have been submitted for copyright, and it is precisely those compiled elements that Defendants’ have knowingly infringed.

Defendants argue that Plaintiff’s compilation of facts is not worthy of copyright protection because it is “purely utilitarian.” Motion, p. 19 [Doc. #63]. This argument fails as well. Although alphabetical listings of business names in a phone book might be purely utilitarian because there is really only one useful way to express this idea, Plaintiff’s multipage organization of codes, hints and tips based upon his subjective opinion about their relative importance does not fall under such an “only one way” rubric. Indeed, if there were only one useful way to express these ideas, all cheat code websites would list their information in the exact same manner. Defendants have presented absolutely no evidence to demonstrate that such is the case, nor could they, because **it is not true**. As discussed in detail in Plaintiff’s Reply to Plaintiff’s Motion for Partial Summary Judgment [Doc. #62, p. 3-5], other cheat code websites present similar information in a completely different fashion and manner of organization. The ordering is a matter of subjective judgment. This Court should not be persuaded by Defendants’ attempt to reduce Plaintiff’s ongoing creative efforts over the course of 10 years in order to escape their own culpability, because neither the real world evidence, nor the case law, support such a conclusion.

The requisite amount of creativity required for copyright protection is minimal. *Feist*, 499 U.S. at 345. See also, *Cannon Group, Inc. v. Better Bags, Inc.*, 250 F. Supp. 2d 893, 901 (S.D. Ohio 2003)(holding that the placement of a drawing in conjunction with the corresponding

text on a plastic bag designed to hold corn ears at grocery stores was eligible for copyright protection); *Budish v. Gordon*, 784 F.Supp. 1320 (N.D. Ohio 1992)(upholding copyright protection for series of tables in book). Cf. *J. Thomas Distribs. V. Greenline Distribs.*, 100 F.3d 956, 1996 WL 636138 (6th Cir. 1996)(no protection afforded to arrangement of information in equipment catalog because it was “nothing more than mere column switching”); *Distrib. Corp. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 709 (6th Cir. 2 ATC 005)(holding allocation of numbers to parts in transmission parts catalog to be “an essentially random process” not worthy of copyright protection).

Here, Plaintiff gathered and organized significant volumes of content on his website, including the cheat code charts referenced in this Motion and in his Original Affidavit, and the various tables and lists of hints and tips referenced in his Current Affidavit, by collecting information from public sources and private contributors, and then choosing, based upon his personal analysis of the relative importance of each fact, the order and manner in which to list and present the information on his site. In many cases Plaintiff also reworded the information to conform to his particular site’s style of presentation. These actions demonstrate sufficient creativity to deserve protection under the law.

D. DEFENDANTS’ COPYRIGHT INFRINGEMENT DEFENSE ALLEGING FRAUD ON THE COPYRIGHT OFFICE FAILS AS A MATTER OF LAW AND SHOULD BE DENIED

“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). Plaintiff registered his 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 (“Copyrighted Web Pages”). 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.

Defendants’ evidence in support of their “fraud on the copyright office” defense consists of nothing more than unsupported assertions in their Motion, multiple irrelevant affidavits from previously undisclosed third parties, inadmissible correspondence between counsel, and examples of prior lawsuits that all ended short of judicial determination.

Even in the event that one or more of affidavits submitted with Defendant’s Motion proved to be legitimate, “[A]n innocent misstatement, or a clerical error, in the affidavit and certificate of registration, unaccompanied by fraud or intent to extend the statutory period of copyright protection, does not invalidate the copyright, nor is it thereby rendered incapable of supporting an infringement action.” *Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706, 708 (6th Cir. 1956), cert. denied, 353 U.S. 949 (1957). To the contrary, “**inadvertent failure to identify pre-existing works on an application is treated no differently from any other application error.**” *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151 (1st Cir. 2007)(emphasis added); *see also Sebring Pottery Co. v. Stuebenville Potter Co.*, 9 F. Supp. 383 (N.D. Ohio 1932)(wrong name and date did not affect suit); *Testa v. Janssen*, 492 F. Supp. 198, 200-01 (W.D. Pa. 1980)(misstatement as to identity of the author did not invalidate copyright); *Urantia Found. v. Burton*, 210 U.S.P.Q. 217 (W.D. Mich. 1980) (same); *Dealer Advertising Dev., Inc. v. Barbara Allan Fin. Advertising, Inc.*, 209 U.S.P.Q. 1003 (W.D. Mich. 1979)(misstatement as to identity

of the copyright claimant did not invalidate copyright); *Campbell v. Wireback*, 269 F. 372, 375 (4th Cir. 1920)(failure to fill out portion of certificate did not invalidate copyright).

In order for a defendant to succeed in establishing that plaintiff's registration is invalid, he must show that plaintiff willfully misstated or failed to state a fact that, if known, might have caused the Copyright Office to reject the copyright application. NIMMER § 7:20B. The burden is on Defendants to establish willful misstatements or fraud by factual proof. Defendants therefore bear a "heavy burden" in their attempt to demonstrate intent to defraud. *See, e.g., Lennon v. Seaman*, 84 F. Supp. 2d 522, 525 (S.D.N.Y. 2000). Here, Defendants have introduced absolutely no factual evidence demonstrating any knowing misstatement by Plaintiff. To the contrary, Plaintiff has affirmed that he has not copied works from gamewinners.com, the web site to which each of the parties signing affidavits allegedly submitted their works.⁸

The few cases cited by Defendants in an effort to support their claim do precisely the opposite. Defendants cite to *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1200 (10th Cir. 2005), a case involving Palladium, a Karaoke music provider that produced tracks of music based upon popular music hits. Palladium copyrighted its works. When it attempted to enforce those copyrights, the defendants presented evidence that Palladium had not registered the sound recording works as derivatives of the preexisting musical compositions on Section 6 of the copyright registration form, and alleged the copyrights were therefore fraudulently obtained. More relevant still in the world of music licensing, Palladium had failed to obtain either compulsory or consensual licenses from the copyright owners of those preexisting musical compositions. *Id.*, 1197. The *Palladium Music* case offers no guidance to this Court for two separate reasons. First, it turns on Section 115 of the Copyright Act, which specifically and

⁸ As was discussed at great length above, only two of the 28 affidavits even relate to the 2005 Copyright. The rest pertain to the 2007 Copyright, which is no longer at issue because of Plaintiff's election to seek statutory damages.

solely pertains to non-dramatic musical works and the compulsory licensing requirements for making and distributing phonorecords from such works. 17 U.S.C.A. § 115; *Id.* There are no comparable compulsory licensing requirements for the use of cheat codes on websites. Second, unlike the plaintiff in *Palladium*, Plaintiff explicitly designated his copyrighted applications as a compilation, pursuant to Section 6(a) and 6(b) of Form TX.

Defendants also cite *Eckes v. Card Prices Update*, 736 F.2d 859, 861 -862 (C.A.N.Y. 1984). Defendants did not accurately state the court's ruling; the court actually held that the lower court "clearly and justifiably believed that appellants' omissions in the copyright application were inadvertent and innocent." The *Eckes* court relied directly upon *Advisers, Inc.*, 238 F.2d 706, 708 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957) (stating that "an innocent misstatement ... in the affidavit and certificate of registration, unaccompanied by fraud or intent to extend the statutory period of copyright protection, does not invalidate the copyright, nor is it thereby rendered incapable of supporting an infringement action."). The *Eckes* court went on to uphold all claims for copyright infringement pursuant to Title 17 and deny each of defendants' defenses.

A close look at the affidavits produced by Defendants underlines the weakness of their efforts. Only 2 of the 28 affidavits filed even applies in the matter at hand, because the other 26 relate only to content that appears exclusively on the 2007 Copyright. Further, of the 28 affidavits submitted, only four of these witnesses were actually disclosed by Defendants on their 26(a) Disclosures or any supplements thereto.⁹ See, Howard Affidavit, Exhibit A. This is true even though most of these affidavits were signed back in October and November of 2009 – more

⁹ The four witnesses are Kevin Merrel, Brandon Mizera, Shayne Colton and Cameron Benoit. Each of these affiants discuss cheat codes they drafted in 2006, which by definition relates to content that could not have been incorporated into the 2005 Copyright and is therefore irrelevant to this case.

than four months ago.¹⁰ Second, seven of the affidavits contain no address or only a partial one, 13 are not notarized, 12 are from affiants who live in other countries and are therefore extremely difficult to contact and highly unlikely to be called to court as witnesses, and one included numerous blanks. It cannot be overemphasized that these constitute last-second affidavits from complete strangers in distant lands alleging that they long ago submitted specific works to a third-party website, and providing absolutely no documentary evidence to support their claims. These affidavits, such as they are, constitute the entire foundation for Defendants' Motion for Summary Judgment.

Further underscoring the unreliability of these previously undisclosed, last-minute affidavits, the Court is referred to the Affidavit of Robert Anthony Hoots, [Doc. #64-9, pp. 150-152] ("Hoots Affidavit").¹¹ In his affidavit, Mr. Hoots states that he posted a game hint for the video game called "Fable II" to the website for gamewinners.com. Hoots Affidavit, ¶3. He then reprints the hint that he posted, which he states is as follows:

Here is the list of items needed for the Box of Secrets trades in the Fable II Knothole Island Expansion for the Xbox360 along with their rewards:

Marriage and How to Survive It – Knothole Skirt
Pretty Necklace – Black Wheel Gang Outfit
Eternal Love Ring – Greaser Wig
Puny Carrot (2) – Assassins Outfit
Table Wine (2) – Cascading Hair
Murgo's Big Book of Trading (2) – Brocadian Warrior Queen Outfit
Crunchy chick (3) – The Wretcher
Crucible Peanuts (2) – Chasm Outfit
Monk Robes – Judge's Steel
Lute (2) – Axe of Disharmony
Diamond – Staff of Wrath
Pure Experience Extract – Hal's Rifle

¹⁰ Plaintiff respectfully requests that all affidavits pertaining to parties that have not been previously disclosed be stricken.

¹¹ This and the numerous other affidavits are, quite literally, not worth the paper that they are printed on. It would appear that Defendants believed that if they filed multiple affidavits, together with numerous web pages, many would not be read.

Regal Purple Dye – Brodican Mace

See, Hoots Affidavit, ¶4. Mr. Hoots then alleges, “Although I did not post this game hint to www.cheatcc.com, a game hint appears on www.cheatcc.com *nearly identical* to mine.” *Id.*, at ¶9 (emphasis added).

Mr. Hoots states that he posted the game hint in the year 2007. Hoots Affidavit, ¶3. The game to which the above hint relates was not even released *until October of 2008*. See, Howard Affidavit, ¶8. As such, it would have been impossible for Mr. Hoots to post a hint related to this game in 2007, as he affirms under oath that he did. Even more significantly, the allegedly “nearly identical” tip on Plaintiff’s site is so far removed from Mr. Hoots’ submission as to fail any legal “substantial similarity” test under copyright law. Plaintiff’s hint for this same part of the Fable II game is as follows:

- The Box Of Secrets shop items

The following is the list of items needed for The Box Of Secrets trades in the Knothole Island bonus downloadable content:

"A lovely hairdo" (Cascading Hair): Trade for two Table Wine.
 "A rare ranged weapon" (Hal's Rifle): Trade for Pure Experience Extract.
 "A rebellious costume" (Black Wheel Gang outfit): Trade for Pretty Necklace.
 "A saintly weapon" (Judges Steel Sword): Trade for Monk Robes.
 "A sexy garment" (Knothole Skirt): Trade for "Marriage And How To Survive It".
 "A strong willed weapon" (Staff Of Wrath): Trade for diamond.
 "A stylish accessory" (Greaser Wig): Trade for Eternal Love Ring.
 "A weapon of note" (Axe Of Disharmony): Trade for two Lutes (can be obtained from the Bowerstone general store).
 "An evil weapon" (Wretcher's Blade): Trade for three Crunchy Chicks (can be obtained from general stores or the gypsy camp general goods seller).
 "Barbaric garments" (Brodican Warrior Queen Outfit): Trade for two "Murgo's Big Book Of Trading" (can be obtained from Bowerstone bookstore or furniture).
 "Barbaric weapon" (Brodican Mace): Trade for Regal Purple Dye (can be obtained from clothing or beauty vendors that stock dyes).
 "Murderous attire" (Assassins Outfit): Trade for two Puny Carrots (can be obtained from food sellers in Bowerstone Market or Bloodstone).
 "Vile attire" (Chasm Outfit): Trade for two Crucible Peanuts.

See, Howard Affidavit, Exhibit C. Comparing the two hints, it is clear that the wording used in each is different, the order in which the information is presented is significantly different, and Plaintiff has added substantial additional content for each tip presented. Indeed, the only thing in

common between the two is a portion of the underlying factual information. It must be reaffirmed that this comprises but one example of the complete unreliable nature of the submitted affidavits.

Finally, although Defendants are now claiming that Plaintiff's compilation contains several third-party works without permission, Defendants have shown no evidence that any of these third parties published copyright notices on gamewinners.com or elsewhere, or provided Plaintiff with demands that their alleged original works be removed. It would appear that this abrupt multi-party claim of originality has only taken place along side the need for affidavits in this lawsuit.

Even if there were reliable evidence of a cheat appearing on Plaintiff's site that was filed in the past without permission from its author, such evidence would at most only invalidate a tiny portion of his entire copyright. *See Russ Berrie & Co. v. Jerrie Elsner Co.*, 482 F.Supp. 980 (S.D.S.Y. 1980) (court found portion of copyright enforceable and separate portion non-enforceable). Instead, it would merely restrict the breadth of his copyright to that portion of his work that represents his original contribution. 17 U.S.C. §103(a) and (b). So doing would have no effect on the claims of infringement set forth by Plaintiff in his Partial Summary Judgment Motion, nor the additional delineated comparatives attached hereto, as the combined sections to which Defendants' affidavits allegedly pertain constitute a miniscule portion of the entire copyright infringement in this matter and do not relate at all to the compilation claims of Plaintiff.

It should be noted that the term "author" as used in the copyright context encompasses a range of creative contributions to a work, from creating the various elements of a work from scratch, to revising, selecting, and arranging those elements. *Burrow-Giles Lithographic Co. v.*

Sarony, 111 U.S. 53, 61 (U.S.1884)(“the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination”); *Feist*, *supra*, at 346. Copyright protection will attach only to the extent of the author’s original contribution. 17 U.S.C. §103(a) and (b).

Plaintiff’s website constitutes a compilation of organized facts, some of which Plaintiff wrote himself and others of which he culled from various other open sources, including developers, programmers, and publishers of the games, visitors to his site who submit the hints, codes and tips to him by email, message boards and forums throughout the Internet,¹² from playing the games and finding the hints, codes and tips himself, magazine articles, and other websites.¹³ Current Affidavit, ¶ 5. In *Feist*, the Supreme Court specifically discussed factual compilations, stating that they typically possess the requisite originality to qualify for copyright protection:

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. Nimmer §§ 2.11[D], 3.03; Denicola 523, n. 38. Thus, 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.**

Feist Publ. Inc., *supra*, at 348-349 (emphasis added).

In the case at hand, Plaintiff is the author of his Copyrighted Web Pages. The term “author” refers not only to those portions of his website that he wrote from scratch, but also to

¹² Game companies often post a lot of cheats, hints, tips, tricks and unlockables on their own message boards and forums to get more people to visit their website.

¹³ It should be noted that Plaintiff denies ever copying content directly from the gamewinners website. Current Allison Affidavit, ¶¶39 and 41. Defendants attempt to state as fact that he did precisely that. At a minimum, this is a question of fact to be resolved at trial.

the creative input he infused to any preexisting content by his process of gathering, revising, and organizing significant volumes of content. His authorship in this compilation context extends both to the various charts and tables he created which have been reproduced identically by Defendants, as well as to the selection and organization of other types of hints and tips for some of the games on his site that have also been reproduced identically by Defendants. *See, e.g.*, Current Affidavit and its accompanying Exhibits 4-21, and Original Affidavit, Exhibits B-I. Defendants have submitted no evidence to demonstrate that any alleged copying done by Plaintiff included the selection and arrangement of information on his site.

As Plaintiff clearly explained in both his Original Affidavit and Current Affidavit, he collects information from public sources and private contributors, and then chooses, based upon his personal analysis of the relative importance of each fact, the order and manner in which to list and present the information on his site based on his own subjective belief about the relative importance of each. Plaintiff could have listed the facts in question in alphabetical order; he could have chosen to list them in the order in which they appear in the game; he could simply have posted them arbitrarily in the order in which he gathered them. He did none of these things. Instead, he created new and original tables, code charts, and hint lists reflecting the specific order and arrangement that he believed would be most useful to his viewers based on his personal assessment of the relative importance of the facts in question. Frequently he rewords the tips in question as well, adding to his creative contribution. In doing all these things, he has demonstrated sufficient creativity to deserve protection under the law.

[T]he originality requirement is not particularly stringent. A compiler may settle on a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another works), and that it display some minimal level of creativity.

Feist, 499 U.S. at 358.

The Supreme Court held that a “garden-variety” telephone directory listing subscribers alphabetically by surname was not sufficiently original because the selection and arrangement was “entirely typical” and “devoid of even the slightest trace of creativity.” *Feist*, supra, at 362. The same cannot be said of Plaintiff’s web pages.

Defendants also attempt to invalidate Plaintiff’s copyright by stating he committed “fraud” by failing to advise the Copyright Office of facts which might have occasioned a rejection of the application. They cite *Cannon Group, Inc. v. Better Bags, Inc.*, 250 F.Supp. 2d, 893 (S.D.Ohio 2003). That case notes, however, that “determining whether [plaintiff] intentionally failed to disclose information to the copyright office is an issue not easily decided on a motion for summary judgment.” *Id.*, at 899. Furthermore, such an inquiry is moot if the failure to disclose would not have precluded copyright registration. *Id.* Here, had Plaintiff stated more clearly on his application the sources from which he compiled his work, he would still have received a copyright to the extent that he infused originality to the work. “Originality requires only a ‘minimal degree of creativity.’” *Id.*, at 898, citing *Feist*, supra, at 345. At a minimum, this issue presents questions of fact, thereby making summary judgment in Defendants’ favor inappropriate.

Throughout their Motion, Defendants repeatedly state that Plaintiff “admits copying.” See, e.g., Motion, Doc. #63 at 7. In support, Defendants cite Doc. #62 at 11. No such admission occurred. This reference is to a paragraph in Plaintiff’s Reply to his Motion for Partial Summary Judgment in which he was commenting on the irrelevance of Defendants’ alleged evidence that he copied some narrative style cheats and posted them to his site *in 2009*. Plaintiff simply noted that this evidence related to content that he posted some four years after the relevant timeframe at

issue, and that the evidence demonstrated nothing about the organization and selection to which he claims copyright protection.

Defendants have failed to demonstrate that Plaintiff's copyright is invalid and unenforceable. On the contrary, Plaintiff's copyright is both valid and enforceable to protect the original contributions he made to his Copyrighted Web Pages. For each of these reasons, Defendants' fraud on the copyright office defense must be denied. In the event that the Court does not agree that Plaintiff's copyright is both valid and enforceable as a matter of law, it must then find that there is a genuine issue of material fact on this issue. As such, it cannot grant Defendants the relief they seek. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Hancock v. Dodson* 958 F.2d 1367, 1374 (6th Cir.1992).

E. DEFENDANTS' COPYRIGHT MISUSE DEFENSE FAILS AS A MATTER OF LAW

In those few jurisdictions that recognize it, the defense of copyright misuse "forbids the use of [a] copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office." *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 977-9 (4th Cir. 1990). An essential element of the defense is that the copyright owner somehow uses its copyright to prevent others from competing in the market. *See, e.g., Lasercomb*, 911 F.2d at 979 ("The misuse arises from Lasercomb's attempt to use its copyright in a particular expression ... to control competition in an area outside the copyright....").

The copyright misuse defense is applied where the copyright owner expressly used the copyright to directly suppress competition. For example, in *Lasercomb*, the copyright owner entered into licenses that expressly forbade licensees from developing, or assisting in developing, any competing software, thereby using the copyright in a manner directly adverse to the very policy embodied in copyright law, which was designed to stimulate creative output. *Id.* at 978.

Conversely, in cases where the copyright owner did not prohibit its licensees from either using or independently developing a competing product, courts have summarily rejected the copyright misuse defense. *See Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1337 (9th Cir. 1995); *Microsoft Corp. v. BEC Computer Co., Inc.*, 818 F. Supp. 1313, 1316-17 (C.D. Cal. 1992) (distinguishing *Lasercomb* because the copyright owners in these cases did not prohibit independent development or use of a competing product). *See also, Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 690 (4th Cir. 1992); *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*, 786 F.2d 1400, 1408 (9th Cir. 1986); *National Cable Television Association, Inc. v. Broadcast Music, Inc.*, 772 F. Supp. 614, 652 (D. D.C. 1991).

In upholding the misuse of copyright defense, the *Lasercomb* court held: “*Lasercomb* undoubtedly has the right to protect against copying of the Interact code. Its standard licensing agreement, however, goes much further and essentially attempts to suppress any attempt by the licensee to independently implement the idea which Interact expresses.”

The court phrased the relevant inquiry as follows: Is the copyright being used in a manner violative of the public policy embodied in the grant of a copyright? *Id.*, at 978. The court found the language in the licensing agreement to be anti-competitive, and held that, contrary to the public policy of copyright law, it stifled expression of ideas in the marketplace. *Id.* As such, the plaintiff had misused its copyright and could not enforce an infringement action.

Defendants can point to no similar stifling of ideas or anti-competitive activity here. Plaintiff is not attempting to snuff out his competition by holding the corner on the market of cheat code websites. Instead, he is merely trying to enforce his copyright to the extent that he has created unique expression. Defendants are free to post anything they want on their various competing websites—short of the unique and original content, organization and structure created

by Plaintiff.

Defendants have provided no legitimate statutory reference for their “misuse of copyright” defense, and acknowledge that the Sixth Circuit has not accepted this defense. See, Doc.#63, p.10. To support their argument that this court should nevertheless apply this defense, Defendants attempt to draw a parallel between the case at hand and a case in the Northern District of Illinois, *Qad, Inc. v. ALN Assoc., Inc.*, 770 F. Supp. 1261 (N.D. Ill. 1991), *aff’d*, 974 F.2d 834 (7th Cir. 1992). There is no such connection to be drawn. In *Qad, Inc.*, the Court found that the substantive aspects of plaintiff’s source code that it had relied upon as a basis to prove infringement and issue a preliminary injunction order had in fact been copied by plaintiff from a third-party’s copyright-protected program. In obtaining injunctive relief based upon its own wrongful acts, plaintiff misused both the judicial process and the copyright laws. *Qad, Inc.* 770 F.Supp. at 1267. Defendants can point to nothing resembling similar wrong-doing here. The evidence that they have attempted to submit shows no similar copying with respect to the validity of Plaintiff’s 2000 and 2005 Copyrights.¹⁴

In the absence of any statutory entitlement to a copyright misuse defense, the defense is solely an equitable doctrine. Any party seeking equitable relief must come to the court with “clean hands.” *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293 (1933). “It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted ... with unclean hands.” *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 779 (5th Cir. 1999)(citations omitted). “One tainted with inequity or bad faith relative to the matter in which he seeks relief” is barred from a court of equity. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945). It is only the party seeking equitable relief whose hands must be unsullied.

¹⁴ Plaintiff’s 2007 copyright is no longer relevant to this action.

Alcatel, at 779. Indeed, it is simply irrelevant if the other party also has “dirty mitts.” *Id.* In fact, at least one circuit that has recognized the defense of copyright misuse has held that the doctrine of unclean hands precludes the defense of copyright misuse. *Supermarket of Homes v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408 (9th Cir.1986).

Defendant Jeremy Wise admits that he used Plaintiff’s site as a source of cheats for a period of at least several months in 2006. See, Affidavit of Jeremy N. Wise, Doc. #64-7, ¶15. While Wise goes on to claim that he did not copy Plaintiff’s selection and arrangement of those cheats, the examples provided in Plaintiff’s Original and Current Affidavits flatly belie that contention. See, Original Affidavit, Exhibits B-I, and Current Affidavit, Exhibits 4-21. Defendants have repeatedly and knowingly infringed Plaintiff’s copyright protected web pages, thereby acting with unclean hands. For that reason, Defendants are now barred from going to this Court and seeking the equitable defense of copyright misuse. Further, as detailed at length above, no basis for such a claim exists under the facts at hand.

F. DEFENDANTS’ ESTOPPEL REQUEST MUST BE DENIED BECAUSE IT HAS NO SUPPORT UNDER THE LAW.

Defendants allege that Plaintiff should be estopped from asserting that the protectable elements of his website are those to which he imbued his own creativity: the selection, organization, writing or revision of information presented therein. In support, they cite *Grand Truck W.R. Co. v. H.W. Nelson Co.*, 116 F.2d 823 (6th Cir. 1941), a Sixth Circuit case from the 1940’s that cites to a U.S. Supreme Court case from the 1870’s. *Grand Truck* and the cases it cites, *Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258 (1877) and *Letta v. Cincinnati Iron & Steel Co.*, 285 F. 707 (6th Cir. 1922) are all breach of contract matters in which the parties entered into contracts, induced the opposing parties to perform under those contracts in detrimental reliance upon specific statements they made, and then sought to take contrary positions when the matters

ended up in litigation.

The parties before this Court have never been in contractual privity. Defendants can cite to no statements made by Plaintiff prior to entering into this lawsuit upon which they relied to their detriment, and about which Plaintiff now asserts something contrary. While poetic, the “Mend the Hold” concept quite simply doesn’t apply under these facts.

The case of *Qad. Inc. v. ALN Assoc., Inc.*, 770 F. Supp. 1261, relied heavily upon by Defendants, is distinguishable on its face.¹⁵ There the plaintiff sought a preliminary restraining order to prevent the defendant from using its software program “MFG/PRO.” The court conducted a multi-day hearing and then granted the relief requested. *Id.*, at 1264. The court based its decision in part on the testimony of plaintiff’s expert, who said the defendants must have directly copied specific aspects of the software. In the subsequent trial, defendants presented evidence that the portions of the software they allegedly copied were actually taken by plaintiff without license or permission from a registered copyright-protected program owned by Hewlett Packard, Inc. *Id.*, at 1264-5. In response, plaintiffs then took the position that those portions of the software—the same ones upon which that court’s preliminary injunction order was based—were *not* the protectable elements of its program because they are functional necessities common to many manufacturing databases. *Id.*, at 1269. In other words, plaintiff argued one legal position before the court in order to obtain a judicial ruling providing injunctive relief, *and in the context of the very same matter*, subsequently disavowed that position and asked the court for what would clearly have been a contradictory ruling. The court refused to be put in such a compromising position.

Although Defendants failed to name it in their Motion, the doctrine the defendants in

¹⁵ Of course this case also has no precedential value in this jurisdiction, and as a District Court decision rather than a Circuit Court one, it has little persuasive value either.

Qad, Inc. invoked is called judicial estoppel. There is significant precedence for this doctrine in the Sixth Circuit. See, e.g., *Teledyne Industries, Inc. v. Nat'l Labor Relations Board*, 911 F.2d 1214, 1217-18 (6th Cir. 1990). “The doctrine of judicial estoppel forbids a party ‘from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.’ ... In order to invoke judicial estoppel, a party must show that the opponent took a contrary position under oath in a prior proceeding and that the prior position was accepted by the court.” *Id.* (internal citations omitted). “Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement. ... Requiring prior judicial acceptance protects the truth-seeking function of the court, while preserving the court's integrity.” *Id.*, at 1218. See, also, *Eubanks v. CBSK Financial Group, Inc.*, 385 F.3d 894 (6th Cir. 2004).

Judicial estoppel cannot be invoked if the prior proceeding resulted in a settlement because the original position cannot be viewed as having been “successfully asserted.” *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982); *City of Kingsport v. Steel & Roof Structure Inc.*, 500 F.2d 617, 620 (6th Cir. 1974). “A settlement neither requires nor implies any judicial endorsement of either party’s claims or theories, and thus, a settlement does not provide the prior success necessary for judicial estoppel.” *Id.* In such cases, there is no need to apply the rule because the integrity of the judicial process is unaffected. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d at 599.

Here, Defendants have submitted absolutely no evidence that Plaintiff has asserted *any* inconsistent legal theories in a prior proceeding that resulting in judicial determination. Nor

could they. None exist.¹⁶ Nor has the Court in this proceeding issued any relief to Plaintiff to date based upon theories that are inconsistent with the ones Plaintiff now asserts. As such, this Court has no basis upon which to apply the doctrine of judicial estoppel.¹⁷

Of course the relief Defendants seek is equitable in nature. A party seeking equity must not have unclean hands of its own. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945); *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 779 (5th Cir. 1999). As described more fully above, Defendants' "mitts are dirty" through their own acts of infringement, thereby precluding this Court from granting the relief they seek. *Alcatel*, 166 F.3d at 779.

Defendants have not presented any binding legal precedent upon which this Court can grant the equitable relief they seek. It must be denied.

CONCLUSION

Defendants have thrown mounds of evidence at the Court in an attempt to distract the Court from their own actions. Plaintiff has a valid and enforceable copyright in his web pages as they appeared as of his 2005 registration because he displayed the creativity necessary to warrant such protection. Defendants infringed significant portions of his creative and protected efforts. They cannot escape liability by submitting irrelevant and inadmissible evidence. They have failed to prove that they are entitled to the relief they seek as a matter of law. At best, they have created issues of fact. Their motion must be denied.

¹⁶ As Plaintiff noted in his affidavit, all prior legal matters were resolved short of judicial determination. Current Affidavit, ¶43.

¹⁷ The Federal Rules of Civil Procedure expressly provide that a party may plead inconsistent theories, acknowledging that as a case develops, a party may shift the focus of his claims. F.R.C.P. Rule 8(a)(3).

Dated this 29th day of March, 2010.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2010, I electronically filed the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR 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)