

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 MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff David Allison, d/b/a Cheat Code Central, pursuant to the provisions of Rule 56(c) of the Federal Rules of Civil Procedure, moves this Court for entry of summary judgment, interlocutory in character, declaring that Defendants Jeremy N. Wise and Wise Buy Now, LLC (“Defendants”) are liable to Plaintiff for copyright infringement (Plaintiff’s First Claim for Relief), leaving only the issue of the monetary amount of Plaintiff’s damages, including attorney’s fees, to be determined with respect to this claim.

This motion is based upon the following statement of facts and memorandum of points and authorities, the Affidavit of David Allison and its supporting exhibits, and the entire record in this matter.

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 site with the U.S. Copyright Office on two separate occasions.

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 never denied the act of copying, and have admitted knowing that Plaintiff's site was copyrighted.

With this Motion, Plaintiff seeks partial summary judgment on the issue of liability for his claim of copyright infringement. There is no dispute that Plaintiff has registered his work with the U.S. Copyright Office, or that Defendants took significant portions of his content and posted it on their sites without his authorization or permission. Absent any material issues of fact, the Court must grant Plaintiff's motion for partial summary judgment, finding Defendants liable for infringement.

STATEMENT OF UNDISPUTED FACTS

Plaintiff is the owner and sole proprietor of the website www.cheatcc.com. *See*, Affidavit of David Allison ("Allison Affidavit"), ¶3. He started this website in 1997 as a way to provide information to the video gaming community on how to achieve higher levels of success in game play. *Id.* His website includes information and commentary on video game strategies, tips, hints, tricks, and cheat codes (hereafter collectively referred to as "cheat codes") for thousands of games across the most popular platforms in the gaming industry. *See*, First Amended Complaint and Jury Demand, ¶14 [Docket #35].

Plaintiff has managed the content of his website since its inception. Allison 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.*

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, and TX 6-516-4-7, issued January 29, 2007 (the “Copyrighted Web Pages”). Allison Affidavit, ¶5. In addition, Plaintiff obtained a copyright for the content of his book, “The Ultimate Code Book,” TX-5-116-527, issued on January 5, 2000. True and correct copies of all three aforementioned copyright registration certificates are attached as *Exhibit A* to the original Complaint filed on February 19, 2008 [Docket # 2].

Plaintiff has his own unique method for organizing the cheat codes that he posts to his site. Allison Affidavit, ¶6. While other cheat code sites tend to organize content in alphabetical order, Plaintiff lists his cheat codes in descending order of importance, with the most useful/noteworthy cheat codes at the top, and the least useful/noteworthy at the bottom. The rank order he selects is based on his personal opinion. *Id.*

There are a number of other websites on the Internet that cater to the same or a similar audience. Many of the sites owned and managed by Defendants fall into this category, including but not limited to the websites *www.cheatmasters.com* and *www.playstaion2-cheats.co.uk*. Allison Affidavit, ¶7.

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. Allison Affidavit, ¶8.

As an example of one of the many instances of Defendants' verbatim infringement, Plaintiff created a cheat code chart for the game "Star Wars: Jedi Outcast – Jedi Knight 2" and posted it on his site in April 2002. Allison Affidavit, ¶9. Some of the codes in this chart were submitted to Plaintiff by emails from individual gamers who discovered them and contributed them for publication on his site. *Id.*; see also, Exhibit A to the Allison Affidavit, which contains copies of three such emails to Plaintiff from email addresses *JBergman@mii-inc.com*, *ghettobeast@comcast.net*, and *dillpickle424@charter.net*, respectively. At the end of his cheat code chart for this game Allison therefore included the following attribution: "-Some codes from *JBergman@mii-inc.com*, *ghettobeast@comcast.net*, and *dillpickle424@charter.net*." Allison Affidavit, ¶9 and its Exhibit B.

In late 2006, Plaintiff found this identical cheat code chart on the web page for the game "Star Wars: Jedi Outcast – Jedi Knight 2" on www.cheatmasters.com. Allison Affidavit, ¶10. Attached as **Exhibit 1** is a copy of Plaintiff's chart followed by a copy of Defendants' *identical* chart. Copies of these charts in the context of the web pages in which they appear are attached as Exhibits B and C, respectively, to the Allison Affidavit.

Not only is this cheat code chart directly copied, but the attribution containing the names of the contributors to the chart's content is copied as well. In other words, at the time infringement occurred, Defendants' website also stated at the end of his cheat code chart, "-Some codes from *JBergman@mii-inc.com*, *ghettobeast@comcast.net*, and *dillpickle424@charter.net*." As noted above, *Plaintiff* was the recipient of the attached source emails from these contributors, not Defendants. See Allison Affidavit, ¶9 and its Exhibit A.

The respective web pages for this game include two other components that are identical: the cheat code under the heading “Double-bladed lightsaber” [sic], and the cheat code under the heading “Cheat Codes.” *See*, Allison Affidavit, Exhibits B and C.

In another example, Plaintiff created a Game Shark Code chart¹ for the game “Star Wars Episode 1 – Jedi Power Battles” and posted it on his site in January 2001. Allison Affidavit, ¶12. In late 2006, he found this identical chart on the web page for the same video game on www.cheatmasters.com. Attached as **Exhibit 2** is a copy of Plaintiff’s chart followed by a copy of Defendants’ virtually *identical* chart. Copies of these charts in the context of the web pages in which they appear are attached as Exhibits D and E, respectively, to the Allison Affidavit.

In yet another example, Plaintiff developed a Game Shark Code chart ten years ago, in 1999, and posted the same on his website in October 1999 on the page associated with the video game “Star Wars: Episode 1 – The Phantom Menace.” Allison Affidavit, ¶13. In late 2006, he found this identical chart on the web page for the same video game on www.cheatmasters.com. Allison Affidavit, ¶13. Attached as **Exhibit 3** is a copy of Plaintiff’s chart followed by a copy of Defendants’ virtually *identical* chart. Copies of these charts in the context of the web pages in which they appear are attached as Exhibits F and G, respectively, to the Allison Affidavit.

Another example of direct infringement can be found on Defendants’ website www.playstation2-cheats.co.uk. Plaintiff created and posted a Game Shark Code chart on his website for the game “Star Wars: Racer Revenge – Racer 2” in May 2002. Allison Affidavit, ¶14. In late 2006, he found this identical chart on the web page for the same video game on www.playstation2-cheats.co.uk. *Id.* Attached as **Exhibit 4** is a copy of Plaintiff’s chart followed

¹ Game Shark Codes are codes that gamers can insert into a peripheral “Game Shark” device attached to their gaming console that allows them to modify a particular game in various ways. Allison obtained underlying codes for his Game Shark Code charts from the manufacturer of Game Shark, as well as from individuals who obtained codes from games and submitted the same to Allison. Allison then designed and published cheat code charts from the codes that he had obtained.

by a copy of Defendants' virtually *identical* chart. Copies of these charts in the context of the web pages in which they appear are attached as Exhibits H and I, respectively, to the Allison Affidavit.

When Plaintiff first noticed that significant portions of his content were appearing on Defendants' websites he monitored the situation over the next several weeks. Allison Affidavit, ¶15. He discovered that every time he added new content to his site, the same would appear on Defendants' sites within one to four days. *Id.* In other words, Defendants were actively continuing to mine his site for content, taking substantive gaming content literally every time it appeared.

Further underlining the direct copying of his substantive content, Plaintiff noticed that a feature particular to his website, including a technical glitch, also appeared on *www.cheatmasters.com*. Allison Affidavit, ¶16. Plaintiff publishes an interactive feature on his *www.cheatcc.com* website called the "CCC Daily Poll."² Every day there is a new question posed to the website's visitors. The viewer has the option to cast a vote in the poll, and can then see the real-time tally expressed in percentage terms of all votes cast at that time. *Id.*

The "CCC Daily Poll" is supposed to appear one time on each video game's web page on Plaintiff's website. Due to a technical error in the underlying .html code, however, the "CCC Daily Poll" was repeated six times within the "Sega Smash Pack" game page on Plaintiff's website. Allison Affidavit, ¶17. Plaintiff was astonished to discover a reference to the "CCC Daily Poll" six times in the "Sega Smash Pack" page on www.cheatmasters.com, thereby reflecting the same .html error. Attached as Exhibit J to the Allison Affidavit is a copy of the "Sega Smash Pack" page from Plaintiff's website, and attached as Exhibit K is the corresponding page from www.cheatmasters.com. The phrase "CCC Daily Poll" shows up six times on both.

² "CCC" reflects the three Cs in "Cheatcc".

In his Answer, Defendant Jeremy Wise “denies that Plaintiff owns the exclusive or any copyright to the *factual* content contained in any particular video game strategy, tip, hint, trick or cheat code that may be published on any particular web page at *www.cheatcc.com*.” Defendant Jeremy Wise’s Answer to First Amended Complaint, ¶6 (hereafter “Wise’s Answer”) (emphasis added) [Docket #37]. Defendant Wise has not attempted to deny that Plaintiff owns the exclusive copyright to the *protectable elements* of his web pages.

Likewise, in its Answer Defendant Wise Buy Now, LLC “denies that Plaintiff owns the exclusive or any copyright to the *factual* content contained in any particular video game strategy, tip, hint, trick or cheat code that may be published on any particular web page at *www.cheatcc.com*.” Defendant Wise Buy Now, LLC’s Answer to First Amended Complaint, ¶6 (hereafter “Wise Buy Now’s Answer”) (emphasis added) [Docket #38]. Defendant Wise Buy Now, LLC has not denied that Plaintiff owns the exclusive copyright to the *protectable elements* of his web pages.

Defendant Jeremy Wise has primary responsibility for the control, management, operation and maintenance of Wise Buy Now, LLC’s affairs. Wise’s Answer, ¶9.

Defendants Wise and Wise Buy Now, LLC are the sole owners and operators of at least nine domain names and associated websites, including *www.cheatmasters.com* and *www.playstation2-cheats.co.uk*. Wise’s Answer, ¶11.

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. 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.

MEMORANDUM OF POINTS AND AUTHORITIES

A. SUMMARY JUDGMENT STANDARD

Summary judgment must be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); *Copeland v. Machulis*, 57 F.3d 476, 478-479 (6th Cir. 1995). When reviewing a motion for summary judgment, the court must view the evidence and any inferences that may be drawn from the evidence in the light most favorable to the nonmoving party. *Redding v. St. Eward* 241 F.3d 530, 532 (6th Cir. 2001), citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The court cannot deny a motion for summary judgment unless the evidence demonstrates that there is a dispute about a material fact. FED. R. CIV. P. 56(e); *Decker Inc. v. G & N Equipment Co.*, 438 F.Supp.2d 734, 739 (E.D.Mich. 2006). “Such a dispute must not merely rest upon the allegations or denials in the pleadings, but instead must be established by affidavits or other documentary evidence.” *Id.* The mere existence of a “scintilla of evidence” to support the nonmoving party’s side will not be sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, there must be sufficient evidence upon which a jury could properly base a verdict, taking into account the parties’ respective burdens of proof. *Id.*

B. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE PLAINTIFF HAS MET HIS BURDEN OF ESTABLISHING THAT DEFENDANTS ARE LIABLE FOR COPYRIGHT INFRINGEMENT.

Plaintiff must prove the following two elements to establish liability in a copyright infringement action: (1) ownership of a valid copyright, and (2) copying of constituent elements

of the work that are original. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* 499 U.S. 340, 361 (1991). *See also, Wickham v. Knoxville International Energy Exposition*, 739 F.2d 1094, 1097 (6th Cir.1984). “The first prong tests the originality and non-functionality of the work. ... The second prong tests whether any copying occurred (a factual matter) and whether the portions of the work copied were entitled to copyright protection (a legal matter).” *Lexmark Intern., Inc. v. Static Control Components, Inc.* 387 F.3d 522, 534 (6th Cir. 2004). Through this Motion and the accompanying Affidavit of David Allison, Plaintiff has demonstrated that there is no genuine issue of material fact with respect to either prong. As such, Plaintiff has met his burden of proof for infringement.

1. Plaintiff Owns a Valid Copyright to the Protectable Elements of His Website.

“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 Copyrighted Web Pages with the U.S. Copyright Office on May 12, 2005, Registration number TX 6-162-180, more than a year before the acts of infringement occurred. In addition, some of the content again appearing on the Copyrighted Web Pages was derived from Plaintiff's copyrighted book, “The Ultimate Code Book,” which he registered on January 5, 2000, Registration number TX-5-116-527. These registrations make Plaintiff's copyrights of the Copyrighted Web Pages presumptively valid, thereby satisfying the first prong of the test for infringement.

Defendants have previously argued that Plaintiff's Copyright is invalid because the web pages contain facts, i.e, cheat codes, rather than unique expression. To the contrary, Plaintiff's web pages contain facts arranged by the Plaintiff in an original manner that qualifies for copyright protection. 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).

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 gathered and organized significant volumes of content on his website, including the Game Shark Code charts and cheat code charts referenced in this Motion

and in his 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. 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 and code charts reflecting the selected 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. In so doing, he has demonstrated sufficient creativity to deserve protection under the law.

2. Defendants Copied The Protectable Elements of Plaintiff's Website Verbatim Without Authorization or Permission.

There are two ways a plaintiff can demonstrate that the defendant copied protectable elements of his website: (1) by providing actual evidence of copying, or (2) through implication, by demonstrating both access and substantial similarity. *Kohus V. Mariol*, 328 F.3d 848, 853-854 (6th Cir. 2003); *Bridgeport Music, Inc. v. UMG Recordings, Inc.* 585 F.3d 267, 274 (6th Cir. 2009). Even if access cannot be proven, a plaintiff may prevail by showing a high degree of similarity between the two works. *Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir.1999); *Bridgeport Music, Inc.*, 585 F.3d at 274.

Plaintiff can demonstrate actual evidence of direct copying in the case at hand. First, Plaintiff created a cheat code chart for the game "Star Wars: Jedi Outcast – Jedi Knight 2" and posted it on his site in April 2002. Allison Affidavit, ¶9. Several of the codes utilized by Allison in creating this chart were submitted to him via email from individual gamers who discovered and contributed them for publication on his site. *Id.*; see also, Exhibit A to the

Allison Affidavit. At the end of Allison's cheat code chart for this game Allison provides an attribution reflecting that fact. **Undisputed Facts**, p. 4.

In late 2006, Allison discovered the *identical* cheat code chart that he had developed, copyrighted and published posted on www.cheatmasters.com. Allison Affidavit, ¶10, Exhibits B and C, respectively, to the Allison Affidavit. Defendants had copied and published not only the original cheat code charts created and published by Plaintiff, but also the attributions published as to the parties that provided *Plaintiff* with the factual information used by Plaintiff to help prepare said works. See Allison Affidavit, ¶9 and its Exhibit A.

Plaintiff also created and posted an original Game Shark Code chart for the game "Star Wars Episode 1 – Jedi Power Battles" in 2001. Allison Affidavit, ¶12. In late 2006, Allison found this *identical* cheat code chart on a web page devoted to the same video game on www.cheatmasters.com. Attached as **Exhibit 2** is a copy of Plaintiff's chart followed by a copy of Defendants' infringing work.³

Plaintiff further developed a Game Shark Code chart in 1999 and posted the same on his website in October 1999 on the page associated with the video game "Star Wars: Episode 1 – The Phantom Menace." Allison Affidavit, ¶13. In late 2006, he then found this *identical* chart on a web page for "Star Wars: Episode 1 – The Phantom Menace" created for www.cheatmasters.com. Allison Affidavit, ¶13. Attached as **Exhibit 3** is a copy of Plaintiff's chart followed by a copy of Defendants' virtually *identical* chart.⁴

³ Copies of these charts in the context of the web pages in which they appear are attached as Exhibits D and E, respectively, to the Allison Affidavit.

⁴ Copies of these charts in the context of the web pages in which they appear are attached as Exhibits F and G, respectively, to the Allison Affidavit.

Finally, Defendants incorporated Plaintiff's own "CCC Daily Poll" and Plaintiff's technical error on their website. The phrase has no meaning at all outside the context of Plaintiff's site, and simply reads as a non sequitur as it appears on *www.cheatmasters.com*. There can be no explanation for its appearance other than that Defendants accidentally picked up this flawed .html code – source code that directs the functioning of the website -- while mining Plaintiff's site for substantive content and unknowingly installed it on their own webpage.⁵ Such evidence offers still further evidence of actual copying.

Plaintiff can also demonstrate that Defendants copied protectable elements of his content by demonstrating access and substantial similarity. Defendants clearly had access to Plaintiff's website: it was and continues to be posted on the Internet, and it is available for viewing (and infringement) by literally anyone with a computer, Internet access, and willful intent. As the owners and managers of numerous websites themselves, Defendants obviously have both computers and Internet access.

The second prong of this test requires demonstration of substantial similarity. Substantial similarity is shown when "the accused work is so similar to the plaintiff's work that an ordinarily reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value." *Decker Inc. v. G & N Equipment Co.* 438 F.Supp.2d 734, 743 (E.D.Mich.,2006). See also, *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir. 2004). A review of **Exhibits 1 through 4** make this finding unequivocal. The charts on Plaintiff's site are absolutely identical to the ones that appear on Defendants' sites, with the sole exception that Defendants chose not to

⁵ Plaintiff is not seeking damages for this particular infringement since that particular code error did not appear on Plaintiff's site until August of 2006 and would therefore not be covered by the 2005 copyright registration. Nevertheless, it is compelling evidence that Defendants copied content directly from Plaintiff's site after the 2005 registration was in effect, and from that the Court can presume content within the coverage of the 2005 registration was taken as well.

include grid lines in the Game Shark Code charts separating the various rows and columns. The precise compilation of words and numbers used, and the selection and arrangement in which they appear, *are exactly the same*.

Whether the Court chooses to use evidence of direct copying, or prefers to infer copying as a result of both access and substantial similarity, it must find that Defendants infringed protectable elements of Plaintiff's Copyrighted Web Pages.

CONCLUSION

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

Dated this 28th day of December, 2009.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2009, I electronically filed the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this matter.

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