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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SCOTT MALCOMSON,
Plaintiff,
vs.
THE TOPPS COMPANY, INC.,
Defendant.

No. CV-08-2306-PHX-GMS

ORDER

Pending before the Court are the Motion for Summary Judgment (Dkt. # 46) filed by Plaintiff Scott Malcomson (“Malcomson”) and the Cross-Motion for Summary Judgment (Dkt. # 53) filed by Defendant The Topps Company, Inc. (“Topps”). For the following reasons, the Court grants summary judgment in favor of Topps and denies Malcomson’s motion as moot.

BACKGROUND¹

On December 12, 2008, Malcomson filed a *pro se* complaint against Topps, claiming ownership of a piece of intellectual property known as the “BattleTech Property.” The BattleTech Property is a war-gaming and science fiction franchise based on a futuristic civil

¹Because Malcomson did not present to the Court a separate statement of facts as required by Local Rule 56.1(a), the recitation of facts here is derived primarily from Topp’s Statement of Facts in Opposition to Malcomson’s Motion for Summary Judgment. (*See* Dkt. # 54.) Nevertheless, the recitation of facts contains only those facts that are not disputed by either party.

1 war in the thirty-first century. It is comprised of computer and video games, role-playing
2 games, collectible card games, over one-hundred novels, over three-hundred source books
3 and rule books, and an animated television series. Malcomson alleges that the BattleTech
4 Property is a joint work, which he co-owns.

5 FASA Corporation (“FASA”) is the original developer and owner of the BattleTech
6 Property. In the early 1990s, Malcomson submitted to FASA a proposed idea for a novel,
7 which FASA chose not to develop. In rejecting his proposal, FASA suggested that
8 Malcomson consider writing some gaming materials and suggested that he work on a project
9 involving one of BattleTech’s fictional characters, the Eridani Light Horse (“ELH”). FASA,
10 however, did not contract for Malcomson’s work on the ELH project. Instead, Malcomson
11 was invited to submit a proposal “on spec” for FASA’s consideration, meaning that “FASA
12 retain[ed] the option to reject the work even after [Malcomson] submitted” his completed
13 manuscript. (*See* Dkt. # 54 at ¶ 14.) In 1993, Malcomson submitted his proposed ELH
14 manuscript (the “Submission”), and from 1993 to 1996, FASA and Malcomson exchanged
15 several letters about the content of the Submission. In September 1996, however, FASA,
16 determined not to publish Malcomson’s Submission.

17 In 2001, FASA transferred its intellectual property rights over the BattleTech Property
18 to WizKids LLC, which later became WizKids, Inc. (“WizKids”). Around this same time,
19 Malcomson’s rejected Submission appeared on BattleTech’s fan website, which was owned
20 by Fantasy Productions LLC (“FanPro”) and operated pursuant to a licensing agreement
21 between WizKids and FanPro. At this time, the website was operated by BattleTech fans who
22 volunteered their time. Once Malcomson learned that his Submission had been posted on the
23 website, he contacted WizKids and threatened legal action. In response, WizKids allegedly
24 offered “formal accreditation” of Malcomson’s contribution, “acceptance of [Malcomson’s]
25 work as ‘canon,’² and retention of [Malcomson’s] pertinent rights” to the Submission. (Dkt.
26

27 ²To be “canon” means that the work has been adopted as the official version of the
28 BattleTech Universe.

1 # 30 at ¶ 6.) As part of this alleged agreement, which is not contained in the record,
2 Malcomson was also allowed to submit a revised version of his ELH manuscript (the
3 “Revised Submission”). This alleged agreement, however, did not provide Malcomson with
4 any payment or royalties from WizKids for either the Submission or the Revised Submission.
5 Because the record contains no admissible evidence of the alleged agreement, it cannot be
6 considered for purposes of this Order.

7 The Revised Submission appeared on the BattleTech website until August 2005, when
8 it was removed by FanPro. After the Revised Submission was removed, Malcomson filed suit
9 against Topps, which purchased WizKids in 2003,³ alleging in his Amended Complaint that
10 Topps, through WizKids, violated his intellectual property rights by posting the Submission
11 and the Revised Submission. (Dkt. # 30.) Because these Submissions were posted on the
12 BattleTech website, Malcomson now seeks a declaration that he co-owns the entire
13 BattleTech Property with Topps. (*Id.*) In March of 2008, prior to bringing this claim,
14 Malcomson obtained a copyright registration on his Revised Submission—the registration
15 is in Malcomson’s name alone. (Dkt. # 55, Ex. E.) And, while Malcomson has obtained a
16 copyright over the Revised Submission, his Amended Complaint does not allege a claim for
17 copyright infringement against Topps. (Dkt. # 30.)

18 Following discovery, Malcomson moved for summary judgment on his joint
19 ownership claim. (Dkt. # 48.) In response to Malcomson’s motion, Topps filed a Cross
20 Motion for Summary Judgment, arguing that Malcomson is not a co-owner of the BattleTech
21 Property. (Dkt. # 53.)

24 ³In its Cross-Motion for Summary Judgment, Topps argues that Malcomson brought
25 suit against the wrong party since WizKids, rather than Topps, owns the BattleTech Property.
26 (Dkt. # 43 at 4.) Malcomson, however, argues that he was unable to sue the correct party
27 because Topps did not tell him who owned the BattleTech Property. (*See* Dkt. # 60 at 2.) To
28 the extent that there may be an issue of fact with respect to whether Topps owns the
BattleTech Property, the Court treats Topps as the current owner of the Property for the
purposes of this Order.

1 **LEGAL STANDARD**

2 Summary judgment is appropriate if the evidence, viewed in the light most favorable
3 to the nonmoving party, shows “that there is no genuine issue as to any material fact and that
4 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Substantive law
5 determines which facts are material, and “[o]nly disputes over facts that might affect the
6 outcome of the suit under the governing law will properly preclude the entry of summary
7 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see Jesinger v. Nev.*
8 *Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). The dispute must also be genuine,
9 that is, the evidence must be “such that a reasonable jury could return a verdict for the
10 nonmoving party.” *Anderson*, 477 U.S. at 248.

11 On a Motion for Summary Judgment, the moving party “bears the initial responsibility
12 of informing the district court of the basis for its motion, and identifying those portions of
13 [the record] which it believes demonstrate the absence of a genuine issue of material fact.”
14 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, need not
15 disprove matters on which the opponent has the burden of proof at trial. *Id.* at 323. In such
16 cases, the burden is on the nonmoving party to establish a genuine issue of material fact. *Id.*
17 at 322–23. The nonmoving party “may not rest upon the mere allegations or denials of [the
18 party’s] pleadings, but . . . must set forth specific facts showing that there is a genuine issue
19 for trial.” Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
20 U.S. 574, 586–87 (1986).

21 **DISCUSSION**

22 The Court grants summary judgment in favor of Topps because Malcomson has failed
23 to present evidence establishing a genuine issue of material fact with respect to his claim for
24 joint ownership of the BattleTech Property. Nevertheless, even if the Court takes
25 Malcomson’s unsupported factual arguments as true, Malcomson’s claim for joint ownership
26 of the BattleTech property is without merit.

27 **I. Malcomson Has Not Carried His Burden of Presenting Evidence of Topps’ Alleged**
28 **Liability.**

1
2 Because Malcomson carries the burden of proving that he is a joint owner of the
3 BattleTech Property, he is required under Federal Rule of Civil Procedure 56 to “set forth
4 specific facts showing that there is a genuine issue” of fact regarding joint ownership. Fed.
5 R. Civ. P. 56(e); *see also Matsushita*, 475 U.S. at 586–87. In the District of Arizona, the
6 manner by which litigants are required to set forth the material facts is provided by Local
7 Rule of Civil Procedure 56.1, which provides:

8 (a) Any party filing a motion for summary judgment shall file a
9 statement, separate from the motion and memorandum of law,
10 setting forth each material fact on which the party relies in
11 support of the motion. Each material fact shall be set forth in a
12 separately numbered paragraph and shall refer to a specific
admissible portion of the record where the fact finds support (for
example, affidavit, deposition, discovery response, etc.). A
failure to submit a separate statement of facts in this form may
constitute grounds for the denial of the motion.

13 (b) Any party opposing a motion for summary judgment shall
14 file a statement, separate from that party’s memorandum of law,
15 setting forth: (1) for each paragraph of the moving party’s
16 separate statement of facts, a correspondingly numbered
17 paragraph indicating whether the party disputes the statement of
18 fact set forth in that paragraph and a reference to the specific
19 admissible portion of the record supporting the party’s position
20 if the fact is disputed; and (2) any additional facts that establish
a genuine issue of material fact or otherwise preclude judgment
in favor of the moving party Each numbered paragraph of
the statement of facts set forth in the moving party’s separate
statement of facts shall, unless otherwise ordered, be deemed
admitted for purposes of the motion for summary judgment if
not specifically controverted by a correspondingly numbered
paragraph in the opposing

21 LRCiv 56.1(a)–(b).

22 In this case, Malcomson has failed to provide evidentiary support for almost all of the
23 factual assertions that he makes in his Motion for Summary Judgment and in his Response
24 to Topps’ Cross Motion for Summary Judgment. While Malcomson does occasionally cite
25 portions of the record in his briefing, he does not provide any citation to the alleged
26 agreement whereby Topps agreed to canonize or create joint ownership of the BattleTech
27 Property. (Dkt. # 30 at ¶ 6.) In addition, he neither cites nor provides any affidavit setting
28 forth the material terms of the alleged agreement. (*See generally* Dkt. ## 53, 60, 61, 66.)

1 Moreover, in spite of Federal Rule of Civil Procedure 56(e) and Local Rule 56.1,
2 Malcomson did not file a separate statement of facts with his Motion or statement of facts
3 controverting Topps’ Motion. Since Malcomson carries the burden of setting forth facts that
4 establish a genuine issue of material fact, his failure to present those facts is fatal to his
5 opposition to Topps’ Motion for Summary Judgment. *See* LRCiv 56.1(a). In addition,
6 Malcomson has effectively admitted Topps’ version of the facts for purposes of the parties’
7 competing motions for summary judgment because he failed to file a controverting statement
8 of facts in compliance with to Local Rule 56.1(b). *See* LRCiv 56.1(b). Due to Malcomson’s
9 failure to present evidence supporting his version of the facts, the Court is unable to
10 determine whether Malcomson has set forth specific facts showing that there is a genuine
11 issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87
12 (1986).

13 Here, Topps’ Separate Statement of Facts provides, amongst other things, that Topps
14 does not own WizKids and that neither party intended to create a joint work when
15 Malcomson submitted the Revised Submission. (*See generally* Dkt # 54.) Accordingly,
16 inasmuch as Malcomson has not provided any facts in support of his claims, and given that
17 the Court is required under Local Rule 56.1(b) to accept Topps’ version of the facts as having
18 been admitted by Malcomson, summary judgment is appropriate in favor of Topps.

19 The fact that Malcomson is appearing in this case *pro se*, does not excuse his failure
20 to comply with these procedural rules. As the Ninth Circuit has repeatedly held, *pro se*
21 litigants are required to follow the same rules as parties who are represented by counsel. *See*
22 *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir.1995) (per curiam) (holding that *pro se* litigants
23 are bound by the same rules and procedures as other litigants). In addition, the Ninth Circuit
24 has “repeatedly upheld the sanction of dismissal for failure to comply with pretrial
25 procedures mandated by local rules and court orders.” *Thompson v. Housing Auth. of L.A.*,
26 782 F.2d 829, 830 (9th Cir. 1986); *see also* Fed. R. Civ. P. 41(b) (noting that failure to
27 comply with the rules or a court order may be grounds for dismissal).

28 **II. Malcomson Fails to Provide Evidence of Joint Ownership.**

1 Even if the Court were to credit the unsupported facts that Malcomson alleges in his
2 briefing, however, Malcomson’s claim for joint ownership fails on the merits. The Copyright
3 Act defines, a “joint work” as “a work prepared by two or more authors with the intention
4 that their contributions be merged into inseparable or interdependent parts of a unitary
5 whole.” 17 U.S.C. § 101 (1976). To constitute a joint work, “each author” must provide “an
6 independently copyrightable contribution.” *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521
7 (9th Cir.1990). “The authors of a joint work are co-owners of copyright in the work.”
8 *Richlin v. MGM Pictures, Inc.*, 531 F.3d 962, 968 (9th Cir. 2008) (quoting 17 U.S.C. at §
9 201(a)). And, “[e]ven if a person’s contribution is minor, once he is accorded joint authorship
10 status, he enjoys all benefits of joint authorship.” *Id.* (citations omitted).

11 To determine whether a piece of intellectual property constitutes a joint work, the
12 Ninth Circuit looks to the following three factors: (1) whether the party claiming joint
13 ownership “superintends the work by exercising control[;]” (2) whether there are “objective
14 manifestations” of a shared intent by the alleged co-authors to be co-authors; and (3) whether
15 the “audience appeal of the work turns on both contributions, and whether the share of each
16 in its success cannot be appraised.” *Aalmuhammed*, 202 F.3d at 1234 (internal quotation
17 marks and citations omitted); *see also Richlin*, 531 F.3d at 968 (approving the *Aalmuhammed*
18 factors for joint ownership). In this case, none of these factors weigh in favor of
19 Malcomson’s joint ownership over the BattleTech Property.

20 **A. Control Over the Submission**

21 First, Malcomson did not have “superintendence” over the Submission or the Revised
22 Submission. *Aalmuhammed*, 202 F.3d at 1234. Instead, Topps, through FASA and WizKids,
23 exercised control over these works. The very nature of Malcomson’s original Submission,
24 which was submitted “on-spec,” meant that FASA had control because it “retain[ed] the
25 option to reject the work even after [Malcomson] . . . submitted the complete manuscript.”
26 (Dkt. # 54 at ¶ 14.) There also is no evidence that Malcomson exercised control over the
27 Revised Submission. Instead, the legal notice page on the BattleTech website stated that fan
28 submissions, whether solicited or unsolicited, “shall be deemed, and shall remain, the

1 property of WizKids,” and “WizKids shall exclusively own all now known or hereafter
2 existing rights to the submission of every kind and nature . . . and shall be entitled to
3 unrestricted use of the submissions . . . without compensation to the provider of the
4 submission.” (Dkt. # 48, Ex. B-3.) This indicates that WizKids had the unrestricted right to
5 reject Malcomson’s work.

6 To the extent that Malcomson exercised some control over the content of his ELH
7 Submissions, WizKids had ultimate control because it had the unilateral right to reject
8 whatever Malcomson submitted. In other words, Malcomson may have been in a position to
9 submit proposals to WizKids, “but [WizKids] was not bound to accept any of them, and the
10 [BattleTech Property] would not benefit in the slightest” from these submissions “unless
11 [WizKids] chose to accept them.” *See Aalmuhammed*, 202 F.3d at 1235. Hence, Malcomson
12 “lacked control over the work, and absence of control is strong evidence of the absence of
13 co-authorship.” *See id.*

14 **B. Objective Manifestations of Shared Intent**

15 Similarly, Malcomson has not brought forth any evidence of a shared intent for the
16 parties to be co-owners. When analyzing this factor, the Court looks to whether the parties
17 intended joint ownership when the work was created. *Thomson v. Larson*, 147 F.3d 195, 199
18 (2d Cir. 1998) (cited approvingly in *Aalmuhammed*, 202 F.3d at 1234); *see also Seigel v.*
19 *Time Warner*, 496 F. Supp.2d 1111, 1145 (C.D. Cal. 2007) (““The touchstone here is the
20 intention, at the time the writing is done””) (quoting S. Rep. No. 94-473, at 103 (1975)).
21 Generally, [t]he best objective manifestation of a shared intent . . . is a contract saying that
22 the parties intend to be or not to be co-authors.” *Aalmuhammed*, 202 F.3d at 1235. “In the
23 absence of a contract,” as is the case here, “the inquiry must of necessity focus on the facts.”
24 *Id.*

25 Based on the facts before the Court, neither FASA, WizKids, nor Malcomson made
26 objective manifestations of an intent to be co-owners of the Submissions or the BattleTech
27 property. Clearly FASA did not intend to be a co-owner of the Submission as FASA rejected
28 Malcomson’s Submission in September 1996. The correspondence between FASA and

1 Malcomson further demonstrates that Malcomson was never considered a co-creator of the
2 BattleTech Property. (*See* Dkt. # 54 at 18.)

3 WizKids also did nothing to manifest an intent to become a co-owner over the
4 Submissions or the BattleTech Property with Malcomson. On each page of the BattleTech
5 website, including on each page of the Submission and the revised Submission, the copyright
6 notice listed WizKids as the sole owner. (Dkt. # 54 at ¶ 29.) WizKids’ official submission
7 policy further provided that all solicited and unsolicited fan submissions “shall be deemed
8 and shall remain, the property of WizKids,” and WizKids shall exclusively own all . . . rights
9 to the submission of every kind and nature.”⁴ (Dkt. # 48, Ex. B-3.) And while two pages of
10 BattleTech’s extensive website attributed an isolated writing credit to Malcomson, this does
11 not constitute a manifestation of joint ownership over the BattleTech Property. *See Larson*,
12 147 F.3d at 203 (“[W]e fail to see how [defendant’s] decision” to credit his dramaturg with
13 a byline “on the final page in [a] script[] reflects co-authorship intent on the part of
14 defendant[,]” where “the manner in which [defendant] listed credits on the script[] strongly
15 supported the view that he regarded himself as the sole author.”) Here, the manner in which
16 WizKids listed itself as the sole owner of the BattleTech property on the website through its
17 copyright notice demonstrates that WizKids regarded itself as the sole owner of that material.
18 (Dkt. ## 48, Ex. B-3; 54 at ¶ 29.)

19 Malcomson further argues that another portion of The BattleTech website provides
20 that material on the site is “owned by WizKids LLC, its licensors, and/or its content
21 providers.” (Dkt. # 60 at 7.) According to Malcomson, this notice evidences WizKids’ intent
22 for Malcomson be a co-owner of the BattleTech Property because he was a content provider.
23 (*Id.*) For this to be true, however, each content provider would be a co-owner of The
24 BattleTech Property, but the evidence before the Court provides that this is not the case.

25
26 ⁴Malcomson appears to argue that this policy is unconscionable because it allows
27 WizKids to use the intellectual property rights of others without compensation. Regardless
28 of whether the policy is valid or invalid, it demonstrates that WizKids did not intent to create
joint works with contributors, such as Malcomson.

1 Instead, the manner in which WizKids treated its other writers indicates that the company did
2 not consider Malcomson, or any of its other authors, to be a co-owner of the BattleTech
3 Property. As explained in *Larson*, “Just as the parties’ written agreements with each other
4 can constitute evidence of whether the parties considered themselves to be co-authors . . . so
5 the parties’ agreements with outsiders can provide insight into co-authorship intent, albeit
6 to a somewhat more attenuated degree.” 147 F.3d at 204. The undisputed evidence provides
7 that other individuals, who authored other BattleTech content, received a writing credit for
8 their contribution, much like Malcomson did. These other authors, however, are not co-
9 owners of the BattleTech Property. Rather, these authors transferred their intellectual
10 property rights to FASA and WizKids. (Dkt. # 54 at ¶¶ 26–28.)

11 Similarly, there is no evidence that Malcomson intended to be a co-owner when he
12 submitted the Submission or the Revised Submission. *See Larson*, 147 F.3d at 202 (holding
13 that “a specific finding of *mutual* intent remains necessary” to prevail on a claim for joint
14 ownership) (emphasis added). According to the court in *Larson*, “[A] writer’s attribution of
15 the work to herself alone is ‘persuasive proof . . . that she intended this particular piece to
16 represent her own individual authorship’ and is ‘prima facie proof that [the] work was not
17 intended to be joint.’” *Id.* at 203 (quoting *Weissmann v. Freeman*, 868 F.2d 1313, 1320 (2d
18 Cir. 1989)). Here, Malcomson renounced any claim to co-ownership by filing his 2008
19 copyright registration to the Revised Submission in his name only. And while Malcomson
20 alleges that he is in the process of amending his copyright registration to reflect joint
21 ownership (Dkt. # 48 at ¶ 3.), the relevant inquiry is not what Malcomson believes now, but
22 what he believed when he created the work. *See id.* In his February 2009 Motion to Amend,
23 Malcomson further indicated in that he did not believe his work to be a joint work when he
24 filed his Complaint (*see* Dkt. # 25 at 2). Likewise in his July 20, 2009 deposition,
25 Malcomson explained, “At the time of filing [of the Complaint], I did not believe that I was
26 a co-owner of Battletech. I believed only that *I* owned specific portions of *my own work* as
27 a contributor to a collected work” (Dkt. # 55, Ex. H at 91) (emphasis added.) Finally,
28 in his reply memorandum, Malcomson again indicated that he “believ[ed] . . . that he

1 qualified only as ‘a contributor to a collective work’” when he filed his Complaint. (Dkt. #
2 60 at 6.) Given that Malcomson attributed both the Submissions to himself when he filed his
3 copyright registration and his original Complaint, it cannot be said that Malcomson intended
4 these Submissions to constitute a joint work with FASA, WizKids, or Topps when these
5 works were created. *See Larson*, 147 F.3d at 199 (holding that the relevant inquiry is the
6 intention of the parties “at the time the writing is done”).

7 The Court also rejects Malcomson’s averment that the parties manifested their intent
8 to create a joint work because the Revised Submission was “canonized.” According to
9 Malcomson, the parties’ decision to adopt the Revised Submission as “canon” is a
10 manifestation that they intended to “merge [the Revised Submission] into the BattleTech
11 Property.” (Dkt. # 66 at 3 (quoting 17 U.S.C. § 101).) To support his claim that WizKids
12 adopted Malcomson’s ELH manuscript as “canon,” Malcomson argues that the Revised
13 Submission was posted on an area of the BattleTech website reserved for official BattleTech
14 content. (*See* Dkt. # 66 at 4.) Malcomson’s argument, however, ignores WizKids’ official
15 policy and definition of “canonized” material. Under that definition, a work becomes
16 BattleTech “canon” only if the intellectual property rights to that work have been transferred
17 to WizKids. (Dkt. # 57 at ¶ 6.) Malcomson, however, vigorously contends that he never
18 transferred his intellectual property rights to WizKids. (*See generally* Dkt. # 30.) In addition,
19 the fact that the Revised Submission was removed from the BattleTech website in August
20 2005 further suggests that WizKids never “canonized” the Revised Submission.

21 Nevertheless, even if the Revised Submission was incorporated into BattleTech’s
22 “canon,” Malcomson fails to explain how this demonstrates WizKids’ intent to make the
23 BattleTech property into a joint work with Malcomson as a co-owner. The undisputed
24 evidence indicates that WizKids was not responsible for posting the Revised Submission on
25 the BattleTech website. In 2002, when the Revised Submission appeared on the BattleTech
26 website, the site was not owned or operated by WizKids or its affiliates. Instead, the
27 BattleTech website was owned by FanPro and operated by BattleTech fans, who volunteered
28 their time. (Dkt. ## 54 at ¶ 20; 66 at 4.) According to Malcomson, FanPro and its volunteers

1 lacked authority to act “on behalf of WizKids.” (Dkt. # 66 at 4.) Since FanPro “did not [act]
2 on behalf of WizKids” in posting the Revised Submission in the area of BattleTech’s website
3 reserved for “canon” (*id.*), it is unclear how FanPro’s decision to post the content manifests
4 WizKids’ or Topp’s intent to create a joint work.⁵

5 **C. Audience Appeal**

6 Finally, as to the third factor for joint ownership, there is no evidence in the record
7 demonstrating that Malcomson’s Submission or his Revised Submission had any audience
8 appeal. *See Aalmuhammed*, 202 F.3d at 1234. Indeed, to the extent that Malcomson’s
9 Submissions were ever part of the BattleTech Property, they constituted only a small portion
10 of that property. The BattleTech Property consists of over 100 novels and over 300 source
11 books and rule books. ELH is briefly mentioned in these materials about twenty times. There
12 simply is no evidence that these twenty references provided any contribution to the success
13 and audience appeal of the BattleTech Property. *See id.*

14 **CONCLUSION**

15 Because Malcomson’s claim for joint ownership is unsupported by evidence in the
16 record and is otherwise meritless, the Court grants summary judgment in favor of Topps.
17 Accordingly, the Court need not address Malcomson’s arguments for summary judgment.

18 **IT IS THEREFORE ORDERED:**

- 19 1. Malcomson’s Motion for Summary Judgment (Dkt. # 46) is **DENIED**;
- 20 2. Topp’s Cross-Motion for Summary Judgment (Dkt. # 53) is **GRANTED**;

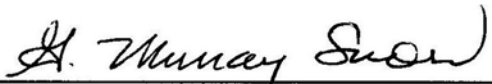
21
22 ⁵Malcomson does allege in his Amended Complaint that FanPro posted the Revised
23 Submission upon direction from WizKids after Malcomson and WizKids came to an
24 agreement whereby the Revised Submission would be “canonized.” (*See* Dkt. # 30 at ¶ 6.)
25 But, because Malcomson carries the burden of proving that the parties intended to create a
26 joint work, he may not rely on the mere allegations of the Amended Complaint to avoid
27 summary judgment. Instead, he must bring forth evidence from the record that creates a
28 material issue of fact. *Id.* Malcomson, however, does not present the agreement itself, nor
does he direct the Court’s attention to any other affidavit or deposition evidence of that
agreement. *See Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys.*, 309 F.3d 433, 436 (7th
Cir. 2002).

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3. The Court **DENIES** Malcomson's Memorandum Regarding Perjury. (Dkt. 67.)
This Court does not investigate criminal conduct. If Plaintiff desires that such conduct be investigated, he should raise the matter with the appropriate law enforcement authority.

4. The Clerk of the Court is directed to **TERMINATE** this action.

DATED this 28th day of January, 2010.



G. Murray Snow
United States District Judge