

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BLAKE BEST,
Plaintiff,

vs.

AT&T MOBILITY, LLC,
Defendant.

Case No. 1:12-cv-564

Beckwith, J.
Litkovitz, M.J.

**ORDER AND REPORT
AND RECOMMENDATION**

Plaintiff Blake Best brings this action against defendants AT&T Mobility LLC (AT&T Mobility) and AT&T Inc., raising various copyright infringement claims. (Doc. 140). This matter is before the Court on defendant AT&T Mobility's Fed. R. Civ. P. 12(b)(6) motion to dismiss Counts I, V, VI, VII, VIII, and IX of plaintiff's fourth amended complaint (Doc. 210), plaintiff's response in opposition (Doc. 213), and AT&T Mobility's reply memorandum (Doc. 214).

This matter is also before the Court on plaintiff's motion for leave to file a sur-reply to AT&T Mobility's motion to dismiss (Doc. 215), AT&T Mobility's response in opposition (Doc. 216), and plaintiff's reply memorandum (Doc. 217). In the interest of fully developing the record before the Court, plaintiff's motion for leave to file a sur-reply (Doc. 215) is **GRANTED** and the sur-reply memorandum attached to plaintiff's motion (Doc. 215 at 4-7) will be considered in connection with the instant motion to dismiss.

I. Factual and Procedural Background

Plaintiff initiated this pro se action on August 16, 2012, bringing copyright infringement claims against Mobile Streams, Inc., Mobile Streams, PLC, Mobilefunster Inc., Funmobile Ltd., Christian Kwok-Leun Yau Heilesen, and various John Doe defendants. (Doc. 6). On February 26, 2014, default judgment was granted in plaintiff's favor on all claims against defendants

Mobilefunster Inc., Funmobile Ltd., and Mobile Streams, Inc. (Docs. 150, 151). On March 11, 2014, plaintiff's claims against defendants Mobile Streams, PLC and Christian Kwok-Leun Yau Heilesen were dismissed for failure to effect service of process. (Doc. 156). On January 13, 2014, plaintiff's motion to substitute was granted and plaintiff's third amended complaint was filed, naming AT&T Mobility and AT&T Inc. as the lone remaining defendants. (Docs. 121, 140). AT&T Inc. filed a motion to dismiss plaintiff's claims against it, asserting that this Court lacked personal jurisdiction over this defendant. (Doc. 191). The undersigned recommended that the motion be granted and the District Judge overseeing this litigation adopted this recommendation in full over plaintiff's objection. (Docs. 204, 205, 207). AT&T Mobility filed a motion for a more definite statement under Federal Rule of Civil Procedure 12(e), asserting that the allegations of plaintiff's third amended complaint were so vague that it could not reasonably prepare a response. (Doc. 190). AT&T Mobility's motion was granted in part and consistent with this Court's Order (Doc. 203), plaintiff filed a fourth amended complaint. (Doc. 206).

In his fourth amended complaint, plaintiff alleges that he is the author of various copyrighted sound recordings, specifically, ringtones for mobile telephones. (Doc. 206, ¶¶ 2-3). Plaintiff states that in 2009, he developed ringtones that were protected by copyright pursuant to 17 U.S.C. § 102(a), with copyright registration number: PA 1-633-253. (*Id.*, ¶ 28). Plaintiff maintains that AT&T¹ "introduced" him to defendant Mobile Streams, a ringtone "aggregator," to broaden the potential market for plaintiff's ringtones. (*Id.*, ¶¶ 18, 37). Plaintiff alleges that pursuant to the licensing agreement he entered into with Mobile Streams, Mobile Streams was granted the right to transmit plaintiff's copyrighted ringtones through its network of internet

¹The Fourth Amended Complaint refers to AT&T Inc. and AT&T Mobility as "AT&T" collectively. *See* Doc. 206 at 2.

providers. (*Id.*, ¶ 37). Plaintiff further alleges that Mobile Streams improperly failed to share the revenue from plaintiff's copyrighted works with plaintiff. (*Id.*, ¶¶ 31-32, 37). Plaintiff alleges that in 2009 he discovered "a vast amount of websites selling [his] content" that were omitted from royalty reports submitted to plaintiff by Mobile Streams. (*Id.*, ¶ 34). Plaintiff further alleges that he alerted counsel for AT&T of this improper omission and that AT&T was "willfully blind" to these acts of copyright infringement. (*Id.*, ¶¶ 34-35). Plaintiff alleges that "because AT&T introduced Mobile Streams to [p]laintiff, they were made aware through emails regarding the problems associated with their 'aggregators' [and that AT&T] had actual knowledge of specific acts and failed to consider possible actions." (*Id.*, ¶ 41). Plaintiff alleges that the evidence "should conclude" that AT&T was "wilfully blind" to the alleged acts of copyright infringement by aggregators such as Mobile Streams. (*Id.*).

Plaintiff raises nine claims against AT&T Mobility: (1) copyright infringement under 17 U.S.C. §§ 101, 106, 501; (2) inducement of copyright infringement under 17 U.S.C. § 106; (3) contributory copyright infringement under 17 U.S.C. § 106; (4) vicarious copyright infringement under 17 U.S.C. § 106; (5) common law copyright infringement; (6) unfair competition under the Lanham Act, 15 U.S.C. § 125; (7) unfair competition under Ohio Revised Code § 4165.02; (8) deceptive and unfair trade practices under Ohio Revised Code § 4165.02(A); and (9) common law unjust enrichment. (*Id.*, ¶¶ 42-112).

II. Standard of Review

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), plaintiffs' fourth amended complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The Court must accept all well-pleaded factual allegations as true but need not “accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). While a complaint need not contain “detailed factual allegations,” it must provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 566 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557. It is well-settled that a document filed pro se is “to be liberally construed,” and that a pro se complaint, “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. . . .” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). However, the Sixth Circuit has recognized the Supreme Court’s “liberal construction” case law has not had the effect of “abrogat[ing] basic pleading essentials” in pro se suits. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989).

III. Resolution

AT&T Mobility moves this Court to dismiss Counts I, V, VI, VII, VIII, and IX of plaintiff’s fourth amended complaint. AT&T Mobility argues that the fourth amended complaint lacks sufficient factual allegations to support plaintiff’s copyright infringement, Lanham Act, and Ohio state law claims. Further, AT&T Mobility contends that the existing factual allegations are confusing, vague, and often unintelligible, such that dismissal is appropriate. AT&T Mobility asserts that plaintiff has failed to remedy the deficiencies in his third amended

complaint identified by this Court's Order granting AT&T Mobility's motion for a more definite statement. *See* Doc. 203. AT&T Mobility therefore seeks to have Counts I, V, VI, VII, VIII, and IX of plaintiff's fourth amended complaint dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (Doc. 210).

Plaintiff responds that the factual allegations in his fourth amended complaint sufficiently allege that AT&T Mobility engaged in copyright infringement. Plaintiff contends AT&T Mobility's motion is not supported by valid authority and is an attempt to misdirect the Court as to the nature of his claims. Plaintiff further contends that he complied with this Court's Order granting AT&T Mobility's motion for a more definite statement in drafting his fourth amended complaint. (Doc. 213).

The Court will address the sufficiency of the allegations supporting plaintiff's claims in turn.

1. Counts I, V: Copyright Infringement Under 17 U.S.C. §§ 101, 106, 501 and Ohio Common Law Copyright Infringement.

Under the federal Copyright Act, copyright infringement occurs when a person "violates any of the exclusive rights of the copyright owner." 17 U.S.C. § 501(a). A complaint for copyright infringement must allege (1) ownership of a valid copyright, and (2) "copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). *See also Bridgeport Music, Inc. v. WM Music Corp.*, 508 F.3d 394, 398 (6th Cir. 2007). The Sixth Circuit has held that claims of copyright infringement require "greater particularity in pleading, through showing 'plausible grounds'," as such claims lend themselves readily to abusive litigation. *Nat'l Bus. Devel. Svcs., Inc. v. American Credit Educ. and Consulting Inc.*, 299 F. App'x 509, 512 (6th Cir. 2008).

It is undisputed that plaintiff's fourth amended complaint satisfies the first prong of a copyright infringement claim. *See* Doc. 206, ¶¶ 28, 30; Doc. 210 at 4 (the fourth amended complaint includes allegations that plaintiff developed copyright protected ringtones in 2009 with copyright registration number PA 1-633-253). AT&T Mobility asserts, however, that the claim must be dismissed because plaintiff has not established the second prong – that AT&T Mobility copied the protected works. (Doc. 210 at 6). The Court must therefore determine whether plaintiff's fourth amended complaint includes factual content establishing that AT&T Mobility infringed on plaintiff's copyrights by engaging in unauthorized copying of his ringtones. For the following reasons, the undersigned finds that it does not and the copyright infringement claims set forth in Counts I and V should be dismissed.

Despite this Court's prior Order requiring plaintiff to amend his complaint to set forth factual allegations showing that AT&T Mobility copied plaintiff's original work (Doc. 203 at 6), the fourth amended complaint lacks any allegations that AT&T Mobility was engaged in such conduct. As best the Court can discern, plaintiff alleges that AT&T Mobility is liable to plaintiff for copyright infringement allegedly committed by other defendant ringtone aggregators, namely Mobile Streams. *See* Doc. 206, ¶ 2, 5-6, 9, 16-19, 35, 39, 43-45, 48, 52. Although plaintiff repeatedly alleges that these aggregators were engaged in "copying and selling of [his] copyrighted sound recordings" (*id.*, ¶ 5), there are no factual allegations in the fourth amended complaint that AT&T Mobility itself engaged in any unauthorized copying. At most, plaintiff alleges that (1) AT&T Mobility improperly retained profits from the infringing acts of the ringtone aggregators and is therefore liable for copyright infringement, and (2) AT&T is liable for the infringing acts committed by these aggregators because it either had knowledge thereof and refused to intervene or was "willfully ignorant." *See id.*, ¶¶ 6, 9, 16, 18-19, 35, 41, 43-45,

48, 52. This alleged conduct fails to state a claim for copyright infringement as there are no factual allegations that AT&T Mobility engaged in the act of copying plaintiff's copyrighted creations. *See Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003).

The undersigned notes that the following excerpts from the fourth amended complaint could arguably be interpreted as asserting actual copying of plaintiff's copyrighted works by AT&T Mobility:

Defendants directly through its network along with it (sic) aggregators copied, reproduced and or distributed without authorization [p]laintiff Slangtones mark as its aggregators Funmobile, Mobilefunster.

Plaintiff is informed and upon such information alleges according to the fact, [AT&T Mobility has] some active part to the allegations mentioned herein have engaged in a deliberate effort to copyright infringe and committed other acts and violations as outlined herein.

(Doc. 206, ¶¶ 2, 17). Assuming for argument's sake that these allegations state that AT&T Mobility infringed plaintiff's copyrights by copying his recordings, the Court nevertheless finds the allegations insufficient for purposes of defeating the instant motion to dismiss. Because copyright infringement readily lends itself to abusive litigation, "greater particularity in pleading, through showing 'plausible grounds,' is required. 'Asking for plausible grounds . . . simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [infringing conduct.]" *Nat'l Bus. Dev. Servs., Inc.*, 299 F. App'x at 512 (quoting *Twombly*, 550 U.S. at 545) (holding that even under the less stringent standard for reviewing pro se pleadings, the pro se plaintiff's speculative and conclusory allegations that the defendant engaged in copyright infringement failed to state a claim for copyright infringement). Plaintiff does not allege any specific facts in connection with his claims, such as when, where, or how AT&T Mobility infringed on his copyrights. Rather, the above quoted selections from the fourth

amended complaint are precisely the sort of “naked assertions[s]” devoid of “further factual enhancement” that cannot withstand a Fed. R. Civ. P. 12(b)(6) challenge. *See Iqbal*, 566 U.S. at 678; *Twombly*, 550 U.S. at 555, 557.

To the extent plaintiff asserts his allegations suffice to state a copyright infringement claim under *Ellis v. Diffie*, 177 F.3d 503 (6th Cir. 1999), *see* Doc. 213 at 6-9, the Court disagrees. In *Ellis*, the Sixth Circuit acknowledged that “[d]irect evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue.” 177 F.3d at 506. There is a two-step test for determining “substantial similarity.” *Kohus*, 328 F.3d at 854-55. “The first step is to ‘filter out the unoriginal, unprotectible elements – elements that were not independently created by the inventor, and that possess no minimal degree of creativity.’” *Winfield Collection, Ltd. v. Gemmy Inds. Corp.*, 147 F. App’x 547, 553 (6th Cir. 2005) (quoting *Kohus*, 328 F.3d at 855). “The second step is to determine whether the allegedly infringing work is substantially similar to the protectible elements of the original.” *Id.* at 554 (citing *Kohus*, 328 F.3d at 856).

Assuming that the fourth amended complaint alleges that AT&T Mobility had access to plaintiff’s copyrighted works and, thus, satisfies the first prong of an inferential copyright infringement claim, the claim still fails because plaintiff has not alleged facts establishing that AT&T Mobility created a secondary work that is substantially similar to his original, copyrighted recordings. Inferential copyright claims such as those at issue in *Ellis* require a showing that the defendant copied the plaintiff’s work and produced a substantially similar non-original work therefrom. Plaintiff here does not allege that AT&T Mobility produced a substantially similar infringing work. Rather, his claim is that ringtone aggregators copied his original works from

AT&T Mobility's networks and that AT&T Mobility is liable because it was aware of the conduct and because the copying occurred on its networks. The inferential copyright analysis enunciated in *Ellis* is therefore inapplicable.

For the reasons stated above, Count I: Copyright Infringement Under 17 U.S.C. §§ 101, 106, 501 and Count V: Ohio Common Law Copyright Infringement² of plaintiff's fourth amended complaint should be dismissed.

2. Count VI: Unfair Competition under the Lanham Act

"The Lanham Act was intended to make 'actionable the deceptive and misleading use of [trade]marks' and 'to protect persons engaged in . . . commerce against unfair competition.'" *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28-29 (2003) (quoting 15 U.S.C. § 1127). "Generally speaking, the key question in cases where a plaintiff alleges trademark infringement and unfair competition is whether the defendant's actions create a likelihood of confusion as to the origin of the parties' goods or services." *Bird v. Parsons*, 289 F.3d 865, 877 (6th Cir. 2002) (citing *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997); *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1116, 1123 (6th Cir. 1996)). Unfair competition occurs when a person "on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or

²Count V of plaintiff's fourth amended complaint alleges that AT&T Mobility was willfully blind to the infringing acts of others and is therefore liable under the Ohio "common-law doctrine of willful blindness to infringement." (Doc. 206, ¶ 82). See also *id.*, ¶¶ 81-87. The Court is not aware of any such doctrine under Ohio state law and plaintiff has not cited to any authority establishing a right of action under Ohio law for his copyright infringement claim. Indeed, "Section 301 of the Copyright Act broadly preempts state law claims" and "states that 'all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106 in works of authorship . . . come within the subject matter of copyright . . . are governed exclusively by this title. . . . [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.'" *Ritchie v. Williams*, 395 F.3d 283, 285 (6th Cir. 2005) (quoting 17 U.S.C. § 301(a)) (emphasis in original). As plaintiff's state law copyright claim is preempted by the federal Copyright Act, Count V of the fourth amended complaint should be dismissed.

misleading description of fact, or false or misleading representation of fact which is likely to cause confusion” 15 U.S.C. § 1125(a)(1)(A). Unlike a claim of trademark infringement, a claim of unfair competition does not require the use of the plaintiff’s trademark. *Bird*, 289 F.3d at 877.

The pertinent allegations of the fourth amended complaint include plaintiff’s claim that he owns an unregistered trademark in connection with his ringtones website, www.slangtones.com. (Doc. 206, ¶ 89). Plaintiff alleges that this mark was used without his consent by ringtone aggregators on their websites in connection with the AT&T logo and that AT&T Mobility financially benefitted from this misleading representation. (*Id.*, ¶¶ 89, 91). Plaintiff claims that this alleged conduct is a violation of “Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).” (*Id.*, ¶ 92).

AT&T Mobility raises two distinct arguments in seeking to dismiss plaintiff’s Lanham Act claim. First, AT&T Mobility asserts the claim must be dismissed because contrary to the Court’s Order on AT&T Mobility’s motion for a more definite statement (Doc. 203 at 8), the fourth amended complaint still fails to identify the specific prongs under which plaintiff is raising his Lanham Act claim. Second, AT&T Mobility argues that notwithstanding this deficiency, the claim must be dismissed because plaintiff has not alleged any conduct by AT&T Mobility that violates Section 43(a) of the Lanham Act. (Doc. 210 at 8-11).

In response, plaintiff contends that he complied with the Court Order by identifying in the fourth amended complaint that his Lanham Act claim arises under Section 43(a). Plaintiff further argues that the conduct alleged – that AT&T Mobility is liable because it controls the networks used by the ringtone aggregators – suffices to state a Lanham Act claim. (Doc. 213 at 10-13).

Plaintiff's fourth amended complaint fails to state a plausible claim for relief under the Lanham Act. Plaintiff's vague allegation, that his claim arises under "Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)" (Doc. 206, ¶ 92), does not provide fair notice to AT&T Mobility as to the nature of his claim and the grounds upon which it rests. Section 43(a) "has been widely interpreted to create, in essence, a federal law of unfair competition. . . ." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (1992) (quoting The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, 77 Trademark Rep. 375, 426 (1987)). Because there are two types of claims that may be brought under § 43(a)(1), this Court specifically ordered plaintiff to specify "under which prong his Lanham Act claim arises and [to allege] the specific conduct or statements by AT&T Mobility that form the basis of this claim." (Doc. 203 at 8). Yet, plaintiff's fourth amended complaint does not identify "whether [he is] alleging that [AT&T Mobility] violated subparagraph (A), the false association prong, or subparagraph (B), the false advertising prong, of the Lanham Act." *Williamson v. Rexam Beverage Can Co.*, 497 F. Supp.2d 900, 909 (S.D. Ohio 2007).³ Nor does the fourth amended complaint allege with any particularity when or how AT&T Mobility purportedly made misrepresentations to the marketplace. This Court has afforded plaintiff ample opportunity to plead a proper Lanham Act claim including giving him specific directives as to what allegations he was required to plead in order to survive a Fed. R. Civ. P. 12(b)(6) challenge. Plaintiff's ongoing failure to properly plead the nature of his Lanham Act claim warrants dismissal. *See id.*

³Plaintiff asserts in his response brief that his Lanham Act claim arises under both the first and second prong. *See* Doc. 213 at 10. This Court cannot consider matters beyond the pleadings, including plaintiff's assertions as to the nature of his claims, in deciding the instant Fed. R. Civ. P. 12(b)(6) motion to dismiss. *See Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009).

Even if the Court were to find that the allegations of fourth amended complaint were sufficient for purposes of determining the nature of plaintiff's Lanham Act claim, the claim should nevertheless be dismissed because plaintiff does not allege any conduct by AT&T Mobility that violates the Act. To state a false association of trademark Lanham Act claim, plaintiff must allege that AT&T Mobility used his trademark in such a way that is likely to cause confusion or mistake, or in an attempt to deceive as to the origin of its goods. *See Lexmark Int'l Inc. v. Static Control Components, Inc.*, -- U.S. --, 134 S.Ct. 1377, 1384 (2014). Likewise, to state a false advertising Lanham Act claim, plaintiff must allege, among other criteria, that AT&T Mobility has made false or misleading statements of fact about its own product or plaintiff's product. *Balance Dynamics Corp. v. Schmitt Ind. Inc.*, 204 F.3d 683, 689 (6th Cir. 2000) (citations omitted). Even under the liberal pleading standard afforded to pro se plaintiffs, the Court cannot conclude that plaintiff has alleged sufficient facts to state either a false association or false advertising claim under the Lanham Act. The fourth amended complaint provides that "plaintiff's Slangtones product was made available on [the] aggregators/affiliates['] website with the AT&T logo" and plaintiff's mark was used on aggregators' websites. (Doc. 206, ¶¶ 89, 91). These allegations indicate that it was not AT&T Mobility who used plaintiff's trademark; rather, it was the aggregators who used AT&T Mobility's network who engaged in this conduct. Plaintiff has not alleged that AT&T Mobility used his mark in a manner that would cause confusion or that AT&T Mobility made false or misleading statements about his ringtones. Plaintiff has therefore failed to allege facts which state a cognizable Lanham Act claim against AT&T Mobility.

Accordingly, Count VI: Unfair Competition under Lanham Act of plaintiff's fourth amended complaint should be dismissed.

3. Counts VII and VIII: Unfair Competition under Ohio Law and Deceptive and Unfair Trade Practices under Ohio Rev. Code § 4165.02

Ohio state law claims of unfair competition and deceptive and unfair trade practices under Ohio Rev. Code § 4165.02 are analyzed similarly. *See White Mule Co. v. ATC Leasing Co. LLC*, 540 F. Supp.2d 869, 896 (N.D. Ohio 2008) (“a common law unfair competition claim is evaluated using the same analytical framework as a claim under the Deceptive Trade Practices Act. . . .”) (internal citation and quotations omitted). Further, the Ohio Deceptive Trade Practices Act (ODTPA) is substantially similar to the Lanham Act and “[w]hen adjudicating claims under the [ODTPA], Ohio courts shall apply the same analysis applicable to claims commenced under the analogous federal law.” *Chandler & Assoc. v. America’s Healthcare Alliance*, 709 N.E.2d 572, 580 (Ohio Ct. App. 1997). “Where claims are made under the Ohio common law and [the ODTPA], Ohio courts are to apply essentially the same analysis as that applied in assessing the law of unfair competition under the federal statutes.” *Cesare v. Work*, 520 N.E.2d 586, 590 (Ohio Ct. App. 1987).

Counts VII and VIII of the fourth amended complaint allege that AT&T Mobility engaged in unfair competition and violated the ODTPA because: (1) it did not act to stop aggregators from selling plaintiff’s ringtones on their networks despite knowledge of the aggregators’ conduct, and (2) the aggregators used plaintiff’s trademark on AT&T Mobility’s network. *See* Doc. 206, ¶¶ 98-99, 103-106.

AT&T Mobility moves to dismiss plaintiff’s Ohio state law unfair competition and ODTPA claims, arguing that the pleading does not allege sufficient supporting facts to state cognizable claims. AT&T Mobility contends that because ODTPA claims are analyzed under the same standards as Lanham Act claims and Ohio state law unfair competition claims are

analyzed under the same framework as ODTPA claims, plaintiff's failure to allege specific conduct on behalf of AT&T Mobility warrants dismissal of these claims. (Doc. 210 at 11-12).

As best the Court can discern, plaintiff asserts in his response that the fourth amended complaint meets the pleading standards for unfair competition and ODTPA claims because he alleges that AT&T Mobility was aware that its aggregators were copying plaintiff's copyrighted sound recordings through its networks.⁴ (Doc. 213 at 13-14).

The Court finds that plaintiff's fourth amended complaint fails to state cognizable unfair competition and ODTPA claims. In its Order granting AT&T Mobility's motion for a more definite statement, this Court found that plaintiff's third amended complaint was deficient with respect to his common law unfair competition and ODTPA claims as follows:

The ODTPA creates avenues for raising various types of claims. For example, a claim may arise where one "passes off goods or services as those of another" or "uses deceptive representations or designations of geographic origin in connection with goods or services. . . ." Ohio Rev. Code. § 4165.02(A)(1), (4). Plaintiff's third amended complaint fails to specify under which prong of the statute he is raising his ODTPA claim or identify the specific conduct by AT&T Mobility that forms the basis of his unfair competition claim. In the absence of such allegations, AT&T Mobility has not been put on notice of the nature of plaintiff's claims and cannot be reasonable expected to prepare a responsive pleading based solely on the existing vague allegations of "unfair competition."

(Doc. 203 at 9-10). The Court thus ordered plaintiff to include allegations in his fourth amended complaint that set forth "the specific conduct that AT&T Mobility engaged in that forms the basis of [these claims] and, further, which identifies the specific sections of the ODTPA under which his claim arises." (*Id.* at 10). The fourth amended complaint does not include these requisite allegations.

⁴Plaintiff's arguments are extremely difficult to decipher. *See, e.g.*, Doc. 213 at 13-14 ("Here Plaintiff explains the AT&T Mobility coping (sic) of Plaintiff (sic) Copyrighted sound recording/ringtones for its aggregators neither of which were authorized to sales Plaintiff ringtones on Defendants aggregators website through its network deceived consumers, and give Plaintiff an unfair advantage to the market.").

With respect to the unfair competition claim, the fourth amended complaint does not set forth factual allegations establishing that AT&T Mobility engaged in conduct that could plausibly be construed as supporting the claim. Rather, the pleading merely alleges that AT&T Mobility failed to stop aggregators from engaging in unfair competition with plaintiff on AT&T Mobility's networks. *See* Doc. 206, ¶ 98. For the reasons set forth above in connection with plaintiff's Lanham Act claim, the absence of any factual allegations showing that AT&T Mobility itself engaged in the alleged infringing conduct warrants dismissal of plaintiff's common law unfair competition claim. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 920 (6th Cir. 2003) (analysis under the Lanham Act suffices to resolve common law claims of unfair competition).

Even if plaintiff's factual allegations sufficed to state a claim for unfair competition, the claim must nevertheless be dismissed because it appears to be preempted by the Copyright Act.⁵ *See Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001)(quoting 17 U.S.C. §§ 102, 103) (holding that Section 301 of the Copyright Act preempts common law claims if "(1) the work is within the scope of the 'subject matter of copyright,' as specified in 17 U.S.C. §§ 102, 103; and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106."). *See also Stromback v. New Line Cinema*, 384 F.3d 283 (6th Cir. 2004). Here, plaintiff's common law unfair competition claim is predicated on the ringtone aggregators' conduct of allegedly copying and selling his copyrighted ringtones through the AT&T Mobility network. *See* Doc. 203, ¶ 98. Accordingly, the claim is

⁵It is unclear from the Court's review of the fourth amended complaint whether plaintiff's common law unfair competition claim sounds in trademark or copyright law. *See* Doc. 203, ¶ 98 ("AT&T Mobility did not take steps to stop their aggregators, affiliates ect (sic), preventing them from the *unauthorized selling of plaintiff's ringtones* through their network; which deceived consumers that plaintiff *ringtones and mark* were [AT&T Mobility's]; because the AT&T *logo* appeared on the aggregators website. . . .") (emphasis added). For the sake of completeness, Count VII is analyzed as alleging unfair competition under theories of both trademark and copyright infringement.

preempted under Section 301. *Sem-Torq, Inc. v. K mart Corp.*, No. 1:89-cv-1318, 1990 WL 278987, at *5 (N.D. Ohio Oct. 4, 1990) (“The Copyright Act preempts those state law claims which are equivalent to federal copyright law. 17 U.S.C. § 301. This provision requires that state law claims which are predicated on alleged acts of copyright infringement such as unfair competition . . . are preempted by federal copyright law.”). *See also Stromback*, 384 F.3d at 304 (finding that courts may have to examine the facts that a plaintiff pleads in order to determine whether “the acts giving rise to the state law claim are merely acts of copyright infringement”) (citing *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C. Cir. 2002)). Accordingly, Count VII of the fourth amended complaint should be dismissed.

Count VIII, plaintiff’s ODTPA claim, suffers from similar pleading deficiencies. As noted above, despite being ordered to identify the specific sections of the ODTPA under which his claim arises, plaintiff’s fourth amended complaint does not include this information. Admittedly, plaintiff now identifies that his claim arises under Ohio Rev. Code § 4165.02(A) whereas his third amended complaint specified only that the claim arose under Ohio Rev. Code § 4165.02. However, § 4165.02(A) contains 13 subsections that lay out the various types of conduct that might form the basis of an ODTPA claim. For example, a person engages in deceptive trade practices under the ODTPA where they “pass[] off goods or services as those of another” or “use deceptive representations or designations of geographic origin in connection with goods and services. . . .” Ohio Rev. Code § 4165.02(A)(1), (3). Because plaintiff has not complied with this Court’s Order to identify the subsections under which his claim arises, his ODTPA claim should be dismissed. *See Steward v. City of Jackson, Tenn.*, 8 F. App’x 294, 296-97 (6th Cir. 2001) (upholding dismissal of the pro se plaintiff’s complaint where the plaintiff

failed to include specific facts in his amended complaint despite being ordered to do so by the district court).

Notwithstanding this procedural pleading deficiency, plaintiff's ODTPA claim is nevertheless subject to dismissal because he has not alleged supporting facts that establish that AT&T Mobility engaged in any deceptive trade practices. Regardless of which of the 13 subsections of § 4165.02(A) plaintiff's ODTPA claim arises under, to state a cognizable claim plaintiff must allege that AT&T Mobility itself engaged in a deceptive trade practice by, for example, causing a likelihood of confusion or misunderstanding as to the source of goods, listing a fictitious business name in a local telephone directory, or disparaging the goods or services of another. *See* Ohio Rev. Code § 4165.02(A)(2), (5), (10). Plaintiff's fourth amended complaint does not allege any such behavior on behalf of AT&T Mobility but, instead, alleges that the violative conduct was committed by ringtone aggregators. *See* Doc. 203, ¶¶ 102-03. As with plaintiff's unfair competition claim and for the reasons set forth above in connection with his Lanham Act claim, plaintiff's ODTPA claim should be dismissed for failure to state a claim as he has not alleged conduct to support his claim against AT&T Mobility.

For the above reasons, Counts VII and VIII of plaintiff's fourth amended complaint should be dismissed.

4. Count IX: Unjust Enrichment

To state an unjust enrichment claim under Ohio law, a complaint must allege: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*,

684 F. Supp.2d 942, 951 (N.D. Ohio 2009) (quoting *Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1302 (Ohio 1984)).

In support of Count IX: Unjust Enrichment of the fourth amended complaint, plaintiff alleges that he submitted his ringtones to AT&T Mobility and that aggregators copied these ringtones using AT&T Mobility networks. (Doc. 203, ¶ 109). Plaintiff further alleges that AT&T Mobility received and retained a benefit in the form of revenue from these aggregators' unauthorized sales of his ringtones. (*Id.*, ¶ 110). Plaintiff alleges that AT&T Mobility's retention of these profits was unjust because plaintiff informed AT&T Mobility about the aggregators' unauthorized sales yet AT&T Mobility refused to investigate his claims. (*Id.*, ¶ 111).

Plaintiff's unjust enrichment claim must be dismissed because it is preempted by the Copyright Act. Copyright law preempts an unjust enrichment claim whenever: "(1) the work is within the scope of 'the subject matter of copyright' as specified in 17 U.S.C. §§ 102, 103; and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106." *Wrench LLC*, 256 F.3d at 453. Plaintiff's unjust enrichment claim meets these criteria as he seeks to recover all proceeds and other compensation realized by AT&T Mobility resulting from the copyright infringement allegedly committed by ringtone aggregators using AT&T Mobility networks to sell his copyrighted sound recordings. *See* Doc. 206, ¶ 112. Accordingly, the unjust enrichment claim is preempted by the Copyright Act and should be dismissed.

The Court acknowledges that plaintiff appears to allege that he and AT&T Mobility had an implied contract. *See* Doc. 203, ¶ 109. In *Wrench*, the Sixth Circuit found that an implied contract claim was not preempted by the Copyright Act because it included the additional

element of “the promise to pay” which changed “the nature of the action so that it [was] qualitatively different from a copyright infringement claim.” 256 F.3d at 456. This “qualitative difference” included “the requirement of proof of an enforceable promise and a breach thereof which requires, *inter alia*, proof of mutual assent and consideration, as well as proof of the value of the work and appellee’s use thereof.” *Id.* The *Wrench* plaintiffs, unlike plaintiff here, alleged facts supporting the existence of an implied promise to pay. *See id.* at 449-52 (the plaintiffs alleged engaging in numerous in-person negotiations with the defendants over the course of a year and the existence of a draft licensing agreement which included a specific payment structure). Although plaintiff alleges that he had an implied contract with AT&T Mobility, the fourth amended complaint does not allege that AT&T Mobility ever made a promise to pay. Therefore, there is “no meaningful ‘extra element’ . . . that removes the reformulated claim[] from the policy of national uniformity established by the preemption provisions of § 301(a).” *Ritchie v. Williams*, 395 F.3d 283, 287-88 (6th Cir. 2005). Accordingly, the Court finds that the Copyright Act preempts plaintiff’s common law unjust enrichment claim.

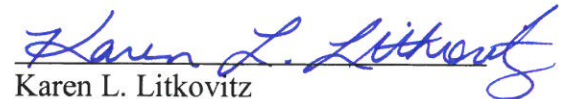
For the above reasons, Count IX of plaintiff’s fourth amended complaint should be dismissed.

IV. Conclusion

As stated above, plaintiff’s motion for leave to file a sur-reply (Doc. 215) is **GRANTED**. Further, it is hereby **RECOMMENDED** that AT&T Mobility’s motion to dismiss Counts I, V, VI, VII, VIII, and IX of plaintiff’s fourth amended complaint (Doc. 210) be **GRANTED**. If this Report and Recommendation is adopted, the remaining claims against AT&T Mobility would be plaintiff’s claims of inducement of copyright infringement, contributory copyright infringement,

and vicarious copyright infringement against AT&T Mobility, Counts II, III, and IV of the fourth amended complaint.

Date: 3/10/15


Karen L. Litkovitz
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BLAKE BEST,
Plaintiff,

vs.

AT&T MOBILITY, LLC,
Defendant.

Case No. 1:12-cv-564

Beckwith, J.
Litkovitz, M.J.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).