

IN THE SUPREME COURT OF MISSOURI

Case No. SC90329

OVERLAP, INC.,
Plaintiff/Respondent,

v.

A.G. EDWARDS & SONS, INC.,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

The Honorable Roger Prokes
Visiting Circuit Judge

**SUBSTITUTE REPLY IN SUPPORT OF PLAINTIFF/RESPONDENT OVERLAP,
INC.'S CONTINGENT CROSS APPEAL**

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I. EACH POINT OF OVERLAP’S CROSS APPEAL IS PROPERLY PRESERVED.

Because Overlap’s cross appeal is strictly contingent – and in no way attacks the sufficiency of the judgment – Overlap was not required to file a motion for a new trial as AGE argues. Any request for a new trial could have led to the absurd result of the trial court granting a new trial (which is not the relief that Overlap seeks). No Missouri court has ever suggested that a contingent cross appellant must file a motion for new trial in order to preserve its cross appeal. And other courts have ruled that contingent cross appellants, such as Overlap, are not required to follow the usual preservation of appeals procedures. *See, e.g., People ex rel. Vuagniaux v. City of Edwardsville*, 672 N.E.2d 40, 46, (Ill. Ct. App. 1996) (“We do not see that any purpose would be served in requiring an appellee to file a cross-appeal in order to preserve conditional arguments against action which may be ordered by this court.”); *see also City of Delta v. Thompson*, 548 P.2d 1292, 1294 (Colo. Ct. App. 1975) (rejecting the “the incongruous situation of a winning party being forced to file a motion for a new trial in order to insure that he could later file a notice of appeal” and that “[s]uch an illogical and inefficient result cannot be countenanced by the judicial system.”)

Each point of Overlap’s contingent cross appeal is properly preserved because requiring a motion for a new trial would lead to the illogical attack on the very judgment that Overlap seeks to uphold. *See id.* Under these circumstances, the rule requiring a motion for a new trial does not apply.

II. OVERLAP'S UNFAIR COMPETITION CLAIM SHOULD HAVE BEEN SUBMITTED TO THE JURY.

A. LEGAL STANDARD

“Unless we find that there is a complete absence of probative fact to support the jury’s conclusion, or, in other words, that the evidence and reasonable inferences are so strong against [plaintiff’s] case that there is not room for reasonable minds to differ, we will not take the case from the jury.” *Davolt v. Highland*, 119 S.W.3d 118, 123-24 (Mo. App. W.D. 2003). AGE argues that this Court may affirm the trial court’s granting of directed verdict *for any reason* since the trial court did not state a reason for its directed verdict ruling. Although the trial court did not state the basis for its order, this Court must still weigh the evidence and inferences in favor of Overlap on appeal. *See id.*

B. AGE’S MISAPPROPRIATION OF OVERLAP IS THE PARADIGM FOR A COMMON LAW UNFAIR COMPETITION CLAIM.

Overlap’s claim for common law unfair competition is to be broadly construed against all types of unfair business practices and schemes to pirate the fruit of another’s labor. *See* Overlap’s Cross Appeal Brief at 84-85. Missouri courts have held time and again that a common law claim for unfair competition should be broadly construed based on the individual circumstances of each case. *See id.*; *Adbar v. PCAA Missouri, LLC*, No. 06-1689, 2008 WL 68858, at *11 (Mo. App. E.D. Jan. 4, 2008) (citations omitted).

AGE attempts to distinguish this case from other unfair competition cases by suggesting that it magnanimously identified Overlap, Inc. as the source of the Overlap information contained in its own reports by using the term “Overlap” in its reports. This

argument fails under scrutiny. Take for example the ACME cola manufacturer who steals the recipe for Coca-Cola and then sells the stolen cola calling it “Coca-Cola by ACME.” The fact that the manufacturer calls the stolen cola “Coca-Cola” obviously does not provide safe harbor from stealing the product, recipe or other proprietary data. The record here shows that AGE spliced Overlap data into its own valuable sales tools without paying for it – this is the paradigm of a common law unfair competition claim.

1. Overlap’s Misappropriation Theory is Separate From its Breach of Contract Claim.

AGE, without analysis, also claims that Overlap’s unfair competition claim is subsumed by its contract claim. Overlap’s claim, however, exists independent of a breach of contract claim. Missouri law is well-settled that tort claims that are separate and distinct from contract claims may co-exist. *See, e.g., Adbar*, 2008 WL 68858, at *8-9, 12 (permitting breach of contract and unfair competition to proceed together even though the claims arose from the same conduct); *Morrill v. Becton, Dickinson and Co.*, 747 F.2d 1217, 1222 (8th Cir. 1984) (“It is clear that under Missouri law, liability in tort may co-exist with liability in contract arising out of the same events.”) (citations omitted). *See also* Overlap’s Opposition Brief at 28-29 (citing cases). Overlap’s unfair competition claim involves the confusion of consumers and AGE’s unfair pirating of a valuable Overlap product. These are not elements of a breach of contract claim and Overlap’s unfair competition claim exists independently of its contract claim.

2. Overlap's Reports and Data Are Proprietary.

AGE also misconstrues Missouri law in claiming that the Overlap analyses generated by Overlap software is public information incapable of misappropriation. A company's product need not be a confidential trade secret before it can be protected by the unfair competition laws. No Missouri case has ever suggested – and AGE cites no authority – that unfair competition requires a showing that the product in question be confidential in nature. Indeed, a review of Overlap's cited unfair competition cases demonstrates that misappropriated products are not normally confidential. *See, e.g., Nat'l Telephone Directory Co. v. Dawson Mfg. Co.*, 263 S.W. 483, 484 (Mo. App. 1924) (misappropriating compilation of telephone directory information); *International News Services v. Associated Press*, 248 U.S. 215, 239-40 (1918) (misappropriating news stories). It is the gathering, synthesis and packaging of the common stock holdings that made Overlap a valuable tool. Overlap demonstrated at trial that developing computer software capable of generating the Overlap reports was difficult, time-consuming and revolutionary. TR 405-414, 426-28. Had AGE developed its own mechanism to calculate common stock holdings and used that mechanism to distribute reports to its brokers, that would have been appropriate. But the record in this case demonstrates that AGE did not do so – instead, it used Overlap software to generate the numbers. As a result, AGE misappropriated the Overlap data and did not merely use data that was easily-accessible in the public domain.

In *International News*, the Supreme Court drew this exact distinction. The Court noted that public news itself may not be protected by unfair competition laws and that no

company owns a monopoly to information in the public domain, but that a defendant's use of another's product that is *created from* public information constitutes unfair competition. 248 U.S. at 239-40. The court stated:

In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown

Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped

A court of equity ought not to hesitate long in characterizing it as unfair competition in business.

Id. The same is true here. The Overlap product took public information, organized it, and generated a proprietary analysis and report. It is the expenditure of Overlap's labor, skill and knowledge that makes the Overlap product valuable and protectable.

C. OVERLAP MADE A SUBMISSIBLE CASE BASED ON ITS TRADEMARK THEORY.

In addition to its arguments attacking Overlap's misappropriation theory, AGE also argues that Overlap did not prove a Missouri common law unfair competition claim based on its trademark theory.¹ Because AGE did not have permission, sponsorship or approval to use Overlap's trademark in marketing its mutual funds, AGE's conduct supports a claim of unfair competition. *See, e.g., Bass Buster, Inc. v. Gapen Manufacturing Co.*, 420 F.Supp. 144, 160 (W.D. Mo. 1976) (claim for unfair competition when the defendant is "passing off his product as that of another so that the public is deceived regarding the source of the goods."); *Cornucopia, Inc. v. Wagman*, 710 S.W.2d 882, 888-89 (Mo. App. E.D. 1986) ("we must keep in mind that the law of unfair competition is designed to prevent commercial hitchhiking and attempts to trade on another's reputation.") (inner citations omitted); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1492 (7th Cir. 1983) (false suggestion of affiliation with trademark owner constituted infringement); *Professional Golfers Ass'n of America v. Bankers Life & Casualty Co.*, 514 F.2d 665, 670 (5th Cir. 1975) (unauthorized use of trademark that is misleading with respect to sponsorship or approval can constitute infringement).

¹ AGE divides Overlap's unfair competition claim into a "trademark theory" and a "misappropriation theory." Within Overlap's trademark theory, there are two related claims: (1) that AGE infringed on Overlap's common law trademark; and (2) that AGE "passed off" the Overlap trademark and product as its own.

1. Overlap Proved the Existence of a Valid Common Law Trademark.

To show a valid common law trademark, a plaintiff must show “prior appropriation and use of the mark in connection with a particular business.” *Bass Buster*, 420 F.Supp. at 157. *See also First Bank v. First Bank System, Inc.*, 84 F.3d 1040, 1044 (8th Cir. 1996) (requiring the use of the trade name in commerce to identify the product in order to establish a common law trademark). Overlap demonstrated at trial that it has used the mark “Overlap” in connection with its software licensing business since it introduced the Overlap product in July 1993, TR 419-20, 436-37, and it successfully registered a trademark on March 12, 1996. TR 436. During the time period that AGE used the Overlap software and trademark, there was no other product that performed the same function. TR 461-62; Trial Ex. 254 Greg Ellston Testimony at 11-12 (SA 378-379); TR 507. These facts easily establish a common law trademark.

Oddly, AGE suggests that Overlap was required to show it had obtained trademark *registration* in order to show that it had a protectable trademark. But during trial, AGE successfully sought to have evidence of Overlap’s federal and state trademark registrations excluded from evidence as irrelevant to the common law claim. *See* TR 105-06. AGE may not now claim that a trademark registration was necessary to show that Overlap obtained a common law trademark. And in any event, the case law is clear that a showing of trademark registration is not required to show use of a common law trademark. *Bass Buster*, 420 F.Supp. at 157; *First Bank*, 84 F.3d at 1044; *Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc.*, 758 F.Supp. 512, 527 (Mo.

App. E.D. 1991) (“a plaintiff has a cause of action for unfair competition regardless of whether or not a trademark has been registered”).

Finally, AGE’s argument regarding the classes of trademark registration is a red herring. There are no classes of common law trademarks.²

2. Overlap Did Not Abandon its Trademark.

AGE also argues that Overlap abandoned its trademark rights by failing to adequately police its mark. There is no record evidence, however, to suggest that Overlap voluntarily or intentionally waived its trademark rights or failed to police its trademark. For this reason alone, AGE’s argument fails. Nor do AGE’s cases support its argument. In *Health Care & Retirement Corp. of America v. Heartland Home Care, Inc.*, 396 F. Supp. 2d 1262, 1267 (D. Kan. 2005), the court rejected the defendant’s waiver argument noting that a showing of intent to waive a right is a critical element of waiver. Similarly, in *Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, LP*, No. 00-2137 JRTFLN, 2002 WL 1763999, at *10 (D. Minn. 2002) the court rejected the

² But even under federal law, any difference between the plaintiff’s registered class of goods and the infringer’s class of goods does not prohibit a suit for trademark infringement. See 15 U.S.C. § 1112 (“The Director may establish a classification of goods and services, for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant's or registrant's rights.”); *In re Knapp-Monarch Company*, 296 F.2d 230, 231 (C.C.P.A. 1961) (trademark office classification of goods is immaterial in determining likelihood of confusion).

defendant's waiver argument finding no record evidence of waiver. Here, AGE presented no facts to support a finding of waiver. On the contrary, the record supports a finding that Overlap did not waive its trademark rights. TR 533-535 (Kevin Fryer testifying that he contacted counsel and sent a cease and desist letter as soon as he suspected AGE was misusing the Overlap product); Ex. 21 (cease and desist letter telling AGE to stop using the Overlap product). Indeed, AGE's argument is directly contradicted by its own conflicting suggestion that Overlap aggressively sued several of its licensees. Even the marketing materials cited by AGE at trial treat Overlap as trademarked materials and contain the symbol ® after the term Overlap. In the absence of evidence supporting a finding of waiver, and with a record full of evidence contradicting AGE's waiver argument, directed verdict cannot stand on AGE's abandonment theory.

3. Overlap's Trademark Is Strong.

Notwithstanding record evidence sufficient to support a finding that Overlap's mark is "suggestive" (*See* Overlap's Cross Appeal Brief at 87-90), AGE argues that the Overlap mark is "descriptive." Even if AGE were correct, AGE acknowledges that Overlap's mark is nevertheless entitled to protection if Overlap can show that its mark has acquired "secondary meaning." *See* AGE's Opposition Brief at 35-36; *Better Bus. Bureau of Kansas City Adver. Club v. Chappell*, 307 S.W.2d 510, 515 (Mo. App. W.D. 1957). Contrary to AGE's suggestion that Overlap has no evidence of secondary meaning, Overlap demonstrated at trial that its mark acquired secondary meaning among financial professionals, who were Overlap's target market. *See* Trial Ex. 254 Greg

Ellston Testimony at 6 (SA 373) (Overlap program “was widely known in the industry”); TR 474 (Overlap was “well recognized in the mutual fund community”); TR 507 (Overlap was “a well known name and product”).

4. Overlap Established Likelihood of Confusion in the Relevant Market.

Overlap went beyond demonstrating a mere likelihood of confusion when it offered direct evidence of actual confusion at trial. *See* Trial Ex. 251 Matt Embleton at 15-16 (SA 353-354) (looking at an AGE “overlap report” and stating “I’m not sure where the overlap even came from . . . It’s not sourced . . . I can’t tell”). Because Overlap was able to demonstrate actual confusion at trial, it satisfied the likelihood of confusion standard. “While actual confusion is not essential . . . it is positive proof of the existence of a substantial likelihood of confusion.” *Home Builders Ass’n of Greater St. Louis v. L & L Exhibition Management, Inc.*, 1999 WL 34803788, *12 (E.D. Mo. 1999) (citations omitted); *Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, LP*, No. 00-2137 JRTFLN, 2002 WL 1763999, at *9 (D. Minn. 2002) (showing of actual confusion defeats summary judgment and is “positive proof” of likelihood of confusion”).

In any event, Overlap also elicited evidence at trial of a likelihood of confusion among consumers. AGE provided Overlap’s proprietary software analyses to unlicensed brokers labeled as “Overlap Analysis,” without attributing the data to Overlap or to the Overlap software. *See* Trial Exs. 1000-1099 (SA 497-799), 1200-1352 (SA 800-1275). As AGE’s own witness confirmed, the widely disseminated documents are confusing on their face. They do not suggest where the analyses came from or whether Overlap

sponsored the analyses. A jury could have easily concluded that AGE financial consultants were misled and confused – as was Mr. Embleton – with respect to the source of the analysis. Even if consumers somehow correctly understood the analyses came from Overlap Inc., consumers were confused regarding Overlap’s sponsorship and approval of AGE’s use of the Overlap software.

5. Each of AGE’s Miscellaneous Attacks on Overlap’s Unfair Competition Claim Fails.

a. The Likelihood of Confusion Test Focuses on Financial Professionals, Not the General Public.

AGE mistakenly suggests that Overlap must demonstrate confusion among the public-at-large before it can establish likelihood of confusion. But the relevant consumers are the potential purchasers of a product – here, financial professionals. *Clinique Laboratories, Inc. v. Dep Corp.*, 945 F. Supp. 547, 552, 558 (S.D.N.Y. 1996) (“the correct test is whether a consumer who is somewhat familiar with the plaintiff’s mark would likely be confused” and noting the test is in regards to the “consuming public”); *Toro Corp. v. R&R Products, Inc.*, 787 F.2d 1208, 1214 (9th Cir. 1986) (noting test is among the “consuming public” as opposed to the public-at-large). The “consuming public” for the Overlap software is different than the “consuming public” for clothing or soft drinks or toilet tissues. The record demonstrates that financial services professionals were the focus of Overlap’s marketing efforts. TR 470-71, 474; TR 505-05 (Overlap marketed “primarily to individual financial consultants as well as broker-dealers and mutual fund companies”). As a result, in evaluating consumer confusion, the

relevant focus is on financial professionals and not the general public. Since the record demonstrates confusion among financial professionals, AGE's public confusion argument fails. *See* Part II(c)(4) above.

b. AGE's Internal Use Does Not Shield It From Liability.

AGE also argues that its use of Overlap's trademark is defensible because it only distributed Overlap analyses to its own financial consultants. The trial court rejected this argument below. *See* November 26, 2007 Order Denying Summary Judgment, LF 996; AGE's Reply in Support of its Second Motion for Summary Judgment at LF 910-13. AGE's argument suggests that a purchaser of a product may make thousands of copies and disseminate it to whomever it wants so long as the copies of the product are disseminated to one's own employees. This is no different from allowing a large corporation to purchase a single can of Coca-Cola and then reproduce the Coca-Cola product and distribute for free it to all its employees without violating unfair competition and trademark laws. Such a myopic interpretation of unfair competition law fails. AGE's circumvention of the licensing process deprived Overlap of the opportunity to license its product to the thousands of AGE financial consultants nationwide. AGE's financial consultants across the United States were precisely Overlap's target consumers.

c. The Fact That AGE and Overlap are Not Direct Competitors Does Not Preclude Liability.

AGE fails to cite a single case in support of its argument that Overlap must be a direct competitor of AGE in order to sue for unfair competition. The case law is crystal clear that a competitive relationship is not required under Missouri unfair competition

law. *Missouri Federation of the Blind v. National Federation of the Blind of Missouri, Inc.*, 505 S.W.2d 1, 5 (Mo. App. W.D. 1973); *Adbar*, 2008 WL 68858, at *12; *Team Tires Plus, Ltd. v. Tires Plus, Inc.*, 394 F.3d 831, 833-35 (10th Cir. 2005) (noting the “basic premise-that a trademark provides protection only when the defendant uses the mark on directly competing goods-is no longer good law. Although this notion survived into the early 1900s, it has long since been superceded.”).

In any event, it was AGE’s unfair competition that directly frustrated Overlap’s ability to sell its product to financial consultants working for AGE. That is, AGE’s brokers who had access to and received as many free Overlap reports as they wanted from AGE would have no interest in purchasing their own Overlap license. As a result, it was AGE’s conduct that directly diverted profits away from Overlap and into the pockets of AGE.

d. AGE’s Tortured Invocation of the “Fair Use” Defense Fails.

AGE’s so-called nominative fair use defense is a defense to a federal trademark claim, not a common law unfair competition claim. AGE cites no authority for its application under these circumstances or in a state unfair competition case. In any event, AGE did not present evidence to support its burden of proof of this defense.

Nominative fair use is the use of another’s trademark for *descriptive* purposes. A nominative fair use “does not imply sponsorship or endorsement of the product because the mark is used only to describe the thing, rather than to identify its source.” *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 800 n.7 (9th Cir. 2002) (citing *New Kids on the*

Block v. News America Publishing, Inc., 971 F.2d 302, 306 (9th Cir. 1992)). To be eligible for the defense, the “user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.” *New Kids*, 971 F.2d at 308. This requirement is fatal to AGE’s defense because Overlap demonstrated at trial that there was confusion about the source or sponsorship of the Overlap reports. Because AGE’s use of Overlap in its reports, at best, suggests Overlap, Inc.’s sponsorship, the nominative fair use doctrine is inapplicable.

Had AGE performed its own common stock holdings analysis and stated in marketing that its analysis was “better than Overlap,” that would be a permissible fair use of Overlap’s trademark. But here, AGE went beyond merely describing, comparing or contrasting Overlap with its own product – it passed Overlap off as its own.

Finally, because AGE used more than just the term “Overlap,” but also included Overlap proprietary data and analyses in its reports, AGE used more than was reasonable necessary to simply identify or describe Overlap. The nominative fair use defense also fails for this independent reason. *See New Kids*, 971 F.2d at 308 (“only so much of the mark or marks may be used as is reasonably necessary to identify the product”).

e. Overlap’s Licensing Efforts Did Not Result in So-Called “Naked Licensing.”

AGE rehashes its argument that Overlap abandoned its trademark in arguing that Overlap’s licensing was “naked.” For the reasons stated above in Part II(C)(2), this argument fails. Further, AGE waived its naked licensing argument because it did not assert it as an affirmative defense and waited to raise it for the first time during trial. *See*

AGE's Answer to Amended Petition, LF at 112-14. In any event, the facts here bear no resemblance to the facts in the "naked licensing" and "uncontrolled licensing" cases. This defense applies when "a trademark owner has licensed someone else to make or manufacture its products and then fails to control the quality of the products made by the licensee." *Heaton Distributing Co. v. Union Tank Car Co.*, 387 F.2d 477, 485 (8th Cir. 1967). Here, the record is void of any evidence that Overlap has permitted AGE or anyone else to make or manufacture Overlap reports or use its trademark except in strict compliance with the terms of the Overlap software license. Indeed, the record demonstrates that Overlap diligently protected its rights by, among other things, issuing a cease-and-desist letter at the first sign of a license violation and initiating this litigation. TR 533-535; Ex. 21.

D. OVERLAP'S UNFAIR COMPETITION CLAIM IS NOT PREEMPTED.

1. Overlap's Trademark Theory is Not Preempted.

Despite its arguments on appeal, AGE admitted at trial that Overlap's trademark theory of unfair competition is not preempted. AGE's counsel stated at trial:

we are not saying that they can't make the unfair competition claim; that it's preempted. *We're not claiming it's preempted.*

TR at 106 (emphasis added). Since AGE expressly admitted the trademark theory is not preempted at trial, AGE is precluded from making that argument now. *See, e.g., Besand v. Gibbar*, 982 S.W.2d 808, 810 (Mo. App. E.D. 1998) (noting that a party is estopped from taking contradictory legal positions and benefiting from its later change in position).

Further, the case law is clear that Overlap's trademark theory is not preempted. *See, e.g., Bass Buster*, 420 F.Supp. at 156 ("Although federal law applies to the federal trademark infringement and unfair competition claims, state law applies to plaintiff's common law claims"); *Adbar*, 2008 WL 68858 (applying Missouri common law and not federal law to trademark theory of unfair competition claim); *Gilbert/Robinson, Inc.*, 758 F.Supp. at 527 ("A plaintiff's failure to establish a statutory right to the trademark does not affect its common law claim of unfair competition.") (inner citation omitted); *BP Chemicals Limited v. Jiangsu Sopo Corp.*, 429 F. Supp. 2d 1179, 1186-89 (E.D. Mo. 2006) (noting there is a difference between a federal Lanham Act claims and state unfair competition claims); *Golden Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (ruling that federal trademark law did not preempt similar state law because the state law, although providing greater protection than federal law, promoted the same public policy and was not conflict with federal law).

Defendant cites two inapposite cases in support of its argument. First, Defendant cites *Sargent & Co. v. Welso Feed Mfg. Co.*, 195 F.2d 929, 935 (8th Cir. 1952). In *Sargent*, the court did not say that common law unfair competition laws are preempted by the federal law, but rather that the plaintiff could not use a specific Iowa statute in place of the federal statute for a federal trademark claim. *Id.* In *Goddard, Inc. v. Henry's Foods, Inc.*, 291 F. Supp. 2d 1021, 1035 (D. Minn. 2003), the plaintiff merely "cut and pasted" its federal trademark claim into a Minnesota unfair competition claim. *Id.* The state law claim was a carbon copy of the plaintiff's federal trademark claim. *Id.* The court ruled that the superfluous recycled claim should be dismissed. *Id.* But here, where

Overlap brought no federal claim, and where it did not plead or rely on the elements of a federal trademark claim (but rather the elements of an unfair competition claim), there is no safe harbor from Missouri's unfair competition law.

2. Overlap's Misappropriation Theory is Not Preempted.

Instead of conflicting with federal law, the Missouri law is coextensive with it – providing broad remedies for victims of unscrupulous business practices. *Words & Data, Inc. v. GTE Communications Services, Inc.*, 765 F. Supp. 570, 579 (W.D. Mo. 1991) (“Missouri common law regarding unfair competition is coextensive with federal law”). Claims that are qualitatively *different* from copyright claims are not preempted. *See, e.g., National Car Rental Sys., Inc. v. Computer Assoc. Int'l, Inc.*, 991 F.2d 426, 428-29 (8th Cir. 1993).³ To pursue a federal copyright claim, a plaintiff must prove: (1) ownership of a valid copyright; and (2) copying of original elements. *See Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006). At trial, neither *ownership* of a copyright nor *copying* were part of Overlap's claims. This alone demonstrates that the Missouri claim is fundamentally different from a federal copyright claim. Instead, it was AGE's unfair

³ Congress specifically reserved room for state law claims that go beyond mere copyright infringement claims in enacting § 301 of the Copyright Act. Section 301 states that “Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright.” 17 U.S.C. § 301(b).

use of and profiteering from the Overlap proprietary data that resulted in an unfair business practice. Overlap's misappropriation theory, therefore, is qualitatively different from a copyright theory because the misappropriation claim requires a showing of: (1) unfairness; and (2) use of the misappropriated materials in furtherance of AGE's own business purposes. Thus, Copyright law does not preempt Overlap's unfair competition claim. *See, e.g., Home Builders Ass'n of Greater St. Louis v. L&L Exhibition Management, Inc.*, 226 F.3d 944, 947 (8th Cir. 2000) (noting potential differences between federal unfair competition laws and state laws such as common law unfair competition claims requiring a showing of bad faith while the federal unfair competition statute does not); *Stewart Title of California, Inc. v. Fidelity Nat. Title Co.*, 279 Fed.Appx. 473, 475-476, 2008 WL 2094617, *1 (9th Cir. May 19, 2008) (finding no preemption because the plaintiff's state law misappropriation claim "includes an 'extra element' of improper *use*, thereby making the rights protected qualitatively different from those afforded in the Copyright Act."); *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089-90 (9th Cir. 2005) (concluding that "[a] state law tort claim concerning the unauthorized use of the software's end-product is not within the rights protected by the federal Copyright Act[.]"). Because copyright law does not have elements of unfairness or use, Overlap's unfair competition claim is qualitatively different from a copyright claim and is not preempted.⁴

⁴ AGE also claims that this case is analogous to *Fred Wehrenberg Circuit of Theaters, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044 (E.D. Mo. 1999). *Fred*

E. OVERLAP CAME FORWARD WITH EVIDENCE OF DAMAGES.

Overlap is entitled to recover the portion of AGE's profits that were derived from its wrongful use of Overlap. *See, e.g., National Broadcasting Co. v. Nance*, 506 S.W.2d 483, 485 (Mo. Ct. App. 1974) (ordering accounting of profits in a common law unfair competition case based on misappropriation); *Doe v. McFarlane*, 207 S.W.3d 52, 74-75 (Mo. 2006) (affirming jury instruction awarding the "unjust pecuniary gain of the defendant" in a case involving the unfair commercial use of a name without consent). This is because Missouri unfair competition law "gives the crop to the sower and not the

Wehrenberg is in no way analogous. In that case, the defendant copied information about the plaintiff's movie times that had been widely disseminated throughout the public domain. The court held that the defendant's copying of public domain information in no way harmed the plaintiff – in fact, the conduct in question promoted the plaintiff's movies and likely helped the plaintiff to sell additional tickets. *Id.* at 1050. Further, the court observed that the plaintiff had agreed that its claims were covered by, and equivalent to, federal copyright law. *Id.* at 1049.

AGE also makes the odd argument that because Overlap brought copyright claims in two different cases, that this case should be preempted. Those cases, however, involved different fact patterns and different legal claims. Indeed, Overlap affirmatively pleaded federal copyright claims in both cases based on their unique circumstances. Overlap, however, never brought a copyright claim in this case.

trespasser.” *Nance*, 506 S.W.2d at 484. An award of profits in unfair competition cases has been well-recognized for decades. *See, e.g., Hamilton-Brown Shoe Company v. Wolf Bros. & Co.*, 240 U.S. 251 (1916). Further, it is well-settled that the burden falls upon the defendant to show what percentage of its profits were not derived from its alleged unfair competition. *Id.* at 260-62; *Bass Buster* at 161 (“the burden is on the defendants to prove that liability should not be imposed for all profits”).

The basis of AGE’s argument is that disgorgement of profits is unavailable because AGE sold mutual funds and Overlap sold software licenses. Although the parties are not direct competitors, AGE made Overlap’s product available at no cost to unlicensed brokers in order to substantially boost its own sales. AGE profited from its use of Overlap and at the same time directly frustrated Overlap’s attempts to sell Overlap licenses to its potential customers – individual AGE financial consultants. Finally, in any event, Missouri law is clear that parties need not be in a competitive relationship in order for a plaintiff to recover under an unfair competition theory. *See* above, Part II(C)(5)(c).

III. THE TRIAL COURT ERRED IN DENYING PREJUDGMENT INTEREST TO OVERLAP.

AGE argues that Overlap did not comply with the requirements of Mo. Rev. Stat. § 408.040.2. Overlap agrees it did not follow the demand procedure of § 408.040.2 – because it did not have to. While the general rule requires a tort plaintiff to follow the procedures of § 408.040.2, Missouri courts have unequivocally stated that where the tortfeasor retains a pecuniary benefit as a result of its conduct, the demand procedure of § 408.040.2 is not required. *See* Overlap’s Cross Appeal Brief at 94-95. Here, AGE

retained millions of dollars in licensing fees as a direct result of its conduct and, therefore, § 408.020 applies to Overlap's tort claims in addition to its contract claims.

In arguing that § 408.020 does not apply to cases involving a pecuniary benefit to the tortfeasor, AGE relies on *Sequa Corp. v. Cooper*, 128 S.W.3d 69, 77 (Mo. App. E.D. 2003). AGE argues that *Sequa* “explicitly rejected” the pecuniary benefit exception. This is simply wrong. The *Sequa* court did not even consider, address or mention the pecuniary benefit exception. *Id.* And three years after *Sequa*, that same court expressly upheld the “pecuniary benefit” exception to § 408.040. *See Rois v. H.C. Sharp Co.*, 203 S.W.3d 761, 764-65 (Mo. App. E.D. 2006). *Rois* directly rejected the same arguments that AGE makes here and distinguished AGE's other cited case of *Union Pacific R.R. Co. v. Carrier Consultants, Inc.*, 973 S.W.2d 500 (Mo. App. E.D. 1998). Indeed, *Rois* pointed out that *Union Pacific* recognized the pecuniary benefit exception, but simply found it inapplicable under the specific circumstances of that case. *Rois*, 203 S.W.3d at 764-65 (noting that in *Union Pacific* there was “no allegation that the defendant's tortious conduct conferred a benefit on the defendant”). *Rois* reaffirmed the pecuniary benefit exception to § 408.040 stating:

This Court recognized the general rule that prejudgment interest is not recoverable in a tort action. However, we acknowledged, “But, like all general rules of law, this rule has exceptions. Where the defendant's tortious conduct confers a benefit upon the defendant, prejudgment interest may be recovered by the plaintiff on his [or her] claim.”

Rois, 203 S.W.3d at 764-65 (citing *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. E.D. 1990)).

Failing to acknowledge the controlling case law, AGE also argues, without authority, that a 1994 revision to § 408.040 somehow altered the pecuniary benefit exception. But the 2006 case of *Rois* makes clear that the pecuniary benefit exception is alive and well.

A. OVERLAP’S DAMAGES ARE LIQUIDATED BECAUSE THEY ARE READILY ASCERTAINABLE.

AGE ignores the controlling Missouri Supreme Court case law that instructs courts to liberally approach the question of whether an amount is liquidated. *See Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 6-8 (Mo. banc 1987) (noting prejudgment interest should be liberally applied even in cases where the amount is not entirely liquidated). *See also Commercial Union Assurance Co. of Australia, Ltd., Melbourne v. Hartford Fire Ins. Co.*, 86 F. Supp. 2d 921, 932 (E.D. Mo. 2000) (noting that “exact calculation is not necessary for a claim to be liquidated”); *St. Joseph Light & Power Co. v. Zurich Ins. Co.*, 698 F.2d 1351, 1355-56 (8th Cir. 1983) (“Under Missouri law, a defendant’s denial of liability or challenge to the amount claimed on a contract will not alter the fact that the amount claimed by the plaintiff is sufficiently ascertainable to require the award of prejudgment interest.”); *Lundstrom v. Flavan*, 965 S.W.2d 861, 866 (Mo. App. E.D. 1998) (noting that a dispute regarding liability does not render a claim unliquidated); *Holtmeier v. Dayani*, 862 S.W.2d 391, 406 (Mo. App. E.D. 1993) (noting that where interest is merely a matter of mathematical computation it can be easily

ascertained by the court without additional pleading requirements); *Weinberg v. Safeco Ins. Co. of Illinois*, 913 S.W.2d 59, 62 (Mo. App. E.D. 1995) (noting that in determining whether pre-judgment interest is available, “[a] court may consider equitable principles of fairness and justice . . .”).

Importantly, “a defendant’s denial of liability or of the amount claimed does not alter the fact that the amount claimed can be sufficiently ascertainable to require the award of prejudgment interest.” *Commercial Union*, 86 F. Supp. 2d at 932 (citing *St. Joseph Light*, 698 F.2d at 1356). AGE’s argument is that because Overlap did not know the precise amount of damages owed, the damages amount is unliquidated. This cannot be the case because Overlap proved at trial that AGE had affirmatively concealed the extent of its usage from Overlap. AGE knew the widespread extent of its usage, and therefore, the exact amount of damages was knowable from the outset of the litigation. The fact that AGE concealed information from Overlap does not immunize it from prejudgment interest. Any inability to arrive at a specific damages amount was a direct result of AGE’s own concealment of the facts. But once the jury determined all AGE financial consultants had access to the Overlap data such that they should all pay for a license, the damages calculation was readily calculable and liquidated. Prejudgment interest is merited pursuant to Missouri’s broad interpretation of liquidated damages and because fairness, equity and common sense so dictate.

In order to avoid the fact that Overlap’s damages are liquidated, AGE characterizes Overlap’s damages as “lost profits.” Overlap never sought “lost profits,” and never characterized its damages as “lost profits.” Instead, Overlap consistently stated

that the damages for its misrepresentation and contract claims were the product of multiplying (1) the amount of people to whom AGE made the Overlap data available, and (2) the price of a license for each such individual. This is a readily calculable figure. While AGE contested the scope and extent of its liability, Overlap’s damages formula never wavered. AGE’s attempt to convert a case with a simple damages formula into a complex and amorphous “lost profits” case should be rejected.⁵

B. OVERLAP MADE AN ADEQUATE DEMAND.

Overlap’s filing of the Petition served as a “demand” triggering the prejudgment interest period pursuant to § 408.020. *See Rois*, 203 S.W.3d at 767 (“the filing of the suit itself is sufficient to constitute a demand”); *Call v. Heard*, 925 S.W.2d 840, 854 (Mo. banc. 1996) (ruling that “an open-ended prayer of relief will suffice” to make prejudgment interest available); *Lundstrom* 965 S.W.2d at 866 (same). AGE argues the Petition cannot serve as a demand because it did not set out a specific dollar amount due and owing to Overlap. Such specificity is not required. The Court of Appeals has stated that:

In the absence of a demand for payment prior to filing a lawsuit, the filing of the suit itself is sufficient to constitute a demand. Further, *the petition need not make a specific*

⁵ Similarly, AGE’s argument that it should receive a volume discount after being found liable should be rejected. A tortfeasor who uses a product without paying for it and then is caught, does not get a retroactive volume discount – the jury agreed.

request for prejudgment interest. This Court has held that a petition which prays that the court grant ‘such other relief as may be proper’ is sufficient.”

Rois, 203 S.W.3d at 767 (emphasis added and internal quotations omitted). Further, it was AGE’s own concealment that made it impossible for Overlap to know the precise amount that AGE owed to Overlap. Under these circumstances, specificity of a demand is not required. See *Chouteau Auto Mart, Inc. v. First Bank of Missouri*, 148 S.W.3d 17, 27-28 (Mo. App. W.D. 2004) (ruling that when the information about the specific amount of damages was in possession of the defendant a specific demand was not required); *Vogel*, 801 S.W.2d at 757-58 (ruling that although the damages were unknown at the time of the demand, they could be readily ascertainable *once liability was established*). Because Overlap made a sufficient demand and the amount in issue is sufficiently liquidated, the trial court should award prejudgment interest in the event the case is remanded for a new trial.

IV. THE TRIAL COURT IMPROPERLY EXCLUDED TESTIMONY ABOUT AGE’S OTHER LICENSE VIOLATIONS.

Plaintiff sought to present testimony from a former AGE information technology manager that AGE had violated other software licenses. AGE argues this evidence was inadmissible because it was not substantially similar to the license violation at issue here. The purpose of the testimony, however, is to show AGE’s disregard for the rights of licensors and AGE’s proclivity to approach licensing compliance in bad faith. Evidence

that AGE did not attempt to comply with licensure helps demonstrate AGE's reckless indifference to the rights of others.

CONCLUSION

In the event this Court orders a new trial, then Overlap's cross appeal should be sustained.

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CERTIFICATION PURSUANT TO MO. R. CIV. P. 84.06(C)

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned counsel hereby certifies as follows: (1) This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (2) this brief was prepared using Microsoft Word as the word processing program. The word count feature of Microsoft Word was used to perform the word count. By use of that feature, the word count for Substitute Reply Brief in Support of Plaintiff/Respondent Overlap Inc.'s Contingent Cross Appeal is 6,247 words, excluding the cover page, certificates and signature block.

Attorney for Respondent

CERTIFICATE OF CD-ROM

Pursuant to Mo. R. Civ. P. 84.06(g), the undersigned counsel certifies that the accompanying CD-ROM contains one copy of the Substitute Reply Brief in Support of Plaintiff/Respondent Overlap Inc.'s Contingent Cross Appeal. Counsel further certifies that this CD-ROM has been scanned for viruses and is free of viruses.

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the Substitute Reply Brief in Support of Plaintiff/Respondent Overlap Inc.'s Contingent Cross Appeal in both paper copy and on a CD-ROM, which were sent via Federal Express for filing this date with the Clerk of the Missouri Supreme Court, have been served via Federal Express, postage prepaid, on the 13th day of January, 2010, to the following:

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