

C26TCAPE Excerpt

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC,

Plaintiff,

v.

12 CV 95 (RJS)

REDIGI INC.,

Defendant.

-----x

New York, N.Y.
February 6, 2012
3:30 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN
Attorneys for Plaintiff
BY: RICHARD MANDEL
JONATHAN KING
RAY BECKERMAN, PC
Attorneys for Defendant
BY: RAY BECKERMAN
M. TY ROGERS

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1 THE COURT: I think I'm prepared to rule. We have had
2 almost a couple of hours of argument.

3 I want to thank the parties for their papers and also
4 for the argument. It was very helpful. Obviously a lot of
5 time and preparation went into it, and it's always appreciated
6 by me. I rely on lawyers who educate me and help me get
7 focused on the issues, so I thank those who spoke and those who
8 were involved in the preparation, and that might be more than
9 the lawyers at the tables.

10 I think there's no doubt what the standard is here.
11 The standard, which I think each of you has quoted to me, is
12 the eBay v. MercExchange case from the Supreme Court. After
13 that case the Second Circuit sort of revised its own standard
14 but said there's really no difference between that standard and
15 the Supreme Court standard, and I think that's true.

16 The key issues really are irreparable harm and
17 likelihood of success on the merits, or short of that,
18 whether -- this was the point made in plaintiff's papers --
19 even if there's not likelihood of success on the merits, that
20 there is a close or a serious question on a balance of
21 hardships that tips in favor of the moving party. And then the
22 other issues that we talked about include the balance of
23 equities and the public interest.

24 In this case, I think the lack of irreparable harm is
25 one that really is the issue that causes me to deny the motion.

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1 It seems to me that money damages should be able to take care
2 of all of this. The Second Circuit in Salinger made very clear
3 what the standard is, and the fact is that this is an
4 extraordinary remedy, and so a Court will have to consider
5 whether or not monetary damages are inadequate to compensate
6 for the injury alleged.

7 In assessing that, the Court has to look to whether
8 market confusion exists or whether there's a prospect of
9 difficulty in proving the loss of sales due to infringement. I
10 think with respect to market confusion, I really don't think
11 that the market confusion being argued by plaintiffs here is
12 what is at the heart of demonstrating irreparable harm. The
13 fact that defendants have espoused a legal theory or defense
14 both in their papers to the Court and on their Web site and in
15 public pronouncements doesn't really equate to the kind of
16 market confusion that the Second Circuit was talking about in
17 Salinger.

18 With respect to the difficult prospect of plaintiff
19 proving loss of sales due to infringement, I think the
20 defendant clearly argues that it keeps careful records, and
21 that if it were found to be infringing on plaintiff's
22 copyrights, there would be a record from which to calculate
23 damages. I have seen nothing to refute that, and I'm persuaded
24 that's the case. So I think there has not been a showing of
25 irreparable harm that would merit the extraordinary relief

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1 sought here.

2 I think likelihood of success on the merits is
3 something that plaintiffs have demonstrated. I should bear in
4 mind or at least repeat what the lawyers already know, which is
5 that that doesn't mean that I'm finding that the plaintiffs
6 would win in this case, it's just that they have demonstrated
7 that there are arguments that on their face look to be
8 compelling or potentially persuasive arguments. They have
9 certainly done a good job of articulating those based on the
10 statute, which I think covers that element.

11 The balance of equities I think is kind of a push. I
12 think each side has interests that would be affected by the
13 ruling on a preliminary injunction, and each interest is a
14 significant one. By virtue of the size of the defendant, if
15 the Court were to begin a preliminary injunction, that would
16 have a devastating impact on the company. By the same token,
17 the plaintiffs have an interest that its copyrights are
18 protected and enforced. So I think each has a strong interest
19 in the preliminary injunction that's being sought.

20 And as to the public interest, I think obviously the
21 public has an interest in seeing copyright law enforced. On
22 the other hand, that copyright law includes recognitions of
23 things like legitimate secondary markets and the ability of
24 owners to resell their items.

25 So I think we've had a preview of what the arguments

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1 are on those fronts, and I think ultimately that's where this
2 case will be resolved. I'm not resolving it today. I'm not
3 going to grant the preliminary injunction. As I said, there
4 hasn't been irreparable harm established.

5 But I do think with limited discovery we should be
6 able to get this teed up for summary judgment or a trial
7 perhaps even on stipulated facts if the parties can get there,
8 then we should try to resolve this as quickly as possible.
9 There's no reason why the courts have to be slow and have to be
10 cumbersome or costly, for that matter. If it is the case that
11 parties really are in agreement about most of the facts that
12 are pertinent to this case, I think stipulating to those facts,
13 identifying where there may be some disputes factually, that
14 should then be the focus of discovery and will be an efficient
15 use of time.

16 So what I will do -- well, let me move to the second
17 contemplated motion, the motion for summary judgment. I think
18 that's premature at this point because it's not clear to me
19 that there are wholly undisputed facts.

20 Now the parties seem to push back on me a little for
21 that one to suggest there are maybe fewer disputed facts than I
22 imagine. If that's the case, let's get it teed up quickly, but
23 for now, I think it would be premature to make that motion.
24 But I say that without prejudice to either side coming back to
25 me soon with pre-motion letters saying now we're ready to go,

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1 and explaining what the disputes left are.

2 MR. BECKERMAN: For the record, we withdraw.

3 THE COURT: The letter? You don't have to do that.

4 There's no offense taken. I don't mean to suggest that.

5 That's just the way I see it.

6 So what I was going to propose is that I give the
7 parties maybe a week or ten days to confer and get back to me
8 with a discovery schedule that should track in general terms my
9 contemplated case management plan. It's on the Web site, take
10 a look. And that's not designed to be set in stone, it's not a
11 one-size-fits-all approach, it's the generally accepted version
12 that I use. If there are things about this case that are
13 unique and that should require a tailoring of the case
14 management plan, I'm open to that. I mean I think courts have
15 to be practical and responsive and ultimately concerned about
16 the efficient resolution of disputes.

17 So take a look at it, and then if there are things
18 that you agree should be tweaked, let me know that, and if you
19 think there are things about which you disagree, where one of
20 you thinks that a tweaking will be in order and another thinks
21 that tweaking would be counter productive, set that out in a
22 letter that explains your positions.

23 But do you think ten days is enough time?

24 MR. MANDEL: Yes.

25 MR. BECKERMAN: Your Honor, Ty and I have three days

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1 of arbitration during the next five or six days, so I would
2 appreciate if we could possibly have a little longer time in
3 which to do that.

4 THE COURT: I don't think it will take too long. Do
5 take a look at my template. It's basically saying when you're
6 going to do interrogatories and document requests, when you're
7 going to do depositions, when you're going to wrap up fact
8 discovery, and whether you'll have experts and when you'll
9 finish that up. So take a look at it. I don't think it's too
10 onerous. It will require a little bit of communication between
11 the parties. By design it requires that. So if you're
12 completely engaged in something else that might make it hard
13 for you, does two weeks make a difference?

14 MR. MANDEL: That's fine, your Honor.

15 THE COURT: Two weeks from today is the 20th, that's a
16 Court holiday. But what I'm asking you to do is send me, via
17 email to my chamber's email address, the case management plan,
18 proposed case management plan, and any correspondence that
19 requires me to resolve any disputes. So I'll be here, and what
20 you send me through email I will get in real-time. So that's
21 fine, so we don't need to worry about the Court holiday.

22 Is there anything else we should cover today?

23 MR. MANDEL: I don't think so, your Honor.

24 THE COURT: Mr. Beckerman?

25 MR. BECKERMAN: No, thank you, your Honor.

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1 THE COURT: Let me again thank you. I found it very
2 interesting and very well argued, so maybe that's why I kept
3 you all as long as I did. I like to see good lawyers plying
4 their trade. I will issue a very short order that just
5 memorializes the result here, but mostly just rely on what I
6 said on the record.

7 If you need a copy of the transcript, you can take
8 that up with the court reporter now or later through Web site.

9 MR. MANDEL: Thank you, your Honor.

10 MR. BECKERMAN: Thank you, your Honor.

11 THE COURT: Thanks very much, have a good day.

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