

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

No. C 22-07611 WHA

v.

CRIBL, INC.,

Defendant.

**ORDER RE REMAINING
CLAIMS AND DEFENSES,
AND INJUNCTIVE RELIEF**

This order addresses the claims and affirmative defenses preserved by the parties and tried to the bench, as well as plaintiff Splunk Inc.’s motion for a permanent injunction (Dkt. Nos. 346–48).

1. AFFIRMATIVE DEFENSES.

Starting with the affirmative defenses, defendant Cribl, Inc. seeks judgment in its favor on account of equitable estoppel, unclean hands, and copyright misuse.

First, the elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the conduct is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the conduct to its injury. *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011)

(citation omitted). At a minimum, Cribl has not met its burden of proving, by clear and

1 convincing evidence, that it was ignorant of the true facts. For example, Cribl has not met its
 2 burden of proving, by clear and convincing evidence, that it believed Splunk approved of uses
 3 of Splunk Enterprise that were permitted under the TAP contract but not under the SGT
 4 contract, which governed once the TAP contract was terminated for cause in November 2021.
 5 Cribl made no meaningful attempt to justify the argument it understood Splunk’s position to be
 6 that Cribl would retain all rights it merely licensed under the TAP contract once the TAP
 7 contract was terminated. If that had been the case, why would Splunk have terminated the
 8 TAP contract to begin with? Meanwhile, Cribl has not met its burden of proving, by clear and
 9 convincing evidence, that it ever believed Splunk approved of its reverse engineering. Indeed,
 10 there is ample evidence in the trial record to support the proposition that Cribl understood
 11 Splunk did not (or would not) approve, so Cribl did not seek to “rock the boat.”

12 *Second*, unclean hands “closes the doors of a court of equity to one tainted with
 13 inequitableness or bad faith relative to the matter in which he seeks relief, however improper
 14 may have been the behavior of the defendant.” *Adler v. Fed. Republic of Nigeria*, 219 F.3d
 15 869, 876–77 (9th Cir. 2000). “Bad intent is the essence of the defense of unclean hands.”
 16 *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989). Cribl’s
 17 argument that it was terminated from the TAP program in bad faith was submitted to and
 18 rejected by the jury. Although the judge found Cribl’s argument that the TAP contract was
 19 improperly terminated because Cribl did not “become” a competitor colorable, the jury did not
 20 agree based on its response to Special Interrogatory A (Dkt. No. 327 at 3). In light of that, this
 21 order cannot reasonably find that Cribl has proven, by clear and convincing evidence, that it
 22 was terminated from the TAP program in bad faith. Nor can this order reasonably find that
 23 Cribl has proven, by clear and convincing evidence, that Splunk induced infringement and
 24 breach on account of improper termination, as Cribl now argues, seeing that the jury rejected
 25 Cribl’s argument that the termination was improper to begin with.

26 *Third*, as for copyright misuse, our court of appeals has recognized that it “forbids a
 27 copyright holder from ‘secur[ing] an exclusive right or limited monopoly not granted by the
 28 Copyright Office.’” *A. & M. Books, Inc. v. Newby, Inc.*, 220 F.3d 1004, 1026 (9th Cir. 2001)

1 (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977–79 (4th Cir. 1990)). It thereby
2 “prevents copyright holders from leveraging their limited monopoly to allow them control of
3 areas outside the monopoly.” *Ibid.* True, our court of appeals has held that copyright misuse is
4 a “defense to copyright infringement” and “not a defense to [] state law claims.” *Altera Corp.*
5 *v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir. 2005). But Splunk is incorrect when it
6 suggests this means copyright misuse cannot be used to bar enforcement of language in a
7 licensing agreement that facilitates the misuse at issue. Indeed, “most of the cases that
8 recognize the affirmative defense of copyright misuse involve unduly restrictive licensing
9 schemes.” *A & M Records*, 239 F.3d at 1027 n.8. Incorporating unduly restrictive language
10 into a licensing agreement is how copyright holders generally secure an exclusive right or
11 limited monopoly not granted by the Copyright Office. *Altera* stands for the straightforward
12 proposition that “it makes little sense to allow [a party] to proceed on an independent claim for
13 copyright misuse when there has been no allegation of copyright infringement.” 424 F.3d
14 at 1090.

15 Cribl appears to invite this district court to broadly enter judgment in its favor under the
16 doctrine of copyright misuse. That cannot be right. Note the verdict is ambiguous concerning
17 the extent to which the jury found Cribl liable for breaching the SGT contract. On the one
18 hand, it might have found that several uses of the Splunk Enterprise copyrighted software by
19 Cribl violated the “internal business purposes” use restriction in Section 9(c) and monitoring
20 for competitive purposes use restriction in Section 9(e). On the other hand, it might have
21 found that only the marketing uses did so. In any event, it cannot be said that Cribl has
22 established that it should get off scot-free because some (but not all) of its uses of Splunk
23 Enterprise were fair uses, notwithstanding all language in the SGT contract.

24 A narrower case could have been made that copyright misuse bars enforcement of
25 language in that licensing agreement to the extent it would prohibit fair use. No court of
26 appeals has yet to extend copyright misuse to language that prohibits fair use specifically,
27 though some have come close. *See, e.g., Assessment Techs. of WI, LLC v. WIREdata, Inc.*,

28 250 F.3d 640, 646 (7th Cir. 2002) (Judge Richard Allen Posner) (observing that restrictive

1 access to one’s uncopyrighted data within a copyrighted computer program by contract might
 2 constitute copyright misuse). Recognizing that Cribl did not advance the argument, however,
 3 and that any appeal will be to the Federal Circuit tasked with applying Ninth Circuit law on the
 4 issue, this would be an inappropriate vehicle to seek the Ninth Circuit’s opinion on it. What’s
 5 more, seeing that the injunction granted herein, as tailored, will afford Cribl the relief it could
 6 have attained by way of copyright misuse, it is also immaterial.

7 **2. SECTION 17200 CLAIM AND COUNTERCLAIM.**

8 Next, we turn to Splunk’s claim and Cribl’s counterclaim under Section 17200 of the
 9 California Business and Professions Code.

10 Starting with Splunk’s Section 17200 claim, at this late stage in the litigation, Splunk
 11 sought to premise a violation only on Cribl’s breach of the SGT contract. Specifically, Splunk
 12 argued that Cribl violated the unlawful and unfair prongs of Section 17200. With respect to
 13 the unlawful prong, our court of appeals has held that breaches of contract alone are
 14 insufficient to state a claim for unlawful violation of Section 17200. *See, e.g., Shroyer v. New*
 15 *Cingular Wireless Servs.*, 622 F.3d 1035, 1043–44 (9th Cir. 2010). Splunk averred that
 16 systematic breaches of contract are sufficient, but the decisions it cited are distinguishable. As
 17 a concession to the shortness of life, this order directs the reader to the reasons provided in
 18 Cribl’s brief (Cribl Section 17200 Opp. 2–7).

19 Turning to the unfair prong, as Cribl recognizes, Splunk’s motion is replete with
 20 decisions applying the traditional balancing test for claims brought by consumers. But “[t]he
 21 California Supreme Court has rejected the traditional balancing test for [Section 17200] claims
 22 between business competitors and instead requires that claims under the unfair prong be
 23 ‘tethered to some legislatively declared policy.’” *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d
 24 1074, 1104 (N.D. Cal. 2017) (Judge Lucy H. Koh) (quoting *Cel-Tech Commc’ns, Inc. v. L.A.*
 25 *Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999)). “In competitor cases, a business practice is
 26 ‘unfair’ only if it ‘threatens an incipient violation of an antitrust law, or violates the policy or
 27 spirit of one of those laws because its effects are comparable to or the same as a violation of
 28 the law, or otherwise significantly threatens or harms competition.” *Dunne v. Sun Energy L.*

1 Valley Bar Assn., 182 Cal. App. 4th 247, 254 (Cal. Ct. App. 2010) (quoting *Cel-Tech*, 973 P.2d
2 at 544). Here, however, Splunk has not sufficiently pleaded any incipient violation of antitrust
3 law, or violation of the policy or spirit of antitrust law, let alone any threat or harm to
4 competition, beyond mere generalizations. See *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136–37
5 (9th Cir. 2014). Rather, it has focused on harm to itself, a competitor (and an incumbent).
6 This is inadequate to state a claim for unfair violation of Section 17200.

7 As for Cribl’s Section 17200 counterclaim, Cribl seeks to premise an unfair violation on
8 copyright misuse. This order finds a Section 17200 claim can be premised on copyright
9 misuse where that copyright misuse violates the policy or spirit of antitrust law. See *Apple Inc.*
10 *v. Psystar Corp.*, No. C 08-03251 WHA, 2009 WL 303046, at *5 (N.D. Cal. Feb. 6, 2009). In
11 light of the issues raised above, however, and seeing that the tailored injunction granted herein
12 has the effect of affording Cribl the relief that Cribl could have attained under the
13 counterclaim, this order does not address it further.

14 Before turning to injunctive relief, this order observes that Cribl has recently sought to
15 broadly recast its affirmative defenses and counterclaim based on the judge’s recent decision in
16 another matter in which a party asserted a copyright preemption defense (*see, e.g.*, Cribl Supp.
17 Br. 1 (quoting *X Corp. v. Bright Data Ltd.*, No. C 23-03698 WHA, 2024 WL 2113859, at *13
18 (N.D. Cal. May 9, 2024)). This is too little too late. “Cribl, mindful of the Court’s request that
19 [it] be selective in choosing which of its equitable defenses and counterclaims to pursue with
20 the Court, [] narrowed its requests for determination” (Cribl Br. 1). In doing so, it deliberately
21 “preserve[d] and assert[ed] its copyright preemption defense . . . to the extent it applie[d] to
22 Splunk’s pending claim of violation of California’s [Section 17200]” (Cribl Br. 21). This order
23 declines to allow Cribl to strategically pivot and try again after the fact. That said, it observes
24 that Cribl’s general concerns will be addressed in the injunctive relief analysis below.

25 **3. INJUNCTIVE RELIEF.**

26 Finally, this order takes up Splunk’s motion for a permanent injunction, premised on the
27 jury’s findings of copyright infringement and breach of the SGT contract (not Splunk’s failed
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