

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOFTWARE FREEDOM
CONSERVANCY, INC. and ERIK
ANDERSEN,

Plaintiffs,

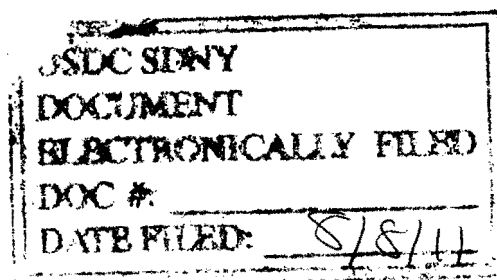
- against -

WESTINGHOUSE DIGITAL
ELECTRONICS, LLC, PHOEBE
MICRO, INC., ZYXEL
COMMUNICATIONS INC. and
WESTERN DIGITAL CORPORATION,

Defendants.
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OPINION AND ORDER

09 Civ. 10155 (SAS)



SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

On December 14, 2009, the Software Freedom Conservancy, Inc. and Erik Andersen (“plaintiffs”) brought an action against fourteen commercial electronics distributors for copyright infringement. Plaintiffs now move to hold non-party Westinghouse Digital LLC (“WD”) in contempt of this Court’s earlier injunction against Westinghouse Digital Electronics, LLC (“WDE”) pursuant to Rule 65(d) of the Federal Rules of Civil Procedure. For the reasons discussed

below, plaintiffs' motion is granted.

II. BACKGROUND

In 1999, Andersen developed software, which he contributed to an open source computer program known as BusyBox.¹ On December 14, 2009, plaintiffs filed an action for copyright infringement against fourteen companies, including WDE.² Plaintiffs claim that the defendants were distributing BusyBox without plaintiffs' permission. After filing its answer and several initial disclosures, WDE ceased responding to plaintiffs' requests for discovery.³ WDE informed this Court that it had sold all of its assets to Credit Management Association ("CMA") as part of a General Assignment for the Benefit of Creditors under California law and would not defend itself in the litigation.⁴ In April 2010,

¹ See 6/1/10 Declaration of Erik Andersen in Support of Motion for Default Judgment, or in the Alternative, Summary Judgment against Defendant Westinghouse Digital Electronics, LLC ("Andersen Decl.") ¶¶ 3-4.

² See Complaint ("Compl.") ¶ 1.

³ See *Software Freedom Conservancy, Inc. v. Best Buy Co., Inc.*, No. 09 Civ. 10155, 2010 WL 2985320, at *1 (S.D.N.Y. July 27, 2010) ("*Software Freedom I*").

⁴ See *id.* WD claims that CMA, on behalf of WDE, made the decision to cease defending the action. See Respondent Westinghouse Digital, LLC's Opposition to Plaintiffs' Motion to Find Westinghouse Digital, LLC in Contempt ("WD Mem.") at 1-2.

WD purchased from CMA the assets needed to operate WDE's business.⁵ On June 3, 2010, plaintiffs moved for a default judgment or, in the alternative, summary judgment against WDE.⁶

In July of 2010, this Court entered a default judgment against WDE for failing to meet its discovery obligations and awarded plaintiffs permanent injunctive relief as well as damages.⁷ Plaintiffs now move to hold WD, a non-party to the injunction, in contempt.⁸

III. APPLICABLE LAW

A. Contempt

“A party may be held in contempt only if it is proven by ‘clear and convincing’ evidence that the party violated a ‘clear and unambiguous’ order of

⁵ See Memorandum of Law in Support of Plaintiffs' Motion to Find Westinghouse Digital, LLC in Contempt (“Pl. Mem.”) at 3. See also WD Mem. at 9.

⁶ See *Software Freedom I*, 2010 WL 2985320, at *1.

⁷ See *id.* at *3.

⁸ In August of 2010, plaintiffs moved to join WD and CMA as defendants under Rule 25(c) as successors in interest. This Court denied both motions. See *Software Freedom Conservancy Inc. v. Best Buy Co., Inc.*, – F. Supp. 2d –, No. 09 Civ. 10155, 2011 WL 1465837, at *1 (S.D.N.Y. April 14, 2011) (“*Software Freedom II*”).

the court.”⁹ “In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate a ‘reasonable certainty’ that a violation occurred.”¹⁰

B. Enjoining a Non-Party

“As a general matter, a court may not enjoin a non-party that has not appeared before it to have its rights legally adjudicated.”¹¹ However, under Federal Rule of Civil Procedure 65(d), an injunction binds not only the parties, but also the parties’ “officers, agents, servants, employees, and attorneys” and “other persons who are in active concert or participation with [them]” as long as they “receive actual notice of it by personal service or otherwise.”¹² Under Rule 65(d),

⁹ *City of New York v. Local 28, Sheet Metal Workers’ Int’l Ass’n*, 170 F.3d 279, 282 (2d Cir. 1999) (citation omitted).

¹⁰ *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) (citation omitted).

¹¹ *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1351 (Fed. Cir. 1998) (citing *Chase Nat’l Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1943)).

¹² Fed. R. Civ. P. 56(d)(2)(A)-(C). *Accord Vacco v. Operation Rescue Nat’l*, 80 F.3d 64, 70 (2d Cir. 1996) (“Rule 65(d) codifies the well-established principle that, in exercising its equitable powers, a court cannot lawfully enjoin the world at large. In order for a court to hold a nonparty respondent in contempt of a court order, the respondent must either [1] abet the [party named in the order], or must [2] be legally identified with him.”) (quotation marks and citations omitted).

an organization and its agents may not circumvent a valid court order merely by making superficial changes in the organization's name or form, and in appropriate circumstances a court is authorized to enforce its order against a successor of the enjoined organization. Whether a new organization is the successor of an enjoined organization depends upon the facts and circumstances of the case. *The critical inquiry is whether there is a substantial continuity of identity between the two organizations.*¹³

“The party seeking enforcement of an order bears the burden of demonstrating that the persons to be held in contempt are within the scope of the injunction.”¹⁴

C. Fair Use Doctrine

Under the fair use doctrine, “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship or research is not an infringement of copyright.”¹⁵ The fair use doctrine “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁶

Whether the use of a work is “fair use” turns on

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational

¹³ *Vacco*, 80 F.3d at 70 (citations omitted) (emphasis added).

¹⁴ *Id.*

¹⁵ 17 U.S.C. § 107.

¹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1993) (quotation marks and citation omitted) (alterations in original).

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