

No. _____

In the Supreme Court of the United States

DONGXIAO YUE,

Applicant,

v.

STORAGE TECHNOLOGY CORPORATION; SUN
MICROSYSTEMS INC.; MICHAEL MELNICK; JULIE
DECECCO; MICHAEL P. ABRAMOVITZ; LISA K.
RADY; JONATHAN SCHWARTZ,

Respondents.

ON APPLICATION FOR STAY FROM THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT
(Ninth Circuit Appeal Nos. 08-15927 and 08-17034)
(District Case No. 5:07-CV-05850-JW (N.D. Cal))

**APPLICATION FOR STAY OF THE DISTRICT COURT ORDER THAT
REQUIRES APPLICANT COPYRIGHT OWNER TO PAY \$219,949.90
ATTORNEYS' FEES TO COPYRIGHT DEFENDANTS**

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To the Honorable Anthony M. Kennedy, Supreme Court Justice of the United States and Circuit Justice for the Ninth Circuit:

NOW COMES the Plaintiff-Applicant, Dongxiao Yue, a citizen of the People's Republic of China, the author of the PowerRPC software, pursuant to United States Supreme Court Rule 23 hereby applies for a Stay of the Order of the Northern District of California in the *Yue-Sun* case below that requires him to pay copyright defendants \$219,949.90 attorneys' fees under Section 505 of the U.S. Copyright Act.

Defendants made unlimited copies of Plaintiff's PowerRPC software. They concealed the software piracy and misled Plaintiff for years. The District Court dismissed Plaintiff's lawsuit and subsequently ordered Plaintiff to pay \$219,949.90 of attorneys' fees to Defendants under 17 U.S.C. §505.

Plaintiff's motion for stay of the enforcement of the fee award was denied at the District Court on November 19, 2008 and denied by the Ninth Circuit on December 5, 2008. Defendants have applied for Writ of Execution/Possession of Personal Property to levy Plaintiff's assets, primarily his family home.

The Magistrate's award of attorneys' fees is contrary to the American Rule established by this Court in 1898, and improperly rewards Defendants' attorneys for violating the District Court's Local Rules. The District Court's refusal to review that Award is contrary to the requirement of F. R. Civ. Proc. Rule 72(b)(3) that it do so. Plaintiff's right to due process has been denied at key junctures. All of the foregoing errors serve to thwart Congress's intent in enacting the Copyright Law.

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Facts on Defendants' Software Piracy

Since 1994, Plaintiff Dongxiao Yue has been developing the PowerRPC software. In July 1996, when the software was near completion, Yue founded the company Netbula, LLC to market PowerRPC. Yue always owned the copyright of the pre-Netbula PowerRPC code, with U.S. Copyright Registration No. TXu 1-576-987 (the "987 Copyright"). See Exhibit to Stay, Page A.1. Yue owned other PowerRPC copyrights via a written assignment.

In 2000, defendant StorageTek bought licenses for distributing 1000 copies of the PowerRPC runtime software. Soon afterward, StorageTek informed Yue that it had stopped distributing PowerRPC. Unknown to Yue, StorageTek incorporated PowerRPC into a product called LibAttach, and vastly exceeded the 1000-copy limit. Defendants committed the software theft knowingly. On March 2, 2004, Lisa K. Rady, the program manager of the LibAttach software, wrote in an internal email:

As you can see, we have exceeded the 1,000 distributions that we had right to with Netbula.... I think it is obvious that engineering has not and did not monitor the distributions on this product.

See A.4. In another email dated March 15, 2004, Thomas J. Murray, Director of Engineering at StorageTek, wrote:

We either need to increase the Netbula license or put a stop-ship on the LibAttach product, because we have shipped LibAttach copies up to the limit of the current Netbula license (Netbula is embedded in our LibAttach product.)

See A.5. On June 28, 2005, responding to an internal report on Sun's PowerRPC usage, Michael Melnick wrote (A.6):

The number that Holly has provided and thought it may be low causes quite a problem for you... You will

need to order additional distribution rights or we will be in breach of the agreement.

Despite its managers' full knowledge of the unauthorized copying of the PowerRPC software, Sun went on to grant its customers the right to make unlimited copies of PowerRPC, while concealing the piracy from Plaintiff. An internal Sun project management document admitted that the PowerRPC software "has been copied, uncontrolled, for several years." A.7. As a result, Sun caused unlimited distribution of PowerRPC by third parties. The First Amended Complaint gave detailed evidence, such as the email exchanges among the individual defendants

Procedural History

In December 2006, Netbula filed a copyright infringement lawsuit against Sun Microsystems and StorageTek based on U.S. copyright registration TX 6-211-063 (the "063 Copyright").

On October 22, 2007, Yue filed a *pro se* motion to intervene and join the *Netbula-Sun* action, based on his personally owned copyrights¹. A.2-3.

Discovery in *Netbula-Sun* was ongoing, and there was no dispositive motion pending at the time. On October 23, 2007, Netbula deposed Sun's 30(b)(6) witness. A.39.

On October 31, 2007, in an *ex parte* proceeding without Yue's participation, the presiding judge of the *Netbula-Sun* case, Martin J. Jenkins, vacated "Non-Party Dongxiao Yue's" motion to intervene in *Netbula-Sun*. A.8.

With his effort to join *Netbula-Sun* case rebuffed, on November 19,

¹ Defense counsel had long acknowledged that Yue owned the copyrights of part of the code. For instance, on January 16, 2008, Defense counsel wrote in a motion: "there is a common question of whether Yue or Netbula holds the copyrights in the software, and what parts are owned by each." A.12.

2007, Yue filed this copyright case against Defendants for infringing the `987 Copyright entitled “YUE PWRPC” and two other copyrights², asserting ten claims of willful copyright infringement. The *Yue-Sun* case was assigned to district judge Susan Illston. A.13-14.

The next day, Yue went to the District Court for the hearing of his *pro se* motion to enforce a protective order in another case³. At the beginning of the hearing, Judge Jenkins asked Yue if Yue was Mr. Yue, then he told Yue to “cease and desist” from filing any paper before the court. When Yue tried to make an argument, Judge Jenkins cut him off and said: “Mr. Yue, I am going to have you taken out if you don’t be quiet.” A.14.

On December 14, 2007, at a hearing in the *Netbula-Sun* case, Judge Jenkins stated it appeared that *Yue-Sun* and *Netbula-Sun* were related, and *Yue-Sun* “is not completely overlapping with” *Netbula-Sun*. A.20. Sun’s counsel Jedediah Wakefield then asked for an extension for responding to the *Yue-Sun* complaint⁴. Judge Jenkins immediately granted Mr. Wakefield’s request to delay responding to the *Yue-Sun* complaint and ordered the parties to stipulate to a new date. When Yue, the *pro se* Plaintiff in *Yue-Sun*, attempted to raise objections, Judge Jenkins forbade Yue to speak. Yue subsequently wrote a letter to Judge Jenkins, stating that he was the *pro se* Plaintiff in *Yue-Sun* and the case was presided over by Judge Illston. A.16-17.

² The other two copyrights are: the “00-SDK” code, with Registration No. TX 6-437-847 (the “847 Copyright) and the “2K4” code, with Registration No. TX 6-491-697 (the “697 Copyright). None of these three copyrights was part of the *Netbula-Sun* litigation.

³ Sun’s counsel had used confidential documents from the related case in other cases.

⁴ Mr. Wakefield did not notice his appearance in the *Yue-Sun* case until January 7, 2008.

On January 2, 2008, Yue filed a motion for default in *Yue-Sun*. After the completion of Yue's motion for default, on January 10, 2008, the District Court entered a backdated order relating *Yue-Sun* to *Netbula-Sun* and reasigned *Yue-Sun* from Judge Illston to Judge Jenkins. A.11.

On January 18, 2008, Judge Jenkins dismissed the copyright claims in *Netbula-Sun*. A.19.

On March 4, 2008, Judge Jenkins dismissed *Yue-Sun* with prejudice, stating that Yue was "virtually represented" in the *Netbula-Sun* case and he should have filed his claims in *Netbula-Sun*.

On March 18, 2008, Defendants filed a motion for attorney's fees, seeking \$92,000.00. On April 8, 2008, Defendants filed a declaration asking for an additional \$42,000.00. A.41.

On April 24, 2008, in a telephone conference, Defense counsel Jedediah Wakefield threatened to incur large amount of fees, seek it from Plaintiff, causing "serious repercussions" for Plaintiff's "personal financial stability." Plaintiff filed a motion to strike Defendants' fee motion for their failure to meet-and-confer with Plaintiff before filing a fee motion, as required by Northern District of California Local Rule 54-6. A.41.

On July 23, 2008, Defendants submitted a supplemental declaration asking for \$87,000 additional fees. A.42.

On August 6, 2008, magistrate judge Elizabeth D. Laporte recommended that Plaintiff's motion to strike to be denied and Defendants to be awarded \$219,949.90 in attorney's fees and costs under 17 U.S.C. §505 as prevailing copyright defendants. A.21-30.

On August 20, 2008, Plaintiff filed **two** duly noticed motions for *de novo* review of the magistrate judge's report and recommendation with specific objections: (1) the "Motion for *De Novo* Determination of Defendants' Motion for Attorney's Fees" (Doc. 146 below; See A.32-61); and (2) the "Motion for De Novo Determination of Plaintiff's Motion to Strike" (Doc. 145 below; See A.31). Both motions were noticed for hearing on November 3, 2008.

On September 5, 2008, the district court declined *de novo* review and vacated the hearing for the motion in docket 145. The order made no mentioning of Docket No. 146 or the objections raised therein. A.62-63.

Defendants have applied for a Writ of Execution to levy Plaintiff's assets. A.66. Plaintiff's motion to stay of enforcement of the fee award was denied in the District Court and the Ninth Circuit. A.65, 67.

ARGUMENT

A. Plaintiff is Likely to Succeed on the Merits of Appeal.

1. Awarding fees to software pirates would serve injustice and damage U.S. copyright law.

As shown by the emails by Rady, Melnick and Murray, Sun and StorageTek knowingly distributed PowerRPC without buying licenses. A.4-7. Defendants concealed the piracy from Plaintiff and misled Plaintiff for years. These facts were not mentioned in various court orders, but they are in the Complaint and other court record and are undeniable. Awarding fees to Defendants is awarding software piracy.

Under the American rule, parties "bear their own attorney's fees unless Congress provides otherwise." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The attorneys' fees were awarded under Section 505 of the Copyright Act.

A.21-30. That award was in contrary to Copyright Act and the decisions interpreting the scope of its attorney fee provisions.

As a matter of policy, rewarding Sun for pirating software weakens the Copyright Law, by encouraging other powerful businesses to follow Sun's example and violate the Copyrights of less powerful inventors contributing to the development of arts and technology.

2. Dismissal based on virtual representation ran counter to Supreme Court decision in the case of *Taylor v. Sturgell*

The District Court dismissed Plaintiff's claims under the doctrine of virtual representation, which had been disapproved in *Taylor v. Sturgell*, 128 S. Ct. 2161 (June 12, 2008). The Magistrate Judge, in her recommendation, stated the two grounds for finding privity: (1) "Plaintiff was an assignee;" and (2) "Plaintiff was virtually represented in Netbula's case as a result of his intertwined relationship with Netbula." A.25:12-15.

Both grounds for finding privity were erroneous, because "due process considerations make adequacy of representation a prerequisite to privity." *Kour-tis v. Cameron*, 419 F.3d 989, 996 (9th Cir. 2005).

The '987 Copyright (YUE PWRPC) was created before the existence of Netbula. There was no assignment as regard to the '987 Copyright. Yue always owned this copyright. The '847 and '697 copyrights were assigned to Yue, but they were never part of the Netbula's action. "The only copyright at issue" in Netbula's action was the '063 Copyright. A.10, 16.

Although the '063 Copyright asserted in Netbula's action was a derivative work of the YUE PWRPC ('987) Copyright, elements drawn from a pre-existing work remain the property of the owner of the pre-existing work and

“[i]t is irrelevant whether the pre-existing work is inseparably intertwined with the derivative work.” *Stewart v. Abend*, 495 U.S. 207, 223 (1990). None of the `987, `847 and `697 copyrights were represented in *Netbula-Sun*, therefore there was no privity between Netbula and Yue on the `987, `847 and `697 copyrights alleged in *Yue-Sun*. Under Ninth Circuit law, Netbula did not even have standing to sue on Yue’s copyrights such as the YUE PWRPC.

The District Court first excluded “Non-Party” Yue from *Netbula-Sun* by vacating Yue’s motion to intervene and join Netbula’s action; then it dismissed Yue’s action on the ground that Yue should have joined Netbula’s action. No matter what Yue tried to do, he could not have his day in court to protect his rights.

3. Defendants are not prevailing parties for fee award purposes under the Copyright Act because the District Court made no ruling on the merits of the copyright claims

The dismissal order made no mentioning of any of the infringement facts. It did not analyze the ten infringement claims in the complaint. A.44. Because the District Court did not decide the merits of the copyright claims, Defendants are not prevailing parties under the Copyright Act. As the First Circuit held in *Torres-Negrón v. J & N Records*, 504 F.3d 151, 164 (1st Cir. 2007):

We have made no ruling on [plaintiff’s] claims of infringement. Therefore, [defendant] has not prevailed on the merits of the copyright infringement allegations and is not entitled to a fee award under the statute.

Without a ruling on the merits of the copyright claims, it would also be impossible to apply the factors identified in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (such as frivolousness and objective unreasonableness). The Mag-

istrate Judge, in analyzing the “objective unreasonableness” *Fogerty* factor for awarding fees under the Copyright Act, stated:

While Yue attacks Abramovitz’s credibility, he does not offer any factual basis for naming the particular two high level officers in this action, revealing that the allegations against them are speculative.

A.26, 57. However, the District Judge never made any factual findings. Yue provided sufficient facts in the Complaint to alleged vicarious and contributory liability of the two Sun officers, including the allegation that they played the delaying game with Plaintiff while allowing the infringement to continue at Sun and its customers. Moreover, as long as Plaintiff gave defendants a fair notice of the claim and the ground upon which it rests, “[s]pecific facts are not necessary.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

4. The fee award was not properly determined because the District Court did not perform *de novo* review of magistrate judge’s report and recommendation

The District Court’s “ORDER ... DENYING MOTION FOR DE NOVO REVIEW” gave the following reason for declining *de novo* review:

Since the Court has wide discretion to consider and reconsider a magistrate's recommendation, the Court finds that Judge Laporte’s award of attorney fees and costs are reasonable and ADOPTS Judge Laporte’s Report and Recommendation.

A.63. But, Federal Rule of Civil Procedure 72(b) (3) says that “[t]he district judge *must* determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.” The Sixth Circuit has held that:

the district court is obliged to make clear and adequate findings of fact, expressly addressing Plaintiff’s specific timely objections. Otherwise, the reasonableness of the award of attorney's fees will be virtually unreviewable.

Massey v. City Of Ferndale, 7 F.3d 506, 510 (6th Cir. 1993). Plaintiff raised twenty-nine (29) objections on law and fact that were dispositive of the fee award, but the district court did not mention any of them in its order denying motion for *de novo* review. Since the district court did not even mention Plaintiff's specific objections, the fee award was not properly decided.

5. Yue was Denied Due Process from the Beginning to the End

The U.S. Constitution prohibits deprivation of property without due process of law. Three of the rudimentary elements that have been identified as basic to one's receipt of due process of the law are: (1) the opportunity to be heard "at a meaningful time and in a meaningful manner"; (2) timely and adequate notice; and (3) a tribunal whose conclusion will be based "solely on the legal rules and evidence adduced at the hearing [and who is] of course . . . impartial." *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). Measured against this standard, the denial of Yue's due process was total.

- 1) October 31, 2007, in an *ex parte* proceeding, Judge Jenkins vacated Non-party Yue's *pro se* motion to intervene and join *Netbula-Sun*;
- 2) November 20, 2007, Judge Jenkins issued a spontaneous "cease and desist" order prohibiting Yue from filing papers;
- 3) December 14, 2007, Judge Jenkins granted Sun's oral motion to delay answering the *Yue-Sun* complaint while forbidding *pro se* Plaintiff Yue to speak (The *Yue-Sun* case wasn't even assigned to Judge Jenkins at the time);
- 4) March 4, 2008, Judge Jenkins dismissed *Yue-Sun* with prejudice by concluding that Yue was virtually represented in *Netbula-Sun*, no decision was made on the merits of the copyright claims;

- 5) March 18, 2008, Defendants filed their fee motion without conferring with Plaintiff;
- 6) Plaintiff had no opportunity to challenge Defendants' subsequently filed declarations seeking \$129,000.00 additional fees;
- 7) The Magistrate Judge's report and recommendation did not even list the reasonable hourly rates and reasonable hours spent by the attorneys;
- 8) Plaintiff's motion for *de novo* determination of the fee award was ignored completely. The district court's order adopting the Magistrate Judge's recommendation did not even mention Plaintiff's motion for *de novo* determination of the fee award.

As shown above, Plaintiff was denied due process at key junctures of the case. His motion to join Netbula's action was never heard, it was taken off calendar in an *ex parte* proceeding; he was not given any chance to argue against that "cease and desist" order; he did not have any prior notice of Defendants' request to enlarge time in answering the *Yue-Sun* complaint and was denied the right to speak against it; he did not have the day in court to litigate the merits of his copyright claims; he did not have the opportunity to contest the fee demands; the District Court refused to conduct *de novo* review of the Magistrate Judge's report and recommendation, and completely ignored the twenty-nine (29) specific objections raised in his motion for *de novo* determination (Docket 146 at the District Court).

Local Rule 54-6(b) of the Northern District of California says counsel "must" meet-and-confer before filing a motion for attorneys' fees. Defendants did not make any effort to meet-and-confer. They admitted it was an "oversight on counsel's part." The district court excused Defendants' non-compliance then awarded them over \$10,000.00 allegedly spent on defending their violation of the local rule of the District Court.

B. Plaintiff Would be Irreparably Injured Absent a Stay

As Plaintiff declared at the District Court and the Ninth Circuit, the only way for Plaintiff to come up with the \$219,949.90 is to sell his family home. The consequence for Plaintiff's family to lose their home would be harsh in this cold winter. The trauma inflicted on Plaintiff's children would be irreparable. Plaintiff attempted to negotiate with Defendants to no avail — they would not accept installment payments. They have applied for Writ of Execution to possess Plaintiff's personal property. A.66.

Sun has authorized numerous third parties to make unlimited copying of Plaintiff's software. Plaintiff suffers irreparable harm from Defendants' copyright infringement. Defendants are using the fee award to acquire Plaintiff's copyrights and other assets, leading to deprivation of Plaintiff's real and intellectual property.

C. A Stay Will Not Substantially Injure the Other Parties

Sun Microsystems has pirated vast number of copies of PowerRPC and profited immensely from the piracy. There is no prejudice to Defendants if the \$219,949.90 fee award is stayed pending appeal.

D. The Public Interest in Copyright Protection Favors a Stay

This PowerRPC infringement case has been widely reported in China and the U.S. Sun's conduct was typical software piracy. Decisions in this case will have profound impact on copyright protection in China and U.S. Software pirates, big and small, domestic and foreign, can readily borrow the legal arguments Sun used in this case and related cases. Absent a stay, Plaintiff will not be able to maintain his appeal; the erroneous copyright decisions

below will stand as the law of the United States and negatively impact the rights of U.S. copyright holders.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the United States Supreme Court grant a stay pending appeal of the order requiring Plaintiff to pay \$219,949.90 to copyright defendants.

Respectfully submitted,

DATED: December 8, 2008

Dongxiao Yue
Plaintiff-Applicant
In *Pro Se*

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I served the foregoing Application for Emergency Stay on Defendants-Respondents via First Class Mail, postage fully-paid at the address below.

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I also mailed a copy of the Application on

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DATED: December 8, 2008

DONGXIAO YUE
Pro Se

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I certify that the motion contains no more than 3,200 words (including footnotes).

Dated: December 8, 2008

Dongxiao Yue