UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICROSYSTEMS SOFTWARE, INC. and MATTEL, INC. Plaintiffs, v. SCANDINAVIA ONLINE AB, ISLANDNET.COM, EDDY L.O. JANSSON, and MATTHEW SKALA Defendants.	CIVIL ACTION NO. 00-10488-EFH

MOTION OF NONPARTIES TO QUASH SUBPOENAS

Nonparties Waldo L. Jaquith, Lindsay Haisley, and Bennett Haselton ("Movants") hereby respectfully request that this Court quash the subpoenas purportedly served upon Movants, or in the alternative declare that no valid subpoena has properly been served upon the Movants pursuant to Fed. R. Civ. P. 45.

As grounds therefor, Movants state as follows:

1. Movant Jaquith lives and works in the state of Virginia. Movant Haisley lives and works in the state of Texas. Movant Haselton lives and works in the state of Washington. None of the three movants is located within, or operates any business within, Massachusetts or within 100 miles of this Court.

2. On or about March 17, 2000, plaintiff Microsystems Software Inc., through counsel, purported to serve on Movants a subpoena by e-mail, a copy of which is attached hereto as Exhibit A. Two of the three movants (Jaquith and Haselton) received the said e-mail.

3. The said purported subpoenas were not served in person as required by Fed. R. Civ. P. 45(b). In telephonic discussions between counsel, plaintiffs represented that this Court authorized service by e-mail. No such order has been provided to Movants or their counsel, however. Accordingly, plaintiffs' contention cannot be verified.

4. The purported subpoenas do not set forth a place for responding thereto that is within 100 miles of the residence or place of business of any Movant as required by Fed. R. Civ. P. 45(c)(3)(B)(iii).

5. Finally, and most importantly, the purported subpoenas would require that each Movant disclose to plaintiffs a list of persons who have downloaded certain content or information of public interest, on a matter of ongoing intense political debate, despite these persons' privacy interest in avoiding such disclosure and despite their legitimate expectation of privacy in anonymously accessing and/or downloading information of interest to them from the Internet. In addition to being unduly burdensome and unfair to movants, this request raises concerns of tremendous constitutional significance, that should not be resolved lightly or without careful analysis of their implications.[1] The Supreme Court has repeatedly reaffirmed the constitutional right to speak anonymously, see, e.g., MacIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 (1995), and at least one court has recognized the importance of protecting anonymous speech in the Internet context. See ACLU v. Miller, 977 F. Supp. 1228, 1231 (N.D. Ga. 1997).

6. This Court need not reach these complex constitutional issues, however, because the subpoenas should be quashed for the reason (in addition to those set forth above) that they

[1] One complicating factor is that, as least with respect to Movant Haselton's logs, people who downloaded the article — not subject to this Court's order and fully protected by the First Amendment — cannot be distinguished from people who downloaded the software. Accordingly, compliance with the subpoenas would result in the disclosure of the identities of people who did not download material actually covered by the subpoena, and who plaintiffs have no right or need to learn the identities of.

are in support of a case that is not properly before this Court. The pending case is improper for at least three dispositive reasons:

a. First, the Court lacks subject matter jurisdiction over this civil action because it is based on a claim of infringement of the Copyright Act that is improper on its face: Plaintiffs contend that the defendants made unauthorized copies of plaintiffs' software in Sweden and in Canada. But, as argued at greater length in the Opposition to Motion for Preliminary Injunction (filed herewith and incorporated by reference herein), the Copyright Act does not apply to conduct that occurred outside the United States. The law is clear that this Court lacks subject matter jurisdiction over a claim of copying that occurred in another country. The remedy for copyright infringement (if any) that occurred in Canada or Sweden is to sue in Canada or Sweden, as provided by the Berne Convention (the international treaty on copyright law to which all three countries at issue here are signatories). Accordingly, the underlying complaint must be dismissed, thereby mooting the subpoenas.

b. Second, the Court lacks personal jurisdiction over the defendants named in the Complaint, and the underlying case must therefore be dismissed for that reason as well. The persons alleged to have committed the copying do not reside or work in this judicial district, and are not alleged to have acted in this judicial district. This point, too, is argued in greater detail in the accompanying Opposition to Motion for Preliminary Injunction, and will not be repeated here.

c. Thirdly, the underlying case must be dismissed as moot. The "problem" faced by CyberPatrol — the availability to the public of a method of determining certain information contained in, or concealed by, the Cyber Patrol software — has been solved by Cyber Patrol itself, which has provided a fix that renders the defendants' software

ineffective for the purposes that Cyber Patrol complains of. Owners of the product can obtain this fix from the plaintiffs. Indeed, the case is moot for a further reason: Cyber Patrol can simply — and apparently has — included on its list of "blocked" web sites all sites on which the defendants' accused software is available. Plaintiffs' theory that children will obtain access to the decryption software by accessing it on a web site and will use it to deactivate their parents' attempts to limit their access to certain web sites makes no logical sense: as long as the web sites containing the decryption software are blocked by Cyber Patrol, no child whose parent is using a current version of Cyber Patrol will be able to access the decryption software.[2]

7. The anonymity of persons accessing Internet web sites should not be breached in aid of a case not properly filed in this Court. Indeed, in a similar situation, Columbia Insurance Co. v. SEESCANDY, Inc., 185 F.R.D. 573, 578-80 (N.D. Cal 1999), the court held that it would not breach the anonymity of an Internet poster without first requiring plaintiff to show the adequacy of the Complaint. See id. ("[P]laintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. A conclusory pleading will never be sufficient to establish this element.")

8. For each of the above reasons, the subpoenas are invalid. Moreover, the Movants are not subject to personal jurisdiction in this Court.[3] Nonetheless, out of an abundance of caution, Movants are filing the within motion rather than simply ignoring the invalid subpoenas as Rule 45 would permit them to do.

[2] Failure to use the latest version of the Cyber Patrol software makes the software essentially ineffective anyhow, since new web-sites of the sort that Cyber Patrol deems objectionable are created literally on a daily basis.
[3] This motion is not intended to constitute a general appearance, and does not waive or acknowledge personal jurisdiction over any Movant by this Court, said personal jurisdiction being expressly denied.

Conclusion

The subpoenas must be quashed because they were not properly served, because they violate the geographic limitations of Rule 45, and because they impose an undue burden on Movants that raises significant constitutional questions. More fundamentally, they must be dismissed because they are in aid of an underlying case that itself must be dismissed for lack of subject matter jurisdiction, lack of personal jurisdiction, and mootness. It is improper to impose on a third party the burden of any subpoena — particularly one that raises a host of thorny privacy issues — in aid of a case that does not belong in this Court in the first place.

Respectfully submitted,

WALDO L. JAQUITH,
LINDSAY HAISLEY, and
BENNETT HASELTON

By their counsel,

Dated: March 24, 2000

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Certificate of Service

I hereby certify that on March __, 2000, I caused true copies of the above document to be sent to counsel for Plaintiffs, by _____.

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Sarah R. Wunsch