IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AL C. RINALDI, INC., et al.	:	CIVIL ACTION
v.	:	
BACH TO ROCK MUSIC SCHOOL, INC., et al.	:	NO. 00-5477

Dalzell, J. March 27, 2006

MEMORANDUM

Plaintiffs Al C. Rinaldi, Inc., Music Unlimited, Inc., and Chopin Piano & Organ, Inc. (collectively "Jacobs Music" or "Jacobs"),[1] have filed a motion for civil contempt against defendant Bach to Rock Music School, Inc. ("Bach to Rock"), alleging that Bach to Rock has violated provisions of a April 2, 2001 Consent Order.

I. Factual Background

In the five-and-a-half years since this action was filed, the parties have repeatedly come before us, and there is no need to revisit the entire factual background of this case. Instead, we set forth here only the necessary facts and refer any interested parties to our August 26, 2003 decision, Al C. Rinaldi, Inc. v. Bach To Rock Music School, Inc., 279 F.Supp.2d 624 (E.D. Pa. 2003), for a comprehensive background.

Jacobs Music filed its complaint on October 20, 2000 alleging that Bach to Rock engaged in a course of deceptive

[1] A fourth plaintiff, Capitol Area Piano Company, LLC, participated in this action, but at a February 23, 2006 hearing, counsel for the three moving plaintiffs informed us that this fourth plaintiff no longer exists.

advertising and asserting claims under the Lanham Act and Pennsylvania common law. On April 2, 2001, we signed a Consent Order embodying the agreement that the parties had reached after the mediation that Magistrate Judge Jacob P. Hart successfully conducted. The Consent Order contains twenty-one prohibitions on Bach to Rock's marketing activity, sets liquidated damages at $10,000.00 for each advertisement that violates the Consent Order, and gives us continuing jurisdiction for purposes of enforcement.

On January 19, 2006, almost two-and-a-half years after we resolved the motion for civil contempt that was the subject of the comprehensive decision cited earlier, Jacobs Music filed another motion for civil contempt, which they supplemented on February 7, 2006. This motion contends that Bach to Rock posted various advertisements on its web site[2] that allegedly violate the terms of the Consent Order. On February 20, 2006, Bach to Rock responded to these allegations, arguing, inter alia, that the Consent Order's provisions do not apply to its web site.

We convened a hearing on this matter on February 23, 2006, but recessed so that the parties could file supplemental briefs on this threshold issue that Bach to Rock identified. Having received those briefs and having afforded the parties time to resolve this latest skirmish (which they failed to do), we now

[2] We decline to follow the parties, but do follow the Oxford English Dictionary Online when we refer to a site on the World Wide Web, i.e., web site and not website.

consider whether the Consent Order applies to Bach to Rock's Web-based advertisements.[3]

II. Legal standard

The parties are familiar with the applicable legal standard from our prior decision, id. at 628, but we nevertheless rehearse it again briefly.

Civil contempt "vindicate[s] the District Court's authority over a recalcitrant litigant." Hutto v. Finney, 437 U.S. 678, 691 (1978). "[C]ivil contempt may be employed to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the [defendant's] disobedience." McDonald's Corp. v. Victory Invs., 727 F.2d 82, 87 (3d Cir. 1984). Federal law governs a motion for civil contempt of a federal order. See Roe v. Operation Rescue, 919 F.2d 857, 869 n.11 (3d Cir. 1990).

To prove that Bach to Rock should be held in civil contempt, Jacobs Music must establish, by clear and convincing evidence, that Bach to Rock disobeyed a court order of which it had knowledge. See Robin Woods, Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994). Willfulness is not an element of civil contempt,

[3] Jacobs Music also submitted a second supplemental motion for civil contempt, to which Bach to Rock responded. The second motion concerns print advertisements, which we will address in a further hearing after limited discovery. Today we are concerned only with the January 19, 2006 motion and its February 7, 2006 supplement.

and good faith is not a defense. See id.; see also Harley-Davidson, Inc. v. Morris, 19 F.3d 142, 148-49 (3d Cir. 1994).

Our task is to "discern the scope of a consent judgment by review of what is within the four corners of the consent, not by reference to 'what might satisfy the purposes of one of the parties to it.'" Harley-Davidson, 19 F.3d at 148 (citation omitted). We shall not "later modify the decree by interposing terms not agreed to by the parties or not included in the language of the decree." Harris v. City of Philadelphia, 137 F.3d 209, 212 (3d Cir. 1998).

For the purposes of enforcement, a consent decree is governed by the ordinary rules of contract interpretation, including the parol evidence rule. Harley-Davidson, 19 F.3d at 148. The parol evidence rule provides that evidence of parties' prior negotiations and understandings is inadmissible to prove the terms of a consent decree, except that it may be introduced to establish the meaning of ambiguous terms. Id. "A contract is ambiguous if, after hearing evidence presented by the parties, the court determines that objective indicia exist to support the view that the 'terms of the contract are susceptible of different meanings.'" Id. (citation omitted). "Contemnors . . . are sometimes excused when they violate vague court orders." Robin Woods, 28 F.3d at 399. "[T]here is a longstanding salutary rule in contempt cases that ambiguities and omissions in orders redound to the benefit of the person charged with the contempt."

Id. (quotations omitted); see also, Liberty Lincoln-Mercury v. Ford Motor Co., 134 F.3d 557, 569 (3d Cir. 1998).

III. Analysis

The Consent Order does not directly or by inference mention web sites or Web-based advertising. Most of the twenty-one prohibitions address certain types of "advertising" or "promoting." The prohibitions are followed by a liquidated damages section, which provides:

> [S]hould the Court determine upon Motion by Jacobs Music Co. that Bach to Rock has published, circulated, distributed or otherwise disseminated or caused to be published, circulated, distributed and/or disseminated any television or radio advertisement, newspaper or magazine advertisement, promotion, circular or other document that is inconsistent with any of the terms of this Order, defendant shall, in accordance with the terms of the parties' Settlement Agreement, be ordered to pay liquidated damages to Plaintiffs in the amount of ten thousand dollars ($10,000) per television or radio station on which or newspaper and/or magazine in which the advertisement appears and/or version of the promotion, circular or other document that was utilized. For purposes of computation, the $10,000 sum shall apply only to the specific newspaper, magazine, television or radio station and not to the number of individual copies or broadcasts thereof. Actual proof of damages shall not be required for any television or radio advertisement, newspaper or magazine advertisement, promotion, circular or other document that violates any of the terms of this Order.

Consent Order of Apr. 2, 2001 at 3-4 (emphasis added).

Bach to Rock contends that the Consent Order is silent about any form of Web-based advertising, and therefore does not govern its web site. It thus contends that it cannot be held in civil contempt for any web site postings.

Jacobs Music does not claim that the parties discussed or agreed upon an understanding that the prohibitions extended to the Internet, but it makes three arguments for why the Consent Order should be construed to apply to the web site postings. First, it contends that the twenty-one prohibitions can be read separately from the liquidated damages provision and do not require violations to occur in a particular medium. Second, Jacobs asserts that the liquidated damages provision can be read to apply to web site advertising. Third, Jacobs Music claims that Bach to Rock has already acknowledged that the Consent Order applies to its web site.

We shall address each argument in turn. Because we find that the Consent Order does not apply to the web site postings, we need not examine their content.

First, Jacobs describes the Consent Order as "comprised of two principal sections: (1) the Prohibitory Provisions; and (2) the Liquidated Damage Provisions." Pls.' Reply 3. Jacobs essentially asks us to consider the first section without reference to the second. It points out that none of the twenty-one prohibitions refers to any particular medium of advertising and therefore concludes that "the Consent Order was intended to prohibit . . . [certain] advertising or promotion through any medium." Id. at 5 (emphasis added). Because Bach to Rock can "advertise"[4] or "promote"[5] through its web site postings, Jacobs

[4] Jacobs Music defines "advertise" as "to make (continued...)

contends that these actions are subject to the Consent Order's prohibitions.

In the liquidated damages provision, the parties' experienced counsel, working under the aegis of Judge Hart, agreed to a detailed description of how liquidated damages would be calculated for each violation. They also painstakingly listed the forms of media to which such damages would apply. Notably, the parties specified that publications in a "television or radio advertisement, newspaper or magazine advertisement, promotion, circular or other document" were subject to liquidated damages if those publications were "inconsistent with any of the terms of this Order." Consent Order at 3. Thus, the liquidated damages provision must by its terms be read together with the prohibitions section.

To avoid this inconvenient conclusion, Jacobs Music wants us to read the prohibitions without reference to the liquidated damages provision. In other words, Jacobs wants the first section to inform our reading of the second, but does not

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[4](...continued)
something known generally or in public, especially in order to sell it" (citing Cambridge Advanced Learner's Dictionary) and "to make a public announcement of, especially to proclaim the qualities or advantages of (a product or business) so as to increase sales" (citing American Heritage Dictionary). Pls.' Reply 6.

[5] They also define promote as "to encourage the popularity, sale, development or existence of something" (citing Cambridge Advanced Learner's Dictionary) and "to attempt to sell or popularize by advertising or publicity" (citing American Heritage Dictionary). Id.

want the second section to inform our reading of the first. We will not apply such an inconsistent -- or heads I win, tails you lose -- approach to contract interpretation. The careful drafting evidenced in the liquidated damages provision informs our reading of the whole Consent Order. Accordingly, we find that, to violate the terms of the Consent Order the parties wrote, Bach to Rock's "advertising" or "promoting" must occur through one of the forms of media that the parties listed in the liquidated damages provision.

Jacobs Music next argues that "the Consent Order plainly imposes liquidated damage for any website advertising that violates its terms." Pls.' Reply 7. Jacobs contends that a contrary interpretation would fail to give effect to all the Consent Order's terms, referencing the words "document" and "promotion" used in the liquidated damages provision. According to Jacobs Music, "'[d]ocument' has been generally defined to include 'a piece of work created with an application, as by a word processor,' and 'a computer file that is not an executable file and contains data for use by applications.'" Id. at 8.[6]

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[6] The American Heritage Dictionary, from which Jacobs draws its definition for document, defines the term, when used as a noun, as:

> **1a.** A written or printed paper that bears the original, official, or legal form of something and can be used to furnish decisive evidence or information. **b.** Something, such as a recording or a photograph, that can be used to furnish evidence or information. **c.** A writing that contains information. **d.** *Computer Science* A piece of work created with an application, as by a word
>
> (continued...)

Jacobs also asserts that posting the information on the web site constitutes a "promotion" -- "a message issued in [sic] behalf of some product" or "publicizing an event." Id. (citing Webster's Online Dictionary).

The Internet was alive and very well indeed when the parties negotiated the Consent Order in 2001. Yet Jacobs Music now wants us to read this "unique and wholly new medium of worldwide human communication," ACLU v. Reno, 929 F.Supp. 824, 844 (E.D. Pa. 1996), aff'd, 521 U.S. 844, 850, 117 S.Ct. 2329, 2334 (1997), into the generic word document. We shall not so radically expand the Consent Order in this fashion, if only based on the word's ordinary meaning described in note 6. If Jacobs wanted the Order to regulate advertising in this important medium -- and it had become most important well before April of 2001 -- it should have negotiated and agreed with Bach to Rock to include

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[6](...continued)
processor. **e.** *Computer Science* A computer file that is not an executable file and contains data for use by applications. **2.** Something, especially a material substance such as a coin bearing a revealing symbol or mark, that serves as proof or evidence.

Pls.' Reply Ex. C, Printout of http://www.bartleby.com/61/64/D0316400.html.

Because Jacobs cites only the definitions that are preceded by the term "Computer Science," there is some question as to whether it can fairly be said that "document" is "generally defined" in such a manner. To the contrary, the Oxford English Dictionary limits its non-obsolete noun definition to "Something written, inscribed, etc. . . . as a manuscript, title-deed, tombstone, coin, picture, etc." IV Oxford English Dictionary 916 (2d ed. 1989).

Thus, the ordinary meaning of document cannot fairly be deemed to include the 1's and 0's of cyberspace.

"Internet" or "World Wide Web" to appear on the face of the Order, along with all the other specified media they agreed upon. Having looked to the four corners of the Consent Order, and finding no mention of Web-based advertising, we shall not now "modify the decree by interposing terms not agreed to by the parties." Harris, 137 F.3d at 212.

We find further support for our decision in the parties' express agreement that "the $10,000 sum shall apply only to the specific newspaper, magazine, television or radio station and not to the number of individual copies or broadcasts thereof." Consent Order at 4. This provision leaves no doubt that the parties considered the implications of multiple copies and broadcasts of offending advertisements, and they agreed upon how they would be penalized. In light of this obvious consideration, we cannot construe the Consent Order to cover all media, including the Internet. Indeed, resolution of how violations for Web-based advertisements would be treated -- e.g., would penalties be assessed by the number of hits to the web site? the numbers of clicks on the advertisement itself? the number of days an advertisement was posted on the web site? -- would require detailed rewriting of the Consent Order, which the jurisprudence disables us from doing.

Jacobs Music offers as an alternative theory the doctrine of ejusdem generis to import "other document" and "promotion" into the liquidated damages provision. Jacobs contends that the similarity between the nature and the purpose

of advertising on the World Wide Web and in the specified categories (i.e., television, newspapers, magazines, and radio) means that the general terms encompass web site advertising.

We disagree. As we have explained, the Internet is a unique and wholly new medium of communication, one that was thriving by 2001. Nothing prevented the parties from agreeing to include the Internet in their Consent Order. They chose not to. As we have made clear, we will not radically expand the scope of that document by adding the Internet to the list of the parties' agreed-upon forms of media. See Harris, 137 F.3d at 212. Moreover, even if we found some ambiguity as to whether "document" should include Web postings, we would have to resolve that ambiguity in favor of Bach to Rock. See Robin Woods, 28 F.3d at 399 ("[T]here is a longstanding salutary rule in contempt cases that ambiguities and omissions in orders redound to the benefit of the person charged with the contempt.") (quotations omitted).

Finally, Jacobs Music claims that Bach to Rock tacitly recognized that the Consent Order applies to its web site. It bases this claim on a communication on February 15, 2005 from Al Rinaldi, Jacobs Music's Chief Executive Officer, to Enrico Aquino, Bach to Rock's Chief Executive Officer, and Aquino's alleged response thereto. Rinaldi had complained about two "violations" on Bach to Rock's web site: (1) use of "the term 'liquidation' sale" and (2) "promoting sale prices of 30% to 67% off manufacturer's published prices, and such prices are not

acceptable authoritative prices." Pls.' Reply Ex. G. Because Aquino allegedly did not challenge the Consent Order's applicability to the web site, Jacobs Music claims that he conceded the point and, presumably, estopped his firm. The only evidence plaintiffs offer on this point is a February 23, 2005 e-mail from Kathryn Creamer, who we assume works for Rinaldi, when she described a message forwarded to her from Jacobs Music's general mailbox:

> [Ric Aquino, Sr.] said that he had received the letter today (Feb. 23) because they have moved and it was forwarded from old address. He said they have changed their website, just so you know. Wanted to let you know he got the letter, and had changed the website, and also said thanks for your advice. . . .

Id. Ex. H.

This e-mail is (double) hearsay, unsupported by an affidavit or transcript. Also, even if Aquino changed the web site's content, the e-mail does not represent that he affirmatively stated that the Consent Order governed his company's web site content. Given these obvious deficiencies, we cannot consider this e-mail as evidence that Bach to Rock definitively accepted Jacobs's expansive reading of the Consent Order.

IV. Conclusion

We hold that the April 2, 2001 Consent Order, which makes no mention of the Internet despite carefully listing other forms of media, does not apply to Bach to Rock's web site

advertisements. This decision does not leave Jacobs Music without a remedy, because we do not absolve Bach to Rock from any obligations it has to Jacobs Music under the Lanham Act. To the extent that any of Bach to Rock's postings on the World Wide Web violate the Lanham Act, they could be the subject of a separate action. Today we find only that the web site postings are not subject to the April 2, 2001 Consent Order that the parties agreed to.

Plaintiffs' motion is DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
v.	:	
	:	
BACH TO ROCK MUSIC SCHOOL,	:	
INC., et al.	:	NO. 00-5477

ORDER

AND NOW, this 27th day of March, 2006, upon consideration of plaintiffs' motion for civil contempt (docket

entry # 53), their supplement to that motion (docket entry # 54), and defendants' response thereto, and in accordance with the accompanying memorandum, it is hereby ORDERED that plaintiffs' motion is DENIED.

BY THE COURT:

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Stewart Dalzell, J.