

Case No. 07-74701

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONGXIAO YUE

Petitioner,

v.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

Respondent.

Real Parties in Interest: Storage Technology Corporation, Sun Microsystems, Inc., EMC Corporation, Darden Restaurants Inc., IBM Corporation., defendants; Netbula, LLC, plaintiff.

**REPLY BRIEF BY PETITIONER IN SUPPORT OF EMERGENCY
MOTION FOR EXPEDITIOUS CONSIDERATION OF PETITION
FOR WRIT OF MANDAMUS AND EXERCISE OF SUPERVISORY
AUTHORITY AND STAY OF SUMMARY JUDGMENT HEARING AT
THE DISTRICT COURT**

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INTRODUCTION

Petitioner, Dongxiao Yue (“Yue”), appealed to the honorable Court as an individual counter-defendant and intervenor in the case below. The issues Yue presented were about rules of civil procedure and procedural due process.

However, in their Response to Yue’s Petition and Emergency Motion, Sun Microsystems, Inc. (“SUN”), EMC Corporation and Darden Restaurants (“SUN defendants”) mostly avoided the procedural questions. Instead, they argue before this Court numerous substantive issues – which were never reached at the district court because of *ex parte* orders that vacated the hearings of Yue’s motions and prohibitions on filing documents and speaking in court.

In the following, Petitioner will first correct some of SUN’s misconceptions to clarify the record, and then argue on the Petition for Writ of Mandamus and the Emergency Motion for Stay. The supporting documents are: (1) the Appendix attached to the Petition for Writ of Mandamus, exhibits 1-8, marked with page numbers A01 to A45, and (2) exhibits 9-13 attached to this Reply brief, marked with page numbers A46 to A67.

CORRECTING SUN’S MISCONCEPTIONS

1. Yue is not representing Netbula

SUN defendants start their response with conclusory statements that Yue acted “unilaterally to attempt to replace Netbula as the party-plaintiff” and he “lacked standing to do so.”

The record shows SUN defendants’ statements to be untrue. At the district court, Yue filed motions to intervene as a third party under Federal Rule of Civil Procedure 24(a) for Intervention of Right. One of the requirements for such intervention is that Yue’s interest is not adequately represented by existing parties. In Yue’s motions to intervene, he argued that he has personal interest independent of Netbula’s interest. For instance, Yue always owned the code he wrote before he founded Netbula, which was copied by SUN defendants.

In fact, the district judge recognized that Yue was not attempting to represent Netbula.

MS. BRILLET: Your Honor, Mr. Yue is not trying to assert of the rights of Netbula.

THE COURT: I recognize that.

Exhibits at A51 (Tr., hearing of the motion to substitute party, p.16:13-15).

Also, at end of the hearing, the district judge further recognized that Yue was acting as a third party.

MR. YUE: I was moving as third party, just a SUN defense counsel.

THE COURT: Right.

Exhibits at A54, lines 11-13.

SUN notes that “Dr. Yue’s application does not challenge the District Court’s denial of Netbula’s Motion to Substitute Dr. Yue as Plaintiff.” This further shows SUN misunderstands the nature of Yue’s Petition. Yue did not appeal a denial of Netbula’s motion because he is not Netbula and cannot represent Netbula.

2. Yue’s Petition was about procedural issues

Except the question of bias, the issues raised by Yue are purely procedural. In his papers filed at the district court, he made numerous arguments on the merits, including whether he had the right to intervene, whether there is irreparable harm to his copyright if injunctive relief is not granted and whether the modification of protective order prejudices him. The problem he had was that his motions or oppositions were summarily thrown out without being afforded any due process.

Thus, Yue does not ask the honorable Court to decide whether he can intervene or he can obtain injunctive or other relief, he merely asks the Court to direct the district court to hear his motions, instead of issuing *ex parte* orders vacating the hearing of his motions and forbidding him from filing papers.

SUN claims that “Petitioner never filed or sought to file an Opposition”

to SUN's motion to intervene and modify the BindView protective order. Such assertion is made without competent inquiry of the BindView docket. Yue's Opposition is Document No. 307 in the BindView case. See A67 for docket sheet.

3. SUN's points on substantive issues

Petitioner does not intend to address all the substantive issues raised in SUN's Response. He will briefly touch the following issues only to clarify the background.

SUN claims that Yue's motion to intervene and for injunction was based on Netbula's copyright. This is untrue. Yue's motion for injunction was based on the copyrights he always personally owned and the copyrights he acquired via assignment. SUN alleges that "[o]n its face, the assignment is suspicious." Tellingly, despite the district judge's suggestion that Mr. Laurence Pulgram should challenge the validity of the copyright assignment, SUN's attack on the assignment is solely based on suspicion.

SUN claims that the declaration supporting its motion for summary judgment "exists, and was filed and served more than 35 days before the currently scheduled hearing." Though the declaration was suspicious, Yue was not questioning the validity of the declaration but rather the validity of the motion: the supporting declaration did not exist when the motion was filed – and SUN does not dispute this fact.

SUN also talks about the summary judgment ruling against Netbula in the BindView case. For the Court's reference, Petitioner is attaching excerpts from Netbula's motion for leave to file motion for reconsideration. See Exhibits at pages A62-65.

FACTS AND BACKGROUND

Yue is the founder of Netbula and the programmer of the PowerRPC software, which consists of code Yue wrote before and after Netbula was formed. The copyrights in the earlier code were not transferred to Netbula and has always been owned by Yue¹. In September 2007, Netbula transferred the copyrights in the code Yue wrote after Netbula was founded back to Yue, making Yue the sole owner of the copyrights of the PowerRPC program in dispute.

Netbula filed the action against Storage Technology Corporation ("StorageTek"), Sun Microsystems, Inc. ("SUN"), et al., in December 2006, along with an application for a temporarily restraining order ("TRO"). At the TRO hearing, the presiding magistrate judge had doubts about Netbula's evidence and stated that he would instead consider an expedited discovery schedule and a permanent injunction.

¹ In fact, SUN's counsel raised this copyright ownership issue to Netbula and Yue. See Exhibits at A56-57.

However, Netbula's initial discovery requests were stayed by an order issued by Judge Martin J. Jenkins in May 2007 at a case management conference, who directed the parties to focus on license issues and contract claims initially without providing a reason. Later, Netbula served amended discovery requests in accordance with the court order.

SUN eventually produced some documents on August 31, 2007 and the parties conducted depositions in September and October 2007. For the first time, Netbula and Yue were able to obtain internal SUN/StorageTek documents evidencing the alleged willful copyright infringement.

In early October 2007, Ms. Vonnah M. Brillet, counsel for Netbula, expressed her desire to quit from representing Netbula.

On October 4, 2007, Ms. Brillet sent a letter to SUN, stating that SUN's use of protected Netbula material from the related BindView case violated the protective order in that case. Shortly afterward, SUN defendants filed a motion to intervene in the BindView case and to modify the BindView protective order. On October 15, 2007, Yue filed a motion to intervene in the BindView case and seek to enforce the BindView protective order and oppose the SUN defendants' motions. Netbula did not file a response to SUN defendants' motion to intervene.

On October 22, 2007, Yue filed a motion to intervene in the SUN case and for injunctive relief and impoundment under the Copyright Act. Yue

also sought a stipulation from SUN defendants to allow him to substitute or join as a copyright plaintiff in the existing lawsuit against SUN/StorageTek, so he could amend the existing complaint instead of filing a separate action. SUN rejected Yue's proposal.

On November 2, 2007, without giving notice to Yue, the district judge issued an order granting SUN defendants' "motion for administrative relief" to vacate the hearing of Yue's motion to intervene in the SUN case and for injunctive relief, after a telephonic hearing without Yue's participation.

On November 19, 2007, Yue filed a separate action against StorageTek, et al, alleging infringement of his other copyrights.

On November 20, 2007, Ms. Brillet and Yue went to the district court for the hearing of Netbula's motion for substitution of party in the SUN case and SUN defendants' motion to intervene in the BindView case and modify the BindView protective order.

At the hearing, Judge Jenkins ordered that Yue cannot file anything before the district court and he could not make arguments before the judge. Later, at the end of the argument about Netbula's motion for substitution of party, Yue requested to speak about the facts only, Judge Jenkins refused, stating that Yue could not speak to the court, only to his attorney.

ARGUMENT

A. Yue Has a Constitutionally Protected Right to Access the Courts

The U.S. Supreme Court has held that “a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). “The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.” *Id* at 429.

In the instant case, Yue is the owner of the copyrights in question, as the original author of the pre-Netbula code he wrote and assignee of the copyrights in the code he later wrote as the owner of Netbula. Even if, as Judge Jenkins suggested to defense counsel, that the assignment of the later code to Yue was somehow invalid, Yue’s ownership of the code he wrote before he founded Netbula was undisputed. Thus, Yue had an undisputed property interest in the SUN case as an individual.

The issues raised by Yue in his Petition for Writ of Mandamus were about procedural due process. Essentially, the district court denied Yue due process by summarily vacating the hearing of his motions and prohibiting him from filing papers or presenting evidence.

B. The “Cease and Desist” Order Violated Yue’s Due Process Rights

The order by the district court judge was a simple and broad prohibition that summarily denied Yue’s access to the court. SUN defendants argue that the district judge issued the order because Yue lacked standing. However,

standing was not an issue. At the time when the “cease and desist” order was issued from the bench, Yue was a *pro se* counter-defendant and intervenor. Indeed, as the district judge indicated, even if Yue substitute or join as a party in the SUN case – at which point he can become *pro se*, the prohibition against filing papers will remain in effect:

THE COURT: ... You should cease and desist from doing such until you are authorized to do so...And *even if I were to grant this motion, it still would not give you authority to do so, to file pleadings in the matter...*

Ex. at A47 (Transcript of the November 20, 2007 hearing on Netbula’s motion to substitute party, p.4:11-15) (emphasis added)². Also, the district judge recognized that Yue was not trying to represent Netbula, which is and will be represented by counsel on the other claims regardless of Yue’s participation.

By forbidding Yue from filing anything before the district court without even colorable legal authority, the district judge deprived Yue the equal protection and equal dignity afforded by the Fourteenth Amendment to the U.S. Constitution.

C. Violation of Due Process is more Prejudicial than Bias

² Although the district judge seem have limited forbidden papers to “pleadings,” because the papers Yue filed were motions, it is apparent the “cease and desist” order also covers motions.

In a report submitted to the Chief Justice authored by a committee led by Justice Breyer, there was a case about a non-party individual who attempted to file a motion for recusal in a case allegedly affected his bank accounts. The non-party individual claimed that the presiding judge told the clerk not to file his motion. The chief judge of the circuit said that a not-to-file order is “reviewable through normal appellate process such as filing a petition for a writ of mandamus...” See Ex. at A60. In comparison, the blanket “cease and desist” order issued by the district judge in this case is much broader.

"Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process in ways that run counter to the scheme established by relevant constitutional and statutory law." 425 F.3d 1179, 1183 (9th Cir. 2005) (dissenting opinion by Judge Kozinski, quoting Lubet, et al.).

D. The District Judge Displayed Unequivocal Antagonism

Besides the “cease and desist” order, Judge Jenkins told Yue: “I am going to have you taken out if you don’t be quiet.” The following exchange further demonstrates Judge Jenkins’s antagonism against Yue:

Ms. Brillat: Because of the fact that there are two portions of the code that have been involved. One set is the set that was created before the advent of Netbula, and the other set is after. So by making him a party in this action now, there would just be one owner.

THE COURT: It's a bit of a shell game, isn't it? Isn't that what it is? They are one in the same... The only thing that's accomplished there is that he gets to stand before the Court and makes arguments.

Ex. at A48-49 (Tr., Nov 20, 2007, pp.11:23-12:15). The district judge's words for Yue were harsh and without legal rationale, in sharp contrast to his words for Mr. Pulgram:

THE COURT: You don't argue the assignment is not valid?

MR. PULGRAM: There is some law to that effect, your honor.

THE COURT: But it's not before me. I haven't seen that in your papers.

...

THE COURT: That's what I am suggesting to you. So to deny the motion means that he's not substituted in as a party?

MR. PULGRAM: Correct.

Ex. at A50 (Tr., p.15:8-20). Since we cannot identify the district judge's legal rationale for excluding Yue from accessing the court, the only reason left is personal.

Judge Jenkins's initially told Yue: "You have no standing at this juncture to make *arguments* to the court." Later at the hearing, Yue asked if he might

“have a word on the *facts*.” Judge Jenkins replied: “No... You can talk with your attorney but you can’t talk to me.” *Id.*, at pp.17:24-18:3, Ex. at A52-53. Being a counter-defendant, intervenor and owner of Netbula, Yue could neither make arguments nor present facts.

With Yue being the key witness for Netbula, it is near impossible that Netbula can have a fair judgment on the merits.

SUN claims that Yue made “wild accusations of judicial bias” that “are wholly unsupported by the record.” It is instructive to compare the facts in the instant situation to those of the *Liteky v. United States*, 510 U.S. 540 (1994). In *Liteky*, the “most serious” ground for disqualification was “judge's interruption of the closing argument of one of Bourgeois' codefendants, instructing him to cease the introduction of new facts, and to restrict himself to discussion of evidence already presented.” *Id.* at 542. Here, the district judge’s words and actions were much more antagonistic.

The substantive standard for recusal is: “[W]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.” *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir.1997) (quoting *United States v. Studley*, 783 F.2d 934, 939 (9th Cir.1986)). SUN claims that “[n]either Netbula nor Dr. Yue has sought to avail itself” the recusal procedures. This argument fails to realize that with Judge Jenkins’s “cease and desist” order in place, Yue is prevented from

filing a motion for recusal at the district court. The only remedy he can seek is requesting the Court to exercise its supervisory authority and reassign the case to another judge.

E. Stay of the Summary Judgment Proceeding is Necessary

There is no irreparable harm to defendants if their motion for summary judgment is continued to the later date. Regardless of the outcome of the summary judgment hearing on their affirmative defense on the copyright claim, the SUN case will continue on other claims.

The summary judgment motion date had been moved once already -- from November 27, 2007 to December 13, 2007 -- to accommodate SUN's untimely filing, clear proof that the hearing date is fairly flexible and not set in stone. In any event, SUN's motion for summary judgment was supported by a non-existent declaration and is invalid on its face.

However, Yue's copyright is suffering from the presumptive irreparable harm from SUN defendants' infringement. If the district court makes a decision out of bias against Netbula and Yue on the copyright claim in spite of the issues raised by Yue in his Petition for Writ of Mandamus, there will be additional irreparable harm to Yue's intellectual property rights.

As a counter-defendant, Yue also believes that the district judge's personal animus against him makes a fair trial on SUN's trademark counter-claims near impossible.

Yue's Petition requests the Honorable Court to vacate the various orders – including the order to allow SUN defendants to use protected BindView material such as Yue's deposition transcript -- issued by Judge Jenkins, which Yue contended to be procedurally invalid or prejudicial to Netbula's case and Yue's other case. To save everybody's time, the Court should enter an order to stay the summary judgment proceedings at the district court until after the Court rules on Yue's Petition.

CONCLUSION

Yue respectfully requests the Court to grant his emergency motion to stay the summary judgment proceedings at the district court and grant the mandamus relief sought.

Respectfully submitted,

Date: December 7, 2007



Dongxiao Yue
Pro Se

CERTIFICATE OF SERVICE

I certify that I served the foregoing Reply Brief and supporting exhibits on the following persons on December 7, 2007:


- 1) Honorable Martin J. Jenkins, U.S. District Court Judge, Northern District of California, by delivering a true copy to the Clerk's Office, in an envelope addressed to Judge Jenkins;
- 2) The real parties in interest, by emailing a true copy in PDF format to their attorneys of record, Mr. Laurence Pulgram, Mr. Jedediah Wakefield, Mr. Albert Sieber, Mr. David Eiseman, Ms. Vonnah M. Brillet, in accordance to an agreement on service by email.



Dongxiao Yue

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that the within brief is proportionately spaced, has a typeface of 14 points, and contains no more than 3,000 words.



Dongxiao Yue