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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

DREW TECHNOLOGIES, INC.,
a Michigan corporation,

Plaintiff,

v.

SOCIETY OF AUTOMOTIVE ENGINEERS, INC., a Pennsylvania non-stock non-profit corporation, individually and d/b/a SAE, and SAE INTERNATIONAL,

Defendants.

Civil Action No. 03-CV-74535 DT

Hon. Nancy G. Edmunds
United States District Judge

Hon. Paul J. Komives
United States Magistrate Judge

FIRST AMENDED COMPLAINT FOR COPYRIGHT INFRINGEMENT, DECLARATORY JUDGMENT, CONTRIBUTORY INFRINGEMENT, AND VIOLATION OF LICENSE AGREEMENT

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COUNSEL FOR PLAINTIFF
DREW TECHNOLOGIES, INC.

COMPLAINT

1. Plaintiff Drew Technologies, Inc. ("DrewTech"), is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at 7012 East M36 Suite 3B, Whitmore Lake, MI 48189-9789.

2. Defendant Society of Automotive Engineers, Inc., is a non-stock, non-profit corporation formed and existing under the laws of the Commonwealth of Pennsylvania, headquartered at 400 Commonwealth Drive; Warrendale, PA, 15096-0001, which does business under the names "SAE" and "SAE International."

3. Defendant has a major automotive engineering facility located at 755 West Big Beaver, Suite 1600; Troy, MI 48084. Defendant does business in and with the State of Michigan in a continuous and systematic manner.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the copyright laws of the United States (Title 17, United States Code, Section 101, *et seq.*).

5. This Court has general and specific personal jurisdiction over the Defendant.

6. Venue is proper in this judicial district and division because the Defendant is located at 755 West Big Beaver, in Troy, and because the claims asserted in this Complaint arose in Oakland and Washtenaw Counties, Michigan.

GENERAL ALLEGATIONS

7. Plaintiff the exclusive owner of a copyrighted computer program called "J1699.c"(hereafter, the "Program"), and revisions of the Program.

8. The Copyright Office of the Library of Congress has issued a Certificate of Registration, No. TX 5-871-015, with an effective date of June 3, 2003, to DrewTech, for the work titled "J1699-3 Test Source Code – Original Publication Version (rev 3)," a copy of which Certificate of Registration is attached hereto as Exhibit A, and is incorporated herein by reference.

9. The Certificate of Registration recognizes DrewTech's original authorship in an "Original computer program, and ***expression*** of author's ideas contained therein" (emphasis added) (namely, the Program), *see* Exhibit A, and also specifically emphasizes that "Ideas not copyrightable" (as opposed to DrewTech's original *expression* of ideas, which expression is copyrightable). The same idea/expression dichotomy applies to any draft, published, or allegedly copyrighted or copyrightable work by the SAE or any of its Members.

10. DrewTech has applied for, and expects to receive, Certificates of Registration, from the Copyright Office, for several subsequent versions of the Program.

11. The Program is an original work of authorship, fixed in a tangible medium of expression. 17 U.S.C. § 102.

12. DrewTech is the entity that affixed the Program in a tangible medium, thereby acquiring the exclusive copyright thereto. 17 U.S.C. § 102.

13. The Program has been released by DrewTech in several revised versions, each revised version serving as a derivative work of the Program.

14. DrewTech is the entity that made and/or committed all revisions to the Program, making each derivative work (revised version) also a copyrighted work of DrewTech.

15. Any employee of DrewTech who worked on the Program, did so within the scope of his or her employment, and all contributions by DrewTech employees are therefore a "work made for hire." 17 U.S.C. §§ 101 (defining "work made for hire"), 201(b).

16. More specifically, prior to the time work commenced on the Program, an employee of DrewTech had, as one of his job responsibilities, active participation in a committee formed by the Society of Automotive Engineers (the "SAE J1699-3 OBD II" committee). This committee did not have, as part of its mission or agenda, at that time, the generation of any computer software.

17. DrewTech's employee proposed to DrewTech management that he be authorized – as a job function – to begin preparing a piece of computer software in conjunction with his job-related participation in the SAE committee.

18. DrewTech management also actively participated on the committee, as well as participating in the development of the Program.

19. DrewTech granted its employee authorization to work on the Program – but only on the explicit condition that the Program be released as Free or Open-Source Software

("FOSS").

20. FOSS is emphatically not the same as "public domain."

21. Rather, "FOSS" refers to a well-defined set of computer software copyright licenses, that meet specific criteria. Specifically, "Open Source" software must be released under a copyright license that meets the criteria set forth in the Open Source Definition promulgated by the Open Source Initiative. See < http://www.opensource.org/licenses/index.php >.

22. "Free Software" is a term of art that refers to the criteria established by the Free Software Foundation, for Free Software licenses. See < http://www.gnu.org/philosophy/free-sw.html >; < http://www.gnu.org/licenses/license-list.html >. All "Free Software" is Open-Source, but not all "Open-Source" software is Free Software. Id.

23. The license under which the overwhelming majority of FOSS and/or Free Software is released, is the GNU General Public License ("GPL"). A copy of the GPL is attached at Exhibit B.

24. The GPL establishes a carefully-balanced bargain between the author of specific software (here, DrewTech), and the community of all users. The Preamble of the GPL explains the theory behind this software license as follows ("you" refers to any end-user of the Program, including – without limitation – the SAE and/or any member of the committee):

When we speak of [F]ree [S]oftware, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of [F]ree [S]oftware (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new [F]ree programs; and that you know you can do these things.

To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. These restrictions translate to certain responsibilities for you if you distribute copies of the software, or if you modify it.

For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. **And you must show them these terms so they know their rights**.

We protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software.

GNU General Public License, vrsn. 2, pmbl (emphasis added).

25. Courts already have recognized the validity and importance of the GPL.

Planetary Motion, Inc. v. Techsplosion, 261 F.3d 1188 (11th Cir. 2001); Progress Software Corp. v. MYSQL, AB, 195 F. Supp. 2d 328, 329 (D. Mass. 2002) (Saris, J.).

26. Prior to the commencement of any work on the Program, DrewTech and its employee announced to the SAE and its committee that – as a pre-condition of any work done on the Program – the committee had to have consensus that the Program would be released as FOSS.

27. There was no dissent on the committee from DrewTech's insistence that DrewTech would only share the Program with other committee members on the condition that the Program must be FOSS.

28. DrewTech authorized its employee to begin preparing the Program on the explicit understanding with other committee members that the Program had to be FOSS.

29. On or about August 5, 2002, DrewTech released the first version of the Program, via SourceForge, an Internet Website that enables teams to collaborate in the development of FOSS projects.

30. At the time DrewTech released the first version of the Program via SourceForge, a condition of obtaining the SourceForge account was identification of the specific license for the Program. When the SourceForge account was registered on July 24, 2002, the license for the Program was identified by DrewTech management as the GPL.

31. At all subsequent times, the SourceForge Website has notified the entire world that the Program is GPLed (meaning, released under the GPL and no other license).

32. At the time the first version of the Program was released by DrewTech, the Program was released exclusively under the GNU General Public License, and not on any other terms.

33. DrewTech has never authorized anyone – ever – to release any version, copy, or revision of the Program under any terms other than the GPL.

34. All subsequent versions of the Program – by the terms of the GPL itself – are "works based on the Program," and therefore must also be released under the GPL and not on any other terms.

35. The requirement that all copies, revisions, and derivatives must be GPLed is clearly set forth in the terms of the GPL itself, and apply no matter who may prepare a "work based on the Program."

36. The most important requirements, for present purposes, are Paragraphs 1 and 2 of the GPL, which require anybody who copies or modifies the Program to continue to publish the copyright notice and to inform all recipients that the Program is GPLed. Paragraph 1 specifically states:

> You may copy and distribute verbatim copies of the Program's source code as you receive it, in any medium, provided that you **conspicuously and appropriately publish on each copy an appropriate copyright notice** and disclaimer of warranty; **keep intact all the notices that refer to this License** and to the absence of any

warranty; **and give any other recipients of the Program a copy of this License** along with the Program.

GNU General Public License, vrsn 2, ¶ 1 (emphasis added).

37. Paragraph 2 of the GPL specifically states:

> You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided that you also meet all of these conditions:
>
> a) You must cause the modified files to carry prominent notices stating that you changed the files and the date of any change.
>
> b) You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License. . . .

Id. § 2.

38. DrewTech's employee later departed the company, but the Program was already GPLed prior to the time the employee departed.

39. All work done by the employee after departure was – by necessity – subject to

the GPL (the employee was a GPL-licensee of a work that belonged to DrewTech).

40. Therefore, the Employee was under a continuing obligation to comply with the terms of the GPL.

41. Likewise, anyone else (including the Defendant, SAE International) is not permitted to copy or distribute the Program (or any work based on the Program) without complying with the terms of the GPL (including the requirement of copyright and license notices).

42. Nevertheless, on several occasions in late 2002 and in 2003, DrewTech's former employee posted on a "message board" on the SAE International Website, copies of the Program (or modified "works based on the Program") without the necessary copyright notices, in violation of the employee's obligations under the GPL.

43. The entity that actually enabled people to download and copy the Program illegally, however, was the SAE – the operator of the "message board" and the SAE International Website.

44. After learning that the SAE Website "message board" was publishing copies of the Program (or versions of the Program), in violation of the GPL and DrewTech's exclusive copyright, DrewTech notified Defendant SAE International of the licensing violation, and demanded that the SAE either remove the infringing copies of the Program from the "message board," or add the appropriate notices to any copies or versions of the Program published on the SAE "message board."

45. The SAE refused to comply, and did not stop publishing non-compliant copies of the Program.

46. It was not until ***after*** the SAE had been sued, and served with the Original Complaint in this lawsuit, that the SAE finally (belatedly) complied with the "takedown" directive issued by DrewTech. Thus, DrewTech was forced to expend a substantial amount of resources (legal fees for the filing of this lawsuit) in order, at long last, to secure compliance from the SAE that should have been forthcoming as soon as the SAE received the "takedown" notice.

47. The SAE has not notified the Librarian of Congress of the identity of a "designated agent," for purposes of the Digital Millennium Copyright Act, and therefore cannot avail itself of the DMCA "safe harbor" established in 17 U.S.C. § 512(c).

48. On August 19, 2003, Plaintiff dispatched a "Cease and Desist" letter to the Society of Automotive Engineers and its counsel, demanding that Defendant stop violating both the Plaintiff's copyright on the Program, and the GPL. See Exhibit C. Plaintiff specifically demanded that the copies of the Program on the SAE Website must either be removed or made compliant with the GPL.

49. When no response was forthcoming from the SAE, Plaintiff on September 18, 2003, sent a DMCA "takedown notice" under 17 U.S.C. § 512(c), specifically identifying the infringing files that needed to be modified (to comply with the GPL) or removed from the SAE Website. See Exhibit D, *attached* (copy of the September 18, 2003 "Notice and

Takedown" Letter). The SAE did not "take down" the infringing files until after this lawsuit was filed and the SAE was served with Summons.

50. In early October, 2003, the SAE's outside counsel sent a letter to Plaintiff's counsel, refusing to comply with the terms of the GPL.

51. Shortly thereafter, DrewTech's legal counsel responded with correspondence refuting the position taken by the SAE, point-by-point, and demanding (again) that the SAE stop distributing copies of the Program in violation of the GPL, and Plaintiff's exclusive copyright.

52. The SAE did not comply until after the lawsuit had been filed. Plaintiff had no choice but to assert its rights in court, and in so doing incurred significant expenses for the legitimate enforcement of its rights under the Copyright Act.

COUNT ONE – COPYRIGHT INFRINGEMENT

53. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1-53 as though set forth verbatim herein.

54. Title 17 of the United States Code grants Plaintiff (and not the SAE or anyone else) the **exclusive** right to make and distribute copies of the Program, or works based on the Program. 17 U.S.C. § 106(1), (2).

55. In violation of Plaintiff's exclusive rights, Defendant made and distributed copies of the Program (and derivative versions of the Program), for several months – much of that time over the Plaintiff's vigorous and written objection.

56. Defendant continued to violate the Plaintiff's exclusive rights even after the Defendant was specifically told to cease and desist violating the Plaintiff's copyright.

57. Defendant is therefore subject to the monetary and injunctive remedies for infringement of the Plaintiff's exclusive rights, set forth in 17 U.S.C. §§ 501, 502, 504, 505.

58. Defendant's violation of the Copyright Act on and after August 19, 2003, has at all times been knowing and willful.

COUNT TWO – CONTRIBUTORY INFRINGEMENT

59. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1-59 as though set forth verbatim herein.

60. Defendant operates the "SAE.org" Website.

61. Published on this Website, until after this lawsuit was filed, were several infringing and non-compliant versions of the Program.

62. Defendant was properly notified that the SAE Website is non-compliant and was distributing the Program unlawfully in violation of the Copyright Act.

63. Defendant was been given specific instructions and reasonable time, in order to come into compliance with the Copyright Act, and to stop infringing.

64. Defendant failed to "takedown" the infringing material, as instructed, and also refused to comply with the Copyright Act – until *after* this lawsuit was filed.

65. Defendant's non-compliance was willful and knowing.

COUNT THREE – VIOLATION OF SOFTWARE LICENSE

66. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1-66 as though set forth verbatim herein.

67. The only lawful manner in which the Defendant can copy the Program or distribute copies of it, is by becoming a licensee under the terms of the GPL.

68. Indeed, any copying or distribution of the Program constitutes acceptance of the GPL. Defendant is therefore subject to the GPL because it has (even after being informed in writing of its infringing conduct) copied and distributed the Program.

69. The GPL requires any licensee – as an absolute pre-condition of permission to copy and/or distribute the Program – to include and display the necessary copyright and license notices.

70. Despite being told repeatedly to comply with this requirement of the GPL, the Defendant willfully and knowingly failed to come into compliance with the requirements of the GPL.

71. Defendant, in violation of the Copyright Act, willfully continued to copy and distribute the Program, without complying with the mandatory terms of the copyright license under which the Program has been released.

COUNT FOUR – DECLARATORY JUDGMENT (NON-INFRINGEMENT)

72. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1-72 as though set forth verbatim herein.

73. In response to Plaintiff's demand that Defendant stop infringing Plaintiff's copyright, Defendant has sent Plaintiff correspondence claiming that Defendant has a "copyright" on a presently-unfinished document (the "J-1699 Specification Document" or "Standards Document"), that has never been approved for publication by the SAE or any of its committees.

74. None of the participants on the SAE J1699-3 OBD II committee are, or ever have been, employees of the SAE. They are volunteers, who work for other employers.

75. The document under preparation by the SAE J1699-3 OBD II committee, is not a "work for hire" as that term is defined in the Copyright Act.

76. None of the participants of the SAE J1699-3 OBD II committee has ever assigned his or her individual rights in and to any part of said document to the SAE.

77. Although the SAE has a policy concerning copyright assignments, the SAE has not enforced this copyright assignment policy for **any** of its committees for many years.

78. In particular, the SAE never complied with its own policies concerning copyright assignment, in connection with the SAE J1699-3 OBD II committee

79. The mere existence of the SAE's assignment policy (which remains unimplemented) does not establish an effective transfer or assignment of copyrights under the Copyright Act.

80. The "Standards Document" and/or rights to it has never been effectively or properly assigned to the SAE, in accordance with the Copyright Act.

81. **Idea-Expression Dichotomy:** Even if the SAE, *arguendo*, has a copyright, a copyright only protects the *expression* of ideas, not the ideas themselves. Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991); Harper & Row Pubs., Inc. v. Nation Enters., 471 U.S. 539, 556 (1985). Thus, a computer program that expresses one method (of countless methods) of implementing the technical standards (the ideas) embodied in the SAE J1699-3 OBD II Standards Document, does not infringe any exclusive right of the SAE, because it relies (of necessity) only on the ideas embodied therein.

82. **Public Policy:** The SAE has no more right to claim an absolute monopoly to charge arbitrary royalty fees (say, $5.00 apiece to Ford, Chrysler, and General Motors – but $10,000 for any new market entrant that wants to make standards-compliant equipment) for any implementation of industry-wide uniform technical standards, than does a private entity have an absolute monopoly to charge royalties to people who happen to want to know what the law is. See Veeck v. SWBCCI, 241 F.3d 398 (5th Cir. 2001) (*en banc*), *cert. denied*, No. 02-355, 539 U.S. __ (June 27, 2003).

83. The Veeck decision is particularly germane because the SAE J1699-3 OBD II standards process has been initiated as a result of regulatory mandates established by the California Air Resources Board and the U.S. Environmental Protection Agency. "OBD II" refers to On-Board Diagnostic equipment, or computerized devices that are (among other things) used to monitor compliance with government emissions standards.

84. The "J1699.c" Program merely establishes one, tested, method of automating

the process of probing "OBD II" equipment on board vehicles, to ensure that the vehicles are 100% compliant with the government-mandated technical standards.

85. The "Standards Document" under development by the Committee, merely describes the standard -- which anybody is then free (without paying royalties) to implement by way of testing and access devices -- including the software that powers the devices.

86. Since the "Standards Document" basically describes in prose what is required in order for OBD devices to pass the automated tests embodied with great precision in the J1699.c Program – one could just as easily describe the "Standards Document" (still in development) as a derivative work of the Program (already released as "Free Software") – rather than the other way around.

87. Ultimately, however, writing a program to implement a standard (say, writing a World Wide Web browser software program that implements the technical reference standard for "hypertext transfer protocol," or that implements some other defined, technical standard), in no way infringes the "copyright" on the prose document that describes the standard. The reason it does not infringe is that the Program only implements *ideas* embodied in the technical standard, and does not violate the protection afforded to particular *expressions* of those ideas.

88. Accordingly, under the Declaratory Judgment Act, Title 28, United States Code, section 2201, Plaintiff respectfully prays for a declaration of the following:

a. That Defendant has not been assigned rights, by committee members,

to any "Standards Document" under development by the SAE J1699-3 OBD II drafting committee;

b. That the "Standards Document" under development by the SAE J1699-3 OBD II drafting committee, is not a "work for hire;"

c. That the Defendant does not have an exclusive copyright on any "Standards Document" under development by the SAE J1699-3 OBD II drafting committee;

d. That it is against public policy for Defendant to attempt to charge royalties to persons who write software that implements the technical standards (the ideas) embodied in any "Standards Document" under development by the SAE J1699-3 OBD II drafting committee; and

e. Public policy aside, that the Copyright Act does not grant the Defendant an exclusive right to charge royalties to persons who write software that implements the technical standards (the ideas) embodied in any "Standards Document" under development by the SAE J1699-3 OBD II drafting committee;

f. That, contrary to the allegations in Defendant's correspondence, Plaintiff has not violated or infringed any copyright that belongs to the Defendant.

PRAYER FOR RELIEF

Wherefore, premises considered, Plaintiff respectfully prays for the following:

a. An injunction prohibiting Defendant from infringing Plaintiff's copyright;

b. An injunction commanding Defendant to comply with the GPL, if it copies or distributes the Program or any version or derivative thereof;

b. Compensatory damages;

c. Statutory damages under the Copyright Act;

d. Costs and attorneys' fees;

e. A Declaratory Judgment that embodies all the items set forth in Paragraph 88, above; and

f. Such other and further relief, in law or in equity, that this honorable Court deems just and proper.

Respectfully submitted,

DREW TECHNOLOGIES, INC.,
by counsel,

February 16, 2004

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COUNSEL FOR PLAINTIFF.

CERTIFICATE OF MAILING

I certify that the foregoing copies of **(1)** Plaintiff's Unopposed FED.R.CIV.P.15(a), and 15(c)(2) Motion and Supporting Memorandum for Leave to Amend the Complaint, and **(2)** First Amended Complaint for Copyright Infringement, Declaratory Judgment, Contributory Infringement, and Violation of License Agreement, were served on the following counsel of record by First Class Mail, postage prepaid, on February 16, 2004, at the following addresses:

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