

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNIVERSAL CITY STUDIOS, INC., et al.,

Plaintiffs,

-against-

00 Civ. 0277 (LAK)

SHAWN C. REIMERDES, et al.,

Defendants.
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ORDER

LEWIS A. KAPLAN, *District Judge*.

Defendants' previously moved to recuse the undersigned pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a) and (b)(2) and "other relevant sections." In an opinion dated July 17, 2000, the Court denied the motion.

The Court recognizes that it has an independent obligation under 28 U.S.C. § 455 to recuse itself if facts so requiring come to its attention. Testimony was received during the trial today bearing on the question whether a lawyer with whom the undersigned previously practiced, during the period in which the Court practiced with him, represented a party "concerning the matter." *See* 28 U.S.C. § 455(b)(2). The Court therefore has reconsidered the matter in light of that testimony.

The witness, Ms. King of Warner Home Video, testified in substance that the subject of encryption and security of digital files on DVDs did not arise at Warner Home Video until 1995 and that Warner was not working on encryption prior to January 1, 1995. In consequence, as the Court concluded on the basis of the evidence previously before it, even if the Court's former law partner worked on such issues for Warner, and the evidence submitted to the Court is that he did not, there would be no basis for concluding that he did so during the period in which the Court practiced with him. Relevant transcript pages, printed from the *draft* real-time transcript, are attached to this order.

On reconsideration in light of this further evidence, the Court again concludes that recusal on this basis is not required under 28 U.S.C. § 455.

SO ORDERED.

Dated: July 19, 2000

Lewis A. Kaplan
United States District Judge

Excerpt from Draft Transcript - July 19, 2000

CROSS-EXAMINATIONContinued

MR. GARBUS:

MR. GARBUS:

Q. Ms. King, I'm TKPWREG to try and pick up where Mr. Gold began examination and I'll try and do it quickly so we can finish before lunch. When did you start at Warner Home Video?

A. Beginning of March 1990.

Q. And when did you start begin working on DVD?

A. We didn't call it DVD, but I did some work on that during the year 1990.

Q. What did you then call it?

A. We called it movie on a TKPEUFBG.

Q. And at some point does that get called DVD or whatever there predecessor was?

A. Then it was called TAZ and then it was called DVD.

Q. And about when was it called DVD?

A. '96, it had been called S-D D as well.

Q. And at the very beginning of these conversations, was there a concern about a security system for whatever was called that was going to be released the movie on a disk?

A. Well, when it was just an idea there wasn't a security system.

Q. When did it go beyond being just an idea?

A. Well, when it was coming into being reality and the studio started meeting we talked about a security system. I believe that was around 1995.

Q. So that the first time?

MR. GOLD: Your Honor, if I may this line of questioning that goes back in time, back before 1996 when this was released and on into the early '90s hasn't got any relevance to this case whatsoever.

THE COURT: Well look, you know why Mr. Garbus wants to go into it and Mr. Garbus knows why he wants to go into it and it hasn't got much to do with the issues in the case and I know why he wants to go into it he's trying to do some discovery for another purpose.

MR GOLD: Yes, your Honor.

MR. GARBUS: No, I'm not, I'll skip it that's not the point.

THE COURT: Pardon me.

MR. GARBUS: That's absolutely not the point and I'll skip it, I'll STARBT with 1996 there has nothing to do I see what's implied and I has nothing to do with that at all, I don't know when it started, I don't know when they thought of security systems.

THE COURT: Mr. Garbus relax there was something else I was going to say on that subject but in light of your representation that that's not what it's all about annual skip it I'll accept the represent station that we'll go on.

Q. Now?

A.

THE COURT:

THE COURT: If you want to press it then we'll deal with it.

Q. Now, when you started working on what we call DVD, let's say 1995 and don't tell me anything about before 1995, was that when the name DVD first came in or was it '96?

A. I can't exactly remember when the name DVD came in. The 2 competing optical disk formats were converged I believe in September of '95. DVD as a name since there was a consequence verge SKWREPBS of 2 standards 1 called S D and 1 called M M CD came in after that. So it was either late '95 or early '96.

Q. And when for the first time after January 1, 1995 did they start discussing encryption systems or security systems?

A. I can't -- I can't remember the initial date and I've been given nothing to refresh my memory I couldn't find it sometime of I'm sure in my files, but around that time in '95, the motion picture companies started discussing legislation originally it was a HREFPSZ HRAEUF proposal between consumer electronics and the motion picture industry to protect their product in the digital domain.

Q. And tell me just a little about those conversations?

A. Those conversations were originally we looked at the audio home recording rights act where they had a bit extreme where *E which had to be recognized WRERP looking at HREFPS STRAEUGS similar to that however you wouldn't be able to make a copy as you are under the recording home rights ago the issue was do we need the KPHAOEURTer industry in there room we certainly at Warner said we did, other studios said we did, did you say flow included when we finally came up with some proposed legislation and brought the I T industry into the room, we stopped the legislation and sat down and started from scratch on a new security idea that that would be acceptable by the computer industry along with a new type of legislation to protect us.

Q. And the people?

THE COURT:

THE COURT: Excuse me a minute, Mr. Garbus, are you able to say from your own knowledge whether Warner was working on Eng KREUPGS prior to January of 1995.

THE WITNESS: No, we weren't.

THE COURT: Proceed.

Q. Now, with respect to instead of en KREUPBGS, how about the word since the judge asked the question how about security system, was there any concern prior to '95 expressed about security for the videos -- pardon me, URBGS for the movie that is were could be released?

A. I don't remember that being a topic that I participated in.

Q. You say you don't RAEB being a topic that you participated?

A. Western try to go come up -- we had a certain window of

opportunity we felt in the video industry at least at Warner Brothers and we were part -- we were a large part of the development of DVD. We wanted to get this hard copy consumer product into the market before high definition television and before video on demand was widely available. We want to do get consumer acceptance and we knew we had a limited window of opportunity. So before you can think about security you have to think about having a product and we were I am percented in developing the product.

Q. Now, one of the issues with the A H R A down what there standing for?

A. The audio home recording rights act.

Q. Yes and that's 1992?

A. I don't know the date.

Q. One of the issues there was the question of security for audio recordings, is that right?

A. That's how I understand it.

Q. So everybody understood after 1992 that you had to have some kind of security system for any product that was released into the market?

A. That's right.

MR. GOLD:

MR. GOLD: I object to the fortunately of the the question your Honor.

THE COURT: Yes, look, this is now enough, Mr. Garbus, I have an affirmative obligation that I recognize as far as I'm concerned, I have discharged it, you can now proceed and handle this case.

MR. GARBUS: Thank you.

Q. Now,

MR. GARBUS: Can we just approach the bench for a moment, your Honor?

THE COURT: I'm sorry?

MR. GARBUS: Can we approach the bench for a moment?

THE COURT: Yes.

MR. GARBUS: I'm not STKPWOELG to pursue this HREUPB of inquiry any further. It seems perfectly obvious to me that even before the audio home recording act of 1992 that any one who was thinking of releasing any product into the consumer market was extraordinarily concerned about security. What this witness has just answered is and I don't remember letter question and answer, that you were not going to have a product released, she just gave a yes to my last question I'm not going to state it here and AOEUP not going to go any further with it, but it's inconceivable to me -- I won't say what's inconceivable to me.

MR GOLD: Your Honor, the witness has testified that Warner will played the decision that they were not going to release DVDs unless there was an encryption system that they felt good about. She also testified that at the meeting she went to in the industry she heard and knew that the other studios felt the same way.

THE COURT: Look, I don't have to hear all of that.

This is exceptionally simple. The only reason I raise the question is because quite apart from what the parties have raised I have an independent obligation under section 455 B-2 of the code to TKEUS KW-L myself if it appears that someone with whom I practiced law at the time I did so was engaged by a party "concerning the matter."

It is a subject? The context of this case on which I have no knowledge of my own, I am entirely at the mercy of what the parties put before me. I don't know there I had an obligation tending so far as to ask the question there I did but I now have before me the witness' deposition testimony. I have what she said here. I have the affidavits that were put before me on the motion. And the issue is as far as I'm concerned closed absent new evidence. I do not view this trial as a discovery proceeding for the purpose of conducting an expedition in search of that new evidence. Obviously if there is such evidence and it requires my disqualification, I will readily do so. But I haven't seen it and what we are here to try now is this case.

MR. GARBUS: So can I understand something? So then I should not continue the line of questioning leading from the A H R A of '92 up to '95 and '96?

THE COURT: I can't make abstract rulings like there. I believe there I said in my opinion, Mr. Garbus, that I reasonably might infer although I don't have the text in front of me, that somebody probably thought about security at some earlier point, but somebody thinking about security and my partner former partner having been engaged with respect to security, if indeed that would be enough which I express no view on right now, in the period between August -- prior to August 22, 1994 is a hole other matter.

MR. GARBUS: Thank you (in open court)