

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

GALLUP, INC., d/b/a THE GALLUP ORGANIZATION,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 00-CV-05523
	:	
v.	:	
	:	
KENEXA CORPORATION,	:	
	:	
Defendant.	:	

Stengel, J.

November 16, 2005

MEMORANDUM AND ORDER

In this copyright infringement case, Gallup, Inc., seeks to recover damages for an alleged copyright infringement by Kenexa Corporation. The dispute between the parties has been the subject of numerous motions, memoranda, and orders. Kenexa filed a motion asking for a clarification of my order entered October 13, 2005, where I granted Gallup's motion to enforce the Honorable Herbert J. Hutton's order of May 28, 2003.

At issue is the extent to which Kenexa can introduce evidence of its costs after Gallup introduces evidence of Kenexa's revenues from the alleged infringement. Section 504 of the Copyright Act, entitled "Remedies for Infringement: Damages and Profits," provides the measure of damages for a copyright infringement:

- (a) **In General.** Except as otherwise provided by this title, an infringer of copyright is liable for either:
 - (1) a copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

- (b) **Actual Damages and Profits.** The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504.

This straight-forward statement of the damages recoverable in this action is complicated by prior developments in the case. Earlier in this litigation, Judge Hutton entered an order in response to a discovery dispute between the parties. Gallup made several discovery requests of Kenexa pertaining to the profits attributable to that portion of Kenexa's business which led to the alleged infringement.¹ Kenexa maintained that the portion of its business involving employee satisfaction surveys did not have separate books or accounts. Kenexa cited this as a reason for its inability to provide specific revenue and cost/expense data for the employee satisfaction survey portion of its business. Gallup then constructed its damages model based upon the overall revenues reported by Kenexa for the applicable time period. Gallup intends to use these "gross revenues" as proof of its damages under section 504 of the Copyright Act.

¹Gallup owns a copyright on an employee satisfaction survey known as the Q¹². Gallup contends that Kenexa has infringed on this copyright by using its own employee satisfaction surveys containing questions and survey items which appear in Gallup's copyrighted product, i.e. the Q¹².

At some point after Gallup's expert constructed his "damages model," Kenexa informed Gallup that it was capable of breaking down its revenues and expenses to show the specific profits attributable to the employee satisfaction survey portion of its business.

Gallup chose to seek an order of sanctions from Judge Hutton who presided over the case in 2003. Judge Hutton found that Kenexa had violated its obligation to provide full and complete responses to discovery requests and entered an order on May 28, 2003 precluding Kenexa from using certain information at trial relating to damages that it had not produced to Gallup. Specifically, Judge Hutton ordered on May 28, 2003 as follows:

1. Defendant Kenexa Corporation is precluded from referring at trial to the reports produced on March 7, 2003 and March 25, 2003 regarding the revenues and costs associated with defendant Kenexa Corporation's employee survey business; and
2. Defendant Kenexa Corporation is precluded from offering at trial the testimony of Mr. Donald Volk to the extent such testimony relates to the specific costs and revenues associated with defendant Kenexa's corporation's employee survey business.

Judge Hutton noted in the Memorandum accompanying the May 28, 2003 order that "due to the extreme nature of an exclusion sanction, the exclusion should only be as broad as is necessary to cure the prejudice inflicted by the disobedient party. Pennypack, 559 F.2d at 905 (noting trial courts can impose 'reasonable sanctions')." Mem. and Ord. of May 28, 2003 at page 11.

As Judge Hutton correctly noted, the exclusion of evidence due to a discovery violation is an extreme sanction. Accordingly, it should be carefully applied and strictly limited. Judge Hutton's May 28, 2003 Memorandum and Order show that the sanction was carefully considered and narrowly applied.

In its Motion to Enforce Court Order, Gallup asked for a wide application of Judge Hutton's preclusion order of May 28, 2003. In my order of October 13, 2005, I granted Gallup's Motion to Enforce Court Order and referred to another order entered that same day on Gallup's Motion to Strike Just Produced Financial Data Already Precluded by Court Order. In a footnote to the Motion to Strike Order, I noted that the order was entered under the law of the case doctrine and that the preclusion of David Volk's testimony by Judge Hutton's May 28, 2003 order would be limited to the terms of that order. In both orders entered on October 13, 2005, I noted that the specific extent of David Volk's testimony would be discussed at the pretrial conference scheduled for November 10, 2005.

At the pretrial conference of November 10, 2005, Gallup urged an interpretation of Judge Hutton's preclusion order that would exclude all evidence from Kenexa as to its costs and expenses. Such an interpretation would lead to the fortuitous result (for Gallup) of the plaintiff introducing evidence of the alleged infringer's gross revenues in the range of \$17 million, with no consideration of a reduction by any costs or expenses. Gallup presumably wants this Court to instruct the jury that the damages recoverable under

section 504 of the Copyright Act would in this case be measured by the \$17 million in revenues generated by Kenexa during the time period in question with no corresponding reduction for costs or expenses. There is no question that Kenexa incurred costs and expenses in generating its gross revenues. This approach involves an expansive application of Judge Hutton's preclusion order and would preclude Kenexa, as the alleged infringer, from presenting evidence specifically referred to in section 504(b) of the Copyright Act. As a practical matter, an instruction to the jury that it should consider Kenexa's \$17 million in revenue with no consideration of any costs or expenses incurred by Kenexa during the applicable time period would create a fiction and might well confuse and mislead the jury.

The problem here is that Gallup is without information about the revenues specifically attributable to Kenexa's employee satisfaction survey business. Gallup is also without information as to Kenexa's costs or expenses attributable to the employee satisfaction survey business. Judge Hutton found that this lack of important information was attributable to Kenexa's failure to fulfill its discovery obligations and issued the appropriate sanction.

Because Gallup does not have the information to present a narrowly tailored damages claim, it is left to introduce evidence of the alleged infringer's gross revenues. Gallup will use Kenexa's documents, provided in discovery, to establish Kenexa's gross revenues. The same documentation contains information as to Kenexa's costs and

expenses. Kenexa seeks to introduce evidence at trial as to its costs and expenses without reference to the reports produced on March 7, 2003 and March 25, 2003 regarding the revenues and costs associated with Kenexa's employee survey business.

So long as the March 7, 2003 and March 25, 2003 reports are not used by Kenexa, and so long as Donald Volk does not testify as to the specific costs and revenues associated with Kenexa's employee survey business, Kenexa can introduce evidence of its costs and expenses to the extent they are contained in the documents provided to Gallup during discovery. This will afford the necessary deference to Judge Hutton's order of May 28, 2003. It will also avoid the presentation to the jury of an unrealistic and artificial damages claim, i.e. \$17 million in revenue, with no consideration of the alleged infringer's costs or expenses. To do otherwise would be to apply Judge Hutton's May 28, 2003 order in a harsh and expansive way. Gallup's proposed application of Judge Hutton's preclusion order would lead to a false and misleading depiction of the damages in this case. Accordingly, Kenexa's Motion to Clarify will be granted to the extent that only the specific matters referred to in Judge Hutton's May 28, 2003 order will be excluded from evidence. Kenexa may introduce evidence of costs and expenses to the extent they are based on information which has been provided to Gallup during discovery in this case. An appropriate Order follows:

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v.	:	
	:	
KENEXA CORPORATION,	:	
	:	
	:	
Defendant.	:	

ORDER

AND NOW, this day of November, 2005, it is hereby **ORDERED** that Kenexa's Motion to Clarify (Docket No. 146) is **GRANTED**, and the Court notes that only the specific evidence referred to in Judge Hutton's May 28, 2003 order shall be excluded from evidence at trial. Kenexa may introduce evidence of costs and expenses in response to Gallup's claim for damages as set forth in section 504 of the Copyright Act so long as Kenexa does not refer to those specific points covered in Judge Hutton's May 28, 2003 order.

BY THE COURT:

LAWRENCE F. STENGEL, J.