

Responses, Replies and Supplemental Briefs[2:03-cv-74535-NGE Drew Tech Inc v. Society of Auto Eng, et al](#)**U.S. District Court****Eastern District of Michigan**

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Case Name: Drew Tech Inc v. Society of Auto Eng, et al**Case Number:** [2:03-cv-74535](#)**Filer:** Drew Technologies, Incorporated**Document Number:** [35](#)**Docket Text:**

RESPONSE to [32] MOTION to Quash *Subpoena Duces Tecum and Subpoena Ad Testificandum for Kerby Suhre*, filed by Drew Technologies, Incorporated. (Grimm, Eric)

The following document(s) are associated with this transaction:

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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.,** individually
and d/b/a **SAE** and **SAE
INTERNATIONAL,**

Defendants.

C.A. No. 03-CV-74535 DT

Hon. Nancy G. Edmunds
United States District Judge

Hon. Paul J. Komives
United States Magistrate Judge

**OPPOSITION MEMORANDUM OF PLAINTIFF DREW TECHNOLOGIES,
INC., TO WITNESS KERBY SUHRE'S MOTION TO QUASH**

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ISSUES PRESENTED

- I. Is Kerby Suhre a necessary witness, whose testimony is required as part of the discovery process in this case?

ANSWER

Yes. Kerby Suhre is one of a tiny handful of witnesses with direct, first-hand knowledge of the precise dates, times and places, where and when a piece of computer software was fixed in a tangible medium. That issue is the central issue in this case. Kerby Suhre's testimony is indispensable.

- II. Was there ever any "deal" not to depose Kerby Suhre?

ANSWER

No. There was never any such "deal." Plaintiff asked for Mr. Suhre's truthful testimony (telling the truth was always an express condition) in the form of a Declaration or Affidavit, in exchange for the promise that Plaintiff would use best efforts to attempt to secure a Summary Judgment ruling from Judge Edmunds. *If* (and only if) the Plaintiff prevailed on summary judgment, then Mr. Suhre would not have to be deposed. Plaintiff followed through on Plaintiff's promise, and valiantly fought for summary judgment. But Judge Edmunds insisted that discovery must be taken before summary judgment can be granted. Accordingly, it is necessary to take Mr Suhre's deposition.

- III. Is Mr. Suhre being subjected to excessive burden?

ANSWER

No. The deposition will be limited to the seven hours specifically permitted under the Federal Rules. Notice was provided three weeks in advance, and Plaintiff's counsel offered to re-schedule the deposition, to accommodate Mr. Suhre's schedule. Plaintiff already spoke with Kerby Suhre's lawyer, and offered to sit down and discuss the scope of the documents to be produced. Suhre's lawyer jumped the gun and filed a "motion to quash" – after waiting the entire three-week period – without bothering to discuss and attempt to resolve any issues pertaining to the scope of the documents to be turned over.

**IN THE UNITED STATES DISTRICT COURT
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**DREW TECHNOLOGIES, INC.,
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Defendants.

C.A. No. 03-CV-74535 DT

Hon. Nancy G. Edmunds
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United States Magistrate Judge

**OPPOSITION MEMORANDUM OF PLAINTIFF DREW TECHNOLOGIES,
INC., TO WITNESS KERBY SUHRE'S MOTION TO QUASH**

Plaintiff, Drew Technologies, Inc. (“DrewTech”), respectfully opposes witness Kerby Suhre’s Motion to Quash. Mr. Suhre is a necessary witness, with indispensable knowledge of key facts in this case. Plaintiff has made it clear that the deposition will be limited in duration to the seven hours permitted under the Federal Rules of Civil Procedure.

We have offered to sit down and discuss the scope of document production with Mr. Suhre’s lawyer. Mr. Suhre’s lawyer never attempted to narrow the issues, before prematurely filing a “motion to quash” filled with hyperbole and alarm. We are more than willing to work together in a constructive manner with Mr. Suhre’s counsel, to make sure that all materials in Mr. Suhre’s possession that are reasonably calculated to lead to the discovery of admissible evidence, are turned over by Mr. Suhre, while at the same time minimizing any

burden or inconvenience for him, to the extent it is reasonably practicable to do so.

“For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” Jaffe v. Redmond, 518 U.S. 1, 9 (1996) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

“[E]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” Baker v. General Motors Corp., 522 U.S. 222, 239 (1998) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)). Here, Mr. Suhre seeks to be excused from giving testimony. The Court should deny his request, because he is a necessary and indispensable witness.

BACKGROUND ABOUT THE CASE

This is a copyright dispute. The dispute centers on two key issues – (1) “fixed in an tangible medium;” and (2) “derivative work.” The “derivative work” issue boils down to an analysis of 17 U.S.C. 102(b), which says, “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” See also Baker v. Selden, 101 U.S. 99 (1879) (explaining the fundamental purpose of idea/expression dichotomy in copyright law). The legal issue before the Court is whether a particular piece of computer software originally

developed by Drew Technologies, Inc., and worked-on personally by Kerby Suhre, while Suhre was an employee of DrewTech, is a “derivative work” of a document (called a “Recommended Practice”) that belongs to the Society of Automotive Engineers.

The Recommended Practice (the “Document”) does not really contain expression protected by the Copyright Act, but merely sets forth – in extraordinary technical detail – the precise functional parameters that must be met by a piece of computer software, in order to implement a regulatory requirement imposed by the California Air Resources Board and by the U.S. Environmental Protection Agency.

In other words, the “Document” contains nothing other than, “idea[s], procedure[s], process[es], system[s], method[s] of operation, concept[s], and principle[s],” which can be implemented in various ways through computer software.

Drew Technologies (and other software companies) have prepared working implementations of the Document, in the form of executable computer code. The Society of Automotive Engineers claims that all such software implementations of the Document are “derivative works” of the Document.

DrewTech reasonably responds that section 102(b) conclusively refutes the SAE’s argument, and entitles DrewTech to prevail as a matter of law. Mr. Suhre, as a key individual who personally worked on the Program, will be able to confirm that the Program contains no protected expression whatsoever from the Document, but only un-protected “idea[s], procedure[s], process[es], system[s], method[s] of operation, concept[s], and principle[s].” For this reason alone, Mr. Suhre is an indispensable witness.

The second issue to be addressed is the “fixed in a tangible medium” issue. A copyright comes into existence when a work is “fixed in any tangible medium of expression.” See 17 U.S.C. § 102(a). For computer software, a copyright comes into existence when software code – that has been entered into an “editor” interface – is “saved,” using the tangible medium of computer memory or a computer hard drive. The individual who “fixes” such software code in a tangible medium of expression, is the author of the work, unless the individual is acting in the scope of his or her employment, in which case, part (a) of the definition of “work made for hire” in 17 U.S.C. § 101 automatically vests the copyright in the programmer’s employer, by operation of law. See also 17 U.S.C. §§ 201(a), (b).

Thus, for purposes of the Program at issue in this case – as Mr. Suhre testifies in his Declaration – the Program was prepared using DrewTech equipment, on DrewTech premises. Moreover, Mr. Suhre testifies that the work he personally performed on the Program was performed in the course of his employment. Thus, as a matter of law, the Program and the copyright in it, automatically became the property of DrewTech, Mr. Suhre’s employer.

The second dispute in this case, between DrewTech and the SAE, is over the ownership of the Program. The SAE contends that the Program does not really belong to DrewTech, but instead belongs to the SAE, because Mr. Suhre started collaborating with some members of an SAE Task Force, after substantial work already had been done by DrewTech on the Program. The SAE does not explain precisely how the statutory requirements were met, in order to transfer any copyright interest to the SAE itself. Indeed, the SAE admits that no SAE employees ever performed any work on the Program.

Even though the SAE did not obtain any written documents to transfer any copyright privileges in the Program to the SAE, until over a year after Mr. Suhre had quit the Task Force (and Mr. Suhre explains in his Declaration that (1) he only transferred rights that he acquired subsequent to his departure from DrewTech, and (2) all such work by him was subject to the GNU General Public License), the SAE vehemently contends that the SAE nevertheless owns the entire program. Again, the SAE does not explain the statutory basis for its vehement insistence, and we cannot identify any viable statutory basis for the claim.

This second issue ultimately depends on an close and careful examination of precisely who (i.e., which individuals, and the identity of their employers), “fixed” the work (the Program) in a tangible medium of expression, when they did so, and under what circumstances.

The reason that Mr. Suhre’s testimony is necessary in this case is that Kerby Suhre personally performed much of the work on the Program, while Mr. Suhre was an employee of DrewTech. As one of the few people with first-hand knowledge (and, in some instances, the only person with first-hand knowledge of some aspects of the original development of the Program), Mr. Suhre is an indispensable witness. He has information for which there simply is no substitute, directly related to the central issues in this case.

BACKGROUND ABOUT MR. SUHRE

It is true that Mr. Suhre abruptly left his employment with Drew Technologies, Inc., after apparently becoming dis-satisfied with his work. Beyond that, we respectfully disagree with Mr. Suhre’s characterization of events. But it would serve no purpose to engage in a

battle of adjectives. Suffice it to say that Suhre was an employee of DrewTech, and is not one anymore. DrewTech has not “harassed” Mr. Suhre, and has had little communication with him (precisely one letter and once Subpoena, over the course of roughly two years) in the time since his departure.

Most of the work on the Program, prior to Mr. Suhre’s departure from DrewTech, was performed by Mr. Suhre on a DrewTech company laptop that was assigned to Mr. Suhre. The laptop, therefore, should contain important details about the process of developing the Program, and the precise times at which particular parts of the code were committed (“fixed,” in statutory parlance).

Trouble is, when Mr. Suhre returned the laptop to his employer, Mr. Suhre failed to return data that was stored on the laptop. Moreover, this data that had been erased from the laptop could not be replaced by any means. The data was very valuable, and no backup existed for some of the data Mr. Suhre erased. Mr. Suhre never had authorization to erase the laptop hard drive. Nor did he have authorization to install a “fresh” installation of Windows on top of the hard drive partition he had been using to store his work.

By erasing the data, Mr. Suhre caused quite a bit of harm to DrewTech and its business operations. DrewTech preserved the hard drive in a secure, safe place, which was a good thing – because of the possibility that data may now be recovered from it.¹

¹For obvious reasons, we respectfully decline at this time to provide more detail about the status (if any) of data recovery operations, or whether law enforcement is investigating the laptop erasure. Suffice it to say that everything in our letter to Mr. Suhre was absolutely truthful.

Drew Technologies has reason to believe that Kerby Suhre has backups of some or all of the data that was on the laptop prior to erasure. Much of that data is directly relevant to one of the two central issues in this case. Accordingly, it is only reasonable for DrewTech to attempt to obtain, in discovery, access to any information that Kerby Suhre may possess.

As stated earlier, we are more than willing to work together with counsel for Mr. Suhre, to ensure that the process imposes no more burden on him than necessary.

THE NEED FOR DISCOVERY

Because Kerby Suhre is the only person in the world able to answer some questions that go to the heart of this lawsuit, he is a necessary and indispensable witness. Because documents in his possession are likely to be the only copies of said documents in the world, it is necessary to obtain documents from him that pertain to this lawsuit.

Each of the document requests are reasonably calculated to lead to the discovery of admissible evidence, and we have offered to coordinate with Mr. Suhre's lawyer, in order to narrow the scope of any document requests that potentially involve substantial volume or expense. His lawyer, unlike us, has access to the documents, so we cannot re-phrase the document requests to narrow them, without cooperation from Mr. Suhre's lawyer, and guidance from him (looking at the documents) as to what documents may or may not be responsive to particular requests, and the volume of such documents.

DrewTech will pay for any copies that are made of documents from Mr. Suhre.

To the extent that Mr. Suhre is concerned about self-incrimination, the right way to address the matter is for Mr. Suhre to be required to sit for deposition, and for his lawyer to

raise Fifth Amendment objections, in response to specific questions.

This is not the place or time to debate whether Mr. Suhre's unauthorized erasure of a computer hard drive constitutes a federal crime or not. If Mr. Suhre has a concern about that issue, he certainly will have the opportunity to raise self-incrimination objections, when presented with specific questions. In the meantime, we have told Mr. Suhre's lawyer that the focus of the deposition will be on the issues relevant to the copyright lawsuit (including, but not limited to, the precise times on which the Program was "fixed in a tangible medium," and Mr. Suhre's personal knowledge of the development of the Program).

We cannot obtain the same information from any other source. Mr. Suhre's Declaration (unlike a deposition transcript) cannot be used at trial.

Mr. Suhre therefore needs to be deposed.

Finally, we respond to Mr. Suhre's claim that there was a "deal" not to depose him – in exchange for a Declaration. That was not the deal. The "deal" was that Mr. Suhre would give a truthful Declaration, and that Plaintiff would use said Declaration, in an attempt to secure summary judgment (thereby cutting off discovery). If summary judgment was obtained (but only if that happened), then Mr. Suhre would not need to be deposed.

Plaintiff has always been just as eager as Mr. Suhre not to be forced to wade into discovery – if it can be avoided – for obvious reasons. We think Judge Edmunds should have disposed of the case on summary judgment. That would have been the right thing to do.

However, Judge Edmunds has instructed us to take discovery. And we have always been clear with Mr. Suhre and his lawyer that if Judge Edmunds insists that we take

discovery, we have no choice but to depose Mr. Suhre. He is indispensable.

We fulfilled our end of the “deal” by vigorously attempting to persuade Judge Edmunds to dispose of the case on summary judgment, without discovery. She rejected our plea. So discovery is necessary. Judge Edmunds does not want us to second-guess her instructions to proceed with discovery, so we intend to comply as instructed.

Thus, Mr. Suhre has the same obligation as every other citizen to testify under oath, about what he knows. He is obligated, like every other witness, to promote the truth-seeking process, by testifying and producing documents, reasonably calculated to lead to the discovery of admissible evidence in this case.

CONCLUSION

For the foregoing reasons, Kerby Suhre’s Motion to Quash should be Denied.

Respectfully submitted,

November 3, 2004

/s/ Eric C. Grimm
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CERTIFICATE OF SERVICE

I certify that the foregoing **OPPOSITION MEMORANDUM OF PLAINTIFF DREW TECHNOLOGIES, INC., TO WITNESS KERBY SUHRE'S MOTION TO QUASH**, was filed through the Court's ECF system on November 3, 2004, and will be served by first class mail, postage prepaid, on November 3, 2004, on counsel of record, and on counsel for Mr. Suhre:

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