

UNITED STATES DISTRICT COURT
FOR DISTRICT OF MASSACHUSETTS

ONE LAPTOP PER CHILD ASSOCIATION, INC.)	
)	
Plaintiff,)	
)	
v.)	
)	
LAGOS ANALYSIS CORPORATION,)	
)	Civil Action No.
Defendant and)	
Third party plaintiff,)	08-CV-10405-GAO
)	
v.)	
)	
NICHOLAS NEGROPONTE,)	
QUANTA COMPUTER, INC., and)	
QUANTA COMPUTER USA, INC.)	
Third party defendants.)	
)	

DEFENDANT'S OPOSITION AND MEMORANDUM OF LAW
IN OPPOSITION TO
PLAINTIFF'S MOTION TO REMAND

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I. INTRODUCTION

OLPC filed a preemptive complaint in Massachusetts Middlesex Superior Court pursuant to M. G. L. c. 231A praying for a declaratory relief that it did not misappropriate LANCOR's trade secrets. (OLPC's Complaint ¶¶ 21-22) More specifically, OLPC characterized the nature of the controversy between the parties as, "OLPC has not misappropriated any trade secrets or proprietary or confidential information of LANCOR" in creating a multilingual keyboard that is incorporated into its XO laptop products. OLPC in its memorandum of law states that its cause of action is one of state of law and that federal question that would give rise to grounds for removal from state court to federal court under the "well-pleaded complaint" rule did not exist.

The controversy between the parties was based on LANCOR's allegations of breach of end user license agreement, misappropriation of trade secrets and copyright infringement by OLPC in relation to the multilingual keyboard layout and process incorporated into the OLPC's XO laptops. OLPC was aware that LANCOR intends to bring an action for copyright infringement because the parties discussed LANCOR's claims and OLPC's defenses in the three weeks preceding the filing of the complaint in state court by OLPC on February 12, 2008. Because infringement of copyright is an essential part of the controversy between the parties, OLPC's artful pleading to omit and/or conceal facts relating to copyright in order to avoid a federal question exclusively reserved for federal courts should be rejected.

If the complete facts of a complaint establish an issue arising under federal law, the federal court can "recharacterize" it accordingly, in order to uphold removal. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) ("If a court concludes that a plaintiff has 'artfully pleaded' claims ... it may uphold removal even though no federal question appears on the face of

the plaintiff's complaint.”)¹ We respectfully request the court to deny OLPC's motion to remand this case to state court.

II. STATEMENT OF RELEVANT FACTS

LANCOR is a pioneer in the development of advanced physical multilingual keyboard technology using four shift keys and characters with combining properties to allow for direct access typing of accents, symbols and diacritical marks during regular typing. LANCOR's technology named Shift² keyboard technology has been used to create a new class of region specific keyboard products called Konyin multilingual keyboard. LANCOR's Konyin multilingual keyboards are available for sale at www.konyin.com² and many other online stores.

OLPC is the developer and marketer of a line of laptop products called XO laptops incorporating multilingual keyboard layouts.

On August 7, 2006, Nicholas Negroponte, the Founder and Chairman of OLPC visited LANCOR's product website, www.konyin.com and placed an order for two (2) Konyin multilingual keyboards. Mr. Negroponte ordered product KB-201PW-US (PS/2) (Konyin United States multilingual keyboard) and KB-201PW-NG (PS/2) (Konyin Nigeria multilingual keyboard). Mr. Negroponte's order was delivered to “Jill Clarke, One Laptop Per Child 1 Cambridge Ctr., 10th Fl Cambridge, MA 02142 United States,” on August 8, 2006. OLPC admitted purchasing “one or more” Konyin keyboards. (OLPC's Complaint ¶ 16)

¹ Moreover, under Massachusetts law a declaratory judgment may not issue if the relief sought will not resolve all controversies between the parties. See *M. G. L. c. 231A § 3*, therefore, for OLPC to obtain relief it may not artfully omit and/or conceal issues of actual controversy between the parties in its complaint, to avoid federal jurisdiction.

² Every page within the www.konyin.com web site is marked with the copyright restriction notice.

In or about March 2007, upon information and belief, OLPC delivered about 300 XO laptops to a school in Abuja, Nigeria. These XO laptops included a multilingual keyboard layout.³

On August 6, 2007, attorneys, in Nigeria, representing LANCOR notified OLPC, by a letter, referenced as: “Infringement of Patented Design, Copyright and Violation of End User License Agreement of Konyin Multilingual Keyboard,” “...that following your purchase of their products on or about August 06, 2006, you took information, albeit surreptitiously, and applied their work product for your use and benefit without permission thereby violating the end user license agreement and infringing on their intellectual property rights .” (See OLPC’s Complaint ¶ 9)

On August 31, 2007, OLPC responded to LANCOR’s demand letter by requesting for identification of the patent LANCOR alleged was infringed, a copy of the EULA ,proof that OLPC executed such agreement, and identification of the specific aspects of LANCOR’s multilingual keyboard design it alleged have been infringed. (See OLPC’s Complaint ¶ 10)

On September 20, 2007, LANCOR’s attorneys replied to OLPC’s request for more information by providing the Nigerian Registered Design Patent certification number 8489 (RD8489) of May 2003 and by stating that XO laptops’ multilingual keyboard composition, outlook and principal characteristics / features are “similar and confusing with our Client’s product and thereby infringe on their exclusivity rights.” LANCOR further stated that OLPC executed the EULA when it activated the Konyin Nigeria Multilingual Keyboard it purchased on August 7, 2006. The letter to OLPC also confirmed that under the enabling Nigerian law on the

³ The layout of the alphanumeric and punctuation keys of the XO laptop with Nigeria multilingual keyboard is one hundred percent (100%) similar to the layout of the alphanumeric and punctuation keys of the Konyin Nigeria multilingual keyboard, purchased by OLPC on August 7, 2006.

subject, LANCOR has a monopoly of a multilingual keyboard registered under the same law. (See OLPC's Complaint ¶ 11)

On November 22, 2007, LANCOR commenced a civil action against OLPC for infringing its Nigerian Registered Design Patent in a Federal Court in Lagos, Nigeria. On December 3, 2007, the Federal Court in Nigeria granted an ex-parte motion for an Order restraining OLPC from distributing and selling its XO laptops in Nigeria. (See OLPC's Complaint ¶ 12)

On December 31, 2007, OLPC filed a "preliminary objection" (Motion to Dismiss) to LANCOR's lawsuit in the Nigerian Federal Court.

On January 18, 2008, LANCOR's American attorney sent a demand letter to OLPC asserting that OLPC violated the EULA and infringed on LANCOR's intellectual property rights in relation to the multilingual keyboard layout and process incorporated into OLPC's XO laptops. OLPC was given until January 31, 2008 to respond. Attorneys representing OLPC contacted LANCOR's attorney and engaged in attempts to resolve issues raised in LANCOR's letter. (See OLPC's Complaint ¶ 13)

On February 08, 2008, Honorable I. N. Auta, a Federal Judge, in Nigeria issued a ruling rejecting all the grounds advanced by OLPC as reasons to dismiss the patent infringement lawsuit and further extended the restraining order against OLPC in Nigeria.⁴

On February 11, 2008, LANCOR indicated to OLPC that it was terminating discussion and will seek all legal remedies that may be available to it. The unresolved issues at that point were allegations of breach of EULA, misappropriation of trade secrets and copyright infringement.

⁴ OLPC has appealed this ruling.

On February 12, 2008, OLPC filed the present action in the Massachusetts Middlesex Superior Court for a preemptive declaratory relief with a single cause of action – to wit – OLPC did not misappropriated LANCOR’s trade secrets. (OLPC’s Complaint ¶¶ 21-22)

On March 12, 2008, LANCOR filed notice of removal of OLPC’s action to this court and properly joined the issues representing the actual controversies between the parties as one for breach of contract, misappropriation of trade secrets and copyright infringement. The claim of copyright infringement is a federal question, to which the federal court has original subject matter jurisdiction.⁵

On March 28, 2008, OLPC filed its present motion to remand the case back to state court.

III. ARGUMENT

A. **The threshold inquiry for a motion to remand is whether or not the federal court has subject matter jurisdiction.**

This Court should deny OLPC’s motion to remand the action to Middlesex Superior Court because LANCOR’s removal was proper, as this court, after properly recharacterizing OLPC’s complaint, has subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a). 28 U.S.C. § 1338(a) provides that district courts have original jurisdiction of “any civil action arising under any Act of Congress relating to ... copyrights” and “such jurisdiction shall be exclusive of the courts of the states in ... copyright cases.” Removal under 28 U.S.C. § 1441(b) is required for “any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the ... laws of the United States.” If an action “arises under” federal copyright law, the federal courts have exclusive jurisdiction under 28 U.S.C. § 1338(a). *Gener-Villar v.*

⁵ On March 27, 2008, LANCOR filed the necessary paperwork and fee to apply for the exclusive rights and privileges in and to the copyrights in the “KONYIN PHYSICAL MULTILINGUAL KEYBOARDS WEBSITE” content under the Copyright Act, 17 U.S.C. §§ 101, *et seq.* LANCOR’s registration is currently pending. (Case #: 1-51582591)

Adcom Group, Inc., 417 F.3d 201, 203 (1st Cir. 2005) The most frequently cited test for whether a suit “arises under” the copyright law states as follows: “An action ‘arises under’ the Copyright Act ... if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement ..., or asserts a claim requiring construction of the Act, ... or ... presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.”

Gener-Villar Id. at 203

The “well-pleaded complaint rule” states that federal removal jurisdiction “is ascertained from the face of the state court complaint that triggered removal.” Danca v. Private Health Care Sys., 185 F.3d 1, 4 (1st Cir. 1999). A corollary to the “well-pleaded complaint” rule is the “artful pleading doctrine” under which a plaintiff may not frame his action under state law and omit federal questions that are essential to recovery, nor artfully omit facts that indicate federal jurisdiction. Marzuki v. AT&T Technologies, 878 F.2d 203 (7th Cir. 1989); Oglesby v. RCA Corp., 752 F.2d 272 (7th Cir. 1985) The “artfully pleaded complaint” doctrine holds that plaintiff cannot foreclose the defendant’s right to remove by artfully omitting the federal issue in its complaint. *14B Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D, § 3722 (1998 & Supp. 2004)*. “If a court concludes that a plaintiff has ‘artfully pleaded’ claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff’s complaint.” Rivet Id. at 475

OLPC has chosen to omit all references to federal law in its complaint. However, the “artfully pleaded complaint” rule allows this Court to recognize the underlying federal questions which OLPC omitted in the characterization of its claim, but not in its content. “Although a plaintiff may be the master of his complaint and is free to choose the forum for his action, this principle is not without limitation. A plaintiff will not be allowed to conceal the true nature of a

complaint through ‘artful pleading.’” *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769 (9th Cir. 1986) OLPC has artfully crafted its complaint to avoid references to federal law although the four corners of its complaint contains LANCOR’s allegations of copyright infringement. The court must recharacterize OLPC’s complaint.

B. OLPC’s complaint represents artful pleading to avoid federal law and subject matter jurisdiction.

A plaintiff may not avoid removal jurisdiction by omitting essential facts or simply failing to plead a necessary federal question in the complaint. See, *Rivet Id.* (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983)) Therefore, “even though no federal question appears on the face of the Plaintiff’s complaint, if the Plaintiff has ‘artfully pleaded’ claims, the Court may uphold removal.” *Id.*

1. OLPC artfully omitted from its complaint the Three weeks of Contact between LANCOR and OLPC

OLPC, in its complaint for declaratory relief at ¶ 13, asserts only that:

“On January 18, 2008, an American attorney representing LANCOR wrote OLPC asserting that OLPC violated the end user license agreement and infringed on LANCOR’s intellectual property rights. LANCOR requested OLPC pay \$6,000,000.00 to settle the claims and threatened to take all necessary legal action to enforce its rights.”

In pleading its complaint, OLPC concealed information about its contacts with LANCOR’s American attorney as not essential to its preemptive complaint for declaratory judgment although the complaint was triggered by the demand letter it received from the

American attorney.⁶ The omission of this essential fact is an attempt to conceal the true nature of the controversy between the parties through “artful pleading.”

The three weeks of contact between the parties ended on February 11, 2008 with the knowledge that LANCOR will seek to commence legal action against OLPC for 1) breach of end user license agreement; 2) misappropriation of trade secrets; and 3) copyright infringement. By omitting the fact of the contact, OLPC artfully seek to avoid referencing copyright infringement as one of the issues between the parties.

2. OLPC artfully omitted from its complaint its use of Konyin Multilingual Keyboard

OLPC, in its complaint for declaratory relief at ¶ 15, asserts that:

“OLPC developed its multilingual keyboard by consulting numerous publicly available sources. In developing the Nigerian keyboard, OLPC developers consulted Wikipedia articles on Nigerian languages, which prompted them to add various character symbols to the keyboard. OLPC experimented with a number of different layouts for the keyboard, consulted with many Nigerians, and used their feedback in deciding where to position and whether to include glyphs.”

Nowhere in its complaint did OLPC admit that it used any part of LANCOR's Konyin keyboard during the development of its own keyboard. However, in its memorandum in support of its motion to remand, OLPC now claims that it used LANCOR's product as part of the knowledge base for the development of its XO laptop multilingual keyboard. See OLPC Memo at page 1 (“In developing the laptop’s multilingual keyboard, OLPC consulted a variety of publicly available sources, including LANCOR’s Konyin Multilingual Keyboard.”)

By omitting and/or concealing the facts surrounding its use of Konyin multilingual keyboard, OLPC artfully sought to avoid referencing copyright infringement as one of the issues

⁶ However, OLPC took pains to set out the back and forth between it and LANCOR’s Nigerian attorneys relating to design patent infringement in Nigeria. (See OLPC’s Complaint ¶¶ 9-12). The August 6, 2007, letter received from LANCOR’s Nigerian Attorney clearly also referenced Copyright violation.

between the parties. It is doubtful that OLPC would have missed the copyright restriction signs because the box containing the Konyin keyboard, the installation CD, the User's manual and the physical keyboard all included the copyright restriction notice.

3. OLPC artfully omitted from its complaint that all pages in www.konyin.com website are copyright restricted

OLPC, in its complaint for declaratory relief at ¶ 19, asserts that:

“The layout of the Konyin Multilingual keyboard is publicly available to anyone who inspects the keyboard. In addition, the LANCOR keyboard layout was publicly available on the internet at www.konyin.com when OLPC was designing the keyboard for its XO laptop. On information and belief, the internet address www.konyin.com is a web address affiliated with LANCOR.”

OLPC correctly asserted that www.konyin.com website contains information about the Konyin keyboard. Prior to filing its complaint on February 12, 2008, OLPC was aware that the true nature of the controversy between the parties, to the extent that it included the website, was whether its possible use of any information, obtained without permission, from the website constituted copyright infringement.

Therefore, LANCOR respectfully submits that OLPC was aware of LANCOR's claim of copyright violations but artfully chose to omit any references to copyright, in its preemptive complaint for declaratory relief in state court, in order to avoid federal jurisdiction.

C. Subject matter jurisdiction is found pursuant to 28 U.S.C. § 1338(a) because OLPC's preemptive complaint for declaratory relief essentially includes a claim of non-infringement of LANCOR's copyright.

This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a), which grants original and exclusive jurisdiction to the federal courts for claims arising under federal copyright law. Further, the Copyright Act preempts state law pursuant to 17 U.S.C. § 301(a), which provides that “all legal or equitable rights that are equivalent to any of the exclusive rights within

the general scope of copyright ... are governed exclusively by this title ... no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.” A state cause of action that is equivalent in substance to a federal copyright infringement claim will be preempted under 17 U.S.C. § 301(a). Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1164 (1st Cir. 1994)

Reading the facts, as the court must, to establish the true nature of the controversy between the parties and recharacterizing OLPC's complaint to include all causes of action that will resolve the issues, it is clear that one of the essential cause of action should be copyright non-infringement claim, a federal question, where original subject matter jurisdiction rests in this Court. “[It] is . . . a court’s responsibility, in considering either the propriety of removal or the propriety of remand, to look beyond the statutory citations in the pleadings to the nature of the claims as they appear on the face of the complaint at the time the petition for removal was filed.” Hood v. City of Boston, 891 F. Supp. 51, 54 (D. Mass. 1995)

Prior to seeking preemptive declaratory relief in State Court, a claim of copyright infringement was one of the issues between the parties and OLPC may not evade federal jurisdiction simply by avoiding reference to Copyright Act in its complaint. A plaintiff cannot defeat removal of a federal claim by omission or concealment through “artful pleading.” If the properly stated facts in a complaint establish an issue arising under federal law, the federal court will “recharacterize” it accordingly, in order to uphold removal. See Rivet Id. at 475 (“Allied as an ‘independent corollary’ to the well-pleaded complaint rule is the further principle that ‘a plaintiff may not defeat removal by omitting to plead necessary federal questions.’ ... If a court concludes that a plaintiff has ‘artfully pleaded’ claims ... it may uphold removal even though no federal question appears on the face of the plaintiff’s complaint.”)

D. The end user license agreement choice of law provision renders the agreement governed by federal law.

This court should find that the choice of law provision in the EULA mandates that the agreement be governed by federal law. Where an agreement contains a choice-of-law provision, the provision must be honored, and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 87 (2002) (Finding that where the choice-of-law provision stated, “The agreement now before us provides that it ‘shall be construed and enforced in accordance with the laws of the State of New York,’” the agreement was governed by New York law). A reasonable choice-of-law provision in a contract generally should be respected. *McCarthy v. Azure*, 22 F.3d 351, 356 (1st Cir. 1994)

The EULA choice of law in the instant matter states, “The laws of the United States of America shall govern this agreement.” (EULA). The right to a federal forum cannot be created contractually by a choice-of-law provision. *Access Group, Inc. v. Frederico*, 2006 U.S. Dist. LEXIS 72888 (D.N.H. 2006) (citing *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991) (Finding principles of federalism prevent court from interfering in a state proceeding concerning cause of action traditionally governed by state law). The instant case is easily distinguished in that this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a), and the application of state law to the claims of copyright infringement and misappropriation of trade secrets is preempted by 17 U.S.C. § 301(a). The grant of subject matter jurisdiction in conjunction with the choice of law provision commands the application of federal law.

IV. CONCLUSION

By omitting and /or concealing, relevant facts and avoiding allegations of copyright infringement, issues clearly necessary to resolve the controversy between the parties, OLPC is engaging in the art of “artful pleading” which must result in the denial of OLPC’s request for remand to state court. Further, OLPC knew that the anticipated lawsuit that will be filed by LANCOR included allegation under the Copyright Act. Additionally, where the nature of OLPC’s action is for a declaratory judgment; its efforts to litigate the controversy in state court will be fruitless, because state courts are without jurisdiction to act on copyright cases. Additionally, under Massachusetts law a declaratory judgment will not issue if the relief will not resolve all controversies between the parties.⁷ See *M. G. L. c. 231A § 3*.

WHEREFORE, the defendant, Lagos Analysis Corporation respectfully requests this Court to deny OLPC's Motion to remand to state court and award of attorney fees and costs to LANCOR

Dated: April 8, 2008

Respectfully submitted,

LAGOS ANALYSIS CORPORATION
By and through its attorney,

/s/ John A. Dalimonte

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⁷ The issue of infringement or non-infringement of copyright cannot be adjudicated in state court, therefore, in addition to reasons stated in this memorandum, in the interest of judicial economy the Court should deny OLPC’s motion to remand.

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V. CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those, if any, indicated as non-registered participants as of today's date.

/s/ John A. Dalimonte

By: John A. Dalimonte