

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

RGIS, LLC,

Plaintiff,

CASE NO.: 2:07-CV-10975

vs.

DISTRICT JUDGE PAUL V. GADOLA  
MAGISTRATE. JUDGE STEVEN D. PEPE

A.S.T., INC., and  
PHYLE INDUSTRIES, INC.  
A/K/A PHYLE INDUSTRIES INCORPORATED.,

Defendants.

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**Report and Recommendation  
to Deny Plaintiff's Motion for Preliminary Injunction (Dkt. # 12)**

On March 6, 2007, Plaintiff, RGIS, LLC, ("RGIS" filed an Complaint against Defendants A.S.T. Inc. ("AST"), and Phyle Industries, Inc., two companies owned by Charles E. Phyle alleging copyright infringement under 17 U.S.C. § 101 *et seq.* (Dkt. # 1).<sup>1</sup> On May 23, 2007, Plaintiff filed a Motion for Preliminary Injunction enjoining Defendants from using in any manner the subject matter of Plaintiff's copyrights and such remedies as the Court deems appropriate (Dkt. # 12). This Motion was referred, pursuant to 28 U.S.C. 636(b)(1)(A) and (B) for Report and Recommendation (Dkt. # 15). Following a hearing and significant rounds of

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<sup>1</sup>On October 16, 2007, Plaintiff was granted leave to file a first amended complaint which included an additional claim of breach of contract which allegedly arose when counsel for the Defendant contacted the United States Copyright Office and altered Plaintiff's copyrights (Dkt. # 43).

briefing and supplemental briefing for the reasons stated below, **IT IS RECOMMENDED** that Plaintiff's motion for a preliminary injunction be **DENIED**

**I. Background Facts and Plaintiff's Complaint:**

Plaintiff, is in the business of taking inventories for clients such as large retail outlets in which it utilizes a computed system involving hand-held computers designed by AST and marketed by Defendant Phyle Industries. Defendant AST designs and manufactures hand-held computers and other software for use in inventory control which are marketed through Defendant Phyle Industries to Plaintiff and other companies. Plaintiff and Defendant maintained a business relationship for 28 years, until it broke down in 2005 after RGIS was acquired by another company. RGIS parted ways with AST and Phyle Industries

As part of this separation, on November 21, 2005, Defendant AST, Inc. executed a COPYRIGHT ASSIGNMENT to Defendant Phyle Industries of various copyrights later assigned to Plaintiff (Dkt. 12, Exhibit 1). On January 27, 2006, Defendant Phyle Industries executed a SOFTWARE TRANSFER AND COPYRIGHT ASSIGNMENT AGREEMENT in which certain software related items were transferred and assigned to Plaintiff (Dkt. 12, Exhibit 2 and Dkt. # 33, Exhibit B). On that same day Defendant Phyle Industries executed a SOFTWARE AND COPYRIGHT ASSIGNMENT to Plaintiff including all of the software and the copyrights on the software needed by Plaintiff to continue its operations in selling devices to undertake business inventories for its clients.

On October 3, 2006, Defendant Phyle Industries executed another abbreviated COPYRIGHT ASSIGNMENT to Plaintiff which duplicated the earlier assignment and was done for filing with the Copyright Office. This 2006 assignment also transferred the U.S. Copyright Registrations Phyle Industries had on various of the software programs and transferred the

November 29, 2005, U.S. Copyright Application for AUDIT Download Builder (Dkt. 12, Exhibits 3 & 4 and Dkt. # 33, Exhibit C). Both of these copyright assignments reserved to Phyle Industries a royalty-free license to use certain Bar Code Algorithms that were part of the software transferred as well as the Elite III and Elite III UPS Driver software. As noted below, the November 29, 2005, Copyright Application (Dkt. 12, Exhibits 4) for AUDIT Download Builder contained errors that attorney Neil E. Wallace tried to correct in April 2007.<sup>2</sup> This “correction” was undertaken after the copyrights and software was assigned to Plaintiff and after this litigation was commenced. It was done without Plaintiff’s knowledge or consent.

After the AST and RGIS ended their long term relation, Defendant AST developed a new business inventory product called Titan EPG. There is no indication that the two parties had entered into a non-compete agreement or an agreement that AST would not produce and sell products for taking business inventories, which it had done for other customers prior to the 2005 parting of ways. RGIS asserts that the AST’s new Titan EPG has many “features, configurations and functionality that are substantially similar if not identical to that of Plaintiff’s proprietary hardware and software” which Defendant Phyle assigned to Plaintiff (Dkt. # 1, ¶

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<sup>2</sup> The Original AUDIT Download Builder application was filed by attorney Jeremy D. Bisdorf on November 29, 2005, for Phyle Industries. The Bisdorf application noted under § 2 of the application that the software was not a “work made for hire”, under § 3a that “1999” was the year the work was completed, and under § 3b “September 9, 1999” as the date of first publication. Mr. Bisdorf left blank both the portions under § 6a on DERIVATIVE WORK OR COMPILATION and under § 6b on “Material Added to this Work.” Under § 8 Mr. Bisdorf was to receive the Registration Certificate. The modifications of April 2007 for the AUDIT Download Builder application changed § 2 noting AUDIT Download Builder was a “work made for hire,” and under § 3a the change was “\*1999 \* 2005” for the year the work was completed, and under § 3b the change was “September 9, 1999 \* 2005” as the date of first publication. In § 6a on DERIVATIVE WORK OR COMPILATION “\*previous version” was added and under § 6b on “Material Added to this Work” Mr. Wallace added “\*additional or revised text of computer program.” The asterisks through these changes reference to “\*Amended by C.O. from phone call to Neil E. Wallace on April 13, 2007” written at the top of page 2.

15).<sup>3</sup> RGIS asserts further that based on comparisons in its attached Exhibit F “there are extensive, verbatim replications of Download Builder architecture, verbiage and functionality” (Id. at ¶ 16). The Exhibit F referred to in support of this assertion contains two computer screen shots taken from AST website advertisements that Plaintiff has labeled “(AST) Titan EPG Script Builder” and two nearly identical screen shots labeled “Download Builder” and “Download Builder Action Codes” generated from the AUDIT Download Builder software RGIS acquired from Defendant Phyle Industries (*Id.* at Exhibit F). Plaintiff complains that Defendant utilized copyrighted material owned by Plaintiff in marketing and developing its Titan EPG product.

Defendant AST and its owner, Charles Phyle, acknowledge that before Titan EPG software was fully developed, AST’s marketing department utilized as promotional material on its website for the Titan product two screen shots from AUDIT Download Builder, the software transferred to Plaintiff (Dkt. # 17, p. 4-5, and Phyle Declaration, Exhibit # 2 ). AST President Phyle states in his declaration that this was done without the knowledge of the principals at AST AST. He noted that instead of contacting AST about the use of the RGIS screen shots, RGIS gave AST notice of this transgression by filing this law suit. Once notice was provided that these screen shots were being used, President Phyle states that AST ceased usage of the image and he assures RGIS “AST will not use the screen shots again” (*Id.* at ¶ 6.). He further states that AST spent over \$1 million developing its new Titan inventory product and that its EPG screens are very different from the AUDIT Download Builder screens.

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<sup>3</sup> In various places this new AST software product is called “Titan”, “Titan EPG”, “EPG Script Builder Advanced” but for simplicity AST’s new product line software will be referred to as “Titan EPG” throughout this Report and Recommendation.

Thus, AST admits that these screen shots are from AUDIT Download Builder and denies they are from its Titan EPG computer program software as Plaintiff contends that Exhibit F to its complaint demonstrates. AST contends that “[t]here is no dispute that the actual Titan software does not look like the screen shots on the web page” (Dkt. 11, Defendants Brief at p. 2).<sup>4</sup> Since this declaration was provided by Mr. Phyle, RGIS has not asserted anything to dispute the facts that: (i.) the screen shots on AST’ website were from the AUDIT Download Builder software and not from Titan software; (ii.) they have been removed from the AST website; and (iii.) they have not been posted by AST anywhere since. As a result, in light of this unrebutted admission of AST President Phyle and his other assertions, Exhibit F of Plaintiff’s complaint would only elucidate the obvious that the two AUDIT Download Builder screen shots that AST admits were on its website would be “substantially similar if not identical” to screen shots that could be generated from Plaintiff’s AUDIT Download Builder. This admission regarding screen shots from RGIS’ AUDIT Download Builder being posted on AST’s website does not demonstrate that AST’s new Titan software is substantially similar to the AUDIT Download Builder software. Because Plaintiff has provided no evidence from a computer forensic expert comparing the source codes of AST Titan products and the AUDIT Download Builder software or any other software assigned to RGIS, Defendants assert that Plaintiff’s complaint is based on attorney assertion only. There is little to nothing in the record to refute this assertion.

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<sup>4</sup> Defendants further assert that after this complaint was filed they set up a meeting with RGIS to show its lawyers and executives the difference between the accused Titan software and the AUDIT Download Builder software RGIS acquired. It asserts that this “software running side-by side” demonstrated that the Titan screens and those generated by AUDIT Download Builder were very different (Dkt. 11, Defendants brief at 2-3.).

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