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## First Technology Safety Systems, Inc. v. Vector Research, Inc., 11 F.3D 641 (6th Cir. 1993)

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## **First Technology Safety Systems, Inc. v. Vector Research, Inc.,**

11 F.3D 641 (6TH CIR. 1993).

### *Introduction*

First Technology Safety Systems, Inc., a manufacturer of crash test dummies, brought this copyright infringement action against its competitor, Vector Research, Inc. The District Court for the Northern District of Ohio issued an ex parte order for the seizure of allegedly infringing business records in order to prevent the immediate and irreparable injury to the plaintiff. However, the United States Court of Appeals for the Sixth Circuit held that the District Court abused its discretion by entering the ex parte order.<sup>1</sup> According to the Appellate Court, plaintiff failed to show that notice to defendants should not have been required, that defendants would have concealed or destroyed the evidence if given notice, and that no less extreme remedies were available.

### *Facts*

First Technology Safety Systems, Inc. (“First”) was the sole designer and manufacturer of crash test dummies. First also held the copyright to the crash test dummies, as well as to the related software programs and manufacturing processes. Vector Research, Inc. (“Vector”) was a corporation developed by former employees of First, and it was designed to compete with plaintiff in the manufacture of crash test dummies.

First alleged that the Vector employees violated proprietary agreements signed by the defendants while employed by plaintiff. Essentially, the agreements prohibited disclosure of trade secrets and proprietary information both during and after employment with First, and it also required the return of confidential information to First after termination of their employment.

According to First, customer lists, customer contracts and other trade secrets had been transferred to a computer media, which had been in the possession of one of the defendants prior to terminating his employment with First. However, that media could not be located when First filed its complaint. Thereafter, Vector began contacting plaintiff’s customers, customers whose identity could have only been learned of via plaintiff’s customer lists. Vector also produced a price list for crash test dummies, calibration equipment, component replacement parts and data acquisition software. According to First, such lists could not be developed and implemented by a new corporation in less than two years. Thus, First alleged that the information was obtained by defendants while in plaintiff’s employ.

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1. First Technology Safety Sys., Inc. v. Vector Research, Inc., 11 F.3d 641, 652 (16th Cir. 1993).

First next claimed that evidence relevant to its allegation - that defendants built their corporation using plaintiff's property - was in Vector's hands; and, because business records were stored on computer media that are easy to destroy, such items should be seized and impounded through an ex parte order. The District Court maintained that First had demonstrated the necessity to prevent immediate and irreparable injury.<sup>2</sup> Thus, it entered an ex parte order allowing plaintiff and the United States Marshal to inventory and impound certain materials on defendants' business premises, as well as allowing plaintiff to inspect, copy and photograph all such seized materials.<sup>3</sup> Defendants appealed the District Court's ex parte order, as well as the court's dismissal of their motion to vacate that order.

### *Legal Analysis*

The issue before the Appellate Court was "whether the district court abused its discretion in refusing to vacate its ex parte order, which permitted plaintiff . . . to enter defendants' business premises and inventory and impound [certain allegedly infringing business documents]."<sup>4</sup> Although Section 503 of the Copyright Act<sup>5</sup> states that the decision to order ex parte the impoundment of all items infringing the plaintiff's copyright along with any means for reproducing those infringing items is within the discretion of the District Court,<sup>6</sup> the Appellate Court nevertheless maintained that the ex parte order was still unauthorized by law.

The court first held that the order was too broad to fall within the parameters of Section 503 of the Copyright Act, because it "permitted plaintiff to seize not only computer software that allegedly infringed plaintiff's copyrights but also to copy defendants' business records . . ." <sup>7</sup> According to the court, Section 503 "only authorizes the impoundment of goods that infringe plaintiff's copyrights and articles that can be used to copy those infringing goods."<sup>8</sup> Since the District Court allowed First to copy Vector's business records, the Appellate Court held that the order fell beyond the boundaries of Section 503. Vector's business records were not means by which defendants could have copied plaintiff's goods.

The court next noted that Section 503 is not meant as a means for preserving evidence, rather it is a means to stop "the eventual destruction of items found at trial to violate the copyright laws by safeguarding them during the pendency of the action."<sup>9</sup> Once again, the Appellate Court found the District Court's order unauthorized by Section 503, since the seizure of Vector's business records was merely to preserve evidence of defendants' wrongdoing, not to prevent the de-

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2. *Id.* at 646.

3. *Id.*

4. *Id.* at 643-44.

5. 17 U.S.C. § 503 (1978).

6. First Technology, 11 F.3d at 647.

7. *Id.* at 649.

8. *Id.*

9. *Id.*

struction of evidence violative of the copyright laws.

The court then reasoned that if the Copyright Act is inapplicable, Federal Rule of Civil Procedure 65<sup>10</sup> must be applied by the lower court when granting injunctive relief.<sup>11</sup> Under Federal Rule 65, however, the only order the District Court may enter *ex parte* is a temporary restraining order. Such an order requires that “immediate and irreparable injury, loss, or damage will result to the applicant . . . and the applicant’s attorney certifies to the court . . . the efforts . . . which have been made to give the notice and the reasons supporting the claim that notice should not be required.”<sup>12</sup>

According to the court, the District Court would have been justified in ordering such a restraining order *ex parte* if notice to Vector was either impossible or where “notice to the defendant would render fruitless further prosecution of the action.”<sup>13</sup> First did not contend that notice was impossible, since defendants were not unknown or unable to be found; thus, First relied on the ground that further prosecution would be fruitless without an *ex parte* order. Yet, according to the court, asserting that Vector would merely dispose of the evidence if given notice is not enough: To justify such an *ex parte* order, there must be “no less drastic means for protecting the plaintiff’s interests.”<sup>14</sup> The court reasoned, however, that the District Court could have sufficiently protected First by ordering Vector not to disturb the items listed in the order and holding an immediate hearing to determine whether the seizure order should issue.<sup>15</sup> Thus, less drastic means existed to protect First.

Thus, First’s only recourse was to “show that defendants would have disregarded a direct court order and disposed of the goods within the time it would take for a hearing[, which would require plaintiff to show that defendants have] a history of disposing of evidence or violating court orders . . . ”<sup>16</sup> The court maintained that First’s only justification - that it is business practice to store business records on computer disks which, in turn, are easy to destroy - was insufficient to proceed *ex parte*, because such a claim did not establish that Vector would, in fact, take such an opportunity to destroy the evidence or that it had done so in the past.<sup>17</sup>

### Conclusion

The Appellate Court held that the District Court abused its discretion by ordering, and refusing to vacate, an *ex parte* order for seizure and impoundment of defendants’ business records and related items. According to the court, the lower court was required to apply Federal Rule of Civil Procedure 65, because neither

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10. FED. R. CIV. P. 65.

11. *First Technology*, 11 F.3d at 650.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 650-51.

17. *Id.* at 651.

Section 503 of the Copyright Act nor the Copyright Rules authorized the ex parte order issued by the District Court. The Appellate Court then held that under Rule 65, plaintiff had made an insufficient showing as to why notice to defendants should not have been required; that no less extreme remedies were available; and that defendants would have concealed or destroyed the evidence if given notice. Thus, plaintiff was not entitled to an ex parte restraining order, and defendants were entitled to have all items taken from their business premises pursuant to the District Court's ex parte order returned, subject to any safeguards the District Court deemed necessary to prevent the items from being concealed or destroyed.

*Deborah A. LaGioia*