UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ASTROLABE, INC., Plaintiff, v. ARTHUR DAVID OLSON, and PAUL EGGERT Defendants.	Case No. 11-cv-11725-GAO

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SANCTIONS UNDER RULE 11

Adam J. Kessel (BBO # 661,211)
Olivia T. Nguyen (BBO # 682,774)
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02210
(617) 542-5070 Telephone
(617) 542-8906 Facsimile

Of Counsel

Corynne McSherry (CA Bar # 221504)
Mitchell L. Stoltz (DC Bar # 978149)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x116
Facsimile: (415) 436-9993

Attorneys for Defendants
Arthur David Olson and Paul Eggert

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INTRODUCTION

If there were ever a pleading that invited Rule 11 sanctions, Plaintiff Astrolabe, Inc.'s ("Astrolabe") Complaint is it. Astrolabe claims to own certain "information and/or data" about time zones, such as the fact that Italy is one hour ahead of Greenwich Mean Time, (*See* ECF No. 1 ¶ 17), and seeks to stop Defendants Arthur David Olson and Paul Eggert (collectively "Defendants") from using these facts in a free online database of time zone information—a proposition that more than a century of settled law squarely rejects. The Complaint also asserts that Mr. Olson and Dr. Eggert "reproduced" an atlas in which Astrolabe claims copyright, but the Complaint itself, and correspondence from Astrolabe's attorney, show that Astrolabe has no basis for that claim. Because the Complaint is both legally and factually baseless, it is evident that Astrolabe and its counsel failed to satisfy their Rule 11 obligations to make a reasonable inquiry to insure that any pleading is well grounded in fact and supported in law.

Astrolabe's frivolous and unfounded Complaint has already caused harm, and not only to Mr. Olson and Dr. Eggert. The time zone database that Defendants maintained is used by computers the world over to set clocks and to determine the local time for a given place and date in history, ensuring that, *inter alia*, files and email messages can be time-stamped and organized accurately. Upon learning of the Complaint, Mr. Olson, lacking the resources to defend a copyright lawsuit, disabled public access to the database. Although the database is now maintained by the Internet Corporation for Assigned Names and Numbers (ICANN), computer users everywhere were denied timely updates to the database while it was unavailable, and the historical research on time zones done by a community of volunteers for the public good, without compensation, was interrupted.

Perhaps realizing the folly of filing such a Complaint, Astrolabe has not yet served Defendants. Yet Astrolabe refuses to voluntarily dismiss its baseless Complaint, and thus the threat of full-blown copyright litigation looms, to the detriment of Defendants and the public interest in obtaining accurate time zone information on the Internet.

Astrolabe's Complaint illustrates the harm that frivolous claims of copyright infringement can cause to a public, collaboratively maintained factual resource. Under Rule 11, the Court should remedy this abuse of the legal system and deter future abuses by striking the Complaint and awarding defendants their costs and attorney fees.

FACTUAL BACKGROUND

Arthur David Olson is an information technology professional at the National Cancer Institute. His hobby is the study of time zones. In about 1986, he founded the Time Zone ("TZ") Database, which contains information about local times in hundreds of localities, including historical information about the time zones and daylight saving time rules in effect at any given date from the inception of standard time to the present. Declaration of Arthur Olson ("Olson Decl.") ¶¶ 2-3. Mr. Olson maintained the database until October 2011, along with Dr. Eggert and many other volunteers who researched current and historical time zone information and kept the database timely and accurate. *Id.* ¶¶ 3-4.

Dr. Paul Eggert is a lecturer in the Computer Science Department of the University of California, Los Angeles ("UCLA"), the same institution where he received his Ph.D. in 1980. He is actively involved, as an unpaid volunteer, in the development of many free software

packages.[1] He has collaborated with Mr. Olson for many years in administering the TZ Database. Declaration of Paul Eggert ("Eggert Decl") ¶ 2.

The TZ Database stores and provides information in a format readable by computers. For example, an entry for Canada reads as follows:

```
# Rule NAME   FROM   TO     TYPE   IN     ON     AT     SAVE   LETTER/S
Rule   StJohns       1917   only   -      Apr     8     2:00   1:00   D
Rule   StJohns       1917   only   -      Sep    17     2:00   0      S
```

These data entries represent historical, legal, and geographic facts—in this example, the fact that in 1917, the city of St. John's, Newfoundland observed Daylight Saving Time from April 8 through September 17. Defendants and other volunteer contributors compiled these facts from a variety of sources, including the ACS International Atlas (the "Atlas"), a book by Thomas Shanks.[2] Olson Decl. ¶ 4; Eggert Decl. ¶¶ 4-5. The TZ Database contains **no text** from the Atlas itself, except for two short quotations.[3] Eggert Decl. ¶¶ 5-6. Nor does it contain code from any Astrolabe software. *Id.*

Many widely-used software programs, including nearly all computer operating systems based on Unix, Apple's Mac OS, and many others, as well as applications such as alarm clocks, access the TZ Database in order to set a clock to local time or to interpret time information in files and email messages from around the world.[4] Referring accurately to dates and times across the global Internet and across decades requires precise and continuously updated information

[1] As one example, Dr. Eggert has been involved in the development of the "GNU C Library" for more than a decade. Thousands of widely used software packages make extensive use of this basic programming tool.

[2] Astrolabe claims to be the copyright assignee for the ACS Atlas. ECF No. 1 ¶ 4.

[3] In their entirety, these quotations read "Even newspaper reports present contradictory information," and "date of change uncertain." Eggert Decl. ¶ 5.

[4] This information is provided merely as background and context for Defendants' motion. Should it prove necessary, Defendants will provide expert testimony that establishes these facts. Because Astrolabe's entire Complaint is baseless, however, Defendants should not be put to the burden and expense of retaining an expert to defend themselves in this case.

about local time zones, Daylight Saving Time observance, and the timing of any changes to those zones and rules. The database maintained by Mr. Olson, Dr. Eggert, and other volunteers is thus a vital public resource.

Plaintiff Astrolabe claims to sells software relating to astrology. Astrolabe alleges that it owns the copyright in the Atlas. (ECF No. 1 ¶ 4.) On May 12, 2011, Astrolabe's counsel sent letters to Mr. Olson and Dr. Eggert's employers, both entitled "DMCA Takedown Notice" and claiming that Mr. Olson and Dr. Eggert had "taken . . . copyright protected information" from the Atlas. Astrolabe's alleged basis for this assertion was that the TZ Database "is replete with references to the fact that the ***source for this information*** is, indeed, the ACS International Atlas." Olson Decl. Ex. A; Eggert Decl. Ex. A (emphasis added). The letters did not identify any text, images, or other expressive material alleged to be copied from the ACS Atlas, and did not contain the information and representations required for a valid takedown notices under the Digital Millennium Copyright Act. *See* 17 U.S.C. § 512(c)(3).

Dr. Eggert's employer, the University of California, Los Angeles, responded to Astrolabe's counsel by letter on June 1, 2011, objecting to Astrolabe's purported takedown notice and pointing out its deficiencies. The letter also explained that the TZ Database contains factual data concerning time zones, and that only "some of the historic facts were obtained through a review of the ACS International Atlas." However, the letter explained, "the use of facts from a hard copy book, or even as extracted from a database, does not violate the Copyright Act because such facts are not protectable." Eggert Decl. Ex. B at 2.

Nonetheless, Astrolabe filed the Complaint against Mr. Olson and Dr. Eggert on September 30, 2011. The Complaint asserts that "Astrolabe is the copyright assignee of the copyright owner, [*sic*] of certain copyright-protected computer software programs **and**

information contained therein . . . known as the 'ACS Atlas'." (ECF No. 1 ¶ 4) (emphasis added). The Complaint characterizes the information in the Atlas as "historical time zone information" concerning "time zones officially and/or in actuality in effect, given the actual latitude and longitudes [sic] of specific locations throughout the world." *Id*. ¶ 5. Astrolabe then accuses Mr. Olson and Dr. Eggert of having "unlawfully reproduced the Works," *id*. ¶ 6, by making "references to historic international time zone data" which is "replete with references to the fact that the source for this information is, indeed, the ACS Atlas." *Id*. ¶¶ 9, 11.

Although Defendants have yet to be served with the Complaint, Mr. Olson quickly learned of the suit and subsequently disabled access to both the TZ Database and the mailing list used by its maintainers on October 6. Olson Decl. ¶ 6. It remained inoperative for several days.

ARGUMENT

I. Rule 11 Prohibits Frivolous and Factually Baseless Pleadings.

Federal Rule of Civil Procedure 11(b) requires that in all pleadings filed with the Court, "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 11 is a purely objective standard, and a violation "might be caused by inexperience, incompetence, willfulness, or deliberate choice." *Cruz v. Savage*, 896 F.2d 626, 633 (1st Cir. 1990). A party violates Rule 11 when its "attorney was in a position to know the [party's] claims were unsupported by fact or law prior to bringing the claims and throughout the litigation." *Id.* Both a party and the party's attorney can be sanctioned for violating Rule 11. Fed. R. Civ. P. 11(c)(1); *see Collins v. Walden*, 834 F. 2d 961, 965-66 (11th Cir. 1987).

II. Astrolabe's Complaint Improperly Asserts Copyright in Historical Facts.

Astrolabe's Complaint is based on the frivolous legal position that one can own copyright in pure "information and/or data" and exclude others from using such information. The Copyright Act protects "original works of authorship" but explicitly excludes "facts" from protection. 17 U.S.C. § 102(b); *Feist Pubs., Inc. v. Rural Telephone Svc. Co., Inc.*, 499 U.S. 340, 344 (1991); *Harper & Row v. Nation Enters.*, 471 U.S. 539, 547 (1985). "The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality." *Harper & Row*, 471 U.S. at 547; *see also Baker v. Selden*, 101 U.S. 99, 102 (1880) ("[T]here is a clear distinction between the book, as such, and the art which it is

intended to illustrate."); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) ("We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material . . . . It is just such wasted effort that the proscription against the copyright of ideas and facts [is] designed to prevent."); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981) ("Copyright protection does not extend to the facts themselves, and the mere use of the information contained in a directory without a substantial copying of the format does not constitute infringement.").

Astrolabe's Complaint does not allege that the TZ Database contains any original, creative expression of Mr. Shanks, the author of the Atlas, or of Astrolabe. Rather, it asserts that the TZ Database contains "historical international time zone data" for which the alleged "source" was the Atlas. (ECF No. 1, ¶ 9, 11.) This information is raw fact, which "may not be copyrighted and [is] part of the public domain available to every person."[5] *Feist*, 499 U.S. at 348.

It is equally well settled that the effort or expense of collecting facts does not make those facts copyrightable. In *Feist*, the Supreme Court rejected the so-called "sweat of the brow" doctrine as a violation of "basic copyright principles." *Id.* at 353. Determining the correct time zone for a given city and date might have required research on the part of Mr. Shanks (or Astrolabe), but that effort did not transform raw facts into protectable expression.

To the extent Astrolabe intends to claim that Defendants violated a compilation copyright, that claim is equally specious. While a compilation of facts can be copyrighted, the

[5] Indeed, Astrolabe plainly had no creative role in coming up with the historical time zone information itself, any more than a historian who writes that "Neil Armstrong walked on the moon in 1969" "created" that fact. Neither Astrolabe, nor the historian, could have a valid copyright claim to the historical facts in question.

copyright in such a compilation extends *only* to any creative selection or arrangement of those facts, not the facts themselves. *Id.* at 358 ("Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented."). Trivial or obvious arrangements, such as an alphabetical list, receive no protection. *Id.* at 362-64. While the Complaint generally alleges that Defendants "reproduced" Astrolabe's "works," Astrolabe's specific allegations make clear that it understands that Mr. Olson and Dr. Eggert only "reproduced" information contained in the Atlas, not the Atlas's ***arrangement***. (*See, e.g.,* ECF No 1 ¶¶ 9, 11.) Factual time zone data derived from the Atlas appears throughout the TZ Database, commingled in no particular order with information derived from other sources, based on the Defendants' and their co-contributors' own judgments about which information was the most accurate. Olson Decl. ¶ 4; Eggert Decl. ¶ 4. Astrolabe did not even attempt to specifically allege that Mr. Olson and Dr. Eggert copied any original selection or arrangement of facts from the Atlas, nor would it have had even a minimal good-faith basis for doing so.

At least since the Supreme Court's ruling in *Baker v. Selden*, 101 U.S. 99 (1879), no court has held that the use of raw facts, derived from a compilation without copying any original selection or arrangement, constitutes copyright infringement. And, of course, this must be the case. A contrary holding would have disastrous consequences for the everyday exchange of information: phone numbers could not be shared; routes from maps could not be copied; business addresses could not be distributed, and so on. Astrolabe's legal claims are thus unwarranted by any existing law or nonfrivolous legal argument.

III. Astrolabe Has No Factual Basis to Allege that Defendants Copied Any Protectable Expression.

The Complaint also contains allegations of fact for which Astrolabe has no possible evidentiary support. It alleges that "defendants Olson and Eggert have unlawfully reproduced the Works." (ECF No. 1 ¶ 6.) The only evidentiary basis for this allegation that is stated or suggested in the Complaint, or in the letters from Astrolabe's counsel, is that the TZ Database "is replete with references to the fact that the source of this information is, indeed, the ACS Atlas." *Id*. ¶ 9. That a collection of factual information cites another work as a source for some of that factual information does not mean that one "reproduced" another, any more than the naming of one book in the bibliography of another is a sound basis for alleging that the former is a "reproduction" of the latter. No other factual basis for this allegation is stated or implied in any communication from Astrolabe and its counsel, and none could be, because the TZ Database in no way "reproduces" the Atlas. This allegation therefore lacks any evidentiary basis, and violates Fed. R. Civ. P. 11(b)(3).

IV. An Award of Attorney Fees Will Make Defendants Whole and Deter Other Frivolous Claims of Copyright in Historical Facts.

Astrolabe's frivolous complaint had actual adverse effects on Internet users all over the world, as well as on Mr. Olson and Dr. Eggert personally. Because of the lawsuit, Mr. Olson shut down the TZ Database and the email discussion list used by its maintainers on October 6. For several days, millions of computer users were denied timely updates to world time zone information and were at risk of inaccurate time information and computer errors. This significant harm to the public at large makes sanctions especially appropriate.

Moreover, both Astrolabe and its counsel had a responsibility under Rule 11 to conduct a reasonable inquiry into the facts and to refrain from making allegations with no evidentiary

support. *McCarty v. Verizon New England, Inc.,* 731 F. Supp. 2d 123, 133 (D. Mass. 2010). The Complaint, and correspondence from Astrolabe's counsel, show that neither undertook to discover what, if anything, the defendants "reproduced" from the Atlas. Therefore, monetary sanctions against both are appropriate. *Collins v. Walden*, 834 F. 2d 961, 965-66 (11th Cir. 1987). Regarding the separate grounds of filing a pleading without legal support, sanctions against Astrolabe's counsel are appropriate.

The Court should strike the Complaint because the factual and legal deficiencies cannot be cured such as to satisfy Rule 11. As explained above, no valid and applicable legal authority supports the proposition that historical, geographic, or legal facts are protected by copyright law. The Complaint contains no other theory of liability.

In addition, an award of attorney fees incurred in bringing this motion is appropriate because it will restore the status quo as to Mr. Olson and Dr. Eggert, and provide a deterrent to future abuses of this type. Fed. R. Civ. P. 11(c)(4); *Silva v. Witschen,* 19 F.3d 725, 732 (1st Cir. 1994) (attorney fees appropriate sanction for Rule 11 violation). Deterrence and compensation are the main purposes of Rule 11 sanctions. *Azubuko v. MBNA Am. Bank*, 396 F. Supp. 2d 1, 7 (D. Mass. 2005) *aff'd*, 179 F. App'x 66 (1st Cir. 2006); *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (deterrence is a "central goal"). An attorney fee award under Rule 11 is not fee shifting, but simply "a means by which to return to the status quo the party which incurred legal expenses as a result of an action or motion which ought never have been filed." *Collins*, 834 F.2d at 966; *see McCarty v. Verizon New England, Inc.*, 772 F. Supp. 2d 362, 367 (D. Mass. 2011).

CONCLUSION

Astrolabe's complaint represents an abuse of the legal system and an improper attempt to assert control over pure facts, which are the common property of everyone. Sanctioning Astrolabe and its counsel for this conduct will affirm Defendants' lawful and selfless efforts on behalf of Internet users worldwide and deter similar misconduct in the future. The Court should strike the Complaint and award Mr. Olson and Dr. Eggert their costs and attorney fees.

Dated: January 11, 2012

/s/ Adam J. Kessel

Adam J. Kessel (BBO # 661,211)
Olivia T. Nguyen (BBO # 682,774)
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02210
(617) 542-5070 Telephone
(617) 542-8906 Facsimile

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Arthur David Olson and Paul Eggert

Of Counsel

Corynne McSherry (CA Bar # 221504)
Mitchell L. Stoltz (DC Bar # 978149)
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