

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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RECORDED BOOKS, LLC,	:	Civil Action No. 8:07-cv-01427-DKC
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Plaintiff,	:	
	:	<b><u>THIRD DECLARATION OF BRIAN</u></b>
v.	:	<b><u>T. DOWNING IN SUPPORT OF</u></b>
	:	<b><u>PLAINTIFF RECORDED BOOKS,</u></b>
OCLC ONLINE COMPUTER LIBRARY	:	<b><u>LLC'S MOTION FOR</u></b>
CENTER, INC. d/b/a NETLIBRARY,	:	<b><u>PRELIMINARY INJUNCTION</u></b>
	:	
Defendant.	:	
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I, Brian T. Downing, hereby declare and state as follows pursuant to 28 U.S.C. § 1746:

1. I am the Publisher of plaintiff Recorded Books, LLC ("Recorded Books"). I submit this third declaration in support of Recorded Books' motion for preliminary injunction.

2. Since the submission of my first two declarations in support of Recorded Books' motion for preliminary injunction, I have learned of additional facts that bear on Recorded Books' motion.

**The Iowa City Public Library's Cancellation of its Subscription**

3. After reading press coverage of this dispute in the *Library Journal*, I learned for the first time that the Iowa City Public Library ("ICPL") terminated its subscription to the Recorded Books/NetLibrary "Bundled Collection" of downloadable audiobooks in favor of a competitive product. As set forth in my second declaration and Recorded Books' reply memorandum, NetLibrary's technical support failures with respect to the ICPL persisted for over a year and resulted in a week-long shutdown of the NetLibrary system.

4. Attached hereto as Exhibit A is a printout from the ICPL's website that states:

A new eAudio product with a company called Overdrive will be available beginning late August 2007. eAudio books downloaded

through NetLibrary prior to July 31, 2007 will expire after 21 days. After July 31, 2007 NetLibrary eAudio books may not be downloaded.

Overdrive is the main competitor of NetLibrary and Recorded Books in the downloadable audiobook market.

**Nearly One out of Eight Libraries Took Affirmative Steps to Terminate their Subscriptions and Many Others Demanded, and Were Given, Significant Discounts**

5. I also understand that NetLibrary has opposed Recorded Books' request for an injunction in part by touting the fact that 88% of libraries had renewed their subscriptions. This statistic is misleading.

6. NetLibrary's agreements with its subscribing libraries renew automatically every year. *See* Agreement, Exhibit D, § I.A.11. The subscribing libraries must take affirmative action sixty days in advance to terminate their subscriptions. *Id.* § III.A.1. Thus, while it is technically accurate to say that 88% of the libraries took no action to end their subscriptions (thus resulting in their automatic renewal), nearly one in eight libraries took affirmative steps to terminate them. At Recorded Books, we do not consider losing one out of every eight of our customers to be an acceptable way of conducting business. Moreover, of the 168 libraries that renewed their subscriptions between January and May of 2007, 44 expressed their unwillingness to renew unless they received a discount off the previous year's subscription price. The discounts Recorded Books was required to give ranged from approximately 20% to up to 60% off the previous year's price.

7. Second, just because a subscribing library does not terminate its subscription or demand a discount does not mean that it is happy with NetLibrary's performance. To the contrary, numerous customers have repeatedly expressed to Recorded Books their dissatisfaction with NetLibrary's customer and technical support, but have nonetheless

continued to use the service because there is no other platform to support Recorded Books' content. Indeed, after this dispute was reported in the library press, a Recorded Books employee, Debbie McDonald, received an e-mail from a customer, Mary Hogue at the West Virginia Library Commission, that made this very point:

I just read in *Hotline* about the Recorded Books and NetLibrary lawsuits. If you all need cheerleaders I'll be standing on the sidelines yelling, "Sic 'em! Sic 'em!" **I'd like to add that just because we didn't cancel our downloadables through NetLibrary did not mean that we were happy or satisfied or not frustrated with NetLibrary. What kept us with them was a great selection of Recorded Books titles, the potential for a whole bunch of disgruntled patrons, and inertia.**

Can you tell us what this means for us? Will the platform disappear? The service? Will a new platform appear that isn't based on, oh, the unknowable MARC record? Would it be, dare I ask, user friendly?

A copy of the e-mail from Ms. Hogue is attached hereto as Exhibit B (emphasis added).

**NetLibrary Continues to Market and Make Unauthorized Sales of Subscriptions and Is Offering Pricing Discounts Without Recorded Books' Authorization**

8. Many months before this dispute commenced, Recorded Books had been dissatisfied with NetLibrary's sales efforts. As a result, Recorded Books instructed NetLibrary, and NetLibrary agreed, to cease its sales activities. One of the main objectives of this was to allow Recorded Books to take control of the sales message that was being delivered to potential customers.

9. Over the last few weeks, NetLibrary has continued to enter into new subscription agreements, making it clear that it has been engaged in sales activities despite Recorded Books' instructions to the contrary. This lack of control over the sales effort is likely to cause Recorded Books irreparable harm. In particular, now that NetLibrary is offering content from other

publishers, Recorded Books has no way of assuring that NetLibrary is not promoting subscriptions to other publishers' content instead of promoting Recorded Books' content.

10. Moreover, although the Agreement provides that any pricing discounts must be agreed to in advance by Recorded Books and NetLibrary, *see* Agreement, Exhibit C, § 2(a)(i), NetLibrary appears to have given a number of libraries within the Califa consortium of California libraries a steep discount for their subscription renewals. For example, according to documents produced by NetLibrary, NetLibrary renewed the subscription for the County of Los Angeles Public Library for \$24,500, and renewed the subscription for the Santa Clara County Library for \$30,380. In the previous year, these libraries paid an already-discounted subscription price of \$47,040 and \$40,000 respectively. Attached hereto as Exhibit C are copies of "Order Forms" showing the subscription renewal prices for the County of Los Angeles Public Library and the Santa Clara County Library.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

  
BRIAN T. DOWNING

Executed on: July 23, 2007  
Prince Frederick, Maryland

LIBA/18105192