

Exhibit D

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

ROBERT JACOBSEN,)	
)	
PLAINTIFF,)	
)	
VS.)	NO. C 06-1905 JSW
)	
MATTHEW KATZER, ET AL.)	
)	
DEFENDANTS.)	
)	

SAN FRANCISCO, CALIFORNIA
FRIDAY, JANUARY 19, 2007

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:	VICTORIA K. HALL ATTORNEY AT LAW 3 BETHESDA METRO SUITE 700 BETHESDA, MD 20814
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FOR DEFENDANT:	FIELD & JERGER 610 SW ALDER SUITE 910 PORTLAND, OREGON 97205
BY:	ROBERT SCOTT JERGER ATTORNEY AT LAW

REPORTED BY:	JAMES YEOMANS, CSR 4039, RPR OFFICIAL REPORTER
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COMPUTERIZED TRANSCRIPTION BY ECLIPSE

1 FRIDAY, JANUARY 19, 2007 9:00 A.M.

2 (THE FOLLOWING PROCEEDINGS WERE HEARD IN OPEN COURT:)

3 **THE CLERK:** CASE C-06-1905, ROBERT JACOBSEN VERSUS
4 MATTHEW KATZER.

5 COUNSEL, PLEASE STEP FORWARD AND STATE YOUR
6 APPEARANCES.

7 **MS. HALL:** VICTORIA HALL COUNSEL FOR PLAINTIFF ROBERT
8 JACOBSEN.

9 **THE COURT:** ALL RIGHT. GOOD MORNING.

10 **MR. JERGER:** SCOTT JERGER COUNSEL FOR DEFENDANTS
11 MATTHEW KATZER AND KAMIND ASSOCIATES, INC.

12 **THE COURT:** GOOD MORNING, COUNSEL.

13 DID BOTH SIDES -- I ASSUME, BOTH SIDES RECEIVED THE
14 COURT'S QUESTIONS?

15 **MS. HALL:** YES.

16 **MR. JERGER:** YES.

17 **THE COURT:** AND THE COURT HAS LOOKED AT THE STATEMENT
18 OF ADDITIONAL AUTHORITIES THAT WERE FILED IN LIGHT OF THE
19 COURT'S QUESTIONS.

20 WHAT I WOULD LIKE THE PARTIES TO DO IS -- WHAT I WOULD
21 LIKE THE PARTIES TO DO, IS INCORPORATE INTO THEIR RESPONSES
22 WHERE THEIR AUTHORITIES FIT IN.

23 AND PLAINTIFFS WOULD -- FILED AT 9:00 O'CLOCK LAST
24 NIGHT, OBVIOUSLY, THE COURT COULDN'T FULLY DIGEST THEM, AND PIN
25 CITES WOULD BE VERY HELPFUL, AS WELL AS SPECIFIC PROVISION, AS

1 WELL AS A GENERAL CONCEPT I WOULD LIKE TO KNOW THAT AS WELL.

2 SO LET'S START RIGHT OUT WITH THE QUESTIONS. AND I'LL
3 START WITH PLAINTIFF'S COUNSEL WITH RESPECT TO QUESTION 1A.

4 **MS. HALL:** YES, YOUR HONOR. THE QUESTION IS, IN LIGHT
5 OF THE FACT THAT IMPOSED --

6 **THE COURT:** SLOW DOWN.

7 **MS. HALL:** -- ON THE USE OF THEIR FREE SOFTWARE, DOES
8 THIS CREATE A NON-EXCLUSIVE LICENSE?

9 AND OUR RESPONSE IS THAT THERE IS A LICENSE ONLY IF
10 THE CONDITIONS HAVE BEEN MET. IF A USER REJECTS THE CONDITIONS
11 HOW CAN HE SAY HE HAS PERMISSION TO USE THE SOFTWARE, HE CAN'T.

12 AND HERE WE'VE SEEN NO ATTEMPT WHATSOEVER THAT HE IS
13 INTERESTED IN ACCEPTING THE LICENSE, SO HE IS NOT INTERESTED IN
14 ACCEPTING THE BENEFITS OF THE LICENSE.

15 **THE COURT:** ALL RIGHT. SO WITH -- MOVING TO QUESTION
16 B. SO IF YOUR ANSWER IS YES, WHAT IS THE ESSENCE OF -- IS THE
17 ESSENCE OF SUCH A NON-EXCLUSIVE LICENSE THE PROMISE NOT TO SUE
18 FOR COPYRIGHT INFRINGEMENT?

19 **MS. HALL:** IF HE ACCEPTS THE CONDITIONS HE IS A
20 NON-EXCLUSIVE LICENSEE AND THERE'S A PROMISE NOT TO SUE FOR
21 COPYRIGHT INFRINGEMENT. AS LONG AS THE ACTIVITIES WITH -- ARE
22 IN THE SCOPE OF THE LICENSE AND THE LICENSE HAS NOT BEEN
23 REVOKED OR CONTRACT RESCINDED, ALONG THOSE LINES.

24 I THINK, IT'S IMPORTANT TO REMEMBER THAT A LICENSE
25 UNSUPPORTED BY CONSIDERATION MAYBE REVOKED AT ANY TIME. AND

1 THAT IF THERE IS FOUND TO BE A LICENSE HERE CERTAINLY HAS BEEN
2 REVOKED.

3 **THE COURT:** BEFORE I MOVE ONTO QUESTION C AND D,
4 BECAUSE I'M GOING TO PUT THOSE TO DEFENDANTS IN THE FIRST
5 INSTANCE, WHAT'S YOUR RESPONSE TO QUESTION 1A AND B?

6 **MR. JERGER:** SURE. IN REGARDS TO 1A, I THINK, THAT
7 THE CONDITIONS DO CREATE A NON-EXCLUSIVE LICENSE. AND I ALSO
8 THINK A NON-EXCLUSIVE LICENSE IS CREATED BY DEFINITION UNDER
9 SECTION 204A OF THE COPYRIGHT ACT, WHICH DECLINED A
10 NON-EXCLUSIVE LICENSE, ANY LICENSE, NO WRITTEN AGREEMENT
11 BETWEEN THE PARTIES SIGNED BY THE OWNER OF THE COPYRIGHT TO
12 CREATE AN EXCLUSIVE LICENSE.

13 **THE COURT:** ALRIGHT. RESPECT TO B, WHAT IS THE
14 ESSENCE OF THE NON-EXCLUSIVE LICENSE?

15 **MR. JERGER:** I AGREE WITH YOUR STATEMENT IN RE CFLC
16 CASE THE ESSENCE OF A NON-EXCLUSIVE LICENSE IS A PROMISE NOT TO
17 SUE FOR COPYRIGHT INFRINGEMENT.

18 AND THE ANSWER TO THE SECOND PART B IS A LITTLE MORE
19 COMPLICATED, I'LL GO INTO THAT NOW. IT SORT OF INFORMS MY
20 ANSWERS TO C AND D.

21 **THE COURT:** ALL RIGHT.

22 **MR. JERGER:** IN OUR VIEW, THERE'S THREE POTENTIAL
23 SCENARIOS HERE IN TERMS OF WHAT SORT OF LICENSE, IF ANY,
24 EXISTS.

25 ONE, IS -- AND WHEN I'M TALKING ABOUT THE LICENSE, I'M

1 REFERRING TO THE ARTISTIC LICENSE PLAINTIFF INTRODUCED WITH
2 THEIR MOVING PAPERS.

3 THE FIRST SCENARIO IS DEFENDANTS TOOK THE ALLEGED
4 PRODUCT PURSUANT TO THE ARTISTIC LICENSE, DIDN'T -- THIS IS
5 WHAT MS. HALL JUST ALLUDED TO -- DIDN'T MEET A CONDITION
6 PRECEDENT FOR THAT LICENSE VESTING, THEREFORE, THE LICENSE
7 NEVER VESTED, THEREFORE, DEFENDANTS WOULD BE LIABLE FOR
8 COPYRIGHT INFRINGEMENT IF THAT WERE THE CASE. THAT'S THE
9 SCENARIO MOST FAVORABLE TO THE PLAINTIFFS.

10 THE SECOND SCENARIO, THE MIDDLE CASE SCENARIO, WHICH
11 IS, DEFENDANT TOOK PURSUANT TO THE ARTISTIC LICENSE, THE TERMS
12 OF THE LICENSE ARE NOT CONDITIONS PRECEDENT, BUT RATHER
13 COVENANTS AND THAT ANY BREACH WOULD, THEREFORE, BE A BREACHED
14 OF CONTRACT. THAT'S WHERE WE GET TO THE ANSWER TO THIS
15 QUESTION.

16 **THE COURT:** MEANING THIS QUESTION, BEING YOUR CLIENT
17 CONTENDS PLAINTIFF CAN ONLY SUE FOR BREACH OF CONTRACT?
18 BECAUSE WE'RE TALKING -- THE LIMITATIONS ON THE USE ARE
19 COVENANTS NOT CONDITIONS PRECEDENT.

20 **MR. JERGER:** CORRECT. THAT IS -- THAT'S THE MIDDLE
21 SCENARIO. THAT IS WHAT OUR AUTHORITIES THAT WE SUBMIT LAST
22 NIGHT ALLUDE TO. CASES THAT FLESH OUT THE DISTINCTION BETWEEN
23 WHAT IS A CONDITION PRECEDENT AND WHAT IS A COVENANT IN A
24 CONTRACT.

25 THAT'S THE RT GRAPHICS CASE AND THE FANTASTIC CASE, AS

1 WELL AS SOME OTHER CASES WE CITED IN OUR REPLY PAPERS.

2 THE THIRD SCENARIO IS THE SCENARIO MOST FAVORABLE TO
3 THE DEFENDANTS. WHICH IS, DEFENDANTS TOOK PURSUANT TO AN
4 APPLIED LICENSE, BASICALLY HAD NO TERMS; IN OTHER WORDS, THE
5 ARTISTIC LICENSE DOESN'T APPLY TO THIS TRANSACTION AT ALL.

6 IN THAT CASE THAT'S THE MOST SIMILAR TO THIS
7 NON-EXCLUSIVE LICENSE WHERE THERE ARE NO CONDITIONS.
8 PLAINTIFFS HAVE WAIVED THEIR RIGHT TO SUE FOR COPYRIGHT AND
9 DEFENDANTS AS WELL AS ANYONE WHO TOOK, PURSUANT TO AN IMPLIED
10 LICENSE WITH NO TERMS, COULD DO WHATEVER THEY WANT WITH THE
11 PRODUCT.

12 THE REASON WE WITHDREW OUR MOTION TO DISMISS THE
13 COPYRIGHT CLAIM WAS IN RESPONSE TO PLAINTIFFS INTRODUCTION OF
14 THE ARTISTIC LICENSE BECAUSE WE BELIEVE AT THIS -- DUE TO THAT,
15 WHICH WASN'T ALLEGED IN THE COMPLAINT, WE NOW HAVE TO INTRODUCE
16 EXTRINSIC EVIDENCE TO SHOW WHAT EXACTLY HAPPENED. HOW
17 DEFENDANTS CAME IN POSSESSION OF THE PRODUCT, WHETHER THE
18 ARTISTIC LICENSE IS INVOKED OR NOT.

19 AS PLAINTIFF MENTIONS IN HIS MOVING PAPERS THERE IS NO
20 CLING WRAP OR SHRINK WRAP AGREEMENT TO GET TO THE ARTISTIC
21 LICENSE, IT'S JUST OUT THERE ON THE INTERNET. AND WE BELIEVE
22 WE HAVE TO INTRODUCE EXTRINSIC EVIDENCE SHOW WHAT HAPPENED BACK
23 THEN, AND THAT'S NOT APPROPRIATE FOR THE 12(B)(6) MOTION.

24 TO PROMOTE EFFICIENCY, GET THIS CASE MOVING, WE'VE
25 WITHDRAWN THE MOTION AT THIS TIME.

1 **THE COURT:** ALL RIGHT. WITH RESPECT, THOUGH, TO
2 QUESTION, I'M NOT SURE YOU ANSWERED QUESTIONS 1C. I DON'T KNOW
3 IF THAT IS YOUR MIDDLE SCENARIO.

4 WHERE THE CLAIM IS THAT YOUR CLIENT USED THE MATERIALS
5 EXCEEDING THE SCOPE OF THE LICENSE, UNDER THE CASES CITED BY
6 THE COURT WOULDN'T THAT YIELD COPYRIGHT LIABILITY?

7 **MR. JERGER:** I THINK, THAT'S THE FIRST SCENARIO.
8 THAT'S THE CONDITIONS PRECEDENT TO THE LICENSE VESTING HAVEN'T
9 BEEN MET. THE DEFENDANTS ARE WORKING WITHOUT A LICENSE OR THE
10 LICENSE DIDN'T VEST, AND AT THAT POINT, I THINK, THAT'S
11 EQUIVALENT TO WHAT YOU'RE REFERRING TO AS EXCEEDING THE SCOPE
12 OF THE LICENSE.

13 IN OTHER WORDS, THEY'RE ACTING OUTSIDE THE AUTHORITY
14 OF WHAT SHOULD HAVE BEEN A VALID LICENSE AND SHOULD HAVE TAKEN
15 A PRODUCT PURSUANT TO. AND IN THAT SCENARIO I DO AGREE
16 DEFENDANTS WOULD BE LIABLE FOR COPYRIGHT INFRINGEMENT.

17 JUST ONE MORE TWIST ON THIS I WANT TO MENTION NOW, SO
18 I DON'T FORGET BECAUSE RELATES TO THE PRELIMINARY INJUNCTION
19 MOTION. THESE QUESTIONS ALSO INFORM THE IRREPARABLE HARM
20 PRESUMPTION.

21 THAT'S GENERALLY GIVEN IN -- WHEN YOU'RE DEALING WITH
22 PRELIMINARY INJUNCTIONS AND COPYRIGHT INFRINGEMENT CASES
23 THERE'S A PRESUMPTION OF IRREPARABLE HARM.

24 WE DISPUTE THAT IN OUR REPLY PAPERS, BUT IT'S
25 IMPORTANT TO NOTE THAT IF THIS COURT FINDS THAT DEFENDANTS

1 TOOK, PURSUANT TO IMPLIED LICENSE WITH NO TERMS, THEN THERE IS
2 NO PRESUMPTION OF IRREPARABLE HARM BECAUSE THE COPYRIGHT
3 INFRINGEMENT CLAIM CAN'T BE BROUGHT.

4 AND WE'RE IN THE WORLD OF BREACH OF CONTRACT AND NOT
5 COPYRIGHT INFRINGEMENT.

6 **THE COURT:** WHAT'S YOUR CLIENT'S POSITION WITH RESPECT
7 TO D?

8 THAT IS, IF THERE IS NO LICENSE FOR WHATEVER REASON,
9 WHAT AUTHORITY GOVERNS YOUR CLIENT'S USE OF THE MATERIALS?

10 **MR. JERGER:** THAT'S THE THIRD SCENARIO, THAT'S THE
11 IMPLIED LICENSE WITH NO TERMS, BASICALLY. WHERE SOMEONE GOES
12 TO JMI WEB SITE DOWNLOADS THE PRODUCTS, NEVER SEE ANY LICENSE,
13 ARTISTIC LICENSE, ANY OTHER LICENSE, NO MEETING OF THE MIND, NO
14 CONTRACT IS FORMED, THEREFORE, JUST IMPLIED LICENSE WITH NO
15 TERMS SINCE IT HAS NO TERMS TO DO WHATEVER.

16 **THE COURT:** MS. HALL, RESPONSE?

17 **MS. HALL:** YES. I JUST WANT TO STEP BACK AND REDRESS
18 SOME OF THINGS HE SAID ABOUT THE THREE SCENARIOS.

19 THE SITUATION THAT WE'RE LOOKING AT IS NOT JUST
20 MERELY, OH, THEY DIDN'T COMPLY WITH ONE SMALL TERM, THEY DIDN'T
21 COMPLY WITH ANYTHING, ANYTHING WHATSOEVER IN THE ARTISTIC
22 LICENSE.

23 WE'RE LOOKING AT A SITUATION WHERE WE HAVE OUR OPEN
24 SOURCE GROUP WHICH SPENDS HUNDREDS, IF NOT THOUSANDS OF
25 YEARS -- OF HOURS OVER FIVE YEARS CREATING A PRODUCT WHICH IS

1 MEANT TO BE USED.

2 **THE COURT:** CAN YOU RESTATE THAT?

3 I DON'T KNOW I UNDERSTOOD WHAT YOU'RE SAYING. YOU
4 SAY, HUNDREDS OF HOURS OVER?

5 **MS. HALL:** OVER FIVE YEARS. COULD BE EASILY -- WE
6 HAVEN'T -- THOUSANDS -- WE HAVEN'T TOTALED IT UP, MORE THAN A
7 DOZEN PEOPLE WORKED ON THIS.

8 WHAT DEFENDANTS DID IS THEY TOOK THAT PRODUCT, STRIPED
9 OUT THE AUTHOR'S NAME AND THE COPYRIGHT HEADERS, CONVERTED IT
10 TO THEIR OWN FORMAT, THEN PRESENTED IT IN THEIR OWN AS THEIR
11 OWN PRODUCT.

12 THEY WERE FREE RIDING ON THE EFFORTS OF THIS OPEN
13 SOURCE GROUP. THESE GROUPS NEED THE PROTECTION OF COPYRIGHT
14 LAW, THAT'S THE REASON WHY WE HAVE A COPYRIGHT CLAIM IN THIS
15 AND IT'S THE REASON WHY WE'RE SEEKING THIS PRELIMINARY
16 INJUNCTION, WHICH I'LL GET INTO IT FURTHER.

17 WE BELIEVE THAT THE LANGUAGE HERE IS DIFFERENT THEN
18 THE LANGUAGE CITED IN THE CASES THAT DEFENDANT RELIES UPON.
19 DEFENDANTS -- THE LANGUAGE CITED ARE THINGS SUCH -- ARE PRETTY
20 CLEARLY COVENANTS, BUT HERE WHAT WE'RE LOOKING AT ARE TERMS,
21 THAT LANGUAGE THAT IS A CONDITION THAT HAS PROVIDED THAT AND WE
22 BELIEVE THAT CREATES A CONDITION PRECEDENT.

23 AND IN THE ALTERNATIVE WE BELIEVE THE INTERPRETATION
24 OF THE CONTRACT REQUIRES THAT REASONABLE MODIFICATIONS BE MADE,
25 NOT THE KIND OF WHOLESALERE RIP-OFF THE DEFENDANTS DID.

1 **THE COURT:** WOULD YOU AGREE, JUST AS A GENERAL MATTER,
2 IF WE'RE TALKING ABOUT BREACH OF CONTRACT HERE AS OPPOSED TO
3 COPYRIGHT INFRINGEMENT, THAT YOUR CLIENT IS NOT ENTITLED TO AN
4 INJUNCTION?

5 LET'S ASSUME THERE'S NO BREACH OF CONTRACT, BREACH OF
6 COPYRIGHT INFRINGEMENT, ARE YOU STILL ENTITLED TO AN
7 INJUNCTION?

8 **MS. HALL:** PURELY NONE IN TERMS OF SOME OF THE
9 ELEMENTS OF COPYRIGHT INFRINGEMENT HAVEN'T BEEN MET, YES, I
10 WOULD AGREE WITH YOU. BUT THE ELEMENTS HAVE BEEN MET AND --

11 **THE COURT:** I UNDERSTAND.

12 **MS. HALL:** -- THE LICENSE HAS BEEN REVOKED.

13 **THE COURT:** I UNDERSTAND YOUR POSITION. AND THAT'S
14 ONE OF THE THINGS WE'RE DISCUSSING THIS MORNING AND THE COURT
15 HAS TO DECIDE.

16 BUT A STATEMENT WAS MADE, PUTTING ASIDE THE QUESTION
17 OF SHOWING OF IRREPARABLE HARM WHERE YOU'RE DEALING WITH
18 NON-EXCLUSIVE LICENSE, IF WE'RE NOT OUT OF THE WORLD IN
19 COPYRIGHT AND IN THE WORLD OF BREACH OF CONTRACT WE ALL SHOULD
20 AGREE, SHOULD WE NOT, PRELIMINARY INJUNCTION IS NOT
21 APPROPRIATE?

22 **MS. HALL:** PRELIMINARY INJUNCTION UNDER COPYRIGHT IS
23 NOT APPROPRIATE. HOWEVER, I THINK, MIGHT BE APPROPRIATE UNDER
24 17200.

25 **THE COURT:** CONTINUE YOUR RESPONSE WITH RESPECT TO

1 QUESTION ONE.

2 **MS. HALL:** DEFENDANTS ARE TRYING TO RELY UPON A
3 NON-EXCLUSIVE IMPLIED LICENSE. HOWEVER, THE REQUIREMENTS NEED
4 TO BE MADE IN ORDER TO BE ABLE TO TAKE ADVANTAGE OF IMPLIED
5 LICENSE.

6 THAT IS, THAT THERE NEEDS TO BE SOMETHING SPECIFIC,
7 SOME SPECIFIC EXCHANGE BETWEEN PLAINTIFF AND DEFENDANTS IN
8 ORDER TO BE ABLE TO GET THE BENEFIT OF AN IMPLIED LICENSE.
9 THAT'S SOMETHING THAT'S SAID IN THE CASE LAW.

10 IT'S, I BELIEVE, IN TAX ASSOCIATE AS WELL AS THE IAE
11 CASE, WHERE IS ANY KIND OF EVIDENCE WHATSOEVER THAT THEY HAD
12 ANY KIND OF SPECIFIC EXCHANGES BETWEEN -- WITH MR. JACOBSEN,
13 THERE IS NONE, AND CERTAINLY THEY COULD HAVE PRODUCED SOMETHING
14 IN THEIR PRELIMINARY INJUNCTION MOTION, I HAVEN'T SEEN IT.

15 THAT ADDRESSES THE COMMENTS THAT I HAD ABOUT WHAT
16 MR. JERGER WAS SAYING SPECIFICALLY OC, JUST AS I WAS SAYING
17 WE'RE ASSUMING THAT DEFENDANTS HAVE A LICENSE WHICH, OF COURSE,
18 WE DISPUTE.

19 AND WE ALSO BELIEVE THAT PER THE SOS DECISION, NINTH
20 CIRCUIT DECISION, THE LICENSE NEEDS TO BE NARROWLY CONSTRUED
21 AND BECAUSE OF THAT NARROW CONSTRUCTION THEIR ACTIVITIES ARE
22 OUTSIDE OF ANY LICENSE THAT THEY COULD POSSIBLY TAKE ADVANTAGE
23 OF.

24 **THE COURT:** ALL RIGHT.

25 **MS. HALL:** AS FOR D, WE BELIEVE IT WOULD BE COVERED BY

1 COPYRIGHT.

2 **THE COURT:** ALL RIGHT. ANYTHING YOU WANT TO SAY
3 FURTHER?

4 **MR. JERGER:** I'LL JUST RESPOND TO A COUPLE OF POINTS
5 SHE MADE.

6 IN REGARD TO SPECIFIC EXCHANGE BETWEEN PLAINTIFF AND
7 DEFENDANTS, THERE HAS BEEN AN EXCHANGE THAT PLAINTIFF PUT THE
8 SOFTWARE ON THE INTERNET AND THE DEFENDANTS ALLEGEDLY
9 DOWNLOADED THE SOFTWARE. THAT'S THE EXCHANGE.

10 IT'S A HIGHLY FACTUAL SITUATION, I THINK, THAT WE
11 WOULD -- UNFORTUNATELY GOING TO HAVE TO DELVE INTO AT SOME
12 POINT REGARDING WHAT LICENSE, IF ANY, VESTED.

13 ONE MORE QUICK POINT IN TERMS OF CONSTRUING THE
14 ARTISTIC LICENSE, AND THE PLAINTIFF CITES THE SOS DECISION,
15 STATING THE LICENSE SHOULD BE NARROWLY CONSTRUED.

16 I THINK, IT'S CLEAR UNDER CALIFORNIA CASE LAW THAT A
17 CONDITIONS PRECEDENT ARE DISFAVORED, IF WE WERE TO CONSTRUE
18 THAT LICENSE IT CONTAINS COVENANTS RATHER THAN CONDITIONS.

19 **THE COURT:** LET'S MOVE ONTO QUESTION ONE.

20 **MS. HALL:** JUST INTERJECT. WHAT THEY'RE SAYING, WHEN
21 IT COMES TO THE AVAILABILITY OF THE SOFTWARE ANYONE COULD TAKE
22 A LOOK AT IT, THEREFORE, THEY GET A LICENSE OR THEY'RE SUBJECT
23 TO IMPLIED LICENSE.

24 THE WORLD-WIDE CHURCH OF GOD DECISION SAYS IT CAN'T BE
25 SOMETHING SO BROAD AND SCATTER SHOT AS WHAT DEFENDANTS

1 DESCRIBE, IT NEEDS TO BE SOMETHING SPECIFIC.

2 THERE NEEDS TO BE SOME SORT OF EXCHANGES BETWEEN THEM,
3 THERE NEEDS TO BE SOMETHING WHERE THEY HAVE TOLD DEFENDANTS AND
4 THERE HAS BEEN A LACK OF OBJECTION OR A PERMISSION GIVEN
5 SPECIFICALLY BY MR. JACOBSEN, THAT'S NOT HERE.

6 **THE COURT:** THANK YOU. LET'S MOVE TO QUESTION ONE.
7 UNDER THE DEFENDANT'S MOTION TO DISMISS, AND I'M GOING TO
8 ADDRESS THIS TO THE --

9 **MS. HALL:** DID YOU WANT NUMBER TWO?

10 **THE COURT:** I'M SORRY, THANK YOU VERY MUCH. WHY DON'T
11 YOU MOVE TO QUESTION NUMBER TWO, UNDER GENERAL QUESTIONS.

12 **MS. HALL:** SHOULD I START?

13 **THE COURT:** YES, PLEASE.

14 **MS. HALL:** WHAT THE DIFFERENCE HERE IS THE DIFFERENCE
15 BETWEEN TRADEMARK AND THE PURPOSE OF TRADEMARK AND COPYRIGHT.
16 TRADEMARK IS VERY SPECIFIC IN THAT A TRADEMARK IS USED AS AN
17 IDENTIFIER OF SOURCE. IT IS USED --

18 **THE COURT:** BEFORE YOU GET TO THAT, ALTHOUGH THAT'S
19 CERTAINLY SUGGESTED BY THE SECOND SENTENCE OF THE SECOND
20 QUESTION. THIS IS A YES OR NO QUESTION, THEN YOU CAN EXPLAIN.

21 IS THERE ANY AUTHORITY IN THE COPYRIGHT CONTEXT ON THE
22 ISSUE OF ACCESSIBILITY TO A LICENSING OF OPEN SOURCE MATERIALS?
23 THIS IS SORT OF LIKE UNIX?

24 **MS. HALL:** SCO THING THAT'S GOING ON?

25 **THE COURT:** YES.

1 HAVE YOU FOUND ANY AUTHORITY ON THAT POINT?

2 MS. HALL: NO, I HAVE NOT. CAN I CHECK WITH A COUPLE
3 OF PEOPLE BACK HERE?

4 THE COURT: NO, COUNSEL, YOU CAN'T DO THAT. THAT'S
5 WHY I PUBLISH THESE IN ADVANCE. SO THE ANSWER FOR NOW IS NO?

6 MS. HALL: NO.

7 THE COURT: SO NOW YOU CAN CONTINUE YOUR ANSWER, ON
8 WHY THIS IS NOT AKIN TO AN ANALYSIS OF NAKED LICENSES IN THE
9 TRADEMARK AREA.

10 MS. HALL: TRADEMARK IS VERY DIFFERENT THEN COPYRIGHT,
11 IN THAT A TRADEMARK OWNER NEEDS TO POLICE THE MARK, A COPYRIGHT
12 OWNER DOES NOT HAVE TO DO THAT.

13 THE REASON IS BECAUSE THE ASSOCIATION OF THE TRADEMARK
14 WITH THE GOODS, THE ASSOCIATION OF A TRADEMARK REPRESENTING
15 QUALITY AND SOURCE OF GOODS.

16 SO TRADEMARK OWNER IS REQUIRED TO POLICE THAT MARK, IF
17 OTHER PEOPLE START USING IT THEY BEGIN TO LOSE THEIR RIGHTS TO
18 IT, IT MAY FALL BY THE WAYSIDE UNDER THE PRINCIPAL OF
19 GENERICIDE. COPYRIGHT DOESN'T HAVE ANY SUCH REQUIREMENT.

20 THE COURT: COUNSEL.

21 MR. JERGER: THE ANSWER --

22 THE COURT: HAVE YOU FOUND ANY AUTHORITY?

23 MR. JERGER: NO, I HAVE NOT FOUND ANY AUTHORITY.

24 IN REGARD TO THE SECOND QUESTION, I DO THINK THE
25 SITUATION IS AKIN TO THE NAKED LICENSE ISSUE IN THE TRADEMARK

1 CONTEXT AND, AGAIN, I GO BACK TO THE IMPLIED LICENSE IDEA.

2 IT'S A HIGHLY FACTUAL INQUIRY, I THINK, AND YOU NEED
3 TO TAKE A LOOK AT HOW A PERSON TOOK THE SOFTWARE. WHETHER, YOU
4 KNOW, IN THIS CASE THERE'S ARTISTIC LICENSE ON THE INTERNET,
5 BUT IT'S NOT READILY AVAILABLE, AND THAT RESULTS POTENTIALLY IN
6 AN IMPLIED LICENSE, I THINK, WOULD BE THE EQUIVALENT LEGALLY AS
7 THIS NAKED LICENSE IDEA IN THE TRADEMARK CONTEXT.

8 **THE COURT:** ALL RIGHT. LET'S MOVE ONTO THE
9 DEFENDANT'S MOTION TO DISMISS. AND I HAVE TO -- I'M GOING TO
10 ASK PLAINTIFF'S COUNSEL TO RESPOND IN THE FIRST INSTANCE,
11 BECAUSE THIS IS ONE OF THE MOST ARCANE ARGUMENTS I'VE EVER
12 SEEN.

13 IT MAY BE BRILLIANT, BUT IT'S ARCANE. AND I, FRANKLY,
14 DON'T UNDERSTAND IT. THAT'S WHAT REALLY GIVES BIRTH TO THESE
15 QUESTIONS.

16 SO IS THE COURT CORRECT IN ITS ASSESSMENT OF YOUR
17 CLAIM FOR UNJUST ENRICHMENT?

18 **MS. HALL:** I BELIEVE SO.

19 **THE COURT:** YOU WANT TO --

20 **MS. HALL:** IF I UNDERSTAND YOU RIGHT.

21 **THE COURT:** IF YOU UNDERSTAND YOUR CLAIM.

22 **MS. HALL:** IF I UNDERSTAND YOUR QUESTION AND WHERE
23 YOU'RE COMING FROM.

24 **THE COURT:** ALL RIGHT.

25 **MS. HALL:** I BELIEVE THAT IT IS. I BELIEVE, WHAT

1 WE'RE ASKING FOR IS SOMETHING DIFFERENT THEN WHAT REMEDY THAT
2 WOULD BE AVAILABLE UNDER COPYRIGHT LAW. THAT'S WHAT TAKES IT
3 OUT OF PREEMPTION.

4 **THE COURT:** IF THE COURT IS CORRECT, THEN WE GO TO THE
5 SECOND QUESTION, HOW WOULD THE PLAINTIFF HAVE BEEN ENTITLED TO
6 CLAIM SUCH A TAX ADVANTAGE SINCE HE OFFERED THE PRODUCT FOR
7 FREE?

8 **MS. HALL:** THE REASON I WOULD TELL YOU THAT IT IS
9 UNDER THE PRINCIPALS OF RESTITUTION, THAT HE'S REQUIRED, THAT
10 HE IS ENTITLED TO THAT BENEFIT.

11 SAY, IF MR. JACOBSEN HAD A \$50 WATCH AND, SAY, MR.
12 KATZER TOOK THAT \$50 WATCH AND PUT IT ON E-BAY AND SAID FOR
13 SALE, THIS IS TOM CRUISE'S OR BRAD PITT'S WATCH, I CAN GIVE YOU
14 A CERTIFICATE OF AUTHENTICITY, WHATEVER, IT SELLS FOR \$5,000.

15 WHAT MR. JACOBSEN WILL BE ENTITLED TO IS THE FULL
16 BENEFIT THAT MR. KATZER GOT FROM THAT. HE WOULDN'T BE ENTITLED
17 TO MERELY 50 BUCKS, HE WOULD BE ENTITLED TO THE FULL 5,000,
18 THAT'S A PRINCIPAL OF RESTITUTION.

19 THERE IS SOME DISCUSSION OF RESTITUTION THAT -- IN
20 SOME OF THE CASES I CITE, IN PARTICULAR KOREA SUPPLY AND ALSO
21 THE OLWELL CASE. OLWELL CASE ABOUT THE USE OF AN EGG WASHER OF
22 ALL THINGS AND KOREA SUPPLY -- DO YOU WANT A CITE?

23 **THE COURT:** NO, IT'S IN YOUR PAPERS, WE HAVE THE
24 CITATION.

25 **MS. HALL:** IT'S ONE OF THE NEW ONES.

1 **THE COURT:** COUNSEL. YOU, OBVIOUSLY, CAN'T COMMENT ON
2 WHAT PLAINTIFF'S CLAIM IS, AT LEAST, PLAINTIFF'S COUNSEL AGREED
3 THE COURT CORRECTLY CONSTRUED IT, WHAT ABOUT HER EGG WASHER
4 ANALOGY OR BRAD PITT ANALOGY?

5 **MR. JERGER:** WELL, I THINK, THE COURT HAS NAILED IT ON
6 THE HEAD WITH THE INFORMATION IN THE QUESTION. ONE
7 SPECIFICALLY -- WHAT'S GLARINGLY MISSING HERE FROM AN UNJUST
8 ENRICHMENT CLAIM IS RETENTION OF A BENEFIT AT THE EXPENSE OF
9 ANOTHER. UNDER NO POSSIBLE SCENARIO HAS THE PLAINTIFF LOST
10 SOME SORT OF BENEFIT OR SUFFERED SOME SORT OF EXPENSE.

11 TYPICAL UNJUST ENRICHMENT CLAIM, I AGREE TO PUT A NEW
12 ROOF ON YOUR HOUSE, I DO IT, YOU DON'T PAY ME, I'M ENTITLED,
13 EVEN IF WE DON'T HAVE A CONTRACT TO, A QUASI CONTRACT QUANTUM
14 MERIT EQUITABLE RECOVERY FOR THE VALUE OF THE ROOF THAT I
15 INSTALLED ON YOUR HOUSE.

16 THIS CASE I AGREE I DON'T UNDERSTAND THE CLAIM AND IT
17 DOESN'T MAKE SENSE TO ME BECAUSE -- IT JUST DOESN'T. IT'S
18 TRYING TO PUT A SQUARE PEG INTO A ROUND HOLE. THERE'S NO LOSS
19 OF GOODS OR SERVICES THAT THE PLAINTIFF HAS SUFFERED TO JUSTIFY
20 ANY KIND OF UNJUST ENRICHMENT THEORY.

21 **MS. HALL:** THE BENEFIT MR. JACOBSEN AND THE REST OF
22 THE JMRI GROUP CONFERRED UPON MR. KATZER IS THE BENEFIT OF
23 SAVED TIME AND THE BENEFIT OF A QUALITY PRODUCT.

24 WHAT THEY ASKED FOR IN RETURN WAS THAT THEY FOLLOW THE
25 TERMS OF THE LICENSE AND THAT THEY GIVE CREDIT AS WELL, THAT

1 WAS THE BENEFIT THAT WAS NOT GIVEN BACK.

2 SO WHAT WE'RE ASKING FOR, OKAY, YOU GOT THIS BENEFIT,
3 WE BELIEVE YOU TOOK SOME SORT OF TAX CREDIT FOR IT, SO THIS IS
4 PART OF THE RESTITUTION THAT WE WANT TO GET IF YOU'RE GOING TO
5 TAKE -- IF YOU'RE GOING TO BENEFIT FROM OUR WORK AND GET MONEY
6 FROM OUR WORK, THEN RETURN THAT MONEY TO US.

7 **THE COURT:** EVEN IF YOU'RE OFFERING THAT WORK FOR
8 FREE?

9 **MS. HALL:** FREE WITH RESTRICTIONS. KEY POINT.

10 **THE COURT:** FREE IS A RELATIVE TERM.

11 **MS. HALL:** ACTUALLY, THE ARTISTIC LICENSE IS SUCH IF
12 YOU MAKE MODIFICATIONS YOU CAN DO IT UNDER CERTAIN CONDITIONS
13 OR YOU CAN CONTRACT THE HEAD OF THE OPEN SOURCE GROUP AND SAY,
14 LET'S GO WORK OUT SOME SORT OF A DEAL.

15 THAT ACTUALLY OFFERS A POSSIBILITY THAT IF THERE WAS
16 SOMETHING THAT THIS PERSON WAS DOING THAT WOULD -- WAS NOT
17 NECESSARILY ACCEPTABLE, THERE MAYBE SOME NEGOTIATION FOR A
18 CHARGE.

19 **THE COURT:** ALL RIGHT. LET'S MOVE ONTO QUESTION
20 NUMBER -- ANYTHING FURTHER YOU WANT TO SAY?

21 OKAY. QUESTION TWO, MS. HALL.

22 **MS. HALL:** HOW ABOUT IF I JUST SAY, LET'S NOT GO FOR
23 DECODOPRO.COM BACK IN THIS LITIGATION. WE -- DECODOPRO.COM
24 BACK IN THIS LITIGATION.

25 IF THAT'S THE CASE I STATED A CLAIM FOR CYBER

1 SQUATTING, THE ELEMENTS OF CYBER SQUATTING LISTED IN THE BOSLEY
2 DECISION I CITED WITH THE STATUTORY DAMAGES AND ATTORNEY'S
3 FEES.

4 AND WHAT WE ALSO LIKE TO HAVE IS ATTORNEYS' FEES AND
5 COST FOR BRINGING AN IN REM ACTION IN EASTERN DISTRICT OF
6 VIRGINIA, WHICH IS ASSIGNED, PUT IN THE COURT'S CUSTODY IN
7 EASTERN DISTRICT OF VIRGINIA AND WE'LL TAKE IT FROM THERE.

8 AND THE OTHER TWO CASES CITED FOR IN REM ACTIONS ARE
9 THE HARRODS CASE AND THE PORSHA CARS CASE.

10 **THE COURT:** THAT MAYBE ALL WELL AND GOOD. THE ANSWER
11 TO QUESTION NUMBER TWO, ARE YOU IMPLICITLY SAYING THE COURT
12 CANNOT INVALIDATE A SETTLEMENT AGREEMENT, AT LEAST, IN ANOTHER
13 COURT?

14 **MS. HALL:** I OFFERED AN ALTERNATIVE, IF THAT'S NOT AN
15 ALTERNATIVE THE COURT WANTS TO PURSUE, THEN I THINK WE MAY BE
16 STUCK ON THAT POINT.

17 BUT IF -- IF -- IF WE DECIDE WE DO NOT WANT TO HAVE
18 THIS COURT ORDER THE RETURN OF DECODERPRO.COM WE'RE OUT OF THIS
19 AND JERRY BRITTON NO LONGER A REQUIRED PARTY.

20 THE ELEMENTS ARE MR. JACOBSEN HAS A VALID TRADEMARK
21 ENTITLED TO PROTECTION. THE MARK IS DISTINCTIVE. THE
22 DEFENDANT'S DOMAIN NAME IDENTICAL OR CONFUSINGLY SIMILAR TO THE
23 MARK, DEFENDANT USED, REGISTERED OR TRAFFIC IN THE DOMAIN --

24 **THE COURT:** SLOW DOWN.

25 **MS. HALL:** AND WITH BAD FAITH, INTENT TO PROFIT.