2009-1221

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT JACOBSEN,

Plaintiff-Appellant,

v.

MATTHEW KATZER and KAMIND ASSOCIATES, INC.
(doing business as KAM Industries),

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of California in Case No. 06-CV-1905, Judge Jeffrey S. White

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BRIEF OF *AMICUS CURIAE* ASSOCIATION FOR COMPETITIVE TECHNOLOGY, INC. IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTEREST

Under Federal Circuit Rule 47.4, counsel for *Amicus Curiae* Association for Competitive Technology, Inc., certifies the following:

1. The full name of every party or *amicus curiae* represented by me is the Association for Competitive Technology, Inc.

2. The name of the real party in interest represented by me is:

Association for Competitive Technology, Inc.

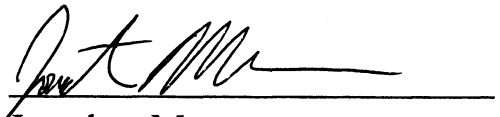
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amicus curiae* represented by me are:

None.

4. The Association for Competitive Technology, Inc. did not appear in the district court. The names of all law firms and the partners or associates that are expected to appear for the *Amicus Curiae* in this Court are:

Before this Court, the Association for Competitive Technology, Inc. is represented by Covington & Burling LLP and the following attorney with that firm:

Jonathan Marcus



Jonathan Marcus

August 4, 2009

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INTEREST OF THE *AMICUS CURIAE*

The Association for Competitive Technology, Inc. ("ACT") is an international grassroots advocacy and education organization that represents over 3,000 small and mid-sized information and technology firms from around the world. With offices in Washington, D.C., and Brussels, Belgium, ACT is the only organization of its kind that focuses on the needs of small business innovators.

ACT advocates for an environment in which small businesses are empowered to innovate, rewarded for their technological contributions to society, and protected from infringement of their legally protected rights. By providing resources, such as the Innovators Network™ website (www.innovators-network.org), ACT has helped its members leverage their intellectual assets to raise capital, create jobs and freely innovate.

Many of ACT's member companies use both open source and commercial licensing models. ACT believes that both commercial and open source license models are innovative and equally entitled to protection under copyright laws. ACT does not condone infringement, and believes that appropriate remedies against infringement are very important to sustaining

incentives to innovation.[1] They are of particular importance in protecting the viability of small and mid-sized enterprises that, like Jacobsen, rely on copyright protection and can see the value of their investment in development efforts significantly and perhaps fatally undermined by forms of infringement including deliberate piracy and intentional misappropriation by competitors. But in order to protect the rights of all of its members, ACT has an interest in advocating for a standard for preliminary injunctive relief that is the same for both licensing models. Creating a special preliminary injunction standard for open source software ("OSS") is inappropriate. The interests potentially harmed by violation of license conditions are not unique to OSS licensors, but are common to all licensing models.

ACT submits this brief to provide this Court with a balanced perspective in light of the amicus brief filed by the Software Freedom Law Center ("SFLC"), which focuses solely on the interests of one licensing (open source) and business (royalty-free distribution) model. ACT believes that the entitlement of a copyright holder to preliminary injunctive relief should not vary based on choice of licensing or business model. It thus

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[1] ACT takes no position on the issue of whether copyright infringement occurred in this case, recognizing that this remains in dispute between the parties.

urges this Court to reject the invitation of Jacobsen and SFLC to adopt a specialized standard or categorical rule that would ease the evidentiary burden only for plaintiffs that are OSS licensors.

Both parties have consented to the filing of this brief.

ARGUMENT

I. This Court Should Not Apply Any Special Presumptions Of Harm From Breach Of License Terms Based On The Licensing Model Chosen by the Copyright Holder.

Jacobsen and SFLC argue that a preliminary injunction is warranted in this case because potential harms enumerated by this Court in the prior appeal are unique to OSS licensors and "inherent" or "inevitable" in any breach of the terms of an OSS license. Brief of Plaintiff-Appellant Robert Jacobsen at 23 (June 1, 2009) ("Jacobsen Br."); Brief of Amicus Curiae Software Freedom Law Center In Support of Appellant at 13 (June 15, 2009) ("SFLC Br."). This argument suggests that the district court erred in requiring Jacobsen to produce *evidence* that he has suffered or is likely to suffer those harms and assumes that a preliminary injunction should issue automatically whenever an open source license has been breached.

Such an argument is fundamentally inconsistent, however, with their position that the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), provides the

governing standard for preliminary injunctions. *See* Jacobsen Br. at 21; SFLC Br. at 12. *Winter* requires the plaintiff to demonstrate "that *he* is likely to suffer irreparable harm in the absence of preliminary relief." *Id.* at 374 (emphasis added). That standard clearly forecloses presumptions of irreparable harm. *See also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (rejecting rule that permanent injunctions should automatically issue upon finding of patent infringement and observing that "this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed").[2]

By arguing that the harms enumerated by this Court inhere in every case involving breach of an OSS license, Jacobsen and SFLC seek to reintroduce a *per se* rule for a subset of copyright infringement cases. Such a rule would not only be inconsistent with *Winter* and *e-Bay*, but would also

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[2] The district court held that *Winter* overruled Ninth Circuit law applying a presumption of irreparable harm from copyright infringement. *See Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997). *Winter* was not a copyright case, however, and the Ninth Circuit recently ruled that the presumption of harm it has applied in trademark infringement cases survives *Winter*. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, No. 08-15101, 2009 WL 1886172, at **2-3 (9th Cir. July 2, 2009). ACT does not take a position on this question, but if *Winter* provides the governing standard, as the parties appear to agree, Jacobsen must make an individualized showing of harm just as any other plaintiff would.

improperly favor a subset of copyright holders based solely on their discretionary choice of licensing model.

It is important for this Court to recognize that there is no distinction between OSS licenses and other software licenses when it comes to the potential for harm from infringement. Copyright is an essential basis for every software license, and ACT's members feel the pain of copyright infringement as much as any other copyright licensors. Developers that publish software under commercial licenses risk harms other than loss of licensing fees, such as harm to market share, reputation, recruitment, and goodwill when others infringe their copyright. At the same time, many that distribute software under open source licenses do so as part of a profit-making business model in which they derive revenue from something other than per-copy licensing fees. While a choice between an open source or commercial license has no effect on the legal determination of whether infringement has occurred when its terms are breached, it does play a role in the business model for marketing the software being licensed.

Business models in the software and IT industries use a variety of fee structures and licenses. *See* Association for Competitive Technology, "Understanding the IT Lobby: An Insider's Guide" (June 2008), *available at*, http://www.actonline.org/library/insiders-guide-to-it-lobby.html. The

most familiar business model is the end user licensing model in which buyers initially pay the developer a licensing fee or pay for a subscription to a service under which they receive successive versions of a software program. Such business models typically use commercial, rather than open source licenses for distribution of their revenue generating software, but may distribute other software for free under commercial or open source licenses in support of their main products. Adobe and Symantec are examples of companies that receive a substantial portion of revenues from license fees for software distributed under commercial licenses.

Another business model that has recently become more common is one in which the developer provides free software that will allow the developer to generate revenue by serving ads to the end user while using the software and/or collecting data from the end user for sale to other marketing entities. Google and Yahoo are prominent players in the online advertising market, and distribute a variety of free software to support their model of generating revenue by serving ads to users of that software. *See* Association for Competitive Technology, "Paying for Free: Security, Privacy, and Sustainability Costs for 'Free Software'" (June 2009), *available at,* http://www.actonline.org/library/paying-for-free-software.html.

Other business models include providing free software to help sell hardware, such as the software included on certain smartphones or server hardware (such as Apple and IBM), and providing free software to help sell support services, commonly used with servers and system integration (such as IBM, Red Hat and Sun). Developers make a choice among these business models based on personal and business needs. Both commercial and open source licenses can be and are used in all of these for-profit business models. There are advantages and disadvantages to each business model, and there is nothing inherent in any one of these different business models, or the associated use of an open source license, that requires special protection from the courts.

A. The Potential Harms Identified By This Court Are Common To All Software Developers And Potentially Apply Regardless Of Licensing Model.

The potential harms enumerated in this Court's initial decision in this case are not unique to software developers choosing a particular licensing model. For that reason, this Court should reject the invitation by Jacobsen and SFLC to apply a special presumption of irreparable harm in OSS cases.

1. Harm to market share, reputation, recruitment, and goodwill is relevant to all developers regardless of licensing model.

Jacobsen argues that the district court failed to consider the potential harm to market share, reputation, recruitment and goodwill when determining that he did not provide evidence of irreparable harm. Both Jacobsen and SFLC contend that these potential harms justify preliminary injunctive relief in the open source context because such harms are difficult to quantify and remedy through an award of monetary damages. *See* Jacobsen Br. at 26-28; SFLC Br. at 8-9. But these potential harms are of at least as much concern to commercial software developers as open source developers, if not more so in many cases, and may be equally hard to quantify in particular cases.

OSS and commercial software compete in a complex commercial environment in which many companies, including those using non-OSS licenses, build their business models on giving away code and then charging for other components of the total package. For example, the business owner who provides free software under a commercial license and sells support services to a client is receiving economic benefits from providing software to his customer. But it would be difficult for this business owner to provide a quantitative analysis of the harm done to his

market share, reputation, recruitment and goodwill based on copyright infringement of his software because that code is not the paid-for component of the total package or business. The potential harms to this business owner from copyright infringement are thus similar to the potential harms to OSS licensors. The decision to grant or deny a preliminary injunction under the *Winter* test should not turn on the business model chosen, but rather on whether the plaintiff has produced evidence establishing that harm is both likely and irreparable.

Whether a given license breach harms a plaintiff's market share, reputation, recruitment, or goodwill depends on a variety of factors, including the nature of the license condition breached and the product involved. Jacobsen's failure to produce evidence that he has suffered a loss of market share, reputation, recruitment, or goodwill does not mean that all OSS licensors will be unable to make such showings. His failure to do so should not be the impetus to carve out a special rule that favors open source over other license models.

2. The desire to drive users to a website to garner feedback and other contributions is not unique to the open source model.

Jacobsen argues that Katzer's alleged misappropriation of his Java Model Railroad Interface (JMRI) code "undercuts the 'creative

collaboration'" of the OSS community and prevents downstream users from submitting improvements to JMRI. *See* Jacobsen Br. at 26-27. Jacobsen provides no evidence to support this argument and instead states that "the district court needed no declaration to establish such an obvious point." *Id.* However, there is ample reason to doubt whether an open source licensor in Jacobsen's position, facing infringement by a party distributing object code under a commercial license, is likely to suffer harm of that nature. Katzer's customers knowingly purchased a commercial software product from which they did not obtain, and would not expect to obtain, source code. Without access to source code, they could not, and would not expect to modify the software and contribute back to an open source project. And Jacobsen has produced no evidence, or reason to presume, that any of them were computer programmers with the ability to do so even if they had been made aware of the availability of source code from another source through the JMRI website. By contrast, if Katzer were a competing open source developer who stripped Jacobsen's code of attribution material and instead invited code modifications through his own website, the likelihood of being harmed through loss of potential future contributions might be much easier for Jacobsen to demonstrate. This underscores the fact that assessing likely harm is a fact-specific exercise.

Nor is there anything unique about OSS developers' interest in driving users of their software to their website. Commercial developers may have just as much interest in driving traffic to their website for various reasons. For example, commercial developers have a strong financial interest in creating a market reputation by having users of their code know who developed the code and in gaining feedback on how the code is used, problems encountered, and changes needed. While commercial developers use this feedback to do their own coding, rather than accepting third-party code from open source developers, the result is still improved, more innovative products. Additionally, commercial developers have an incentive to increase their brand recognition and revenue by driving traffic back to their website for additional purchases and advertising.

3. Difficulty in calculating monetary damages is not unique to the open source model and should not be used as a substitute for requiring a showing that irreparable harm is likely.

Jacobsen (Br. at 25) and SFLC (Br. at 12-13) argue that in any case involving an open source license, because monetary damages may be difficult to prove, irreparable harm should be presumed. Again, Jacobsen and SFLC ignore the fact that OSS licensors are not the only parties who could have difficulty proving or quantifying monetary damages. As discussed above, there are non-open source licensing models in which the

commercial licensor elects not to charge a royalty for its code as part of its business model, but derives revenue from advertising or support services that is not quantifiable based on the number of infringing copies made or the nature or amount of the code that is misappropriated. Alternatively, commercial licensors who do charge a licensing fee could in some cases have just as much difficulty proving damages because they cannot establish the number of infringing copies made (to serve as a multiplier of lost royalties), or that a small amount of misappropriated code appearing in a competitor's product translates fairly into entitlement to lost royalties on its full product. These evidentiary challenges can be just as great in a given case as those faced by an OSS licensor who charges no royalties but obtains other benefits from the magnitude of its distribution.[3]

Moreover, that monetary damages may be difficult to quantify in a given case may justify concluding that the harm at issue is irreparable, but it is not a reason to excuse the plaintiff from demonstrating that the harm

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[3] Additionally, SFLC fails to acknowledge that it has been successful in securing out-of-court remedies for breach of open source license terms, including monetary payments, despite the asserted difficulty with a specific calculation of money damages. In the past year, SFLC has settled cases with several companies alleged to have infringed open source licenses, including Cisco, Extreme Networks, and Supermicro. *See* Part III, *infra.* These settlements resulted in monetary payments in addition to other remedies.

has actually occurred or is likely to occur.[4] Thus, even assuming that on certain facts, harms from copyright infringement would be difficult to quantify, under *Winter* a plaintiff still must establish that he is likely to suffer them.

4. Harm to the core copyright power to exclude is not special to the open source model.

Jacobsen argues that "copyright law's right to exclude supports a finding of irreparable harm." Jacobsen Br. at 25. That argument squarely invokes the presumption of irreparable harm in copyright infringement cases that the district court held was overruled by *Winter*, a ruling that neither Jacobsen nor SFLC directly challenges. The principal rationale for the presumption of irreparable harm previously applied by many courts of appeals, including the Ninth Circuit, was that harm was obvious when a copyright was violated because the copyright owner was deprived of its right to exclude competitors. *See, e.g., Cadence*, 125 F.3d at 830; *Merkos L'Inyonei Chinuch, Inc. v. Otstar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96-97 (2d Cir. 2002) ("This case illustrates the rationale behind this presumption

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[4] If this Court were to hold otherwise, it would invite all copyright owners to embed additional attribution and similar non-economic conditions in their licenses that would be breached by infringing uses of their code, and to plead harm to interests other than quantifiable lost royalties, simply in order to benefit from a presumption of irreparable harm and ease their evidentiary burden in obtaining preliminary injunctive relief.

[of irreparable harm]: Since Otsar sells essentially the same product as Merkos to the same market, it will obviously suffer considerable loss if Otsar disseminates its prayerbook, because each sale of an Otsar prayerbook probably results in one less sale of the Merkos' prayerbook."). While this presumption of irreparable harm applied regardless of licensing model and would have been applicable to an OSS license, the district court determined that it was rejected by *Winter* and a case-specific showing of harm was needed.[5] Jacobsen cannot justify a special presumption for OSS licenses based on harm to the right to exclude when this rationale applies equally to all infringements of copyright and he does not challenge the district court's ruling that *Winter* controls.

5. Alternatively, if this Court concludes that the presumption survives *Winter* and *e-Bay*, then there is no sound reason to apply it only to an OSS licensor.

A commercial licensor has just as much, if not more, at stake when its right to exclude is infringed, because a commercial licensor obtains

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[5] A similar presumption that a permanent injunction was warranted for patent infringement was overruled by *eBay*. *See supra* page 4. In declining to adopt a categorical rule for patent cases, the Supreme Court rejected the notion that "this statutory right to exclude alone justifies [a] general rule in favor of permanent injunctive relief." 547 U.S. at 392; *see also Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (relying on *eBay* to reject claim that copyright holder is automatically entitled to an injunction upon a jury finding of infringement).

its revenue directly from licensing fees rather than indirectly from support, service, and reputation. SFLC incorrectly assumes (Br. at 6-8) that its interests in "freedom," "cooperation," "trust" and "political and non-economic principles" have a special claim to protection under the copyright laws.

The thrust of SFLC's brief is that preliminary injunctive relief is always necessary to prevent "immediate" and "inevitable" irreparable harm to open source "political and non-economic principles." SFLC Br. at 8, 10, 13. ACT supports the effort to use copyright law to advance the "political and non-economic principles" described by SFLC, just as it supports the effort to use copyright law to promote commercial business models. But SFLC cannot point to anything in the copyright laws that suggests, much less provides, that its goals are entitled to special protection.[6]

Contrary to SFLC's assertions, it is far from clear that each and every breach of any OSS license condition will "inevitabl[y]" (SFLC Br. at 13) cause significant, imminent and irreparable harm to the cohesiveness, trust, or output of a monolithic OSS community or any significant subset of

[6] The use of copyright law to further SFLC's goals is permissible, but derivative of the "right to exclude" discussed above.

it in the absence of preliminary relief.[7] Open source developers range widely in their individual motivation for engaging in open source development, from the individual code developer working as a hobby in the evenings out of non-economic motives, to employees of major companies paid a salary to contribute to open source projects that further their employer's for profit business model. It is far from clear that each and every OSS licensor is motivated by the broad political agenda of the SFLC. *See id.* at 12 ("[D]evelopers are motivated to contribute to FOSS by their belief in freedom."). Such broad assertions go well beyond the question of irreparable harm to the individual movant.

B. Assuming That *Winter* Provides The Governing Standard, Jacobsen and SFLC's Request For A Categorical Rule That Copyright Infringement Of An OSS License Causes Irreparable Harm Is Untenable.

To recognize Jacobsen and SFLC's arguments would re-establish a presumption of irreparable harm contrary to *Winter*, and compound this error by making the presumption hinge on a software developer's choice of licensing or business model in the absence of any sound basis for this distinction. *Winter* requires that any plaintiff, regardless

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[7] It is also important to remember that this case is not about breach of OSS license conditions other than the attribution requirement found in the Artistic license. Questions about breach of other conditions of key interest to OSS developers, such as provision of source code, are not before the Court.

of model, bear the same burden of coming forward with evidence sufficient to establish that irreparable harm is likely to occur in his or her particular case. Some OSS and commercial licensors will be unable to satisfy this requirement. However, ACT is confident that many OSS licensors will be able to make the requisite showing, just as many commercial licensors will. ACT is equally confident that a preliminary injunction standard that favors OSS licensors has no basis in the law.

II. This Court Should Not Truncate the Balancing of Equities and Public Interest Elements of the Preliminary Injunction Inquiry.

1. Jacobsen argues (Br. 40) that the Court should bypass the requirement to balance the equities of preliminary injunctive relief because it is irrelevant whether defendants will be harmed by the preliminary injunction. This argument is incorrect.

The balance-of-equities element is intended to examine the proportionality of applying the extraordinary remedy of preliminary injunctive relief before a full hearing on the merits and should be given equal weight in the four-factor test identified under *Winter*. *See* 129 S. Ct. at 374 ("A plaintiff seeking a preliminary injunction must establish . . . that the balance of equities tips in his favor."). Here too the categorical rule for which Jacobsen argues—that the balance of equities automatically tips in his

favor—is inconsistent with *Winter* and *eBay*. Under traditional equitable principles, this Court should compare the magnitude of the harm to the plaintiff against the harm to the defendant. *See Belushi v. Woodward*, 598 F. Supp. 36, 37 (D.D.C. 1984). As with the other parts of the preliminary injunction inquiry, this balancing is necessarily fact specific, and sweeping generalizations will not do. Where, as in this case, the defendant is distributing a commercially licensed product in exchange for a licensing fee, it may be appropriate in such circumstances to take into account the impact of enjoining further distribution on the defendant and its customers who rely on the software (including how quickly and easily the infringing code can be replaced and a new version tested and distributed), the significance of the improperly used OSS code to the commercial distribution (*i.e.*, whether the OSS code is minor in extent and functionality in relation to the whole work), the circumstances under which it was incorporated (*e.g.*, intentionally or as a result of an employee incorporating open source code contrary to company policies), and the purpose of the specific OSS license terms breached.

2. Jacobsen (Br. at 41) and SFLC (Br. at 10-12) also make the sweeping assertion that preliminarily enjoining a breach of OSS license terms is always in the public interest. Assuming as they do that *Winter* provides the governing standard, their request for a *per se* rule for OSS

licensors is no less defensible with respect to this element of the preliminary injunction standard than any other. Moreover, they fail to cite any case law, statute, legislative history, or other legitimate source of authority for the proposition that OSS licensed software is uniquely innovative and has a superior claim to being in the public interest. In fact, there is no basis in the record for concluding that OSS licensing is inherently more innovative or generates more features than commercial licensing models.[8] The commercial model has an equal claim to producing innovation and has generated much of the software and product choice on which businesses and consumers depend for their daily computing activity. Likewise, to the extent that this argument rests on the proposition that OSS software is distributed free of charge and commercially licensed software is not, as described above, commercially licensed software is also frequently distributed free of any license fee, while open source software frequently is not free in light of charges for service, or hardware, or the inability to avoid receiving advertising with use of such software. Whether or not a particular piece of

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[8] SFLC argues (Br. at 10-12) that OSS produces more interoperability, or lower barriers to entry in other industries, or gives software users greater choice in their support options. These statements are entirely unsubstantiated and go well beyond the record and issues in this case. Indeed, SFLC never explains how these objectives would be undermined by failing to issue a preliminary injunction in favor of Jacobsen in this case.

software is "free" is a more complex question that does not turn solely or even primarily on the form of license used.

ACT does not believe that either an OSS or a commercial software model is inherently more beneficial to the public interest and is certain that Congress has not made any such determination in writing the copyright laws. Accordingly, this Court should not skew the protections of the copyright laws in favor of one set of competitors based on an idealized depiction of the open source model.

III. Applying The Preliminary Injunction Standard In A Non-Discriminatory Fashion Would Not Render Open Source Licenses Unenforceable.

Jacobsen and SFLC suggest that holding OSS licensors to the same standard as commercial licensors would render OSS licenses unenforceable. This conclusion is contradicted by the recent settlements SFLC has obtained and press releases touting its own enforcement of OSS licenses in various cases. *See* SFLC Press Release, *FSF and Cisco Settle GPL Dispute* (May 20, 2009), *available at*, http://www.softwarefreedom.org /news/2009/may/20/fsf-cisco-settlement/; SFLC Press Release, *BusyBox Developers Settle Case With Extreme Networks* (Oct. 6, 2008) (settling and dismissing OSS lawsuit), *available at*, http://www.softwarefreedom.org/ news/2008/0ct/06/busybox-extreme-settle/; SFLC Press Release, *BusyBox*

Developers and Supermicro Agree to End GPL Lawsuit (July 23, 2008) (same), *available at*, http://www.softwarefreedom.org/news/2008/jul/23/busybox-supermicro/. Indeed, SFLC's own materials suggest that OSS licensors are able to enforce their licenses effectively and achieve financial settlements and compliance without courts issuing preliminary injunctions. *See* Software Freedom Law Center, Inc., "A Legal Issues Primer for Open Source and Free Software Projects" (2008), *available at*, http://www.softwarefreedom.org/resources/2008/foss-primer.html.

OSS plaintiffs, like commercial plaintiffs, will be able to meet the standard necessary to obtain a preliminary injunction if the facts support them. Jacobsen and SFLC seek to excuse the evidentiary shortcuts in Jacobsen's pleadings by painting his failure to put forward evidence as a problem that would affect all OSS plaintiffs absent a special presumption for OSS plaintiffs. But Jacobsen's failures provide no reason to believe that an OSS licensor in a different case could not show a likelihood of suffering one or more of the harms this Court identified as potentially arising from copyright infringement in the OSS context.

Jacobsen and SFLC also fail to acknowledge that a preliminary injunction is not the only remedy available for copyright infringement. Congress has provided statutory damages as an alternative remedy at the

election of the plaintiff. 17 U.S.C. § 504(c); *see also F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). Statutory damages further compensatory and punitive purposes and "a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant in order to sanction and vindicate the statutory policy of discouraging infringement." *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (internal citation and quotation marks omitted). Statutory damages are equally available to OSS and non-OSS licensors.[9]

IV. This Court Cannot Adopt A Policy Favoring Open Source Material Without Congressional Action.

The copyright laws establish no presumption in favor of any particular licensing model when extending copyright protection to encourage innovation. Accordingly, it would be improper for this Court to adopt a policy favoring one licensing model over another. *See Powerex Corp. v. Reliant Energy Serv., Inc.*, 551 U.S. 224, 237 (2007) ("[A] policy

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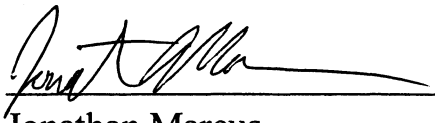
[9] To be eligible for statutory damages, a copyright owner must have registered its copyright. It may be that many OSS licensors fail to register their copyright and thus may be precluded from such relief. However, the OSS community should not have any special claim to avoid the registration burdens associated with qualifying for statutory damages. If such an exception is warranted, it is for Congress and not the courts to create. *See infra* Part IV.

debate . . . belongs in the halls of Congress, not in the hearing room of this Court."); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("[W]e do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress, not the courts."); *Randall v. Loftsgaarden*, 478 U.S. 647, 666 (1986) ("It is for Congress, not this Court, to decide whether the federal securities laws should be modified to comport with respondents' vision of economic reality.").

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,



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Dated: August 4, 2009

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I certify that on this 4th day of August, 2009, I caused to be served by hand delivery two copies of the Brief of *Amicus Curiae* Association for Competitive Technology, Inc. upon the following:

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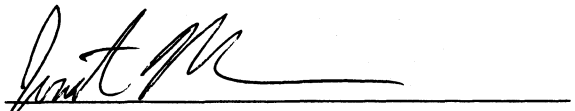

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Technology, Inc.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

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