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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ROBERT JACOBSEN, an individual,)
14)
Plaintiff,)
15)
v.)
16)
MATTHEW KATZER, an individual, and)
17 KAMIND ASSOCIATES, INC, an Oregon)
corporation dba KAM Industries,)
18)
Defendants.)

No. C-06-1905-JSW
**REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**
Date: Friday, December 19, 2008
Time: 9:00 a.m.
Courtroom: 2, 17th Floor
Judge: Hon. Jeffrey S. White
Filed concurrently:
Supplemental Declaration of Robert Jacobsen

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1 SUMMARY OF ARGUMENT

2 Defendants raise no arguments that defeat Jacobsen’s motion for preliminary injunction.
3 Jacobsen is likely to succeed on the merits. Irreparable injury exists. The balance of the equities
4 favors Jacobsen. Defendants do not contest that the public interest favors Jacobsen.

5 After Jacobsen filed his motion, the U.S. Supreme Court issued Winter v. Natural Res. Def.
6 Council, Inc., No. 07-1239, 555 U.S. ___, slip op. at 12 (U.S. Nov. 12, 2008), which rejected the
7 Ninth Circuit’s “possibility of irreparable injury” standard. Under Winter,

8 a plaintiff seeking a preliminary injunction must establish that he is likely to
9 succeed on the merits, that he is likely to suffer irreparable injury in the absence of
preliminary relief, that the balance of the equities tips in his favor, and that an
injunction is in the public interest.

10 Slip op. at 10. Even under this standard, Jacobsen is still entitled to a preliminary injunction.

11 Jacobsen is likely to succeed on the merits. Defendants conceded Jacobsen owned the
12 copyright. JMRI developers coded variable selection, naming, and arrangement in their works.
13 Defendants copied that in more than 100 files, and still do in QSI and Lenz files. Jacobsen has
14 shown that Defendants exercised his exclusive rights, and Jacobsen defeated their license
15 argument. Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008). Jacobsen will succeed.

16 Irreparable injury exists and, as Defendants conceded on appeal, damages are inadequate.
17 The threat of future infringement exists. Jacobsen has found JMRI-specific variable names in
18 Defendants’ version 312. Defendants have not proven they independently created their new works.
19 They could have produced the evidence, but they chose not to. Because Defendants refuse to offer
20 evidence in their possession, this Court should resolve these facts against them.

21 The equities favor Jacobsen. If the injunction does not issue, Jacobsen could face years of
22 continued infringement with inadequate damages to compensate for the injury. An infringer cannot
23 complain about hardship that he may suffer as a result of being ordered to stop his intentional
24 infringement, but Defendants nevertheless complain. Equity does not recognize their complaints.

25 Finally, the injunction is definite enough for Defendants to follow—especially Defendants
26 who claim not to use JMRI materials.

27 Jacobsen will succeed. The injury is irreparable and real. The injunction should issue.
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1 Jacobsen respectfully submits this Reply memorandum in response to Defendants' Second
2 Corrected Opposition [Docket #264] to Jacobsen's Motion for Preliminary Injunction.

3 **I. INTRODUCTION**

4 Defendants contend that Jacobsen has not shown a likelihood of success on the merits, and
5 has not shown irreparable injury. They contend that they will suffer hardship.

6 Defendants are wrong. Jacobsen will prevail. The Federal Circuit decision acknowledged
7 irreparable injury. Equity does not consider the harm caused to an infringer who is ordered to stop.
8 For these and other reasons, the Court should order the preliminary injunction to issue.

9 **II. PROCEDURE**

10 After his demands that Defendants halt their copyright infringement were met with silence,
11 Jacobsen moved for a preliminary injunction on October 25, 2006 to enjoin the infringement.
12 Motion for Preliminary Injunction [Docket # 114]. The Court heard argument on January 19,
13 2007, and denied the motion on August 17, 2007. Order Granting Defendants' Motion to Dismiss,
14 Granting in Part and Denying in Part Defendants' Motion to Strike, and Denying Plaintiff's Motion
15 for Preliminary Injunction [hereinafter District Court's Aug. 17, 2007 order] [Docket #158] at 8-
16 11. The Court stated that terms in the Artistic License were covenants, not conditions, and thus,
17 Jacobsen's remedy lay in contract law, not copyright law. *Id.* at 10-11.

18 Jacobsen appealed. On August 13, 2008, the U.S. Court of Appeals for the Federal Circuit
19 vacated this Court's order, finding that terms in the Artistic License were conditions that limited
20 the scope of the license grant. *Jacobsen v. Katzer*, 535 F.3d 1373, 1382 (Fed. Cir. 2008). The
21 Federal Circuit remanded the matter to this Court to make findings of fact on whether Jacobsen had
22 shown likelihood of success on the merits, and whether Jacobsen was entitled to a presumption of
23 irreparable harm or had to demonstrate irreparable harm. *Id.* at 1382-83.

24 On remand, this Court ordered the parties to update their motions to reflect the current state
25 of the law. Amended Minute Entry [Docket # 229]. Jacobsen updated his motion for preliminary
26 injunction to include a motion based on 17 U.S.C. Sec. 1202, and filed the updated motion on
27 October 3, 2008. Motion for Preliminary Injunction [Docket #230]. Defendants filed an original
28 Opposition and two corrected Oppositions on November 7, 2008. Defendants Matthew Katzer and

1 KAMIND Associates, Inc.’s Opposition to Plaintiff’s Motion for Preliminary Injunction [Dockets
2 #260, 263, 264]¹. In addition to denying irreparable injury and pleading hardship, Defendants
3 contested likelihood of success on the merits of copyright infringement, but not Sec. 1202.

4 Meanwhile, the United States Supreme Court on November 12, 2008 issued a ruling
5 overturning the Ninth Circuit’s standard for a preliminary injunction. Winter v. Natural Res. Def.
6 Council, Inc., No. 07-1239, 555 U.S. ___, slip op. at 12 (U.S. Nov. 12, 2008) (rejecting the
7 “possibility of irreparable injury” standard). Under Winter,

8 a plaintiff seeking a preliminary injunction must establish that he is likely to
9 succeed on the merits, that he is likely to suffer irreparable injury in the absence of
10 preliminary relief, that the balance of the equities tips in his favor, and that an
11 injunction is in the public interest.

12 Slip op. at 10.

13 Jacobsen addresses the stricter standard in this Reply memorandum, in addition to
14 responding to Defendants’ Second Corrected Opposition [Docket #264].

15 **III. FACTS**

16 In its ruling, the Federal Circuit recognized the bargain between open source groups and
17 their downstream users: users may download and use the software within the terms of the license.
18 Jacobsen, 535 F.3d at 1382. Open source groups suffer irreparable harm when users like
19 Defendants infringe or encourage others to infringe copyrighted open source works. See id. at
20 1382 & 1383 n.6. Open source groups rely upon the terms of their licenses for several reasons: (1)
21 to drive traffic to their website, (2) to ensure compliance with license terms, (3) to gain further
22 contributors to improve their software, and (4) to increase their reputation. The Federal Circuit
23 found that these constitute an economic interest, albeit a non-traditional interest. See id. at 1382.

24 This interest may be impossible to value. Defendants conceded this during oral argument at
25 the Federal Circuit:

26 ¹ In Defendants’ original Opposition, Defendants asked this Court to reconsider their mootness
27 arguments which both this Court and the Federal Circuit rejected. Defendants also argued that an
28 injunction was not in the public interest. Defendants removed these arguments from the Second
Corrected Opposition to comply with this Court’s 15-page limit. Jacobsen does not address them.

1 Judge Hochberg: So you're basically saying it's a covenant, therefore only damages
2 would be available, [Ms. Hall] can't prove any damages, so "Too bad, so sad." Is
3 that basically the argument?

4 Mr. Jerger: That is the legal position, yes.

5 Judge Hochberg: That's what I thought.

6 [...]

7 Judge Hochberg: I understand your argument, but, what your argument is saying in
8 essence is that these conditions have no way to enforce them. If they're not capable
9 of being quantified in damages terms, so you can't get damages for their breach if
10 they're covenants, and you argue they're not conditions, then they're meaningless,
11 is what you're saying.

12 Mr. Jerger: Well, to the extent that they can prove damages under breach of
13 contract....

14 Judge Hochberg: I just took damages out of it because a moment ago I asked you
15 the question and you said no [Ms. Hall] can't, you agreed with me, [Ms. Hall] can't
16 prove damages.

17 Mr. Jerger: Well, if they can't prove damages, then I would agree with you that ...

18 Judge Hochberg: They're meaningless. That's what your position is.

19 Mr. Jerger: Yes.

20 Oral argument, Jacobsen v. Katzer, No. 2008-1001 [hereinafter Oral argument], at 22:52-23:04 &
21 26:05-:48, available at <http://oralarguments.cafc.uscourts.gov/mp3/2008-1001.mp3> (recorded May
22 7, 2008). Stepping away from their concession, Defendants now contend that the \$1200 that they
23 have earned from their software is sufficient compensation to Jacobsen for (1) the three and a half
24 years of infringement they, their distributors, and their users engaged in, (2) two and a half years of
25 contentious litigation, including an appeal that involved 6 amicus groups and resulted in an
26 appellate ruling that completely repudiated Defendants' position, and (3) ongoing infringement.
27 For the following reasons, it is not sufficient.

28 Katzer has engaged in a pattern of copying. He admits copying JMRI files in early 2005.
Declaration of Matthew Katzer [hereinafter Katzer Decl.] at ¶ 7. He also copied again in summer
2005 in order to obtain the QSI files from JMRI. See Declaration of Robert Jacobsen [hereinafter
Jacobsen Decl.] at ¶¶ 71-72. He copied all content except the copyright notice and the authors'
names. Id. at ¶ 72 (last bullet). Katzer knew about DecoderPro since May 2003 and knew about
the license terms since March 2004. Id. at ¶¶ 44-49 & Exs. P-U. Thus, Katzer engaged in

1 unauthorized copying at least twice and he knew about the requirements of the license when he
2 began his unauthorized copying.

3 Katzner misrepresents what he copied. Katzner describes what he took as manufacturer data,
4 Katzner Decl. at ¶ 8, but it is more than that. Katzner copied JMRI's selection, naming conventions,
5 and arrangement. Jacobsen Decl. at ¶¶ 71-73. JMRI developers identified and selected variables to
6 include in the Decoder Definition Files. *Id.* at ¶¶ 17-32. Variable names come from a variety of
7 sources, including manufacturer manuals. *E.g., id.* at ¶¶ 23-25. JMRI developers arranged the
8 variables to make DecoderPro more user friendly. Katzner took all of this.

9 Katzner intentionally removed copyright management information. Katzner said that he left
10 out the copyright notice and the reference to the license on accident because it was in a comment
11 field, Katzner Decl. at ¶ 13, but he declined to put his program code for the infringing tool into
12 evidence. The facts show the removal was intentional. In order to convert JMRI files to KAM
13 files, Katzner had to review JMRI files to determine what he wanted and what he didn't want.
14 Supplemental Declaration of Robert Jacobsen [hereinafter Jacobsen Supp. Decl.] at ¶¶ 1-8. Katzner
15 didn't want the top lines, the comment fields, in JMRI files, which had the copyright notices and
16 the reference to the license. He had to create a program that recognized those lines and skipped
17 over them. *Id.* at ¶¶ 3-8. Katzner didn't want the author's name, which is not in a comment field.
18 In order to copy the date and version number, Katzner's copying program had to read the entire line
19 of text, skip over the author's name, and pluck out the date and version number to copy it to
20 Katzner's files. *Id.* at ¶¶ 6-7. Katzner had to write the copying program to leave out the author's
21 name. *Id.* at ¶ 7. Therefore, Katzner intended to remove the copyright management information.

22 Katzner attempted to expand the number of infringers by urging the National Model Railroad
23 Association to adopt his infringing template for all to use. *See* Katzner Decl. at ¶ 12. After twice
24 making unauthorized copies of JMRI content, and then distributing his infringing product, Katzner
25 spearheaded an effort to get the NMRA to develop and adopt a standard for decoder definitions—
26 and suggested his own format. *See id.* Katzner claimed that he had his own decoder definitions,
27 which were in his Decoder Command product, and hid from the NMRA that he had copied his
28 content from JMRI. *See* Jacobsen Decl. at ¶ 50, Ex. V. No JMRI developer was involved or

1 supported Katzer's effort. Jacobsen Supp. Decl. at ¶ 9. Katzer's effort to get the NMRA to
2 standardize decoder definitions took place years after JMRI started distributing its Decoder
3 Definition Files, and months after Katzer himself had created and distributed his copy of JMRI
4 content. Contrary to what Katzer says, there is no evidence that JMRI's Decoder Definition Files
5 "built on the effort to construct a master, uniform template of manufacturer's specification data."
6 Id. Katzer undertook that effort personally after he had committed infringement.

7 Unrepentant, Katzer claims he has a right to engage in his infringing activities. See Katzer
8 Decl. at ¶¶ 48-52. As an excuse for his continued copying, Katzer states that he has a copyright
9 assignment to the QSI manual, which he obtained after Jacobsen registered his copyright, and thus
10 the assignment gives him the right to continue copying JMRI's QSI file. Id. at ¶ 48. Katzer points
11 to some variables that appear in both works, id. at ¶ 51 & Exs. F-AO, but fails to identify the other
12 variables present in the JMRI work that are not in the QSI manual. Jacobsen Supp. Decl. at ¶¶ 11-
13 17. Katzer also fails to identify that the QSI files—6 of them—are subsets of QSI variables, and
14 that these subsets were chosen based on selection criteria related to the train function they were
15 emulating. Id. at ¶ 11. Katzer argues that his license to the QSI manual entitles him to all the
16 separate creation expressed in JMRI's QSI files—the variable selection, naming, and arrangement,
17 Katzer Decl. at ¶ 52, for which he does not have a license, Jacobsen Supp. Decl. ¶ 18. In addition,
18 Katzer also does not explain how he had the right to copy 101 other JMRI files or how he has a
19 right to copy JMRI's Lenz file, a variation of which was in Katzer's version 312. Id.

20 Katzer claims he has halted all infringement, Katzer Decl. at ¶¶ 15-19, 26, but he declines
21 to put the proof into evidence, even though it is in his possession. Katzer says that he has recalled
22 all infringing versions of his software, id. at ¶ 15, but he provides no evidence of a recall letter or
23 email. Jacobsen has not received any recall notices, and still has his KAM software copies.
24 Jacobsen Supp. Decl. at ¶¶ 21-23. Katzer has done nothing to halt the infringing tool from running.
25 Id. at ¶ 23. KAM users can still create infringing KAM templates from JMRI files. Id.

26 Katzer makes various claims about how he will never infringe again, Katzer Decl. at ¶¶ 17-
27 22, 24, but he never shows any evidence of independent creation, even though this evidence, if it
28 exists, is in his possession. Katzer says that his newer versions are incompatible with JMRI, and

1 therefore, he will never again infringe. *Id.* at ¶¶ 18-21. However, Katzer’s earlier versions were
2 technically incompatible with JMRI, and Katzer was still able to copy JMRI content into them,
3 thus infringing Jacobsen’s copyright. Jacobsen Suppl. Decl. at ¶ 19. Katzer then says he is using
4 different technology for his decoder definitions, and that this technology is more expensive and
5 incompatible with JMRI. Katzer Decl. at ¶¶ 18-19. But this is irrelevant. Katzer could have
6 copied JMRI content to the new technology format. Jacobsen Supp. Decl. at ¶ 19. Katzer states
7 that the decoder definitions are not required to start up Decoder Commander. Katzer Decl. at ¶ 11.
8 This is irrelevant. Decoder Commander may be able to initiate, but it cannot program a decoder
9 without some form of a decoder definition, whether from JMRI or another source, in a definition
10 file or a database. Jacobsen Supp. Decl. at ¶ 20. Katzer says KAM versions 304 and 305 no longer
11 work, but Jacobsen was able to get both to start and display infringing content. *Id.* at ¶¶ 22-23. If
12 Katzer had created the new decoder definitions independently, he could have offered the evidence,
13 but he does not. He could have offered his database structure and content into evidence, but he
14 does not. If he has concerns about its confidentiality and wanted it to be sealed, he had 5 weeks to
15 do so, but chose not to. Instead of producing any evidence of independently created new decoder
16 definitions, Katzer employs confusing and irrelevant arguments to distract attention from the issue.

17 Katzer claims he has no motive to infringe, saying that he never knew his product was
18 going to be compared to JMRI in Model Railroad News, Katzer Decl. at ¶ 25—but the evidence
19 shows otherwise. Model Railroad News announced in 2006 that it was reviewing model railroad
20 software. Jacobsen Supp. Decl. at ¶ 26. In order to have the software reviewed, the software
21 producer had to contact Model Railroad News. *Id.* Katzer did that, because his name appears on
22 the list. *See id.* at ¶ 27. Along with Jacobsen, Katzer received emails from Model Railroad News
23 regarding the reviews. *Id.* Also, Model Railroad News is the only publication that Katzer still
24 advertises in. *Id.* at ¶ 28. Katzer knew about the upcoming reviews and that his software would be
25 compared with JMRI’s software. Because Katzer’s software does not have the range of features
26 that JMRI’s has, Katzer’s software risked being reviewed unfavorably. So, Katzer has motive to
27 use JMRI materials to increase the range of features.

28

1 Katzner maintains that if the injunction issues, KAMIND Associates, Inc. will go out of
 2 business. Katzner Decl. at ¶ 36.² Katzner now says that a never-before-disclosed unidentified
 3 “Company” is willing to do business with him, but that it will be “scared” away if the injunction
 4 issues. *Id.* at ¶ 41. Katzner provides no evidence of what the company’s name is or any records to
 5 support his assertions. Katzner says “Company” is “litigation adverse”, *id.* at ¶ 38, but Katzner’s
 6 litigation tactics of suing competitors’ wives, *Katzner v. Mireille S. Tanner*³, did not scare
 7 “Company” away. Katzner’s tactics of sending intrusive, accusation-laden FOIA requests⁴ to his
 8 competitor’s government employer also did not scare “Company” away. Katzner’s accusations of
 9 patent infringement, made without a factual foundation,⁵ also have not scared “Company” from
 10 engaging in talks with Katzner. Katzner’s wholesale repudiation of licenses (Artistic License and
 11 GPL) also did not scare “Company” away from starting contractual negotiations with Katzner.
 12 Katzner’s bad faith registration of others’ intellectual property—and transfer with a penalty of
 13 \$20,000 and attorneys fees⁶—that also did not scare “Company”. But an injunction ordering
 14 Katzner to meet his obligations under the Artistic License—according to Katzner, that injunction will
 15 scare “Company” away.

16 In short, Katzner says he’s stopped infringing, and that he will be injured if the injunction
 17 issues. Katzner could have produced documentary evidence to support his claims. If the evidence
 18 existed, it was in Katzner’s possession. Katzner didn’t produce the evidence—because it’s either
 19 adverse or it doesn’t exist.

21 ² Compare Katzner’s earlier statements about KAMIND’s solvency. Declaration of Matthew Katzner
 22 in Support of Defendants Response in Opposition to Plaintiff’s Motion for Preliminary Injunction
 [Docket # 124, Attachment #1] at ¶ 3 (“KAM is adequately capitalized....”)

23 ³ *Katzner v. Mireille S. Tanner*, No. CV-02-1293-ST (filed Sept. 18, 2002), Request for Judicial
 Notice in Support of Opposition to Motion to Dismiss for Mootness [Docket #246], Ex. I.

24 ⁴ Defendants’ FOIA Request, Memorandum in Opposition to Defendants’ Motion to Dismiss for
 Mootness, Affidavit of Robert Jacobsen in Support of Opposition [Docket #213], Ex. E.

25 ⁵ *See* Declaration of Kevin Russell Supporting Reply to Plaintiff’s Opposition Brief [Docket #254]
 26 at ¶¶ 3, 6 (admitting that he had done no claim construction or factual investigation prior to making
 his accusations, but that he was going to make accusations of patent infringement anyway).

27 ⁶ *See Jacobsen v. Britton*, No. D2007-0763 (WIPO July 26, 2007) (describing Katzner’s bad faith
 28 registration of decoderpro.com, and transfer to Jerry Britton). Second Motion for Leave to File
 Supplementary Material [Docket #156], App. A at 7-9.

1 **IV. ARGUMENT**

2 The preliminary injunction should issue. Under Winter,

3 a plaintiff seeking a preliminary injunction must establish that he is likely to
4 succeed on the merits, that he is likely to suffer irreparable injury in the absence of
5 preliminary relief, that the balance of the equities tips in his favor, and that an
6 injunction is in the public interest.

7 Slip op. at 10. Jacobsen has shown earlier a likelihood of success, irreparable harm, inadequate
8 damages, the balance of the equities favors him, as does the public interest. In their Second
9 Corrected Opposition, Defendants do not contest that the public interest favors Jacobsen.
10 Defendants' other new arguments do not change the result. They do not challenge Jacobsen's
11 arguments relating to 17 U.S.C. Sec. 1202. This Court should issue the preliminary injunction.

12 **A. Jacobsen Has Shown Likelihood of Success on the Merits**

13 Jacobsen has shown a likelihood of success on the merits. He is the copyright holder,
14 which Defendants conceded. Jacobsen, 535 F.3d at 1379. Jacobsen has also shown that
15 Defendants exercised his exclusive rights in a manner that was outside the scope of the license. Id.
16 at 1383. Jacobsen defeated Defendants' license theory. See id. Therefore, Jacobsen has shown a
17 likelihood of success on the merits.

18 Although bound by his concession, Katzer newly raises an argument—lack of ownership, a
19 defense was available to him in November 2006—which Katzer maintains will show that Jacobsen
20 will not succeed on the merits. For the following reasons, this argument fails.

21 Katzer claims to own the JMRI QSI files because, after being accused of infringement and
22 after Jacobsen's registration, he worked out a deal with the owners of QSI Industries in November
23 2006 for an exclusive license to a QSI manual. Assuming the QSI-KAM transfer is valid, the
24 copyrights are different. The QSI Manual copyright is a reference manual to assist QSI decoder
25 owners in programming their chips. Given away free, the QSI Manual is primarily instructional
26 text. This text is not available in JMRI decoder definition files. The JMRI QSI decoder
27 definitions—6 of them, which are subsets of variables in the QSI manuals and include variable
28 names from other sources—result in a screen display showing radio buttons, check boxes, sliding
scales, etc., to make it easier for decoder owners to program their chips. These screens, and the

1 specific variable selection, naming, arrangement, and setting, are not present in the QSI manual.
2 They are a compilation covered by JMRI's copyright, see Feist Publ'ns, Inc. v. Rural Tel. Serv.
3 Co., 499 U.S. 340, 345, 350 (1991); Key Publ'ns, Inc. v. China Today Publ'g Enters., Inc., 945
4 F.2d 509, 513 (2d Cir. 1991), and are distinctly different from Katzer's copyright, which is not a
5 compilation. Katzer copied all of JMRI's variable selection, naming, and arrangement from all 6
6 QSI files. In his declaration, Katzer cherry-picked variables from the JMRI QSI files for his
7 comparison, and intentionally did not show the other non-QSI manual variable names. A review of
8 the variables in Katzer's exhibits shows that JMRI developers took variable names from a range of
9 sources, and also created their own variable names. Jacobsen Supp. Decl. at ¶¶ 12-17. Katzer, in
10 no way, shows how the JMRI files lack creativity in selection. Thus, his arguments fail and the
11 variable selection is covered by Jacobsen's copyright.

12 Thus, Jacobsen has shown a likelihood of success on the merits.

13 **B. Jacobsen Has Shown Irreparable Harm**

14 Jacobsen has suffered irreparable harm, and shown that it will likely continue. A
15 preliminary injunction may only be granted when the moving party has demonstrated a significant
16 threat of irreparable injury, irrespective of the magnitude of that injury. Simula, Inc. v. Autoliv,
17 Inc., 175 F.3d 716, 725 (9th Cir. 1999). Damage to an intangible, such as goodwill, recruitment
18 efforts, or the right to exclude when the owner does not regularly license work, results in
19 irreparable injury. Rent-a-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d
20 597, 603 (9th Cir. 1991). See eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006)
21 (Roberts, C.J., concurring) (in patent case, addressing the difficulty in protecting a right to exclude
22 through monetary damages when the use is against the patent holder's wishes). When the nature of
23 a plaintiff's loss may make it difficult to value, or if an infringer is likely to become insolvent,
24 damages are inadequate. In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467,
25 1479 (9th Cir. 1994) (citing Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 386 (7th Cir.
26 1984)). Defendants have repeatedly violated Jacobsen's right to exclude. They are not complying
27 with the license terms. Because of Defendants' infringement, Jacobsen is losing contributors who
28 would have otherwise known about the JMRI project, and would have contributed to it.

1 Furthermore, KAMIND Associates asserts it is teetering on the verge of insolvency, which may
2 make it difficult, if not impossible, for Jacobsen to collect. Damages are inadequate and
3 irreparable harm has been shown.

4 This irreparable harm is likely to continue. Defendants have offered no proof of
5 independent creation, although that proof is within their control. A court may resolve facts against
6 a party who refuses to provide evidence under his control. Sampson v. Murray, 415 U.S. 61, 89
7 n.63 (1974). It is appropriate to do so here. Next, Katzer's argument that he is confused about
8 what he should not copy, negates his earlier statements that he is no longer using JMRI materials.
9 That aside, Defendants have shown a pattern of misappropriating others' intellectual property. The
10 existence of past violations may give rise to an inference there will be future violations. Metro-
11 Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1221 (C.D. Cal. 2007). In
12 Jacobsen v. Britton, a WIPO panel faulted Katzer for his bad faith registration of decoderpro.com.
13 Two patent examiners have found that Defendants claimed as their own invention, the work of
14 another competitor, DigiToys.⁷ When an infringer offers "thin excuses" when confronted with his
15 conduct, the threat of future infringement is inferred. Designer Skin, LLC v. S & L Vitamins, Inc.,
16 No. CV 05-3699-PHX-JAT, 2008 WL 4174882, at *5 (D.Ariz. Sept. 5, 2008). Katzer knew of the
17 license and its terms. He is familiar with open source groups and their software development
18 model. He took JMRI materials anyway and chose not to follow any of the terms. In his defense,
19 he says that he "didn't think" Jacobsen would be "upset" by his actions—an absurd excuse. Katzer
20 is not sorry he infringed—he is sorry that he was caught. All of these, coupled with KAMIND's
21 potential insolvency, show that Jacobsen is likely to suffer irreparable harm in the absence of an
22 injunction.

23 This Court should issue the injunction.

24 **C. Balance of Equities Tips in Jacobsen's Favor**

25 The balance of the equities favors Jacobsen. Equity does not recognize the harm that an
26 infringer will suffer from being forced to stop his wrongdoing. Concrete Machinery Co. v. Classic

27 _____
28 ⁷ See Plaintiff Robert Jacobsen's Request for Judicial Notice in Support of Opposition to
Defendants' Motion to Dismiss for Mootness, Ex D at 4, Ex. G at 4-6.

1 Lawn Ornaments, Inc., 843 F.2d 600, 612 (1st Cir. 1988). Indeed, once a copyright holder has
2 shown a likelihood of success on the merits, the hardship caused from a lack of an injunction tip
3 sharply in its favor. Id. Lack of an injunction will impose hardship on Jacobsen, but a grant of
4 injunction will cause no hardship to Defendants that the law recognizes.

5 1. Jacobsen Will Suffer Hardship If the Injunction Does Not Issue

6 Unless this Court stops Defendants, Jacobsen risks having his works infringed through this
7 litigation with inadequate damages to compensate for it. Defendants have shown a pattern of
8 misconduct. They refuse to provide documentary evidence to show that this infringement has
9 stopped. The equities strongly favor Jacobsen.

10 2. Defendants Do Not Suffer Any Hardship—Except that Which They Inflicted
11 Upon Themselves

12 Knowing he was violating JMRI's license, Katzer infringed Jacobsen's copyrights and took
13 a chance that he would be caught. He lost. Balancing the equities is inappropriate when a
14 defendant intentionally infringes a copyright. See Louis W. Epstein Family P'ship v. Kmart Corp.,
15 13 F.3d 762, 769-70 (3d Cir. 1994) (in easement case, balancing the equities is inappropriate when
16 a violation of easement terms is intentional). Here, Defendants do not suffer any hardship that they
17 did not thrust upon themselves. If Defendants are continuing their infringement, then they have no
18 basis to complain if they are ordered to stop.⁸ The equities do not favor Defendants.

19 Unable to find a hardship, Defendants created a new one, never before seen. Defendants
20 claim they are in the midst of a deal with an unidentified, never-before-disclosed, "Company".
21 They offer neither any of the business plans that support the figures they disclose, nor a declaration
22 from the Company. Defendants claim that, if the injunction issues, they will lose an opportunity to
23 make \$290,000/year and sell 45,000 units of software to said Company, because the Company is
24 "litigation adverse" and afraid of Jacobsen. The Company apparently is not discouraged by
25 Katzer's aggressive litigation tactics, nor is it concerned with Katzer's record of failing to meet his
26 obligations. Even if "Company" really exists, the numbers Katzer state lack credibility for

27 ⁸ Defendants state they have stopped their use of JMRI materials. If true, then they suffer no
28 hardship from the injunction because they can continue their work without fear of facing a
contempt sanction.

1 Katzer's business and for model railroading. Over all these years, Katzer's gross receipts are only
2 \$1200 on Decoder Commander.⁹ It taxes credibility that Katzer would suddenly be able to make
3 \$290,000/year in sales on his hobby software, when he has been unable to make substantial sales
4 before. That said, Katzer could easily resolve the problem by offering a warranty to the Company
5 that his software has no infringing content, and offering to indemnify said Company, and pay its
6 attorneys fees and costs, if Katzer's software is found to infringe. These are standard terms,
7 commonly made in commercial transactions. Furthermore, even if what Defendants say is true,
8 Defendants should have thought about the consequences before they infringed Jacobsen's
9 copyrights. Their attempt to blame Jacobsen for their reputation problems is like the repeat
10 shoplifter who blames his bad reputation on the store owner who pressed charges. The Court
11 should reject Defendants' contentions that they will suffer hardship.

12 Katzer complains about the adverse publicity that this case has generated, and says he fears
13 future adverse publicity. Katzer brought this on himself. After reviewing Katzer's letters, FOIA
14 request, lawsuits, and filings, independent commentators took a dim view of Katzer's litigation
15 tactics. If Katzer had been reasonable and agreed to a consent injunction, this matter would never
16 have garnered the attention that it has. Katzer has no basis to complain.

17 **D. Preliminary Injunction Terms Are Sufficiently Definite for Defendants to Obey**

18 The terms of the preliminary injunction are sufficiently definite so that Defendants can
19 follow them—especially, since Defendants claim they stopped using JMRI materials altogether.
20 An injunction must be “specific in terms”, Fed. R. Civ. P. 65(d), but broad injunctions are
21 warranted when Defendants, as here, blatantly violate the law. Creative Computing v.
22 Getloaded.com LLC, 386 F.3d 930, 937 (9th Cir. 2004).

23 Katzer understands what Jacobsen has claimed. Jacobsen registered several copyrighted
24 works. These works have version numbers. They are readily accessible on JMRI's SourceForge
25 website, as Katzer knows since he downloaded them multiple times from there. Jacobsen also

26 _____
27 ⁹ As to Katzer's figures, as popular as JMRI is, JMRI has only 11,000 users over the course of 8
28 years, thus averaging an increase of 1,500 users/year. Jacobsen Supp. Decl. at ¶ 24. This raises
doubt that Defendants have realistic sales estimates.

1 deposited the works with the Copyright Office, so Defendants, in the alternative, can obtain them
2 by request. Jacobsen’s claim is to “new computer program and updates to existing program,
3 compilation and selection of pre-existing data by listed authors.” So Katzer knows what the
4 copyright covers. Furthermore, if Katzer is no longer copying JMRI files, then he need not worry
5 about violating the injunction.

6 Defendants cite Louis W. Epstein Family Partnership v. Kmart Corp., 13 F.3d 762 (3d Cir.
7 1994) for the proposition that a court cannot order the enjoined party to stop violating the law, but
8 the case does not help Defendants. In Epstein, two family members—Louis and Morris Epstein—
9 owned a parcel, tenants in common. Id. at 764. Levitz furniture store rented a portion of the
10 parcel. Id. Louis and Morris later divided the parcel, with Louis obtaining the portion of the parcel
11 where Levitz was located. Id. at 764-65. This portion of the parcel was landlocked. Id. Morris
12 and Louis signed and recorded a Declaration of Easements to ensure that tenants of Louis’ parcel
13 had ingress and egress. Id. Years later, Morris sold his portion to Kmart, which sought to develop
14 the parcel. Id. Kmart’s development plan violated the Declaration of Easements. Id. Louis
15 brought suit, and obtained a preliminary injunction to bar Kmart, which had begun plans for the
16 development, from taking actions that would interfere with Louis’ rights. Id. However, the
17 preliminary injunction also restricted Kmart from all future violations of the Declaration of
18 Easements. Id. The Third Circuit found that term to be overly broad, especially since Kmart had
19 the right to use the parcel, and had violated the declaration only once. Id. at 771. Here, the terms
20 are not generally prohibitions against violating the law, as in Louis Epstein. Defendants have no
21 rights in Jacobsen’s copyrighted work. They have violated Jacobsen’s rights multiple times and
22 have done so intentionally. The injunction terms are simple—(a) do not copy, modify, or distribute
23 JMRI copyrighted works, and (b) do not remove, alter, or falsify copyright management
24 information, as defined by 17 U.S.C. Sec. 1202(c), or distribute said CMI. These terms cannot be
25 simpler, especially for infringers who claim to have halted their illegal activities. Thus, the terms
26 are definite enough for Defendants to obey.

1 **E. Once Again, Defendants' Citations Do Not Stand for the Proposition that They**
2 **Are Cited For**

3 Defendants once again cite case law that does not state what Defendants say it states. At
4 oral argument, the Federal Circuit caught Defendants in the act, and chastised Defendants for their
5 misrepresentation of case law.

6 Mr. Jerger: Well, you know, our position is that when the decoder definition files
7 were put on the Internet pursuant to the Artistic License, at that point the exclusive
8 rights, the copyright rights, were given to the general public, and that's what the
9 Judge found, and that's what the Sun Microsystems case says in the Ninth Circuit,
10 when you grant the public a nonexclusive license, you are waiving the right to sue
11 them in copyright infringement.

12 Judge Hochberg: I don't think Sun goes that far.

13 Oral argument, at 33:49-34:19. Defendants' misrepresentation of Sun Microsystems to this Court
14 led to the Federal Circuit decision. As shown next, they are continuing their misrepresentations.

15 Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466 (9th Cir. 1984) is cited for
16 supporting, "Speculative losses are insufficient." This precedent actually says: "Speculative injury
17 does not constitute irreparable harm." Id. at 472 (emphasis added). In other words, a harm is not
18 irreparable if it is contingent on multiple events that may or may not happen, or if it is not
19 supported by any facts. Here, open source groups attract users and contributors through
20 compliance with their license. Jacobsen, 535 F.3d at 1378-79. These users and contributors drive
21 the engine that fuels the open source development model. See id. When infringers like Defendants
22 divert those users and contributors, they slow down development. See id. at 1379. The harm, as
23 the Federal Circuit recognized, is real.

24 United States v. Lyons, 461 U.S. 95 (1983) is cited for: "Past exposure to illegal conduct
25 does not in itself show a present case or controversy regarding injunctive relief." This quotation is
26 incomplete. The full quotation is, "Past exposure to illegal conduct does not in itself show a present
27 case or controversy regarding injunctive relief if unaccompanied by any continuing present adverse
28 effects." Id. at 102. Because KAM's current users and distributors are unaware of their
obligations to JMRI, there is a continuing threat of future infringement. Also, these infringers are
not contributing to JMRI because they are unaware of their obligations. As discussed in Sec. IV.B,
Katzner's refusal to provide any evidence of independent creation of his newer software strongly

