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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual,)
)
)
 Plaintiff,)
)
 vs.)
)
 MATTHEW KATZER, an individual, and)
 KAMIND ASSOCIATES, INC., an Oregon)
 corporation dba KAM Industries,)
)
 Defendants.)

Case Number C06-1905-JSW
Hearing Date: December 4, 2009
Hearing Time: 9:00am
Place: Ct. 11, Floor 19
Hon. Jeffrey S. White

**DEFENDANTS MATTHEW
KATZER AND KAMIND
ASSOCIATES, INC.'S RESPONSE
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

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OTHER AUTHORITIES

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10 Costs for ‘Free Software’” (June 2009), *available at*, [http://www.actonline.org/library/paying-](http://www.actonline.org/library/paying-for-free-software.html)

11 [for-free-software.html](http://www.actonline.org/library/paying-for-free-software.html).....10

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SUMMARY OF THE ARGUMENT

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3 Summary judgment should not be granted for Plaintiff's on any of his claims. Most
4 importantly, Plaintiff is not entitled to summary judgment on his copyright infringement claim.
5 There is no evidence in the record (much less no factual dispute) that Defendants copied *and*
6 *distributed* Plaintiff's original selection and arrangement in the Decoder Definition Text Files.
7 As discussed in detail in Defendants' Motion for Summary Judgment, Plaintiff fails to
8 distinguish between the act of copying the Decoder Definition Text Files (allowed by the Artistic
9 License) and the act of distributing portions of those files (which is outside of the Artistic
10 License). Plaintiff's analysis is based on the literal content of the JMRI Decoder Definition Text
11 Files and is thus fundamentally flawed. Therefore, summary judgment for Plaintiff is improper
12 and, in fact, summary judgment should be granted for Defendants on this claim because there is
13 no genuine issue of material fact that Defendants did not distribute Plaintiff's original work and,
14 alternatively, that Plaintiff did not suffer any damages.

15 Summary judgment is not appropriate for Plaintiff on Defendants' copyright infringement
16 claim because Mr. Severson's (the president of QSI) deposition testimony and Plaintiff's own
17 statements regarding JMRI's for-profit activities creates factual issues surrounding Plaintiff's
18 license, fair use and laches defenses.

19 Summary judgment is also not appropriate on Plaintiff's cyber-squatting claim because
20 an issue of fact exists whether (1) Plaintiff is the owner of the trademark, and (2) whether
21 Defendants acted in bad faith. Finally, summary judgment is inappropriate on Plaintiff's DMCA
22 claim because issues exist whether Defendants did distribute false copyright information and
23 whether Plaintiff used "technological measures performed by automated systems" to protect his
24 copyright material as required by the DMCA.
25
26

1 **STATEMENT OF ISSUES TO BE DECIDED**

- 2 1. Does a genuine issue of material fact exist as to whether Plaintiff is the owner of
3 decoderpro.com and whether Defendants acted in bad faith in registering the domain
4 name?
- 5 2. Does a genuine issue of material fact exist as to whether Defendants distributed
6 Plaintiff's copyrighted works?
- 7 3. Does Plaintiff have a license to use the QSI material?
- 8 4. Was Plaintiff's use of the QSI material fair?
- 9 5. Is Defendants' counterclaim barred by laches?
- 10 6. Does a genuine issue of material fact exist as to whether Defendants removed copyright
11 management information as that term is defined by the DMCA?

12 **ARGUMENT**

13 ***I. PLAINTIFF HAS NOT ESTABLISHED HE IS THE OWNER OF THE***
14 ***TRADEMARK DECODERPRO.COM OR THAT DEFENDANTS ACTED IN***
15 ***BAD FAITH***

16 A genuine issue of material fact exists as to whether Plaintiff is the trademark owner of
17 the mark decoderpro.com. Under the Lanham Act only the "trademark owner" can assert a claim
18 under the Anti-Cybersquatting Consumer Protection Act ("ACPA"). 15 U.S.C. § 1125(d)(1)(A);
19 *see also Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2004).

20 Here, Plaintiff states that he is the trademark owner of decoderpro.com citing only to his
21 registration of the mark. Declaration of Robert Jacobsen in Support of Motion for Summary
22 Judgment [Dkt.#345] ("Jacobsen Decl.") ¶ 1, Ex. A. However, registration is not proof of
23 ownership of the mark. An issue of fact exists because Plaintiff, previously, has stated that he is,
24 at best, only a co-owner of the mark. See Second Amended Complaint ("Complaint") at ¶ 356
25 ("Defendant Katzer knew DecoderPro...belonged to the JMRI Project"); Complaint at ¶ 494
26 ("Jacobsen and the JMRI Project are the owners of the trademark DECODERPRO."). There is

1 nothing in the record to indicate that the JMRI Project, who is not a Plaintiff in this action, has
2 assigned its ownership rights to Jacobsen. Therefore, a genuine issue of material fact exists as to
3 ownership of the mark and summary judgment is not appropriate on Plaintiff's cybersquatting
4 claim at this time.

5 Assuming that Plaintiff can prove ownership, Defendants concede that all of the other
6 elements to prove a cybersquatting claim are met, with the exception of Defendants' bad faith
7 intent to profit from the mark. A genuine issue of material fact exists as to this element.
8 Defendants admit that they did register the site. Declaration of Matthew Katzer in Opposition to
9 Plaintiff's Motion for Summary Judgment (hereinafter "Katzer Decl"), ¶ 5. However,
10 Defendants never put the site on-line and never offered any commercial product to the public via
11 the site. Katzer Decl., ¶6. Additionally, Defendants never "had to relinquish rights in
12 decoderpro.com to a third party" as Plaintiff alleges. Plaintiff's Motion for Summary Judgment
13 (hereinafter "Pl.'s Motion") at 3. Rather, JMRI member Jerry Britton registered KAM's
14 trademark domain name computerdispatcherpro.com in retaliation of Defendants' registration of
15 decoderpro.com. Katzer Decl., ¶ 7. Britton advertised JMRI product on the
16 computerdispatcherpro.com site. Katzer Decl., ¶ 7. Defendants sued Britton to recover the
17 domain name. Katzer Decl. ¶ 9. The settlement agreement terms basically provide that KAM
18 and JMRI member Britton will swap domain names. Decl. of Hall [Dkt.#348], Ex. J, page 5.

19 Plaintiff had full knowledge of all of Mr. Britton's activities on behalf of JMRI and did
20 not discourage them. See Declaration of Scott Jerger ("Jerger Decl."), Ex 1, pages 1-2 (emails
21 between Jerry Britton and Plaintiff). Plaintiff, during the pendency of this lawsuit, has
22 encouraged Britton to find a lawyer to pursue Katzer, and even performed unsolicited research
23 on potential attorneys for Britton to engage to pursue Katzer. See Jerger Decl., Ex 1, pages 3-4.
24 Given the history of the domain disputes and the actions of *both parties* in regard to this, a
25 genuine issue of material fact exists as to whether Defendants registered the domain name with
26 bad faith, or at the very least whether Plaintiff's actions mitigate Defendants' actions.

1 **II. *COPYING IS NOT INFRINGEMENT AND DEFENDANTS DID NOT***
2 ***DISTRIBUTE ANY OF PLAINTIFF'S ORIGINAL WORKS***

3 Defendants agree with Plaintiff that a copyright registration raises the presumption of
4 copyright validity and ownership. Pl.'s Motion at 6. However, as discussed in Defendants'
5 Motion for Summary Judgment, Defendants have successfully rebutted this presumption by
6 demonstrating that Plaintiff's work is not original. Defendants' copying of the Decoder
7 Definition Text Files did not exceed the scope of the Artistic License and therefore cannot lead
8 to copyright infringement. Defendants' modification and distribution of component parts of the
9 Decoder Definition Text Files does not lead to copyright infringement either, because these
10 component parts are not original to Plaintiff. Plaintiff has presented nothing in his present
11 motion to the contrary. Plaintiff's argument is, essentially, that Defendants copied (1) Plaintiff's
12 selection of a limited number of decoders from the world of approximately 500 decoders and (2)
13 that Defendants copied Plaintiff's user interface, format and design. As discussed below, neither
14 of these propositions are true, and at the very least an issue of material fact exists as to whether
15 Defendants' product contains Plaintiff's original work. Therefore summary judgment for
16 Plaintiff is improper.

17 **A. *KAM did not copy JMRI's selection of decoders***

18 Plaintiff alleges that Defendants stole Plaintiff's selection of decoders in its software
19 product. Plaintiff alleges that Version 1.7.1 of the Decoder Definition Text Files "contained 102
20 decoder definition files defining 291 decoders" out of a possible 500 decoders available in the
21 market. Pl.'s Motion at 7. Plaintiff claims a copyright right in this selection of 291 out of a
22 possible 500 decoders. While Defendants concede that they downloaded the literal versions of
23 the Decoder Definition Text Files contained in Version 1.7.1 (including the 291 decoder
24 selections), Defendants did not distribute this selection of the decoders contained in the JMRI
25 work. Rather, Version 304 of Decoder Commander (which incorporated components of Version
26 1.7.1 of the Decoder Definition Text Files) contains definition files for 107 decoders, not 291

1 decoders. Katzer Decl. ¶ 12. Plaintiff's "selection" of decoders was not copied by Defendants
2 since Defendants used only a subset of Plaintiff's selection (107 out of 291); and therefore has no
3 infringing act has been committed by Defendants. *See Feist Publications, Inc. v. Rural Tel.*
4 *Serv. Co.*, 499 U.S., 348, 350 (1991).

5 **B. Plaintiff does claim rights in the "raw data" of manufacturers**

6 Plaintiff argues that Defendants' focus on "raw data" is a red herring. Pl.'s Motion at 8.
7 Defendants' confusion regarding Plaintiff's copyright claim stems from Plaintiff's own inability
8 to articulate his copyright infringement claim. When asked specifically what Plaintiff was
9 asserting Defendants were infringing, Plaintiff stated "[t]he entire factual content of [one of the
10 decoder definition text files]." Declaration of Matthew Katzer in Support of Defendants' Motion
11 for Summary Judgment [Dkt.#353], Ex. 3, page 27.¹

12 Regardless, Defendants have addressed in detail how Plaintiff's "selection and
13 arrangement" was not distributed by Defendants as discussed in Defendants' Motion for
14 Summary Judgment. As discussed in Defendants' Motion, it is Plaintiff's failure to distinguish
15 between the separate acts of copying and distribution that leads to much of this confusion.
16 Plaintiff asserts in his Motion that Plaintiff "objects only to the wholesale literal copying of the
17 selection and arrangement of such data from JMRI's Decoder Definition Files to KAM's
18 Decoder Commander program." Pl.'s Motion at 8. As Defendants have pointed out, the
19 wholesale literal copying of the Decoder Definition Text Files is allowed under Plaintiff's
20 license and cannot lead to infringement. Defendants' distributed Decoder Commander product
21 does not contain Plaintiff's literal work, nor does it contain any of Plaintiff's original selection
22 and arrangement and thus cannot lead to infringement.
23
24
25

26 ¹ Additionally, even Plaintiff's own most recent declaration asserts that JMRI authored the
feature phrases (*i.e.* "Directional Headlight+Directional Mars Light") that originate from the QSI
manual, discussed more *infra*. Jacobsen Decl. [Dkt#345], ¶ 48.

1 **C. *Defendants Computer Program and Interface is original***

2 Plaintiff asserts that Defendants copied the “intuitive interface” and organization of
3 Plaintiff’s computer program. Pl.’s Motion at 9-12. It bears repeating that Defendants only
4 copied Plaintiff’s Decoder Definition Text Files and not any of Plaintiff’s architecture, interface
5 or executable computer code. Katzer Decl., ¶¶ 13-14. As discussed in Defendants’ Motion at
6 10-13, none of Plaintiff’s structure, selection and arrangement in the Decoder Definition Text
7 Files survives in Defendants’ files, only the non-original information was distributed. Plaintiff’s
8 Motion fails to provide any concrete examples of any overall structure, basic vocabulary, format,
9 or choices made by Plaintiff that Plaintiff alleges were incorporated into Defendants’ software.²
10 Motion at 9-10.

11 Defendants interface, layout, design and architecture were developed completely
12 independent of JMRI. Katzer Decl. ¶¶ 13-14. Defendants contracted with Robert Bouwens to
13 create Decoder Commander. *Id.* Bouwens created the user interface and architecture of Decoder
14 Commander based on his own work and on the work of ESU (a manufacturer) and the NMRA.
15 Katzer Decl., ¶ 14. Defendants have the rights to use all of these materials. Katzer Decl. ¶ 15.
16 A comparison between the ESU Lok Commander interface and the Decoder Commander
17 interface is contained as Ex. 2 to the Declaration of Matthew Katzer submitted with these
18 opposition papers. This comparison shows the similarity between the user interface design of the
19 two products.

20 Finally, it is important to note that Defendants cannot be “vicariously liable” for any of
21 the products it ships contrary to Plaintiff’s allegations. *See* Pl.’s Motion at 12. Plaintiff’s theory,
22 apparently, is that the decoder template tool which allows customers to convert the JMRI
23 Decoder Definition Text Files for use with Decoder Commander leads to vicarious liability.
24 Second Amended Complaint at ¶¶ 300-307. Here again, Plaintiff fails to make the distinction
25

26 ² Again, Plaintiff’s focus is on the “fundamental choices” contained *in the files that Defendants copied*, rather than on Defendants’ distributed work. Pl.’s Motion at 10.

1 between (1) copying and (2) modification and distribution of the Decoder Definition Text Files.
2 Customers are allowed to copy the JMRI Decoder Definition Text Files under the terms of the
3 Artistic License. Jacobsen Decl. [Dkt# 131], Ex. A at ¶1. It is only when the customers attempt
4 to modify and distribute the programs that they would run afoul of the license, and there is no
5 evidence in the record that any of Defendants' customers attempted to distribute any modified
6 Decoder Definition Text Files.

7 Based on the above, and since a genuine issue of material fact exists, summary judgment
8 is not appropriate for Plaintiff on his copyright infringement claim. Rather, and as discussed on
9 Defendants' Motion for Summary Judgment, summary judgment should be granted for
10 Defendants' on Plaintiff's copyright infringement claim because the work distributed by
11 Defendants is not original to Plaintiff. Alternatively, and as also discussed in Defendants'
12 Motion for Summary Judgment, Plaintiff's copyright infringement claim should be dismissed
13 because Plaintiff there is no genuine issue of material fact that Plaintiff did not suffer any actual
14 damages and Plaintiff is not entitled to statutory damages as a matter of law.

15 **III. SUMMARY JUDGMENT IS NOT APPROPRIATE ON ANY OF**
16 **PLAINTIFF'S AFFIRMATIVE DEFENSES**

17 **A. Plaintiff did not have a license to incorporate QSI material into the**
18 **Decoder Definition Text Files.**

19 The record reflects that Plaintiff did not have permission to extensively incorporate QSI
20 material into JMRI files as he did. At the very least a genuine issue of material fact exists and
21 therefore summary judgment for Plaintiff is not appropriate at this time. The record does reflect
22 that Mr. Fred Severson, the president of QSI, authorized Plaintiff to *use* the QSI data and to
23 incorporate numerical CV values into the Decoder Definition Text Files. The record also
24 reflects, however, that this permission did not extend to the wholesale, literal incorporation of
25 QSI descriptive phrases into the Decoder Definition Text Files which Plaintiff is *still* claiming as
26 his own and asserting that Defendants are infringing. *See* Jacobsen Decl. ¶ 48.

1 While Plaintiff would like to believe that he was granted an “implied license,” unlimited
2 in scope, to do whatever he wished with the QSI data, this is simply not the case. Plaintiff fails
3 to distinguish in his moving papers between incorporation of the QSI CV numerical values
4 (which was authorized by QSI) and the wholesale incorporation of large portions of the QSI
5 manual including feature descriptions (which was not authorized by QSI). When asked, under
6 oath, about the “scope” of his permission, Mr. Severson clearly stated that the permission
7 extended to incorporating CV numerical values from the QSI manual, but not the copyrighted
8 QSI descriptive phrases:

9
10 A: It’s the information that is authorized. [...]. But it’s that, you know, CV13, default
value is 10, you know, [...].

11 Q: Okay. So if they used that information, the CV values, the descriptions—

12
13 A: Not the descriptions. I didn’t say anything about descriptions. I just said send this
information regarding the values to put into—see, when you download a file for a new
14 decoder, there’s no description in that file. It’s just CV14 equals 10, or something like
that. [...].

15 Q: So that—so the use of these terms, the use of this information, is permitted by QSI
16 to JMRI developers for creating decoder definitions to support QSI decoders?

17 A: Well, like I was saying before, what I expected JMRI to do was to take the values of
18 the CVs that were downloaded, you know, that applied to each one of these things, all
these ID numbers for instance for the sounds, and to put those into them in whatever
19 way that they wanted to do it. [...] You know, so I didn’t—I didn’t-- like I say, I’ve
never seen the JMRI stuff so I don’t know. And you know, frankly, when they use
20 specific things that, you know, belong to QSI and then claim ownership on it and then
sue a business associate for it, that’s pretty unacceptable. Jerger Decl., Ex. 2, pages 2-5
21 (Excerpts of Deposition of Fred Severson, president of QSI).

22
23 Therefore, the record contains evidence that the scope of the “implied license” was
limited to Plaintiff’s incorporation of the CV numerical values into the Decoder Definition Text
24 Files. And, the record also contains evidence that JMRI exceeded the scope of this license by
25 incorporating (and claiming authorship to) QSI descriptions in the Decoder Definition Text Files.
26 For example, in his most recent declaration, Plaintiff cites the following example as proof that
Defendants’ copied the JMRI Decoder Definition Text Files:

1 The evidence of copying in just this small area of the files includes:

- 2 • The author of the JMRI file used “and” and “+” to represent the word “and”.
This appears in the following choices:
- 3 • “Directional Headlight + Directional Mars Light”
4 • “Directional Headlight + Directional Ditch Lights”
5 • “Scale mph Report and Status Report”
6 • “Squealing Brakes + Air Brakes”. Jacobsen Decl. [Dkt.# 345] in Support of Motion
for Summary Judgment at pages 9-10.

7 These descriptive phrases are the phrases Mr. Severson was referring to as the
8 copyrighted QSI descriptive phrases; and these descriptive phrases (with the exception of “Scale
9 mph Report and Status Report”) come verbatim (including the “+” sign) from the QSI Manual.
10 See Katzer Decl. [Dkt.# 353], Ex. 4. The “Scale mph report and Status Report” is a very basic
11 abbreviation of the phrase “Scale Miles Per Hour Report and Status Report” which comes
12 directly from the QSI Manual. Jerger Decl., Ex 4.

13 Finally, Plaintiff’s assertions that Mr. Pruss, an employee of QSI, somehow gave the
14 appropriate permission is unavailing. Mr. Pruss does not have the authority to grant any license
15 on behalf of QSI. Jerger Decl., Ex. 2, Pages 6-7. Therefore, JMRI exceeded the scope of the
16 implied license to use the QSI manual and this Court should deny Plaintiff’s motion for summary
17 judgment on Plaintiff’s license defense.

18 ***B. Plaintiff’s incorporation of the QSI descriptions was unfair***

19 Plaintiff’s incorporation of the QSI descriptions is not a use that is fair under any of the
20 factors in 17 U.S.C. § 107. First, the purpose and character of the use of the QSI descriptions
21 was not for a nonprofit educational purpose, but rather for incorporation into Plaintiff’s open
22 source “free” software product. There are many for-profit business models which provide free
23 software to help sell hardware (Apple, IBM) or to help sell support services (IBM, Red Hat, Sun
24 Microsystems); therefore the fact that the software license comes free of charge is of little
25 consequence. See Association of Competitive Technology, “Paying for Free: Security, Privacy,
26 and Sustainability Costs for ‘Free Software’” (June 2009), available at,

1 <http://www.actonline.org/library/paying-for-free-software.html>. There is nothing preventing
2 Plaintiff from pursuing this for-profit open source business model in the future, therefore it is
3 inaccurate to equate open source, free software with non-profit as Plaintiff does. Additionally,
4 the record flatly contradicts Plaintiff's assertions that he and JMRI are a not for profit venture.
5 Plaintiff states, in his declaration, that "JMRI does not charge for its software. It has never
6 charged in the past, and has no plans to charge for it in the future." Jacobsen Decl. [Dkt.# 345],
7 ¶ 29. However, in a March 26, 2005 letter attempting to qualify JMRI for membership in the
8 Model Railroad Industry Association, Plaintiff represented that:

9 " [JMRI does] in fact sell both directly to modelers and to dealers for resale...I can tell
10 you that last year's sales exceeded \$5,000. We expect significant growth this year...".
11 Jerger Decl., Ex 3.

12 Lastly, it is disingenuous for Plaintiff to claim that his purpose is "not for profit" when
13 Plaintiff seeks over \$150,000 from Defendants in actual damages for copyright infringement of
14 his works,³ including the QSI descriptions. Jacobsen Decl., ¶ 48; Katzer Decl., ¶ 17. Plaintiff
15 cannot have it both ways.

16 The second and third factors also do not favor Plaintiff. Plaintiff states that the
17 programmers that assigned him copyright rights to their work only used a "tiny fraction" of the
18 QSI copyrighted work. Pl.'s Motion at 17. The fact that Defendants only incorporated a "tiny
19 fraction" of Plaintiff's data into their Decoder Commander product has never blunted Plaintiff's
20 enthusiasm for his own copyright infringement claim against Defendants. It is not the quantity
21 of the words, but the quality in this case. If Plaintiff can maintain a copyright infringement claim
22 against Defendants for the selection and use of the NMRA term "Primary Address" (Jacobsen
23 Decl. [Dkt.#345], ¶ 14-18), surely Defendants claim against Plaintiff for the use and selection of

24
25
26 ³ Plaintiff's damage measurement reflects only the purported value of the JMRI software, while
ignoring any damage recovery for Defendants failure to attribute (*i.e.* reputational harm), which
was the act that exceeded the license.

1 QSI's copyrighted description "Directional Headlight + Directional Ditch Lights" (Jacobsen
2 Decl., ¶ 48) is on an equal footing.

3 The fourth factor also weights against Plaintiff. Plaintiff, out of anyone, should realize
4 that the fact that QSI's manual is "public information" and "in the public domain" (Pl.'s Motion
5 at 16) does not mean that QSI has waived its copyright rights. This issue has been the focus of
6 this lawsuit for three years now and is the foundation of Plaintiff's copyright claim against
7 Defendants. Second, it is patently untrue that Plaintiff's use of the QSI descriptions "benefited
8 QSI." Pl.'s Motion at 16. Mr. Severson clearly explained the problem with Plaintiff's use of his
9 work:

10 Q: If [JMRI's use is] a concern of yours, why didn't you contact Bob to make
arrangements?

11 A: Because he sued a business associate over stuff that I wrote. For crying out loud, I
12 mean, all of a sudden I hear about this thing out of the blue. All of the sudden I got—I
13 mean, Microsoft would drop me like a hot potato if they didn't think that I had
14 ownership of my own copyrighted material. They won't talk to people that don't own
their stuff, if there's any issues about it whatsoever. And this is an issue. This is a big
issue. Jerger Decl., Ex 2, pages 8-9.

15 Contrary to Plaintiff's assertions, Plaintiff's use of the QSI works does harm
16 Defendants and QSI *qua* this lawsuit and the damages that Plaintiff seeks from Defendants
17 are for works based, in part, on QSI's copyrighted feature descriptions. See Jacobsen Decl.
18 [Dkt#345], ¶ 48. Therefore, Plaintiff's use of the QSI materials had a negative effect on
19 QSI, Defendants, and the entire model train industry.
20

21
22 ***C. Defendants' Counterclaim is not Inequitable***

23 Defendants have not "slept on their rights" and there has been no delay that has
24 prejudiced Plaintiff. Defendants bought the rights to the QSI manual in November 2006.
25 Defendants did not "inform" Plaintiff of the assignment because Defendants (and QSI) are more
26

1 concerned with protecting the intellectual property rights of QSI than obtaining money damages
2 from Plaintiff. Mr. Severson made this clear in this deposition:

3 Q: You said you expected a contractual-some sort of contractual negotiations to be
4 started?

5 A: A phone call, an e-mail, something. I didn't get anything.

6 Q: You did.

7 A: I got something from you. I got something from him here towards the—you know,
8 towards, the 11th hour after Matt got sued. Then I got something.

9 Q: And you didn't respond.

10 A: No. At that point, are you kidding me? Now I'm in situation where I've got to
11 establish ownership of my copyrighted material. We're already in a lawsuit. Matt is
12 already in a lawsuit. I'm not going to sue Bob Jacobsen over this and spend a lot of
13 money when I can establish this thing in court in another route. Jerger Decl., Ex 2,
14 pages 10-11.

15 Defendants delay does not prejudice Plaintiff because Defendant's are not seeking
16 damages from Plaintiff based on Plaintiff's distribution of software containing QSI work.
17 Rather, Defendants believe that the correct measure of damages, as discussed in Defendants'
18 Motion for Summary Judgment at page 20, is what a willing buyer would have been reasonably
19 required to pay to a willing seller for the work, or, in other words, the value of an imputed
20 license. *See Frank Music Corp., v. Metro Goldwyn-Mayer*, 772 F.2d 505, 512 (9th Cir. 1985).
21 Lastly, it is inaccurate for Plaintiff to claim that his use of the QSI work would have "stopped
22 immediately" if only Defendants or QSI had objected to the use of the work. Pl.'s Motion at 18.
23 Defendants counterclaim was filed on February 11, 2009 and, to date, Plaintiff has not removed
24 any of the allegedly infringing material.

25 ***IV. SUMMARY JUDGMENT IS NOT APPROPRIATE ON PLAINTIFF'S DMCA
26 CLAIM***

As discussed on Defendants' Motion for Summary Judgment, summary judgment should
be granted for Defendants on Plaintiff's DMCA claim since Defendants did not distribute a
copyrightable work and therefore cannot be liable for concurrently distributing false copyright
management information. At the very least, a genuine issue of material fact exists as to whether
Defendants distributed a copyrightable work with false copyright management information.

1 Alternatively, a hybrid factual/legal issue exists as to whether Plaintiff's "script" which
2 inserted a copyright notice in each Decoder Definition Text File (Jacobsen Decl. [Dkt#345], ¶
3 37) was a technological measure of an automated copyright protection or management system
4 entitled to protection under the DMCA. The DMCA only protects copyright management
5 information "performed by the technological measures of automated systems." *IQ Group, Ltd.,*
6 *v. Wiesner Pub., LLC*, 409 F.Supp.2d 587, 598 (D. N.J. 2006). There is no evidence in the
7 record that Plaintiff's "script" meets this requirement and Plaintiff's motion fails to address this
8 issue. Therefore, summary judgment for Plaintiff should not be granted on the DMCA claim.

9
10 **CONCLUSION**

11 Based on the above, Defendants respectfully request that this Court deny Plaintiff's
12 motion for summary judgment in its entirety because genuine issues of material fact exist and
13 Plaintiff is not entitled to judgment as a matter of law.

14
15 Dated November 13, 2009.

16 Respectfully submitted,

17 /s/Scott Jerger

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CERTIFICATE OF SERVICE

I certify that on November 13, 2009, I served Matthew Katzer's and KAM's RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT on the following parties through their attorneys via the Court's ECF filing system:

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