

In The
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.

BRIEF OF APPELLEES

R. Scott Jerger
FIELD JERGER LLP
621 SW Morrison Street, Suite 1225
Portland, Oregon 97205
(503) 228-9115

Counsel for Appellees

Dated: July 28, 2009

RECEIVED
2009 JUL 28 AM 11:52
U.S. COURT OF APPEALS
FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Jacobsen v. Katzer

No. 2009-1221

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)
Appellee certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:
Matthew Katzer; KAMIND Associates, Inc. dba KAM Industries

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
Field Jerger, R. Scott Jerger; Gorman & Miller, John Gorman.

7/28/09
Date


Signature of counsel
R. Scott Jerger
Printed name of counsel

Please Note: All questions must be answered
cc: Victoria Hall; David McGowan; David Ravicher

TABLE OF CONTENTS

I. Statement of Related Cases 1

II. Jurisdictional Statement..... 1

III. Statement of the issue 2

IV. Statement of the Case 2

V. Statement of the Facts..... 4

 A. Corrections to Misstatements of Fact in Appellant’s Brief.....4

 B. Katzer’s Statement of Relevant Background Facts.....8

VI. Summary of the Argument 11

VII. Argument 12

 A. Standard of Review..... 12

 B. The District Court applied the correct legal standard..... 13

 C. Jacobsen failed to submit any evidence of irreparable harm..... 17

 D. Jacobsen failed to provide any evidence of any future threat 21

 E. Jacobsen has not shown that he will succeed on the merits
 of his copyright claim 25

 1. Plaintiff has failed to identify his copyrighted work..... 25

 2. Katzer owns the copyright to the only Decoder
 Definition File in the Record 26

F. Amicus’s request for a presumption of irreparable harm is directly contrary to the Supreme Court’s holding in <u>Winter</u>	28
VIII. Conclusion	31

TABLE OF AUTHORITIES

Cases	Page(s)
<u>American Trucking Associations, Inc. v. City of Los Angeles</u> , 559 F.3d 1046, 1052 (9 th Cir. 2009)	14, 29
<u>Apotex v. Thompson</u> , 347 F.3d 1335, 1342 (Fed. Cir. 2003)	1
<u>Atari, Inc. v. JS & A Group, Inc.</u> 747 F.2d 1422, 1438-40 (Fed. Cir. 1984).....	12
<u>Bracco v. Lackner</u> , 462 F. Supp 436, 442 n.3 (N.D. Cal. 1978).....	17
<u>Buchanan v. United States Postal Service</u> , 508 F.2d 259, 267 n.24 (5 th Cir. 1975)	13
<u>City of Los Angeles v. Lyons</u> , 461 U.S. 95, 102 (1983)	22
<u>Deltak, Inc. v. Advanced Systems, Inc.</u> , 767 F.2d 357 (7 th Cir. 1985)	7
<u>eBay v. MercExchange, LLC</u> , 547 U.S. 388, 391 (2006)	28, 29
<u>FDIC v. Faulkner</u> , 991 F.2d 262, 265 (5 th Cir. 1993)	19
<u>Goldie’s Bookstore v. Superior Court</u> , 739 F.2d 466, 472 (9 th Cir. 1984)	22
<u>GoTo.com, Inc. v. Walt Disney Co.</u> , 202 F.3d 1199, 1204-1205 (9 th Cir. 2000).....	3

<u>Hutchins v. Zoll Med. Corp.</u> , 492 F.3d 1377, 1383 (Fed. Cir. 2007)	12
<u>Jacobsen v. Katzer</u> (2008-1001), 535 F.3d 1373 (Fed. Cir. 2008)	1, 3, 6
<u>Louis Epstein Family Partnership v. Kmart Corp.</u> , 13 F.3d 762 (3 rd Cir. 1994)	25
<u>Lujan v. Defenders of Wildlife</u> , 504 U.S. 555 (1992).....	17
<u>Mazurek v. Armstrong</u> , 520 U.S. 968, 972 (1997)	17
<u>Midgett v. Tri-County Metro. Transp. Dist. of Oregon</u> , 254 F.3d 846, 850-851 (9 th Cir. 2001).....	21
<u>Miss Universe, Inc. v. Flesher</u> , 605 F.2d 1130, 1133 & n.8 (9 th Cir. 1979)	13
<u>Paramount Land Co. v. Cal. Pistachio Comm’n</u> , 491 F.3d 1003, 1012 (9 th Cir. 2007)	21
<u>Sampson v. Murray</u> , 415 U.S. 61, 90 (1974)	19
<u>Simula, Inc. v. Autoliv, Inc.</u> , 175 F.3d 716, 725 (9 th Cir. 1999)	21
<u>Sports Form, Inc. v. United Press Int’l, Inc.</u> , 686 F.2d 750, 753 (9 th Cir. 1982)	12
<u>Sun Microsystems, Inc. v. Microsoft Corp.</u> , 188 F.3d 1115, 1119 (9 th Cir. 1999)	3, 28
<u>U.S. v. International Harvester Co.</u> , 387 F.Supp. 1338 (D.D.C. 1974).....	17

<u>United States v. United States Gypsum Co.</u> , 333 U.S. 364, 395 (1948)	13
<u>Wildmon v. Berwick Universal Pictures</u> , 983 F.2d 21, 24 (5 th Cir. 1992)	31
<u>Winter v. Natural Resources Defense Council</u> , --- U.S.---; 129 S.Ct. 365, 374 (2008)	<i>passim</i>
<u>Wright v. Rushen</u> , 642 F.2d 1129, 1132 (9 th Cir 1981)	12
<u>Yakus v. United States</u> , 321 U.S. 414, 440 (1944)	17

Statutes

17 U.S.C. § 504(b)	7
28 U.S.C. §§ 1292(c)(1) and 1295	1
28 U.S.C. § 1338	1
28 U.S.C. § 1631	2

Rules and Regulations

37 C.F.R. § 1.321(a)	2
Fed. R. Civ. P. 12(b)(1)	1

Other Authority

Nimmer, <i>Nimmer on Copyright</i> , § 14.02 (2007)	7
--	---

I. Statement of Related Cases

This case is the second appeal to this Court of a denial of Plaintiff-Appellant Robert Jacobsen's ("Jacobsen") motion for a preliminary injunction for alleged copyright infringement by the district court. The first appeal was resolved by this Court in Jacobsen v. Katzer (2008-1001), 535 F.3d 1373 (Fed. Cir. 2008) on August 13, 2008 before the panel of judges Michel, Prost, and Hochberg.

II. Jurisdictional Statement

Under 28 U.S.C. §§ 1292(c)(1) and 1295, this Court has exclusive jurisdiction over appeals from interlocutory orders of district courts refusing injunction requests as long as the District Court's jurisdiction was based in whole or in part upon 28 U.S.C. § 1338. See Apotex v. Thompson, 347 F.3d 1335, 1342 (Fed. Cir. 2003), Jacobsen v. Katzer, 535 F3d. at 1377.

In addition to denying Jacobsen's motion for a preliminary injunction, the Order being appealed in this case, *inter alia*, granted Matthew A. Katzer and Kamind Associates, Inc.'s (hereinafter collectively "Katzer") motion to dismiss all of Jacobsen's claims for declaratory relief on the Katzer patent-in-suit, the '329 patent, for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Order Granting Motion to Dismiss for Mootness; Denying in Part and Granting in Part Motion to Dismiss for Failure to State a Claim; Denying Motion to Strike; and Denying Motion for Preliminary Injunction (hereinafter "District Court's Order")

at A3-A6. The District Court found that the statutory Disclaimer of Patent under 37 C.F.R. § 1.321(a) filed by KAM with the U.S. Patent and Trademark Office on February 1, 2008, disclaiming all claims in the '329 patent (Disclaimer), divested the district court of jurisdiction over all of the patent claims in the case. District Court's Order at A3, A5-A6.

Katzer filed a motion to transfer this case to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1631 on March 10, 2009. This motion was denied by this Court in an Order dated April 20, 2009.

III. Statement of the issue

- Did the District Court err in finding that Jacobsen failed to put forward any evidence of irreparable harm in support of his motion for a preliminary injunction for copyright infringement?

IV. Statement of the Case

In October 2006, Plaintiff-Appellant Robert Jacobsen (Jacobsen) moved for a preliminary injunction based on his claim for copyright infringement in the underlying complaint. On August 17, 2007, the District Court denied Jacobsen's motion for a preliminary injunction. At that time, under Ninth Circuit law, a plaintiff was entitled to a preliminary injunction if she could demonstrate either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits,

where the balance of hardships tips sharply in plaintiff's favor. GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1204-1205 (9th Cir. 2000). Also, at the time, under federal copyright law, a plaintiff who demonstrated a likelihood of success on the merits of a copyright claim was arguably entitled to a presumption of irreparable harm. Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999).

The District Court held that Jacobsen had waived his right to sue in copyright by granting a nonexclusive license to the copyrighted materials and that Jacobsen's claim sounded only in contract and not in copyright. A1420.

On August 13, 2008, this Court vacated the District Court's decision. This Court disagreed with the District Court's conclusion that Jacobsen's claim sounded only in contract and not in copyright and remanded the case to the District Court "to enable the District Court to determine whether Jacobsen has demonstrated (1) a likelihood of success on the merits and either a presumption of irreparable harm or a demonstration of irreparable harm; or (2) a fair chance of success on the merits and a clear disparity in the relative hardships and tipping in his favor" for purposes of determining whether a preliminary injunction should issue. A1596-A1597; Jacobsen v. Katzer, 535 F.3d at 1382.

On January 5, 2009, the District Court, again, after another round of briefing and evidentiary submissions, denied Jacobsen's motion for a preliminary

injunction finding that Jacobsen has failed to put forward any *evidence* of harm, irreparable or otherwise. District Court's Order at A14 (emphasis in original). The District Court also concluded that the law governing preliminary injunctions had changed due to the passage of time since Jacobsen filed his first motion for a preliminary injunction. The District Court concluded that a plaintiff is no longer entitled to a presumption of irreparable harm upon a showing of likelihood of success on the merits. Rather, a plaintiff seeking a preliminary injunction must now establish that she is likely to succeed on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that an injunction is in the public interest. Winter v. Natural Resources Defense Council, --- U.S.---; 129 S.Ct. 365, 374 (2008). Jacobsen does not contest this conclusion of law regarding the new legal standard for preliminary injunctions established by the Supreme Court in Winter. Rather, Jacobsen contests the District Court's application of this legal standard to his motion.

V. Statement of the Facts

A. Corrections to Misstatements of Fact in Appellant's brief

Jacobsen's "Statement of the Facts" contains numerous misrepresentations worthy of clarification at the outset. Jacobsen's assertion that the parties agree on a number of facts regarding Jacobsen's copyright claim is inaccurate. Brief of Plaintiff-Appellant Robert Jacobsen (Appellant's Brief) at 12.

First, Jacobsen states, without support, that Katzer has “never contested” Jacobsen’s copyright registrations. Appellant’s Brief at 13, 35. This is not true. So far, Katzer has only had the opportunity to contest these registrations at the pleading stage, which he has done by denying, based on lack of knowledge or information, that Jacobsen is the owner, assignee, and registrant of copyrighted works. See e.g. A1698 (Answer to Complaint, page 13, ¶88).

Second, Jacobsen states that “the record reflects no disagreement” that the manufacturer data in the JMRI software is “selected, arranged, and supplemented” by JMRI programmers. Appellant’s Brief at 15. This statement addresses the copyrightability of Jacobsen’s work, which Katzer has contested in his answer to the complaint. See e.g. AR1697 at ¶ 80.

Third, Jacobsen states that he “submitted evidence showing that Katzer’s program incorporated original JMRI expression from each of approximately 100 Decoder Definition Files...”. Appellant’s Brief at 15. This is incorrect. As discussed in detail, *infra*, the record contains only one Decoder Definition File (to which Katzer owns the copyright).

Fourth, Jacobsen states that “Katzer has conceded that Jacobsen was the owner and/or assignee of JMRI materials, as claimed by Jacobsen’s copyright registrations.” Appellant’s Brief at 33 (citing to Jacobsen’s Complaint as authority for this proposition). Katzer has not conceded that Jacobsen is the owner of any

JMRI materials because these materials have never been identified by Jacobsen. Jacobsen appears confused about a statement in KAM's Appellee Brief in the first appeal to this Court where Katzer states that he "concedes, *for purposes of this appeal*, that Jacobsen is the owner or assignee of the copyright..." in order to frame the narrow legal issue on appeal regarding whether Jacobsen's license contained covenants or conditions. Appellee's Brief in Jacobsen v. Katzer (2008-1001) at 11 (emphasis added). For purposes of this second appeal, Katzer does not concede that Jacobsen is the owner of any copyrighted material. This is clear from the briefing at the District Court on Jacobsen's second motion for a preliminary injunction and was a primary issue before the District Court. As discussed in detail in Katzer's briefing at the District Court, Jacobsen has never identified the work to which he claims a copyright.

Fifth, Jacobsen states repeatedly that Katzer concedes or "admits that damages are inadequate." See Appellant's Brief at 24-25, 29. Katzer does not admit that copyright damages are inadequate. The cited authority for this proposition is the undersigned discussions with Judge Hochberg at oral argument in the first appeal relating to damages associated with a claim for *breach of contract*. Appellant's Brief at 24-25. Ignoring the evidentiary problems associated with citing a transcript of an oral argument discussion by counsel and this Court based on hypothetical questions and qualified statements, the conduct at issue in

this appeal (allegedly copyright infringement) is different than the conduct at issue in the above-cited discussion at oral argument on the first appeal (breach of license term requiring attribution). Therefore, any damages associated with each “breach” are significantly different.¹

Additionally, the measure of damages for a breach of contract claim is significantly different than and irrelevant to the measure of actual damages allowed for copyright infringement under the Copyright Act. Most notably, the Copyright Act allows recovery of lost profits due to the infringement to the plaintiff as well as allowing recovery of any profits of the infringer attributable to the infringement.

17 U.S.C. § 504(b). See Nimmer, *Nimmer on Copyright*, § 14.02 (2007).

Additionally, a plaintiff can arguably seek the “value of the use” to the infringer should there be no out-of-pocket losses to the plaintiff and no profits to the defendant. See *Deltak, Inc. v. Advanced Systems, Inc.*, 767 F.2d 357 (7th Cir. 1985). None of these measures of recovery are strictly applicable in a breach of contract action which allows a damage recovery to restore the plaintiff to the position she would have been in had the defendant performed the contract.

Lastly, Jacobsen continually states that Katzer misappropriated “JMRI code.” See e.g. Appellant’s Brief at 26-28. It is worthwhile to note that while the

¹ Indeed the entire point of Judge Hochberg’s line of questioning addressed the fairness of Jacobsen’s position of being forced to pursue only a breach of contract remedy without the availability of copyright damages.

data contained in the Decoder Definition Files allegedly infringed by Katzer in and the QSI manual allegedly infringed by Jacobsen is on a very broad level “code,” it is not “source code” as that term is used in computer science because the information allegedly taken by both parties is just raw data and not code compiled in a human-readable computer programming language (i.e. JAVA) that can be used to execute a program. Katzer’s software is written in a different computer programming language than Jacobsen’s. A799, ¶ 5.

B. Katzer’s Statement of Relevant Background Facts

Jacobsen is appealing the denial of a motion for a preliminary injunction seeking to enjoin Katzer from copying and distributing Jacobsen’s copyrighted works entitled “JMRI Program and Decoder Definitions or JMRI Decoder Definitions.” A776 (Proposed Order for Preliminary Injunction). These Decoder Definition Files contain data from decoder manufacturers to help the software user program a decoder. A442-A443. Additionally, Jacobsen seeks to enjoin Katzer from, *inter alia*, providing and distributing “copyright management information that is false.” A776.

Jacobsen claims to have copyrighted somewhere between 100 and 195 Decoder Definition Files. A443; Appellant’s Brief at 15. Only one of these Decoder Definition Files is contained in the record. This is the QSI Decoder located at Exhibit AD to A441. Jacobsen’s declaration at the District Court

provides specific examples of textual information that was allegedly authored by JMRI in this QSI Decoder Definition File, and then allegedly stolen and copied by Katzer. A454-A457, A458, and A464 at ¶¶ 71-73, 80, 109.

Jacobsen, however, has no copyright rights to this textual information contained in this particular QSI Decoder Definition File which he accuses Katzer of infringing. A807-808, ¶¶ 48-52. Rather, this information was originally created by QS Industries, Inc. and then published by QS Industries, Inc. in a work entitled “NMRA DCC Reference Manual for QSI Quantum HO Equipped Locomotives – Version 3.0” (QSI Manual) before it was copied by Jacobsen. A807-808, ¶¶ 48, 51. Katzer owns all the copyright rights to the QSI manual work. A807, ¶ 48.

Jacobsen submitted two lengthy declarations in support of his motion for a preliminary injunction (A441-A763 and A1103-A1130). However neither of these declarations discusses, at all, the harm that Jacobsen has suffered from Katzer’s alleged conduct or the harm that Jacobsen will likely suffer should an injunction not issue.

In 2006, to address Jacobsen’s concerns regarding the alleged copyright infringement, Katzer recalled his previous software and released Decoder Commander, version 307. A801-A802 at ¶¶ 14-18. Decoder Commander V307 contains only manufacturer’s specifications data manually entered by Katzer and does not contain any manufacturer’s specifications data copied from any JMRI

Decoder Definition Files. A802-A803, ¶ 18. KAM has ensured the inability to allegedly infringe JMRI works because Decoder Commander V307 cannot read or write any decoder definition data files from JMRI or anyone else. A802-A803, ¶ 18. This is because Decoder Commander V307 uses a separate and new database of manufacturer's specifications data. A802, ¶ 18. None of the JMRI Decoder Definition Files were used in any way to construct this database. A802-A803, ¶ 18. The record reflects that Decoder Commander does not now include support for the old decoder definition file based technology and will never revert to the old decoder definition file based technology. A803, ¶ 20.

Katzer also testified that all software released prior to November 2006 (V306 and earlier) is incompatible with any KAM software released after that date and all previous copies of Decoder Commander have been recalled or destroyed. A803, ¶ 21. Additionally, all registered customers and dealers have been sent new updated replacement copies of Decoder Commander. A803, ¶ 21.

In response, Jacobsen submitted a declaration opining that Katzer is still infringing because there is “[n]o technical reason” preventing Katzer from infringing. A1107.

Based on the above, the District Court concluded that Jacobsen failed to offer any evidence of any harm suffered from the alleged infringement, that Jacobsen failed to demonstrate that there is any continuing or ongoing conduct that

indicates that future harm is imminent, that Jacobsen failed to identify with the requisite particularity the extent of his copyright ownership over the disputed underlying material, and that the JMRI Project Decoder Definition Files incorporate many manufacturers' specifications data as well as specific terms whose copyright is owned by Katzer. District Court's Order at A14.

VI. Summary of the Argument

The District Court correctly applied the legal standard for a preliminary injunction, stating the correct standard four times in its Order. Jacobsen's argument that the District Court applied an incorrect legal standard is based on a mis-reading of the Order.

Regardless, under any legal standard, Jacobsen cannot prevail on his preliminary injunction motion. The District Court found that the record contains no evidence of past irreparable harm suffered by Jacobsen and the record contains no evidence of any future threat. This finding is sound. Jacobsen failed to submit any evidence of harm at the District Court level (despite submitting two lengthy declarations in support of his motion). Even more telling, Jacobsen's Appellant's Brief does not contain any cites to the record which discuss harm.

Additionally, Jacobsen has failed to show that he will succeed on the merits of his copyright infringement claim since the underlying data contained in the only work allegedly copyrighted by Jacobsen in the record is owned by Katzer.

Finally, Amicus' request for a presumption of irreparable harm for preliminary injunctions in the copyright context is directly contrary to the Supreme Court's recent holding in Winter and should be rejected.

VII. Argument

A. Standard of Review

Katzer agrees with Jacobsen that this court looks to the interpretive law of the regional circuit, here the Ninth Circuit in this copyright appeal. Hutchins v. Zoll Med. Corp., 492 F.3d 1377, 1383 (Fed. Cir. 2007) (citing Atari, Inc. v. JS & A Group, Inc. 747 F.2d 1422, 1438-40 (Fed. Cir. 1984) (*en banc*) (for issues not exclusively assigned to the Federal Circuit, to avoid inconsistency and forum shopping we apply the law of the regional circuit in which the case was tried). To expand on the standard of review in Jacobsen's brief, Katzer submits the following.

An order granting or denying the injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion. Wright v. Rushen, 642 F.2d 1129, 1132 (9th Cir 1981). Unless the district court's decision relies on erroneous legal premises, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case. Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982). Rather, a reviewing court is not empowered to substitute its

judgment for that of the district court and can reverse only if the district court abused its discretion. Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1133 & n.8 (9th Cir. 1979).

A district court's order denying a preliminary injunction is only reversible for factual error when the district court rests its conclusions on clearly erroneous findings of fact. Id. (citing Buchanan v. United States Postal Service, 508 F.2d 259, 267 n.24 (5th Cir. 1975)). A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

B. The District Court applied the correct legal standard

Jacobsen's primary argument is that the District Court applied the wrong legal standard for irreparable harm by requiring a showing of "actual harm instead of likelihood of harm." Appellant's Brief at 21. Setting aside the fact that Jacobsen has failed to introduce *any* evidence of harm that would satisfy any legal standard, the record clearly reflects that the District Court applied the correct legal standard per Winter.

As Jacobsen acknowledges, Winter requires that:

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

Winter, 129 S.Ct. at 374 (emphasis added); Appellant’s Brief at 20. The Supreme Court has spoken in clear terms and has rejected the Ninth Circuit’s former standard, holding that a “possibility” of irreparable harm is “too lenient” and an “incorrect legal standard.” Winter, 129 S.Ct. at 375-76 (“Issuing a preliminary injunction based only on a possibility of irreparable injury is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”).

The Ninth Circuit has adopted and acknowledged the new Winter standard for preliminary injunctions holding that “[t]o the extent our cases have suggested a lesser standard, they are no longer controlling, or even viable.” American Trucking Associations, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). Jacobsen does not contest the District Court’s conclusion that Winter applies to preliminary injunctions in the copyright context, rather Jacobsen believes that the District Court did not apply the Winter standard in this case.

The District Court correctly applied the Winter standard regarding the showing required for irreparable harm. In its opinion, the District Court accurately stated the Winter standard on four occasions. On page 12 of the District Court’s order, the District Court sets out the four-prong standard recited above verbatim from the Supreme Court’s opinion. A12. In regard to irreparable harm, on the same page, the District Court sets out the correct standard stating that a plaintiff

“must demonstrate that irreparable injury is ‘*likely* in the absence of an injunction.’” (emphasis in original). A12. On page 13, the District Court again recites the correct standard stating that “[i]n order to grant Jacobsen a preliminary injunction, the Court must find, based on the entire record that Jacobsen is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” A13. On page 14, the District Court again cites the correct standard stating that the Federal Circuit did not find that “there was a likelihood of irreparable harm that tipped the balance of equities in Jacobsen’s favor.” A14.

After reciting the correct legal standard four times, the District Court concluded that Jacobsen failed to proffer *any evidence* of any harm-possible, potential, likely, actual or otherwise. A14.

Jacobsen’s contention that the Court “required a showing of actual harm instead of likelihood of harm” (Appellant’s Brief at 21) is based on an inaccurate reading of the District Court’s Order. The language that concerns Jacobsen is on A14 of the District Court’s Order. In the Order, the District Court states that “Jacobsen has failed to proffer any evidence of any specific and actual harm suffered as a result of the alleged copyright infringement and he has failed to

demonstrate that there is any continuing or ongoing conduct that indicates future harm is imminent.” A14; Appellant’s Brief at 21 (emphasis in brief).

Contrary to Jacobsen’s contention, the District Court did not require Jacobsen to prove “specific and actual injury” for purposes of obtaining a preliminary injunction. Appellant’s Brief at 22. Rather, the Court states that Jacobsen has failed to proffer any evidence of any specific or actual harm suffered as a result of Katzer’s alleged *past* infringement² and has also failed to proffer any evidence of any conduct indicating that *future* harm is imminent. Any evidence of past harm would necessarily be “actual” and “specific” because there is no such thing as “likely” past harm-it either happened or it did not.

This distinction between past and present/future harm made by the District Court is made clear in footnote 3 to the opinion where the District Court states:

“Although Jacobsen makes legal arguments regarding the alleged harm he may suffer, for instance delays and inefficiency in development and time lost in the open source development cycle, he has failed to put forward any *evidence* of such harms. Jacobsen has failed to proffer evidence of harm suffered or any evidence of a real or immediate threat of imminent harm in the future.” (italics emphasis in original, underlined emphasis added).

A14, n.3. Similarly, Jacobsen takes issue with the District Court’s statement that “[t]here is no showing on the record before this Court that Jacobsen has actually suffered any of these potential harms,” *i.e.* the potential harms listed in the

² The Record reflects that the allegedly infringing conduct began in 2005 and was discovered by Jacobsen in 2006. See e.g. A88, ¶ 271; A91, ¶ 310; ¶ 313.

original Federal Circuit decision. (Appellant’s Brief at 21) (emphasis in brief). Again, the Court is referring to any past harm that would have occurred from the allegedly infringing activities that began in 2005.

Simply put, the District Court applied the correct standard of “likely irreparable harm” and correctly concluded that the record is devoid of any scintilla of evidence that (1) any past harm occurred or (2) future harm is imminent or likely.

C. Jacobsen failed to submit any evidence of irreparable harm

A preliminary injunction is a drastic and extraordinary remedy. Yakus v. United States, 321 U.S. 414 (1944). A party moving for a preliminary injunction must present evidence that he or she will be injured by the threatened conduct before a court issues injunctive relief. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); U.S. v. International Harvester Co., 387 F.Supp. 1338 (D.D.C. 1974). This factual evidence must be set forth in “affidavits,” “oral testimony,” or “on depositions.” Fed. R. Civ. P. 43 (c); see also Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Bracco v. Lackner, 462 F.Supp 436, 442 n.3 (N.D. Cal. 1978) (noting that submission of affidavits in support or in opposition to a preliminary injunction is customary and appropriate). In the Northern District of California, the local rules require that factual contentions made in support of a motion for a

preliminary injunction “must be supported by an affidavit or declaration...”. Civ. Local Rule 7-5.

In furtherance of his most recent motion for a preliminary injunction, Jacobsen has submitted two declarations, a 24-page declaration with hundreds of pages of attachments in support of his motion [A441-A763] and a seven-page supplemental declaration in reply to Katzer’s opposition with attachments [A1103-A1130].

However, neither of these declarations (including, remarkably, the reply declaration)³ contains *any* evidence of harm that Jacobsen will suffer without injunctive relief. Jacobsen has failed twice in his moving papers and also, now, in his Appellant’s Brief in this Court to cite to one-sentence in either declaration that addresses harm. That is because the record is devoid of any evidence addressing irreparable harm. A review of the “evidence” of harm cited in Jacobsen’s Appellant’s brief reveals that none of the “evidence” is contained in the factual record of this case, but rather consists of legal arguments of theoretical harm. Additionally, most of the cited “evidence” is non-responsive to the issue of irreparable harm.

³ Katzer’s memorandum in opposition to the motion discusses, in detail, Jacobsen’s failure to submit evidence of irreparable harm with his moving papers. See A788-789.

First, Jacobsen states that monetary damages are difficult to prove citing to the oral argument and opinion in the first Federal Circuit appeal, without citation to the factual record. Appellant’s Brief at 25. As discussed supra, this discussion centered around the availability of contract damages for the breach of the attribution term in the licensing agreement, not copyright infringement. Even assuming for the sake of argument that monetary damages are unavailable under copyright law, this is relevant only to the “irreparable” nature of any harm, it does not address whether any harm occurred or is likely to occur. Sampson v. Murray, 415 U.S. 61, 90 (1974); see also FDIC v. Faulkner, 991 F.2d 262, 265 (5th Cir. 1993) (a legal remedy indicates that a party’s injury is not irreparable).

Second, Jacobsen states that “copyright law’s right to exclude” supports a finding of irreparable harm citing to case law, without citation to the record. Appellant’s Brief at 25. The District Court found that Jacobsen proffered no evidence that such harm had occurred or is likely to occur and this finding is sound.

Third, Jacobsen states that “[c]ompetition by an infringer threatens shifts in market share arising from one competitor’s misappropriation of another’s intellectual property” citing to case law, without citation to the record. Appellant’s Brief at 26. The District Court found that Jacobsen proffered no evidence that such harm had occurred or is likely to occur and this finding is sound.

Fourth, Jacobsen states that the alleged infringement “undercuts the ‘creative collaboration’ that this Court previously recognized” citing to the prior opinion in this case and other cases, without citation to the factual record. Appellant’s Brief at 26. The District Court found that Jacobsen proffered no evidence that such harm had occurred or is likely to occur and this finding is sound.

Fifth, Jacobsen states that the alleged infringement “denied JMRI programmers credit for the work they did” citing to law review articles, this Court’s prior opinion and case law, without citation to the record. Appellant’s Brief at 27. The District Court found that Jacobsen proffered no evidence that such harm had occurred or is likely to occur and this finding is sound.

Sixth, Jacobsen states that the alleged infringement “harmed the goodwill associated with JMRI” citing to an email in the record wherein Katzer allegedly “touted his software” to a yahoo newsgroup. A452; Appellant’s Brief at 28. This email is neither responsive nor relevant evidence to the issue of Jacobsen’s alleged harm, therefore, the District Court’s finding that Jacobsen proffered no evidence that such harm had occurred or is likely to occur is sound.

Jacobsen summarizes this “evidence” by stating that the District Court had: “uncontradicted evidence that (a) Katzer admitted damages were inadequate, (b) Katzer, a competitor, knowingly copied, modified and distributed JMRI code in violation of license terms, (c) Katzer did not give proper attribution, (d) he intentionally concealed his copying, and then (e) in an attempt to grab a larger share of the market, he went into the market bragging that his product was better than the code on which, it was, secretly based.”

Appellant's Brief at 29. Even assuming that the record did contain evidence of the above, which it does not, none of the statements above address the issue of Jacobsen's harm. Subsection (a) relates to the irreparableness of any harm as discussed supra. Subsections (b)-(d) are merits issues addressing whether Katzer committed copyright infringement. Subsection (e) is irrelevant to both the merits and the harm inquiry.

Based on the above, this Court should affirm the District Court's finding that Jacobsen has failed to present any evidence of harm as this finding is sound and not clearly erroneous.

D. Jacobsen failed to provide any evidence of any future threat

The District Court's finding that Jacobsen "failed to demonstrate that there is any continuing or ongoing conduct that indicates that future harm is imminent" (A14) is also sound. Jacobsen's declaration provides only mere speculation that a future threat is imminent. Additionally, Katzer submitted evidence that future infringement is impossible and has been for quite some time.

The Ninth Circuit, like other circuits, rejects claims of irreparable harm that are merely speculative, remote, or tenuous. See Winter, 129 S.Ct. at 374, Paramount Land Co. v. Cal. Pistachio Comm'n, 491 F.3d 1003, 1012 (9th Cir. 2007); Simula, Inc. v. Autoliv, Inc. 175 F.3d 716, 725 (9th Cir. 1999); Midgett v. Tri-County Metro. Transp. Dist. of Oregon, 254 F.3d 846, 850-851 (9th Cir. 2001);

Goldie's Bookstore v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984) (holding that speculative injury does not constitute irreparable harm). Additionally, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

Jacobsen has failed to allege that there is a real and immediate threat that the alleged copyright infringement will continue. Jacobsen provides two record cites for his evidence of future, threatened harm: A464 and A1107 (both Jacobsen declarations). Appellant's Brief at 30. A464, contains pure speculation that Katzer is infringing. At A464 ¶ 110, Jacobsen states that he "believe[s] that Defendants have motive to continue using JMRI software as a basis for their product" since Model Railroad News is reviewing Katzer's software. Jacobsen then opines that KAM's new Decoder Commander must use "infringing files" because it is "essentially unusable without additional decoder definitions." A464, ¶ 110. Finally, Jacobsen speculates that "Katzer is ridding himself of infringing CDs at a low price so that he can obtain tax breaks for a business loss" based on his belief that KAM CDs are distributed through a veterinary website. A464, ¶ 110. Previously, in the same declaration, Jacobsen states that he is unsure whether Katzer's new database is infringing because he could not get the latest version of Decoder Commander to work (through no fault of Katzer, see A805, ¶ 25). A462, ¶ 97.

Katzer responded by providing clear evidence that future infringement of the Decoder Definition Files is impossible. First, Katzer points out that Jacobsen's declaration uses version 304 of Decoder Commander as evidence of alleged infringement. A454-455, ¶¶ 70-72. Version 304 became fully non-functional on October 10, 2006. A802, ¶ 17. Katzer's more recent versions of Decoder Commander contains no allegedly infringing data files as the software now uses a new database technology (based upon an SQL database) and does not use template files from JMRI or anyone else. A802-A803, ¶¶ 18-21. This database is not encrypted and includes textual information which is readily viewable by anyone with appropriate software tools. A803, ¶ 20; Exhibit A to A798. The supported decoder definitions in this database are only those for which KAM has permission to use from the copyright owner. A804, ¶ 28. KAM's new Decoder Commander is fully functional with the included decoder definitions for those decoders that it supports. A803, ¶ 22.

At this time, the most recent version of Defendants' Decoder Commander available (and mailed as a replacement to all registered customers and dealers) does not contain any of the decoder definition file data (*i.e.* manufacturer specification data) to which Jacobsen alleges he owns copyright rights. A802-A803, ¶¶ 18-20. This version does not read, write or run previous versions of Decoder Commander, including KAM's previous decoder template files containing

the manufacturer specifications data. A802, ¶18. KAM's template verifier tool, the tool that plaintiff alleges allows others to make unauthorized copies of plaintiff's copyrighted work (A457, ¶ 74) is not contained in and does not function with the most recent versions of Decoder Commander. A803, ¶ 24. Additionally, this tool is not available on the KAM website and has not been available since September 18, 2006. A802, ¶ 16. Decoder Commander now uses an entirely new database for its decoder template files. A802, ¶ 18. There is absolutely no possibility that Defendants could or will use Plaintiff's alleged copyrighted materials in the future, especially since such JMRI Decoder Definition Files, and all other decoder definition files, are completely non-compatible with all versions of Decoder Commander since November 2006. A802-A803, ¶¶ 18-21.

Jacobsen's supplemental reply declaration cite to A1107 in response to Katzer's evidence is similarly lacking and contains only pure speculation that Katzer's product infringes. A1107 (there is "[n]o technical reason prevents Katzer from copying JMRI content into his new storage method.")

The remainder of Jacobsen's statements in his brief addressing the threat of future harm are unsupported by any citation to the record and are irrelevant to the issue of future harm in the preliminary injunction context. Appellant's Brief at 31-32. Jacobsen statements regarding Katzer's alleged "course of conduct" and his "pattern of misappropriation and obfuscation" are unrelated to the copyright

infringement issue and relate to whether Jacobsen is in reasonable apprehension of suit over Katzer's '329 patent, the patent that Jacobsen filed a declaratory action on, but has since been dismissed from this case by the District Court. See A3-A6.

E. Jacobsen has not shown that he will succeed on the merits of his copyright claim

1. Plaintiff has failed to identify his copyrighted work

This Court will search the record in vain for the material to which Jacobsen is claiming copyright ownership. *A sin qua non* to a preliminary injunction is the identification of the work that is the subject of the injunction. See Louis Epstein Family Partnership v. Kmart Corp., 13 F.3d 762 (3rd Cir. 1994). The record contains numerous copyright registrations for “JMRI Program and Decoder Definitions” and “JMRI Decoder Definitions.” See Ex. C-I of A47. Jacobsen's proposed injunction seeks to enjoin Defendants from using “Plaintiff Robert Jacobsen's copyrighted works entitled JMRI Program and Decoder Definitions.” A776. However, Jacobsen failed to submit the actual works described by the phrase “JMRI Program and Decoder Definitions” into the record. The only Decoder Definition File contained in the record is the QSI Decoder Definition File, where the underlying data is owned by Katzer.

2. Katzer owns the copyright to the only Decoder Definition File in the Record

The record reflects that the JMRI Decoder Definition Files are not foundational works and they incorporate many manufacturer's specifications data initially created by multiple manufacturers as well as specifications data created by the National Model Railroad Association. A801, ¶ 12. For example, Jacobsen uses the "JMRI Decoder Definition File, QSI_Electric.tpl.xml" to highlight instances of Defendants alleged copyright infringement of "variable structure, selection, naming and default variable values." A454, ¶ 71. A441 at Exhibit AD contains the JMRI Decoder Definition File and A441 at Exhibit AE contains KAM's comparable work from the Version 304 of Decoder Commander (which became non-functional on October 10, 2006, A802, ¶ 17). Jacobsen's declaration discusses various instances of Katzer's alleged infringement of this JMRI Decoder Definition File by comparing similar lines of text in Exhibits AD and AE and conclude that KAM had copied numerous fields of text from the "author of the JMRI file." A454-455, A458, and A464 (¶¶ 71-73, 80, 109).

However, Jacobsen does not have any rights to the QSI terms and associated values described in his declaration. The variable structures, selection, naming and default variable values contained in the JMRI Decoder Definition File are copied directly from the NMRA DCC Reference Manual for QSI Quantum HO Equipped

Locomotives-Version 3.0 (QSI Manual). A807-A808, ¶ 51, A798 at Exhibit E. This QSI Manual was originally created by QSI Industries, Inc. and then published in February 2005 by QSI Industries, Inc. A807-A808, ¶ 51. The JMRI Decoder Definition File containing this information was subsequently published in June 2005. A807-808, ¶ 51. Exhibits F through AO to A798 demonstrate that the textual information used by Plaintiff as examples of alleged infringement of JMRI intellectual property was copied by JMRI directly from the QSI Manual into the JMRI Decoder Definition File.

KAM is the owner, via assignment, of all copyright rights in the QSI Manual. Katzer A807, ¶ 48, A798 at Exhibit C. KAM registered its copyright rights with the United States Copyright Office and obtained Copyright Registration Number TX 6-445-094, effective November 13, 2006. A807, ¶ 48. A copy of this registration is attached as Exhibit D to A798. This QSI Manual copyright protects expressions of code, structure, sequence, and organization for programming QSI decoders. A807, ¶ 49. Based on this copyright, KAM has the right to use all of the QSI material in its Decoder Commander software. A808, ¶ 52.

The record demonstrates that Jacobsen is not the copyright owner of the QSI works, the works that Jacobsen chose as his best example of Katzer's alleged misconduct. The record shows that Katzer has the right to use the works contained in the QSI Manual and Jacobsen has no copyright rights in this material. Katzer is

counterclaiming against Jacobsen for copyright infringement of the QSI manual (A1686), but at this time has not sought to enjoin Jacobsen's use of this material.

F. Amicus's request for a presumption of irreparable harm is directly contrary to the Supreme Court's holding in Winter

Amicus Curiae Software Freedom Law Center (*Amicus*) argue that a copyright holder should be entitled to a presumption of irreparable harm when seeking a preliminary injunction. While this presumption existed at one time under federal copyright law, it was critically injured by the Supreme Court in eBay v. MercExchange, LLC, 547 U.S. 388, 391 (2006) and completely eviscerated in Winter in late 2008.⁴

Prior to eBay, a plaintiff seeking a preliminary injunction under federal copyright law who demonstrated a likelihood of success on the merits of a copyright claim was entitled to a presumption of irreparable harm. Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999). In 2006, however, the Supreme Court eradicated the presumption of irreparable harm to motions for permanent injunctions in the patent infringement context, holding that a Plaintiff seeking a permanent injunction must demonstrate that the traditional

⁴ It is worthwhile to note that the open source license quoted in *Amicus's* brief, the GNU General Public License v2.0 is not the license at issue in this case. See *Amicus* Brief at 4-5. The Artistic License 1.0 governed Jacobsen's Decoder Definition Files during the alleged infringing conduct as discussed in detail in the opinion in the first appeal of this case (A1579).

equitable factors for granting an injunction have been met. eBay Inc., 547 U.S. at 391. As time went by, federal courts (including this Court) applied the logic of eBay to motions for injunctive relief in copyright and trademark cases and also applied the strictures of eBay to preliminary injunctions. Katzer’s brief in opposition to Jacobsen’s preliminary injunction motion canvasses this case law. See AR 782-783.

If any doubt existed by late 2008, it was completely eviscerated by Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008) where the Supreme Court confirmed that a plaintiff seeking a preliminary injunction “must establish that he is likely to suffer irreparable harm in the absence of preliminary relief.” Winter at 374. The Ninth Circuit has acknowledged the Supreme Court’s recent expatiation of the proper standard for preliminary injunctive relief stating that the former standard used by the Ninth Circuit was “much too lenient” and that “[t]o the extent our cases have suggested a lesser standard, they are no longer controlling or even viable.” American Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009).

The District Court correctly summarized the change in the legal standard in its Order:⁵

⁵ Jacobsen does not take issue with the legal conclusion that the presumption of irreparable harm no longer exists for preliminary injunctive relief for copyright claims.

Initially, when this matter was before the Court on a motion for preliminary injunction, federal copyright law provided that a plaintiff who demonstrates a likelihood of success on the merits of a copyright claims was automatically entitled to a presumption of irreparable harm...However, because of the passage of time, the governing law has changed. Now, a plaintiff is not granted the presumption of irreparable harm upon a showing of likelihood of success on the merits. Instead, a plaintiff seeking a preliminary injunction must establish that...he is likely to suffer irreparable harm in the absence of preliminary relief...(citing Winter).

A11-A12. *Amicus*'s brief, however, requests that this Court ignore controlling Supreme Court law and apply a presumption of irreparable harm for all preliminary injunction motions brought by open source license holders. *Amicus* state that two harms must certainly, always, occur the instant an open source license is violated: (1) the developer is deprived of the rights reserved in the license, and (2) the developer's relationship with other licensees who never become aware of their rights is severed.⁶ *Amicus* Brief at 13. These harms are "inevitable" and "certain" and developers "always suffer" these harms when an open source license is violated. Id. *Amicus* are requesting that this Court presume that Katzer caused Jacobsen irreparable harm based solely on allegations that infringement occurred and without the proffering of any evidence that any harm will likely occur. This is contrary to controlling law.

⁶ As discussed *supra*, there is no evidence in the record that Jacobsen suffered either of these potential harms.

Amicus's citation to authority is inapposite and unavailing. None of the cases cited by *Amicus* address the preliminary injunction standard post-Winter. Additionally, *Amicus* inaccurately cites Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 24 (5th Cir. 1992) for the proposition that copyright doctrine favors injunctive relief when the resulting harm is noneconomic. *Amicus* Brief at 9. This case does not stand for this proposition at all, and, in fact, never mentions the word "copyright." Regardless, *Amicus*'s unsupported statement regarding the favorability of injunctive relief is certainly not the state of the law post-Winter. *Amicus*'s request to apply a presumption of irreparable harm to Jacobsen is contrary to the law and should be rejected.

VIII. Conclusion

For the foregoing reasons, Katzer respectfully requests that this Court affirm the District Court's denial of Jacobsen's motion for preliminary injunction.

Dated: July 28, 2009

Respectfully submitted by:

R. Scott Jerger (OSB#02337)
Field Jerger LLP
621 SW Morrison Street, Suite 1225
Portland, Oregon 97205
Tel: (503) 228-9115
Fax: (503) 225-0276
Of Attorneys for Defendants-
Appellees

2009-1221

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT JACOBSEN,

Plaintiff-Appellant,

vs.

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 NUMBER C06-1905-
JSW, JUDGE JEFFREY S. WHITE

PROOF OF SERVICE

I hereby certify that on July 28, 2009 I filed the original and eleven copies of Defendants-Appellees' **Appellee Brief** on the Clerk of the US Court of Appeals for the Federal Circuit at the following address via hand delivery:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

I further certify that on July 28, 2009, I served two true copies of Defendants-Appellees' **Appellee brief** following parties, through their attorneys, at the following address via UPS Next Day Air:

Victoria K. Hall
Law Office of Victoria K. Hall
3 Bethesda Metro Suite 700
Bethesda MD 20814

David McGowan
Warren Hall
5998 Alcala Park
San Diego, CA 92110
Attorneys for Plaintiff-Appellant Robert Jacobsen

Daniel B. Ravicher, Esq.
Software Freedom Law Center
1995 Broadway, FL 17
New York, NY 10023-5882
Attorney for *Amicus Curiae*

Dated: July 28, 2009.

R. Scott Jerger (OR State Bar #02337)
Field Jerger LLP
621 SW Morrison Street, Suite 1225
Portland, Oregon 97205
Tel: (503) 542-2015
Fax: (503) 225-0276
Email: scott@fieldjerger.com

Attorneys for Defendants-Appellees

FORM 19. Certificate of Compliance With Rule 32(a)

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

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or FRAP 28.1(e).

- The brief contains [7,013] words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or
- The brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or FRAP 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

- The brief has been prepared in a proportionally spaced typeface using [Microsoft Word 2003] in [14 Point, New Times Roman Font], or
- The brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [14 Point, New Times Roman Font].

(s) _____

R. Scott Jerger

(Name of Attorney)

Appellee

(State whether representing appellant, appellee, etc.)

7/27/09

(Date)